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REPORTS OF CASES

DECIDED BETWEEN

JANUARY 13, 2012 and JUNE 21, 2012

IN THE

# Supreme Court of Nebraska

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# NEBRASKA REPORTS

## VOLUME CCLXXXIII

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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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## SUPREME COURT
## DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
John F. Wright, Associate Justice
William M. Connolly, Associate Justice
John M. Gerrard, Associate Justice[1]
Kenneth C. Stephan, Associate Justice
Michael M. McCormack, Associate Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice[2]

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## COURT OF APPEALS
## DURING THE PERIOD OF THESE REPORTS

Everett O. Inbody, Chief Judge
John F. Irwin, Associate Judge
Richard D. Sievers, Associate Judge
Frankie J. Moore, Associate Judge
William B. Cassel, Associate Judge[3]
Michael W. Pirtle, Associate Judge

---

Peggy Polacek . . . . . Reporter
Lanet Asmussen . . . . . Clerk
Janice Walker . . . . . State Court Administrator

[1]Until February 5, 2012
[2]As of May 9, 2012
[3]Until May 8, 2012

# 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 |
| | | 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 |
| | | Kimberly Miller Pankonin | 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 | 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 |
|---|---|
| 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 |

## ATTORNEYS
### Admitted Since the Publication of Volume 282

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Jeremy K. Anderson
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Lori Armstrong Browning
Megan Beth Brunken
Samuel Wesley Butler
Jacob Daniel Bylund
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Daniel Flemming Church
Kayla Marie Coleman
William Macon Collyer
Aaron James Conn
Tracy Lyn Darmody
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Benjamin B. Dennis
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Scott Kendall Green
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R. Hayley Huyser
Kenneth Willard Kingma
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Samantha Kay Pelster
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Katelyn Shea Werner
Ryan John Wiesen
Rachel Marie Williams
Russell Neill Williams
Jordan Lyndsay Zendejas

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## LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-10-907: **State v. Gonzalez-Rios**. Affirmed. Per Curiam. Wright, J., not participating.

Nos. S-10-938, S-10-939: **State v. Garcia**. Petition for further review dismissed as having been improvidently granted. Per Curiam.

No. S-11-181: **In re Guardianship of Oliver M**. Appeal dismissed. Per Curiam.

No. S-11-575: **Meyers v. LSI Temporary Servs**. Affirmed. McCormack, J.

No. S-11-602: **Daniel B. on behalf of Marcy Jo G. v. Mary Jo G**. Affirmed. McCormack, J.

No. S-11-715: **Dietz v. City of Hastings**. Judgments vacated, appeal dismissed, and cause remanded with directions. Wright, J.

Nos. S-11-818 through S-11-821: **In re Interest of Det D**. Affirmed as modified. Stephan, J.

# LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-11-394: **State v. Salinas**. Affirmed. See § 2-107(A)(1).

No. S-11-648: **In re Complaint of Northeast Neb. Pub. Power Dist**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-11-707: **State v. Sommer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-11-729: **City Bank & Trust Co. v. Malone**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-11-801: **TierOne Bank v. Arbor Heights II, LLC**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-11-889: **State v. Armendariz**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

No. S-11-892: **State v. Harris**. Appeal dismissed. See § 2-107(A)(2).

No. S-11-1019: **State v. Tucker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-11-1048: **Blaser v. County of Madison**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009).

No. S-11-1102: **State v. Huff**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-11-1103: **Jefferson v. Nebraska Unicameral Legislature**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

No. S-12-244: **State v. Jacob**. Appeal dismissed. See § 2-107(A)(2).

# LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. S-10-442: **State v. Smith**, 19 Neb. App. 708 (2012). Petition of appellant for further review sustained on May 16, 2012.

No. S-10-442: **State v. Smith**, 19 Neb. App. 708 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. A-10-472: **State v. Novascone**. Petition of appellant for further review denied on March 14, 2012.

No. A-10-845: **Tiefenthaler v. Citywide Ins**. Petition of appellant for further review denied on April 18, 2012.

No. A-10-875: **In re Interest of Jaiden D**. Petition of appellant for further review overruled on January 9, 2012, for lack of jurisdiction.

No. A-10-876: **In re Interest of Ashton D**. Petition of appellant for further review overruled on January 9, 2012, for lack of jurisdiction.

No. A-10-877: **In re Interest of Sean D**. Petition of appellant for further review overruled on January 9, 2012, for lack of jurisdiction.

No. A-10-886: **Berry v. Wells Fargo Bank**. Petition of appellant for further review denied on January 11, 2012.

Nos. S-10-938, S-10-939: **State v. Garcia**. Petitions of appellee for further review sustained on February 23, 2012.

No. S-10-945: **Sherman v. Neth**, 19 Neb. App. 435 (2011). Petition of appellee for further review sustained on February 15, 2012.

No. A-10-965: **Sickler v. Kirby**, 19 Neb. App. 286 (2011). Petition of appellants for further review denied on March 14, 2012.

No. A-10-965: **Sickler v. Kirby**, 19 Neb. App. 286 (2011). Petition of appellees for further review denied on March 14, 2012.

No. S-10-968: **In re Interest of David M. et al.**, 19 Neb. App. 399 (2011). Petition of appellee for further review sustained on February 15, 2012.

No. A-10-975: **Petersen v. Nebraska Dept. of Health & Human Servs.**, 19 Neb. App. 314 (2011). Petition of appellant for further review denied on January 11, 2012.

No. S-10-981: **State v. Nadeem**, 19 Neb. App. 565 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. A-10-982: **State v. King**, 19 Neb. App. 410 (2011). Petition of appellant for further review denied on January 25, 2012.

No. A-10-999: **In re Estate of Tully**. Petition of appellee for further review denied on May 9, 2012.

No. S-10-1015: **In re Interest of Jesse M. et al**. Petition of appellant for further review dismissed on March 30, 2012, as having been improvidently granted.

No. S-10-1043: **State v. Vela-Montes**, 19 Neb. App. 378 (2011). Petition of appellant for further review sustained on January 19, 2012.

No. S-10-1106: **Midwest Renewable Energy v. Lincoln Cty. Bd. of Eq.**, 19 Neb. App. 441 (2011). Petition of appellant for further review sustained on February 23, 2012.

No. A-10-1130: **Wyatt v. Drivers Mgmt**. Petition of appellant for further review denied on February 2, 2012.

No. A-10-1130: **Wyatt v. Drivers Mgmt**. Petition of appellee for further review denied on February 2, 2012.

No. A-10-1211: **Associated Engineering v. Arbor Heights**. Petition of appellant for further review denied on February 2, 2012.

No. S-11-042: **Turbines Ltd. v. Transupport, Inc.**, 19 Neb. App. 485 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. A-11-056: **Klingelhoefer v. Monif**. Petition of appellant for further review denied on March 21, 2012.

No. S-11-060: **Henderson v. City of Columbus**, 19 Neb. App. 668 (2012). Petition of appellee for further review sustained on June 13, 2012.

No. A-11-073: **Wright v. Wright**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-074: **State v. Allen**. Petition of appellant for further review denied on March 28, 2012.

No. S-11-093: **State v. Ross**. Petition of appellee for further review sustained on January 19, 2012.

No. A-11-131: **Klein v. Klein**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-133: **Dangberg v. Kirby**. Petition of appellant for further review denied on April 25, 2012.

No. A-11-139: **Centurion Stone of Nebraska v. Trombino**, 19 Neb. App. 643 (2012). Petition of appellee for further review denied on June 6, 2012.

No. A-11-140: **Ajeti v. Madonna Rehab. Hosp**. Petition of appellant for further review denied on March 28, 2012.

No. A-11-159: **In re Interest of LaKeiara J**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-160: **State v. Kilmer**. Petition of appellee for further review denied on April 11, 2012.

No. A-11-164: **State on behalf of Reece C. v. Keith F**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-165: **Hong's, Inc. v. Grand China Buffet**, 19 Neb. App. 331 (2011). Petition of appellant for further review denied on January 11, 2012.

No. A-11-167: **In re Interest of Michael M**. Petition of appellee for further review denied on January 11, 2012.

No. A-11-184: **Obrecht v. Hansen**. Petition of appellant for further review denied on February 2, 2012.

No. A-11-204: **Begley v. Harkins**. Petition of appellee for further review denied on February 2, 2012.

No. A-11-213: **In re Guardianship & Conservatorship of Mayhue**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-222: **Titus v. Titus**, 19 Neb. App. 751 (2012). Petition of appellant for further review denied on June 6, 2012.

No. A-11-225: **Ivey v. City of Omaha**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-226: **In re Estate of Hue**. Petition of appellants for further review denied on January 11, 2012.

No. A-11-235: **State v. Mick**, 19 Neb. App. 521 (2012). Petition of appellee for further review denied on May 16, 2012.

No. S-11-236: **State v. Mick**, 19 Neb. App. 521 (2012). Petition of appellee for further review sustained on May 16, 2012.

No. S-11-236: **State v. Mick**, 19 Neb. App. 521 (2012). Petition of appellee for further review dismissed on June 14, 2012, as having been improvidently granted.

No. A-11-242: **State v. Heredia**. Petition of appellant for further review denied on February 15, 2012.

No. A-11-244: **State v. Balvin**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-251: **Collins v. Collins**, 19 Neb. App. 529 (2012). Petition of intervenor-appellee for further review denied on May 16, 2012.

No. A-11-253: **Leach v. State**. Petition of appellant for further review denied on January 19, 2012.

No. A-11-262: **In re Interest of Jal C. et al**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-262: **In re Interest of Jal C. et al**. Petition of appellee Lazarus L. for further review denied on March 14, 2012.

No. A-11-271: **Spady v. Spady**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-279: **Benell v. Ross**, 19 Neb. App. 514 (2012). Petition of appellee for further review denied on June 13, 2012.

No. A-11-285: **State v. Johnson**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-307: **Beckman v. Federated Mut. Ins. Co.**, 19 Neb. App. 656 (2012). Petition of appellant for further review denied on May 16, 2012.

No. A-11-308: **State v. Broussard**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-313: **In re Interest of Autumn L. et al**. Petition of appellee State for further review denied on May 16, 2012.

No. A-11-316: **State v. Robles**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-321: **State v. Christensen**. Petition of appellant for further review denied on April 11, 2012.

No. A-11-322: **Wurdeman v. Wells Fargo Bank**. Petition of appellant for further review denied on February 15, 2012.

No. A-11-324: **State v. Handsaker**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-340: **Zoubenko v. Zoubenko**, 19 Neb. App. 582 (2012). Petition of appellant for further review denied on May 23, 2012.

No. A-11-341: **Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.**, 19 Neb. App. 596 (2012). Petition of appellant for further review denied on June 13, 2012.

No. A-11-356: **In re Interest of Kenyetta C**. Petition of appellant for further review denied on January 25, 2012.

No. A-11-368: **State v. Ellis**. Petition of appellant for further review denied on April 11, 2012.

No. A-11-383: **In re Interest of Emerald C. et al.**, 19 Neb. App. 608 (2012). Petition of appellee Jeffrey A. Wagner for further review denied on May 23, 2012.

No. A-11-389: **State v. Sheperd**. Petition of appellant for further review denied on January 11, 2012.

No. S-11-394: **State v. Salinas**. Petition of appellant for further review sustained on February 15, 2012.

No. A-11-396: **State v. Armstrong**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-440: **Hatch v. BryanLGH Medical Center East**. Petition of appellant for further review denied on January 23, 2012.

No. A-11-460: **Murphy v. Murphy**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-483: **Houchin v. Houchin**. Petition of appellant for further review denied on April 25, 2012.

No. A-11-489: **Dulaney v. Drivers Mgmt**. Petition of appellee for further review denied on May 9, 2012.

No. A-11-506: **State v. Allen**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-507: **State v. Balvin**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-512: **Crawford v. Crawford**. Petition of appellant for further review denied on June 13, 2012.

No. S-11-535: **In re Interest of Ashley W**. Petition of appellant for further review sustained on May 16, 2012.

No. A-11-549: **Citta v. Facka**, 19 Neb. App. 736 (2012). Petition of appellant for further review denied on June 13, 2012.

No. A-11-555: **State v. Parker**. Petition of appellant for further review denied on February 2, 2012.

No. A-11-557: **State v. Holladay**. Petition of appellant for further review denied on February 23, 2012.

No. A-11-565: **In re Interest of Marcus C. et al**. Petition of appellant for further review denied on June 13, 2012.

No. A-11-594: **In re Interest of Akol M. et al**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-600: **State v. Frazier**. Petition of appellant for further review denied on January 11, 2012.

Nos. A-11-605, A-11-609: **State v. Bonham**. Petitions of appellant for further review denied on January 25, 2012.

No. A-11-606: **In re Interest of Haley P**. Petition of appellant for further review denied on March 14, 2012.

Nos. S-11-659, S-11-660: **In re Interest of Zylena R. & Adrionna R**. Petitions of appellant for further review sustained on June 6, 2012.

No. A-11-703: **State v. Webster**. Petition of appellant for further review denied on April 18, 2012.

No. A-11-711: **State v. Kolter**. Petition of appellants for further review denied on January 11, 2012.

No. A-11-728: **State v. Tyma**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-751: **In re Interest of Deziree K. et al**. Petition of appellants pro se for further review denied on May 23, 2012.

No. A-11-782: **In re Interest of Addison F. et al**. Petition of appellant for further review denied on May 16, 2012.

No. A-11-800: **State v. Stuart**. Petition of appellant for further review denied on May 9, 2012.

No. A-11-832: **In re Interest of Elijah F**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-833: **In re Interest of Penelope F**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-849: **Castonguay v. Department of Corr. Servs**. Petition of appellant for further review denied on February 15, 2012.

No. A-11-854: **State v. Rauch**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-861: **Bornhoft v. Bornhoft**. Petition of appellant for further review denied on January 11, 2012.

No. A-11-865: **Onuachi v. Western Waterproofing Co**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-928: **State v. Marshall**. Petition of appellant for further review denied on March 28, 2012.

No. A-11-937: **Gallagher v. Dolt**. Petition of appellant for further review denied on March 20, 2012. See § 2-102(F)(1).

No. A-11-956: **State v. Njokanma**. Petition of appellant for further review denied on March 14, 2012.

No. A-11-967: **State v. Hughes**. Petition of appellant for further review denied on June 6, 2012.

No. A-11-998: **Caton v. Houston**. Petition of appellant for further review denied on April 18, 2012.

No. A-11-1011: **State v. King**. Petition of appellant for further review denied on June 13, 2012.

No. A-11-1036: **State v. Lewis**. Petition of appellant for further review denied on April 13, 2012, as untimely filed.

No. A-11-1038: **State v. Reichert**. Petition of appellant for further review denied on June 13, 2012.

No. A-11-1075: **State v. Thompson**. Petition of appellant for further review denied on April 18, 2012.

No. A-12-003: **Payne v. Department of Corr. Servs**. Petition of appellant for further review denied on May 9, 2012.

No. A-12-102: **Cook v. City of Norfolk**. Petition of appellant for further review denied on June 6, 2012.

No. A-12-214: **State v. Workman**. Petition of appellant for further review denied on May 18, 2012, as filed out of time.

# CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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STATE OF NEBRASKA, APPELLEE, V.
ALMA RAMIREZ GONZALEZ, APPELLANT.

807 N.W.2d 759

Filed January 13, 2012. No. S-10-1097.

1. **Pleas: Appeal and Error.** The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
2. **Pleas: Sentences: Proof.** With respect to withdrawal of a plea of guilty or no contest made after sentencing, withdrawal is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice.
3. **Pleas: Sentences: Judgments.** A motion for withdrawal of a plea of guilty or no contest is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it was made subsequent to judgment or sentence.
4. **Pleas: Proof.** Manifest injustice justifying withdrawal of a plea may be proved if the defendant proves, by clear and convincing evidence, that (1) he or she was denied the effective assistance of counsel guaranteed by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his or her behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he or she did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement.
5. ____: ____. A defendant seeking to withdraw a plea must plead and prove that omissions constituting manifest injustice have resulted in prejudice.
6. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
7. **Pleas: Effectiveness of Counsel: Proof.** In the context of a plea of guilty or no contest, to prevail on a claim of ineffective assistance of counsel, a defendant

must allege facts showing a reasonable probability that he or she would have insisted on going to trial but for counsel's errors.

8. **Constitutional Law: Right to Counsel: Effectiveness of Counsel: Case Overruled.** Advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel, and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), applies to such a claim, abrogating *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).
9. **Pleas: Attorney and Client.** Counsel must inform his or her client whether a plea carries a risk of deportation.
10. **Plea Bargains: Effectiveness of Counsel.** To obtain relief on a claim of ineffective assistance of counsel based on failure to advise a client whether a plea carries a risk of deportation, the defendant must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.
11. **Effectiveness of Counsel: Appeal and Error.** A claim of ineffective assistance of counsel presents a mixed question of law and fact. 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, but the appellate court reviews factual findings for clear error.

Appeal from the District Court for Hall County: James D. Livingston, Judge. Affirmed.

Joshua W. Weir, of Dornan, Lustgarten & Troia, P.C., L.L.O., 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.

Alma Ramirez Gonzalez was convicted of fraudulently obtaining public assistance benefits, based upon a no contest plea that she entered pursuant to a plea agreement. Over 2 years after her sentencing, she filed a motion to withdraw her plea, alleging that she had received ineffective assistance of counsel because her attorney had not explained that her plea would result in automatic deportation. We conclude that procedurally, Gonzalez was permitted to move for withdrawal of her plea. But we also conclude that she failed to prove by clear and convincing evidence that withdrawal of her plea was necessary to prevent a manifest injustice. Therefore, we affirm the district court's decision to overrule her motion.

## BACKGROUND

Gonzalez was, at the time of this action, living in Grand Island, Nebraska, with two of her three children. In December 2006, before criminal proceedings were brought against her, Gonzalez was detained by the federal government for living in the United States illegally. As a result, deportation proceedings were brought against her. As of August 31, 2010, the deportation proceedings were ongoing.

In 2007, Gonzalez was arrested for fraudulently obtaining public assistance benefits in an amount greater than $500, which is a Class IV felony, punishable by up to 5 years' imprisonment or a $10,000 fine.[1] Gonzalez was charged by information on January 2, 2008. She was arraigned and pled not guilty. Before she entered her plea, she was advised of her rights by the court, including the warning that conviction for the offense charged against her could have the consequence of deportation or denial of a naturalization request. Gonzalez said she understood those rights.

On March 20, 2008, Gonzalez withdrew her initial plea of not guilty and, pursuant to a plea agreement, pled no contest to the charge. In exchange for Gonzalez' plea of no contest, the State agreed to recommend a term of probation at sentencing. Gonzalez also agreed to pay restitution to the State for the benefits illegally obtained, in the amount of $18,522. The factual basis for the plea established that Gonzalez had applied for and received public assistance, but had not reported the fact that she was employed under an assumed name. Her failure to report her employment resulted in an overpayment of benefits.

Before accepting Gonzalez' plea, the court again advised her that conviction for the offense could result in her deportation or a denial of her naturalization requests, and she said she understood. The court convicted Gonzalez pursuant to her plea and, on May 8, 2008, sentenced her to a term of 5 years' probation.

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[1] See, Neb. Rev. Stat. § 68-1017(2) (Cum. Supp. 2010); Neb. Rev. Stat. § 28-105 (Reissue 2008).

Because Gonzalez pled no contest to fraudulently obtaining public assistance benefits, she became ineligible to stay in the United States. Specifically, Gonzalez was ineligible for a "cancellation of removal," for which she had been eligible because she had U.S. relatives and she had been living in the United States for 10 years.[2] Her ineligibility for a cancellation of removal was a direct result of her conviction for fraudulently obtaining public assistance benefits.[3]

Gonzalez filed a "Motion to Withdraw Plea and Vacate Judgment" in the district court on July 14, 2010, on the ground that she had received ineffective assistance of counsel. An evidentiary hearing was held. At the hearing, Gonzalez testified that she had not discussed the immigration consequences of her plea with her criminal trial counsel. Gonzalez testified that her criminal trial counsel had known Gonzalez was not a U.S. citizen, but Gonzalez had not informed her criminal trial counsel of her ongoing immigration case.

Gonzalez said that if she had known beforehand that there could be consequences with immigration that could result in deportation, she "would have looked for another solution." She admitted, however, that although the immigration consequences were very important to her before she entered her plea, she never asked her attorney whether there might be a problem. She also admitted that the court had informed her there could be immigration consequences to her plea, but that the advisement was said "very rapidly through the interpreter" and she "didn't understand much." She said that the first time she learned about the effect of the plea on her immigration status was about 5 months before the hearing on her motion to withdraw, when she was told by a different attorney who represented her in the immigration proceedings.

The district court denied Gonzalez' motion. While the district court accepted Gonzalez' claim that her criminal trial counsel's performance was deficient, the court determined that Gonzalez had failed to demonstrate prejudice resulting from that deficient performance. The court explained that Gonzalez'

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[2] See 8 U.S.C. § 1229b(b) (2006).

[3] See, *id.*; 8 U.S.C. § 1227(a)(2) (2006).

assertion that she would have found a "'different solution'" did not satisfy Gonzalez' burden of showing prejudice, because whether a "different solution" was possible was not within Gonzalez' control. The court also noted that Gonzalez had two different attorneys at the time of the plea—her criminal trial counsel and her immigration attorney—and apparently did not inquire of either one of them about the specific immigration consequences of her plea, despite her awareness that such consequences were possible. So, the court found that Gonzalez had failed to prove prejudice and denied her motion to withdraw her plea. Gonzalez appeals.

## ASSIGNMENT OF ERROR

Gonzalez assigns, as consolidated, that the district court erred in denying her motion to withdraw her plea, because she was denied effective assistance of counsel.

## STANDARD OF REVIEW

[1] The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.[4]

## ANALYSIS

### Jurisdiction Over Motion to Withdraw Plea

The State argues that we have no appellate jurisdiction. The State claims that there is no procedure in Nebraska law for withdrawal of a guilty plea after judgment based on ineffective assistance of counsel. So, the State argues, the trial court lacked jurisdiction over Gonzalez' motion and we likewise lack jurisdiction over her appeal.[5]

The premise of the State's argument is incorrect; we do have jurisdiction over this appeal. But in order to explain the legal principles that govern our disposition of the merits of this particular appeal, it will be helpful to review some of our more recent case law regarding the procedural avenues

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

[5] See *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

available to a defendant who claims that he or she was not properly advised of the immigration consequences of a plea. Specifically, there are three such avenues generally available: (1) a motion for postconviction relief under the Nebraska Postconviction Act,[6] (2) withdrawal of the plea pursuant to Neb. Rev. Stat. §§ 29-1819.02 and 29-1819.03 (Reissue 2008), and (3) a common-law motion to withdraw the plea. We agree with the State that only the third avenue is at issue here.

To begin with, this is not a postconviction action. For reasons that will become apparent below, it is at least possible that due to the U.S. Supreme Court's decision in *Padilla v. Kentucky*,[7] a defendant in Gonzalez' position could bring a postconviction action based on allegations of ineffective assistance of counsel. But Gonzalez has not brought such a claim—her motion neither cites nor relies upon the Nebraska Postconviction Act, and perhaps most clearly, her motion was not verified, as a postconviction motion is required to be.[8]

It is equally clear that §§ 29-1819.02 and 29-1819.03 provide no relief here, and Gonzalez does not contend otherwise. Section 29-1819.02 requires a trial court, before accepting a plea, to advise defendants that a conviction may have immigration consequences. And that section also establishes a statutory procedure whereby a convicted person may file a motion to have a criminal judgment vacated and a plea withdrawn when the court did not give the required advisement and the defendant faces an immigration consequence not included in the advisement given.[9]

In this case, however, the statutory advisement was given. So, §§ 29-1819.02 and 29-1819.03 are inapplicable. But that does not foreclose a common-law remedy for withdrawal of a plea. We held in *State v. Rodriguez-Torres*[10] that § 29-1819.02

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[6] See Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Supp. 2011).

[7] *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

[8] See, § 29-3001; *State v. Robinson*, 215 Neb. 449, 339 N.W.2d 76 (1983).

[9] See, *Mena-Rivera, supra* note 4; *Yos-Chiguil, supra* note 5.

[10] See *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008).

did not create a statutory procedure pursuant to which a plea entered before the statute was enacted could be withdrawn after the person convicted of the crime had already served his sentence. But we later clarified that *Rodriguez-Torres* did not foreclose a common-law remedy for withdrawal of a plea.[11]

[2,3] Gonzalez has pursued such a remedy here. And contrary to the State's suggestion, it is well established that a defendant may move to withdraw a plea, even after final judgment. However, the grounds for such a withdrawal are quite difficult for a defendant to prove—the bar is set high. If a motion to withdraw a plea of guilty or no contest is made *before* sentencing, a court, in its discretion, may allow a defendant to withdraw his or her plea for any fair and just reason, provided the prosecution would not be substantially prejudiced by its reliance on the plea.[12] But with respect to withdrawal of a plea of guilty or no contest made *after* sentencing, withdrawal is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice.[13] That standard applies even where a motion to withdraw a plea has been made after the sentencing court's judgment has become final.[14] A motion for withdrawal is timely if made with due diligence, considering the nature of the allegations therein, and is not necessarily barred because it was made subsequent to judgment or sentence.[15]

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[11] See *Yos-Chiguil, supra* note 5.

[12] See, *State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987); *State v. Molina-Navarrete*, 15 Neb. App. 966, 739 N.W.2d 771 (2007).

[13] See, *Minshall, supra* note 12; *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986), *disapproved on other grounds, Minshall, supra* note 12; *State v. Holtan*, 216 Neb. 594, 344 N.W.2d 661 (1984); *State v. Jipp*, 214 Neb. 577, 334 N.W.2d 805 (1983); *State v. Rouse*, 206 Neb. 371, 293 N.W.2d 83 (1980); *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977), *disapproved on other grounds, Minshall, supra* note 12; *State v. Evans*, 194 Neb. 559, 234 N.W.2d 199 (1975), *disapproved on other grounds, Minshall, supra* note 12; *State v. Lewis*, 192 Neb. 518, 222 N.W.2d 815 (1974); *Molina-Navarrete, supra* note 12.

[14] See, *Holtan, supra* note 13; *Kluge, supra* note 13.

[15] *Evans, supra* note 13.

In short, while it is possible that Gonzalez could have brought a motion for postconviction relief based on her allegations, she is also permitted to move to withdraw her plea. The trial court had jurisdiction to consider her motion, and we have jurisdiction over her appeal. Whether Gonzalez has adduced the clear and convincing evidence of manifest injustice necessary to justify withdrawal, however, is another matter, and requires us to consider the merits of her assignment of error.

## Manifest Injustice and Ineffective Assistance of Counsel

As noted above, withdrawal of a plea is proper only where the defendant makes a timely motion and establishes, by clear and convincing evidence, that withdrawal is necessary to correct a manifest injustice.[16] Gonzalez made her motion with due diligence: it was filed shortly after the U.S. Supreme Court's decision in *Padilla*[17] held that a claim for ineffective assistance of counsel was available based upon the immigration consequences of a plea.[18]

[4,5] We have explained that "manifest injustice" may be proved if the defendant proves, by clear and convincing evidence, that (1) he or she was denied the effective assistance of counsel guaranteed by constitution, statute, or rule; (2) the plea was not entered or ratified by the defendant or a person authorized to so act on his or her behalf; (3) the plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed; or (4) he or she did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose those concessions as promised in the plea agreement.[19] And the defendant must plead and prove that such omissions have resulted in prejudice.[20]

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[16] See cases cited *supra* note 13.

[17] *Padilla, supra* note 7.

[18] See *Evans, supra* note 13.

[19] *Holtan, supra* note 13; *Evans, supra* note 13.

[20] See *Jipp, supra* note 13.

[6,7] Obviously, what is at issue here is whether Gonzalez proved, by clear and convincing evidence, that ineffective assistance of counsel has resulted in a manifest injustice. It is well understood that to prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[21] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[22] And we recently reaffirmed that in the context of a plea of guilty or no contest, a defendant must allege facts showing a reasonable probability that he or she would have insisted on going to trial but for counsel's errors.[23]

[8] In 2002, we held in *State v. Zarate*[24] that counsel's failure to inform the defendant of the immigration consequences of a plea did not support a claim of ineffective assistance of counsel. Obviously, the U.S. Supreme Court's decision in *Padilla* abrogated our decision in *Zarate*.[25] In *Padilla*, the Court held that advice regarding deportation was not categorically removed from the ambit of the Sixth Amendment right to counsel and that *Strickland* applied to such a claim.

[9,10] Specifically, the Court explained that when the law regarding the possible deportation consequences of a plea is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, the duty to give correct advice is equally clear. In sum, the Court concluded that counsel must inform his or her client whether a plea carries a risk of deportation and that to obtain relief on such a claim, the defendant must convince the court

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[21] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[22] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 563 U.S. 1012, 131 S. Ct. 2912, 179 L. Ed. 2d 1254 (2011).

[23] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). See, also, *Premo v. Moore*, 562 U.S. 115, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011); *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[24] *State v. Zarate*, 264 Neb. 690, 651 N.W.2d 215 (2002).

[25] See *Padilla, supra* note 7.

that a decision to reject the plea bargain would have been rational under the circumstances.[26]

We recognize that there is some significant dispute regarding whether the Court's holding in *Padilla* is applicable on collateral review of pleas that were entered before *Padilla* was decided.[27] We need not resolve that issue in this case, however, because we conclude that even under *Padilla*, Gonzalez failed to establish the clear and convincing evidence of manifest injustice necessary to justify withdrawal of her plea.

[11] Although this case arises in the context of a motion to withdraw a plea, in the context of postconviction relief, we have stated that a claim of ineffective assistance of counsel presents a mixed question of law and fact.[28] Whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision.[29] But we review factual findings for clear error.[30] We see no reason to depart from that standard of review in evaluating whether a defendant proved ineffective assistance of counsel, although the court's ultimate determination of whether the defendant is permitted to withdraw his or her plea is still reviewed for an abuse of discretion.

We agree with the district court's conclusion that Gonzalez did not prove prejudice here. The district court had well-founded skepticism regarding Gonzalez' testimony that the immigration consequences of her plea were important to her, yet she apparently never inquired about them to either of her attorneys. She purportedly never did so despite having been cautioned of possible deportation consequences by the court more than once, and her acknowledgment even at the hearing on her motion to withdraw her plea that she had been at least aware of those advisements. She was aware of the general

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[26] See *id.*

[27] See, e.g., *Chaidez v. U.S.*, 655 F.3d 684 (7th Cir. 2011) (and cases cited therein).

[28] See *Yos-Chiguil, supra* note 23.

[29] *Id.*

[30] *Id.*

possibility of immigration consequences, and her criminal trial counsel could not have informed her of the specific effect of her plea on her "cancellation of removal," because Gonzalez had not informed her counsel of the separate immigration proceeding.

And most important, Gonzalez did not testify that the possibility of deportation would have led her to insist on going to trial instead of pleading guilty.[31] She simply said that she would have "looked for another solution," but presented no evidence of what such a solution might have been or whether such a solution would have been available to her. Under the Immigration and Nationality Act,[32] cancellation of removal is unavailable to any alien who has committed an "aggravated felony,"[33] which includes an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000."[34] There appears to be no dispute that Gonzalez did what she was accused of, or any question that her conduct fit that description, which means that there is nothing in *this* record to suggest that her case could have been resolved in a way that would avoid the Immigration and Nationality Act. The argument in Gonzalez' appellate brief that the State might have been willing to "craft a creative plea bargain"[35] is nothing more than speculation. And Gonzalez faced up to 5 years' imprisonment, so a recommendation of probation was not an unfavorable plea agreement in the underlying proceeding.

Simply put, Gonzalez presented no evidence that she would have insisted on going to trial absent her counsel's allegedly deficient performance,[36] and nothing in the record persuades us that "a decision to reject the plea bargain would have been rational under the circumstances."[37] We agree with the district

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[31] See *id.*

[32] 8 U.S.C. § 1101 et seq. (2006).

[33] See §§ 1227(a)(2)(A)(iii) and 1229b(b)(1)(C).

[34] See § 1101(a)(43)(M)(i).

[35] Brief for appellant at 24.

[36] See, *Premo, supra* note 23; *Hill, supra* note 23.

[37] See *Padilla, supra* note 7, 130 S. Ct. at 1485.

court that Gonzalez did not prove the prejudice prong of *Strickland*.[38] As a result, even if *Padilla* applies retroactively to her plea, she did not prove ineffective assistance of counsel and therefore did not prove the manifest injustice necessary to justify withdrawing her plea. The district court did not abuse its discretion in overruling Gonzalez' motion, and we find no merit to her assignment of error.

## CONCLUSION

Although we conclude that the district court had jurisdiction to consider Gonzalez' motion to withdraw her plea, despite the fact that her conviction had become final, we find that she did not prove ineffective assistance of counsel. The district court did not abuse its discretion in overruling her motion. The district court's order is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[38] See *Strickland, supra* note 21.

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JULIE LOVELACE, APPELLEE, V.
CITY OF LINCOLN, APPELLANT.

809 N.W.2d 505

Filed January 13, 2012. No. S-10-1241.

1. **Workers' Compensation.** Under the odd-lot doctrine, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his or her services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his or her crippling handicaps.
2. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings 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: Time.** A worker cannot be considered permanently totally disabled for a period of time when he or she was working either part time or full time at the same job he or she had prior to his or her injury.

Appeal from the Workers' Compensation Court. Affirmed.

Rodney Confer, Lincoln City Attorney, and Margaret M. Blatchford for appellant.

Travis Allan Spier, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

## INTRODUCTION

The City of Lincoln (City) appeals the decision of a three-judge panel of the Nebraska Workers' Compensation Court, which affirmed in part and in part reversed the original award which found Julie Lovelace to be temporarily and totally disabled for the periods "from and including June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently and totally disabled." The City alleges that the original award of the Workers' Compensation Court is ambiguous and therefore does not comply with Workers' Comp. Ct. R. of Proc. 11 (2010) and that the three-judge panel did not correct the error. The City also alleges that as a matter of law, a worker "cannot be earning wages at a similar job with the same employer and at the same time have suffered a 100 percent loss of earning capacity." We affirm the decision of the three-judge panel.

## BACKGROUND

The facts of this case are largely undisputed. On March 21, 2006, Lovelace was injured in the course and scope of her employment as an office specialist for the City. Lovelace was carrying a box when she tripped over a cart and fell to the floor, injuring her left knee and lower back. Lovelace continued to work after her injury up until June 22, the date of the surgery on her left knee. Lovelace returned to work on

October 2 and continued working for the City, with restrictions, until November 6, 2007, when she again slipped and fell, injuring her right leg. Lovelace had another surgery on her left knee on December 19. She did not return to work, and the City terminated her employment in June 2008.

[1] Lovelace filed suit with the compensation court to recover unpaid medical expenses, mileage, attorney fees, and ongoing medical care. Lovelace also sought payments for temporary total disability for the periods between June 22 and October 1, 2006, and December 19, 2007, and August 19, 2009, and payments for permanent disability from August 20, 2009, continuing indefinitely into the future. The compensation court found that Lovelace had been temporarily totally disabled for the periods "from and including June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently and totally disabled." The compensation court also found that Lovelace was entitled to "benefits of $358.56 per week for 101 5/7 weeks for temporary total disability and thereafter and in addition thereto the sum of $368.09 per week for permanent total disability." The compensation court found that Lovelace was permanently and totally disabled, because she was an odd-lot worker.[1] Under the odd-lot doctrine,

> "'[t]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.'"[2]

The City was given credit for $97,842.86 paid toward Lovelace's medical bills and was ordered to pay the remaining

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[1] See *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[2] *Id.* at 617, 748 N.W.2d at 63.

balances. The City was also ordered to pay $4,557.93 in mileage expenses, and $10,000 in attorney fees, because the City failed to pay medical bills in a timely fashion. The compensation court later issued an order nunc pro tunc, stating that the City should pay $2,445.17 in penalties together with interest as allowed by law for failing to "'catch up'" permanency benefits for the period of March 22 through June 22, 2006, pursuant to *Hobza v. Seedorff Masonry, Inc.*[3] The compensation court also revised the amount of certain compensable medical expenses incurred by Lovelace.

The City appealed the award to a three-judge panel of the compensation court. The three-judge panel affirmed the award in part, and in part reversed. The three-judge panel found that some of the medical expenses Lovelace had submitted were unrelated to her workplace injuries and remanded that portion of the award for further findings by the compensation court. The three-judge panel also found that *Hobza* was not applicable, because *Hobza* had been superseded by amendments to Neb. Rev. Stat. § 48-119 (Reissue 2008). Therefore, the three-judge panel found that no benefits were to be paid prior to June 22, 2006, because Lovelace worked full time between the first accident, which occurred on March 21, through June 22. The three-judge panel affirmed the categorization of Lovelace as an odd-lot worker and found no merit to the remainder of the City's or to Lovelace's assignments of error on cross-appeal regarding future surgeries. The City appealed.

## ASSIGNMENTS OF ERROR

The City assigns that the compensation court erred when it (1) failed to comply with rule 11 (discussed below), by not specifying in the award and order the weeks owed and credited in disability benefits, and (2) determined that a worker could be earning wages at a similar job with the same employer and, at the same time, have suffered a 100-percent loss of earning capacity.

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[3] *Hobza v. Seedorff Masonry, Inc.*, 259 Neb. 671, 611 N.W.2d 828 (2000).

## STANDARD OF REVIEW

[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 findings 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.[4]

[3] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.[5]

## ANALYSIS

*Compensation Court's Award Did Not Violate Rule 11.*

We address the City's assignments of error together, because both are based on the argument that the compensation court failed to adequately address benefits owed for the period of time between October 2, 2006, and December 18, 2007. In essence, the City claims the compensation court failed "to set out in specificity in the Award and Order the weeks and amounts owed in benefits and credited in benefits. The Court's lack of specificity results in ambiguity as to how much is owed in permanent total disability benefits."[6] Rule 11 provided at the time of the compensation court's award that "[d]ecisions of the court on original hearing shall provide the basis for a meaningful appellate review. The judge shall specify the evidence upon which the judge relies."

Although the parties' briefs do not make this entirely clear, the confusion appears to center on the period of time between October 2, 2006, and December 18, 2007, when Lovelace was working either part time or full time with restrictions. Prior to trial, the compensation court ordered both parties to submit, among other things, a pretrial statement addressing Lovelace's weekly wages, periods of indemnity, and medical expenses incurred and paid. In her pretrial statement, Lovelace made

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[4] *Tapia-Reyes v. Excel Corp.*, 281 Neb. 15, 793 N.W.2d 319 (2011).

[5] *Id.*

[6] Brief for appellant at 14.

no claims regarding her disability between October 2, 2006, and December 18, 2007, whether partial or total, temporary or permanent. In its pretrial statement, however, the City claimed to have voluntarily paid partial temporary disability during this time, a claim that Lovelace did not dispute. The City appears to be concerned that it will be penalized if it does not pay permanent total disability benefits for that period of time (between October 2, 2006, and December 18, 2007).

First, we note that the compensation court made no findings for the period of time between October 2, 2006, and December 18, 2007, probably because Lovelace did not claim in her pretrial statement that she was owed benefits for that period of time. In paragraph I of the award, the compensation court found that Lovelace was "temporary [sic] totally disabled from and including June 22, 2006, through October 1, 2006, and again from December 19, 2007, through August 19, 2009, and thereafter became permanently and totally disabled." In paragraph III, the compensation court ordered the City to pay Lovelace "$358.56 per week for 101 5/7 weeks for temporary total disability," and "$368.09 per week for permanent total disability." The periods of temporary total disability are precisely those claimed by Lovelace in her pretrial statement. And while the City argues that there is no clear start date to the permanent disability benefits, the award sets forth the periods of time that Lovelace was temporarily totally disabled and states "and *thereafter* became permanently and totally disabled." (Emphasis supplied.)

[4] To the extent that there is any confusion over the payment of permanent total disability for the period of time between October 2, 2006, and December 18, 2007, we find that Lovelace is not entitled to permanent total disability benefits for that same period while she was working either part time or full time and receiving temporary partial disability payments.[7] Our prior case law dictates that a worker cannot be considered permanently totally disabled for a period of time when he or

[7] See *Kam v. IBP, inc.*, 12 Neb. App. 855, 686 N.W.2d 631 (2004), *affirmed* 269 Neb. 622, 694 N.W.2d 658 (2005).

she was working part time or full time at the same job he or she had prior to his or her injury.[8]

*Application of* Hobza.

Although both the City and Lovelace argue strenuously about the application of *Hobza v. Seedorff Masonry, Inc.* to this case, *Hobza* is inapposite.[9] Citing *Hobza*, the compensation court ordered the City to pay penalties and interest for failing to "'catch up'" permanency benefits for the period of time between March 22 and June 22, 2006, or between her first injury and the subsequent knee surgery. In *Hobza*, this court held that under § 48-119 (Reissue 1998), benefits were to be paid from the date of injury. However, since *Hobza* was decided, the Legislature changed the statute to specifically provide that compensation begins from the date of disability. The three-judge panel recognized this fact and reversed the decision as it related to *Hobza*, finding the City was not required to pay Lovelace benefits for that period of time when she had been working full time. We agree with the finding of the three-judge panel.

## CONCLUSION

We find that Lovelace is not entitled to permanent total disability benefits for the period of time after she was injured and while she was working between October 2, 2006, and December 18, 2007. Lovelace is, however, entitled to permanent total disability payments from December 19, 2007, onward. We affirm the decision of the three-judge panel.

AFFIRMED.

WRIGHT, J., not participating in the decision.

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[8] *Id.*

[9] *Hobza, supra* note 3.

# Thomas & Thomas Court Reporters, L.L.C., appellee and cross-appellant, v. Douglas Switzer, an individual, and Hathaway & Switzer, L.L.C., appellants and cross-appellees.

810 N.W.2d 677

Filed January 13, 2012. No. S-11-029.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **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.
3. ____: ____. 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. **Attorney Fees: Appeal and Error.** A trial court's decision denying attorney fees will be upheld absent an abuse of discretion.
5. **Contracts: Principal and Agent: Liability.** When a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract.
6. ____: ____: ____. 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.
7. **Attorney and Client: Agency.** The relationship between attorney and client is one of agency, and the general agency rules of law apply to the relation of attorney and client.
8. **Attorney and Client: Contracts: Liability.** Unless a lawyer or third person disclaims such liability at the time of contracting, a lawyer is subject to liability to third persons on contracts entered into on behalf of a client if the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit.
9. **Corporations: Liability.** The individual members and managers of a limited liability company are generally not liable for a debt, obligation, or liability of the company.
10. **Corporations: Fraud.** A court will disregard a limited liability company's identity only where the company has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.

11. **Corporations.** A limited liability company's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears.
12. **Corporations: Liability: Proof: Fraud.** A plaintiff seeking to impose liability on an individual member or manager of a limited liability company has the burden of proving that the company's identity should be disregarded to prevent fraud or injustice to the plaintiff.
13. **Actions: Attorney Fees: Words and Phrases.** A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.
14. ____: ____: ____. The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
15. **Actions: Attorney Fees.** Pro se litigants are not entitled to recover attorney fees, even if the pro se litigant is a licensed attorney.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed in part, and in part reversed and remanded with directions.

Douglas Switzer and Richard P. Hathaway, of Hathaway Switzer, L.L.C., pro se.

Ronald E. Reagan, of Reagan, Melton & Delaney, L.L.P., for appellee.

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

GERRARD, J.

Thomas & Thomas Court Reporters, L.L.C. (Thomas & Thomas), sued Douglas Switzer, an attorney, and his law firm, Hathaway & Switzer, L.L.C. (Hathaway Switzer), for failure to pay for court reporting services. The primary issue presented in this appeal is whether Hathaway Switzer is liable to Thomas & Thomas for its fees or whether Hathaway Switzer's clients are. We conclude that Hathaway Switzer is liable.

## FACTS

Thomas & Thomas sued Switzer and Hathaway Switzer for failure to pay for court reporting services provided in five cases between January 28 and October 14, 2009. (Switzer's partner was never named as an individual party to the action.) Thomas & Thomas alleged that it was owed a total of $5,992. Thomas

& Thomas alleged that demand had been made for payment more than 90 days prior to the filing of the complaint and that therefore, it was also due attorney fees pursuant to Neb. Rev. Stat. § 25-1801 (Cum. Supp. 2010). Thomas & Thomas sought a total judgment of the $5,992 it was owed and attorney fees totaling $624.21.

In an answer, Switzer individually and Hathaway Switzer denied that they requested services from Thomas & Thomas. Switzer and Hathaway Switzer also alleged that Thomas & Thomas had failed to join as necessary parties those on whose behalf the depositions were taken and who were properly liable for the costs. Hathaway Switzer alleged that it acted as an agent for its clients in its interactions with Thomas & Thomas. As an affirmative defense, Switzer asserted that Thomas & Thomas had no claim against him as an individual because he interacted with Thomas & Thomas only as a member of a limited liability company. Switzer also counterclaimed that he should be awarded at least $4,000 in attorney fees because the action against him was frivolous.

A bench trial was held. At trial, one of the owners of Thomas & Thomas, John Thomas, testified that he had been a court reporter for 35 years and that his wife and co-owner had been a court reporter for 33 years. Thomas explained the procedure used to retain Thomas & Thomas' services. In most cases, a law firm telephones Thomas & Thomas to schedule a deposition. Thomas & Thomas asks the law firm to send it a notice. The deposition request is entered in Thomas & Thomas' billing and scheduling software, which generates a confirmation sheet. The confirmation is faxed or e-mailed to the law firm that requested the services.

Thomas stated that if he had been advised that Hathaway Switzer would not be responsible for services provided for its clients, he would have either demanded cash on delivery, obtained payment before the deposition, or declined the assignment. Thomas' wife also testified that if a law firm said it was not going to be responsible for payment, Thomas & Thomas would require a retainer or payment on delivery. If payment was not promised by either of these methods, Thomas & Thomas would not accept the assignment. Thomas'

wife said these procedures are standard in the court reporting industry. However, Thomas admitted during his deposition that a majority of the payments Thomas & Thomas had received from Hathaway Switzer over the years were payments actually received from clients—e.g., a check written by a client.

The district court entered judgment for Thomas & Thomas. The court noted Thomas & Thomas' evidence that the industry standard in the local community is that the attorney is primarily responsible for the cost of court reporting services, absent an agreement to the contrary. The court found no evidence that Hathaway Switzer had informed Thomas & Thomas that the clients would be responsible for payment until after all the invoices were presented to Hathaway Switzer.

The court found, based on the custom and usage or course of dealing in the industry as proved by Thomas & Thomas, that an implied or constructive contract is created between an attorney and a court reporter that makes an attorney primarily responsible for court reporting services ordered by the attorney and rendered for the client, absent an express disclaimer of responsibility by the attorney. The court found that Thomas & Thomas proved performance of the reporting services on the order of Switzer and Hathaway Switzer, that Switzer and Hathaway Switzer were properly invoiced for the services, that the invoices were fair and reasonable for the services performed, and that Switzer and Hathaway Switzer failed to pay the invoices. The court entered judgment against Switzer and Hathaway Switzer in the amount of $5,992, along with costs. The court declined to award attorney fees to either party.

## ASSIGNMENTS OF ERROR

Switzer and Hathaway Switzer assign, restated, that the district court erred in finding (1) that Hathaway Switzer was a party to a contract with Thomas & Thomas and therefore liable for payment, when Thomas & Thomas had notice that Hathaway Switzer was acting as an agent for a disclosed principal and Hathaway Switzer had disclaimed contractual liability by its prior course of dealing with Thomas & Thomas, and (2) that Switzer was liable to Thomas & Thomas although

it presented no evidence to pierce Hathaway Switzer's company veil.

On cross-appeal, Thomas & Thomas assign that the court erred in not awarding it attorney fees.

## STANDARD OF REVIEW

[1-4] A suit for damages arising from breach of a contract presents an action at law.[1] 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.[2] 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, who is entitled to every reasonable inference deducible from the evidence.[3] When reviewing questions of law, however, we have an obligation to resolve the questions independently of the conclusion reached by the trial court.[4] And a trial court's decision denying attorney fees will be upheld absent an abuse of discretion.[5]

## ANALYSIS

There is no dispute in this case that someone owes Thomas & Thomas money. The question is, who? Hathaway Switzer contends that its clients are the real debtors. And Switzer contends that even if Hathaway Switzer is liable, he is not liable, in an individual capacity, for the company's debt. We address each argument in turn.

### Hathaway Switzer's Liability

[5,6] Hathaway Switzer's argument rests upon basic principles of agency law. The general rule is that when a party contracts with a known agent acting within the scope of his or her authority for a disclosed principal, the contract is that of the

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[1] *Dutton-Lainson Co. v. Continental Ins. Co.*, 279 Neb. 365, 778 N.W.2d 433 (2010).

[2] *Hastings State Bank v. Misle*, 282 Neb. 1, 804 N.W.2d 805 (2011).

[3] See *id.*

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

[5] See *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

principal only and the agent cannot be held personally liable thereon, unless the agent purports to bind himself or herself, or has otherwise bound himself or herself, to performance of the contract.[6] Stated another way, 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.[7] Hathaway Switzer argues that it was acting as an agent for known principals: the clients of Hathaway Switzer for whose cases Thomas & Thomas' services were being sought. Thomas & Thomas does not deny knowing the identity of Hathaway Switzer's clients. So, Hathaway Switzer concludes, Thomas & Thomas' contract—and remedy—is with those known principals.

[7] There is little question that the relationship between attorney and client is one of agency and that the general agency rules of law apply to the relation of attorney and client.[8] Thus, a client may be liable for the acts of the client's attorney when such was within the attorney's scope of authority.[9] But, while general agency rules apply to the attorney-client relationship, there is much more involved than mere agency.[10] The attorney, not the client, is responsible for performing the details of litigation.[11]

[8] Thus, the Restatement (Third) of the Law Governing Lawyers provides that unless a lawyer or third person disclaims

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[6] *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 749 N.W.2d 478 (2008).

[7] *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

[8] *VRT, Inc. v. Dutton-Lainson Co.*, 247 Neb. 845, 530 N.W.2d 619 (1995).

[9] See *id.*

[10] See, *Burt v. Gahan*, 351 Mass. 340, 220 N.E.2d 817 (1966); *Gaines Reporting Service v. Mack*, 4 Ohio App. 3d 234, 447 N.E.2d 1317 (1982).

[11] See *id.* See, also, *McCullough v. Johnson*, 307 Ark. 9, 816 S.W.2d 886 (1991); *Anheluk v. Kubik*, 374 N.W.2d 67 (N.D. 1985); *Molezzo Reporters v. Patt*, 94 Nev. 540, 579 P.2d 1243 (1978); *Boesch v. Marilyn M. Jones & Associates*, 712 N.E.2d 1061 (Ind. App. 1999); *Copp v. Breskin*, 56 Wash. App. 229, 782 P.2d 1104 (1989); *Ingram v. Lupo*, 726 S.W.2d 791 (Mo. App. 1987).

such liability at the time of contracting, a lawyer is subject to liability to third persons on contracts entered into on behalf of a client if "the contract is between the lawyer and a third person who provides goods or services used by lawyers and who, as the lawyer knows or reasonably should know, relies on the lawyer's credit."[12] And the Restatement specifically explains that, even when a client is a disclosed principal, a lawyer is liable for the compensation of a court reporter who reasonably relies upon the lawyer's credit.[13] "Merely disclosing the client's name does not convey that the client rather than the lawyer is to pay. Such persons are likely to rely on the credit of the lawyer because they regularly deal with lawyers, while investigating the reliability of the client might be costly."[14]

As a practical matter, in today's legal system, an attorney dealing with those who provide legal support services acts less as an agent who relies on the client for authority to manage the case, and more as a "general contractor," albeit a professional, who is responsible for supervising the various aspects of litigation.[15] In that context, it is appropriate that the attorney, with superior legal knowledge and familiarity with the case and client, should bear the burden of clarifying his or her intent regarding payment.[16] It is, in fact, a relatively simple matter for an attorney to disclaim liability with a clear statement to that effect.[17] And an attorney's liability for (and payment of) expenses of litigation is consistent with our ethical rules.[18]

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[12] Restatement (Third) of the Law Governing Lawyers § 30(2)(b) at 216 (2000). See, also, *McCullough, supra* note 11; *Anheluk, supra* note 11; *Patt, supra* note 11; *Burt, supra* note 10; *Boesch, supra* note 11; *Copp, supra* note 11; *Ingram, supra* note 11; *Mack, supra* note 10. But see, e.g., *McCorkle v. Weinstein*, 50 Ill. App. 3d 661, 365 N.E.2d 953, 8 Ill. Dec. 567 (1977).

[13] See Restatement, *supra* note 12, § 30, comment *b*.

[14] *Id.* at 217.

[15] See *Ingram, supra* note 11.

[16] *Boesch, supra* note 11.

[17] *Patt, supra* note 11; *Burt, supra* note 10.

[18] See, Neb. Ct. R. of Prof. Cond. § 3-501.8(e)(1) and (2); § 3-501.8, comment 10.

Hathaway Switzer argues that even under that rule, it still effectively "disclaimed" liability through its ordinary course of business with Thomas & Thomas: specifically, that Thomas & Thomas generally received payment for its services from Hathaway Switzer's clients. We note that this supposed course of business was not as well substantiated by the evidence as Hathaway Switzer suggests. Neither Switzer nor his partner testified, so the only evidence on this point was Thomas' deposition testimony that a "majority" of payments were apparently made by clients, and his trial testimony that he did not "dispute" Hathaway Switzer's argument that most of Thomas & Thomas' payments had been from clients.

But assuming that the evidence would have been sufficient to establish a course of business, that evidence would not establish that Hathaway Switzer disclaimed liability. Instead, it would only indicate that the bills were oftentimes paid by clients. And as the Restatement makes clear, it does not matter who pays the bill; absent an express disclaimer at the time of contracting, the attorney is responsible for payment.

Thus, even assuming that such evidence was relevant in determining whether Hathaway Switzer had disclaimed liability, it still presented the district court with what was, at best, a question of fact. Thomas & Thomas countered with direct testimony of Thomas and his wife regarding their understanding of their agreement with Hathaway Switzer and the general practice in the court reporting business from which they had formed their expectations. And, we note, Thomas & Thomas' practice was to accept employment before meeting the client, and to send its bills to Hathaway Switzer—putting Hathaway Switzer on notice that Thomas & Thomas was relying on the firm's credit, not the client's.[19] In short, the court was presented with a question of fact as to whether Thomas & Thomas should have expected Hathaway Switzer's clients to pay Thomas & Thomas' bills or whether Hathaway Switzer had effectively disclaimed liability for those bills—a question of fact which was resolved against Hathaway Switzer by the

[19] See *Copp, supra* note 11.

trier of fact and which we find sufficient evidence to support on appeal.[20]

### Switzer's Liability

Switzer also argues that the court erred in holding him individually liable, essentially piercing Hathaway Switzer's "corporate veil," or company veil in this case. We find more merit to this point.

Thomas & Thomas specifically alleged that Hathaway Switzer is a limited liability company, and that fact is undisputed. Thomas & Thomas also alleged that Switzer was the party "personally engaging the services" of Thomas & Thomas, but this allegation was denied by Switzer. And Switzer repeatedly alleged that he had not, in his individual capacity, retained Thomas & Thomas' services. Switzer also raised an affirmative defense based on his allegation that he interacted with Thomas & Thomas only in his capacity as a member of Hathaway Switzer. And in his trial brief, Switzer asserted that there was no evidence he had contracted with Thomas & Thomas to provide services for his personal use. Nonetheless, without specifically discussing the issue, the court entered judgment against both Hathaway Switzer and Switzer individually.

[9-12] But the individual members and managers of a limited liability company are generally not liable for a debt, obligation, or liability of the company.[21] And a court will disregard such a company's identity only where the company has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.[22] The company's identity as a separate legal entity will be preserved, as a general rule, until sufficient reason to the contrary appears.[23] And a plaintiff seeking to impose liability on an individual member or manager has the burden of proving that the

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[20] See, e.g., *Ingram, supra* note 11.

[21] See Neb. Rev. Stat. § 21-2612 (Cum. Supp. 2010). See, also, Neb. Rev. Stat. § 21-129 (Cum. Supp. 2010).

[22] See *Christian v. Smith*, 276 Neb. 867, 759 N.W.2d 447 (2008).

[23] See *id.*

company's identity should be disregarded to prevent fraud or injustice to the plaintiff.[24]

No such proof was presented here. The evidence does not show that Switzer ever contracted individually with Thomas & Thomas, although he was occasionally responsible for ordering Thomas & Thomas' services. There is no evidence that Switzer ever did so in any capacity other than as a member of Hathaway Switzer. Nor is there evidence of fraud or injustice supporting disregard for the company's legal identity. In short, the record does not contain sufficient evidence (or, indeed, any evidence) to support the court's judgment against Switzer in an individual capacity. So, we find merit to this assignment of error.

## Attorney Fees

[13,14] Each side of this case argues for an award of attorney fees. We find none of their arguments to have merit. Switzer argues that he should have been awarded attorney fees because Thomas & Thomas' claim against him as an individual was frivolous. A court may award attorney fees against any attorney or party who has brought or defended a civil action which alleges a claim or defense which a court determines is frivolous or made in bad faith.[25] A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position.[26] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[27]

[15] We reject Switzer's argument. First, Switzer did not specifically assign error to the court's failure to award fees.[28] But more pertinent, Switzer represented himself pro se. And

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[24] See *id.*

[25] Neb. Rev. Stat. § 25-824(2) (Reissue 2008).

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

[27] *Id.*

[28] See *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

pro se litigants are not entitled to recover attorney fees, even if the pro se litigant is a licensed attorney.[29]

Thomas & Thomas also argues for attorney fees. First, it argues that Switzer's counterclaim was frivolous. But while Switzer's counterclaim lacked merit, it was directed at Thomas & Thomas' attempt to hold Switzer personally liable—a claim which we found to be unsupported by the evidence. Thus, even though Switzer was not entitled to recover an attorney fee as a "pro se litigant," we cannot say that Switzer's individual counterclaim was frivolous per se, i.e., ridiculous, or that the claim was filed with an improper motive.

Finally, Thomas & Thomas argues that it was entitled to attorney fees pursuant to § 25-1801. That section provides that a claimant with a claim amounting to less than $4,000 for, among other things, services rendered, may present that claim to the allegedly liable party and then, if the claim is not paid within 90 days, sue for the amount of the original claim and additional costs, interest, and attorney fees.[30] But Hathaway Switzer argues that § 25-1801 does not apply, because Thomas & Thomas' claim was for more than $4,000. We agree.

Thomas & Thomas attempted to bring its claim under $4,000 by styling its complaint as five separate causes of action, each based on its services with respect to five separate cases litigated by Hathaway Switzer. But organizing the complaint by client was essentially arbitrary—in some cases, for instance, Thomas & Thomas took depositions from several different witnesses and billed separately for each. And, we note, Thomas & Thomas not only sent bills to Hathaway Switzer for each deposition—it also sent a statement to Hathaway Switzer for all its past-due amounts. The total past-due amount on that statement was $5,992—the exact amount that the district court awarded. Based on the facts alleged and the evidence presented, the best characterization of Thomas & Thomas'

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[29] See *Young v. Midwest Fam. Mut. Ins. Co.*, 276 Neb. 206, 753 N.W.2d 778 (2008).

[30] See § 25-1801.

claim is that it is an action on an account.[31] As such, it is a single claim for an amount exceeding $4,000, and § 25-1801 is inapplicable.[32] We find no merit to Thomas & Thomas' cross-appeal.

## CONCLUSION

We find no merit to Hathaway Switzer's claim that it was not liable for the services provided by Thomas & Thomas. Nor do we find merit to any of the arguments for attorney fees. But we find that the court erred in entering judgment against Switzer individually. The court's judgment, to the extent that it holds Hathaway Switzer liable in the sum of $5,992, is affirmed. The judgment is reversed to the extent that it holds Switzer personally liable, and the cause is remanded to the district court with directions to dismiss Thomas & Thomas' claim against Switzer as an individual.

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

WRIGHT, J., not participating in the decision.

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[31] See, generally, *Sodoro, Daly v. Kramer*, 267 Neb. 970, 679 N.W.2d 213 (2004).

[32] See *Schaffer v. Strauss Brothers*, 164 Neb. 773, 83 N.W.2d 543 (1957) (refusing fees under former version of § 25-1801, based on rejection of plaintiff's argument that he filed 71 claims for $20 each instead of 1 claim for $1,420). See, also, *Hancock v. Parks*, 172 Neb. 442, 110 N.W.2d 69 (1961).

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STATE OF NEBRASKA, APPELLEE, V.
ROBERT J. DUNKIN, APPELLANT.

807 N.W.2d 744

Filed January 13, 2012. No. S-11-220.

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: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
5. **Postconviction: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
6. **Effectiveness of Counsel: Pleas: Proof.** Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.
7. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
8. **Trial: Pleas: Mental Competency.** A person is competent to plead or 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 own condition in reference to such proceedings, and to make a rational defense.
9. ____: ____: ____. The test of mental capacity to plead is the same as that required to stand trial.
10. **Pleas: Mental Competency: Right to Counsel: Waiver.** A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.
11. **Effectiveness of Counsel: Mental Competency: Proof.** In order to demonstrate prejudice from counsel's failure to investigate competency and for failing 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 him or her to be incompetent had a competency hearing been conducted.
12. **Constitutional Law: Trial: Mental Competency.** An individual has a constitutional right not to be put to trial when lacking mental competency.
13. **Postconviction: Effectiveness of Counsel: Presumptions: Proof.** Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.
14. **Postconviction: Effectiveness of Counsel: Presumptions: Appeal and Error.** After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will

be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Sanford Pollack, of Pollack & Ball, L.L.C., for appellant.

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

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

MCCORMACK, J.

## I. NATURE OF CASE

Robert J. Dunkin pled no contest to the charge of murder in the second degree. The district court accepted Dunkin's plea, entered a judgment of guilty, and subsequently sentenced Dunkin to 40 years' to life imprisonment. Dunkin did not directly appeal the judgment, but filed a motion for postconviction relief which alleged that his constitutional right to the effective assistance of counsel had been violated. Following an evidentiary hearing, the district court denied Dunkin's request for postconviction relief. Dunkin appeals.

## II. BACKGROUND

### 1. CONVICTION AND SENTENCING PROCEEDINGS

Dunkin was charged by information with murder in the first degree and use of a weapon to commit a felony in connection with the death of his girlfriend, Lynn Anderson. Pursuant to plea negotiations, the information was amended to charge Dunkin with murder in the second degree, to which Dunkin pled no contest. The district court accepted Dunkin's plea and entered a judgment of guilty. On April 28, 2009, the court sentenced Dunkin to 40 years' to life imprisonment. No direct appeal was taken from Dunkin's conviction and sentence.

On February 23, 2010, Dunkin filed a pro se "Motion to Vacate and Set Aside Sentence and Conviction Pursuant to [Neb. Rev. Stat.] §§ 29-3001 to 29-3004 [(Reissue 2008)]." Dunkin alleged that his constitutional right to the effective

assistance of counsel had been violated. Dunkin asserted that his trial counsel coerced and pressured Dunkin to plead no contest to the charge of second degree murder, failed to investigate Dunkin's state of mind at the time of the offense, failed to have Dunkin undergo a mental health examination or retain a medical professional to testify, failed to adequately present evidence at the suppression hearing, failed to adequately prepare for trial, made sentencing representations to Dunkin that he would receive a sentence of 20 to 30 years' imprisonment, and failed to perfect an appeal of Dunkin's sentence despite Dunkin's request.

Dunkin also filed a motion to withdraw his plea of no contest, wherein he claimed that he had been promised prosecutors would recommend a minimum sentence of 20 to 30 years' imprisonment and that he had been promised by his attorney he would be paroled upon first eligibility. At the time of the plea, Dunkin claimed he was so "mentally impaired/medicated that he didn't fully understand what was going on" because he was on a number of medications, the combined effect of which "is not known to Dunkin." He claimed he was experiencing hallucinations, delusions, a confused state, disorientation, disturbed concentration, anxiety, drowsiness, dizziness, weakness, fatigue, and headache. Dunkin claimed, at the time of the plea, that he had not been evaluated regarding the defense of not guilty by reason of insanity and that the plea was a product of coercion at the hands of his attorney. Dunkin asserted that he believes he has a meritorious defense to the charge of murder in the second degree.

Dunkin filed a motion for appointment of postconviction counsel, which the court granted. The State filed a responsive pleading, and the court conducted an evidentiary hearing on Dunkin's motion for postconviction relief.

### 2. Evidentiary Hearing on Postconviction Motion

Dunkin testified at the hearing on his postconviction motion. Dunkin stated that he was initially represented by an attorney from the Commission on Public Advocacy, but that Dunkin's brother wanted to hire a private attorney. Dunkin's brother

hired trial counsel to represent him, and Dunkin's brother signed a fee agreement and paid a flat fee of $25,000. Dunkin stated that throughout the proceedings, his mother and brother were in contact with counsel while Dunkin was in jail, to relay messages from Dunkin. Dunkin stated that he could not contact counsel directly because counsel's office did not accept collect telephone calls. Counsel testified, however, that his office policy was to accept collect calls from clients who are in jail.

Dunkin testified regarding his first meeting with counsel on August 1, 2008, during which meeting Dunkin told counsel his version of the events that occurred on January 21 and 22, 2008, which had led to the death of Anderson. Dunkin explained that he had been in a relationship with Anderson for approximately 6 months. The evening of her death, she had gone to Dunkin's house and began crying. The two had previously discussed whether Anderson had cheated on Dunkin, and he again asked her if that was the case. Anderson did not answer, and Dunkin repeatedly asked if she had cheated on him until Anderson got angry. Anderson then jumped out of her chair and swung her purse at Dunkin, which hit him in the head and knocked him to the ground. Anderson swung her arms at Dunkin, and he attempted to restrain her but she bit him on the arm, knocking him to the ground again.

Dunkin testified that Anderson told him she was going to kill him and then reached for a chair where he kept a gun. At the same time, Dunkin moved to reach the gun first; a struggle ensued, during which Anderson kicked Dunkin in the knee and he fell into the wall. When Dunkin fell, the gun went off and struck and killed Anderson. Dunkin testified that he told counsel that Anderson's death was accidental and unintentional. Dunkin stated that counsel told him that he thought Dunkin had a good case for manslaughter.

Dunkin explained to counsel that he had taken a large amount of prescription pills after the incident, including more than 60 Xanax pills, some Percocet, hydrocodone, and "Ambien CR." Dunkin stated that he remembers nothing between the time he took the pills and when he woke up in jail. Dunkin testified that counsel commented he thought that that number of pills

would have killed Dunkin and that Dunkin stated he had taken the pills because he wanted to kill himself because he could not live with what had happened.

(a) Suppression Hearing

Following the incident, Dunkin was taken from his home to a hospital by ambulance because of the possible overdose. Dunkin made statements to medical personnel and police officers during the ambulance ride and after arriving at the hospital. The statements made by Dunkin during this time were recorded by a police officer who rode to the hospital in the ambulance with Dunkin.

Counsel filed a motion to suppress the statements Dunkin had made to law enforcement and medical personnel when he was taken into custody. In the motion to suppress, counsel argued that Dunkin's statements to medical personnel should be suppressed on the basis of doctor-patient privilege. He also claimed that the statements Dunkin made to police officers at the hospital should be suppressed, because Dunkin was not properly advised of his *Miranda* rights. A suppression hearing was scheduled, and on December 23, 2008, Dunkin met with counsel for the second time for approximately 10 minutes immediately prior to the hearing to discuss what would happen.

At the suppression hearing, the State called two police officers to testify; counsel did not call any witnesses on Dunkin's behalf, nor did Dunkin testify. Dunkin met with counsel briefly following the suppression hearing, and counsel explained that the hearing had gone as he expected it would. Dunkin testified that he was lucid during the hearing and understood what was going on.

After taking the motion to suppress under advisement, the court overruled the motion in regard to Dunkin's statements made during transport to the hospital and those made to police officers at the hospital after Dunkin was read his *Miranda* rights, and it sustained the motion in regard to statements he made to police prior to being advised of his *Miranda* rights. The court reserved ruling on statements made by Dunkin to the treating physician at the hospital. Dunkin said that he wanted

to appeal the suppression order but that counsel told him that could not be done because it was not a final, appealable order. Dunkin then told counsel he should try to negotiate a manslaughter charge.

(b) Autopsy Report

Dunkin testified that he told counsel that the autopsy report was incorrect, because it reported that Anderson had died of strangulation and a gunshot wound. Dunkin told counsel that Anderson must have had bruises on her neck and that if this could be confirmed, it would support Dunkin's version of the events—that the death was accidental.

Counsel obtained court approval for appointment of an expert witness. Counsel retained Dr. George Nichols, with whom he had worked in a previous case. Counsel believed Nichols to be highly qualified and retained Nichols to review the autopsy report. Nichols was supplied with the police and medical reports related to Dunkin's case. Counsel testified that Nichols reviewed all of the documents in the case and was unable to confirm Dunkin's version of the events. Counsel stated that Nichols' opinion was generally unfavorable to Dunkin and that he did not receive a written report of Nichols' findings.

Nichols reviewed the bruises on Anderson's neck, with which Dunkin took issue, and determined that the bruises on her neck were not from strangulation or a purse strap as Dunkin had stated, but appeared to be from a "karate chop"-like blow to the neck. After reviewing the documents, Nichols informed counsel that he thought Dunkin's version of the incident was implausible and that it appeared that Anderson's death "was an execution."

(c) Plea Negotiations and Proceeding

On February 10, 2009, counsel presented Dunkin with a plea offer of second degree murder and a dismissal of the gun charge. Dunkin asked counsel, If "this were your kid" in this situation, "what would you tell them [sic] to do?" Counsel said that he would advise him to take the plea deal, because the State would dismiss the gun charge and he would probably be looking at 20 to 30 years' imprisonment, which would be "really close" to what a manslaughter conviction would

get him. Dunkin testified that counsel told him that the judge wanted his plea by the end of the day if he were going to take the deal. Dunkin stated that he felt "pressured" and "rushed" during the meeting regarding the plea offer.

Dunkin met with counsel for a second time also on February 10, 2009, for 10 to 15 minutes. Dunkin testified that at that point, Dunkin felt that they were not ready for trial, which was scheduled for 1 week later. Dunkin stated that they had not discussed strategy and that he had not been prepped to testify, so he decided to take the plea offer. Dunkin testified that counsel told him he had spoken with the prosecutor, the judge, and the parole board and that Dunkin would be let out of prison on his first parole date.

Counsel stated that he did not depose any witnesses because he was able to rely on witness interviews conducted by Dunkin's previous attorney from the Commission on Public Advocacy. Counsel also testified that he felt he was prepared for trial and that he advised Dunkin to take the plea offer, because he felt there was a substantial likelihood Dunkin would be convicted of first degree murder if the case went to trial.

Dunkin entered his plea of no contest to the charge of murder in the second degree on February 10, 2009. At the plea hearing, Dunkin stated that he was taking several medications and that the medications helped him to think more clearly. During postconviction proceedings, however, Dunkin stated that he was suffering from anxiety on February 10 and that as a result, his mind was "racing" and he could not think straight. Dunkin testified that he did not freely and voluntarily plead no contest, because he was heavily medicated, he was not "in the right mind" to make such a decision, and he felt pressured. Dunkin stated that he decided to take the plea, because he had not discussed trial strategy with counsel and he felt rushed.

Dunkin also testified that counsel told him what answers to give to the judge at the plea hearing. Dunkin stated that without that preparation, he would not have been able to properly answer the questions regarding his understanding of the plea. Counsel testified that he did not pressure Dunkin in any way to accept a plea offer; that at all times, he told Dunkin to answer

questions from the court truthfully; and that he told Dunkin he hoped for a sentence of 20 to 30 years' imprisonment, but had made no promises.

Sentencing was scheduled for April 27, 2009. Dunkin did not meet or speak with counsel prior to the sentencing date. On the day of the sentencing hearing, Dunkin and counsel met briefly. Dunkin had prepared a statement for the hearing that he wanted to read so Anderson's family could hear what had happened. Counsel told Dunkin it would be in his best interests not to say anything, and Dunkin refrained from reading his statement and said only that he was sorry and took responsibility for what had happened. The court imposed a sentence of 40 years' to life imprisonment.

(d) Possibility of Appeal

Dunkin had no further contact with counsel following sentencing, nor did they discuss an appeal. Dunkin did not speak with counsel directly regarding an appeal of his conviction or sentence. However, Dunkin testified that he asked his mother, brother, and son to tell counsel that he wanted to appeal. Dunkin stated that he did not receive any correspondence from counsel regarding his ability to appeal and that he never signed a waiver of appeal.

Dunkin's mother, Meredith Chisholm, testified that Dunkin called her on May 8, 2009, and asked her if she would contact counsel to request an appeal. Chisholm contacted counsel on May 12 and left a message. Counsel returned Chisholm's call 2 days later, when Chisholm asked about the chances Dunkin would have on appeal and asked that counsel visit Dunkin in jail. Counsel stated that he believed the chances of success on appeal were slim and that he could not "take any more money from [the family]." Counsel did not speak with Chisholm any further regarding the possibility of an appeal.

Counsel testified that he did not get a written waiver of appeal from Dunkin or advise Dunkin or Chisholm that it would be possible to obtain court-appointed counsel to prosecute an appeal if Dunkin was determined to be indigent. However, counsel stated that he discussed the possibility of a successful appeal with Chisholm within 30 days of Dunkin's

sentencing. At that time, Chisholm did not request that he file an appeal. Counsel further testified that he had explained to Dunkin that he would not be able to appeal the suppression order if he accepted the plea offer. And counsel testified that he also discussed all the other rights that Dunkin would waive if he entered the plea.

(e) Disposition

Following the evidentiary hearing, the district court denied Dunkin's request for postconviction relief. The court determined that Dunkin's plea was made freely and knowingly, without pressure or coercion from counsel and without the promise of a specific sentence. The court also found that counsel was not ineffective in his preparation for trial or in failing to request a competency examination. Finally, the court determined that although counsel engaged in some discussion regarding the possibility of an appeal, counsel was not ineffective in failing to file an appeal, because the record reflects that no request for appeal was made.

In denying Dunkin's claims, the court noted:

> Dunkin cannot bring himself to come to grips with the facts of this case, that is, the killing was not an accident. When his first attorney was unable to obtain a reduced charge of manslaughter, he and his family somehow believed that if they retained the services of a well-known experienced criminal attorney, he would be able to achieve the desired reduction in the original charge of first degree murder to manslaughter. There is no doubt that [counsel] fit Dunkin's qualification. He is an experienced, competent and well respected criminal lawyer. When he first heard Dunkin's version of the facts surrounding the incident, he felt there may be a viable defense theory to the case. However, after reviewing the reports and other documents, and conferring with the forensic pathologist who was retained at the expense of Lancaster County, [counsel] concluded that manslaughter was not an alternative that the state would consider. In fact, at the time of sentencing this court noted that its review of the record and autopsy did not support a theory that the death was

> accidental. Merely because the result of the case is not that hoped for by the defendant does not support a finding of ineffective assistance of counsel.

Dunkin appeals the denial of his motion for postconviction relief. Additional facts relating to Dunkin's plea and conviction will be discussed as necessary in our analysis section below.

## III. ASSIGNMENTS OF ERROR

Dunkin assigns that the district court erred in (1) failing to grant Dunkin's request for postconviction relief, because Dunkin's constitutional right to the effective assistance of counsel was violated throughout the discovery, trial, plea, and sentencing phases of his case, and (2) failing to grant Dunkin's request for postconviction relief, because Dunkin's right to the effective assistance of counsel was violated when trial counsel disregarded Dunkin's request to appeal his sentence.

## IV. STANDARD OF REVIEW

[1-3] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.[1] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.[2] 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.[3]

## V. ANALYSIS

Dunkin argues that the district court erred in denying his motion for postconviction relief on the basis of ineffective assistance of counsel. Dunkin claims that his trial counsel failed to properly investigate the case, retain experts, conduct discovery, and prepare for trial. Had trial counsel properly prepared, Dunkin asserts that he would not have entered a plea of no contest but would have insisted on a trial. Dunkin argues that counsel should have requested a competency hearing

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[1] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[2] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

[3] *State v. Yos-Chiguil, supra* note 1.

and investigated Dunkin's mental health. Dunkin also asserts that trial counsel disregarded Dunkin's request to appeal his sentence.

[4] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*,[4] to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense in his or her case.[5] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[6]

### 1. Plea

[5-7] In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[7] Within the plea context, in order to satisfy the prejudice requirement to establish an ineffective assistance of counsel claim, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial.[8] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.[9]

#### (a) Pressure to Enter Plea

Dunkin argues that he did not freely and voluntarily plead no contest to the amended information, because counsel pressured him to plead to the amended charge. Dunkin claims he

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[4] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[5] *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010).

[6] *Id.*

[7] *Id.*

[8] *State v. Yos-Chiguil, supra* note 1.

[9] *State v. McDermott*, 267 Neb. 761, 677 N.W.2d 156 (2004); *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002); *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001); *State v. Silvers*, 260 Neb. 831, 620 N.W.2d 73 (2000).

accepted the plea agreement only because he recognized that his counsel was not ready for trial. The district court concluded that Dunkin's arguments were without merit, because the record did not reflect that counsel pressured Dunkin to plead no contest and Dunkin failed to present any evidence of prejudice resulting from counsel's allegedly deficient pretrial investigation.

The record affirmatively reflects that Dunkin freely and voluntarily entered his plea. During the plea proceeding, the following colloquy occurred:

> THE COURT: Have you discussed the plea proceedings that we are conducting here today with [counsel]?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Did he explain the Amended Information and the charge to you together with the rights we have been discussing?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And did [counsel] discuss with you all of the possible defenses to this charge that you might have if you were to have a trial?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Are there any defenses that you feel you may have or any facts about the case that you feel might be helpful to your defense that you have not discussed with [counsel]?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: In other words, have you told him everything about the case that you feel he needs to know to be able to represent you properly?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Are you satisfied with the job he's done as your attorney?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Do you feel he is a competent lawyer, that he knows what he's doing?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Is there anything you have asked [counsel] to do in regard to representing you in this matter that he has failed to do?

THE DEFENDANT: No, Your Honor.

THE COURT: And have you had enough time to talk with him about the case?

THE DEFENDANT: Yes, Your Honor.

We agree with the district court that the record does not indicate that Dunkin was in any way uncertain or reluctant to enter his plea.

Based upon our review of the record, the district court's finding that Dunkin was not pressured or coerced is not clearly erroneous. Accordingly, we conclude that the court did not err in denying Dunkin's claim for postconviction relief.

(b) Adequacy of Preparation

In addition, Dunkin apparently argues that but for counsel's ineffective representation at the suppression hearing, Dunkin would not have entered a plea of no contest, but would have insisted on going to trial. Dunkin asserts that counsel's failure to obtain an order suppressing the entirety of the statements Dunkin made to police officers and medical personnel on the night of the incident contributed to his decision. He argues that counsel's statement that the suppression order was not appealable also contributed to his acceptance of the plea. Dunkin claims he believed the determinations in the suppression order could not be reviewed. If he had known the issues would be preserved following a trial, he would not have taken the plea.

The postconviction court determined that because an order overruling a motion to suppress is not a final, appealable order, Dunkin's claim is without merit. We agree and note that the record does not indicate that counsel represented to Dunkin that the suppression order could never be appealed. Counsel only indicated that he was unable to file an interlocutory appeal in the case. And there is nothing in the record to suggest that the suppression order was entered erroneously. Accordingly, Dunkin has failed to establish that trial counsel was ineffective in this regard.

Finally, Dunkin asserts that he accepted the plea because counsel did not follow his instructions to interview witnesses and investigate the case. Dunkin requested that counsel interview

Dunkin's sons, various experts, and character witnesses and argues that counsel should have subpoenaed such witnesses to testify at trial. Again, Dunkin claims that if counsel had interviewed or subpoenaed these witnesses, Dunkin would have insisted on going to trial. But Dunkin presented no evidence that any of these witnesses could have presented testimony both relevant to the case and favorable to Dunkin. The district court noted that Dunkin's sons had already been subpoenaed by the State and that counsel contacted a forensic pathologist, Nichols, per Dunkin's request. The court concluded, however, that the expert testimony would not be helpful to Dunkin, as it contradicted Dunkin's version of the incident. We agree with the district court that there is no evidence that Dunkin was prejudiced by counsel's failure to call these witnesses. Nor did counsel's decision not to call these witnesses unduly pressure or coerce Dunkin to accept a plea.

Dunkin has failed to establish that counsel's preparation for the case was unreasonable or inadequate. And Dunkin has not established prejudice: The record does not indicate a reasonable probability that, but for counsel's alleged errors, Dunkin would not have entered his plea and would have insisted on going to trial. Dunkin's claim regarding inadequate preparation is therefore without merit.

(c) Competency

[8-10] Dunkin also argues that counsel was ineffective for failing to request a mental health evaluation or competency examination to determine whether Dunkin understood the effect of the plea proceedings. A person is competent to plead or 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 own condition in reference to such proceedings, and to make a rational defense.[10] The test of mental capacity to plead is the same as that required to stand trial.[11] A court is not required to make a competency determination in every case in which a defendant seeks to plead guilty or to

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[10] *State v. Vo, supra* note 5.

[11] *Id.*

waive his or her right to counsel; a competency determination is necessary only when a court has reason to doubt the defendant's competence.[12]

[11] In order to demonstrate prejudice from counsel's failure to investigate competency and for failing 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 him or her incompetent had a competency hearing been conducted.[13] The issue of prejudice in this case is necessarily bound up in the law of competency, and we will turn to that now.[14]

[12] An individual has a constitutional right not to be put to trial when lacking mental competency.[15] In *State v. Guatney*,[16] 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. We held that the defendant 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.[17] The defendant's unstable emotional state, paranoid ideation, and occasional outbursts in court did not render him incompetent.[18]

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[12] *Id.*

[13] See, *Hull v. Kyler*, 190 F.3d 88 (3d Cir. 1999); *Felde v. Butler*, 817 F.2d 281 (5th Cir. 1987); *Matheney v. Anderson*, 377 F.3d 740 (7th Cir. 2004); *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Futch v. Dugger*, 874 F.2d 1483 (11th Cir. 1989); *Nelson v. State*, 43 So. 3d 20 (Fla. 2010); *Ridgley v. State*, 148 Idaho 671, 227 P.3d 925 (2010).

[14] See *Hull v. Kyler, supra* note 13.

[15] See, *Indiana v. Edwards*, 554 U.S. 164, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008); *State v. Fox*, 282 Neb. 957, 806 N.W.2d 883 (2011); *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[16] *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980). See, also, *State v. Fox, supra* note 15; *State v. Hessler, supra* note 15.

[17] *State v. Guatney, supra* note 16.

[18] *Id.*

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, comprehend the defendant's own condition in reference to such proceedings, and to make a rational defense.[19] Here, the record demonstrates that Dunkin had the capacity to understand the proceedings and assist in his defense.

Prior to accepting Dunkin's plea of no contest to the charge of murder in the second degree, the district court made a number of inquiries as to Dunkin's background and articulated the rights he was waiving by entering the plea. During this inquiry, Dunkin informed the court that he was 44 years of age, had completed high school and taken some college courses, and had been employed as an area facilities manager for apartments in several states. Dunkin stated which prescription medications he was taking and for what purpose, that he had taken the prescribed dosage, and that the medication was not affecting his ability to understand the proceedings. The record also reflects the following exchanges regarding Dunkin's understanding of the proceedings:

> THE COURT: . . . [H]ave I used any words here so far that you don't understand?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you have any questions about any of these rights?
>
> THE DEFENDANT: No, Your Honor, I do not.
>
> THE COURT: And are you in fact waiving and giving up the rights we have been discussing freely and voluntarily?
>
> THE DEFENDANT: Yes, Your Honor.
>
> . . . .
>
> THE COURT: And do you still wish to plead no contest to the charge in the Amended Information?
>
> THE DEFENDANT: Yes, I do, Your Honor.
>
> THE COURT: Again, are you freely and voluntarily entering this plea and waiving your rights?
>
> THE DEFENDANT: Yes, Your Honor.

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[19] *Id.*

> THE COURT: . . . [I]s there anything else you wish to say at this time or any questions you have either of [counsel] or myself before I accept your plea?
>
> . . . .
>
> THE DEFENDANT: No, Your Honor.

The only evidence in the record to support Dunkin's assertion that he did not voluntarily enter his plea is his own testimony that counsel coached Dunkin in answering the court's questions. There is nothing in the record to corroborate this allegation. Nor is there evidence of any mental or physical symptoms relating to Dunkin's medications or his purported anxiety issues. The record of Dunkin's plea proceeding does not reflect that Dunkin was incompetent to enter his plea. Dunkin's responses to questions from the court were appropriate and reflected his knowledge that he was appearing in court for the purpose of entering a plea of no contest and that he understood the consequences of such action as they were explained to him by the judge.

Though Dunkin claims that counsel was ineffective for failing to raise the competency issue, Dunkin testified at the evidentiary hearing in February 2009 that he believed himself to be competent to stand trial. So, Dunkin apparently does not seek to prove that he was prejudiced by the absence of a competency hearing. He argues that "[i]t would have seemed prudent, *even though nothing may have come of it*, to request a mental health evaluation or competency examination."[20] Accordingly, Dunkin has not established the prejudice required on this claim. Moreover, because the record affirmatively reflects that Dunkin was competent to enter his plea, his counsel was not ineffective for failing to raise the issue of competency—an argument that has no merit—in the trial court.[21]

(d) Promise of Specific Sentence

Dunkin claims that counsel was ineffective in failing to object to the State's alleged breach of the plea agreement when he was sentenced to 40 years' to life imprisonment rather than

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[20] Brief for appellant at 22 (emphasis supplied).

[21] See *State v. Vo, supra* note 5.

20 to 30 years' imprisonment. The district court determined that Dunkin's allegation that a specific sentence was promised or that the plea agreement was conditioned on such a sentence was without merit. The district court discussed sentencing with Dunkin at the plea hearing:

> THE COURT: I assume there has been a plea agreement here, is that correct?
>
> [Counsel for the State:] There has, Judge. The plea agreement is in exchange for the State filing the amended charge of second degree murder, . . . Dunkin would plead guilty or no contest to that charge. No other charges stemming from the events of January 21, 2008, would be filed against . . . Dunkin.
>
> THE COURT: [Defense counsel], is that your understanding of the plea agreement?
>
> [Defense counsel]: That's accurate, Your Honor.
>
> THE COURT: And . . . is that your understanding of the plea agreement?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And is this an agreeable way to dispose of the matter as far as you are concerned?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Other than this agreement, has anyone connected with law enforcement or anyone else made any threats, direct or indirect, used any force or held out any promises of any kind to get you to come in here today and to enter this plea and to waive your rights?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Has anyone made any promises or representations to you as to what the actual sentence in this case might be should you enter this plea?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Do you understand that within the limits of the statute the determination of the appropriate sentence is entirely up to the Court?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And do you still wish to plead no contest to the charge in the Amended Information?
>
> THE DEFENDANT: Yes, I do, Your Honor.

> THE COURT: Again, are you freely and voluntarily entering this plea and waiving your rights?
>
> THE DEFENDANT: Yes, Your Honor.

There is no evidence that Dunkin was promised a certain sentence, and other than his testimony at the evidentiary hearing below, there is no evidence that Dunkin believed he was guaranteed a sentence of 20 to 30 years' imprisonment. The record reflects that counsel told Dunkin he hoped for such a sentence, but this does not support an ineffectiveness claim. Dunkin's arguments to the contrary are without merit.

### 2. Failure to File Direct Appeal

[13,14] Dunkin contends that his trial counsel was ineffective for failing to file a direct appeal in response to his request that he do so. Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.[22] After a trial, conviction, and sentencing, if counsel deficiently fails to file or perfect an appeal after being so directed by the criminal defendant, prejudice will be presumed and counsel will be deemed ineffective, thus entitling the defendant to postconviction relief.[23]

Assuming without deciding that the same principle would apply where conviction is the result of a guilty or no contest plea, the critical question of fact is whether Dunkin directed his counsel to file a direct appeal on his behalf. After reviewing the evidence received at the postconviction hearing, the district court concluded that he did not. As noted above, Dunkin's mother, Chisholm, contacted counsel to discuss the possible success of an appeal, but the record does not indicate that she specifically requested counsel to pursue an appeal. And there is no evidence that Dunkin attempted to contact counsel by letter or telephone to make such a request himself. It is uncontested that Dunkin and counsel had no contact following the

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[22] *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[23] *Id.*

sentencing proceedings. Based upon our review of the record, we conclude that these findings are not clearly erroneous.

## VI. CONCLUSION

For the reasons discussed above, we conclude that the district court did not err in denying Dunkin's motion for postconviction relief, and we affirm its judgment.

AFFIRMED.

WRIGHT, J., not participating in the decision.

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STATE OF NEBRASKA, APPELLEE, V.
JOSHUA W. NOLAN, APPELLANT.

807 N.W.2d 520

Filed January 20, 2012. No. S-10-1011.

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. **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: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motive on the officer's part is irrelevant.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** Once a vehicle has been lawfully detained for a traffic violation, police officers may order the driver out of the vehicle.
5. ____: ____: ____. In order to justify a pat-down of a person during a traffic stop, the police must still harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.
6. **Identification Procedures: Due Process: Appeal and Error.** A district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.
7. **Constitutional Law: Identification Procedures: Due Process.** The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.
8. **Identification Procedures: Police Officers and Sheriffs: Motions to Suppress.** Suppression of identification evidence on the basis of undue suggestion is

appropriate only where the witness' ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct.

9. **Trial: Identification Procedures.** When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.
10. **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.
11. **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.
12. **Rules of Evidence: Other Acts.** Bad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008).
13. **Criminal Law: Evidence.** Intrinsic evidence, or evidence necessary to tell a complete story of the crime, is admissible to provide the context in which the crime occurred.
14. **Rules of Evidence: Presumptions.** All evidence offered by the State is presumably prejudicial to the defendant; otherwise, it would be irrelevant, and would be inadmissible. But, in order for evidence to be excluded under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), the objecting party must prove that the danger of unfair prejudice substantially outweighs any probative value.
15. **Trial: Evidence: Appeal and Error.** 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. An appellate court reviews a trial court's ruling on authentication for abuse of discretion.
16. **Rules of Evidence: Hearsay: Presumptions.** Evidence admitted pursuant to the business records exception to the rule against hearsay is presumed to be trustworthy.
17. **Rules of Evidence: Hearsay.** If foundation is laid for the business records exception, then the authentication requirements of Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901 (Reissue 2008), are also met.
18. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
19. **Judges: Recusal.** A judge shall be disqualified if a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
20. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

21. **Jury Instructions: Judgments: Appeal and Error.** Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
22. **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.
23. ____: ____: ____. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.
24. **Intent: Words and Phrases.** Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act.
25. **Homicide: Intent: Time: Words and Phrases.** The term "premeditated" means to have formed a design to commit an act before it is done. One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. 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.
26. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
27. **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.
28. **Effectiveness of Counsel: Records: Trial: Evidence: Appeal and Error.** A claim of ineffective assistance of counsel need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.
29. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

Brian S. Munnelly 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.

Joshua W. Nolan, the appellant, was charged with first degree murder and use of a deadly weapon to commit a felony in connection with the killing of Justin Gaines. At trial, the State contended that Gaines had been visiting with a family friend in the driveway of an Omaha, Nebraska, home when Nolan and Trevelle J. Taylor, Nolan's accomplice, shot and killed him. Nolan, relying primarily on inconsistencies among the statements and testimony of the State's witnesses, argued that there was a reasonable doubt as to whether Nolan had shot and killed Gaines. A jury convicted Nolan of both charges, and he appeals. We find no merit to Nolan's various assignments of error, and affirm his convictions and sentences.

## I. BACKGROUND

The events leading up to Gaines' death began on the morning of September 19, 2009, the day of the shooting. Joshua Kercheval testified that at around 11:30 a.m. that day, Taylor and Nolan had shown up at his house and that Kercheval drove Taylor and Nolan around Omaha. Kercheval explained that Taylor asked him to drive, although Kercheval was not told where to go. Kercheval ended up driving them around town for roughly 30 minutes before deciding to drive to a gas station near 72d Street and Ames Avenue. Video surveillance from the gas station places the three of them at the gas station from 1:21 to 1:30 p.m. Kercheval testified that when they left the gas station, he began driving back toward his house. But as they approached the intersection of 45th and Vernon Streets, Taylor told Kercheval to stop the car and Nolan and Taylor both got out. At that point, Kercheval parked the car and was sitting in the car texting on his telephone when he heard a number of gunshots.

Meanwhile, at around 1 p.m., Gaines had driven past a home near 45th Street and Curtis Avenue and had seen Catrice Bryson, a close family friend, in the driveway. Bryson was at the house visiting a friend and her baby, but had stepped outside to smoke a cigarette. Gaines pulled into the driveway, parked right behind Bryson's car, and greeted Bryson with a hug. Bryson and Gaines began talking; Gaines sat back in his

car, on the driver's side, one foot in, one foot out, with the car door open. Bryson, standing with the open car door between her and Gaines, continued talking with Gaines for roughly 10 to 15 minutes. Toward the end of their conversation, Bryson went to get a pen from her car to give Gaines her telephone number.

When Bryson turned back around, she saw two individuals with guns behind Gaines' car and she heard shooting. The two shooters were on each side of Gaines' car, angled toward each other. Bryson described the shooter on the passenger's side of Gaines' car as a black male in his early twenties with a beard and goatee and shoulder-length hair in braids, wearing a "do-rag." Bryson identified the shooter on the passenger's side of Gaines' car as Nolan.

Gaines, while still sitting in the driver's-side seat of his car, was shot in the back. Once Gaines had been hit, the shooters made their escape, each fleeing in opposite directions on Curtis Avenue. At that point, Bryson began screaming for help. Several people responded, and the police arrived quickly thereafter. Gaines was transported to a nearby hospital, but never regained consciousness and was pronounced dead.

Several eyewitnesses to the aftermath of the shooting testified at trial. Heather Riesselman, at the time of the shooting, lived close to the house where the shooting took place. On the day of the shooting, at approximately 1:40 p.m., Riesselman was outside on her porch with her daughter. At that time, Riesselman saw a young black man "jogging down the street." Riesselman described him as being roughly 5 feet 10 inches tall, medium build, medium complexion, with his hair in braids and with a long, thin goatee. Riesselman identified the man, in court, as Nolan.

Carrie Schlabs was Riesselman's next-door neighbor. At approximately 1:30 p.m. on the day of the shooting, Schlabs was at home with her husband and two friends when they heard gunshots and dove to the floor. Once the gunfire ceased, Schlabs heard screaming, so she got to her feet and ran out to her front porch. Once outside, Schlabs started running toward the screams on Curtis Avenue, to the south, and she saw a young man running to the north. Schlabs saw the young man

holding his left side, which made her think that he had been shot. Schlabs ran up to him, getting to within a foot of him, and asked if he needed help. In response, the individual just smiled at Schlabs. At that point, Schlabs continued on toward the screams. While Schlabs could not remember any specific details of the young man's physical appearance or clothing, she remembered his face. Schlabs identified the man, in court, as Nolan.

Kercheval testified that after he had heard the gunshots, he had started the car, getting ready to drive off. But then Kercheval saw Nolan approaching the car and waited until Nolan jumped into the back passenger seat. Once Nolan was in the car, he told Kercheval to "Drive. Go." Kercheval said that he began driving toward his house, but, at Nolan's direction, Kercheval dropped Nolan off near a school. Whether it was Nolan or Taylor who was dropped off near the school was in dispute. Kercheval's next thought was to "go dump the car." But before he was able to do so, he was arrested. Taylor was also arrested that day. Nolan, however, was not taken into custody that day.

Eight days after the shooting, Nolan, driving in his car, was pulled over for making an improper turn. The officers received identification for both the driver and the passenger. The officers knew that Nolan was associated with a local gang. Upon approaching the driver's-side door of the car, the arresting officer noticed bullet holes in the car. After running data checks on both the driver and the passenger, the officer saw that the Omaha police homicide unit had put out a "locate" for Nolan. A "locate" means that an officer wishes to speak with the individual, but it does not give the officers authority to arrest the individual.

At that point, the officer asked Nolan to get out of his car and stand near the back fender area. Instead, Nolan went past that area and sat on the curb. The officer observed that Nolan moved "[v]ery quickly" and was grabbing his waistband. The officer also observed that Nolan's pants were falling down and that it appeared as if there was something heavy in his pants. Finally, when asked if he had any weapons or other dangerous objects on his person, Nolan did not respond. The officer

conducted a pat-down of Nolan, looking for weapons. The pat-down revealed a .44-caliber gun, found in Nolan's waistband. A subsequent search of Nolan's person uncovered live ammunition, and Nolan was placed under arrest at that time. The gun and ammunition were admitted into evidence at trial over objection.

Nolan was charged with one count of murder in the first degree and one count of use of a deadly weapon to commit a felony. Nolan filed several pretrial motions. The motions relevant to this appeal are (1) a motion to suppress the gun and ammunition recovered from Nolan during the traffic stop, (2) a motion to suppress identifications of Nolan by Riesselman and Schlabs, and (3) a motion for the judge to recuse himself from the case. Each of these motions was denied. The case proceeded to a jury trial, and Nolan was convicted of both crimes. Nolan was then sentenced to a term of life imprisonment for the first degree murder conviction, and a consecutive term of 10 years' imprisonment for the use of a weapon conviction. Nolan appeals.

## II. ASSIGNMENTS OF ERROR

Nolan assigns, consolidated and restated, that the district court erred in (1) denying his motion to suppress the gun and ammunition resulting from the traffic stop, (2) denying his motion to suppress the identifications of Nolan made by Riesselman and Schlabs, (3) admitting the .44-caliber gun into evidence in violation of Neb. Evid. R. 403 and 404, Neb. Rev. Stat. §§ 27-403 (Reissue 2008) and 27-404 (Cum. Supp. 2010), (4) allowing a cellular telephone company employee to testify regarding telephone records, (5) denying his motion to recuse the trial judge, (6) giving a "step" jury instruction, and (7) concluding that the evidence was sufficient to sustain his convictions. Nolan, as his eighth assignment of error, also claims that he received ineffective assistance of counsel at trial.

## III. ANALYSIS

### 1. Motion to Suppress Gun and Ammunition

During a traffic stop on September 27, 2009, the State recovered a .44-caliber gun and matching ammunition from Nolan.

Nolan filed a motion to suppress that evidence, claiming that the officers lacked reasonable suspicion to conduct the traffic stop and subsequent pat-down and that therefore, evidence regarding the gun and ammunition should have been excluded at trial. We disagree.

(a) Standard of Review

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

(b) Analysis

[2,3] Nolan claims that the officers lacked reasonable suspicion to stop his car. But we have repeatedly held that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[2] Here, the record indicates that the officers observed Nolan commit a traffic infraction when he made an improper turn. The turn was improper because Nolan made a wide right turn, rather than turning into the curbside lane.[3] And, as long as a traffic violation occurred, any purported ulterior motive for the stop is irrelevant.[4] Thus, even though the officers began following Nolan's car because they were aware the car was associated with a local gang, once Nolan committed a traffic violation, the officers had probable cause to stop the car. The initial stop was lawful.

[4,5] Nolan also claims that the officers lacked reasonable suspicion, based on articulable facts, to justify patting down Nolan. That pat-down, of course, led to the discovery of the .44-caliber gun on Nolan's person. There is no question that once a vehicle has been lawfully detained for a traffic violation,

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[1] *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

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

[3] See Neb. Rev. Stat. § 60-6,159(1) (Reissue 2010).

[4] See *State v. Dallmann*, 260 Neb. 937, 621 N.W.2d 86 (2000).

police officers may order the driver out of the vehicle.[5] But, in order to justify a pat-down of a person during a traffic stop, the police must still harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.[6]

In *Arizona v. Johnson*,[7] police officers lawfully stopped a vehicle after a license plate check revealed that the vehicle's registration had been suspended for an insurance-related violation. Upon approaching the vehicle, officers noticed that one of the passengers in the vehicle, the defendant, was wearing a blue bandanna, which was consistent with membership in a particular gang. The defendant also had a police scanner in his pocket and told one of the officers that he had previously spent time in jail for burglary. On these facts, the officer conducted a pat-down of the defendant and felt the butt of a gun, which led to the defendant's arrest. The U.S. Supreme Court found that the officer had a reasonable suspicion that the defendant was armed and dangerous and that therefore, the pat-down was lawful.[8]

The facts here likewise indicate that officers could reasonably suspect that Nolan was armed and dangerous and that a pat-down was necessary to ensure officer safety. As in *Johnson*, officers in this case were aware of Nolan's gang affiliation. When the circumstances are taken together, especially considering that Nolan failed to follow directions and was holding his waistband, the evidence supports a finding of reasonable suspicion that Nolan was armed and dangerous, and a pat-down was warranted. Therefore, Nolan's first assignment of error is without merit.

### 2. Motion to Suppress Identifications

Nolan also filed a motion to suppress the identifications made by both Riesselman and Schlabs, claiming that the

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[5] See *Arizona v. Johnson*, 555 U.S. 323, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009).

[6] *Id.*

[7] *Id.*

[8] See *id.*

State's pretrial identification procedure was unduly suggestive and that their in-court identifications of Nolan were irreparably tainted as a result. The identifications made by Riesselman and Schlabs were the subject of a motion to suppress based on a meeting between Riesselman, Schlabs, and the prosecutor that had occurred on March 25, 2010; and the sequence of events at that meeting is essentially undisputed.

At that meeting, approximately 6 months after the shooting, Riesselman met with the prosecutor to go over her testimony in preparation for a hearing. Schlabs, who at that point had not come forward as a witness, accompanied Riesselman for support. While at that meeting, the prosecutor handed a photographic array to Riesselman—the same array consisting of six photographs from which Riesselman had previously identified Nolan. Schlabs saw Nolan's photograph and exclaimed "Oh, my God, that's him. That's who I ran up to."

Although the photographic array contained Riesselman's handwriting identifying the photograph she had picked out of the array previously, Schlabs testified that she saw only Nolan's photograph, which she immediately recognized, but did not see the handwriting. As soon as Schlabs exclaimed that the man she saw on the day of the shooting was in the photographic array, Riesselman and Schlabs were separated. Schlabs felt sick to her stomach, and the prosecutor took her to another room to lie down. Riesselman did not go with Schlabs or the prosecutor to the other room. Schlabs was then questioned by police outside the presence of Riesselman, and she eventually identified Nolan at trial. The record indicates that when she first saw the photographic array, Schlabs did not in any way indicate who she had identified; she made no gesture, hand signal, or other movement which would suggest to Riesselman that Schlabs had identified Nolan specifically. And Riesselman testified that her identification of Nolan was not influenced by Schlabs' exclamation in the prosecuting attorney's office.

(a) Standard of Review

In reviewing motions to suppress identifications based on alleged due process violations, our standard of review has been

less than clear. In *State v. McPherson*,[9] we explained, generally, that a trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous. In *State v. Jacob*,[10] we reviewed the lower court's denial of a motion to suppress an identification, and the subsequent admission of the eyewitness' identification at trial, under an abuse of discretion standard. And, in other cases, we have simply stated that a lower court's factual findings will be upheld unless they are clearly erroneous, but we did not explicitly state the standard of review for the conclusions drawn from those facts.[11]

More recently, in situations involving a motion to suppress based on various other constitutional violations, we have utilized an explicit two-part standard of review, in which findings of fact are reviewed for clear error and questions of law are determined independently. Specifically, this standard of review has been used in situations involving motions to suppress based on an alleged Fourth Amendment violation[12] and when a confession was allegedly involuntary.[13]

There is no principled reason why the same two-part standard of review would not function equally well in a situation such as this, where the motion to suppress is based on a claim that a pretrial identification procedure was unduly suggestive. Indeed, we have already impliedly used this standard of review in our previous cases. In other words, when we have stated that the lower court's findings of fact would be upheld unless clearly erroneous, the implication is that the conclusion to be drawn from those facts—whether the identification procedure is inconsistent with due process—would be reviewed independently.[14]

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[9] *State v. McPherson*, 266 Neb. 734, 668 N.W.2d 504 (2003).

[10] *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998).

[11] See, e.g., *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004).

[12] See *Garcia, supra* note 1.

[13] See, *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010); *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[14] See, e.g., *Tolliver, supra* note 11.

[6] But we take this opportunity to state explicitly what we have previously expressed only through implication. We recognize that the determination of whether a witness' identification should be suppressed is a highly factual inquiry and that, for the most part, a lower court's factual findings will largely determine an appellate court's judgment on appeal. But utilizing the two-prong standard provides a clearer picture of how we make our determinations and is consistent with our approach in reviewing motions to suppress in other contexts. We therefore adopt that standard of review here. We hold that a district court's conclusion whether an identification is consistent with due process is reviewed de novo, but the court's findings of historical fact are reviewed for clear error.[15]

(b) Analysis

Our determination on this issue is controlled by the U.S. Supreme Court's recent decision in *Perry v. New Hampshire*.[16] In *Perry*, police had received a call reporting that a man was trying to break into cars in the parking lot of the caller's apartment building. When the officer who responded asked the caller to describe the man, she pointed out her kitchen window and said that the man she had seen was standing in the parking lot next to a police officer. The suspect was arrested and charged, and he made a pretrial motion to suppress the eyewitness identification on the ground that admitting it at trial would violate due process. The trial court overruled the motion, the defendant was convicted of the charge, and the New Hampshire Supreme Court affirmed his conviction.

The U.S. Supreme Court affirmed that decision.[17] The Court acknowledged that, generally, the Due Process Clause places

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[15] See *U.S. v. Harris*, 281 F.3d 667 (7th Cir. 2002). See, e.g., *U.S. v. Hilario-Hilario*, 529 F.3d 65 (1st Cir. 2008); *U.S. v. Thompson*, 524 F.3d 1126 (10th Cir. 2008); *U.S. v. Saunders*, 501 F.3d 384 (4th Cir. 2007); *U.S. v. Mathis*, 264 F.3d 321 (3d Cir. 2001). Cf. *Sumner v. Mata*, 455 U.S. 591, 102 S. Ct. 1303, 71 L. Ed. 2d 480 (1982).

[16] *Perry v. New Hampshire*, No. 10-8974, 2012 WL 75048 (U.S. Jan. 11, 2012).

[17] See *id.*

a check on the admission of eyewitness identification when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime. And, the Court said, when an identification is infected by improper police influence, the trial judge must screen the evidence, pretrial, for reliability. But the Court, examining its precedent, said that it had not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Instead, the Court's decisions had turned on the presence of state action and the aim to deter police from rigging identification procedures.[18]

The Court reasoned that the Constitution "protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit."[19] The Court explained that the requirement of a due process check for reliability comes into play only after the defendant establishes police misconduct, because a primary aim of excluding such evidence is to deter law enforcement's use of unduly suggestive identification techniques in the first place.[20] So, the due process check had been limited to improper police arrangement of the circumstances surrounding an identification.[21]

To conclude otherwise, the Court explained, would open the door to "judicial preview, under the banner of due process, of most, if not all, eyewitness identifications," because "[e]xternal suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony."[22] The Court noted, for example, that a witness might identify the defendant to police officers "after seeing a photograph of the defendant in the press captioned 'theft suspect,' or hearing a radio report implicating

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[18] See *id.*

[19] *Id.*, 2012 WL 75048 at *5.

[20] *Perry, supra* note 16, citing *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[21] *Id.*, citing *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999, 26 L. Ed. 2d 387 (1970).

[22] *Id.*, 2012 WL 75048 at *9.

the defendant in the crime."[23] The trial court's involvement in such examinations, however, would "entail a vast enlargement of the reach of due process as a constraint on the admission of evidence."[24] Instead, the Court explained, it is the jury, not the judge, who traditionally determines the reliability of evidence. Other safeguards are built into the adversarial system, such as the right to confront the eyewitness, the right to effective assistance of counsel, the rules of evidence, and the requirement of proof beyond a reasonable doubt. And many of those safeguards were, the Court noted, at work in that case.[25]

[7-9] In sum, the Court held that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances *arranged by law enforcement*."[26] Suppression of identification evidence on the basis of undue suggestion is appropriate only where the witness' ability to make an accurate identification is outweighed by the corrupting effect of improper police conduct.[27] When no improper law enforcement activity is involved, it suffices to test the reliability of identification testimony at trial, through the rights and opportunities generally designed for that purpose, such as the rights to counsel, compulsory process, and confrontation and cross-examination of witnesses.[28]

In this case, Nolan does not allege that the initial photographic array, in which Riesselman had identified Nolan, was impermissibly suggestive. Instead, Nolan's argument is centered around the meeting between Riesselman, Schlabs, and the prosecutor. Based on what occurred at that meeting, Nolan claims that the identification procedure, as a whole, was impermissibly suggestive because the prosecuting attorney failed to

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[23] *Id.*

[24] *Id.*

[25] See *Perry, supra* note 16.

[26] *Id.*, 2012 WL 75048 at *11 (emphasis supplied).

[27] See *Perry, supra* note 16, citing *Brathwaite, supra* note 20.

[28] See *id.*

take any precautionary measures to prevent the contamination of the witnesses' identifications.

But it is unclear what additional precautionary measures the prosecutor could have taken to prevent the contamination, if any, of the witnesses' identifications. Prior to the meeting, Schlabs had never come forward as an eyewitness capable of identifying Nolan, despite numerous opportunities to speak with police. At the meeting, when Schlabs was asked why she had accompanied Riesselman, she explained she was there only to provide support. Thus, the prosecutor had no reason to suspect that having both women in the room at the same time could compromise future in-court identifications of Nolan. And immediately after Schlabs exclaimed that she recognized one of the photographs as the man she had seen the day of the shooting, the prosecuting attorney took Schlabs out of the office, and no questions were asked of Schlabs in front of Riesselman. Thus, because the prosecutor was unaware that Schlabs was able to identify one of the shooters, it is unclear what the prosecutor could have done to prevent the contamination, if any, of the witnesses' identifications of Nolan.

Obviously, this falls far short of the affirmative police misconduct that, under *Perry*, must be shown in order for pretrial suppression of the evidence to be appropriate. The law enforcement involvement in the identifications at issue here was no more substantial or improper than the police conduct at issue in *Perry*.[29] There is no evidence in the record to support a conclusion, nor does Nolan argue, that police or the prosecutor deliberately arranged the circumstances of the meeting in order to influence either Riesselman's or Schlabs' identification of Nolan. In the absence of such evidence, due process did not require a pretrial inquiry into the reliability of their testimony, or suppression of that evidence.

Thus, the district court did not err in admitting Riesselman's and Schlabs' identifications of Nolan. It was the jury's duty to assess their reliability, and we note, as did the Court in *Perry*,[30] that Nolan's defense was able to utilize, at trial, the procedural

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[29] See *id.*

[30] See *id.*

tools available to a defendant to test a witness' credibility. Both Riesselman and Schlabs were subject to full cross-examination at trial and were specifically questioned about the circumstances of the March 25, 2010, meeting, and how it affected their identifications of Nolan. The jury determined, based on all factors, whether it would believe their respective identifications. And these are precisely the type of fact-specific disputes, when evidence is properly admitted, that a jury resolves. Nolan's assignment of error is without merit.

### 3. Admission of .44-Caliber Gun

Nolan objected to the admission of the .44-caliber gun into evidence under §§ 27-404 and 27-403. But the trial court determined that Nolan's possession of a .44-caliber gun, when coupled with the fact that Gaines was killed by a .44-caliber weapon and there was evidence that a .44-caliber gun was discharged at the scene of the crime, was evidence which formed the factual setting of the crime. As such, the trial court determined § 27-404 did not apply. The trial court also overruled Nolan's § 27-403 objection. Because the trial court did not abuse its discretion, we find no merit to this assigned error.

#### (a) Standard of Review

[10,11] 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.[31] 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.[32] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under §§ 27-403 and 27-404(2), and the trial court's decision will not be reversed absent an abuse of discretion.[33]

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[31] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[32] *Id.*

[33] *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

(b) Analysis

Section 27-404(2) states:

> 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.

When evidence is admitted pursuant to § 27-404(2), § 27-404(3) requires that a hearing be held to determine whether the State is able to prove the defendant committed the crime, wrong, or act for which evidence is offered. Nolan argues that, because no § 27-404(3) hearing was held, the gun should not have been admitted into evidence.

[12,13] Here, the question is whether § 27-404(2) applies, and *State v. Robinson*[34] provides the answer. *Robinson* reaffirmed the principle that "[b]ad acts that form the factual setting of the crime in issue or that form an integral part of the crime charged are not covered under rule 404(2)."[35] *Robinson* explained that "'intrinsic evidence,'" or evidence necessary to tell a complete story of the crime, is admissible to provide the context in which the crime occurred.[36]

Nolan claims that the fact that the State's gun expert could not conclusively tie that specific gun to Gaines' shooting means that it is covered by § 27-404(2). In other words, because the State was unable to prove that Nolan's gun was the murder weapon, it could not be considered intrinsic evidence of the crime. But the key inquiry is whether the evidence is "so closely intertwined with the charged crime that it completes the story or provides a total picture of that crime."[37]

Here, the district court ruled that the .44-caliber gun was intrinsic evidence which formed the factual setting of the crime. While Nolan's weapon could not be definitively labeled

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

[35] *Id.* at 713, 715 N.W.2d at 548.

[36] *Id.* at 713, 715 N.W.2d at 549.

[37] *Id.* at 714, 715 N.W.2d at 550.

as the murder weapon, the gun expert did testify that a .44-caliber gun was used to kill Gaines. The fact that Nolan was found in possession of a .44-caliber gun 8 days after the shooting, while not conclusive, arguably provides a clearer picture of the crime. An abuse of discretion occurs when a trial court's decision is based on reasons which are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[38] We cannot say that the trial court abused its discretion in this instance, and therefore, Nolan's claim of error in this regard lacks merit.

Nolan also claims that the district court erred in admitting the gun over Nolan's § 27-403 objection. Nolan's brief does not provide any support for this assigned error. Instead, he merely states, "Clearly, the prejudicial weight of this gun being introduced into this trial outweighs [its] probative value in violation of" § 27-403.[39]

[14] Section 27-403 states, in pertinent part: "Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of *unfair* prejudice . . . ." (Emphasis supplied.) All evidence offered by the State is presumably prejudicial to the defendant; otherwise, it would be irrelevant, and would be inadmissible. But, in order for evidence to be excluded under § 27-403, the objecting party must prove that the danger of *unfair* prejudice *substantially* outweighs any probative value. Nolan does not explain what unfair prejudice would result or why it would substantially outweigh the gun's probative value. Therefore, the district court did not abuse its discretion.

### 4. Foundational Objection to Testimony of Patricia Love

Patricia Love, a technical support supervisor for a cellular telephone company, was called to testify in order to provide foundation for the admission of Nolan's cellular telephone records. Love explained how calls are recorded, how that information is maintained, what information is actually compiled

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[38] *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008).

[39] Brief for appellant at 37.

with each telephone call, and the retrieval process to access that information following the call. Love also testified that the automated electrical process is maintained and calibrated often, although she could not testify as to how or when those checks were made.

Nolan argues that Love should not have been allowed to testify because she did not know whether and how the electrical equipment which recorded the call information had been calibrated or maintained. In short, Nolan questioned Love's ability to verify the accuracy of the records. But because Love was able to provide testimony sufficient to support a finding that the evidence was what it was claimed to be, Nolan's assignment of error lacks merit.

(a) Standard of Review

[15] 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.[40]

(b) Analysis

Nolan's assignment of error is based solely on Neb. Evid. R. 901, Neb. Rev. Stat. § 27-901(1) (Reissue 2008), which states, in relevant part: "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." This requirement is not a particularly high hurdle.[41]

[16,17] We addressed this same situation in *State v. Taylor*,[42] which involved the prosecution of Nolan's accomplice, Taylor, for his role in Gaines' death. In *Taylor*, we explained that evidence admitted pursuant to the business records exception

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[40] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[41] See, e.g., *State v. Jacobson*, 273 Neb. 289, 728 N.W.2d 613 (2007).

[42] *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

to the rule against hearsay is presumed to be trustworthy.[43] Moreover, we stated that if foundation is laid for the business records exception, then the authentication requirements of § 27-901 are also met.[44]

The fact that the records custodian did not know how the actual switch functioned, electronically speaking, does not render her unable to testify as to how the records are compiled, what they are used for, and what they mean. Nolan argues that a more in-depth foundational analysis is required and that because Love was unable to answer questions regarding how the network switch was calibrated or maintained, she was unable to provide foundation for the cellular telephone records.[45]

But § 27-901 does not require such explanation; the authentication rule requires only sufficient facts that the evidence is what its proponent claims it to be.[46] The evidence is that these were Nolan's cellular telephone records, and there is no evidence suggesting that the records were inaccurate. Additionally, because the cellular telephone records in this case would meet the business records exception,[47] they are presumed to be trustworthy absent some contrary indication in the record.[48] And, as we explained in *Taylor*, if sufficient foundation is laid to satisfy the business records exception, then the relatively low threshold requirement of § 27-901(1) has also been met.[49] Nolan's assignment of error lacks merit.

### 5. Motion for Recusal

Nolan claims that the trial judge erred in failing to recuse himself. The basis for Nolan's motion was a statement by the presiding judge at the sentencing of Terrence Hills, who was the passenger in Nolan's car when police stopped Nolan for

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[43] See *id.*

[44] See *id.*

[45] See *In re Vee Vinhnee*, 336 B.R. 437 (9th Cir. 2005).

[46] See § 27-901(1).

[47] See Neb. Evid. R. 803(5), Neb. Rev. Stat. § 27-803(5) (Reissue 2008).

[48] *Taylor, supra* note 42.

[49] *Id.*

making an improper turn. A transcript of the relevant portion of the hearing was offered into evidence as an exhibit. The transcript indicates that at Hills' sentencing, the judge stated:

> [O]ne thing you may have and you get unfortunately that some of those other ones do not get is you know that you are getting out and you are getting another chance to decide whether you [are] going to stay in the game and then get what you get or whether you're going to change your ways.

Nolan claims that this statement implies that the judge had already decided that Nolan would not have a chance to get out of jail, even though Nolan had not yet been convicted. Nolan asserts that a reasonable person, knowing the circumstances of this case, might consider the judge to have lost his impartiality.

(a) Standard of Review

[18] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[50] An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[51]

(b) Analysis

[19,20] We have explained that in order to demonstrate that a trial judge should have recused himself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[52] In addition, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[53]

Here, there is absolutely no reason to think that a reasonable person would question the judge's impartiality in this case

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[50] *State v. Fleming*, 280 Neb. 967, 792 N.W.2d 147 (2010).

[51] *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

[52] *State v. Pattno*, 254 Neb. 733, 579 N.W.2d 503 (1998).

[53] *Id.*

based on the statement made at Hills' sentencing. The judge made no explicit reference to Nolan, nor is one reasonably implied. The most logical explanation for the judge's comments is that he was telling Hills that, unlike many people who pass through his court to be sentenced, Hills would have an opportunity to get out of jail and change his ways. There is no indication that he had already predetermined the sentence of Nolan, who had not yet been tried or convicted. This assignment of error has no merit.

### 6. "Step" Jury Instruction

The jury was provided with 18 jury instructions, one of which, No. 4, was a "step" instruction. Essentially, it told the jury to consider the material elements of first degree murder and, if those were not met, to proceed to the elements of the lesser-included offenses of second degree murder and then manslaughter. Nolan argues that the instruction utilized by the court violated his due process rights and that the model jury instruction from the Nebraska Jury Instructions should have been used instead. Because this court has held that the step instruction used in this case is not constitutionally infirm, we find no merit to Nolan's assignment of error.

#### (a) Standard of Review

[21] Whether jury instructions given by a trial court are correct is a question of law. When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[54]

#### (b) Analysis

The jury instruction used by the district court is the same jury instruction examined by this court in *State v. Bormann*[55] and *State v. Goodwin*.[56] In both of those cases, this court held that the jury instruction was not constitutionally infirm. Specifically, in *Goodwin*, we stated:

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

[55] *Id.*

[56] *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

> Although we find no constitutional infirmity or other error in the step instruction that was given, we conclude that NJI2d Crim. 3.1 provides a clearer and more concise explanation of the process by which the jury is to consider lesser-included offenses, and we encourage the trial courts to utilize the current pattern instruction in circumstances where a step instruction on lesser-included homicide offenses is warranted.[57]

Thus, there is no constitutional error in the jury instruction which was provided here.

While not constitutionally infirm, the district court's use of this step instruction is puzzling. The trial in this case occurred in August 2010, long after our decision in *Goodwin*. In *Goodwin*, we stated our preference for the NJI2d Crim. 3.1 jury instruction in situations where a step instruction on lesser-included homicide offenses is needed. We have explained that the model instruction is both clearer and more concise than the instruction used in this case. We iterate that stance now and admonish the trial courts to heed our instruction.

### 7. Sufficiency of Evidence

Nolan argues that the evidence adduced at trial is insufficient to support a conviction of first degree murder. Specifically, Nolan claims that there was no evidence that the killing was done with deliberate and premeditated malice. Contrary to Nolan's argument, however, there is evidence in the record sufficient to support the jury's verdict in this case.

#### (a) Standard of Review

[22,23] 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.[58] And in our review, we

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[57] *Id.* at 967, 774 N.W.2d at 749.

[58] *Epp, supra* note 40.

do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.[59]

(b) Analysis

This court imposes a heavy burden on a defendant who claims on appeal that the evidence is insufficient to support a conviction.[60] Because Nolan's conviction for use of a deadly weapon to commit a felony rests solely on his conviction for first degree murder, only the sufficiency of the first degree murder conviction need be analyzed. The applicable statute states, in relevant part: "A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice . . . ."[61] Thus, the three elements which the State must prove beyond a reasonable doubt are that the defendant (1) killed another person, (2) did so purposely, and (3) did so with deliberate and premeditated malice.

[24,25] There is sufficient evidence to meet each of these elements. The first two elements are satisfied, and Nolan does not argue otherwise. To find a person guilty of first degree murder, however, the State must also show that the defendant acted with deliberate and premeditated malice. In describing that element, we have stated:

> Deliberate means not suddenly, not rashly, and requires that the defendant considered the probable consequences of his or her act before doing the act. . . . The term "premeditated" means to have formed a design to commit an act before it is done. . . . One kills with premeditated malice if, before the act causing the death occurs, one has formed the intent or determined to kill the victim without legal justification. . . . No particular length of time for premeditation is required, provided that the intent to kill is formed before the act is committed and not

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[59] *Id.*

[60] *Id.*

[61] Neb. Rev. Stat. § 28-303 (Reissue 2008).

> simultaneously with the act that caused the death. . . . A question of premeditation is for the jury to decide.[62]

Given the foregoing principles and remembering that the evidence is viewed in a light most favorable to the State, we determine that there is sufficient evidence to support the jury's finding that Nolan killed Gaines with deliberate and premeditated malice. The act of shooting an individual, at least in the fashion described by Bryson, is inherently a deliberate act. According to Bryson, Nolan had a large gun and repeatedly fired at Gaines. There was also evidence that Nolan "jogged" down the street to the house where Gaines was at; he had time to think over his actions. A rational jury could certainly find that Nolan shot and killed Gaines and that his act was deliberate and premeditated, satisfying the elements of first degree murder. Nolan's assignment of error in this regard lacks merit.

### 8. Ineffective Assistance of Counsel

Nolan claims, consolidated and restated, that his trial counsel, who was different from appellate counsel, provided ineffective assistance in three respects, by failing to (1) file a motion to suppress evidence retrieved from the investigatory stop of Nolan's car, (2) object to prejudicial statements obtained through custodial interrogation in violation of *Miranda*,[63] and (3) consult and call a fingerprint expert or identification expert to rebut the State's testimony.

#### (a) Standard of Review

[26-28] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[64] A claim of ineffective assistance of counsel

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[62] *State v. Robinson*, 272 Neb. 582, 627, 724 N.W.2d 35, 73-74 (2006) (citations omitted), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

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

[64] See *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011).

need not be dismissed merely because it is made on direct appeal. The determining factor is whether the record is sufficient to adequately review the question.[65]

(b) Analysis

*(i) Failing to File Motion to Suppress Evidence Obtained From Investigatory Stop of Nolan's Car*

[29] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[66] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[67] Here, the record is sufficient to review Nolan's first claim because, contrary to Nolan's assertion, the record shows that trial counsel did file a motion to suppress evidence obtained from the stop of Nolan's car. Indeed, Nolan's first assignment of error dealt with the trial court's overruling of that motion. Thus, trial counsel's performance could not have been deficient for failing to file a motion to suppress when he did in fact file such a motion.[68]

*(ii) Failing to Object to Prejudicial Statements Obtained Through Custodial Interrogation in Violation of* Miranda

Trial counsel filed a motion to suppress statements obtained by police through interrogation, claiming that those statements were obtained in violation of *Miranda*. The district court granted the motion in part, excluding all of Nolan's statements except those relating to his basic biographical information and his cellular telephone number. Thus, Nolan's statement identifying his cellular telephone provider was excluded. Nolan claims that his trial counsel provided ineffective assistance by failing to object to the introduction of evidence of the identity

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[65] *State v. Young*, 279 Neb. 602, 780 N.W.2d 28 (2010).

[66] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[67] *Young, supra* note 65.

[68] See *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

of his cellular telephone provider, which came in through an alternate source; namely, Nolan's cellular telephone provided the same information, which was found in a car which the police impounded and searched.

The exclusionary rule exists to prevent the admission of illegally seized evidence. In *Wong Sun v. United States*,[69] the U.S. Supreme Court explained that the question is "'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'"

The record is sufficient to conclude that counsel did not perform deficiently in failing to object to the evidence, for two reasons. First, the evidence which had been suppressed was never offered or admitted into evidence. In other words, the statements which were illegally obtained from Nolan were not admitted at trial. Second, the State had a viable, alternative source for that information, which makes the exclusionary rule inapplicable. One of the police officers who found the telephone testified that the police powered the telephone on to identify its number. The police then powered the telephone off, ran the number through a database to obtain the cellular telephone provider, and then drafted a subpoena and a search warrant to collect data off of the telephone. Nolan does not claim that any part of this procedure was illegal. Thus, counsel's performance was not deficient, because he had no basis to object to evidence regarding the identity of Nolan's cellular telephone provider. Therefore, trial counsel did not perform in a deficient manner.

*(iii) Failing to Consult and Call Fingerprint Expert or Identification Expert to Rebut State's Testimony*

Finally, Nolan claims that trial counsel should have called expert witnesses in order to rebut aspects of the State's case. In particular, Nolan claims that trial counsel should have

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[69] *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963) (citation omitted).

consulted with experts on fingerprint evidence and the reliability of eyewitness identification.[70] But, while we know such rebuttal evidence was not presented at trial, the record does not establish whether trial counsel considered or explored such strategies, what may or may not have led trial counsel not to pursue the strategies, or what such experts would have said had they been retained and called to testify. In other words, from our review of the record, we cannot make any meaningful determination whether expert testimony beneficial to Nolan could have been produced or, if it could have, whether trial counsel made a reasonable strategic decision not to present certain evidence.[71] The record is, therefore, not sufficient to adequately review these claims on direct appeal, and we decline to consider them at this time.[72]

## IV. CONCLUSION

For each of the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[70] See, e.g., *People v. Abney*, 13 N.Y.3d 251, 918 N.E.2d 486, 889 N.Y.S.2d 890 (2009); *People v. McDonald*, 37 Cal. 3d 351, 690 P.2d 709, 208 Cal. Rptr. 236 (1984), *overruled on other grounds, People v. Mendoza*, 23 Cal. 4th 896, 4 P.3d 265, 98 Cal. Rptr. 2d 431 (2000). See, also, *State v. Clopten*, 223 P.3d 1103 (Utah 2009) (collecting cases).

[71] See *Young, supra* note 65.

[72] See *id.* See, also, *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011).

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# PRIME HOME CARE, LLC, APPELLEE AND CROSS-APPELLANT, v. PATHWAYS TO COMPASSION, LLC, APPELLANT AND CROSS-APPELLEE.

809 N.W.2d 751

Filed January 20, 2012. No. S-11-030.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion

independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

3. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
4. **Names.** The registration of trade names in Nebraska is governed by the Trademark Registration Act, Neb. Rev. Stat. §§ 87-126 to 87-144 (Reissue 2008).
5. ____. The evil sought to be eliminated by trade name protection is confusion.
6. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
7. ____: ____. Descriptive trademarks are entitled to protection only if the plaintiff can prove secondary meaning under the common law. To establish secondary meaning, a party must show by a preponderance of the evidence that the primary significance of the term in the mind of the consuming public is not the product but the producer.
8. ____: ____. Secondary meaning can be established for trade name protection in many ways, including, but not limited to, direct consumer testimony; survey evidence; exclusivity, manner, and length of use of a mark; amount and manner of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant.
9. **Names.** One of the factors to be considered as to whether a trademark has acquired secondary meaning is whether actual purchasers of the product bearing the claimed trademark associate the trademark with the producer.
10. ____. Once a party has demonstrated that there is a protectable trade name, either by demonstrating that the name is distinctive or by proving secondary meaning, the next step is to determine whether there has been an infringement on the trade name.
11. **Names: Proof.** The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.
12. **Names.** Among the considerations for determining whether trade name confusion exists are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.
13. **Rules of Evidence: Appeal and Error.** The admission of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.

14. **Pleadings.** The pleadings in a cause are not mere ordinary admissions for the purposes of use in that suit, but are judicial admissions.
15. **Pleadings: Evidence: Waiver.** In effect, pleadings are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.
16. **Pleadings: Evidence.** Any reference that may be made to pleadings, where the one party desires to avail himself or herself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.
17. ____: ____. Judicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence.
18. **Attorney Fees: Appeal and Error.** An appellate court reviews the award of attorney fees for an abuse of discretion.
19. **Attorney Fees.** To determine proper and reasonable fees, it is necessary for the court to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
20. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

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

Tiernan T. Siems and Andrew M. Collins, of Erickson & Sederstrom, P.C., for appellee.

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

HEAVICAN, C.J.

## I. INTRODUCTION

Following a bench trial, Pathways to Compassion, LLC (Pathways), appeals from the decision of the Douglas County District Court granting Prime Home Care, LLC, a permanent injunction and attorney fees. Prime Home Care sought a permanent injunction pursuant to Neb. Rev. Stat. § 87-217 (Supp. 2011), part of the statutes governing the protection

of trade names, and Neb. Rev. Stat. § 87-303 (Cum. Supp. 2010), part of the Uniform Deceptive Trade Practices Act,[1] to prevent Pathways from using the name "Compassionate Care Hospice." Pathways appeals, contending that "Compassionate Care Hospice" was too descriptive to be protectable as a registered trade name under either § 87-217 or § 87-303. Prime Home Care cross-appealed, alleging that it is owed additional attorney fees and, because Pathways did not have a registered Nebraska agent at the time of the suit, that Prime Home Care should have been granted a default judgment. We affirm the decision of the district court.

## II. BACKGROUND

Jacqueline K. Ross, the owner and operator of both Prime Home Care and "Compassionate Care Hospice," testified during the bench trial that she had been a partner in Nurses in Motion, L.L.C., which registered the trade name "Compassion Care Hospice" in 2003. At trial, Ross testified that "Compassion Care Hospice" was a typographical error and that the company had always presented itself as "Compassionate Care Hospice." Nurses in Motion assigned the registration of the trade name "Compassion Care Hospice" to Prime Home Care in September 2005.

In November 2006, pursuant to Neb. Rev. Stat. § 87-130 (Reissue 2008), Prime Home Care filed an application to register the trade name "Compassionate Care Hospice" with the Secretary of State. In that application, Prime Home Care stated that the name had been in use since October 1, 2006. At the same time, apparently in order to clear up any confusion, Prime Home Care filed with the Secretary of State a notice of "Consent to Use of Similar Trade Name," allowing Prime Home Care to use both "Compassion Care Hospice" and "Compassionate Care Hospice." The Secretary of State allowed Prime Home Care to register both names.

Judith Grey is the chief operating officer of "Compassionate Care Hospice Group," which operates hospice facilities in 19

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[1] See Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2008 & Cum. Supp. 2010).

different states. When the group expanded into Nebraska in 2009, it filed a request with the Secretary of State to form a limited liability corporation under the name "Compassionate Care Hospice of Nebraska, LLC." The Secretary of State sent out a rejection notice on March 11, which stated:

> The requested name is not available at this time as we currently have "Compassion Care Hospice" and "Compassionate Care Hospice" on file. To continue to file under the requested name original letters of consent from these entities must accompany the articles. If consent is not an option, please re-file under an available name.

At that point, Grey formed a limited liability corporation under the name "Pathways to Compassion, LLC." Grey was listed as the registered agent, but was not at the time a Nebraska resident as required under Neb. Rev. Stat. § 21-2609 (Reissue 2007). However, at some point during the proceedings, Pathways named a Nebraska resident as its registered agent.

From the time it expanded into Nebraska, Pathways did business as "Compassionate Care Hospice of Nebraska," even after Pathways had received the above notice and had discovered that a company called "Compassionate Care Hospice" was doing business in the Omaha, Nebraska, area. One of the managers of Pathways approached Ross to request permission to use the name "Compassionate Care Hospice of Nebraska," which permission Ross denied. Ross' attorney sent Pathways a cease-and-desist letter, requesting that it not use the trade name "Compassionate Care Hospice." Grey testified that she continued using the name after receiving the cease-and-desist letter. Grey acknowledged that she also received a letter from the Nebraska Attorney General's office informing her that the use of "Compassionate Care Hospice" could result in criminal charges for deceptive trade practices. At trial, when asked about the letters, Grey repeatedly said, "I turned [them] over to my attorney." She eventually admitted that she was waiting for the outcome of this case to decide whether to cease using the name "Compassionate Care Hospice."

Prime Home Care filed this action alleging that Pathways' use of "Compassionate Care Hospice" injured Prime Home Care's business and caused confusion in the market, constituting a

deceptive trade practice. The district court agreed, finding that "Compassionate Care Hospice" was not so generic as to be unregistrable but that even if merely descriptive, it had acquired secondary meaning as applied to Prime Home Care's business. The district court entered a permanent injunction and granted attorney fees in the amount of $27,500. Pathways appealed, and Prime Home Care cross-appealed.

## III. ASSIGNMENTS OF ERROR

Pathways assigns, consolidated and restated, that the district court erred in (1) granting Prime Home Care's request for a permanent injunction and attorney fees; (2) finding that Pathways violated the Uniform Deceptive Trade Practices Act; and (3) admitting exhibit 37, a document entitled "Assignment of Registration of Trade Name" between Nurses in Motion and Prime Home Care.

In its cross-appeal, Prime Home Care assigns that the district court erred in (1) denying its motion for default as a result of Pathways' failure to designate a proper registered agent, (2) not awarding the full amount of attorney fees requested, and (3) admitting Pathways' expert witness testimony.

## IV. STANDARD OF REVIEW

[1] An action for injunction sounds in equity.[2]

[2] In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

[3] A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.[4]

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[2] *Nebraska Irrigation, Inc. v. Koch*, 246 Neb. 856, 523 N.W.2d 676 (1994).

[3] *Id.*

[4] *Carlson v. Okerstrom*, 267 Neb. 397, 675 N.W.2d 89 (2004).

## V. ANALYSIS

### 1. Arguments on Appeal

#### (a) Trial Court Did Not Err in Granting Injunction or Attorney Fees

Pathways' brief lists multiple assignments of error related to the district court's decision to grant Prime Home Care's motion for an injunction and attorney fees and in the related findings of fact. We address these assignments of error together.

Pathways first argues that the trial court erred in granting Prime Home Care's request for an injunction and attorney fees pursuant to § 87-217, part of the statutes governing the protection of trade names, and § 87-303, part of the Uniform Deceptive Trade Practices Act. Pathways' argument rests on its contention that "Compassionate Care Hospice" is merely descriptive and therefore is not a protectable trade name.

[4] The registration of trade names in Nebraska is governed by the Trademark Registration Act.[5] Section 87-130 sets forth the requirements for an application for registration of a trade name, which is then approved or denied by the Nebraska Secretary of State. Under Neb. Rev. Stat. § 87-209(5)(a) (Supp. 2011), a trade name will not be registered if it

> [i]s merely descriptive or misdescriptive . . . . The Secretary of State may accept as evidence that a trade name has become distinctive proof of continuous use by the applicant as a trade name in this state or elsewhere for five years preceding the date of the filing of the application for registration.

Section 87-217 provides in part:

> Any registrant of a trade name may proceed by suit to enjoin the use, display, or sale of any counterfeits or imitations thereof, and a court of competent jurisdiction may restrain such use, display, or sale on terms which the court deems just and reasonable and may require the defendants to pay to the registrant (1) all profits attributable to the wrongful use, display, or sale, (2) all

[5] See Neb. Rev. Stat. §§ 87-126 to 87-144 (Reissue 2008).

damages caused by the wrongful use, display, or sale, or (3) both such profits and damages, and reasonable attorney's fees.

[5,6] The evil sought to be eliminated by trade name protection is confusion.[6] In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.[7]

(b) "Compassionate Care Hospice" Acquired Secondary Meaning

Pathways' argument rests on the premise that "Compassionate Care Hospice" is merely descriptive and has not acquired secondary meaning. Under § 87-209(5)(a), a trade name shall not be registered if it is "merely descriptive or misdescriptive." The district court found that "Compassionate Care Hospice" was not merely descriptive but that even if it was, the name had acquired secondary meaning, which requires that the consuming public associates the name with the source, rather than with the product itself.[8] We decline to address whether the district court erred in determining that "Compassionate Care Hospice" was not merely descriptive because we find that, in any event, the name had acquired secondary meaning as it concerned Prime Home Care's hospice services.

Although existing Nebraska case law mentions "secondary meaning," this court has not yet had cause to address what evidence is required to prove such.[9] Pathways urges us to look to federal authority for direction in interpreting the Lanham Act,

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[6] *Equitable Bldg. & Loan v. Equitable Mortgage*, 11 Neb. App. 850, 662 N.W.2d 205 (2003).

[7] *Id.*

[8] See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 123 S. Ct. 2041, 156 L. Ed. 2d 18 (2003).

[9] *Ransdell v. Sixth Street Food Store*, 174 Neb. 875, 120 N.W.2d 290 (1963); *Equitable Bldg. & Loan, supra* note 6.

also known as the Trademark Act of 1946,[10] because that act is very similar to Nebraska's Trademark Registration Act. We agree that federal law is instructive, and we adopt the requirements for trade name protection defining secondary meaning as set out in federal case law.

[7,8] Under the Lanham Act, a plaintiff alleging trademark infringement has to prove first that the trademark is entitled to protection and, second, that the defendant's use of a trademark will cause confusion.[11] Descriptive trademarks are entitled to protection only if the plaintiff can prove secondary meaning under the common law.[12] To establish secondary meaning, a party must show by a preponderance of the evidence that the primary significance of the term in the mind of the consuming public is not the product but the producer.[13] Under federal law,

> [s]econdary meaning can be established in many ways, including (but not limited to) direct consumer testimony; survey evidence; exclusivity, manner, and length of use of a trademark; amount and manner of advertising; amount of sales and number of customers; established place in the market; and proof of intentional copying by the defendant.[14]

Pathways claims that Prime Home Care did not present sufficient evidence to prove secondary meaning. We disagree.

*(i) Testimony of Consumers*

[9] One of the factors to be considered as to whether a trademark has acquired secondary meaning is whether actual

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[10] See 15 U.S.C. §§ 1051 to 1141n (2006 & Supp. IV 2010).

[11] *Gruner + Jahr USA Pub. v. Meredith Corp.*, 991 F.2d 1072 (2d Cir. 1993).

[12] *Id.*

[13] *General Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405 (6th Cir. 2006).

[14] *Filipino Yellow Pgs. v. Asian Journal Publications*, 198 F.3d 1143, 1151 (9th Cir. 1999). See, also, *Gruner + Jahr USA Pub., supra* note 11; *Spraying Systems Co. v. Delavan, Inc.*, 975 F.2d 387 (7th Cir. 1992); *International Kennel Club v. Mighty Star, Inc.*, 846 F.2d 1079 (7th Cir. 1988); *American Scientific Chem. v. American Hosp. Supply*, 690 F.2d 791 (9th Cir. 1982).

purchasers of the product bearing the claimed trademark associate the trademark with the producer.[15] Prime Home Care presented witness testimony from the acting administrative director of an assisted living facility, who testified that he had referred patients to Compassionate Care Hospice in the past and that he associates that name with Ross, the owner of Prime Home Care. An administrator at another assisted living facility also testified that she had referred patients to Prime Home Care and that she associated the name "Compassionate Care Hospice" with Ross and Prime Home Care. Prime Home Care's community outreach director, who as a former administrator with an assisted living facility had also made referrals to "Compassionate Care Hospice," testified that he associated the name with Ross.

Pathways claims that Prime Home Care should have presented a great deal more testimony from actual consumers, but the evidence at trial suggested Prime Home Care had a relatively small market share. Ross testified that at the time of trial, Prime Home Care had only 12 patients. Ross further testified that the Omaha hospice market was very small and that "Compassionate Care Hospice" served fewer clients than did some of the other hospice providers in the area. Prime Home Care argues that the number of people who did testify is proportionate to the actual consuming public and thus sufficient to show that consumers associated "Compassionate Care Hospice" with Ross and her company.

*(ii) Degree and Manner of Advertising*

Prime Home Care also entered as evidence advertising it had utilized, including business cards, brochures, telephone book advertisements, pill boxes, pens, and note pads. Although some of the items advertised Prime Home Care and "Compassionate Care Hospice" side by side, other items, such as the brochures, advertised only "Compassionate Care Hospice." Ross testified that "Compassionate Care Hospice" markets itself mostly face-to-face, but that it also advertises in the telephone book and disseminates brochures. Ross testified that employees of Prime

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[15] *Filipino Yellow Pgs., supra* note 14.

Home Care belong to a number of different committees, such as the Bellevue Fire and Rescue Division, and that employees market through participation in those committees. Ross stated that Prime Home Care also conducts seminars and presentations designed to increase referrals to its services.

During trial, Ross was asked how much Prime Home Care had spent on advertising for "Compassionate Care Hospice" since 2003. Ross stated her accountant told her that Prime Home Care had spent $120,000 during that time period but that she believed that number was not an accurate reflection of funds actually spent on advertising. Ross stated that the figure did not include her salary or the salaries of other marketers and that it was her opinion that $500,000 to $600,000 would be a more accurate figure.

A nurse marketer for Prime Home Care testified that she worked on marketing and increasing Prime Home Care's client base. She stated that she had given presentations to physicians and social workers regarding Prime Home Care's hospice care services. She testified that Prime Home Care is a small, local operation and that it did business as "Compassionate Care Hospice."

*(iii) Length and Manner of Use of Claimed Trademark*

Pathways has several assignments of error related to the district court's admission of evidence and findings of fact regarding Prime Home Care, or its predecessor's, use of the name prior to October 1, 2006. Pathways' arguments rest on two assumptions. The first assumption is that Prime Home Care's complaint constituted a judicial admission and that no evidence of its use prior to October 1, 2006, should have been admitted. And the second assumption is that the record does not support a finding that Prime Home Care established secondary meaning through continuous use. We discuss the admission of exhibit 37, the "Assignment of Registration of Trade Name," below, and determine that Prime Home Care's complaint was not a judicial admission that precluded admitting evidence of Prime Home Care's use of "Compassionate Care Hospice" prior to October 1, 2006.

Furthermore, after our de novo review of the record, we find the record does support the following facts: Ross and her partner in Nurses in Motion first registered "Compassion Care Hospice" in 2003. Ross testified that the name on the registration was a typographical error and that Nurses in Motion had actually used the name "Compassionate Care Hospice" continuously since 2003. Nurses in Motion assigned the name to Prime Home Care in 2005, and Prime Home Care filed a trade name registration for the name in 2006. At the same time, Prime Home Care filed a notice allowing the use of a similar trade name. Therefore, at the time of trial, Prime Home Care or its predecessor had been using the name "Compassionate Care Hospice" for 6 years or more. Ross further stated that Prime Home Care's hospice services were certified by Medicare and licensed by the State of Nebraska under the name "Compassionate Care Hospice."

*(iv) Exclusive Use of Trademark*

After Pathways began doing business in Nebraska, Prime Home Care took immediate steps to protect its trade name. Although Pathways had operated outside Nebraska as "Compassionate Care Hospice" or "Compassionate Care Hospice Group," Prime Home Care presented evidence at trial that it did business as "Compassionate Care Hospice" exclusively in Nebraska for 6 years prior to Pathways' expansion into this state.

The district court found that Prime Home Care had met its burden to show that "Compassionate Care Hospice" had attained secondary meaning as related to Prime Home Care's hospice services. Specifically, the district court found that Prime Home Care, or its predecessor, had been using the name continuously since 2003, and referral sources testified that they associated "Compassionate Care Hospice" with Ross of Prime Home Care. We review the district court's findings de novo on the record. Given the evidence outlined above, we find that the district court did not err.

Having determined the district court did not err when it found that "Compassionate Care Hospice" had secondary meaning, we next turn to whether the district court erred

when it granted Prime Home Care's request for a permanent injunction.

(c) Injunction and Likelihood of Confusion

Under § 87-209(6), protection is given to trade names registered in this State. Section 87-217 provides that "[a]ny registrant of a trade name may proceed by suit to enjoin the use, display, or sale of any counterfeits or imitations thereof, and a court of competent jurisdiction may restrain such use, display, or sale on terms which the court deems just and reasonable . . . ."

[10] We set forth the requirements for granting an injunction to protect a trade name in *Nebraska Irrigation, Inc. v. Koch*.[16] Once a party has demonstrated that there is a protectable trade name, either by demonstrating that the name is distinctive or by proving secondary meaning, the next step is to determine whether there has been an infringement on the trade name.[17] We have determined that Prime Home Care demonstrated it had a protectable trade name, because it established that "Compassionate Care Hospice" had attained secondary meaning in this state as related to Prime Home Care. But in order to obtain a permanent injunction, Prime Home Care bears the burden of proving that there was a likelihood of confusion.[18]

[11,12] The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.[19] Among the considerations for determining whether

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[16] *Nebraska Irrigation, Inc., supra* note 2.

[17] See *id.*

[18] See *id.*

[19] *Id.*

trade name confusion exists are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.[20]

*(i) Degree of Similarity of Product and Trade Name*

In this case, the two trade names are essentially identical. Prime Home Care used "Compassionate Care Hospice" and sometimes "Prime Home Care and Compassionate Care Hospice." Pathways did business as "Compassionate Care Hospice of Nebraska." Ross testified at trial that at least on one occasion, a Pathways representative stated that she worked for "Compassionate Care Hospice." Furthermore, both Pathways and Prime Home Care offer identical or nearly identical services.

*(ii) Geographical Trade Areas and Competition*

Both Prime Home Care and Pathways operate within the Omaha area, and both market to the same groups. One of Ross' business associates informed Ross that she had seen the name "Compassionate Care Hospice" on a building in the same geographic region. Ross also testified that she was at a seminar when a representative from Pathways was present and was using the name "Compassionate Care Hospice." From the record, it is clear that Prime Home Care and Pathways were operating in the same geographical area and competing for the same or similar clients.

*(iii) Duration of Use Without Actual Confusion*

Several witnesses for Prime Home Care testified that they were confused by Pathways' use of the name. Witnesses who had referred clients to Prime Home Care testified that they had been confused by the appearance of "Compassionate Care Hospice of Nebraska" in the area. Prime Home Care's

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[20] *Id.*

community outreach director testified that one of Prime Home Care's clients had mistaken Pathways for Prime Home Care. The confusion appears to have arisen very soon after Pathways expanded into Nebraska.

Prime Home Care presented sufficient evidence to show that Pathways was operating a business with a nearly identical name in the same geographical area and serving the same or similar clients. Prime Home Care also presented evidence that consumers had been confused between the two names. We find the district court did not err when it found that confusion existed as a result of Pathways' use of Prime Home Care's protected trade name.

(d) Attorney Fees

We next turn to Pathways' claim that the trial court erred in its award of attorney fees. Prime Home Care sought attorney fees under both § 87-217, which addresses trade name infringement, and § 87-303, which is part of the Uniform Deceptive Trade Practices Act. We therefore address Pathways' argument that the district court erred in finding that Pathways had violated the Uniform Deceptive Trade Practices Act, in conjunction with its argument that the district court erred when it awarded Prime Home Care attorney fees. As discussed below, we find that Prime Home Care could have recovered attorney fees under either § 87-217 or § 87-303.

Pathways claims the trial court could award attorney fees only if Prime Home Care can prove that it willfully engaged in a trade practice it knew to be deceptive. But § 87-217, quoted above, provides that a trade name registrant may receive reasonable attorney fees in a case for trade name infringement where no such deception is required. As discussed above, the district court did not err in granting Prime Home Care's request for an injunction and Prime Home Care showed that a likelihood of confusion existed. Under § 87-217, Prime Home Care is entitled to reasonable attorney fees.

Prime Home Care also sought attorney fees under § 87-303, part of the Uniform Deceptive Trade Practices Act. Pathways claims that because it had a good faith belief that it could use the trade name "Compassionate Care Hospice," the district

court erred when it found that Pathways had violated the act. Under § 87-302, "a person engages in a deceptive trade practice when, in the course of his or her business, vocation, or occupation, he or she . . . [c]auses likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services" or "[c]auses likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another."

As noted above, Prime Home Care presented evidence that Pathways knew the trade name "Compassionate Care Hospice" was already in use when it expanded into Nebraska. Pathways continued to do business under that name even after being notified by the Secretary of State that "Compassionate Care Hospice" was in use and after Ross' attorney sent a cease-and-desist letter.

Hence, we find that the district court did not err in determining that Pathways had engaged in deceptive trade practices or in granting Prime Home Care's request for attorney fees under either § 87-217 or § 87-303. These assignments of error are without merit.

### (e) Trial Court Did Not Err When It Admitted Exhibit 37

In its next assignment of error, Pathways argues that the trial court erred by admitting exhibit 37, which was the "Assignment of Registration of Trade Name" between Nurses in Motion and Prime Home Care. Prime Home Care's amended complaint stated that it had "registered the trade name 'Compassionate Care Hospice,' under which it had conducted business in Nebraska since October 1, 2006 in connection with its home healthcare and hospice care business." Exhibit 37 appears to support Prime Home Care's contention that some form of the name "Compassionate Care Hospice" was in use prior to October 1, 2006, the date of the trade name registration. Pathways claims that because Prime Home Care made a judicial admission in its amended complaint, exhibit 37 should not have been admitted.

[13-16] The admission of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial

court.[21] The pleadings in a cause are not mere ordinary admissions for the purposes of use in that suit, but are judicial admissions.[22] In effect, they are not a means of evidence, but a waiver of all controversy, so far as the opponent may desire to take advantage of them, and therefore, a limitation of the issues.[23] Thus, any reference that may be made to them, where the one party desires to avail himself or herself of the other's pleading, is not a process of using evidence, but an invocation of the right to confine the issues and to insist on treating as established the facts admitted in the pleadings.[24]

[17] Pathways claims that based on the doctrine of judicial admissions and Prime Home Care's amended complaint, October 1, 2006, should be considered the first date Prime Home Care used "Compassionate Care Hospice." Prime Home Care counters by stating that "[j]udicial admissions must be unequivocal, deliberate, and clear, and not the product of mistake or inadvertence."[25]

Prime Home Care argues that its amended complaint makes no mention of its use of "Compassionate Care Hospice" prior to October 1, 2006. Prime Home Care also argues that even if the statement in its amended complaint could be read in such a way, it would be inadvertent.

We find that the trial court did not abuse its discretion by admitting exhibit 37, because Prime Home Care's admissions cannot be said to have been unequivocal, deliberate, or clear. Pathways' final assignment of error is without merit.

### 2. Arguments on Cross-Appeal

#### (a) Prime Home Care's Motion for Default

In its cross-appeal, Prime Home Care assigns that the district court erred when it denied its motion to default. Prime

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[21] *Doe v. Gunny's Ltd. Partnership*, 256 Neb. 653, 593 N.W.2d 284 (1999).

[22] *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981).

[23] *Id.*

[24] *Id.*

[25] Brief for appellee at 25, citing *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

Home Care argues that § 21-2609 requires a limited liability corporation to have a properly designated registered agent. Because we found that the district court properly granted Prime Home Care's request for an injunction, we need not address this assignment of error.

(b) Prime Home Care Not Entitled to Additional Attorney Fees

Next, Prime Home Care argues that the district court committed an abuse of discretion by not granting the full amount of attorney fees. It alleges that by the end of the trial, its attorney fees totaled $55,700.50 and that the district court awarded only $27,500. In its order, the district court stated that it had

> reviewed the entire file herein and determines that the value of [Prime Home Care's] services including all criteria specified in the Cannons [sic] of Ethics relating to attorney fees warrant the award of an attorney fee to [Prime Home Care] for the benefit of [its] attorney in the amount of $27,500.00.

[18-20] As Prime Home Care noted, we review the award of attorney fees for an abuse of discretion.[26] To determine proper and reasonable fees, it is necessary for the court to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.[27] In this respect, a judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[28]

The attorney invoices appear to support Pathways' contention that some of the fees were incurred on unrelated matters. The district court appears to have considered the appropriate

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[26] See *Schirber v. State*, 254 Neb. 1002, 581 N.W.2d 873 (1998).

[27] *Id.*

[28] *Id.*

factors in its award of attorney fees, and its finding is not clearly untenable. We therefore find that the district court did not abuse its discretion in the amount of attorney fees it awarded. This assignment of error is without merit.

(c) Expert Witness Testimony

Finally, Prime Home Care argues that the trial court erred in admitting the expert testimony of a lexicographer. Prime Home Care alleges that this testimony was not helpful to the fact finder and did not have sufficient foundation. The expert witness testified as to the descriptiveness of the name "Compassionate Care Hospice." Because we did not decide whether "Compassionate Care Hospice" was merely descriptive, but concentrated our analysis on whether it had acquired secondary meaning, we need not address this assignment of error.

## VI. CONCLUSION

We find that the name "Compassionate Care Hospice" acquired secondary meaning as related to Prime Home Care's hospice services. We further find that the district court did not err in granting an injunction and attorney fees to Prime Home Care. Finally, we find that Prime Home Care's assignment of error on cross-appeal regarding attorney fees is without merit.

AFFIRMED.

WRIGHT, J., not participating in the decision.

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STATE OF NEBRASKA, APPELLEE, V.
TIMOTHY D. JIMENEZ, APPELLANT.

808 N.W.2d 352

Filed January 20, 2012. No. S-11-303.

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 determination made by the court below.
2. **Extradition and Detainer: Words and Phrases.** A detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he or she is wanted to face criminal charges pending in another jurisdiction.

3. **Extradition and Detainer.** A detainer for a prisoner who has been convicted but not sentenced does not relate to an untried indictment, information, or complaint and thus does not trigger the procedural requirements of Article III of the interstate Agreement on Detainers.
4. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

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

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

Jon Bruning, Attorney General, George R. Love, and Jordan M. Osborne, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Article III of the interstate Agreement on Detainers (Agreement)[1] prescribes the procedure by which a prisoner against whom a detainer has been lodged may demand a speedy disposition of outstanding charges.[2] This procedure may be utilized where there is pending in a party state "any untried indictment, information or complaint on the basis of which a detainer has been lodged against [a] prisoner" incarcerated in another party state.[3] The issue presented in this appeal is whether a detainer for a person who has been convicted of a criminal offense but not sentenced falls within this provision. We conclude that the district court for Cheyenne County did not err in determining that such a detainer does not fall within this provision of the Agreement, and we therefore affirm its judgment.

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[1] Neb. Rev. Stat. § 29-759 (Reissue 2008). See 18 U.S.C. app. 2, § 2 (2006).

[2] *State v. Reed*, 266 Neb. 641, 668 N.W.2d 245 (2003).

[3] § 29-759.

## BACKGROUND

Timothy D. Jimenez was charged with possession of methamphetamine, a Class IV felony, and was further alleged to be a habitual criminal. On March 9, 2010, pursuant to a plea agreement, he pled guilty to the possession charge and the State dismissed the habitual criminal allegation. The matter was set for sentencing on April 27.

Prior to the sentencing hearing, Jimenez was arrested in Colorado. He failed to appear on April 27, 2010, and the Cheyenne County Attorney's office obtained a bench warrant for his arrest. At some point thereafter, a detainer was placed on Jimenez in Colorado by the Cheyenne County sheriff's office.

On February 22, 2011, Jimenez filed a request for final disposition in Cheyenne County. He alleged that he was serving a term of imprisonment in Colorado and that as a result of the detainer, he was unable to access all of the Colorado institution's educational and treatment alternatives. He asked to be brought before the Nebraska court for final disposition or for an order directing the State of Nebraska to release the detainer. The State filed an objection to the request.

On March 3, 2011, Jimenez filed a motion asking the court to order the Cheyenne County Attorney's office to produce an "Inmate Status Certificate" from the official who had custody of Jimenez, in accordance with § 29-759. Jimenez alleged that he had reason to believe that the certificate was in the custody of the Cheyenne County Attorney, the sheriff, or other law enforcement agency.

In an order dated March 25, 2011, the Cheyenne County District Court determined that the Agreement did not apply, because Jimenez had no untried matters pending in Nebraska. The court found that Jimenez had been convicted of the offense when his plea was accepted and that therefore, guilt had been established beyond a reasonable doubt. The only remaining matter was the imposition of the sentence. The court denied Jimenez' motion for a court order and request for final disposition, and Jimenez appealed. We granted the State's petition to bypass pursuant to Neb. Rev. Stat. § 24-1106 (Reissue 2008).

## ASSIGNMENT OF ERROR

Jimenez asserts, summarized, that the district court erred in determining he was not eligible to invoke the Agreement to obtain a final disposition of his Nebraska conviction.

## 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 determination made by the court below.[4]

## ANALYSIS

[2] The Agreement is a congressionally sanctioned interstate compact to which Nebraska is a contracting party.[5] It is codified in § 29-759. The Agreement does not define "detainer," but we have stated that a detainer is a notification filed with the institution in which an individual is serving a sentence, advising the prisoner that he or she is wanted to face criminal charges pending in another jurisdiction.[6]

Article I of the Agreement provides in part:

> [C]harges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints.[7]

The Agreement states throughout that it applies to detainers filed in connection with "any untried indictment, information or complaint."[8] Article III(a) of the Agreement states:

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[4] *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[5] See *State v. Rieger*, 270 Neb. 904, 708 N.W.2d 630 (2006).

[6] *Reed, supra* note 2.

[7] § 29-759.

[8] *Id*.

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days . . . .[9]

In Article III(d), the Agreement also provides:

> Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. . . . If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.[10]

The issue in the case at bar is whether the phrase "untried indictments, informations or complaints" applies to Jimenez' Nebraska case, in which he has been convicted but not sentenced. Although we have not previously considered the meaning of this phrase in this or similar contexts, other courts have done so.

In *Carchman v. Nash*,[11] the U.S. Supreme Court considered whether a detainer based upon a probation violation fell within the language of the Agreement. In concluding that it did not, the Court reasoned that "[t]he most natural interpretation of the words 'indictment,' 'information,' and 'complaint' is that they refer to documents charging an individual with having

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[9] *Id.*

[10] *Id.*

[11] *Carchman v. Nash*, 473 U.S. 716, 105 S. Ct. 3401, 87 L. Ed. 2d 516 (1985).

committed a criminal offense."[12] The Court stated that its interpretation is "reinforced by the adjective 'untried,' which would seem to refer to matters that can be brought to full trial, and by Art. III's requirement that a prisoner who requests final disposition of the indictment, information, or complaint 'shall be *brought to trial* within 180 days.'"[13] The Court concluded that this interpretation was consistent with the legislative history of the Agreement.

Other courts have interpreted the language of the Agreement in a similar manner. For example, in *State v. Barefield*,[14] the Washington Supreme Court applied the reasoning of *Carchman* and stated, "Neither the history nor the purposes of the [Agreement] indicate that it ought to be applied to sentencing detainers." A New Mexico appellate court in *State v. Sparks*[15] also cited *Carchman* in support of its conclusion that "a request for the disposition of an outstanding sentencing is not cognizable under the [Agreement]." The court determined that "sentencing, like probation revocation, does not fall within the plain meaning of an 'untried indictment, information or complaint'" and that therefore, the provisions of the Agreement did not apply.[16] The court reasoned that use of the adjective "untried" supported a conclusion that the Agreement does not apply when a defendant has been convicted but not sentenced.[17]

In *Moody v. Corsentino*,[18] the Colorado Supreme Court held that the Agreement did not apply to a prisoner's request to be sentenced in an action in which he had been convicted. The court reasoned that while indictments, informations, and complaints are all documents that institute charges against a

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[12] *Id.* at 724.

[13] *Id.* (emphasis in original).

[14] *State v. Barefield*, 110 Wash. 2d 728, 733, 756 P.2d 731, 734 (1988) (en banc).

[15] *State v. Sparks*, 104 N.M. 62, 64, 716 P.2d 253, 255 (N.M. App. 1986).

[16] *Id.* at 65, 716 P.2d at 256.

[17] *Id.*

[18] *Moody v. Corsentino*, 843 P.2d 1355 (Colo. 1993).

person, "the sentencing process merely finalizes the disposition of charges that have already been tried," and that therefore, the language of the Agreement suggests that it does not extend to sentencing detainers.[19] The court concluded, "[A] detainer placing a hold on a prisoner based on an unresolved sentencing determination in another jurisdiction arising from charges for which the prisoner has already been convicted does not trigger the procedural requirements" of the Agreement.[20] Other courts are in accord.[21]

Jimenez urges that we follow two cases which reached conclusions contrary to the authorities discussed above. In *Hall v. State of Fla.*,[22] the court held that the phrase "untried indictment, information or complaint," as used in the Agreement, encompassed sentencing. The court relied on cases in which the U.S. Supreme Court and other federal courts held that a trial includes sentencing for purposes of the Sixth Amendment.[23] And in *Tinghitella v. State of Cal.*,[24] the court concluded that the terms "trial" and "final disposition" as used in the Agreement "encompass sentencing," meaning the Agreement "imposes an obligation on California to sentence a Texas prisoner in timely fashion where California has secured the conviction of the prisoner in California but he has not been sentenced before his incarceration in Texas on a Texas conviction."

We are not persuaded by these cases. As the court noted in *Barefield*,[25] the holding of *Tinghitella* is arguably dicta because the defendant had not complied with the Agreement's requirements. And the reasoning and conclusion of *Tinghitella*

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[19] *Id.* at 1370.

[20] *Id*. at 1372.

[21] See, *People v. Castoe*, 86 Cal. App. 3d 484, 150 Cal. Rptr. 237 (1978); *People v Barnes*, 93 Mich. App. 509, 287 N.W.2d 282 (1979); *People v. Randolph*, 85 Misc. 2d 1022, 381 N.Y.S.2d 192 (N.Y. Crim. 1976); *State v. Barnes*, 14 Ohio App. 3d 351, 471 N.E.2d 514 (1984).

[22] *Hall v. State of Fla.*, 678 F. Supp. 858 (M.D. Fla. 1987).

[23] *Id*.

[24] *Tinghitella v. State of Cal.*, 718 F.2d 308, 311 (9th Cir. 1983).

[25] *Barefield, supra* note 14.

were called into question by the subsequent decision in *Carchman*.[26]

Other courts have taken the position that "trial," as used in the Agreement, does not include sentencing. In *U.S. v. Coffman*,[27] the court disagreed with *Tinghitella*, and held that "'trial' does not include sentencing for purposes of the [Agreement's] anti-shuttling provisions." The court agreed with the *Tinghitella* court's determination that the use of "final disposition" in the Agreement includes sentencing, but determined that the Agreement "differentiates between the trial phase of a proceeding and all post-trial procedures, including sentencing."[28] It is true that in Nebraska, the judgment in a criminal case is the sentence.[29] But it does not logically follow that a pending sentencing renders an indictment, information, or complaint "untried."

[3] We therefore hold that a detainer for a prisoner who has been convicted but not sentenced does not relate to an "untried indictment, information or complaint" and thus does not trigger the procedural requirements of the Agreement. The district court did not err in concluding that the Agreement does not apply to Jimenez and in denying his motion for a court order and request for final disposition.

[4] Jimenez also argues that the district court erred in not ordering the State of Nebraska to request an "Inmate Status Certificate" from the Colorado Department of Corrections. Having determined that the Agreement does not apply to the pending Nebraska proceedings, it is unnecessary for us to address this issue. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[30]

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[26] *Id*.

[27] *U.S. v. Coffman*, 905 F.2d 330, 331 (10th Cir. 1990).

[28] *Id*. at 332.

[29] *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[30] *Law Offices of Ronald J. Palagi v. Howard*, 275 Neb. 334, 747 N.W.2d 1 (2008).

## CONCLUSION

For the reasons discussed, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT and GERRARD, JJ., not participating.

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THOMAS LESIAK AND ANGELINE LESIAK, HUSBAND AND WIFE, ET AL., APPELLANTS AND CROSS-APPELLEES, v. CENTRAL VALLEY AG COOPERATIVE, INC., A COOPERATIVE CORPORATION, APPELLEE AND CROSS-APPELLANT.

808 N.W.2d 67

Filed January 27, 2012. No. S-10-323.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **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.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Directed Verdict: Evidence.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Crops: Damages.** Where a growing crop is injured but not rendered entirely worthless, the damage to it may be measured by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.
6. **Courts: Juries: Damages.** While it is the jury's duty to determine the amount of damages, it is the duty of the trial court to refrain from submitting the issue of damages to the jury where the evidence is such that a jury could not determine the issue without indulging in speculation or conjecture.

7. **Damages: Evidence: Proof.** Damages are not required to be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages.
8. **Summary Judgment.** A motion for summary judgment is a proper mechanism to dispose of individual legal theories.
9. **Products Liability: Torts: Contracts: Negligence: Damages.** Where a defective product causes economic loss and is unaccompanied by personal injury or damage to other property, the aggrieved party's remedy lies in contract law rather than tort law.
10. **Products Liability: Torts: Contracts: Negligence: Breach of Contract.** The economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties.
11. **Damages: Words and Phrases.** Economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage.
12. **Breach of Contract: Damages: Torts.** Where only economic loss is suffered and the alleged breach is of only a contractual duty, then the action should be in contract rather than in tort.
13. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable.

Appeal from the District Court for Merrick County: MICHAEL J. OWENS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

David A. Domina, Brian E. Jorde, and Anneliese Wright, of Domina Law Group, P.C., L.L.O., for appellants.

Jordan W. Adam and D. Steven Leininger, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.

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

PER CURIAM.

Thomas Lesiak and Angeline Lesiak, husband and wife; Timothy Lesiak, their son; and Ronald Lesiak, Thomas Lesiak's brother, are Nebraska farmers who own land in Merrick and Nance Counties. The Lesiaks suffered a reduced corn yield in 2005, allegedly due to the overapplication of herbicide to their crops by Central Valley Ag Cooperative, Inc. (CVA). The main issues presented in this case are whether sufficient evidence existed to allow a jury to reasonably estimate the

extent of the Lesiaks' damages and whether the economic loss doctrine precluded the Lesiaks from seeking relief under a negligence theory.

## I. BACKGROUND

In early 2005, the Lesiaks began preparing for the upcoming farming season. The Lesiaks were planning on farming 20 different fields, encompassing approximately 2,000 acres of farmland. Randy Zmek, an employee for CVA, called on Thomas (Tom) Lesiak in an effort to earn more of the Lesiaks' business. In the past, the Lesiaks had purchased fertilizer and other chemicals from CVA. But, for the 2005 crop year, the Lesiaks took all of their business to CVA, purchasing a "complete package." This package included diesel fuels, chemicals, fertilizer, and seed. The package also included CVA's general farming knowledge and expertise. As a result of this transaction, CVA conducted soil tests on the Lesiaks' land in order to determine the soil composition and texture. CVA recommended which fertilizers, seed corn, pesticides, and herbicides to use. CVA then sold all of these products to the Lesiaks.

The Lesiaks began to plant their corn in the spring. Following CVA's recommendation, the Lesiaks had purchased approximately 947 gallons of Guardsman Max, a herbicide, from CVA and Guardsman Max was applied to 16 of their 20 fields that year. Once the Lesiaks finished planting a field, they would notify CVA, who would then spray the field with Guardsman Max.

Guardsman Max is designed to kill a broad number of weeds in a cornfield without damaging the corn crop. In order to be effective, however, Guardsman Max must be applied at a specific rate based on a number of conditions; particularly important are the soil textures and organic content of the fields to be sprayed. The coarser the soil of the field, the less Guardsman Max was required. Also, if the field contained less than 3 percent organic matter, then less Guardsman Max was needed.

All of the Lesiaks' fields contained less than 3 percent organic matter, with the exception of a small portion of one of their fields. The record indicates that roughly 68 percent of the land consisted of coarse-textured soils and that 32 percent

of the land consisted of medium-textured soils. All but one of the Lesiaks' fields contained some medium-textured soils. For coarse-textured soils with less than 3 percent organic matter, the Guardsman Max label suggested an application rate of 2.5 to 3.0 pints per acre. And for medium-textured soils with less than 3 percent organic matter, the label suggested an application rate of 3.0 to 4.0 pints per acre. It is undisputed that CVA applied Guardsman Max at a uniform rate of 4.0 pints per acre across all of the Lesiaks' fields.

On June 2, 2005, Tom Lesiak called Zmek and advised Zmek that the Lesiaks' corn crop was stunted and that he suspected chemical damage. Zmek came out to inspect the crops the day after receiving Tom Lesiak's telephone call, and he initially found nothing wrong. But, after being shown to a specific area of the field, Zmek admitted to there being chemical damage, though he did not specifically reference Guardsman Max. After Zmek's inspection in June, the Lesiaks continued to notice problems with their crop throughout the summer and reported those problems to CVA. CVA allegedly did nothing until October, when the Lesiaks began reporting their yields to CVA. At that point, CVA inspected the Lesiaks' fields, but denied any damage resulting from its application of Guardsman Max.

The Lesiaks filed this action against CVA. The Lesiaks alleged that CVA's improper application of Guardsman Max caused damage to their corn crop, decreasing their total yield. The Lesiaks asserted multiple theories of recovery, including, as relevant to this appeal, negligence, breach of implied warranty of merchantability, and breach of implied warranty of services. CVA moved for summary judgment, which the district court granted on both the implied warranty of services and negligence claims. The court found that Nebraska law did not recognize the claim of implied warranty of services outside of the building and construction context. Additionally, the court found that the Lesiaks' negligence claim was precluded by the economic loss doctrine. This left the Lesiaks with only their claim for breach of implied warranty of merchantability.

Following the Lesiaks' presentation of their case, CVA moved for a directed verdict, asserting that the Lesiaks had

failed to prove the measure of the damage, if any, which resulted from the alleged overapplication of Guardsman Max to their cornfields. The court granted the motion for a directed verdict, explaining that the evidence was insufficient to allow the fact finder to determine what damage was attributable to Guardsman Max and what was attributable to a lack of irrigation. The Lesiaks appeal.

## II. ASSIGNMENTS OF ERROR

The Lesiaks assign, restated and renumbered, that the district court erred in (1) directing a verdict for CVA on the basis that the Lesiaks' proof of damages was not sufficiently definite for submission to the jury, (2) allowing a motion for summary judgment to be used to dismiss individual theories of relief, (3) granting partial summary judgment on the Lesiaks' breach of implied warranty of services claim, and (4) granting partial summary judgment on the Lesiaks' negligence theory based on the economic loss doctrine.

On cross-appeal, CVA assigns, restated, that the district court erred in failing to grant CVA summary judgment on all of the Lesiaks' claims because the Lesiaks could only speculate as to the money they saved from not having to dry and transport crops which were allegedly lost.

## III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[1]

[2,3] 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

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[1] *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008).

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]

## IV. ANALYSIS

We first address the Lesiaks' contention that the district court erred in directing a verdict in favor of CVA based on the Lesiaks' alleged inability to prove their damages. We address this issue first because the Lesiaks' other assigned errors are dependent on the outcome of this one. In other words, if the Lesiaks are unable to prove damages as a matter of law, then whether the district court properly granted summary judgment on the Lesiaks' various other theories of relief is irrelevant.

### 1. Directed Verdict

The Lesiaks assert that the district court erred when, at the close of the Lesiaks' case, the court directed a verdict in favor of CVA. The court determined that the jury, without speculating, would be unable to apportion the damage allegedly caused by the overapplication of Guardsman Max and damage caused by a lack of irrigation. Because the Lesiaks presented sufficient evidence to allow a jury to calculate damages to a reasonable degree of certainty and exactness, this assigned error has merit.

#### (a) *Hahn v. Weber & Sons Co.*

In making its ruling, the district court relied upon *Hahn v. Weber & Sons Co.*[4] In *Hahn*, a farmer planted soybeans in two tracts of land lying directly north of, and adjacent to, his neighbor's land. The neighbor sprayed his land with herbicide to control the weeds on his acreage. The farmer claimed that the neighbor acted negligently and that the herbicide spray

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[2] *Golden v. Union Pacific RR. Co.*, 282 Neb. 486, 804 N.W.2d 31 (2011).

[3] *Id.*

[4] *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 390 N.W.2d 503 (1986).

drifted onto his land and damaged his soybeans. The trial court found that the spray did drift onto the farmer's crops, but that the farmer also failed to irrigate at the proper time, and that the plants which were irrigated properly produced a normal yield.[5] The court found that any attempt to determine what damage to the field was attributable to the sprayed herbicide, as opposed to a lack of irrigation, would be "'conjectural, speculative and a "guesstimate"'" and dismissed the petition.[6]

On appeal, we explained that the farmer had the burden of proving that some or all of the damage was proximately caused by the neighbor's negligent act. In explaining the farmer's burden, we said:

> Where the injury is the result of two separate, independent causes, and the defendant is responsible for only one of the causes, the plaintiff must establish that the entire damage would have occurred from the cause for which the defendant is liable or establish the amount of damage directly caused by the defendant's negligence.[7]

We concluded that absent any evidence to properly allocate damages between the herbicide application and the lack of irrigation, "any attempt to determine what damage was attributable to vapor drift would be conjectural and speculative."[8] In essence, then, *Hahn* sets forth the Lesiaks' burden of proof in this case. *Hahn* stands for the proposition that there must be some evidence to allow a jury to properly allocate damages between two independent causes.

[4] But *Hahn* does not speak to the propriety of a directed verdict. We have stated that a directed verdict is proper "only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law."[9] And, as understood from our

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[5] See *id.*

[6] *Id.* at 428, 390 N.W.2d at 505.

[7] *Id.* at 429, 390 N.W.2d at 506.

[8] *Id.* at 430, 390 N.W.2d at 506.

[9] *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 747, 807 N.W.2d 170, 177 (2011).

standard of review, we view a directed verdict skeptically, resolving every controverted fact in favor of the aggrieved party and giving that party the benefit of every inference reasonably deducible from the evidence.[10]

Here, while the directed verdict was granted on the basis of an inability to prove damages, the issues of damages and causation are intertwined. Essentially, CVA argues that as a matter of law, the Lesiaks were unable to prove what damage, if any, resulted from the alleged overapplication of Guardsman Max to their cornfields. But, as will be explained more fully below, the record presents sufficient evidence to allow a jury to find that Guardsman Max injured the Lesiaks' corn crop. And the record also presents sufficient evidence to allow a jury to estimate damages to a reasonable degree of certainty and exactness. Thus, the trial court erred in directing a verdict in favor of CVA.

(b) Could Jury Find That Guardsman Max Had Damaged the Lesiaks' Corn Crop?

The Lesiaks alleged that CVA applied Guardsman Max at too high a rate, which caused significant damage to their corn crop. CVA, on the other hand, asserted that other events caused the damage, including a lack of irrigation and the presence of weeds in the fields (other than those that were supposed to have been controlled by Guardsman Max). Here, the record presents sufficient evidence to allow a jury to find that Guardsman Max, as applied, had injured the Lesiaks' corn crop.

The Lesiaks called Dale Flowerday, an agronomist, as their expert witness, and his status as an expert is undisputed by the parties. Flowerday inspected five or six of the Lesiaks' fields, relying upon Tom Lesiak to show him fields representative of the entire farming operation, as Flowerday testified was customary in his profession because it is the farmer who knows his or her land best. Flowerday explained that he was able to determine the cause of the damage from reviewing the crop residue and root systems following harvest. Flowerday opined that the improper application of Guardsman Max to the Lesiaks'

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[10] See *Countrywide Truck Ins. Agency, supra* note 1.

cornfields caused a lower yield at harvest. Flowerday noted that his opinion applied only to the Lesiaks' irrigated fields. And Flowerday also explained that he did not know whether Guardsman Max had injured the areas of the fields containing medium-textured soils, but could only be certain as to the areas of the fields containing coarse-textured soils.

CVA asserts that there is no evidence establishing that Guardsman Max caused damage to the Lesiaks' crops grown in medium-textured soils, because the 4-pints-per-acre rate was within the range prescribed by the label for medium-textured soils. Notably, Flowerday did not rule out Guardsman Max as the cause of the damage to the crops grown in medium-textured soils. Rather, he simply stated that he did not know if it caused the damage, because it was applied at a rate within that prescribed by the Guardsman Max label. Flowerday did explain that he saw damage throughout the fields, on crops in both medium- and coarse-textured soils, and that the damage was simply more extensive with the crops in the coarse-textured soils. Moreover, in examining the relevant land value sheets and soils maps, Flowerday determined that a majority of the Lesiaks' land consisted of coarse-textured soils—specifically, 68 percent of the soils were coarse textured, and 32 percent were medium textured. Based on those soil compositions, and the Guardsman Max label instructions, Flowerday opined that CVA had applied Guardsman Max at too high a rate.

Thus, in Flowerday's opinion, all of the fields were coarse textured for purposes of applying herbicide. The Guardsman Max label explains that "[w]hen use rates are expressed in ranges, use the lower rates for more coarsely textured soils lower in organic matter and use the higher rates for more finely textured soils that are higher in organic matter." Thus, the instructions contemplated situations where the fields were not easily classified wholly as coarse or medium textured. And in those situations, the label directs the applicator to, essentially, err on the side of caution and apply Guardsman Max at the lower end of the rate range.

In other words, the record contained evidence that despite the combination of coarse- and medium-textured soils in the Lesiaks' fields, CVA should have applied Guardsman Max

conservatively, as if the soil were coarse textured. The record also contained evidence that the Lesiaks' crop was damaged. And the record contains evidence explaining the biological mechanism by which overapplication of Guardsman Max can cause the kind of damage that was observed in the Lesiaks' corn. In short, there was evidence from which the jury could have found that something damaged the Lesiaks' crop on coarse- and medium-textured soils, that Guardsman Max can cause that kind of damage, and that Guardsman Max was over-applied to the Lesiaks' fields. This was sufficient evidence to allow a jury to find that Guardsman Max injured the corn on both coarse- and medium-textured soils.

(c) Was Jury Capable of Allocating Damages Without Engaging in Speculation or Conjecture?

Flowerday's opinion was limited to the irrigated fields. Here, many of the fields contained both irrigated and nonirrigated portions and there was evidence that a lack of irrigation, among other things, caused damage to a number of fields. The issue is whether there is enough evidence in the record to allow a jury to reasonably apportion damages between each of these independent causes of yield loss. There is.

[5-7] We have explained that where a growing crop is injured but not rendered entirely worthless, the damage to it may be measured by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.[11] While it is the jury's duty to determine the amount of damages,[12] it is the duty of the trial court to refrain from submitting the issue of damages to the jury where the evidence is such that a jury could not determine the issue without indulging in speculation or conjecture.[13] But this duty

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[11] See, *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996); *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922).

[12] See *Bristol, supra* note 11.

[13] See *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

is balanced against the realization that determining the extent of crop loss, much like lost profits, requires reasonable estimation.[14] As a result, damages are not required to be proved with mathematical certainty, "'but the evidence must be sufficient to enable the trier of fact . . . to estimate with a reasonable degree of certainty and exactness the actual damages. . . .'"[15] We have also explained that if there is evidence establishing that damage occurred, "it is proper to let the jury determine what the loss probably was from the best evidence the nature of the case allows."[16] In short, we require enough evidence to provide a reasonable basis for the jury to estimate the extent of the damage.

At trial, the Lesiaks introduced exhibit 305, summarizing their estimated loss. Exhibit 305 contained the projected and actual yields for each field. Then, based on those figures, along with the price of corn and the estimated savings from not having to dry and transport a full crop, the Lesiaks estimated their loss. But the accuracy of exhibit 305 was called into question during trial. CVA asserts that exhibit 305 was unreliable and that therefore, a jury could only speculate as to the amount of damages suffered by the Lesiaks.

Specifically, CVA makes two points. First, the evidence was in conflict over what reasonable projected yields for each field would be. Second, CVA points out that the Lesiaks did not have exact records of each field's individual crop yield; instead, the Lesiaks worked from their total yield and used that number to estimate each field's yield. In effect, CVA asserts that without accurate projected yield figures, and because the Lesiaks did not track each individual field's actual yield, it would be impossible for the jury to accurately calculate damages because of the multitude of other events which caused crop loss on each field.

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[14] See, *Bristol, supra* note 11; *Peterson, supra* note 13.

[15] *Peterson, supra* note 13, 218 Neb. at 269, 354 N.W.2d at 633, citing *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

[16] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 292, 799 N.W.2d 249, 259 (2011).

But that is not the case. Here, there is sufficient evidence to allow a jury to reasonably calculate damages. First, there is sufficient evidence regarding the projected yields. The soil tests each listed a yield goal ranging from 180 to 200 bushels per acre (BPA) on each field. Tom Lesiak also testified that he created a "conservative" estimate for each field, projecting an average yield of approximately 180 BPA. And exhibit 305's projected yield figures were based on the alleged promises of Zmek and the performance of other farmers' fields in the nearby area under CVA's program. The jury could choose which evidence was most credible and work from those figures.

Furthermore, there is sufficient evidence in the record to establish the actual yields in each field, to a reasonable degree of certainty and exactness. The names of each field, where each is located, and the number of irrigated acres may be determined by cross-referencing exhibit 58 (the names and legal descriptions of each field), exhibit 173 (land value sheets), and exhibit 220 (diagrams of certain irrigation systems). Additionally, exhibit 93 contains all of the "yield maps" for each field. A yield map is created by the combine harvester as the crop is being harvested. A yield map calculates the average BPA based on the total crop input and the speed at which the combine is traveling. The yield maps also indicate the total number of harvested acres for each field.

At trial, Tom Lesiak testified that although the yield maps are not 100 percent accurate, they were about 90 percent accurate—certainly accurate enough to be a valuable guide to farmers analyzing their crop yields. The inaccuracy stems from the lag which occurs between a change in combine speed and the subsequent update of the combine's harvesting monitor, which produces the yield maps. Additionally, there is a drop in accuracy when the combine is forced to turn around at the end of rows. This is because the harvest rate calculation dips as the combine is forced to slow and there is no harvesting occurring.

It is undisputed that testimony adduced at trial indicates that multiple fields suffered crop loss from sources other than the alleged overapplication of Guardsman Max. But the record would allow a jury to subtract those damages out of the

calculation. For example, Tom Lesiak admitted that one of his fields, the "Sigea" field, suffered a loss from a lack of irrigation. The Sigea field was center-pivot irrigated, meaning that a large circular pivot irrigated the majority of the field. Thus, the corners of the field did not receive any irrigation. But, additionally, the pivot had a few plugged nozzles which caused a small circle in the interior of the pivot circle to receive an inadequate amount of water. This resulted in a loss attributed to a lack of irrigation.

A jury could deduct that loss out without resorting to speculation or conjecture. The Sigea yield map provides extensive information, including the total number of acres harvested, the average BPA yield for the entire field, and the number of acres harvested for each BPA range. For example, the Sigea field indicates that 156.18 acres were harvested, at an estimated 128.28 BPA. Of those 156.18 acres, 35.9 acres yielded less than 90 BPA, while 16.4 acres yielded 180 or more BPA. Those 35.9 acres correspond to the areas which received inadequate or no irrigation. Without going into the mathematical specifics, a jury could estimate the Sigea field's average BPA yield without those 35.9 nonirrigated acres. In other words, a jury could estimate the average BPA yield for just the irrigated portions of the field. From there, it is a matter of comparing that yield to the projected yield and then calculating the estimated economic loss.

A similar approach could be used for each of the fields where there were multiple causes of yield loss, regardless of whether that loss was from a lack of irrigation, sandburs, or other weeds or pests. Granted, the Sigea field is one of the easier examples, compared to some of the others, but the fact remains that there is a reasonable basis for the jury to approximate the damage allegedly caused by Guardsman Max. The law does not require mathematical certainty. Instead, the law requires a reasonable estimation based on the evidence in the record and the nature of the case. And the fact that such a calculation would require some sophistication from a jury, in that they would have to sift through large amounts of evidence, does not change that burden. Although the parties could have presented expert testimony to help the jury in performing that

task, it was not necessary for them to do so in order to avoid a directed verdict. Our system asks juries to make complex factual findings in many cases, and that is what the jury would have been asked to do here. There is evidence in the record which would allow a jury to find that the overapplication of Guardsman Max damaged the Lesiaks' fields and also to reasonably estimate the extent of the damage. The trial court erred in directing a verdict in favor of CVA.

### 2. Summary Judgment Disposition of Theories of Relief

[8] The Lesiaks also assert that the district court erred in various respects at the summary judgment stage. First, the Lesiaks assert that the district court improperly considered CVA's motion for summary judgment, in essence, because CVA's motion sought to strike particular legal theories of relief rather than claims. But there is no question that the parties may, in pretrial proceedings, seek to limit the scope of the issues on which evidence may be adduced and which may be submitted to the jury. A motion for summary judgment may be used for that purpose, and our case law is replete with instances where a motion for summary judgment was considered with regard to a specific legal theory.[17] In short, because a motion for summary judgment is a proper mechanism to dispose of individual legal theories, this assigned error has no merit.

### 3. Implied Services Warranty

Next, the Lesiaks argue that CVA breached its implied warranty to provide its services in a workmanlike and appropriate manner. The district court found that no such warranty existed under Nebraska law, except in cases involving building and construction contracts, and granted summary judgment to CVA on this issue. The Lesiaks assign this ruling as error. But because no implied services warranty exists in a contract for agronomical services or goods under Nebraska law, the district court's ruling was correct.

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[17] See, e.g., *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987).

The Lesiaks' argument presumes that their contract with CVA is a services contract. But regardless of whether the contract is for goods or services, the Lesiaks' claim fails. If the contract is determined to be a contract for the sale of goods, then Nebraska's Uniform Commercial Code controls.[18] The Uniform Commercial Code adopts only two implied warranties in a sale-of-goods contract: the implied warranty of merchantability[19] and the implied warranty of fitness for a particular purpose.[20] And while the Uniform Commercial Code explains that "other implied warranties may arise from course of dealing or usage of trade,"[21] the Lesiaks have offered no evidence that an implied services warranty arose through either source. As such, if the contract is considered a contract for the sale of goods, no services warranty is implied and the Lesiaks' assigned error lacks merit.

If the contract is determined to be a contract for the provision of services, then the common law would control. The only circumstance under which we have found an implied services warranty in a contract for services is in the context of building and construction contracts.[22]

The Lesiaks argue that an implied services warranty should be found here because CVA was hired to help "build" a corn crop. But it is a stretch to consider what was done here to be "building" similar to that in, for example, *Moglia v. McNeil Co.*[23] It has been explained that the rationale for allowing the purchaser of new construction to recover on a theory of breach of an implied warranty is that it may be impossible for the ordinary consumer to determine the building's structural quality, because many of the most important elements of its construction are hidden from view and are not discoverable

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[18] See Neb. U.C.C. § 2-102 (Reissue 2001).

[19] See Neb. U.C.C. § 2-314 (Reissue 2001).

[20] See Neb. U.C.C. § 2-315 (Reissue 2001).

[21] See § 2-314(3).

[22] See, e.g., *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005).

[23] *Id.*

even by careful inspection.[24] The consumer can determine little about the soundness of the construction but must rely upon the fact that the vendor-builder holds the structure out to the public as fit for use and of reasonable quality.[25] Therefore, the builder or seller of new construction, not unlike the manufacturer or merchandiser of goods, makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.[26]

Obviously, that logic is not applicable to spraying a corn crop, for several reasons—most notably, a corn crop is not a finished product capable of having a latent defect at the time of contracting. And to conclude otherwise would be to effectively eliminate the requirement that negligence be proved and, instead, impose strict liability for the results of the vendor's performance. Thus, we conclude that it is both unnecessary and unwise to expand our application of the implied services warranty outside of the building and construction context. This assignment of error lacks merit.

### 4. Economic Loss Doctrine

Finally, the Lesiaks assert that the district court erred when it granted summary judgment on the Lesiaks' negligence claim. The court determined that the economic loss doctrine applied and that the Lesiaks could only proceed under contractual theories of relief. Because we find the doctrine inapplicable here, this assignment of error has merit.

#### (a) Overview

The economic loss doctrine, generally stated, is a "judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are

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[24] See, e.g., *Dixon v. Mountain City Const. Co.*, 632 S.W.2d 538 (Tenn. 1982)*; McDonald v. Mianecki*, 79 N.J. 275, 398 A.2d 1283 (1979); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Smith v. Old Warson Development Company*, 479 S.W.2d 795 (Mo. 1972).

[25] See *Smith, supra* note 24.

[26] See *Pollard, supra* note 24. Accord *Dixon, supra* note 24.

economic losses."[27] While the doctrine may be easy to state, it is difficult to apply. Indeed, it has been described as a "confusing morass,"[28] and has been compared to the "ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*"[29] that could "consume much of tort law if left unchecked."[30] We confront the doctrine's application and scope in this case.

[9] The economic loss doctrine originated in the context of products liability actions. The case attributed with the creation of the doctrine, and its modern application in courts today, is *Seely v. White Motor Co.*[31] In *Seely*, the California Supreme Court explained:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.[32]

The U.S. Supreme Court adopted *Seely*'s reasoning in *East River S.S. Corp. v. Transamerica Delaval.*[33] *East River S.S. Corp.* was an admiralty case which applied the doctrine in a products liability context. *East River S.S. Corp.* stands for the proposition that where a defective product causes economic loss and is unaccompanied by personal injury or damage to

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[27] *Indemnity Ins. Co. v. American Aviation*, 891 So. 2d 532, 536 (Fla. 2004).

[28] See *id.* at 544 (Cantero, J., concurring; Wells, J., joins).

[29] *Grams v. Milk Products, Inc.*, 283 Wis. 2d 511, 539, 699 N.W.2d 167, 180 (2005) (Abrahamson, C.J., dissenting; Butler, J., joins).

[30] *Id.* at 539, 699 N.W.2d at 181.

[31] *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[32] *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

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

other property, the aggrieved party's remedy lies in contract law rather than tort law.[34]

We have adopted the doctrine, as described in *East River S.S. Corp.*, in Nebraska.[35] But the exact contours of the doctrine, particularly outside of the products liability context, have not been addressed. Each of our cases addressing the doctrine has involved a defective product.[36] And while the doctrine originated in the context of defective products, the doctrine's application has been expanding.[37] We take this opportunity to clarify the doctrine's application and scope in Nebraska.

(b) Analysis

[10,11] Here, we are presented with a situation where the product, Guardsman Max, was not alleged to be defective—instead, the Lesiaks claim the product was negligently applied, resulting in damage to their corn crop. After reviewing our own case law, the case law from other jurisdictions, and the scholarly work done on the subject, we hold that the economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties. And economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage.[38]

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[34] See *id.*

[35] See, *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 793 N.W.2d 445 (2011); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

[36] See, *Dobrovolny*, *supra* note 35; *Hilt Truck Line v. Pullman, Inc.*, 222 Neb. 65, 382 N.W.2d 310 (1986); *National Crane Corp., supra* note 35; *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds, National Crane Corp., supra* note 35.

[37] See, e.g., *Neibarger v Universal Cooperatives*, 439 Mich. 512, 486 N.W.2d 612 (1992).

[38] See, *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007); *Miller v. U.S. Steel Corp.*, 902 F.2d 573 (7th Cir. 1990).

Multiple rationales have been given to support the doctrine's existence. But the primary rationale, and the one that we find most compelling, is to maintain the line of demarcation between tort law and contract law.[39] In other words, "'[t]he underlying purpose of the economic loss rule is to preserve the distinction between contract and tort theories in circumstances where both theories could apply.'"[40] The concern is that if tort remedies were available where the losses suffered were only economic, then private ordering (contract law) would be less effective. If a party could simply avoid its contractual bargain by suing in tort, which often offers more generous terms of recovery, then the effectiveness of contract law would be reduced. Or, in the words of the U.S. Supreme Court, the doctrine exists to prevent contract law from drowning in a "sea of tort."[41]

But the opposite must also be true, and the same type of concern must also exist for tort law. While the doctrine has its place in the law of damages, it should not be interpreted so broadly as to undermine tort law and preclude tort remedies in situations which, historically, have presented viable tort cases.[42] That is to say, the doctrine should not be expanded to allow traditional tort remedies to drown in a sea of contract.

To that end, we are expressly limiting the doctrine's application and take a position similar to that espoused by the Supreme Court of Florida.[43] First, we reaffirm the doctrine's continued application in the products liability context. As applied in that context, the doctrine requires that where a defective product causes harm only to itself, unaccompanied by either personal injury or damage to other property, contract law provides the exclusive remedy to the plaintiff.[44] The reasoning for this proposition is strong: Where the damage done is only to the product itself, the buyer has experienced only a loss of the benefit of its

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[39] See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523 (2009).

[40] *Id.* at 546.

[41] *East River S.S. Corp., supra* note 33, 476 U.S. at 866.

[42] See *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

[43] See *Indemnity Ins. Co., supra* note 27.

[44] See *East River S.S. Corp., supra* note 33.

bargain, which is the essence of a warranty action.[45] We have recognized this reasoning in our case law.[46]

Second, the doctrine also applies where the alleged breach is only of a contractual duty, and no independent tort duty exists. Again, restated, the purpose of the doctrine is to preserve the distinction between tort law and contract law. Furtherance of that purpose requires that when the alleged breach is of a purely contractual duty—a duty which arises only because the parties entered into a contract—only contractual remedies are available. This is a commonsense conclusion. If the only duty breached is a contractual one, then only contractual remedies should be available. Thus, the doctrine serves to "weed[] out cases involving nothing more than an allegedly negligent failure to perform a purely contractual duty—a duty that would not otherwise exist."[47] Based on the doctrine's primary purpose of maintaining the boundaries of tort law and contract law, it is these cases where the doctrine most logically applies, because the plaintiff is suing for a breach of a contractual duty which would not have existed but for the contractual relationship.[48] This should be brought as a breach of contract action, and not a tort claim.[49]

We realize that this conclusion is somewhat at odds with past statements in some of our case law. Under Nebraska law, with each contract comes an accompanying duty "'to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done.'"[50] We have previously stated that a violation of that duty may give rise to a breach of contract action or a tort action for negligent performance of the contract.[51]

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[45] See *id.*

[46] See *Dobrovolny, supra* note 35.

[47] Johnson, *supra* note 39 at 567.

[48] See *id.*

[49] See *id.*

[50] *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 850, 606 N.W.2d 85, 91 (2000).

[51] See, *id.*; *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

[12] We qualify that statement now: Where only economic loss is suffered and the alleged breach is of only a contractual duty (such as the duty stated above), then the action should be in contract rather than in tort. In other words, the doctrine would apply to bar a tort action for the negligent performance of a contract when only economic losses were incurred. We also note that in each case where we have allowed a tort theory to proceed for breach of the above contractual duty, the outcome would remain the same under the standard we adopt today. That is to say, the doctrine would not bar tort theories in those cases, because either (1) the damages alleged were not solely economic losses or (2) there existed an independent tort duty alleged to be breached, which was separate and distinct from the above-stated contractual duty.[52]

In sum, we conclude that the primary purpose of the economic loss doctrine is to maintain the separateness of tort law and contract law. Generally speaking, the doctrine limits a party's ability to recover for economic losses (or commercial losses), unaccompanied by personal injury or damage to other property, allowing recovery only under contract law. But we expressly restrict the doctrine's application to where economic losses are (1) caused by a defective product or (2) caused by an alleged breach of a contractual duty, where no tort duty exists independent of the contract itself.

(c) Application

The question still remains whether the doctrine bars the Lesiaks' negligence claims here. It does not. It is true that the alleged breach was of a contractual duty which would not

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[52] See, *Thomas v. Countryside of Hastings*, 246 Neb. 907, 524 N.W.2d 311 (1994) (negligent installation of furnace damaged home and caused carbon monoxide injuries to residents); *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989) (action for professional negligence and breach of fiduciary duties); *Schuster v. Baumfalk*, 229 Neb. 785, 429 N.W.2d 339 (1988) (negligent repair of farm equipment damaged other buildings and equipment); *Lincoln Grain, supra* note 51 (action for professional negligence); *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954) (negligent installation of propane system resulted in destruction of residence).

have existed but for the creation of the contractual relationship between the Lesiaks and CVA. But the damage allegedly caused by the breach was not purely economic loss; rather, CVA's actions allegedly caused damage to the Lesiaks' corn, which qualifies as "other property"—that is, property other than the property that was sold pursuant to the contract. Thus, this case is removed from the doctrine's reach.

CVA argues, however, that the doctrine should still apply to bar the Lesiaks' claim because their claim involves only their disappointed commercial expectations and that as a result, contract law should control. This "'disappointed expectations'" test has been adopted by some courts.[53] In essence, the test stands for the proposition that "whether particular damage qualifies as damage to 'other property' turns on the parties' expectations of the function of the bargained-for product."[54] In *Grams v. Milk Products, Inc.*,[55] the Wisconsin Supreme Court reasoned that a commercial buyer should anticipate that a product could fail or disappoint in its performance and that the responsibility for protecting itself against economic loss (i.e., through a warranty) falls on the buyer.[56] Failure to do so, and regretting it later, is not grounds for allowing pursuit of a tort remedy when the issue could have, or should have, been a part of the bargaining process and resulting contract.[57] Thus, the *Grams* court held that "if claimed damages are the result of disappointed expectations of a bargained-for product's performance, the economic loss doctrine applies to bar the plaintiff's tort claims and the plaintiff must rely upon contractual remedies alone."[58]

But we are not persuaded by the *Grams* court's reasoning, and we decline to adopt it here. Adoption of the "disappointed

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[53] Ralph C. Anzivino, *The Disappointed Expectations Test and the Economic Loss Doctrine*, 92 Marq. L. Rev. 749, 753 n.24 (2009) (collecting cases).

[54] *Grams, supra* note 29, 283 Wis. 2d at 530, 699 N.W.2d at 176.

[55] See *Grams, supra* note 29.

[56] See *id.*

[57] See *id.*

[58] *Id.*, 283 Wis. 2d at 516, 699 N.W.2d at 169.

expectations" test would virtually destroy the "other property" exception espoused by the U.S. Supreme Court and adopted by this court in *Dobrovolny v. Ford Motor Co.*,[59] because almost nothing would qualify as "other property" under the "disappointed expectations" test. This is because the "disappointed expectations" test precludes tort remedies whenever the purchaser should have anticipated the occurrence of the damage at issue—in essence, whenever the occurrence of the damage was reasonably foreseeable.[60] Thus, under this test, if "other property" damage occurs, but it was foreseeable at the time of contracting, then all tort theories would be precluded. Therefore, the only circumstance in which tort theories would not be precluded would be when the damages were not foreseeable. But, of course, then a plaintiff would likely have no remedy in tort either.[61] In effect then, the "disappointed expectations" test eliminates tort remedies for damage to "other property," but that type of damage has traditionally been recoverable in tort.[62]

As noted by one author, the "disappointed expectations" test seems to create a presumption that by entering into a contract, a party's exclusive remedy for foreseeable harm (traditionally the province of tort law) is found only through contractual protection.[63] This might make sense if the parties did in fact bargain over the possible occurrence of damage, because then a court would be deferring to the parties' intentions as expressed through their contract. But where the damages were never bargained for and are not expressly dealt with in the contract, it makes no sense to preclude a party's traditional tort remedies. "In other words, if a party to a contract has not relinquished independent tort rights through private ordering, it is unfair to say that those independent tort rights have been lost because

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[59] *Dobrovolny, supra* note 35.

[60] See, *Grams, supra* note 29; *Foremost Farms USA Co-op v. Perf. Process*, 297 Wis. 2d 724, 726 N.W.2d 289 (Wis. App. 2006).

[61] See Anzivino, *supra* note 53.

[62] See *East River S.S. Corp., supra* note 33.

[63] See Johnson, *supra* note 39.

they *might* have been bargained away."[64] In effect, this would be a substitution of contract law for tort law and would go well beyond the boundary-line function of the economic loss doctrine. We instead adhere to the underlying purpose of the economic loss rule.

Furthermore, the "disappointed expectations" test is not in keeping with U.S. Supreme Court precedent. The Court addressed the scope of the "other property" exception in *Saratoga Fishing Co. v. J. M. Martinac & Co.*[65] In *Saratoga Fishing Co.*, a defective hydraulic system was installed in a fishing boat. The initial user of the boat added fishing equipment to the boat, including a skiff, seine net, and various other spare parts, and then sold the boat to a second user. The hydraulic system then malfunctioned, causing a fire which destroyed the boat and the extra equipment. The issue was whether the extra equipment constituted "other property." The Court determined that the extra equipment was "other property" and that the plaintiff was able to pursue remedies in tort. The Court reasoned that while parties could theoretically have included a term in the contract which would have dealt with the occurrence of the damage in that case, whether a hypothetical contractual remedy was available was irrelevant. The Court explained that "[n]o court has thought that the *mere possibility* of such a contract term precluded tort recovery for damage to . . . other property."[66]

The "disappointed expectations" test does just that—it precludes tort recovery based on the mere possibility that the parties could have included a contract term dealing with the occurrence of the damage at issue. This reasoning was rejected by the U.S. Supreme Court, and we likewise reject it here. As a result, the Lesiaks' negligence claim is not barred by the economic loss doctrine, because the Lesiaks assert that CVA's conduct harmed their corn crop, which is considered "other

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[64] *Id.* at 578-79 (emphasis supplied).

[65] *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 117 S. Ct. 1783, 138 L. Ed. 2d 76 (1997).

[66] *Id.*, 520 U.S. at 882 (emphasis supplied).

property." Therefore, the district court erred in granting summary judgment to CVA on this issue.

### 5. CVA's Cross-Appeal

On cross-appeal, CVA asserts that the Lesiaks were unable to prove the amount of money they saved from not having to dry and transport the corn that they allegedly lost; in essence, CVA claims that the Lesiaks could only speculate as to how much money they saved from having less corn to dry and transport. Therefore, CVA asserts that the district court erred in denying CVA summary judgment. But because the Lesiaks' estimation of per-bushel savings rests on competent evidence, this assignment of error is without merit.

[13] We have held that the denial of a summary judgment motion is neither appealable nor reviewable.[67] In *Moyer v. Nebraska City Airport Auth.*,[68] we explained that whether a motion for summary judgment should have been granted generally becomes moot after trial. This is because the overruling of such a motion does not decide any issue, but merely indicates that the trial court was not convinced that the moving party was entitled to judgment as a matter of law. And we explained that "'[a]fter trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.'"[69] Thus, we do not consider whether the district court erred in denying CVA summary judgment on this issue. Instead, this claimed error falls within CVA's general argument that the Lesiaks were unable to prove their damages with sufficient specificity. But the record reveals sufficient evidence to support the Lesiaks' per-bushel savings estimate.

Over objection, Tom Lesiak explained that the Lesiaks saved approximately $0.02 per bushel in drying costs and $0.10 per bushel in transportation costs. Adequate foundation was supplied for each figure. He explained that when a farmer deposits

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[67] See, e.g., *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[68] *Id.*

[69] *Id.* at 208, 655 N.W.2d at 862.

his crop in a grain elevator, the farmer is charged a certain amount of money based on the moisture remaining in the crop. Tom Lesiak knew the grain elevators' moisture rates in 2005 and knew the moisture levels in his corn. From those figures, he was able to approximate the amount of money saved per bushel for drying costs. With regard to the transportation costs, he explained that he was familiar with what people were charging to transport crops in 2005. Transportation costs were an expense that the Lesiaks incurred every year, including in 2005, so they knew what had been spent to transport their actual yield. Based on this information, he was able to estimate how much money was saved from not having to haul the lost yield. This information forms a reasonable basis for the jury to calculate any savings obtained by the Lesiaks in not having to dry and transport the allegedly lost yield. Further specifics, such as fuel costs or machinery use-depreciation costs, are not necessary.[70] Therefore, CVA's cross-appeal is without merit.

## V. CONCLUSION

We determine that the district court erred in granting a directed verdict in favor of CVA. We also find that the district court erred in granting summary judgment on the Lesiaks' negligence claim. The Lesiaks' other assigned errors, however, lack merit, as does CVA's assigned error on cross-appeal. The judgment is affirmed in part, and in part reversed and remanded for a new trial consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating in the decision.

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[70] See *Peterson, supra* note 13.

# State of Nebraska, appellee, v. Jorge Vigil, appellant.

810 N.W.2d 687

Filed January 27, 2012. No. S-11-434.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Rules of Evidence: 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 review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
4. **Rules of Evidence: Hearsay.** Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.
5. ____: ____. Under the federal and Nebraska rules of evidence, statements admissible under the medical diagnosis and treatment exception are not restricted to statements made by the patient, and the statements need not be made to a physician.
6. **Rules of Evidence: Hearsay: Sexual Assault: Minors.** Statements made by a child victim of sexual abuse to a forensic interviewer in a medical setting may be admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), even though the interview has the partial purpose of assisting law enforcement's investigation of the crimes.
7. **Rules of Evidence: Hearsay.** Statements gathered strictly for investigatory purposes do not fall under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008).
8. **Rules of Evidence: Hearsay: Proof.** Statements having a dual medical and investigatory purpose are admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), only if the proponent of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.
9. **Rules of Evidence: Hearsay: Appeal and Error.** Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), and an appellate court reviews that determination for clear error.

10. **Rules of Evidence: Hearsay.** The appropriate state of mind of the declarant under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), may be reasonably inferred from the surrounding circumstances.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Jennifer A. Birmingham, Chief Deputy Madison County Public Defender, and Melissa A. Wentling for appellant.

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

CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and MOORE, Judge.

MCCORMACK, J.

## NATURE OF CASE

The issue in this case is whether statements of a child sexual assault victim to a forensic interviewer working for the child advocacy department of a hospital are admissible under the Nebraska Evidence Rules hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."[1] The interview, which was reported to the supervising physician for diagnostic and treatment purposes, was also shared with law enforcement so that the child victim could be spared the trauma of multiple interviews. The appellant, Jorge Vigil, argues that because some time had passed since the sexual assaults and the victim did not see the physician that day, the primary purpose of the interview was for law enforcement purposes and it should not fall under rule 803(3). Vigil asserts that he was clearly prejudiced by the trial court's failure to grant his motion in limine to exclude the interview from trial.

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[1] Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008).

## BACKGROUND

Vigil was charged with two counts of sexual assault of a child in the first degree. The victim, D.S., was his stepdaughter. Prior to the trial, Vigil filed a motion in limine seeking to exclude a video-recorded interview of D.S. on the ground that it was inadmissible hearsay. The trial court denied the motion. At trial, Vigil renewed his hearsay objection to the evidence. The trial court overruled the objection and allowed the interview into evidence. The court found that the interview fell under rule 803(3), the medical purpose exception to the hearsay rule.[2]

The interview in question was conducted on September 15, 2010. In the early morning hours of that same day, D.S. had told her mother that Vigil had repeatedly forced her to perform oral sex on him over the course of the previous 2 years. D.S. was 12 years old at the time she reported the abuse. The sexual abuse began when she was 10 years old.

D.S.' mother testified that she drove D.S. to the local sheriff's office to report the abuse the same day D.S. reported it. An investigator at the sheriff's office, Michael Bowersox, was their principal contact. Bowersox testified that both D.S. and her mother were crying and visibly upset. After a short conversation, Bowersox ascertained that D.S. had possibly been sexually abused and advised D.S.' mother to take D.S. immediately to the Northeast Nebraska Child Advocacy Center (CAC) located in a local hospital.

Bowersox explained that it was the policy of the sheriff's office to send children who allege sexual abuse to the CAC to make sure they are medically screened and receive proper followup care. He believed that D.S. needed such medical services. Bowersox also explained that the CAC provides a "one-stop shop," because the CAC usually allowed law enforcement to observe the forensic interview conducted at the hospital before the medical examination. Bowersox explained that this relationship between the CAC and law enforcement was devised to protect the child victim from having to repeat the telling of harmful events to multiple interviewers.

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[2] *Id.*

Bowersox told D.S.' mother that, at the hospital, D.S. would be interviewed by a forensic interviewer and that a doctor or nurse would conduct a medical examination. The mother testified that Bowersox explained to her the process they would go through at the CAC and what medical procedures would be performed. She was aware that law enforcement would likely be able to view the interview.

The mother testified that when she took D.S. to the hospital, the only thing on her mind was whether "my daughter was okay." The mother testified that she was concerned about possible medical issues stemming from the abuse. Particularly, she was worried that D.S. might have contracted herpes from Vigil. The mother noted that D.S. had been "complaining a lot" about being "sick in her throat" over the course of 2010. The mother testified that she was also concerned about her daughter's mental health, especially after "hold[ing] whatever feelings she were [sic] having for two years."

On the way to the hospital, the mother explained to D.S. what would occur upon their admission to the hospital. She told D.S. that she would be subjected to a physical examination. In particular, the mother told D.S. that she would probably "have something that we adults call Pap smear." D.S. understood this was a medical procedure. D.S. had seen doctors before, but had not yet had a gynecological examination.

The mother also told D.S. she would be interviewed at the hospital. The mother testified that she explained to D.S. the purposes of the interview. She did not "exactly" tell D.S. that the interview might serve a law enforcement purpose. Rather, she told D.S. that the interview "was a process we had to go through to clarify everything that has been happening the past two years."

D.S. testified that she understood she was going to a hospital and that she was expecting to see a doctor and have a physical examination on that day. D.S. testified that she was worried "something might be wrong" with her. D.S. elaborated she had been told that Vigil had "a sickness." She testified, "[H]e had it and he made me do things I didn't want to and I was afraid I had gotten it." D.S. described that Vigil did not use a condom

during the assaults. D.S. testified that she later learned the "sickness" was herpes.

D.S. testified that she and her mother entered the hospital through the front entrance. D.S. was then signed in as a patient of the hospital. D.S. was sitting next to her mother when she signed the patient service agreement. D.S. and her mother were also given a patient service brochure. After that, D.S. was taken into an interview room. D.S. was reasonably familiar with medical examinations and procedures, and she testified that she believed "it was very important to tell the whole truth" when talking to the people at the hospital.

Kelli Lowe, a forensic interviewer for the CAC, conducted the interview of D.S. Lowe testified that the CAC is a department of the hospital. Lowe's educational background is in counseling and social sciences. She also has training through the National Children's Advocacy Center in how to interview child sexual assault victims and how to assist a physician with assault examination kits. Lowe stated that she typically assists the physician when a physical examination is conducted at the CAC.

Lowe testified that her role as a forensic interviewer is to gather information from the patient to determine possible abuse or traumatic injury. If the treating physician is there, he or she will observe the interview through closed-caption television in another room. If the treating physician is not present, it is Lowe's job to summarize the interview for the physician "so they don't have to retake that history." Lowe testified that the treating physician utilizes the forensic interview in determining the proper treatment and therapy for the patient.

Lowe explained that patients are generally referred to the CAC by the hospital's emergency department, the Department of Health and Human Services, or law enforcement. With the patient's permission, law enforcement, members of the county attorney's office, and members of the Department of Health and Human Services are allowed to observe the forensic interview through closed-caption television in another room. However, Lowe testified that the purpose of the interviews was not to aid and assist law enforcement. Her job is "simply . . . to gather

the information for all, for everyone involved so that the child only has to go through it one time."

Lowe testified that her interview of D.S. was for the purpose of determining a medical or psychological diagnosis and a recommended treatment plan. Lowe explained that the details of the sexual abuse are a necessary part of medical diagnosis and treatment. In particular, such details are relevant to therapy, possible sexually transmitted diseases, and safety plans.

The DVD of the interview shows that Lowe introduced herself to D.S. as a person whose job it is to "talk to people" and "find out what is going on." Lowe proceeded to ask D.S. open-ended questions about the abuse, and D.S. described the sexual assaults in detail. In summary, D.S. reported that Vigil forced D.S. to perform oral sex on him 10 to 20 times over a period of 2 years. He also made her watch pornography.

Representatives of the local sheriff's office and the Department of Health and Human Services observed the interview and were given copies of the recorded interview and report. The physician was not present for the interview, but Lowe gave the physician a summary of the interview before D.S. was discharged from the hospital on September 15, 2010. Based on Lowe's summary of the interview, the physician directed the discharge instructions, which recommended therapy and a physical examination. The mother ultimately decided to postpone the physical examination until September 24, at which time a thorough physical examination was conducted. No evidence of sexual abuse or other physical injury or disease was detected during the examination. D.S. attended therapy as directed by the treating physician's original discharge instructions.

After a trial in which the State presented the testimony of D.S., her mother, Bowersox, Lowe, and others, the jury found Vigil guilty of both counts of sexual assault. Vigil was sentenced to 20 to 30 years' imprisonment on each count, to be served consecutively. Vigil appeals the convictions.

## ASSIGNMENTS OF ERROR

Vigil assigns that the trial court erred in overruling his motion in limine and in allowing Lowe's testimony and evidence of the

CAC interview to be heard by the jury, because that testimony and evidence are inadmissible hearsay for which there are no exceptions.

## STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility.[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]

[3] 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.[5]

## ANALYSIS

[4] Rule 803(3) provides that the hearsay rule does not exclude "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." Rule 803(3) is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.[6] In order for statements to be admissible under rule 803(3), the party seeking to introduce the evidence must demonstrate

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[3] *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

[4] *Id.*

[5] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[6] See, *State v. Beeder*, 270 Neb. 799, 707 N.W.2d 790 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007); *State v. Hardin*, 212 Neb. 774, 326 N.W.2d 38 (1982).

(1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.[7]

[5] Although the heart of the rule 803(3) exception lies in statements made by a patient to a treating physician, the exception casts its net wider than the patient-physician relationship.[8] Under the federal and Nebraska rules of evidence, statements admissible under the medical diagnosis and treatment exception are not restricted to statements made by the patient, and the statements need not be made to a physician.[9] Thus, in addition to statements made to physicians, we have held that a child's statements to a therapist describing sexual abuse were admissible under rule 803(3).[10] We have also held that statements by a child's foster mother to a therapist, reporting unusual sexual behavior by a child and her suspicions of sexual abuse, were admissible under rule 803(3).[11]

While we have not had occasion to address additional reporting scenarios, other jurisdictions have held that medical purpose statements can be made to various other recipients, including social workers and forensic interviewers.[12] In such instances, courts sometimes look to whether the recipient is a

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[7] See, *In re Interest of B.R. et al., supra* note 3; *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004). See, also, e.g., *State v. Edward Charles L.*, 183 W. Va. 641, 398 S.E.2d 123 (1990); *In re Paternity of H.R.M.*, 864 N.E.2d 442 (Ind. App. 2007); *State v. Williams*, 137 Wash. App. 736, 154 P.3d 322 (2007); *People v Hackney*, 183 Mich. App. 516, 455 N.W.2d 358 (1990); *Begley v. State*, 483 So. 2d 70 (Fla. App. 1986).

[8] *In re Interest of B.R. et al., supra* note 3.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] See, generally, 38 A.L.R.5th 433 (1996).

member of a medical diagnostic team[13] or is part of the "chain of medical care."[14]

And, while we have never specifically addressed the question of mixed medical and investigatory purposes, other courts agree that the purpose of the statement need not be solely for the purpose of medical diagnosis or treatment in order to fall under rule 803(3).[15] Rather, a statement is generally considered admissible under the medical purpose hearsay exception if gathered for dual medical and investigatory purposes.[16]

It has been held that even the declarant's knowledge that law enforcement is observing or listening to the statements does not necessarily preclude admissibility of a statement as being for a medical purpose.[17] Further, the "predominant purpose" of the statement is not the real question in determining admissibility.[18] The fundamental inquiry is whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment. For, "[i]f the challenged statement has some value in diagnosis or treatment, the patient would still have the requisite motive for providing the type of 'sincere and reliable' information that is important to that diagnosis and treatment."[19]

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[13] See *State v. Salazar*, 504 N.W.2d 774 (Minn. 1993).

[14] *State v. Donald M.*, 113 Conn. App. 63, 71, 966 A.2d 266, 271 (2009).

[15] See, *State v. Payne*, 225 W. Va. 602, 694 S.E.2d 935 (2010); *State v. White*, 145 N.H. 544, 765 A.2d 156 (2000), *vacated on other grounds sub nom. White v. Coplan*, 399 F.3d 18 (1st Cir. 2005); *State v. Janda*, 397 N.W.2d 59 (N.D. 1986); *State v. Hebert*, 480 A.2d 742 (Me. 1984); *State v. Donald M., supra* note 14; *State v. Williams, supra* note 7; *Webster v. State*, 151 Md. App. 527, 827 A.2d 910 (2003); *State v. Isenberg*, 148 N.C. App. 29, 557 S.E.2d 568 (2001); *People v Van Tassel (On Rem)*, 197 Mich. App. 653, 496 N.W.2d 388 (1992); *In re Lucas*, 94 N.C. App. 442, 380 S.E.2d 563 (1989).

[16] See *id.* Compare *State v. Stafford*, 317 N.C. 568, 346 S.E.2d 463 (1986).

[17] See *State v. Miller*, 121 Conn. App. 775, 998 A.2d 170 (2010).

[18] See *Webster v. State, supra* note 15, 151 Md. App. at 545, 827 A.2d at 920.

[19] *Id.* at 545-46, 827 A.2d at 920.

Under this reasoning, several courts have specifically found admissible statements by child sexual assault victims to forensic interviewers working for hospital child advocacy centers.[20] In *State v. Donald M.*,[21] the police arranged for a 10-year-old girl to go to a child advocacy center located in a local hospital. At the center, the girl was interviewed by a child interview specialist who did not have medical training. However, the interviewer, who had degrees in social work and psychology, stated that the purpose of the interview was to assess the victim for psychological and physical needs stemming from the abuse. While the child recalled little about the interview or its purpose, a social worker testified that she had explained to the victim that she was going to talk to the interviewer to make sure she was safe, help her deal with what she went through, and decide whether a doctor needed to examine her. The interview ultimately did not result in a medical examination, because the victim did not express any medical needs, but the victim and her family were referred for therapy. The court upheld the trial court's admission of the videotaped interview, because the statements were made, at least in part, for purposes of medical diagnosis or treatment.[22]

Similarly, in *State v. Richardson*,[23] the mother of two young victims of sexual abuse took them to a child medical evaluation program at a hospital upon the suggestion of the sheriff's department. The mother understood that the program coordinators would be able to conduct a more thorough examination of the children than the one conducted at the emergency room a month earlier. At the hospital, a mental health consultant conducted videotaped interviews of the children in order to assist the supervising physician in a subsequent examination of the

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[20] *State v. Payne, supra* note 15; *Branch v. State*, 998 So. 2d 411 (Miss. 2008); *State v. Lukacs*, 188 Ohio App. 3d 597, 936 N.E.2d 506 (2010); *State v. Donald M., supra* note 14; *State v. Williams, supra* note 7; *Webster v. State, supra* note 15; *State v. Waddell*, 130 N.C. App. 488, 504 S.E.2d 84 (1998); *State v. Richardson*, 112 N.C. App. 58, 434 S.E.2d 657 (1993).

[21] *State v. Donald M., supra* note 14.

[22] *Id.* See, also, *State v. Miller, supra* note 17.

[23] *State v. Richardson, supra* note 20.

children. The court upheld the trial court's admission of the videotapes under the hearsay exception for medical diagnosis or treatment.

[6] We agree that statements made by a child victim of sexual abuse to a forensic interviewer in a medical setting may be admissible under rule 803(3) even though the interview has the partial purpose of assisting law enforcement's investigation of the crimes. In fact, we note that Neb. Rev. Stat. § 28-711 (Reissue 2008) places a legal obligation on medical professionals to report any evidence of child abuse or neglect to law enforcement and, further, that law enforcement plays a vital role in keeping the child safe from further physical and psychological harm.

[7,8] But statements gathered strictly for investigatory purposes do not fall under rule 803(3).[24] Statements having a dual purpose are admissible under rule 803(3) only if the proponent of the statements demonstrates that (1) the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.[25]

[9] Whether a statement was both taken and given in contemplation of medical diagnosis or treatment is a factual finding made by the trial court in determining the admissibility of the evidence under rule 803(3), and we review that determination for clear error.[26]

[10] We said in *State v. Vaught*[27] that the appropriate state of mind of the declarant may be reasonably inferred from the surrounding circumstances. In this case, the circumstantial

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[24] See *State v. Payne, supra* note 15. Compare *State v. Stafford, supra* note 16.

[25] See, *In re Interest of B.R. et al., supra* note 3; *State v. Vaught, supra* note 7. See, also, e.g., *State v. Edward Charles L., supra* note 7; *In re Paternity of H.R.M., supra* note 7; *State v. Williams, supra* note 7; *People v Hackney, supra* note 7; *Begley v. State, supra* note 7.

[26] See, *State v. McCave, supra* note 4; *Webster v. State, supra* note 15.

[27] *State v. Vaught, supra* note 7. See, also, e.g., *Webster v. State, supra* note 15; *State v. Alvarez*, 110 Or. App. 230, 822 P.2d 1207 (1991).

evidence and D.S.' testimony indicate that D.S. believed, at the time of the interview, she was going to be subjected to a physical examination at the hospital. As the mother was going to the hospital, her principal concern was with D.S.' physical and psychological well-being, and it appears that this was communicated to D.S. D.S. observed that she was checked in as a patient of the hospital before proceeding to the interview. D.S. testified that she was particularly concerned that she might have contracted a sexually transmitted disease from the sexual contacts. The trial court thus did not clearly err in determining that D.S. had a legitimate medical purpose and a motivation to be truthful during the interview in her descriptions of the sexual contacts.

We also conclude that the trial court did not clearly err in finding that the statements were pertinent to medical diagnosis or treatment. We have said that description of medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, are reasonably pertinent to diagnosis.[28] We reject Vigil's contention that D.S.' statements do not fall under rule 803(3) because she did not complain of physical symptoms at the time of the interview or because the alleged abuse did not occur shortly before the interview. There were reasonable concerns that D.S. might have contracted a sexually transmitted disease. D.S. was taken to the hospital the day she told her mother of the abuse, and her admission to the CAC on September 15, 2010, was the first opportunity for an evaluation of the possible medical consequences of the multiple sexual contacts with Vigil. A sexual assault victim may have injuries or may have contracted a sexually transmitted disease even though the victim feels no pain and bears no external signs of injury.[29]

Moreover, there were concerns about D.S.' psychological health. Details of the abuse are relevant to psychological implications regardless of whether any physical injury occurred. As

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[28] *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992).

[29] See *Webster v. State, supra* note 15.

recognized in *In re Interest of B.R. et al.*,[30] evaluation of the need for psychological treatment is a fundamental component of sexual assault cases and, thus, a component of medical diagnosis and treatment in such cases. Where an individual is alleged to be the victim of sexual assault, statements reasonably pertinent to medical diagnosis and treatment of both physical and psychological trauma are admissible under rule 803(3).[31] Insofar as *State v. White*[32] holds otherwise, we overrule that case.

While statements relating to fault are generally not admissible under rule 803(3), when a child is sexually abused, and especially when the child has a familial relationship with the child's abuser, the identity of the perpetrator is reasonably pertinent to diagnosis and treatment, because the victim cannot be effectively treated if sent right back into the abuser's clutches.[33] In this case, the evidence was that Vigil was going to return home in approximately 1 week, after having served jail time for driving with a suspended license.

The frequency and nature of the sexual contacts with Vigil were part of D.S.' medical history. Lowe indicated that information was necessary for determining medical or psychological diagnosis, and for a recommended treatment and safety plan. Lowe testified that, as was her regular practice, she conveyed a summary of the interview to the treating physician, who relied

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[30] *In re Interest of B.R. et al., supra* note 3.

[31] See *State v. Grant*, 776 N.W.2d 209 (N.D. 2009). See, also, e.g., *U.S. v. Gabe*, 237 F.3d 954 (8th Cir. 2001); *U.S. v. Cherry*, 938 F.2d 748 (7th Cir. 1991); *Ex parte C.L.Y.*, 928 So. 2d 1069 (Ala. 2005); *Hawkins v. State*, 348 Ark. 384, 72 S.W.3d 493 (2002); *Oldman v. State*, 998 P.2d 957 (Wyo. 2000); *State v. Stinnett*, 958 S.W.2d 329 (Tenn. 1997); *Jones v. State*, 606 So. 2d 1051 (Miss. 1992); *State v. Robinson*, 153 Ariz. 191, 735 P.2d 801 (1987); *State v. Sheppard*, 164 Ohio App. 3d 372, 842 N.E.2d 561 (2005).

[32] *State v. White*, 2 Neb. App. 106, 507 N.W.2d 654 (1993).

[33] *State v. Beeder, supra* note 6. See, also, e.g., *United States v. Iron Shell*, 633 F.2d 77 (8th Cir. 1980); *State v. Bullock*, 320 N.C. 780, 360 S.E.2d 689 (1987); *Goldade v. State*, 674 P.2d 721 (Wyo. 1983); *State v. Vosika*, 83 Or. App. 298, 731 P.2d 449 (1987); *Stallnacker v. State*, 19 Ark. App. 9, 715 S.W.2d 883 (1986).

upon that information in formulating D.S.' discharge instructions. The discharge instructions included a therapy referral and recommended that a physical examination be conducted. The trial court did not err in finding that the interview of D.S. was reasonably pertinent to medical diagnosis and treatment.

The only issue in this appeal was whether the trial court properly admitted D.S.' interview over Vigil's hearsay objection. We determine that the trial court did not err in finding that the elements of the medical purpose exception found in rule 803(3) were met. Therefore, Vigil's assignment of error lacks merit and we affirm the convictions and sentences imposed below.

## CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

AFFIRMED.

HEAVICAN, C.J., WRIGHT, and GERRARD, JJ., not participating.

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## STATE OF NEBRASKA, APPELLEE, V. MARCO ENRIQUE TORRES, JR., APPELLANT.

812 N.W.2d 213

Filed February 3, 2012. No. S-10-111.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Other Acts: Appeal and Error.** It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under Neb. Evid. R. 403 and 404(2), Neb. Rev. Stat. §§ 27-403 and 27-404(2) (Reissue 2008), and the trial court's decision will not be reversed absent an abuse of discretion.
3. **Statutes.** The interpretation of a statute presents a question of law.
4. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards,

however, is a question of law, which an appellate court reviews independently of the trial court's determination.

5. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
6. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for the Nebraska Supreme Court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.
7. ____: ____: ____. A sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by an appellate court.
8. **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.
9. ____: ____. 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).
10. **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.
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) (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.
12. **Rules of Evidence.** A proponent of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), shall, upon objection to its admissibility, be required to state on the record the specific purpose or purposes for which the evidence is being offered, and the trial court shall similarly state the purpose or purposes for which such evidence is received.
13. **Rules of Evidence: Jury Instructions.** Any limiting instruction given upon receipt of evidence offered pursuant to Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), shall likewise identify only those specific purposes for which the evidence was received.
14. **Intent: Words and Phrases.** Intent is generally defined as the state of mind accompanying an act.
15. **Rules of Evidence: Other Acts.** Under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008), evidence of other crimes or wrongs, while not admissible to prove the character of a person in order to show that he or she acted in conformity therewith, is admissible for other purposes, including motive.

16. **Words and Phrases.** Though difficult to define, character has been described as the generalized tendency to act in a particular way.
17. **Criminal Law: Words and Phrases.** Motive is defined as that which leads or tempts the mind to indulge in a criminal act.
18. **Jury Instructions: Appeal and Error.** In making a determination as to whether the giving of an overly broad jury instruction is harmless, an appellate court must decide whether the giving of the instruction materially influenced the jury to reach a verdict adverse to the substantial rights of the defendant.
19. **Conspiracy: Hearsay: Rules of Evidence.** Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008), is applicable regardless of whether the defendant is charged with conspiracy.
20. ____: ____: ____. Before a trier of fact may consider testimony under Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008), a prima facie case establishing the existence of a conspiracy must be shown by independent evidence.
21. **Sentences: Death Penalty.** That a method of execution is cruel and unusual punishment bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself.
22. **Statutes: Constitutional Law: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
23. **Constitutional Law: Appeal and Error.** The Nebraska Supreme Court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.
24. **Aggravating and Mitigating Circumstances: Mental Distress: Juries.** A jury may not consider a victim's mental anguish in finding the existence of the aggravating circumstance set forth in Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008).
25. **Aggravating and Mitigating Circumstances: Proof: Words and Phrases.** Exceptional depravity pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.
26. **Homicide: Aggravating and Mitigating Circumstances.** The Nebraska Supreme Court has identified specific narrowing factors that support a finding of exceptional depravity: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim.
27. **Homicide: Aggravating and Mitigating Circumstances: Other Acts: Words and Phrases.** History as contemplated by Neb. Rev. Stat. § 29-2523(1)(a) (Reissue 2008) refers to the individual's past acts preceding the incident for which he or she is on trial, and substantial refers to an actual, material, and important history of acts of terror of a criminal nature, but does not refer to the particular incident involving the homicide for which he or she is subject to sentence.
28. **Sentences: Aggravating and Mitigating Circumstances: Proof.** There is no burden of proof with regard to mitigating circumstances, but because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.

29. **Aggravating and Mitigating Circumstances: Words and Phrases.** For purposes of Neb. Rev. Stat. § 29-2523(2)(c) (Reissue 2008), extreme means that the disturbance must be existing in the highest or the greatest possible degree, very great, intense, or most severe.
30. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.
31. ____: ____: ____: ____. In reviewing a sentence of death, the Nebraska Supreme Court considers whether the aggravating circumstances justify imposition of a sentence of death and whether any mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.
32. ____: ____: ____: ____. The Nebraska Supreme Court is required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty.
33. ____: ____: ____: ____. The Nebraska Supreme Court's proportionality review, which is separate from the sentencing panel's, looks only to other cases in which the death penalty has been imposed and requires the court to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge. Affirmed.

Kirk E. Naylor, Jr., and Peter K. Blakeslee for appellant.

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

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

HEAVICAN, C.J.

## I. INTRODUCTION

Marco Enrique Torres, Jr., was convicted by jury of two counts of first degree murder, one count of robbery, three counts of use of a deadly weapon to commit a felony, and one count of unauthorized use of a financial transaction device. Torres was sentenced to death on each count of murder, 50 years' to 50 years' imprisonment on each of the robbery and use counts, and 20 months' to 5 years' imprisonment for the unauthorized use of a financial transaction device. In this automatic appeal

of his conviction and death sentence,[1] Torres assigns a number of errors related to both the trial and sentencing phases of his trial. We affirm.

## II. FACTUAL BACKGROUND

### 1. Welfare Check Leads to Discovery of Victims

On March 5, 2007, at approximately 8:50 p.m., law enforcement officers responded to a request to perform a welfare check on the owner of a Grand Island, Nebraska, home, Edward Hall. The check was requested by Gina Padilla, a resident of the home. In the home, officers discovered Hall's body, bound with an orange extension cord, gagged with the belt from a bathrobe, and seated in an armchair on the first floor of the home. The body of Timothy Donohue, another resident of the home, was discovered upstairs.

### 2. Autopsy Results and DNA Evidence

Autopsies were performed on both Hall and Donohue by a forensic pathologist. Hall's autopsy revealed that he had suffered three "contact" gunshot wounds to the head and that those wounds were made by a small-caliber weapon. Hall's lips were purple, suggesting a lack of oxygen prior to his death. Hall's cause of death was listed as asphyxiation by gagging, suffocation, physical restraint, and multiple deeply penetrating gunshot wounds. The pathologist testified that in any case, the gunshots would have killed Hall, but that if Hall had not been shot, he would have asphyxiated.

Donohue's cause of death was three gunshot wounds to the head and chest. The pathologist testified that these shots were fired at close range, again probably contact or near-contact shots.

The pathologist was unable to give an exact time of death for either Hall or Donohue, but did testify that it was his opinion that both died at or around the same time, on March 3, 2007, or possibly in the early hours of March 4. The pathologist indicated that it was not possible to determine who died first.

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[1] See Neb. Rev. Stat. § 29-2525 (Reissue 2008).

DNA testing was performed on the bathrobe belt found gagging Hall and the extension cord binding Hall, as well as on cigarette butts found in Donohue's room. Torres' DNA was found in a mixture with Hall's DNA on the belt and could not be excluded as a source of DNA on the extension cord. And Torres' DNA was a contributor to DNA mixtures found on the cigarette butts.

### 3. Relationship Between Hall and Other Players

From the record, it appears that Hall was a generous person. This generosity was apparently responsible for Donohue's taking up residence in Hall's home—Hall allowed Donohue to move into a room on the second floor. This generosity was also apparently the reason for Padilla's presence in Hall's home; she moved in after agreeing to keep the house clean and look after Hall's many cats.

Padilla was dating a man named "Jose Cross," who dealt drugs in the Grand Island area. Cross eventually moved into Hall's home and used the house as a base for his drug business. Through that drug business, Cross was acquainted with a man named "William Packer," who also ran an area drug business. It was through Packer that Torres met Cross, Padilla, and Donohue.

### 4. Torres Obtains Gun

In early February 2007, Torres informed Packer that he wished to obtain a gun. Packer took Torres to the home of a man who arranged for the delivery of a weapon. The man left Torres and Packer alone in a room with the weapon, and, according to the man's testimony, after Torres and Packer left the room, the gun was also gone. The man further testified that the gun in question was a black or brown .22-caliber revolver.

### 5. Events of March 2007

On March 1, 2007, Torres contacted Cross about staying at Hall's home, as he had nowhere else to go. Cross was reluctant, but Donohue agreed to allow Torres to stay in his room.

Early the next morning, March 2, 2007, Cross and Padilla left Hall's home for a planned trip to Texas with Padilla's

mother, leaving Torres with Hall and Donohue. According to Cross, Torres, who was originally from Texas, was interested in returning to Texas. Cross testified that he did not want Torres to know that the couple was leaving or where they were going, because he knew Torres had a gun.

It is not clear from the record what Torres, Donohue, and Hall did during the daytime hours of March 2, 2007. But at approximately 11 p.m., Hall went to a discount store in Grand Island to purchase a home theater system. Afterward, Hall, who was driving his white Ford Focus station wagon, took a friend and her son out for a late meal. Hall paid for the meal at 12:49 a.m. on March 3 and then dropped off the friend and her son at the son's apartment. This was apparently the last time Hall was seen alive; another witness testified that she had daily or near-daily contact with Hall, but that the last time she spoke with him was on March 2.

Bank records show that between 2:41 and 2:54 a.m. on March 3, 2007, Hall's automatic teller machine (ATM) card was used several times. ATM security footage reveals that it was Torres who was using Hall's card. Bank records indicated that the last transaction, at 2:54 a.m., occurred at a discount store in Grand Island. Security footage from that store shows Torres entering the store alone at approximately 2:52 a.m. and leaving at approximately 3:30 a.m. Torres then apparently went to a motel in Grand Island.

Telephone records from the motel show that repeated calls were made to Cross' cellular telephone from rooms in which Torres was known to have stayed. According to Cross, in one call, Torres allegedly asked for drugs, so Cross arranged for his brother, who was also in Grand Island, to bring some drugs to Torres. In a second call, Torres allegedly told Cross that Cross and Padilla should not go back to Hall's house without letting Torres know. Torres then indicated that after Cross and Padilla had left Hall's house earlier the previous day, Donohue became angry and tried to break into Cross and Padilla's room. When Torres tried to stop him, Hall came upstairs and mentioned something about calling the police. Cross testified, "[Torres] told me that, you know, can't have cops, and he had to put them to sleep." Cross testified that he understood that to mean

that Torres had killed Hall and Donohue. Cross testified that he did not remember when these conversations took place; telephone records suggest that the calls were probably placed at 10 a.m. or later on March 3, 2007.

Torres checked out of the motel in Grand Island on March 5, 2007. Several days later, on or about March 8, Torres arrived in Houston, Texas. Once in Houston, he contacted an ex-girlfriend who resided there. The ex-girlfriend met Torres, who was driving a white station wagon, and accompanied him to a local motel.

While at the motel, Torres learned of the investigation into the murders of Hall and Donohue and that he was wanted for questioning. Torres also learned that law enforcement was on the lookout for Hall's white Ford Focus station wagon. That vehicle was later found in Texas and had been burned. A partial vehicle identification number was traced back to Hall and to the investigation into Hall's murder. Torres' ex-girlfriend testified that she accompanied Torres to the area where the burned station wagon was recovered, but that she did not actually witness Torres set fire to the vehicle. Houston area law enforcement later determined that Torres was staying in the area and apprehended him on March 26, 2007.

### 6. Torres Interviewed in Texas

Grand Island law enforcement officers went to Texas to interview Torres. According to the testimony of a Grand Island investigator, one of the first things Torres did during the interview was deny killing "those people." During the interview, Torres indicated that he knew Packer, Cross, and Padilla, as well as some of their acquaintances, including Hall, Donohue, and the man who arranged for the delivery of a weapon to Torres. Torres acknowledged that he used drugs with some of these individuals.

Torres then indicated that Packer, Cross, and Padilla were manufacturing a methamphetamine-like substance at Hall's house with the assistance of Donohue and with Hall's knowledge. During this interview, Torres initially blamed Cross and Padilla for the murders and, when he learned both had alibis, shifted the blame to Packer.

In Torres' possession when he was apprehended was Packer's cellular telephone. Torres explained that he had gotten the telephone from Packer and also that Hall had given Torres Hall's car and ATM card. At one point, Torres indicated that Cross and Padilla went with him to the ATM to use the card. But Torres also told law enforcement that Padilla had given him Hall's ATM card, jokingly noting to Torres, "[h]a ha, I have . . . Hall's card" as she did so. Torres stated that he used the card at the discount store only to prove to Padilla that she had already taken all of the money out of the account. In addition, law enforcement recovered from Torres' motel room in Houston ammunition for a .22-caliber weapon.

### 7. Trial

Torres' trial was held August 17 to 27, 2009. The jury found him guilty of two counts of first degree murder, one count of robbery, three counts of use of a deadly weapon to commit a felony, and one count of unauthorized use of a financial transaction device.

### 8. Penalty Phase

The State alleged four aggravating factors pursuant to Neb. Rev. Stat. § 29-2523 (Reissue 2008): (1) The murder was committed in an effort to conceal the commission of a crime or to conceal the identity of the perpetrator of such crime[2]; (2) at the time the murder was committed, the offender also committed another murder[3]; (3) the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence[4]; and (4) the offender has a substantial prior history of serious assaultive or terrorizing criminal behavior.[5] Following his convictions, pursuant to Neb. Rev. Stat. § 29-2520(3) (Reissue 2008), Torres waived his right to a jury determination of whether the aggravating circumstances had been met. On November 13, 2009, a

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[2] § 29-2523(1)(b).

[3] § 29-2523(1)(e).

[4] § 29-2523(1)(d).

[5] § 29-2523(1)(a).

three-judge panel was convened for a sentencing determination hearing. At that hearing, the State offered into evidence the bill of exceptions from Torres' trial, as well as testimony from several law enforcement officers. Torres introduced evidence regarding the effects of methamphetamine on the body.

On January 29, 2010, the sentencing panel made written findings as required by statute and found all four aggravating factors as alleged above with respect to Hall's murder and three of the four aggravating factors with respect to Donohue's murder. With respect to Donohue, the panel declined to find that his murder was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."[6] The panel also considered and rejected all statutory and nonstatutory mitigating factors.

We are now presented with Torres' automatic appeal of his convictions and sentences.

## III. ASSIGNMENTS OF ERROR

Torres assigns, renumbered, that the district court erred in (1) admitting evidence of certain prior acts of Torres under Neb. Evid. R. 404(2), Neb. Rev. Stat. § 27-404(2) (Reissue 2008); (2) admitting the testimony of two witnesses regarding Torres' alleged efforts to get those witnesses to testify falsely on Torres' behalf; and (3) overruling his motion to suppress.

Torres also assigns, restated and consolidated, that the sentencing panel erred in (4) receiving for purposes of the State's proof of aggravating circumstances the trial court's bill of exceptions over Torres' objections; (5) its retroactive application of Neb. Rev. Stat. §§ 83-964 to 83-972 (Cum. Supp. 2010); (6) not finding that § 83-964 is unconstitutional in violation of the distribution of powers clause of the Nebraska Constitution,[7] Nebraska case law, and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution; (7) not finding Neb. Rev. Stat. §§ 29-2519 to 29-2546 (Reissue 2008 & Cum. Supp. 2010) unconstitutional on their face; (8) not finding § 29-2523(1)(a), (b), and (d)

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[6] § 29-2523(1)(d).

[7] Neb. Const. art. II, § 1.

unconstitutional on its face, as interpreted by this court and as applied to Torres; (9) using "the victim's 'mental suffering' and the 'victim's uncertainty as to [his] ultimate fate'" as support for finding that Hall's murder was "especially heinous, atrocious, cruel" under § 29-2523(1)(d) and also finding that the State proved this aggravator beyond a reasonable doubt; (10) finding that the State proved beyond a reasonable doubt the existence of the aggravators under § 29-2523(1)(a) and (b); and (11) concluding that no statutory or nonstatutory mitigating factors existed.

## IV. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[8] It is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts under rule 404(2) and Neb. Evid. R. 403,[9] and the trial court's decision will not be reversed absent an abuse of discretion.[10]

[3] The interpretation of a statute presents a question of law.[11]

[4] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.[12]

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

[9] Neb. Rev. Stat. § 27-403 (Reissue 2008).

[10] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[11] See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

[12] *State v. Seberger*, 279 Neb. 576, 779 N.W.2d 362 (2010).

[5] When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[13]

[6] When reviewing the sufficiency of the evidence to sustain the trier of fact's finding of an aggravating circumstance, the relevant question for this court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the aggravating circumstance beyond a reasonable doubt.[14]

[7] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[15]

## V. ANALYSIS

### 1. Rule 404 Evidence

In his first assignment of error, Torres argues that the district court erred in admitting evidence of a prior incident wherein Torres kidnapped Packer and then held Packer, Cross, and Padilla at gunpoint. On February 12, 2007, Packer called Cross and asked Cross for permission to stop by Hall's residence, where Cross was living. Cross agreed. But, Cross said, when Packer arrived, Torres was with Packer, holding Packer at gunpoint. Torres then forced Cross and Packer into Cross and Padilla's room. Torres made Cross bind Packer with duct tape. Torres took Packer's ATM card, obtained the personal identification number for the card, and ordered Cross and Padilla to withdraw nearly $800 from the account. Cross gave the money to Torres. Eventually, Torres released Packer, Cross, and Padilla, but took and kept Packer's money and Packer's cellular telephone. Cross testified that Torres let Packer go after Cross agreed to provide transportation for Torres to Texas.

During this event, Torres made Packer contact the Lincoln and Omaha airport authorities, as well as two airlines and various other individuals, in order to obtain a plane ticket to get

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[13] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[14] *Id.*

[15] See *id.*

Torres to Texas. Apparently, Torres planned to fly to Texas to meet with some associates. Meanwhile, Cross was to drive to Texas to deliver a package of "ice," a potent form of methamphetamine, for Torres. Though apparently Packer was unable to provide the "ice" to Torres, Torres attempted to fill the order so it could be taken to Texas. Though the record is not clear about the details, Torres apparently kidnapped Packer in an attempt to make him fill the order for "ice," which Torres needed to be delivered to Texas. Cross testified that during the kidnapping and the days following, he made certain promises to Torres involving driving Torres to Texas because Cross wanted to "get rid of the problem, which was to take [Torres] back to [Texas]."

We note that Torres was, in a separate case, convicted of kidnapping and robbery and the two associated use of a firearm counts for the February 2007 incident described above and was sentenced to consecutive terms totaling 90 to 140 years' imprisonment.

[8-11] Section 27-404(2) provides in relevant part:

> 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.[16] 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).[17] 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.[18] An appellate court's analysis under rule 404(2) considers (1) whether the

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[16] *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

[17] *Id.*

[18] *Id.*

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.[19]

[12,13] 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.[20] And any limiting instruction given upon receipt of such evidence shall likewise identify only those specific purposes for which the evidence was received.[21]

Before trial, both the State and Torres filed motions regarding the admissibility of the evidence relating to this kidnapping and robbery. A hearing was held on these motions, at which time the bill of exceptions from Torres' trial on the kidnapping charge was admitted into evidence. Following the hearing, the district court overruled Torres' motion and found by clear and convincing evidence that the incident did occur and was admissible for purposes of motive, intent, plan, knowledge, opportunity, and identity. The district court noted:

> In this particular set of facts the evidence . . . goes to the relationship between [Torres] and the location of the criminal activity alleged; it goes to the method used in the criminal activity alleged such as the use of a gun, the tying up of individuals and goes to motive of obtaining money and transportation to the State of Texas. The Court will allow the evidence for these limited purposes under [rule 404(2)].

However, at trial, the district court admitted the evidence as relevant only to show Torres' intent, motive, and opportunity.

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[19] *Id.*

[20] *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[21] See *id.*

The jury was instructed accordingly, both at the time the evidence was admitted and in the final instructions to the jury prior to the submission of the case.

On appeal, Torres argues that the evidence of this kidnapping was inadmissible, as it was not independently relevant, but, rather, was relevant only to show his propensity to be violent.

Because the jury was instructed only with respect to motive, intent, and opportunity, this court will address only those reasons for independent relevance. We affirm the district court's decision insofar as it concluded that this evidence was admissible to show Torres' motive, but conclude that this evidence was not relevant to show his intent or opportunity. As such, it was error for the district court to instruct the jury that it could consider the evidence with respect to intent and opportunity. However, as we explain below, we conclude that the admission of this evidence for these latter reasons was harmless.

(a) Opportunity

We begin by considering whether this evidence was relevant to show Torres' opportunity to rob and murder Hall and Donohue. The district court explained that the kidnapping offered evidence of the relationship between Torres and Hall's house. But we disagree that this prior incident is relevant to show opportunity.

In essence, the district court found that such evidence was relevant to show that because Torres had been in the house when he kidnapped and robbed Packer, Cross, and Padilla, he had the opportunity to later enter the house to rob and murder Hall and Donohue. But there is no evidence in the record suggesting that this was so. For example, there is no evidence that by having been in the house before, Torres had access to a key, security code, or any other information that might give him the opportunity to again enter the house for the purpose of robbing and murdering Hall and Donohue. And as with intent, opportunity was largely undisputed: Other evidence established that Torres was staying at Hall's house, and it would not have been necessary to admit evidence of the entire incident in order to establish that Torres had been to Hall's house before. As such,

we conclude that the prior kidnapping incident was inadmissible to show Torres' opportunity.

(b) Intent

[14] Intent is generally defined as "[t]he state of mind accompanying an act."[22] In this case, the State was required to prove that Torres intended to steal from Hall and that he purposely and with deliberate and premeditated malice murdered Hall and Donohue. But we do not find that intent was at issue in this case. Here, there is no dispute that these crimes were intentional; there is only a dispute over whether Torres committed them. We agree with Torres that this evidence was not admissible to show his intent where intent was not at issue.

(c) Motive

We next address motive. The district court concluded the February 2007 incident showed that Torres' motive to restrain, rob, and kill Hall was to obtain money and transportation to Texas, which was something that Torres, during that prior incident, attempted to obtain in the same manner from Packer, Cross, and Padilla.

On appeal, Torres argues that the evidence relating to the kidnapping of Packer, Cross, and Padilla is simply character, or propensity, evidence and relevant only to show that he is a violent person and that the evidence is therefore inadmissible. We disagree and instead conclude that the district court correctly admitted the evidence to show Torres' motive.

[15-17] Under rule 404(2), "[e]vidence of other crimes or wrongs," while "not admissible to prove the character of a person in order to show that he or she acted in conformity therewith," is admissible for other purposes, including motive. Though difficult to define, character has been described as the generalized tendency to act in a particular way.[23] On the other hand, motive is defined more specifically as that which leads or

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[22] Black's Law Dictionary 881 (9th ed. 2009).

[23] David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 8.3 (Richard D. Friedman ed. 2009).

tempts the mind to indulge in a criminal act.[24] A person's prior actions can help to show motive because of the light they shed on that person's state of mind.[25] So in the case of motive, the prior act and the uncharged act need not be similar.[26]

There is a fine line between prior bad acts evidence that goes only to the character of the actor and prior bad acts evidence that speaks upon the actor's motive to commit a later crime. And the weaker the inferences of motive, the less probative the evidence on the ultimate issue of identity and the stronger the argument that the court should exclude the evidence to avoid the risk of unfair prejudice.[27]

We agree that motive reasoning requires propensity inferences. But, so long as the evidence is also relevant for reasons not based on the defendant's character, it is admissible under rule 404(2). As one commentator noted:

> The rule regulating the circumstantial use of uncharged misconduct . . . only forbids the use of the evidence [when such use is based upon a moral judgment of an actor's character traits]. If there is a rational chain of inferences that does not require an evaluation of character, the court may admit the evidence. That is the purpose and message of the uncharged misconduct rule. As one author put it, "All character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence." The theory behind the use of uncharged misconduct to prove "motive" shows that the rule does not avoid all propensity inferences, but only those that are based on character. It is supposed that the dangers associated with character do not exist, or at least are minimized, when the phenomenon that drives behavior is not based on morality.[28]

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[24] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[25] Leonard, *supra* note 23, § 8.4.1.

[26] See *id.*

[27] *Id.*, § 8.5.1(c).

[28] *Id.*, § 8.3 at 495-96.

We acknowledge that in previous cases, we have defined the concept of "special" or "independent" relevance as relevance that "does not depend upon its tendency to show propensity."[29] But in context, it is clear that we were referring to propensity generally, in the sense of a character trait and not a specific propensity to do a particular thing. As we explained in *State v. McManus*[30]:

> If the evidence is relevant because it tends to show the defendant's criminal disposition or propensity to commit a certain type of crime, it is relevant for an improper purpose and is inadmissible under rule 404(2). However, if it is relevant to show something other than the defendant's character, then it is relevant for a proper purpose and is admissible under rule 404(2).

In other words, "propensity" is meant to refer simply to criminal propensity, i.e., character.

It is obvious that evidence is not barred by rule 404(2) just because its relevance could be characterized in terms of "propensity." For instance, one of the paradigmatic uses of other acts evidence is the use of previous acts to establish a modus operandi, or "signature," that is methodologically so reminiscent of the charged crime as to earmark it as the defendant's handiwork.[31] It is well established that such evidence is admissible when the acts are sufficiently similar to be probative on the issue of identity—yet it is equally clear that the special relevance of the evidence depends on what can be characterized as the defendant's "propensity" to commit crimes in an idiosyncratic way. Motive evidence is much the same: It can easily be framed as relevant because it shows a defendant's "propensity" to commit crimes for a particular reason, i.e., motive. Someone who has a motive to commit a crime could also be described as having a "propensity" to commit the crime. But where the defendant's motive is particular—in other words, is not based

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[29] See, e.g., *State v. Williams*, 282 Neb. 182, 195, 802 N.W.2d 421, 432 (2011).

[30] *State v. McManus*, 257 Neb. 1, 7-8, 594 N.W.2d 623, 628-29 (1999).

[31] See, e.g., *U.S. v. Ingraham*, 832 F.2d 229 (1st Cir. 1987).

in the defendant's character—evidence of prior acts is nonetheless admissible to show the defendant's motive to commit the charged crime because an inference of a *criminal* propensity is not required to establish independent relevance.

We agree with the district court that in this case, the evidence of the February 2007 kidnapping was independently relevant to show Torres' motive. We note that the motive for that first incident—to obtain money and transportation to Texas—was the same motive Torres had for robbing Hall. Thus, the link between the two incidents is clear; the evidence surrounding the kidnapping shows that Torres' motivation was to get to Texas. Torres made Packer call for plane tickets and made plans for Cross to drive to Texas while Torres flew there. Cross testified that Torres released Packer, Cross, and Padilla only after Cross agreed to drive Torres to Texas. During this event, Torres also had Cross and Padilla withdraw money from Packer's bank account, which money Torres then kept. And in the incident resulting in Hall's and Donohue's deaths, Torres stole Hall's ATM card and attempted multiple times to withdraw money from Hall's bank account. Torres also stole Hall's car, which was later found in Texas and was further linked to Torres by the testimony of Torres' ex-girlfriend.

The evidence surrounding the kidnapping and robbery of Packer, Cross, and Padilla was, therefore, independently relevant because it proved Torres' rather desperate desire for money and transportation to Texas. And when Hall and Donohue were killed, the perpetrator apparently took Hall's money and then drove Hall's car to Texas. The logical relevance of the rule 404(2) evidence does not depend on an inference that Torres acted in conformity with a general propensity to commit crimes—rather, it depends on the inference that the person who killed Hall and Donohue wanted money and transportation to Texas, and the rule 404(2) evidence proved Torres' pressing desire to obtain those specific things. Although the evidence also reflects poorly on Torres' character, its logical relevance is independent of that.

Additionally, we note that the fact that Hall and Donohue ultimately were murdered, in addition to Hall's being robbed, is of no consequence to our determination here. First, as noted

above, unlike other theories relating to the introduction of prior bad acts evidence, admission based upon motive does not require any similarity between the prior act and the charged act. This is so because it is the state of mind behind the acts that shows the motive. And in this case, the prior evidence shows that the motives to commit each *robbery* were the same, even though the latter robbery eventually ended in the deaths of Hall and Donohue.

We are also not persuaded by the insistence in the concurrence that Torres' motive for the Packer kidnapping was not the same as his motive for Hall's and Donahue's murders. The concurrence bases this assertion on its review of the evidence from the kidnapping trial and concludes that the motive as shown at that trial was the result of a drug deal gone bad and was not an effort to obtain money and transportation to Texas. But the concurrence acknowledges that the need for money and transportation was underlying Torres' actions as shown at the kidnapping trial. We do not find this conclusion inconsistent with this court's determination that the continued need for money and transportation was still a motivating factor for Torres to rob Hall and murder Hall and Donohue.

We therefore conclude that the evidence at issue was admissible to show Torres' motive.

(d) Evidence More Prejudicial Than Probative

We next turn to the question of whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, and we conclude that it was not. Specifically, as explained above, this event was probative of Torres' motive to rob Hall and eventually murder Hall and Donohue. We acknowledge that the evidence was highly prejudicial to Torres; however, it was also highly probative of Torres' motive to commit the charged crimes. We find that the court did not abuse its discretion in concluding that the probative value of the evidence was not outweighed by the potential for unfair prejudice.

(e) Harmless Error

[18] We have concluded that the district court was correct in admitting the challenged evidence because it was independently relevant to the issue of Torres' motive, but that the

district court erred in admitting the evidence to show Torres' intent and opportunity. We must therefore determine whether the district court's error prejudiced Torres, or whether instead the error was harmless. In making that determination, we must decide whether the giving of the overly broad instruction materially influenced the jury to reach a verdict adverse to the substantial rights of Torres.[32]

Though the district court erroneously instructed the jury that it could consider the prior incident wherein Torres kidnapped Packer, Cross, and Padilla as independently relevant evidence of Torres' intent and opportunity, it did not instruct the jury that it could consider that incident for any reason the jury wished. The instruction as given protected Torres from an inference that simply because he committed the earlier kidnapping, he also committed the crimes at issue in this case. Moreover, we have concluded that intent was not at issue in this case. Torres could not have been prejudiced by an instruction to the jury that it could consider this evidence for intent when there was no dispute that the crimes at issue were committed intentionally. Similarly, instructing the jury that it could consider the previous kidnapping as relevant to opportunity could not have prejudiced Torres, because his opportunity to commit the crime was not contested and, in any event, the prior kidnapping was not particularly helpful in that regard.

In short, there was no basis from which the jury could conclude that Torres committed the charged crimes but did not do so intentionally; nor was there any basis for the jury to reason that Torres could not have committed the charged crimes because he had no opportunity to do so. Therefore, permitting the jury to consider Torres' prior bad acts as relevant to those issues could not have prejudiced Torres. The court's erroneous limiting instruction provides no basis for reversing Torres' convictions or sentences.

As such, while we conclude that the district court erred in instructing the jury that it could consider evidence of the prior incident involving Packer, Cross, and Padilla as relevant to

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[32] See, *Ellis, supra* note 13; *State v. McKinney*, 273 Neb. 346, 730 N.W.2d 74 (2007).

show intent and opportunity, we conclude that any error therein was harmless error and not reversible error.

### 2. Conspiracy Exception to Hearsay Rule

In his second assignment of error, Torres assigns that the district court erred in allowing two witnesses to testify regarding Torres' attempts to have them fabricate evidence exonerating him. Torres contends that the testimonies of these witnesses was hearsay and did not fall within the coconspirator exclusion set forth in Neb. Evid. R. 801(4)(b)(v), Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008).

Some background is helpful. At trial, there was evidence presented that Torres attempted to bribe witnesses and fabricate evidence in his case. Robert Mattson, one of Torres' fellow inmates at the Hall County jail, testified that Torres wanted Robert to have his wife, Jennifer Mattson, contact law enforcement with a story suggesting that a person other than Torres had admitted to Hall's and Donohue's murders. According to Jennifer, Torres had offered her $10,000 to do so and she met with Torres' mother in furtherance of this plan. Torres actually wrote Jennifer a letter, which was addressed by name to one of his original attorneys, but by location to Jennifer's address, and which detailed the story Torres wished her to tell.

And another of Torres' fellow inmates, Stacy Alexander, testified that Alexander contacted his girlfriend, Amanda Lane, and requested that she assist Torres in convincing Alexander's ex-brother-in-law, James Hemmingway, to approach law enforcement with a story about Torres. Lane testified that she and Hemmingway met Torres' mother at the Grand Island police station. Other evidence shows that Torres' mother actually accompanied Hemmingway inside the police station. However, once there, Hemmingway admitted the fabrication to law enforcement and provided the narrative which Lane had written for him. Lane testified that Torres' mother paid her $300, which she split with Hemmingway.

[19,20] Rule 801(3) provides that "[h]earsay 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." However, "[a] statement is not hearsay if [it]

is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."[33] This court has held that rule 801(4)(b)(v) is applicable regardless of whether the defendant is charged with conspiracy.[34] But before a trier of fact may consider testimony under the coconspirator exception to the hearsay rule, a prima facie case establishing the existence of a conspiracy must be shown by independent evidence.[35]

(a) Testimony of Jennifer

We begin with the testimony of Jennifer. On appeal, Torres argues that the district court erred in finding Jennifer's testimony was not hearsay under rule 801(4)(b)(v) because there was no evidence presented that she planned to participate in the plot to fabricate evidence.

Torres' argument is without merit. There is no requirement under the plain language of rule 801(4)(b)(v) that the person testifying to the statement be a part of the conspiracy. And this court, in *State v. Hudson*,[36] found that statements made by a coconspirator, but testified to by a non-coconspirator, were admissible under rule 801(4)(b)(v).

Rather, the only requirements for such statement to be admissible are that (1) the statement be made by a coconspirator, (2) the statement be in furtherance of the conspiracy, and (3) the State show prima facie evidence of that conspiracy by independent evidence. All of these requirements were met with respect to Jennifer's testimony.

First, the statements in question were made by Jennifer's husband, Robert, a coconspirator. These statements were made to Jennifer with the intent to gain her agreement to participate in Robert's and Torres' plan to fabricate evidence in order to exonerate Torres. And Robert's own testimony, introduced prior

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[33] § 27-801(4).

[34] *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated in part on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[35] See *id.*

[36] *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009).

to Jennifer's testimony, established that the conspiracy existed. Thus, Jennifer's testimony regarding Robert's statements to her was admissible under rule 801(4)(b)(v).

(b) Testimony of Lane

With respect to Lane's testimony, Torres argues that there was insufficient evidence shown that a conspiracy existed and that as such, the statements were not admissible under rule 801(4)(b)(v). We again find Torres' argument without merit.

Prior to Lane's testifying, Alexander testified that he asked Lane to do certain things as requested by Torres. And in her own testimony, Lane stated without objection that Alexander wanted her to talk to Hemmingway about having him "take this story that [Torres] told [Alexander] to the cops." Through Alexander's testimony, the State showed that Torres and Alexander had some type of agreement. When considered along with Lane's testimony, the State has shown that this agreement involved, at least in part, Alexander's inducing Lane and Hemmingway to provide to law enforcement a story intended to exonerate Torres. Such actions constituted a conspiracy, and Torres' argument that the State failed to show prima facie evidence of that conspiracy is without merit.

Torres' second assignment of error is without merit.

3. Motion to Suppress

In his third assignment of error, Torres argues that the district court erred in overruling his motion to suppress. Torres contends that law enforcement failed to honor his request to cut off questioning during an interview on March 26, 2008, which he claims he did when he stated that he was "done" at around the 2-hour 30-minute mark of the interview.

We stated in *State v. Rogers*[37]:

> The U.S. Supreme Court has explained that once the right to cut off questioning has been invoked, the police are restricted to "'scrupulously honor[ing]'" that right. This means, among other things, that there must be an appreciable cessation to the interrogation. However, before the police are under such a duty, the invocation of the right to

[37] *State v. Rogers*, 277 Neb. 37, 52, 760 N.W.2d 35, 50-51 (2009).

> cut off questioning must be "unambiguous," "unequivocal," or "clear." This requirement of an unequivocal invocation, the Court has explained, prevents the creation of a "third layer of prophylaxis" which could transform the prophylactic rules of *Miranda* "'into wholly irrational obstacles to legitimate police investigative activity.'" To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the right to remain silent. And if the suspect's statement is not an "unambiguous or unequivocal" assertion of the right to remain silent, then there is nothing to "scrupulously honor" and the officers have no obligation to stop questioning.

In this case, Torres waved his hand in front of the interviewing officer, who had been asking a question about telephone calls made by Torres to Cross. At the same time, Torres said to the officer, "End of conversation; we're done." However, immediately afterward, and with no prompting or questioning by law enforcement, Torres continued the conversation regarding the telephone calls. A review of the interview also shows that Torres subsequently continued to freely engage in the interview and continued to converse with the officers.

Based upon these facts, we cannot say that Torres unambiguously or unequivocally asserted his right to remain silent. This court recently noted that "[w]e have never held that any utterance of 'I'm done,' no matter what the surrounding circumstances or other statements, will be construed as cutting off all further questioning."[38] For this reason, the district court did not err in denying Torres' motion to dismiss.

Torres' third assignment of error, and final trial error assignment, is without merit.

### 4. Admission of Trial Bill of Exceptions During Sentencing Proceeding

In his fourth assignment of error, Torres assigns that the sentencing panel erred in receiving for purposes of the State's

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[38] *State v. Schroeder*, 279 Neb. 199, 218, 777 N.W.2d 793, 809 (2010).

proof of aggravating circumstances the trial court's bill of exceptions. Torres argues that the admission of the trial court's bill of exceptions contained inadmissible hearsay and violated his due process and confrontation rights.

Following the jury verdicts of guilty, Torres waived his right to a jury determination of any alleged aggravating circumstances, as provided in § 29-2520(3). That subsection provides:

> The defendant may waive his or her right to a jury determination of the alleged aggravating circumstances. The court shall accept the waiver after determining that it is made freely, voluntarily, and knowingly. If the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, such determination shall be made by a panel of judges as a part of the sentencing determination proceeding as provided in section 29-2521.

Section 29-2521 provides the general framework for the sentencing procedure taken in cases involving the death penalty:

> (1) When a person has been found guilty of murder in the first degree and (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) such person waives his or her right to a jury determination of the alleged aggravating circumstances, the sentence of such person shall be determined by:
>
> (a) A panel of three judges . . . .

Section 29-2521(3) sets out the specific procedure to be followed "[w]hen a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520." And, as is relevant in this case, § 29-2521(2) provides the procedure where a defendant has waived his or her right to a jury determination:

> In the sentencing determination proceeding before a panel of judges when the right to a jury determination of the alleged aggravating circumstances has been waived, the panel shall, as soon as practicable after receipt of the written report resulting from the presentence investigation

> ordered as provided in section 29-2261, hold a hearing. At such hearing, *evidence may be presented as to any matter that the presiding judge deems relevant to sentence* and shall include matters relating to the aggravating circumstances alleged in the information, to any of the mitigating circumstances set forth in section 29-2523, and to sentence excessiveness or disproportionality. The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances. Each aggravating circumstance shall be proved beyond a reasonable doubt. *Any evidence at the sentencing determination proceeding which the presiding judge deems to have probative value may be received.* The state and the defendant or his or her counsel shall be permitted to present argument for or against sentence of death. The presiding judge shall set forth the general order of procedure at the outset of the sentencing determination proceeding. *The panel shall make written findings of fact based upon the trial of guilt and the sentencing determination proceeding*, identifying which, if any, of the alleged aggravating circumstances have been proven to exist beyond a reasonable doubt. Each finding of fact with respect to each alleged aggravating circumstance shall be unanimous. If the panel is unable to reach a unanimous finding of fact with respect to an aggravating circumstance, such aggravating circumstance shall not be weighed in the sentencing determination proceeding. After the presentation and receipt of evidence and argument, the panel shall determine an appropriate sentence as provided in section 29-2522.

(Emphasis supplied.)

Torres argues that the sentencing panel should not have been permitted to receive the trial record into evidence. He claims that this was improper because two of the three members of the panel were thereby limited to evaluating the evidence from a transcript instead of live testimony. But we rejected a similar argument in *State v. Ryan*.[39] In *Ryan*, the sentencing provisions

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[39] *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).

in effect at the time required a sentencing panel to determine aggravating and mitigating circumstances and provided for a hearing at which "'evidence may be presented as to any matter that the court deems relevant to sentence [and a]ny such evidence which the court deems to have probative value may be received.'"[40] We have reached the same conclusion under the comparable current statute.[41] And, we noted, the statute required the panel's determination to be "'supported by written findings of fact based upon the records of the trial and the sentencing proceeding.'"[42]

Based on that statutory language, we concluded that the sentencing panel "not only [had] the statutory *authority* to consider the trial record," but was "statutorily *required* to make written findings of fact based upon that record."[43] And as noted above, § 29-2521(2) now contains language that is effectively identical to the language we relied upon in *Ryan*. It is a well-established principle of statutory interpretation that when legislation is enacted which makes related preexisting law applicable thereto, it is presumed that the Legislature acted with full knowledge of the preexisting law and judicial decisions of the Supreme Court construing and applying it.[44] We conclude that based on the language of § 29-2521(2), our decision in *Ryan* is controlling and the sentencing panel is not only permitted, but required, to consider the trial record.

In addition to finding that the procedure followed by the sentencing panel was proper, we reject Torres' arguments regarding hearsay, confrontation, and due process. We turn first to hearsay. Hearsay is defined by rule 801(3) as 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

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[40] *Ryan, supra* note 39, 248 Neb. at 442, 534 N.W.2d at 790 (emphasis omitted).

[41] See, *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009); *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[42] *Ryan, supra* note 39, 248 Neb. at 441, 534 N.W.2d at 790 (emphasis omitted).

[43] *Id.* at 442, 534 N.W.2d at 790.

[44] *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

matter asserted"; in other words, an out-of-court statement. But the bill of exceptions at issue was a word-for-word transcription of all of the statements made by the witnesses *in court and at Torres' trial*. The bill of exceptions, then, quite plainly falls outside of the definition of hearsay. And even if the bill of exceptions was hearsay, it would nevertheless be admissible under § 29-2520 or § 29-2521 as discussed above.

We next address and reject Torres' argument that his right to confrontation was violated when the panel admitted the record of the trial of guilt. But in situations such as this, where a jury determination of aggravating circumstances was waived, the statutes are clear that the panel's determination of those circumstances is to be part of the sentencing proceeding.[45] And we have found that the right to confrontation is inapplicable to sentencing proceedings.[46]

Nor do we find that Torres' due process rights were violated. The capital sentencing statutes make it clear that the sentencing panel is to make the determination of aggravating circumstances based upon the trial of guilt and a sentencing hearing. Torres waived his right to have the jury determine the aggravating circumstances. In doing so, he waived many of the rights that are present during such a hearing, but not available at sentencing.[47] A defendant's decision to waive a jury finding of aggravating circumstances obviously implicates procedural differences, the advantages and disadvantages of which can be weighed by the defendant.[48] Moreover, Torres was permitted to introduce whatever evidence and witnesses he chose during the sentencing determination proceeding.

Torres' fourth assignment of error is without merit.

### 5. Retroactive Application of §§ 83-964 to 83-972

In his fifth assignment of error, Torres argues that the sentencing panel erred in retroactively applying §§ 83-964

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[45] §§ 29-2520(3) and 29-2521(2).

[46] *Galindo, supra* note 41.

[47] See *id.*

[48] See *Ellis, supra* note 13.

to 83-972. Torres contends that the retroactive application of the death penalty statutes would be a violation of the rights given him under the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions.[49] At its essence, Torres' argument is that he could not be sentenced to death unless a method of execution existed, at the time of sentencing, under which he could be put to death.

[21] We recently addressed Torres' basic argument in both *State v. Mata*,[50] and *State v. Ellis*.[51] In *Mata*, this court found electrocution to be unconstitutional as cruel and unusual punishment under Neb. Const. art. I, § 9. But even as we held the method of execution unconstitutional, we upheld the defendant's death sentence, noting:

> Under Nebraska law, the sentencing panel can fix the sentence either at death or at life imprisonment. Because a panel's sentencing authority does not extend beyond that, the method of imposing a death sentence is not an essential part of the sentence. And Nebraska's statutes specifying electrocution as the mode of inflicting the death penalty are separate, and severable, from the procedures by which the trial court sentences the defendant. In short, that a method of execution is cruel and unusual punishment "'"bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself."'" Because we find no error in imposing a sentence of death, we affirm the district court's judgment.[52]

[22,23] We did not explicitly address the validity of a death sentence in the context of the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions in *Mata* or *Ellis*. Both U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, provide that no ex post facto law may be passed. A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing

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[49] See, U.S. Const. art. I, § 10; Neb. Const. art. I, § 16.

[50] *Mata, supra* note 39.

[51] *Ellis, supra* note 13.

[52] *Mata, supra* note 39, 275 Neb. at 67-68, 745 N.W.2d at 278-79.

penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[53] This court ordinarily construes Nebraska's ex post facto clause to provide no greater protections than those guaranteed by the federal Constitution.[54]

We find Torres' argument on this point to be without merit. Put simply, the sentencing court always had the authority to sentence Torres to death; the State's enactment of a new method of execution and its accompanying protocol simply made it possible for the State to enforce that sentence. As *Mata* made clear, the method of execution does not bear upon the sentence of death itself. Nothing about this scenario violates Torres' rights under the Ex Post Facto Clauses of the federal and state Constitutions.

Torres' fifth assignment of error is without merit.

### 6. Separation of Powers

In his sixth assignment of error, Torres argues that § 83-964 is unconstitutional, in violation of the distribution of powers clause of the Nebraska Constitution, Nebraska case law, and the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. Section 83-964 provides: "A sentence of death shall be enforced by the intravenous injection of a substance or substances in a quantity sufficient to cause death. The lethal substance or substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services."

In *Ellis*, we recently addressed the question of whether the Legislature could properly delegate to the Department of Correctional Services the function of creating, maintaining, and administering a lethal injection protocol and concluded that it could.[55] We decline to revisit that decision.

As such, Torres' sixth assignment of error is without merit.

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

[54] *Id.*

[55] *Ellis, supra* note 13.

### 7. Constitutional Challenge to Death Penalty Statutes and § 29-2523(1)(a), (b), and (d)

In his seventh and eighth assignments of error, Torres argues generally that the Nebraska death penalty statutes[56] are unconstitutional on their face and specifically contends that § 29-2523(1)(a), (b), and (d) are unconstitutional on their face, as interpreted by the courts of the State of Nebraska and as applied in this case. We have previously rejected these arguments and do so again today.

#### (a) Aggravator (1)(a)

Torres first argues that § 29-2523(1)(a), which provides as an aggravating circumstance that the defendant "has a substantial prior history of serious assaultive or terrorizing criminal activity," is unconstitutional because it fails to define the terms "substantial," "history," and "serious assaultive or terrorizing criminal activity." We have addressed and rejected this argument before, including most recently in *Ellis*.[57] We decline to overrule that authority, and as such, we decline to conclude that aggravator (1)(a) is unconstitutional, either facially or as interpreted by the courts of this state.

Torres also argues that this aggravator is unconstitutional as applied to him, because the sentencing panel used as evidence of this prior history the incident wherein he kidnapped Packer, Cross, and Padilla. Torres notes that he fed Packer food and drugs and released him unharmed and contends that if this behavior were sufficient to support a finding of this aggravator, such would be unconstitutional.

Torres attempts to downplay the incident involving Packer, Cross, and Padilla. Torres suggests that he held them for a period of time, fed them food and drugs, and then let them go. This characterization is not entirely accurate. Torres held

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[56] §§ 29-2519 to 29-2546.

[57] *Ellis, supra* note 13. See, also, *Hessler, supra* note 41; *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, Mata, supra* note 39; *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Holtan*, 197 Neb. 544, 250 N.W.2d 876 (1977), *disapproved on other grounds, State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977).

Packer at gunpoint and forced him to drive to Hall's home to meet Cross and Padilla. Torres then held all three at gunpoint. Torres forced Cross and Padilla to tie Packer up. He forced Packer to hand over his ATM card and its personal identification number. Torres then made Cross and Padilla withdraw money from Packer's account to buy food for everyone. Though Cross and Padilla were allowed to leave on their own, they were concerned for Packer's safety and did not want anyone to get hurt, so they returned. Torres then continued to hold them at gunpoint and forced Packer to make various telephone calls to obtain transportation to Texas. Torres eventually let Packer go. Packer indicated that he was released so he could make a court date. However, Packer and Cross both also testified that part of the reason Packer was released was because Cross promised to drive Torres to Texas. And though Packer was allowed to leave, Torres kept Packer's cellular telephone and also took $800 from Packer.

Given the circumstances of Torres' prior assaultive behavior, we decline to conclude that the application of aggravator (1)(a) would be unconstitutional as applied to Torres. Torres' argument with regard to this aggravator is without merit.

(b) Aggravator (1)(b)

Torres next argues that § 29-2523(1)(b) is unconstitutional. This subsection provides as an aggravating circumstance that "[t]he murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime." But we have repeatedly held that this aggravator is constitutional, most recently in *State v. Hessler*,[58] and we decline to revisit that holding today. Torres' argument regarding aggravator (1)(b) is without merit.

(c) Aggravator (1)(d)

Finally, Torres contends that § 29-2523(1)(d), which provides as an aggravating circumstance that the murder was

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[58] *Hessler, supra* note 41. See, also, *Bjorklund, supra* note 57; *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), *modified* 255 Neb. 889, 587 N.W.2d 673 (1999); *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *disapproved on other grounds, State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (2000).

"especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence," is unconstitutional. In particular, Torres takes issue, as many have before him, with the "exceptional depravity" prong of this aggravator.

We decline to address what so many courts have previously found to be a constitutional aggravator,[59] and we conclude that the aggravator as a whole, and the "exceptional depravity" prong in particular, is not unconstitutional on its face or as interpreted by the courts of this state.

Torres also argues that aggravator (1)(d) is unconstitutional as applied to him. Torres contends:

> In the case at bar, the defense pathologist noted that the extension cord used to tie the victim . . . Hall did not appear to be that tight, and there was no evidence that he had been tied up for an extended period of time. . . . In the absence of grounds for exceptional depravity that more "suitably directed, limited, and defined" that prong of the aggravator, the aggravator is simply too vague and overbroad to be constitutionally applied . . . .[60]

We do not find this contention relevant to a discussion of whether aggravator (1)(d) was constitutional as applied to Torres. In its findings, the panel noted that Torres relished the murders, as evidenced by the fact that he told Cross that he put Hall and Donohue to "sleep," as well as the fact that he later retold the story of the murders to a fellow inmate, Robert, while incarcerated. The panel also noted that Hall was tied up and gagged and was helpless when robbed, shot, and killed. These facts are not lessened by the fact that the cord binding Hall was not very tight or the fact that Hall might not have been tied up very long before he was shot. We decline to conclude that these factors would somehow make the

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[59] See, *Ellis, supra* note 13; *Mata, supra* note 39; *Hessler, supra* note 41; *State v. Gales*, 269 Neb. 443, 694 N.W.2d 124 (2005); *Bjorklund, supra* note 57; *Palmer, supra* note 57; *Ryan, supra* note 57. See, also, *Joubert v. Hopkins*, 75 F.3d 1232 (8th Cir. 1996); *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

[60] Brief for appellant at 94.

application of this aggravator to Torres unconstitutional. His argument on this point, and also with regard to this aggravator, is without merit.

### 8. Considering Hall's "Mental Suffering" and "Uncertainty as to His Ultimate Fate" to Support Existence of § 29-2523(1)(d)

#### (a) Did Sentencing Panel Err in Considering "Mental Suffering"?

In his ninth assignment of error, Torres first argues that the sentencing panel erred when it considered Hall's "'mental suffering'" and "'uncertainty as to [his] ultimate fate'" as support for finding that § 29-2523(1)(d) applied to Torres. The basis of Torres' argument is this court's decision in *State v. Sandoval*,[61] which was released after the sentencing order was filed in this case. In *Sandoval*, this court held that it was error for the district court to instruct the jury that it could consider the victim's "'mental anguish'" in finding the existence of aggravator (1)(d)—specifically, in including "'mental anguish'" in the standard for whether the murder was "'especially heinous, atrocious, or cruel.'"[62]

[24] We agree with Torres insofar as he argues that mental anguish should have not been considered by the sentencing panel, and thus, the findings made by the panel to that end were erroneous. A jury may not consider a victim's mental anguish in finding the existence of the aggravating circumstance set forth in § 29-2523(1)(d). But unlike in *Sandoval*, where the error resulted in a finding that the aggravator was not established, in this case, the failure of this one finding does not mean the failure of the entire aggravator.

*Sandoval* dealt with an erroneous jury instruction with regard to mental anguish. The jury in *Sandoval* was asked to determine only whether the various aggravators were established and did not provide any additional factual findings. Thus, where the jury instruction was incorrect, it was not possible for this court

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[61] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 563 U.S. 1012, 131 S. Ct. 2912, 179 L. Ed. 2d 1254 (2011).

[62] *Id.* at 352-53, 788 N.W.2d at 211-12.

to determine whether the jury's finding of the aggravator had been based upon the incorrect instruction and the entire aggravator had to be disregarded.[63]

But aggravator (1)(d) provides as an aggravating circumstance that "[t]he murder was especially heinous, atrocious, cruel, *or* manifested exceptional depravity by ordinary standards of morality and intelligence."[64] This aggravating circumstance contains two separate disjunctive components which may operate together or independently of one another.[65] In *Sandoval*, the jury instruction and verdict form did not permit us to determine upon which prong the jury's finding of aggravator (1)(d) had been based—thus, we could not conclude that the jury's finding had not been based on the inclusion of "'mental anguish'" in the court's instruction on "'especially heinous, atrocious, or cruel.'"[66] In this case, however, the sentencing panel made detailed findings and explained that *both* prongs of the aggravator had been proved. As a result, Torres was not prejudiced by the sentencing panel's erroneous understanding of aggravator (1)(d)'s "especially heinous, atrocious, [or] cruel" provision so long as the evidence was sufficient to support the panel's finding that the murder exhibited exceptional depravity. We now turn to that question.

(b) Did State Prove Aggravator (1)(d)
Beyond Reasonable Doubt?

Having concluded that the sentencing panel erred in considering Hall's mental suffering, we now turn to Torres' argument that the sentencing panel erred in finding that the State proved beyond a reasonable doubt the existence of § 29-2523(1)(d) with regard to the murder of Hall.

We find that the "exceptional depravity" prong was proved beyond a reasonable doubt and supports the finding of this aggravator.

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[63] See, also, *Ryan, supra* note 57.

[64] § 29-2523(1)(d) (emphasis supplied).

[65] *Ellis, supra* note 13.

[66] *Sandoval, supra* note 61, 280 Neb. at 352-53, 788 N.W.2d at 211-12.

[25,26] Exceptional depravity pertains to the state of mind of the actor and may be proved by or inferred from the defendant's conduct at or near the time of the offense.[67] We have identified specific narrowing factors that support a finding of exceptional depravity: (1) apparent relishing of the murder by the killer, (2) infliction of gratuitous violence on the victim, (3) needless mutilation of the victim, (4) senselessness of the crime, or (5) helplessness of the victim.[68]

The evidence in this case was sufficient to show beyond a reasonable doubt the presence of this aggravator with regard to Hall's death. A "helpless" victim is readily understood to be one who is unable to defend oneself, or to act without help.[69] The evidence establishes that Hall was bound and gagged when he was shot, showing not only that Hall was helpless, but that the murder was senseless because Hall posed no threat to Torres. And Hall was not simply shot to death—he had been gagged and strangled to the point of asphyxiation, demonstrating the infliction of gratuitous violence. The evidence was clearly sufficient to prove the existence of exceptional depravity, and therefore, the sentencing panel did not err in finding that the State proved beyond a reasonable doubt aggravator (1)(d).

### 9. Proof of Aggravators

In his 10th assignment of error, Torres contends the sentencing panel also erred in finding that the State proved beyond a reasonable doubt the existence of § 29-2523(1)(a) and (b). Torres does not appeal the sentencing panel's determination that at the time the murder was committed, he also committed another murder, thereby establishing aggravator (1)(e).

#### (a) Aggravator (1)(a)

Torres first argues that the sentencing panel erred in finding he had a substantial history of serious assaultive or terrorizing activity and that thus, the finding of aggravator (1)(a) was in error. Torres argues that he had only two prior incidents, a

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[67] See *Ryan, supra* note 39.

[68] *Id.*

[69] *Ellis, supra* note 13.

domestic violence charge from 1999 and the kidnapping and other charges surrounding the February 2007 incident with Packer, Cross, and Padilla. Torres contends that the kidnapping was "not sufficiently removed in time or sequence from the events of the homicides to warrant a finding that the kidnapping established a 'substantial history'" and notes that the only prior violent offense he had was a misdemeanor domestic violence assault from "many years earlier." [70]

[27] We have previously addressed an argument similar to the one made by Torres here. In *State v. Moore*,[71] the defendant argued that one prior murder, committed just 4 days before the murder the sentencing panel was considering, while indicative of serious assaultive criminal behavior, could not be described as a substantial history as contemplated by § 29-2523(1)(a). We disagreed, noting:

> "'"History"' refers to the individual's past acts preceding the incident for which he is on trial and '"substantial,"' . . . refers to an actual, material, and important history of acts of terror of a criminal nature. It does not refer to the particular incident involving the homicide for which he is subject to sentence."[72]

In this case, Torres had previously been convicted of kidnapping, robbery, and two counts of use of a weapon to commit a felony in the February 2007 incident involving Packer, Cross, and Padilla. That event took place 3 weeks prior to the murders of Hall and Donohue. Particularly given the nature of that prior incident, it alone is a sufficient substantial history under aggravator (1)(a).

Even if it were not, aggravator (1)(a) would still have been met. In addition to being met by a substantial prior history, the aggravator is met when the offender was previously convicted of a "crime involving the use or threat of violence."[73] And in this case, as noted above, Torres was convicted of kidnapping

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[70] Brief for appellant at 103.

[71] *Moore, supra* note 58.

[72] *Id.* at 836, 553 N.W.2d at 141 (quoting *Holtan, supra* note 57).

[73] § 29-2523(1)(a).

and robbery as well as two use of a weapon charges relating to the prior incident with Packer, Cross, and Padilla. Such is sufficient to show a previous conviction for purposes of this aggravating circumstance.

The sentencing panel did not err in finding that the State proved beyond a reasonable doubt aggravator (1)(a).

(b) Aggravator (1)(b)

Torres next argues that the sentencing panel erred in finding that § 29-2523(1)(b) was met. That subsection provides as an aggravating circumstance the situation where one murder was "committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime."

This court held in *State v. Lotter*[74] that for aggravator (1)(b) to apply, a defendant "must commit the murder in an effort to conceal some crime or to conceal the identity of the perpetrator of some crime other than the murder itself." In this case, Torres was found to have both robbed and killed Hall. In addition, Torres was found to have killed both Hall and Donohue. Given these facts, the sentencing panel could infer that Hall was killed to conceal Torres' identity as the perpetrator of the robbery and, further, that Donohue was killed to conceal Torres' identity as the murderer of Hall.[75]

Torres contends that the sentencing panel erred in finding this aggravator because it lacked a jury finding as to whether Torres was guilty of premeditated murder or felony murder. Torres argues that if he was convicted of felony murder, the predicate felony—in this case, robbery—could not be used as the "crime" to be concealed for purposes of this aggravator. Torres cites no authority to suggest that the robbery could not be used to support the finding of this aggravator; nor do we find his argument persuasive.

A review of the jury instructions and verdict forms shows that the jury was instructed as to the elements of both first degree murder and felony murder with the predicate offense of robbery. In addition, the jury was instructed as to the elements

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[74] *Lotter, supra* note 58, 255 Neb. at 522-23, 586 N.W.2d at 635.

[75] See *Sandoval, supra* note 61.

of the separate charge of robbery. Torres was found guilty on all charges. Thus, it is clear that the jury found Torres guilty of robbery and murder, regardless of whether the ultimate conviction was premeditated murder and robbery or felony murder with robbery as its predicate offense. The robbery was clearly a separate offense. Nor are we persuaded that the predicate felony for a felony murder cannot, for purposes of aggravator (1)(b), be the crime that the perpetrator sought to conceal. The fact that double jeopardy might preclude punishment for the predicate felony[76] does not change the fact that statutorily it is a separate crime that the defendant could have sought to conceal.

The sentencing panel did not err in finding that the State proved beyond a reasonable doubt aggravator (1)(b).

### 10. Mitigating Factors

In his 11th and final assignment of error, Torres asserts that the sentencing panel erred by not finding any statutory or nonstatutory mitigating factors. We disagree.

Torres first argues that the sentencing panel erred by not finding the existence of statutory mitigators (2)(c) and (2)(g): Section 29-2523(2)(c) considers whether the crime was committed while the offender was under the influence of extreme mental or emotional disturbance; § 29-2523(2)(g) considers whether at the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

[28] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[77] We have held that there is no burden of proof with regard to mitigating circumstances, but because the capital sentencing statutes do not require the State to disprove the existence of mitigating circumstances, the risk of nonproduction and nonpersuasion is on the defendant.[78]

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[76] See *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

[77] *Ellis, supra* note 13.

[78] *Id.*

(a) Mitigator (2)(c)

Torres argues that this mitigator existed due to his methamphetamine use at the time of the murders. Torres directs this court to the testimony of a licensed drug and alcohol counselor, during the sentencing phase, that the use of methamphetamine can induce hyperawareness, paranoia, and breaks with reality. In addition, Packer, who admitted that he was addicted to methamphetamine, testified that the drug caused memory loss, created an altered mental state, caused confusion about what was real and not real, and induced hallucinations and paranoia. Torres further argues that the record shows he was using methamphetamine at the time of the murders.

We question Torres' implicit assumption that voluntary intoxication can form the basis for finding mitigator (2)(c).[79] But assuming without deciding that such could be the case, we nonetheless evaluate the factual merits of Torres' argument if for no other reason than that the same evidence underlies Torres' argument with respect to mitigator (2)(g).

Though Torres contends he was using methamphetamine at the time of Hall's and Donohue's murders, the evidence on that point is contradictory. The presentence investigation states that Torres began using methamphetamine in January 2007. He started by smoking the drug, but in February, Torres began using it intravenously, and he did so throughout that month. According to Torres, his girlfriend had been "'shoot[ing] him up'"; when that relationship ended, Torres returned to smoking the drug, apparently one "bowl" every other day. The presentence report indicated that Torres said he continued to do so until his arrest in March, which happened in Texas on March 26. However, the report also indicates that Torres stated that by the time he left Nebraska for Texas on or about March 5, he was not using methamphetamine because "'a big deal was going down and he needed to be clear-headed.'"

[29] Upon our de novo review, we conclude that the sentencing panel did not err in not finding the existence of

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[79] See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). Cf. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

mitigator (2)(c). For purposes of this mitigator, "extreme" means that the disturbance must be "'"existing in the highest or the greatest possible degree, very great, intense, or most severe."'"[80] The risk of nonproduction and nonpersuasion in this instance was on Torres; he failed to present sufficient evidence to show that he was under the influence of methamphetamine at the time of the murders, let alone to show that any drug use rose to the level of an extreme mental or emotional disturbance.

(b) Mitigator (2)(g) and Nonstatutory Mitigators

For these same reasons, we conclude that Torres did not produce sufficient evidence of methamphetamine use around the time of the murders which resulted in impairment by intoxication such as would require a finding of the existence of mitigator (2)(g) or a finding of nonstatutory mitigators based upon Torres' alleged methamphetamine use. And we note that the sentencing panel explicitly concluded that even if such impairment were shown, it would be insufficient to outweigh the aggravating factors found by the panel.

### 11. Supreme Court De Novo Review and Proportionality Review

[30,31] Finally, in reviewing a sentence of death, the Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.[81] In so doing, it considers whether the aggravating circumstances justify imposition of a sentence of death and whether any mitigating circumstances found to exist approach or exceed the weight given to the aggravating circumstances.[82] Having considered the evidence, we are of the opinion that the aggravating circumstances, and the lack of any mitigating circumstances, justify imposition of the death penalty.

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[80] *Ellis, supra* note 13, 281 Neb. at 611, 799 N.W.2d at 300-301.

[81] *Ellis, supra* note 13.

[82] *Id.*

[32,33] In addition, we are required, upon appeal, to determine the propriety of a death sentence by conducting a proportionality review, comparing the aggravating and mitigating circumstances with those present in other cases in which a district court imposed the death penalty.[83] The purpose of such review is to ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.[84] Our proportionality review, which is separate from the sentencing panel's, looks only to other cases in which the death penalty has been imposed and requires us to compare the aggravating and mitigating circumstances of a case with those present in other cases in which the death penalty was imposed, and ensure that the sentence imposed in a case is no greater than those imposed in other cases with the same or similar circumstances.[85]

In conducting our review, we agree with the sentencing panel that our decisions in *State v. Palmer*[86] and *State v. Peery*[87] are pertinent here. In *Palmer*, the defendant was convicted of felony murder in the death of a coin shop operator who was robbed, beaten, and tied up. The victim's cause of death was strangulation. The defendant was sentenced to death based upon findings that the murder was committed in an apparent attempt to conceal the defendant's identity as the perpetrator of the robbery and that the murder manifested exceptional depravity by ordinary standards of morality and intelligence. And in *Peery*, the defendant was convicted of first degree murder and robbery. Like the victim in *Palmer*, the victim in *Peery* was a coin dealer who was robbed and tied up, as well as gagged, before being shot three times. The defendant in *Peery* was sentenced to death based upon findings that the murder was committed in an apparent attempt to conceal the defendant's identity as the perpetrator of the robbery and that

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Palmer, supra* note 57.

[87] *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

the murder was especially heinous, atrocious, or cruel or manifested exceptional depravity by ordinary standards of morality and intelligence.

Having reviewed our capital jurisprudence, and taking note of comparable cases, we are persuaded that the sentences imposed in this case were not greater than those imposed in other cases with the same or similar circumstances, and accordingly, we uphold the sentencing panel's imposition of the death sentence.

## VI. CONCLUSION

Although we find that the jury was improperly instructed regarding some of the evidence admitted under rule 404(2), we find that this error was harmless. We find no merit to any of Torres' other assignments of error relating to his trial.

We also find merit to Torres' argument that the sentencing panel incorrectly considered the mental suffering of one of his victims in determining whether the aggravating circumstance of § 29-2523(1)(d) was in existence. However, the failure of this one finding does not affect the existence of the aggravator. Otherwise, we find no merit to Torres' assignments of error regarding sentencing.

Accordingly, we affirm Torres' convictions and sentences.

AFFIRMED.

WRIGHT, J., not participating.

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

I dissent from the majority opinion's conclusion that extrinsic evidence of Torres' kidnapping and robbery of Packer was admissible to show Torres' motive for robbing Hall or killing Hall and Donohue. This conclusion is contrary to the pretrial evidence of Torres' conflicting motives that the court reviewed when it admitted the extrinsic evidence. It is also contrary to the evidence presented at trial about Torres' actual motives for the murders. Moreover, finding the prior kidnapping and robbing of Packer relevant to Torres' motive for robbing Hall or committing the murders required the jurors to engage in classic propensity reasoning—Torres kidnapped and robbed Packer, so he must have robbed and killed Hall and Donohue. So admitting the evidence violated our standard of admissibility under

rule 404(2).[1] But because the properly admitted evidence of Torres' guilt was overwhelming enough to conclude that the verdict was surely unattributable to erroneous admission of Torres' extrinsic acts, I conclude that the error was harmless.

Regarding the sentencing phase of Torres' trial, I disagree with the majority opinion's conclusion that the sentencing panel constitutionally applied the exceptional depravity aggravator. The evidence did not support the sentencing panel's conclusion that Torres relished the murders, and the majority opinion fails to analyze this issue. But I conclude that the panel's reliance on this component of the exceptional depravity prong was also harmless error.

## I. THE COURT IMPROPERLY ADMITTED EXTRINSIC ACTS EVIDENCE

In the information, the State alleged two theories of first degree murder: premeditated murder and felony murder. And the court instructed the jury on both theories. It also instructed the jury on the charge that Torres had robbed Hall. But the court did not limit the admission of the kidnapping and robbery of Packer to proving Torres' motive for robbing Hall. And its jury instruction did not distinguish between considering the evidence for Torres' motives for robbing Hall and for committing the murders:

> This evidence regarding actions of [Torres] involving . . . Packer is presented to you solely for the limited purpose of helping you to decide whether [Torres] had the motive, intent and opportunity to go to the place where the crimes that the defendant is charged with are alleged to have occurred on or about March 3 through March 5, 2007, as alleged and commit the crimes that he is presently charged with. You must consider that evidence only for that limited purpose and no other.

This instruction permitted the jurors to consider the prior kidnapping and robbery crimes as proof of Torres' motive for robbing Hall and his motive for murdering Hall and Donohue. I believe that the court erroneously admitted the evidence for both purposes.

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[1] See Neb. Rev. Stat. § 27-404(2) (Reissue 2008).

### 1. Torres' Motive for the Extrinsic Crimes Was Not the Same as His Motive for the Murders

#### (a) The Motive for the Kidnapping and Robbery of Packer Was a Drug Deal Gone Bad

The evidence that the court received for admitting the extrinsic acts showed that Torres kidnapped and robbed Packer over a drug deal; Packer had apparently failed to provide methamphetamine that he owed Torres. Packer testified that during the robbery, Torres wanted an ounce of methamphetamine and stated that he would leave after he got it. The record showed that an ounce of methamphetamine cost between $800 and $1,200 and sold for about $2,400 on the street.

Cross and Packer made calls to find drugs but were unsuccessful. They eventually convinced Torres to release Packer to make a court appearance after Packer promised that he would return with methamphetamine for Torres. But Torres first took $800 to $850 in cash from Packer's wallet. He was angry because Packer's failure to produce the methamphetamine had endangered Torres' girlfriend and son, who were in Texas. Torres wanted Packer to get him money and a plane ticket to Texas. But the money that Torres took was consistent with what Torres believed Packer owed him in drugs. And after Padilla and Cross purchased food, all four of these people ate and used drugs together. When Torres' girlfriend later asked Torres about the incident with Packer because she had read about it in the news, he told her that it "was a deal that had gone bad."

This evidence indicated that Torres (1) intended to force Packer to find the drugs he had promised to provide, or intended to take the equivalent in cash; and (2) intended to make Packer pay for Torres' transportation to Texas to make an exchange for other drugs that Packer wanted or to appease a drug source there. The motive for these actions was Torres' anger over Packer's failure to follow through with a drug deal.

#### (b) Torres' Motive for the Murders of Hall and Donohue Was Different

In contrast, the court admitted no evidence that showed Torres was angry with Hall or Donohue over a drug deal. Instead, a police report indicated that Torres killed Hall and

Donohue to silence them. The police report documented an interview with Robert Mattson, who was incarcerated with Torres after his arrest. Torres had told Mattson that he had murdered Donohue and Hall. Mattson reported the following:

> [Torres] "tied up some old man, he killed a guy that came home, and then he killed the old man." . . .
>
> [Torres] told [Mattson] that he tried to make it look like a robbery. [Mattson] was not clear on the details, but [Torres] told [Mattson] that he had a bunch of money and/or ingredients to make drugs that were ripped off from him. [Torres] went to the house to scare them and ended up tying up the old man. [Mattson] continued that during this, some other guy came home and flipped out on [Torres]. [Torres] told [Mattson] that he shot the guy that was flipping out on him. [Torres] told [Mattson] that he did not want to, but since he shot the other guy he had to shoot the old man. [Mattson] advised the old man's name was [Hall].

At the murder trial, the direct evidence of Torres' motive for the murders was also that he killed Hall and Donohue to silence them. Mattson testified that Torres told him that Donohue owed Torres a lot of money and that Torres went to Hall's house to scare Hall and Donohue. Torres said he tied up Hall when Donohue came home. Torres and Donohue then argued, and Donohue was going to call the police. Torres shot Donohue upstairs. When Torres went back downstairs, Hall was screaming for him to call an ambulance. Torres stated that he did not know what to do and shot Hall.

Cross similarly testified that Torres had admitted to killing Hall and Donohue to keep them from calling the police. He testified that after he and Padilla left Hall's house, he spoke to Torres on the telephone. As stated in the majority opinion, Torres told Cross that "Donohue became angry and tried to break into Cross and Padilla's room. When Torres tried to stop him, Hall came upstairs and mentioned something about calling the police. Cross testified, '[Torres] told me that, you know, can't have cops, and he had to put them to sleep.'"

The police report that the court reviewed for its admissibility ruling showed that Torres' motive for going to Hall's house

to commit a robbery was to obtain money or contraband that Torres believed Hall or Donohue had stolen from him. The report also showed that Torres' motive for the murders was to silence Hall and Donohue. So the pretrial evidence of Torres' motive for the robbery and murders was sufficient to alert the court that a conflict existed between Torres' motive for the extrinsic crimes and his motive for the charged crimes.

It is true that a defendant's extrinsic bad act can show his or her motive for the charged crime even if the defendant's motives for the separate acts were not the same.[2] But here, the State produced the extrinsic bad acts specifically to show that Torres robbed and murdered Hall and Donohue for the same reason that he had kidnapped and robbed Packer: Because he was desperate to get to Texas and had no means of doing so. And if the court had inquired further, it might have recognized that the motives were not the same. But I do not believe that evidence showing that Torres kidnapped and robbed Packer because he was angry that Packer had failed to deliver drugs to Torres supports a conclusion that Torres robbed or murdered Hall and Donohue to get money to go to Texas, except through classic propensity reasoning—Torres kidnapped and robbed Packer; therefore, Torres robbed Hall and murdered him and Donohue.

### 2. Extrinsic Acts Evidence of Torres' Motive for the Murders Was Not Independently Relevant

Even if Torres killed Donohue and Hall to get money and a car to go to Texas, admitting evidence that he previously kidnapped and robbed Packer to prove that motive violated our admissibility standard under rule 404(2). Since 1999, we have required extrinsic acts evidence to be independently relevant.[3] As stated in the majority opinion, extrinsic acts evidence is independently relevant if its relevance does not depend upon a tendency to show propensity.[4] But a juror could only conclude

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[2] See 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence § 3:16 (rev. ed. 2001).

[3] See *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[4] See, e.g., *State v. Baker*, 280 Neb. 752, 789 N.W.2d 702 (2010).

that Torres' kidnapping and robbing of Packer were relevant to prove his motive for the murders by reasoning that Torres was the type of person who would use violence to take a person's property. The propensity inference in the chain of reasoning necessary to find this evidence relevant to motive is unavoidable.

I agree with the majority opinion that character is a generalized tendency to act in a particular way. But when a person's general tendency continues over time and governs similar but disconnected circumstances, the person's disposition is generally called his or her character trait or propensity.[5]

We have distinguished between *logical* relevance and *independent* relevance and have held that even if the State's extrinsic acts evidence is logically relevant to a permissible purpose, it is inadmissible if it lacks independent relevance.[6] And we have specifically held that a court should exclude evidence when its relevance depends on classic propensity reasoning about the defendant's character.[7] Our standard of admissibility is consistent with the decisions of many other jurisdictions,[8] as well as the opinions of major legal commentators.[9] So I strongly disagree with the following statement in the majority

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[5] See, 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.02 (Joseph M. McLaughlin ed., 2d ed. 2011); Lee E. Teitelbaum & Nancy Augustus Hertz, *Evidence II: Evidence of Other Crimes as Proof of Intent*, 13 N.M.L. Rev. 423 (1983).

[6] See *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[7] See, *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001); *McManus, supra* note 3; *State v. Sutton*, 16 Neb. App. 185, 741 N.W.2d 713 (2007).

[8] See, e.g., *U.S. v. Green*, 617 F.3d 233 (3d Cir. 2010), *cert. denied* 562 U.S. 942, 131 S. Ct. 363, 178 L. Ed. 2d 234; *U.S. v. Commanche*, 577 F.3d 1261 (10th Cir. 2009); *U.S. v. Varoudakis*, 233 F.3d 113 (1st Cir. 2000); *State v. Cassavaugh*, 161 N.H. 90, 12 A.3d 1277 (2010); *State v. Johnson*, 340 Or. 319, 131 P.3d 173 (2006); *State v. Clifford*, 328 Mont. 300, 121 P.3d 489 (2005); *Masters v. People*, 58 P.3d 979 (Colo. 2002).

[9] See, 1 Imwinkelried, *supra* note 2, § 2:19; 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:28 (3d ed. 2007); 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5239 (Supp. 2011).

opinion: "[M]otive reasoning requires propensity inferences. But, so long as the evidence is also relevant for reasons not based on the defendant's character, it is admissible under rule 404(2)." This conclusion upends our rule 404(2) jurisprudence and is based on a misreading of the treatise on which the majority relies. In that treatise, the author distinguishes between a person's motivation to take an action in specific circumstances and a person's propensity to act in a particular manner under general circumstances.[10] The confusion here arises because the author refers to a person's propensity attached to a motive and a person's propensity attached to character. He also argues that whenever a person has a motive to commit a crime, concluding that the person acted on that motivation involves some inference about the person's bad character. He argues that "[t]he question, therefore, is whether the connection between the existence of the motive and acting on the motive requires a character inference."[11] But he explains the difference between a person's motive and character propensities as follows:

> [H]ow does motive-based propensity differ from character-based propensity? Primarily, the law assumes that motive is more specific than character, and its existence in a given situation does not depend upon the person's morality. Under the right set of circumstances, even non-violent people can possess a motive to act violently, and honest people can have a motive to lie. . . . We assume that a motive might exist because *any person* might possess one under those specific circumstances. The tendency to have such a motive is simply *human*; it does not derive from a trait of character specific to the person involved in the trial.[12]

This case offers a textbook example of the distinction that the author makes. As noted, the direct evidence in the murder trial showed that Torres' motive for the murders was to keep Hall and Donohue from calling the police. This is a classic

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[10] See David P. Leonard, The New Wigmore: Evidence of Other Misconduct and Similar Events § 8.3 (Richard D. Friedman ed. 2009).

[11] *Id.* at 502.

[12] *Id.* at 496 (emphasis in original).

example of motive proof that does not rely on propensity reasoning, or reasoning that the defendant acted in conformity with a bad character trait. Under this proof, the defendant committed the murder in response to the specific possibility

> of being charged with [an extrinsic] crime as a result of Victim's reporting of the crime to the authorities. Arguably, at least, to make the inference we need not ask whether Defendant possesses a violent character, nor is the inference based on the sorts of general motivations that might affect all people. We need only note the possibility that *any* person with this specific motive is more likely to act on the motive than a randomly chosen person without such a motive.[13]

In contrast, the State's reason for presenting Torres' prior act of kidnapping and robbery was to show his motive of needing money and a car. When admitting extrinsic bad acts evidence to show financial stress as a motive for the charged crime, courts must carefully consider whether jurors are likely to view the motive evidence as actually a reflection of character.[14]

Obviously, most people under financial stress are no more likely to commit a robbery or murder than a person without financial stress. So when the court permitted the jurors to consider Torres' prior kidnapping and robbery crimes to show his motive for the murders, a juror was all but certain to infer that he would not have committed the murders except for his specific propensity to commit violent acts to get other people's property when he is under financial stress. Under these facts, I believe the risk was unacceptably high that jurors would infer that Torres had robbed Hall or murdered Hall and Donohue because of a flaw in his character—as illustrated by his previous crimes against Packer.

In *State v. Sanchez*,[15] this court addressed the issue of asking jurors to infer conduct from a proffered motive that is certain to invoke propensity reasoning. There, the State attempted

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[13] *Id.* at 505 (emphasis in original).

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

[15] *Sanchez, supra* note 6.

to prove a defendant's motive for sexually assaulting a child through evidence of his sexual assaults against other children. We held that the proof of the defendant's motive relied on propensity reasoning: "[U]nder the guise of motive, the State is really attempting to prove propensity, i.e., that one who in the past was motivated to seek sexual gratification from children is likely to do so again."[16] Other courts have specifically rejected the admission of extrinsic acts evidence to prove a motive of financial stress under similar circumstances.[17]

I would hold that the court erred in admitting Torres' extrinsic acts to prove this motive. Similarly, the State's proof of Torres' intent based on his extrinsic acts required jurors to conclude that he intended to achieve the goal implied by his motive.[18] Because the State's proof of motive depended upon an inference about Torres' character, the same inference was necessarily present when his motive was used to show that he intended to kill Hall and Donohue. So even if intent had been genuinely at issue, I believe the court additionally erred in instructing jurors that they could consider Torres' extrinsic crimes as proof of his intent. But I conclude that Torres' verdict of guilt was surely unattributable to the erroneous admission of his prior acts to show his motive and intent.

### 3. Erroneous Admission of Extrinsic Acts Was Harmless

In a jury trial of a criminal case, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[19] Harmless error exists when there is some incorrect conduct by the trial court that, on review of the entire record, did not materially influence the jury's verdict adversely to a defendant's substantial right.[20] When determining whether an

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[16] *Id.* at 310, 597 N.W.2d at 375.

[17] See, e.g., *Varoudakis, supra* note 8; *U.S. v. Utter*, 97 F.3d 509 (11th Cir. 1996).

[18] See 22 Wright & Graham, *supra* note 9, § 5240.

[19] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[20] *Id.*

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.[21]

Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[22] The erroneous admission of evidence that is not cumulative may constitute harmless error beyond a reasonable doubt when the defendant's conviction is supported by overwhelming evidence that has been properly admitted or admitted without objection.[23]

Here, the record shows that Torres was using Hall's ATM card shortly after Hall was last seen by someone other than Torres or Donohue. Torres' DNA was on the cloth bathrobe belt that was used to gag Hall. Hall and Donohue were killed by gunshot wounds from a small-caliber weapon. Torres had obtained a small-caliber weapon, and the police found ammunition for such a weapon among Torres' possessions in his Houston motel room. Torres burned Hall's car after he got to the Houston area and learned that the police were looking for him. He also bribed witnesses to fabricate exculpatory evidence for him. And most important, Torres told both Mattson and Cross that he had killed Hall and Donohue. Although he gave slightly different versions of the story to these witnesses, the versions were similar in all significant aspects and sufficient to conclude that he had truthfully conveyed his conduct.

Even if Torres could provide a plausible explanation for any single piece of this evidence, when considered together, the evidence of his guilt was overwhelming. Thus, I conclude that there is no reasonable probability that the erroneously admitted evidence materially influenced the jury's verdict of

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[21] *Id.*

[22] *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[23] *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000).

guilt. I therefore concur in the majority's judgment affirming Torres' convictions.

## II. NO CONSTITUTIONAL ERROR OCCURS IN THE WEIGHING PROCESS WHEN THE SENTENCER GIVES AGGRAVATING WEIGHT TO THE SAME EVIDENCE UNDER A DIFFERENT SENTENCING FACTOR

As the majority opinion notes, the sentencing panel issued its order before we issued our decision in *State v. Sandoval*.[24] In *Sandoval*, the majority disagreed with the U.S. Supreme Court's approval of a state court's "mental anguish" narrowing factor under an "especially heinous, atrocious, or cruel" aggravator in *Walton v. Arizona*.[25] In *Walton*, the Court affirmed the Arizona Supreme Court's narrowing factor of mental anguish under a heinousness aggravator when the victim would have been uncertain as to his ultimate fate. But the *Sandoval* majority concluded that "[a]ll victims threatened by a deadly weapon would have uncertainty as to their ultimate fate."[26] It therefore disapproved of the "mental anguish" narrowing factor for Nebraska's "especially heinous, atrocious, or cruel" murder under aggravator (1)(d).[27]

I disagreed with that decision. And I continue to believe that the mental anguish factor for a victim's uncertainty of his ultimate fate could be constitutionally considered when the evidence would support one of two findings: (1) The victim would have been uncertain whether the defendant intended to kill him and had time to agonize over whether the defendant would decide to kill him; or (2) the victim would have been certain of the defendant's intent to kill him and had time to agonize over his imminent doom before the defendant committed the

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[24] *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010), *cert. denied* 563 U.S. 1012, 131 S. Ct. 2912, 179 L. Ed. 2d 1254 (2011).

[25] *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[26] *Sandoval, supra* note 24, 280 Neb. at 353, 788 N.W.2d at 212.

[27] See Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 2008).

murder. But now, under *Sandoval*, the mental anguish narrowing factor under § 29-2523(1)(d) is invalid. So the question is, How do we deal with the sentencing panel's reliance on the mental anguish factor to find the existence of the heinousness prong of aggravator (1)(d)?

I believe that the majority opinion incorrectly analyzes this issue in two major respects: First, it fails to apply the proper standard for determining whether constitutional error occurred in the sentencing process. Second, it fails to set out and apply the correct standard for determining whether a sentencing error in a capital case is harmless.

### 1. Unconstitutional Skewing Under *Brown v. Sanders*

As I have previously pointed out,[28] the U.S. Supreme Court's decision in *Brown v. Sanders*[29] has changed the analytical framework for determining whether a constitutional error occurs in a capital sentencing case when a sentencer considers an invalid sentencing factor. Under *Brown*,

> [a]n invalidated sentencing factor (whether an eligibility fact or not) will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.[30]

In other words, if the sentencer could have given aggravating weight to the same facts and circumstances under a different sentencing factor, then no constitutional error occurred.[31]

For example, in *Brown*, the state court invalidated two of the four eligibility factors that the jury considered in determining whether a death sentence was appropriate. Nonetheless, in addition to these sentencing factors, the California sentencing scheme included a catchall sentencing factor for considering

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[28] See *Sandoval, supra* note 24 (Connolly, J., concurring in part, and in part dissenting).

[29] *Brown v. Sanders*, 546 U.S. 212, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006).

[30] *Id.*, 546 U.S. at 220 (emphasis in original).

[31] See *Brown, supra* note 29.

"'[t]he circumstances of the crime of which the defendant was convicted in the present proceeding.'"[32] Because the catch-all sentencing factor permitted the jury to consider the same aggravating facts and circumstances presented under the invalidated factors, no constitutional error in the weighing process occurred.[33]

Here, the sentencing panel found that the State had proved the mental anguish factor because Torres bound and gagged Hall before killing him. The panel concluded that these circumstances constituted mental suffering because Hall was completely at Torres' mercy and could not know his ultimate fate. It did not find the existence of physical torture. So under *Brown*, the question is whether the sentencing panel nonetheless gave aggravating weight to the binding and gagging facts under a different sentencing factor. Although the majority opinion does not acknowledge the *Brown* standard, it concludes that the evidence supported the existence of the narrowing factors for the "helplessness of the victim" and "senselessness of the crime" under the exceptional depravity prong of aggravator (1)(d).

I agree that evidence showing Torres killed Hall after he had bound and gagged him supported the existence of the helpless victim factor under the exceptional depravity prong.[34] Because the sentencing panel properly gave aggravating weight to the evidence under this narrowing factor, its consideration of the evidence did not skew its weighing process under *Brown*. Thus, no constitutional error occurred.

### 2. An Appellate Court's Finding That Sufficient Evidence Supported Other Sentencing Factors Does Not Cure Constitutional Error in a Capital Sentencing Case

If the sentencing panel had improperly considered—under any aggravating factor—evidence that Torres killed Hall after

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[32] *Id.*, 546 U.S. at 222.

[33] See *id.*

[34] See, *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), citing *State v. Peery*, 199 Neb. 656, 261 N.W.2d 95 (1977).

Torres had bound and gagged him, I do not believe the error could be cured by simply concluding that other narrowing factors under aggravator (1)(d) were supported by sufficient evidence. Under *Brown*, no constitutional error occurred here, so no harmless error analysis is required. But the *Sandoval* majority did not follow *Brown* in determining whether unconstitutional skewing occurred in the weighing process. So the rule stated in *Sandoval* is the law. Under that rule, constitutional error occurred because the sentencing panel relied on an invalidated factor and harmless error analysis is required:

> When an appellate court reviewing a death penalty invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists that the sentencing panel did not consider in its balancing, the appellate court may, consistent with the U.S. Constitution, conduct a harmless error analysis or remand the cause to the district court for a new sentencing hearing.[35]

A sentencing error is not harmless because an appellate court concludes that other aggravating factors are sufficiently supported by the evidence. This court lacks statutory authority to reweigh mitigating and aggravating circumstances on appeal. In doing so, we act "as an unreviewable sentencing panel in violation of Nebraska law."[36] To reweigh mitigating and aggravating circumstances violates a capital defendant's due process rights under Nebraska law. So I disagree with the following statement in the majority opinion:

> [T]he sentencing panel made detailed findings and explained that both prongs of the aggravator had been proved. As a result, Torres was not prejudiced by the sentencing panel's erroneous understanding of aggravator (1)(d)'s "especially heinous, atrocious, [or] cruel" provision so long as the evidence was sufficient to support the panel's finding that the murder exhibited exceptional depravity.

(Emphasis omitted.)

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[35] *Sandoval, supra* note 24, 280 Neb. at 349-50, 788 N.W.2d at 209.

[36] *Id.* at 358, 788 N.W.2d at 214-15.

Instead, in *State v. Ryan*,[37] we explained that *Chapman v. California*[38] governs harmless error analysis of constitutional errors. The question under *Chapman* "is not whether the legally admitted evidence was sufficient to support the death sentence, . . . but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained.'"[39] This standard is consistent with the harmless error standard that we apply when reviewing a court's improper admission of evidence in the guilt phase of a capital case. And the U.S. Supreme Court also applies the *Chapman* standard to constitutional errors occurring in the sentencing phase of a capital murder trial.[40]

I would agree that there is no reasonable probability that the sentencing panel's consideration of the mental anguish factor under the heinousness prong contributed to Torres' sentences because the panel properly gave aggravating weight to the same evidence under the helpless victim sentencing factor. This is similar to what we concluded in *State v. Ryan*.[41] Although *Brown* has since subsumed this analysis under its constitutional error inquiry, our harmless error analysis in *Ryan* is consistent with *Brown* under a different analytical framework.

But the statements and analysis in the majority opinion are not consistent with U.S. Supreme Court precedent. The majority opinion would make harmless error turn on whether a death sentence is supported by other sufficient evidence under different narrowing factors, without regard to whether the *same* evidence supported the existence of those factors. In addition to being inconsistent with the fact that we do not reweigh aggravating and mitigating circumstances, this harmless error

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[37] *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).

[38] *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

[39] See *Satterwhite v. Texas*, 486 U.S. 249, 258-59, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988), quoting *Chapman, supra* note 38. Accord *Williams v. Clarke*, 40 F.3d 1529 (8th Cir. 1994).

[40] See *Satterwhite, supra* note 39.

[41] See *Ryan, supra* note 37.

standard ignores what *Chapman*[42] requires. I therefore dissent from the majority's harmless error standard and analysis.

## III. SENTENCING PANEL ERRED IN GIVING AGGRAVATING WEIGHT TO EVIDENCE SUPPORTING THE "RELISHING OF THE MURDER" FACTOR

In addition to finding the existence of the mental anguish factor, the sentencing panel found the existence of four narrowing factors under the exceptional depravity prong of aggravator (1)(d). It found that the following factor existed only as to the murder of Hall: the helplessness of the victim. The panel also found that the following factors existed for the murders of both Hall and Donohue: (1) the senselessness of the crime; (2) the infliction of gratuitous violence on the victims; and (3) the apparent relishing of the murder.

Torres assigns that "[t]he sentencing panel erred in finding the evidence sufficient to prove beyond a reasonable doubt the existence of aggravators 1(a), 1(b), *and 1(d)*."[43] Under this assignment of error, Torres argues that his statements to Cross and Mattson did not show that he relished the murders, and he refers to his previous argument on this issue. Torres had previously argued in his brief that the sentencing panel's erroneous consideration of the mental anguish factor was not harmless because we could not say that the sentencing panel had given great weight to other factors that could be applied to any murder or that were contrary to the evidence. And Torres explicitly argued that the evidence did not show he had relished the murders:

> There is nothing in the differing versions of the murders given to Cross and Mattson by [Torres] that suggests that [Torres] relished the murders. The mere fact that [Torres] informed another person that he committed the murders adds nothing worthy of the tag "exceptional depravity," — i.e. "marked by exceptional debasement, corruption, perversion or deterioration." . . . Nothing in

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[42] *Chapman, supra* note 38.

[43] Brief for appellant at 103 (emphasis supplied).

> the Bill of Exceptions suggests that [Torres'] manner of telling Cross and Mattson what happened was of a bragging, gloating, or arrogant nature . . . . If Cross's account of [Torres'] phone call is accepted as true, then it can be said that [Torres] did not gratuitously murder . . . Hall, but rather found it necessary to do so because [Torres] did not want the cops to be called.[44]

But in affirming the sentencing panel's finding of the relishing of the murder factor, the majority opinion ignores these arguments. In giving short shrift to a constitutional argument in a death penalty case, we fail in our duty "to protect the constitutional rights afforded under both the federal and the state Constitutions."[45] Equally important, I do not agree that the evidence supported the existence of the relishing of the murder factor.

As I explained in my *Sandoval* concurrence, we adopted our exceptional depravity narrowing factors from the Arizona Supreme Court. And under that court's precedents, relishing the murder refers to the defendant's actions or words, apart from the murder itself, that show the defendant savored or took pleasure in a killing. I provided examples of the type of conduct that proves the existence of that factor under Arizona precedents. In general, the defendant's conduct must show the defendant's debasement or perversion in savoring the killing. And Torres' statements to Cross and Mattson—that he killed the victims to keep them from calling the police—do not fit the bill.

In contrast, the majority does not attempt to compare these facts to analogous facts or to clarify what relishing the murder means for future guidance. But I do not believe that Torres' admissions that he committed the murders can show he relished the murders without some additional statement showing that he took pleasure in killing the victims, as distinguished from his indifference to human life—a definition that would apply to any murder and would fail to preclude arbitrary sentencing.

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[44] *Id.* at 100-101.

[45] *Mata, supra* note 37, 275 Neb. at 38, 745 N.W.2d at 260.

Similarly, the majority opinion's conclusion that these facts satisfy the relishing of the murder factor trivializes the purpose of having narrowing factors under the exceptional depravity prong. Those factors guide the sentencer in determining whether a murder was totally and senselessly bereft of any regard for human life.[46] By lowering the bar for proving this narrowing factor, the majority opinion undermines our efforts to clearly channel the sentencer's discretion so that the death penalty is not imposed in an arbitrary manner. The narrowing factors cannot be vague themselves.

I also conclude that the sentencing panel could not have considered Torres' statements to Cross and Mattson under any other sentencing factor that it found to exist. Under *Brown* or *Sandoval*, then, the sentencing panel's giving aggravating weight to these statements was constitutional error. I believe that this error requires us to conclude that there is no reasonable probability that the sentencing panel's improper consideration of the relishing sentencing factor contributed to Torres' sentences because the other aggravating facts that the sentencing panel found to exist overwhelmingly supported the sentences. And I believe that we can reach that conclusion.

Although evidence that Torres admitted to killing Hall and Donohue was powerful evidence of his guilt, it was minor evidence when considered to determine whether Torres was deserving of the death penalty. In contrast to this evidence, the sentencing panel properly weighed evidence that Torres murdered Hall and Donohue at the same time; that he murdered Hall while he was helpless because Torres had bound and gagged him; and that he murdered Hall and Donohue to keep them from calling the police, i.e., to conceal the robbery and his identity as the perpetrator. In addition, the panel properly weighed Torres' history of serious assaultive and terrorizing activity. This evidence showed that under threat of their death, Torres had kidnapped and robbed Packer and forced Cross and Padilla to follow his orders.

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[46] See, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *Palmer, supra* note 34.

It is true that the sentencing panel did not specify which factors or evidence it considered most significant. But neither did the panel's order state that Torres' statements to Cross and Mattson weighed heavily in its decision. Considering the overwhelming aggravating evidence that the sentencing panel weighed, I believe that we can conclude beyond a reasonable doubt that Torres' statements to Cross and Mattson did not materially influence the sentencing panel. Instead, the panel appears to have been so convinced of its sentencing decision that it overreached in finding that the relishing of the murder factor existed. That was error, but it was harmless error.

In sum, I agree with the conclusions in the majority opinion because I conclude that the errors in the guilt and sentencing phases were harmless. But I do not agree with how the majority opinion has analyzed these issues. I believe that the majority opinion incorrectly holds that extrinsic bad acts are admissible to prove motive even if they are relevant to motive only by reasoning that the defendant acted in conformity with a bad character. As stated, this conclusion will upend our rule 404(2) jurisprudence.

Even more so, I disagree with the majority opinion's holding that a defendant in a capital murder case is not prejudiced by a sentencer's reliance on an invalidated narrowing factor if other evidence supports the sentencer's finding that another factor existed. I believe that this analysis is contrary to the constitutional requirements for finding capital sentencing errors harmless and how we have previously analyzed such errors. I believe this opinion will significantly confuse the way we review capital sentencing procedures.

# AT&T Communications of the Midwest, Inc., and TCG Omaha, Inc., an Iowa telecommunications corporation, appellants and cross-appellees, v. Nebraska Public Service Commission, an administrative agency of the State of Nebraska, et al., appellees and cross-appellants, and CenturyLink, a Louisiana telecommunications corporation, et al., appellees.

811 N.W.2d 666

Filed February 3, 2012. No. S-11-258.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011), for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Appeal and Error.** In an appeal under the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011), an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.
4. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.
6. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
7. **Statutes: Appeal and Error.** An appellate court will not read into a statute a meaning that is not there.

Appeal from the District Court for Lancaster County: Karen B. Flowers, Judge. Reversed and remanded with directions.

Loel P. Brooks, of Brooks, Pansing & Brooks, P.C., L.L.O., and Leo J. Bub for appellants AT&T Communications of the Midwest, Inc., and TCG Omaha, Inc.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

Paul M. Schudel and James A. Overcash, of Woods & Aitken, L.L.P., for appellees "Rural Independent Companies."

Steven G. Seglin, of Crosby Guenzel, L.L.P., for appellee MCI Communications Services, Inc., doing business as Verizon Business Services.

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

HEAVICAN, C.J.

## INTRODUCTION

This case involves a dispute between AT&T Communications of the Midwest, Inc., and TCG Omaha, Inc. (collectively AT&T), and the Nebraska Public Service Commission (PSC) regarding the correct interpretation of Neb. Rev. Stat. § 86-140 (Reissue 2008). That section governs the regulation of access charges. In its order, the PSC determined that telecommunications companies like AT&T could seek the negotiation and review of access charges under § 86-140 only when a local exchange carrier had implemented new or revised access charges, and not "at will," as was contended by AT&T.

AT&T appealed to the district court, which reversed in part and in part modified the decision of the PSC. AT&T now appeals from the order of the district court, and the PSC, joined by various rural independent telecommunications companies, cross-appeals. We reverse the decision of the district court and remand the cause to the district court with directions to remand the case to the PSC to enter an order consistent with this opinion.

## BACKGROUND

On February 24, 2009, the PSC opened an investigation into access charge policies under § 86-140. Though not entirely clear from the record, it appears this investigation stemmed, at least in part, from an access charge dispute between AT&T and a local exchange carrier which required an interpretation of § 86-140.

Section 86-140 provides in relevant part:

> (1) Access charges imposed by telecommunications companies for access to a local exchange network for interexchange service shall be negotiated by the telecommunications companies involved. Any affected telecommunications company may apply for review of such charges by the commission, or the commission may make a motion to review such charges. Upon such application or motion and unless otherwise agreed to by all parties thereto, the commission shall, upon proper notice, hold and complete a hearing thereon within ninety days of the filing. The commission may, within sixty days after the close of the hearing, enter an order setting access charges which are fair and reasonable. The commission shall set an access charge structure for each local exchange carrier but may order discounts where there is not available access of equal type and quality for all interexchange carriers, except that the commission shall not order access charges which would cause the annual revenue to be realized by the local exchange carrier from all interexchange carriers to be less than the annual costs, as determined by the commission based upon evidence received at hearing, incurred or which will be incurred by the local exchange carrier in providing such access services. Any actions taken pursuant to this subsection shall be substantially consistent with the federal act and federal actions taken under its authority.
>
> . . . .
>
> (3) For purposes of this section, access charges means the charges paid by telecommunications companies to local exchange carriers in order to originate and terminate calls using local exchange facilities.

On April 23 and June 10, 2009, AT&T and several other interested parties filed comments as part of the PSC's investigation. On January 6, 2010, the PSC held a hearing on the issue. More comments were filed by AT&T and others on February 16 and 26.

On April 20, 2010, the PSC issued an order concluding that negotiation and review under § 86-140 was available for only new or revised access charges. AT&T requested a review of that order with the district court on May 20. A hearing was held on August 30, and on February 24, 2011, the district court entered its order holding that § 86-140 was available for new or revised access charges and also in those situations where prior agreements regarding access charges had expired and negotiations for a new agreement were unsuccessful. AT&T filed a motion for clarification, which was denied. AT&T now appeals. The PSC, joined by the rural independent companies, cross-appeals.

## ASSIGNMENTS OF ERROR

On appeal, AT&T assigns, restated, that the district court erred in its interpretation of § 86-140. Specifically, AT&T argues that it is entitled to seek negotiation and review under § 86-140 at any time, or "at will," and not just during the time periods as found by the district court.

On cross-appeal, the PSC and the rural independent companies assign, also restated and consolidated, that the district court erred in failing to affirm the PSC's finding that only new or revised access charges are reviewable under § 86-140.

## STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2010 & Supp. 2011), may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[1] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry

[1] *Tyson Fresh Meats v. State*, 270 Neb. 535, 704 N.W.2d 788 (2005).

is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2] In an appeal under the Administrative Procedure Act, an appellate court will not substitute its factual findings for those of the district court where competent evidence supports the district court's findings.[3]

[4] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[4]

## ANALYSIS

*Arguments of Parties.*

The only issue presented by AT&T's appeal and the PSC's and the rural independent companies' cross-appeals is the proper interpretation of § 86-140(1). AT&T argues that the PSC and the district court erred by not holding that § 86-140 permits a telecommunications company to initiate negotiations concerning access charges at any time and, failing such negotiations, seek "at will" review of such access charges. Specifically, AT&T contends that there is no language in § 86-140 imposing any limits on an affected carrier's right to seek negotiations and review of another carrier's access charges.

In support of its interpretation, AT&T directs this court to the federal Telecommunications Act of 1996 and 1999 Neb. Laws, L.B. 514, which was the Legislature's response to the 1996 federal act. Specifically, AT&T argues that L.B. 514 sought to make access charge reform and the review of access charges "easier, more standardized and more rapidly responsive to the ever-changing demand of the nation's regulatory environment and competitive market conditions."[5] But, AT&T contends, the district court's order does the opposite: it "restrict[s], limit[s],

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Brief for appellants at 12.

encumber[s and] discourage[s] access reform and the review of carrier access charges."[6]

The PSC and the rural independent companies, while agreeing with the district court that "at will" review is unavailable, take issue with the district court's further conclusion that review under § 86-140 is also available for expired agreements. Essentially, they argue that review is available under § 86-140 for only new and revised access charges.

The PSC and the rural independent companies first suggest that AT&T's interpretation allowing "at will" review would render the negotiation requirement of § 86-140 meaningless and would open the floodgates to access charge reviews, which under the statute have to be conducted within a relatively short timeframe. They suggest that allowing such a review would overwhelm the PSC. They further reason that other avenues exist for an "at will" review, namely Neb. Rev. Stat. § 75-119 (Reissue 2009). This section, codified within the statutes setting forth more general provisions relating to the PSC, states:

> When any common carrier or other interested person petitions the commission alleging that a rate, rule, or regulation should be prescribed when none exists or alleging that an existing rule, regulation, or rate is unreasonably high or low, unjust, or discriminatory, notice shall be given to the common carriers affected in accordance with the commission's rules for notice and hearing. The minimum notice to be given under this section shall be ten days. The order granting or denying the petition or application shall be mailed to the parties of record. If a petition or application is not opposed after notice has been given, the commission may act upon such petition or application without a hearing.

The PSC and the rural independent companies argue that because of the availability of this review process, the Legislature did not intend for § 86-140 to be the primary mechanism to conduct such reviews.

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[6] *Id.*

They also contend that the "filed rate" doctrine is applicable here and that application of this doctrine requires the conclusion that, as was found by the PSC, only new and revised access charges are subject to review.

The "filed rate" doctrine, which has been adopted in both Nebraska[7] and other jurisdictions,[8] prohibits a regulated entity, like a telecommunications common carrier, from charging any rate other than the rate filed with the relevant regulatory authority—in this case, the PSC.[9] The purpose of the doctrine is to (1) preserve the regulating agency's authority to determine the reasonableness of the rate and (2) ensure that the regulated entities charge only those rates that the agency has approved or has been aware of as the law may require.[10] Consistent with this doctrine, the PSC and the rural independent companies assert that it is not an agreement between the parties that establishes these access charges, but instead, the access charges are controlled by the rate sheets filed by the various carriers. And because a rate sheet controls until a new one is filed by a carrier, there can never be an expiring agreement. As such, the district court was incorrect insofar as it concluded that expiring agreements were subject to review under § 86-140.

*Resolution.*

Our rules of statutory interpretation are familiar. In examining the language of a statute, its 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]

Section 86-140 states that "[a]ccess charges . . . shall be negotiated by the telecommunications companies involved," and further that "[a]ny affected telecommunications company

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[7] See *In re Formal Complaint of Nebco, Inc.*, 212 Neb. 804, 326 N.W.2d 167 (1982).

[8] See, e.g., *H.J. Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 488 (8th Cir. 1992).

[9] See *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669 (8th Cir. 2009).

[10] *H.J. Inc. v. Northwestern Bell Telephone Co., supra* note 8.

[11] *Skaggs v. Nebraska State Patrol*, 282 Neb. 154, 804 N.W.2d 611 (2011).

may apply for review of such charges . . . .” Our examination reveals nothing in § 86-140 that would limit the availability of the negotiation and review process, nor will this court read such limitations into § 86-140.

[5-7] We agree with the PSC and the rural independent companies that the rules of statutory interpretation require this court to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.[12] Moreover, as the PSC also notes, components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[13] However, neither of these principles allows this court to read into a statute a meaning that is not there.[14] And the language of § 86-140 is plain, direct, and unambiguous, and not in need of any further interpretation.

The Legislature could easily have chosen to include language in § 86-140 that would limit the rights of telecommunications companies to seek negotiation and review. It failed to do so. We accordingly conclude that the decision of the district court placing certain limitations on the § 86-140 negotiation and review process is reversed, and the cause is remanded with directions. We conclude that the plain language of § 86-140 envisions both a negotiation and a review process that is not limited by the statute. While we acknowledge the PSC and the rural independent companies’ concerns regarding the practical consequences of our holding today, we are constrained by the words chosen by the Legislature in enacting § 86-140. And simply put, those words contain no limitation on the right to negotiate or review access charges.

Given this conclusion, we reject the PSC’s and the rural independent companies’ cross-appeals.

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[12] See *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

[13] See *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

[14] See *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 281 Neb. 93, 798 N.W.2d 823 (2011).

## CONCLUSION

The decision of the district court is reversed. We remand the cause to the district court with directions to remand the case to the PSC to enter an order not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT and STEPHAN, JJ., not participating.

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# SARPY COUNTY FARM BUREAU, A NEBRASKA NONPROFIT CORPORATION, ET AL., APPELLEES, V. LEARNING COMMUNITY OF DOUGLAS AND SARPY COUNTIES, ET AL., APPELLANTS, AND SARPY COUNTY TREASURER, RICH JAMES, IN HIS OFFICIAL CAPACITY, ET AL., APPELLEES.

808 N.W.2d 598

Filed February 3, 2012. No. S-11-805.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Pleadings.** A pleading serves to guide the parties and the court in the conduct of cases, and thus the issues in a given case are limited to those which are pled.
3. **Legislature: Municipal Corporations: Taxation: Property.** The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local governmental unit to make the levy. The converse is also true; where the Legislature has authorized and required local governmental units to make a property tax levy for state purposes, it should not be treated as a local levy for local purposes merely because it is made by a local governmental unit.
4. **Taxation.** The fact that a tax is for a governmental purpose does not automatically make it for state purposes rather than local purposes. This is so because in many, if not most, cases a governmental function may be accurately described as having both state and local purposes.
5. **Statutes: Intent.** Where state and local purposes are commingled in a statutory enactment, the crucial determination is whether the controlling and predominant purposes are state purposes or local purposes. While this is a judicial question, there is no sure test by which state purposes may be distinguished from local purposes. The court must consider each case as it arises and draw the line of demarcation.
6. **Taxation: Statutes: Legislature: Intent: Evidence.** In deciding whether a state or a local purpose predominates, the language of the statutory scheme is of prime

importance. A court may also consider the legislative history and evidence in the record relating to the history of the taxing scheme at issue.

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. **Constitutional Law: Taxation.** The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted.
11. ____: ____. Constitutional limitations on the power to tax must be strictly construed.
12. ____: ____. A commutation occurs in violation of the Nebraska Constitution when tax funds raised in one district are diverted entirely to the benefit of another district.
13. **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.
14. **Legislature: Taxation.** The Legislature creates a taxing district when it grants an entity the power to require the county clerk to levy a tax for the support of the district.
15. **Taxation: Valuation: Constitutional Law.** The object of Nebraska's uniformity clause is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions to dismiss.

Scott E. Daniel and Kurth A. Brashear, of Brashear, L.L.P., for appellant Learning Community of Douglas and Sarpy Counties.

Kenneth W. Hartman, Elizabeth Eynon-Kokrda, and Kelly R. Dahl, of Baird Holm, L.L.P., for appellant Douglas County School District No. 1.

Patrick J. Sullivan and Benjamin E. Maxell, of Adams & Sullivan, P.C., for appellant Sarpy County School District No. 1.

Thomas J. Culhane and Matthew V. Rusch, of Erickson & Sederstrom, P.C., for appellees Sarpy County Farm Bureau, John Knapp, and Ron Woodle.

Jeff C. Miller, Duncan A. Young, and Keith I. Kosaki, of Young & White Law Offices, for appellee Douglas County School District No. 17.

Michael F. Coyle and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., for appellee Douglas County School District No. 66.

Heavican, C.J., Connolly, Stephan, and McCormack, JJ., Inbody, Chief Judge, and Sievers and Cassel, Judges.

Stephan, J.

In 2010, the Learning Community of Douglas and Sarpy Counties (Learning Community) established a common levy for the general fund budgets of its 11 member school districts.[1] After Sarpy County levied this tax on real property, three taxpayers brought an action in the district court seeking a declaration that the tax was unconstitutional. They alleged that (1) it was a property tax for a state purpose,[2] (2) it was a commutation of taxes,[3] and/or (3) it violated the requirement that taxes "be levied by valuation uniformly and proportionately upon all real property."[4] The Learning Community, each of its member school districts, and the Sarpy County treasurer were named defendants in the action. Ruling on cross-motions for summary judgment, the district court declared the Learning Community's common levy was unconstitutional as a property tax for state purposes but did not reach the alternative grounds of alleged unconstitutionality. The Learning Community and two of its member school districts appeal. We reverse, and remand with directions to dismiss.

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[1] See Neb. Rev. Stat. § 77-3442(2)(b) (Cum. Supp. 2010).

[2] Neb. Const. art. VIII, § 1A.

[3] *Id.*, § 4.

[4] *Id.*, § 1.

## I. BACKGROUND

### 1. Learning Community Structure

A learning community is a political subdivision authorized by legislation enacted in 2006.[5] Each Nebraska city of the metropolitan class is required to establish a learning community which includes all the school districts having a principal office in the county where the city of the metropolitan class is located and all the school districts having a principal office located in a county that has a contiguous border of at least 5 miles in aggregate with such city of the metropolitan class.[6] In addition, a learning community may be established at the request of at least three school boards located outside a metropolitan area, provided certain requirements are met.[7] A learning community shares the territory of its member school districts.[8]

When the Legislature enacted the learning community legislation, it amended a statute which had provided that "[e]ach incorporated city of the metropolitan class . . . shall constitute one Class V school district."[9] The statute currently provides that each such city "shall contain at least one Class V School district."[10]

A learning community is governed by a coordinating council.[11] The coordinating council has, among other powers, the authority to levy a common levy for the general funds and special building funds of its learning community's member school districts.[12] Section 77-3442(2)(b) provides that a learning community, for each fiscal year, "may levy a maximum levy for the general fund budgets of member school districts of ninety-five cents per one hundred dollars of taxable valuation of property

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[5] See 2006 Neb. Laws, L.B. 1024, § 103 (codified at Neb. Rev. Stat. § 79-2101 (Reissue 2008)).

[6] Neb. Rev. Stat. § 79-2102 (Reissue 2008).

[7] *Id.*

[8] § 79-2101.

[9] Neb. Rev. Stat. § 79-409 (Supp. 2005).

[10] § 79-409 (Reissue 2008).

[11] See § 79-2101.

[12] Neb. Rev. Stat. § 79-2104(1) and (2) (Cum. Supp. 2010).

subject to the levy. The proceeds from the levy pursuant to this subdivision shall be distributed pursuant to section 79-1073." That section provides as follows:

> On or before September 1 for each year, each learning community coordinating council shall determine the expected amounts to be distributed by the county treasurers to each member school district from general fund property tax receipts pursuant to subdivision (2)(b) of section 77-3442 and shall certify such amounts to each member school district, the county treasurer for each county containing territory in the learning community, and the State Department of Education. Such property tax receipts shall be divided among member school districts proportionally based on the difference of the school district's formula need calculated pursuant to section 79-1007.11 minus the sum of the state aid certified pursuant to section 79-1022 and the other actual receipts included in local system formula resources pursuant to section 79-1018.01 for the school fiscal year for which the distribution is being made.
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> Each time the county treasurer distributes property tax receipts from the common general fund levy to member school districts, the amount to be distributed to each district shall be proportional based on the total amounts to be distributed to each member school district for the school fiscal year. Each time the county treasurer certifies a property tax refund pursuant to section 77-1736.06 based on the common general fund levy for member school districts or any entity issues an in lieu of property tax reimbursement based on the common general fund levy for member school districts, including amounts paid pursuant to sections 70-651.01 and 79-1036, the amount to be certified or reimbursed to each district shall be proportional on the same basis as property tax receipts from such levy are distributed to member school districts.[13]

Section 77-3442(2)(g) provides that a learning community may, each fiscal year, "levy a maximum levy of two cents on

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[13] Neb. Rev. Stat. § 79-1073 (Cum. Supp. 2010).

each one hundred dollars of taxable property subject to the levy for special building funds for member school districts. The proceeds from the levy pursuant to this subdivision shall be distributed pursuant to section 79-1073.01." Neb. Rev. Stat. § 79-1073.01 (Cum. Supp. 2010) provides:

> Amounts levied by learning communities for special building funds for member school districts pursuant to subdivision (2)(g) of section 77-3442 shall be distributed by the county treasurer collecting such levy proceeds to all member school districts proportionally based on the formula students used in the most recent certification of state aid pursuant to section 79-1022. Each time the county treasurer certifies a property tax refund pursuant to section 77-1736.06 based on the levy of a learning community for special building funds for members [sic] school districts or any entity issues an in lieu of property tax reimbursement based on the levy of a learning community for special building funds for member school districts, including amounts paid pursuant to sections 70-651.01 and 79-1036, the amount to be certified or reimbursed to each district shall be proportional on the same basis as property tax receipts from such levy are distributed to member school districts.
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> Any amounts distributed pursuant to this section shall be used by the member school districts for special building funds.

A levy by a learning community limits the permissible levies by its member school districts. Subject to certain exceptions not applicable here, a school district which is not included within a learning community is authorized to "levy a maximum levy of one dollar and five cents per one hundred dollars of taxable valuation of property subject to the levy."[14] However, school districts which are members of a learning community "may levy for purposes of such districts' general fund budget and special building funds a maximum combined levy of the difference of one dollar and five cents on each one hundred

[14] § 77-3442(2)(a).

dollars of taxable property subject to the levy minus the learning community levies."[15]

Originally, a learning community was required to distribute tax receipts directly to its member school districts.[16] But that system of distribution was changed by legislative amendment[17] as a cost-saving and efficiency measure. Currently, the county treasurer for each county containing territory in a learning community distributes funds to the member school districts from the levy tax receipts.[18]

The Learning Community involved in this action was established in 2009. It has its own separate and distinct boundaries, but shares its territory with the public school districts in Douglas and Sarpy Counties as follows: Douglas County school districts Nos. 1 (Omaha Public Schools), 10 (Elkhorn Public Schools), 15 (Douglas County West Community Schools), 17 (Millard Public Schools), 54 (Ralston Public Schools), 59 (Bennington Public Schools), and 66 (Westside Community Schools); and Sarpy County school districts Nos. 1 (Bellevue School District), 27 (Papillion-La Vista Public Schools), 37 (Gretna Public Schools), and 46 (South Sarpy District 46). Each member school district retains its separate status as a political subdivision, as well as its boundaries and system of administration.

Prior to adopting its 2010-11 budget, the Learning Community solicited input from its member school districts and conducted public hearings on the proposed budget and levy. On September 16, 2010, the Learning Community's coordinating council adopted a 2010-11 budget which included a common levy for the general funds of its member school districts of $0.95 per $100 of taxable valuation of property subject to the levy. The common levy for special building funds of member school districts was set at zero. The council certified the levy

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[15] § 77-3442(2)(c).

[16] See §§ 79-1073, 79-1073.01, and 79-2104(1) and (2) (Reissue 2008).

[17] 2009 Neb. Laws, L.B. 392, §§ 13 to 16.

[18] Neb. Rev. Stat. § 79-1041 (Cum. Supp. 2010).

to the Douglas and Sarpy Counties boards of equalization[19] and certified the expected distributions from revenues generated by the levy to the member school districts, the affected county treasurers, and the State Department of Education.[20] On October 5, 2010, the Sarpy County Board of Commissioners sitting as the Board of Equalization of Sarpy County levied property taxes which included the Learning Community's common levy.

### 2. District Court Proceedings

This action was commenced on December 21, 2010, in the district court for Sarpy County by Sarpy County Farm Bureau, John Knapp, and Ron Woodle (collectively the taxpayers). Sarpy County Farm Bureau is a nonprofit corporation with its principal place of business in Sarpy County and pays property taxes in that county. Knapp and Woodle are residents of Sarpy County and pay property taxes there. The taxpayers sought a declaratory judgment that the Learning Community's common levy was unconstitutional, because it was a property tax for state purposes,[21] because the tax and its distribution constituted a commutation of taxes,[22] and because it was not levied uniformly and proportionately.[23] Named defendants were the Learning Community, each of its member school districts, and the Sarpy County treasurer. The taxpayers prayed that §§ 77-3442(2)(b) and 79-1073 be declared unconstitutional, that the tax levies and their distribution be declared void and illegal, and for such other relief as the court determined to be just and equitable.

The taxpayers subsequently filed a motion for summary judgment. Three of the defendants, namely, the Learning Community, Douglas County School District No. 1 (Omaha Public Schools), and Sarpy County School District No. 1

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[19] See Neb. Rev. Stat. § 13-508 (Cum. Supp. 2010).

[20] See § 79-1073.

[21] Neb. Const. art. VIII, § 1A.

[22] *Id.*, § 4.

[23] *Id.*, § 1.

(Bellevue School District) filed cross-motions for summary judgment. After conducting an evidentiary hearing, the district court sustained the taxpayers' motion. It determined that the Learning Community's common general fund levy made pursuant to § 77-3442(2)(b) and distributed pursuant to § 79-1073 was an unconstitutional property tax levied for a state purpose. It reasoned the legislative history showed that learning communities were created to pool the resources of the member districts in order to allow for a redistribution of tax dollars. Although not requested to do so, the district court also determined that the statutes authorizing learning communities to levy for special building funds of member school districts[24] and to distribute such revenues[25] were unconstitutional for the same reason. The district court did not reach the taxpayers' alternative constitutional claims. Accordingly, the district court declared §§ 77-3442(2)(b) and (g), 70-1073, and 70-1073.01 to be "unconstitutional as in violation of Neb. Const. art. VIII, § 1A."

The Learning Community, Omaha Public Schools, and Bellevue School District (collectively appellants) perfected a timely appeal. We granted the Learning Community's motion to stay the order and judgment of the district court pending resolution of the appeal and a second motion by the Learning Community to expedite the appeal. Separate briefs and notices of constitutional question were filed by each of the three appellants. The appellee taxpayers filed a joint brief. Appellee Douglas County School District No. 17 (Millard School District) filed a separate brief taking no position on the merits of the appeal but urging this court to adopt a prospective remedy if it determines that any of the challenged statutes are unconstitutional. Douglas County School District No. 66 (Westside Community Schools) did not file a brief but advised the court by letter that it joined in Millard School District's request. No other party has appeared on appeal.

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[24] § 77-3442(2)(g).

[25] § 79-1073.01 (Cum. Supp. 2010).

## II. ASSIGNMENTS OF ERROR

Appellants assign, restated and summarized, that the district court erred in (1) finding the common general fund levy was an unconstitutional property tax for a state purpose, (2) finding unchallenged statutes to be unconstitutional, (3) granting the taxpayers' motion for summary judgment, and (4) denying appellants' motion for summary judgment.

## III. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, we are obligated to reach a conclusion independent of the decision reached by the court below.[26]

## IV. ANALYSIS

### 1. Preliminary Matters

[2] Before addressing the merits of the constitutional issues presented in this appeal, we consider two preliminary matters raised by appellants. First, they argue that because the district court was not asked to rule on the constitutionality of §§ 77-3442(2)(g) and 79-1073.01, which authorize a learning community's common levy for the special building funds of its member districts, it erred in doing so. We agree. The constitutionality of these statutes was not raised in the complaint. A pleading serves to guide the parties and the court in the conduct of cases, and thus the issues in a given case are limited to those which are pled.[27] A sua sponte determination by a court of a question not raised by the parties may violate due process.[28] We hold that the district court's conclusion that §§ 77-3442(2)(g) and 79-1073.01 are unconstitutional is void. Because the district court lacked authority to address this issue, we likewise lack such authority, and our analysis is limited to the constitutionality of §§ 77-3442(2)(b) and 79-1073.

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[26] *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011); *Yant v. City of Grand Island*, 279 Neb. 935, 784 N.W.2d 101 (2010).

[27] See *Spanish Oaks v. Hy-Vee*, 265 Neb. 133, 655 N.W.2d 390 (2003).

[28] See *id.*

Second, appellants urge us not to reach the constitutional issues presented on the premise that they are nonjusticiable political questions. Appellants contend that the taxpayers' complaints about the common fund levy are simply challenges to policy decisions made by the Legislature about the appropriate structure of and funding for public education. According to appellants, this is the heart of the legislative policymaking function and this court is not a proper forum for resolving such broad and complicated policy decisions. We agree that broad policy decisions are the Legislature's prerogative. But here, we are specifically asked to determine whether the Legislature's chosen means of implementing a particular policy violate specific provisions of the state Constitution. This is a judicial function which this court is obligated to perform.[29]

### 2. Property Tax for State Purposes

#### (a) General Background and Case Law

Article VIII, § 1A, of the Nebraska Constitution provides: "The state shall be prohibited from levying a property tax for state purposes." This provision was first adopted in 1954 and was amended to its present form in 1966 after Nebraska adopted a state sales and income tax.[30] The purpose of the provision was to require the State, after it adopted sales and income taxes, to leave the realm of property taxation.[31] Accordingly, no state interest or function can be financed by means of property taxes; all "traditional" state interests and functions must be financed by means other than property taxes.[32]

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[29] See *Davis v. General Motors Acceptance Corp.*, 176 Neb. 865, 127 N.W.2d 907 (1964).

[30] See, *State ex rel. Western Technical Com. Col. Area v. Tallon*, 196 Neb. 603, 244 N.W.2d 183 (1976), citing *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon*, 192 Neb. 201, 219 N.W.2d 454 (1974); *State ex rel. Meyer v. County of Banner*, 196 Neb. 565, 244 N.W.2d 179 (1976).

[31] *Garey v. Nebraska Dept. of Nat. Resources*, 277 Neb. 149, 759 N.W.2d 919 (2009); *Swanson v. State*, 249 Neb. 466, 544 N.W.2d 333 (1996).

[32] *Swanson, supra* note 31, 249 Neb. at 476, 544 N.W.2d at 340.

We first addressed article VIII, § 1A, in *Craig v. Board of Equalization*.[33] In that case, a taxpayer alleged that a statute requiring the county to levy property taxes to pay for the care of its indigent mentally ill residents in state institutions was unconstitutional. Noting a prior case in which we held that while the institutions were run by the State, "'maintenance of the insane is not necessarily a state burden, and therefore it is within the power of the legislature to require that the tax be levied and collected by each county for the purpose of reimbursing the state,'"[34] we concluded that although the statute commingled state and local purposes, it did not contravene the prohibition of article VIII, § 1A.

Later the same year, this court decided *R-R Realty Co. v. Metropolitan Utilities Dist*.[35] The challenged state statute required counties and municipalities to levy a tax on property within a metropolitan water district in order to provide fire hydrants. We rejected the taxpayer's argument that the tax was levied for a state rather than a local purpose, stating: "If we were to accept the reasoning urged by the plaintiff, any property tax for governmental purposes levied by a city or county under legislative directions fixing a maximum amount and a maximum levy would become a tax levy by the state for state purposes."[36]

In *Kovarik v. County of Banner*,[37] a county alleged that requiring it to use county funds from property tax revenue to pay attorneys for defending indigent county residents was a state purpose and violated article VIII, § 1A. Although we agreed that the services did benefit "countless people, not only in the county, but also in the state and country, and perhaps in the entire world," we also determined that the "mere chance that the collective benefits may be universal does not alter

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[33] *Craig v. Board of Equalization*, 183 Neb. 779, 164 N.W.2d 445 (1969).

[34] *Id*. at 783, 164 N.W.2d at 447, quoting *State v. Douglas County*, 18 Neb. 601, 26 N.W. 378 (1886).

[35] *R-R Realty Co. v. Metropolitan Utilities Dist.*, 184 Neb. 237, 166 N.W.2d 746 (1969).

[36] *Id*. at 240, 166 N.W.2d at 748.

[37] *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

the fact there is a definite and substantial benefit accruing to the counties."[38] We noted that historically, counties had been responsible for funding criminal prosecutions, and found nothing about the constitutional amendment which indicated an intent to remove that historical responsibility from counties. We concluded that the purpose was predominantly local in nature and that the law did not violate the constitution.

Our first case holding a statute to be in violation of article VIII, § 1A, was *State ex rel. Western Nebraska Technical Com. Col. Area v. Tallon* (*Tallon I*).[39] In that case, the Legislature attempted to group previously independent junior and technical colleges into a "new statewide independent system of technical community colleges."[40] A state board was to control the new system, and it was given power over budget, qualifications and credentials of instructors, training program content, and admission policies. The system was to be financed in part by a property tax levy. In addressing whether this tax violated article VIII, § 1A, we noted:

> The fabric of an educational system is woven of many threads. It is impossible to separate the threads which proclaim a state purpose from those which proclaim a local purpose and difficult to pick them out or identify them in the overall pattern. It is transparently clear that the State has, and should have, an abiding purpose to further all educational opportunities for its citizens, whether the particular institution or system is controlled, operated, and financed by local units of government under the provisions of state law, or whether it is controlled, operated, and financed directly by the state government, also under the provisions of state law.[41]

But noting that our task was to discern whether the primary purpose of the new system was a state purpose or a local purpose, we reasoned:

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[38] *Id*. at 824, 224 N.W.2d at 766.

[39] *Tallon I, supra* note 30.

[40] *Id.* at 204, 219 N.W.2d at 456.

[41] *Id*. at 209-10, 219 N.W.2d at 459.

> Under the act with which we are concerned here, the State has assumed the direct control of major policy decisions which affect the operation of each of the seven community college areas, and the statute reflects *a purpose to control the operation of all seven areas for the benefit of the residents of the state as a whole*. The provisions requiring that the tuition in any technical community college area for any resident of the State of Nebraska shall be the same as for a resident of the particular area is a strong indication of the *legislative purpose to benefit residents of the entire state as contrasted to residents of particular local areas*. The direct control by the State over capital expenditures . . . together with the complete and direct control of the individual budget of each technical community college area, demonstrate the dominance of the State as opposed to the local areas in all major matters of control and operation of the statutory system.[42]

After our decision in *Tallon I*, the Legislature took another approach to creating a system of technical colleges, and its new statutory procedure came before us in *State ex rel. Western Technical Com. Col. Area v. Tallon (Tallon II)*.[43] The new procedure no longer centralized state control, but instead gave technical community college areas many of the same powers as other political subdivisions, so that they operated much the same way as public school districts, "on a strictly local basis subject only to guidelines laid down by the Legislature."[44] We concluded that this new system, which authorized the area districts to levy property taxes, did not violate article VIII, § 1A. We noted in part that the mere fact that the area schools received state aid did not render their operation a state function, because "[s]tate aid to schools necessarily involves a commingling of state and local purposes."[45]

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[42] *Id*. at 211, 219 N.W.2d at 460 (emphasis supplied).

[43] *Tallon II, supra* note 30.

[44] *Id*. at 607, 244 N.W.2d at 186.

[45] *Id*. at 605, 244 N.W.2d at 186.

In *State ex rel. Meyer v. County of Banner*,[46] a county challenged the constitutionality of a state statute requiring it to use its property tax revenue to maintain county and district courts, prosecute state criminal violations, and conduct state and national elections. These functions had traditionally been financed by counties, and the constitutional amendment "does not affect the use of property taxes by a county . . . or other local subdivision. Counties . . . and other taxing subdivisions . . . have traditionally relied and still rely upon property taxes as their major source of revenue."[47] We concluded that the statutory requirement that such expenses be paid by the county from its property tax revenue was constitutional.

A somewhat similar situation was presented in *Rock Cty. v. Spire*.[48] There, the Legislature enacted a statute giving sole responsibility for the administration of social services programs to the State. Part of the statutory scheme required that all equipment that had been used by counties for the administration of public assistance programs was to be transferred to the State. These items had been purchased with property tax moneys collected from county residents. The county contended that because the items had been so purchased, converting them for state use violated article VIII, § 1A. We rejected this argument, reasoning:

> Although the State has assumed responsibility for the administration of social services programs, providing such services to people in need still remains a matter which is of local concern. Certainly, historically, the county has been responsible for certain of the costs of social services programs, including, obviously, the cost of purchasing the furniture and equipment at issue here. Under the ownership of [the State], the county's furniture and equipment will continue to be used for predominantly local purposes.[49]

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[46] *State ex rel. Meyer, supra* note 30.

[47] *Id.* at 568, 244 N.W.2d at 181.

[48] *Rock Cty. v. Spire*, 235 Neb. 434, 455 N.W.2d 763 (1990).

[49] *Id.* at 447, 455 N.W.2d at 771.

*Swanson v. State*[50] involved a constitutional challenge to legislation[51] which reorganized certain school districts and provided for a common levy for the benefit of multiple school districts grouped together as a Class VI school system. The legislation affected Class I school districts, which maintained only elementary schools, and Class VI school districts, which maintained only high schools. Under prior law, property within a Class I school district which had not chosen to become part of an affiliated school system was taxed only in an amount necessary to support the schools of that district and the Class VI district where its students attended high school. Affiliated Class I districts, however, were taxed as if all the school districts in the affiliated system were part of one large district. Hence, affiliated Class I school districts effectively paid property taxes to support other Class I districts, while unaffiliated Class I districts did not.

The challenged legislation created a "Class VI school system" out of Class I and Class VI districts. Each system included one high school and each of the elementary schools whose students would attend that high school. Each district within this local system maintained its independent school board and operated as an independent entity. But the property of residents within the local system was taxed based on the amount necessary to support the entire system, not just the elementary district and high school district affiliated with that property. The property tax levy was uniform throughout each local system, and the proceeds were distributed proportionally to the individual districts within the system. State aid was based on the resources and needs of the whole system, rather than on the resources and needs of each individual district.

A taxpayer alleged the legislation violated article VIII, § 1A, because under it, state aid to individual school districts depended on the common levy for the system. It was undisputed that under the legislation, state equalization aid to some school districts, including the district in which the taxpayer resided, was reduced. The taxpayer argued that the Legislature

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[50] *Swanson, supra* note 31.

[51] See 1993 Neb. Laws, L.B. 839.

had "in effect established a property tax for a state purpose, to expand property tax bases so as to make possible the redistribution of equalization aid."[52]

In addressing this issue, we reviewed our decisions in *Tallon I* and *Tallon II* and emphasized our conclusion in *Tallon I* that the legislative scheme at issue was unconstitutional, because it was primarily for the benefit of the state as a whole. We found a lack of state control in the scheme in *Swanson*; the State had no control over the budgets, programs, personnel, or administrative rules and regulations of the school districts within the new systems. We held that because the "State has assumed neither control nor the primary burden of financial support" of the new systems, nor had the State conditioned the property tax levy on something that would benefit the State, the levy was not unconstitutional as a property tax for a state purpose.[53]

More recently, in *Garey v. Nebraska Dept. of Nat. Resources*,[54] we held that a property tax was unconstitutional because it was levied for a state purpose. In that case, residents and taxpayers of natural resources districts challenged a state statute that authorized any district with "'a river subject to an interstate compact among three or more states'" to annually levy a property tax.[55] Legislative history clearly demonstrated that the controlling and predominant purpose of the tax was to create a fund to enable the State to comply with an interstate compact. Because the benefit was predominantly to the state as a whole, we held that the tax was unconstitutional.

(b) Legal Principles

[3] The levy of a property tax by a local governmental unit should not be treated as a state levy for state purposes merely because the Legislature has authorized or required the local

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[52] *Swanson, supra* note 31, 249 Neb. at 476, 544 N.W.2d at 340.

[53] *Id*. at 478, 544 N.W.2d at 341.

[54] *Garey, supra* note 31.

[55] *Id*. at 152, 759 N.W.2d at 925, quoting Neb. Rev. Stat. § 2-3225(1)(d) (Reissue 2007).

governmental unit to make the levy.[56] The converse is also true; where the Legislature has authorized and required local governmental units to make a property tax levy for state purposes, it should not be treated as a local levy for local purposes merely because it is made by a local governmental unit.[57] Construing the constitutional amendment to prohibit only a direct statewide property tax levy by the State itself would emasculate the amendment and render it virtually meaningless and wholly ineffective.[58]

[4-6] The fact that a tax is for a governmental purpose does not automatically make it for state purposes rather than local purposes.[59] This is so because in many, if not most, cases a governmental function may be accurately described as having both state and local purposes.[60] Where state and local purposes are commingled in a statutory enactment, the crucial determination is whether the controlling and predominant purposes are state purposes or local purposes.[61] While this is a judicial question, there is no sure test by which state purposes may be distinguished from local purposes.[62] The court must consider each case as it arises and draw the line of demarcation.[63] In deciding whether a state or a local purpose predominates, the language of the statutory scheme is of prime importance.[64] We may also consider the legislative history[65] and evidence in the record relating to the history of the taxing scheme at issue.[66]

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[56] See *R-R Realty Co., supra* note 35.

[57] See *Tallon I, supra* note 30.

[58] *Id.*

[59] *R-R Realty Co., supra* note 35.

[60] See *Kovarik, supra* note 37.

[61] See, *Garey, supra* note 31; *Tallon I, supra* note 30.

[62] *Id.*

[63] *Id.*

[64] See, *Garey, supra* note 31; *Swanson, supra* note 31; *Tallon II, supra* note 30; *Tallon I, supra* note 30.

[65] *Garey, supra* note 31.

[66] *Id.*; *Rock Cty., supra* note 48; *State ex rel. Meyer, supra* note 30; *Kovarik, supra* note 37; *R-R Realty Co., supra* note 35.

(c) Statutory Language

The taxpayers urge us to focus on only the common levy provision in the learning community legislation. But the constitutionality of the common levy cannot be considered in a vacuum. Instead, it must be considered in the context of the learning community legislation of which it is an integral part. In both *Tallon I* and *Tallon II*, we examined the statutory enactment as a whole and did not focus solely on the funding mechanism at issue. We conducted a similar analysis in *Swanson*, and conclude we must do so here.

Various provisions of the learning community legislation clearly relate to local issues by authorizing or requiring a learning community to provide educational services to the students and school districts within its territory. For example, a learning community must adopt a diversity plan designed to increase the socioeconomic diversity of enrollment at each school building within the learning community.[67] Learning communities employ an open enrollment attendance system, whereby a student residing in the learning community may apply to attend any school building within the learning community even if that school is not within the school district where the student resides.[68] A learning community may also establish and administer elementary learning centers which serve as resource centers for enhancing the academic success of elementary students.[69] The elementary learning centers may offer classes for family members, extended learning and summer school programming, health services, tutoring, support services programs, and resource advisors.[70]

We also note that the learning community legislation authorizes a learning community to levy a property tax for the general fund budgets of its member school districts, but does not require a common levy.[71] And by establishing a "maximum

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[67] Neb. Rev. Stat. §§ 79-2110 and 79-2118 (Cum. Supp. 2010).

[68] See §§ 79-2104(8) (Cum. Supp. 2010) and 79-2110.

[69] § 79-2104(11) and Neb. Rev. Stat. § 79-2112(1) (Cum. Supp. 2010).

[70] Neb. Rev. Stat. § 79-2114 (Reissue 2008).

[71] See § 77-3442(2)(b).

levy . . . of ninety-five cents per one hundred dollars of taxable valuation,"[72] the statute leaves the amount of any such levy to the discretion of the learning community's coordinating council.

But it is also clear that a learning community council has no discretion regarding the distribution of the proceeds of the common levy. Section 77-3442(2)(b) directs that such distribution be "pursuant to section 79-1073." That section directs that such proceeds be divided among member school districts in accordance with a formula that uses specific numbers calculated under sections[73] of the Tax Equity and Educational Opportunities Support Act.[74] While the act determines state aid to education, the state aid formula is different from the common levy disbursement formula.

(d) Legislative History

The legislative history related to learning communities is extensive. Although the taxpayers and the district court focused on only a specific and relatively small portion of the history, we conclude that our task is to examine the history as a whole.[75]

The examination begins with the history of L.B. 1024, the 2006 bill that established learning communities. According to the Introducer's Statement of Intent, L.B. 1024

> would provide for a new type of educational service unit (E.S.U.) to be referred to as a learning community. The territory of the learning community would form a single tax base for purposes of a common general fund levy and a common capital fund levy. The governing board for a learning community would be composed of one school board member from each member school district.
>
> Students would be residents of the learning community and would be able to attend school in their attendance

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[72] *Id.*

[73] Neb. Rev. Stat. §§ 79-1002 (Reissue 2008) and 79-1007.11 and 79-1018.01 (Cum. Supp. 2010).

[74] Neb. Rev. Stat. §§ 79-1001 to 79-1033 (Reissue 2008 & Cum. Supp. 2010).

[75] See *Garey, supra* note 31.

> area or in any other school in the learning community that had capacity. Transportation would be provided if the student did not choose the closest school. School districts could operate focus schools with authorization from the learning community board and be eligible for additional resources.
>
> . . . Once in a learning community, the boundaries of any school district could only be changed through a plan submitted by the learning community board to the State Committee for the Reorganization of School Districts. The boundaries for districts in the counties that are required to be in a learning community would remain as they existed on January 1, 2005 until a plan is approved by the committee. Within the first 5 years, the learning community board would be required to submit a plan that assures member districts do not have more than 25,000 students and that equalizes economic diversity between member school districts.[76]

During committee debate on the bill, its principal introducer stated that it was intended to address "the metro area school organization issue."[77] The senator stated that by enacting the legislation,

> We achieve an opportunity for cooperation between school districts that is locally directed. The benefit of individual school districts and the variety of choices they offer students and parents is retained. The financial underpinnings of districts are made more equitable. Student mobility and opportunity [are] enhanced. The possibility of focus programs or campuses that serve the entire metro area is created.[78]

The principal introducer also stated that the learning community "would be responsible for a common financial base" and

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[76] Introducer's Statement of Intent, L.B. 1024, Committee on Education, 99th Leg., 2d Sess. (Jan. 30, 2006).

[77] *Id.*, Committee on Education Hearing at 15.

[78] *Id.* at 16-17.

would deal with "the broad issue of diversification of schools within that learning community."[79]

Also during floor debate, one senator noted that the learning community legislation was "for the purpose of working to integrate our schools, for the purpose of creating a common levy, for the purpose of trying to address the problems in Omaha."[80] Another senator stated, "And I think LB 1024 is about the metropolitan area becoming one family of schools, one learning community, far larger than just one city, one school, but all of us together, working to solve the problems."[81]

One of "the problems" in the metropolitan area was a boundary issue. At the time that the Legislature first considered the learning community legislation, a Nebraska statute provided that "[e]ach incorporated city of the metropolitan class . . . shall constitute one Class V school district."[82] The principal introducer of L.B. 1024 stated: "The issue we attempt to address in LB 1024 came storming onto the scene in June of last year, when OPS, Omaha Public Schools, proposed to expand its school district boundaries to the city limits of Omaha . . . ."[83] Other senators echoed the thought. One stated:

> I ask you, why are we here? We are here because of boundaries. We are here because no school board in the metro area—none—was willing to sit down and discuss the issue of boundaries, to discuss the issue of the segregated areas. No one was willing to sit down and talk about giving up territory, giving up part of their little fiefdom and/or growing. That is why we are here.[84]

Another senator observed:

> Now we've got a situation where some of our districts, some of our children, are in one fight. It is our responsibility and nobody else's to stop that fight. LB 1024 provides

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[79] *Id.*, Floor Debate at 12969-70 (Apr. 10, 2006).

[80] *Id.* at 13166-67 (Apr. 11, 2006).

[81] *Id.* at 13548-49 (Apr. 13, 2006).

[82] § 79-409 (Supp. 2005). See L.B. 1024, § 23.

[83] Floor Debate, L.B. 1024, 99th Leg., 2d Sess. 12405-06 (Apr. 4, 2006).

[84] *Id.* at 13157 (Apr. 11, 2006).

> an excellent way of doing that. It provides a learning community in which everyone is fully to the table.[85]

The issue of boundaries also appeared as the learning community legislation evolved. L.B. 1024 froze school district boundaries in the learning community subject to later redrawing, while 2007 Neb. Laws, L.B. 641, permanently froze school district boundaries.

The legislative history of L.B. 1024 also reflects concern about educational issues unique to a metropolitan area. One senator stated that L.B. 1024 encouraged "suburban districts" "to be involved with the urban district in making sure that all children have the best opportunities for educational success."[86] The principal introducer of L.B. 1024 stated, "One of the main objectives of the learning community is to address . . . the issue of integration within the entire learning community . . . ."[87] He stated that the legislation "basically involves a cooperative arrangement for funding, for addressing building needs, and for addressing whatever student mobility issues and educational opportunity issues that may be available, and the last may be the most important."[88] Another senator described the learning community structure as one in which the member districts are "interrelated," explaining, "We're trying to find a way to bring better delivery of services, to bring the benefits of local control and shared responsibilities in the larger group all together in one bill . . . ."[89]

It is also evident that the Legislature considered the impact of a learning community's common levy on state equalization aid. One senator remarked, "not only are we as a Legislature, through our policies, making equity . . . but the sharing of the property tax amounts throughout the learning community make a significant difference on the funding side of things."[90]

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[85] *Id*. at 13159-60.

[86] *Id*. at 12417 (Apr. 4, 2006).

[87] *Id*. at 12994 (Apr. 10, 2006).

[88] *Id*. at 12423 (Apr. 4, 2006).

[89] *Id*. at 13548 (Apr. 13, 2006).

[90] *Id*. at 12440 (Apr. 4, 2006).

The principal introducer of the legislation stated during floor debate that

> part of this proposal is the formation of a learning community and a common operating levy within that learning community and a sharing of that entire community resource. You're right that any one of these or any other district in the learning community that happened to be relatively low on property tax resources would rely relatively more on state aid. But . . . that's the way it does now happen in our aid formula.[91]

One colloquy during floor debate on L.B. 1024 is particularly instructive, and because various parties rely on portions of it, we quote it at some length:

> SENATOR HOWARD: Thank you. As you know, you and I worked closely on the issue of the common levy and I'm very supportive of that. I think that's a way to address the needs of all children equally. But my question is the common levy, and I know that you can understand this and really can help me better understand it, the common levy is used to equalize the resources among districts. Am I correct in that?
>
> SENATOR RAIKES: Yes.
>
> SENATOR HOWARD: My second part of this question then, would you see this issue, would you see this as . . . this equalization, this funding being used for a purpose for the state, a more general purpose regarding the students?
>
> SENATOR RAIKES: I'm not sure I follow your question, Senator. Are you talking about the common levy within the learning community and its implications for statewide finance or policy?
>
> SENATOR HOWARD: Well, my question really is . . . and I'm sorry if I'm vague. I'll have to try to phrase this better to be . . . to have some more clarity in it. But the levy will result, no matter what the levy is, that amount of money will come from property tax, is that correct? I mean the source of it, when you boil it right down.

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[91] *Id*. at 12811 (Apr. 6, 2006).

SENATOR RAIKES: Right.

SENATOR HOWARD: So if we take that then and look at that money that's going to be used for educational purposes for all students, is this considered a state purpose, since education funds come from the state, it's governed . . . the educational program is governed by the decisions made by the legislative body for the state, and is the levy going to be used for a state purpose?

SENATOR RAIKES: No, the levy is to support the local school system.

SENATOR HOWARD: But isn't that the state? Aren't we ultimately responsible for that? And I know it's local in that many of the decisions are made locally and by the school boards, but ultimately isn't this the state that is responsible?

SENATOR RAIKES: Well, it's a shared responsibility between the state and local districts, and the local property tax is the local share of the financing of the school districts.

SENATOR HOWARD: Okay. I think I have a better concept of this. So that the levy, the common levy would be divided by the committee, no longer being called a board, now called the committee, they would . . .

SENATOR RAIKES: It's a council.

SENATOR HOWARD: . . . they would make the . . .

SENATOR RAIKES: Coordinating council.

SENATOR HOWARD: Thank you. Thanks. The council. We've changed that name a few times. But they would have the leverage to make the decision regarding the funding.

SENATOR RAIKES: They . . . that council has the authority to set the common levy up to a maximum . . .

SENATOR HOWARD: And that would be . . .

SENATOR RAIKES: . . . much the same as an individual school board now has the authority to set a local school district levy up to a maximum.[92]

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[92] *Id.* at 12852-54.

In 2007, the year after the Legislature enacted L.B. 1024, it considered L.B. 641, which was introduced by the same senator who had introduced L.B. 1024 the previous year. He described the bill as one of several "introduced this year to deal with what we have come to know as the metro area issue."[93]

As with L.B. 1024, the floor debate on L.B. 641 included a discussion of the school district boundary issues which precipitated the learning community legislation.[94] And there was further discussion of educational goals, with one senator noting that the problem which the bill sought to address was "an achievement gap for minority students in Omaha that must not be permitted to continue."[95] Speaking on the subject of learning community structure, another senator remarked:

> But you've got to have a governance to be able to commingle and send assets and resources and dollars to areas of the two-county learning community that need the special aid to make good things happen so that we improve education and learning and ultimately test scores and everything else that's important to us that we talk about. Quality education is what we're working on.[96]

The floor debate on L.B. 641 also included a discussion of the impact of a learning community's common levy on state aid to education. The introducer of L.B. 641 explained how the common levy would work:

> Let's assume that the learning community council establishes a common general fund levy of 95 cents. That would be levied against all the valuation in the entire learning community and that money collected from that would be distributed to the learning community school districts in proportion to their needs, the needs as calculated in the state aid formula.[97]

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[93] Floor Debate, L.B. 641, 100th Leg., 1st Sess. 54 (May 9, 2007).

[94] *Id.* at 54-56.

[95] *Id.* at 72.

[96] *Id.* at 103.

[97] *Id.* at 148 (May 21, 2007).

In response to a question of how learning community operating costs would affect the state's budget over time, he stated:

> There are effects sort of going both ways. The idea of a common levy within a learning community whereby you have a sharing of high valuation and low valuation districts actually does, I'll say, free up state aid money for the state. So you may view that additional state aid money that is available as funding that could be made available for learning community operations. I will tell you that I am hopeful, at least, that the learning centers, the learning community council will be successful in getting leveraging money from the community in the metro area to help support some of these programs.[98]

During floor debate on 2008 Neb. Laws, L.B. 1154, which made additional amendments to the learning community legislation, the principal introducer explained that the proceeds of the common levy did not go to the learning community itself, but, rather, to the individual school districts within the learning community "in proportion to need."[99] He described the common levy as

> a critical part of the needed funding arrangement for the educational opportunities in the learning community. It enhances the provision of educational opportunities, the open enrollment provisions, and it also enhances the notion that you get, at least financingwise, equal educational opportunities for students in the metro area.[100]

(e) Disposition

Because a learning community is a political subdivision having defined boundaries which circumscribe its operational and taxing authority, its property tax levy is not facially "for state purposes." But our jurisprudence requires that we look deeper to determine whether the Legislature has attempted to "avoid or circumvent [the] constitutional mandate" of article VIII,

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[98] *Id.* at 29.

[99] Floor Debate, L.B. 1154, 100th Leg., 2d Sess. 117 (Mar. 26, 2008).

[100] *Id.* at 115.

§ 1A, "by converting the traditional state functions into local functions supported by property taxes."[101]

[7-11] We undertake this analysis in the context of familiar general principles. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[102] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.[103] The unconstitutionality of a statute must be clearly established before it will be declared void.[104] The power to tax being a sovereign power, constitutional provisions relating thereto do not operate as grants of power of taxation to the government, but are merely limitations on a power which would otherwise be unrestricted.[105] Constitutional limitations on the power to tax must be strictly construed.[106]

One factor we must consider is whether operational control of the entity supported by the property tax lies with the state or with the local entity.[107] In *Tallon I*, we concluded that the Legislature had assumed direct control of major policy decisions which affected each of the seven technical community college areas which were financed by a property tax. This included control over capital expenditures, the right to control and direct facilities and training available in each area, and the "complete and direct control of the individual budget of each technical community college area."[108] But in upholding the revised legislation in *Tallon II*, we noted that the colleges were no longer dominated by the State, but, rather, were governed by area boards which "exercise the same powers and functions

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[101] *Swanson, supra* note 31, 249 Neb. at 476, 544 N.W.2d at 340.

[102] *Kiplinger, supra* note 26; *Yant, supra* note 26.

[103] *Id*.

[104] *Id*.

[105] *Dwyer v. Omaha-Douglas Public Building Commission*, 188 Neb. 30, 195 N.W.2d 236 (1972).

[106] *Id*.

[107] See, *Swanson, supra* note 31; *Tallon II, supra* note 30; *Tallon I, supra* note 30.

[108] *Tallon I, supra* note 30, 192 Neb. at 211, 219 N.W.2d at 460.

as other political subdivisions."[109] We noted that the technical community colleges were "now in largely the same position as our school districts. They operate on a strictly local basis subject only to guidelines laid down by the Legislature."[110] The absence of operational control by the State was also a key factor in upholding the legislation before this court in *Swanson*. There, we noted that the legislation did not give the State "control over individual budgets, capital expenditures, availability of programs, whether and how to hire personnel, or administrative rules and regulations. All of these decisions remain within the province of the individual . . . school districts."[111] We concluded that the Class I and VI school districts "maintain[ed] their autonomy and independence in all respects except their grouping for property tax support."[112]

Operational control within a learning community is similarly local. The school boards of the member districts retain control over their budgets, educational programs, and other operational matters in much the same manner as if no learning community existed. Operational control over programs of the learning community itself, such as diversity plans, open enrollment, and elementary learning centers rests with the learning community's coordinating council, not with any state agency.

Our prior school financing cases have also examined whether the challenged property tax levy is mandated by the State or left to the discretion of the local taxing authority. In *Tallon I*, we concluded that while the statute did not require area boards to certify a levy of one mill, it effectively enforced that result by voiding any state appropriation to an area whose mill levy was less than that amount. The legislation which we upheld in *Tallon II* empowered but did not require local college areas to levy property taxes, and we noted this factor as a part of the basis for our conclusion that the tax did not violate article VIII, § 1A. And upholding the property tax challenged in *Swanson*,

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[109] *Tallon II, supra* note 30, 196 Neb. at 606, 244 N.W.2d at 186.

[110] *Id.* at 607, 244 N.W.2d at 186.

[111] *Swanson, supra* note 31, 249 Neb. at 478, 544 N.W.2d at 341.

[112] *Id.*

we reasoned that the State had not "conditioned state funding on the performance of some act, or the levying of some tax, to benefit the State."[113]

Similarly, a learning community is not statutorily required to levy the property tax challenged in this case. Section 77-3442(2)(b) provides that a learning community "may levy" a property tax of up to $0.95 per $100 of taxable valuation for the general funds of its member school districts. Unlike the statute in *Tallon I*, there is no penalty for failing to do so. To the extent that a learning community elects to levy, the taxing authority of its member school districts decreases; and conversely, to the extent that a learning community elects not to levy, the authority of its member school districts increases subject to the statutory maximum levy.[114]

But the taxpayers urge us to focus on § 79-1073, which directs that the proceeds of a learning community levy be divided among member school districts in accordance with a formula which utilizes numbers calculated according to the provisions of the Tax Equity and Educational Opportunities Support Act. The taxpayers argue that through this statute, the State, not a learning community, controls the distribution of revenue from a learning community's levy. They alleged in the complaint that

> [w]hat the Legislature has done in the learning community legislation is to convert the traditional state function of providing "equalization aid" (i.e., providing state sales and income tax dollars to school districts that have a greater need and less ability to generate property tax receipts) into a local function supported by property taxes.

They argue the common levy thus serves a state purpose by using "property tax funds to 'equalize' aid to education within the Learning Community and thus save the state from committing additional aid from other sources."[115] They contend that as a result of a learning community's common levy, "the State of

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[113] *Id.*

[114] See § 77-3442(2)(c).

[115] Brief for appellee taxpayers at 24.

Nebraska is able to reallocate state education aid and is able to avoid making an additional commitment of income tax or sales tax proceeds to some school districts within the Learning Community despite knowing that additional aid is needed by those districts."[116]

For purposes of our analysis, we assume without deciding that the Learning Community levy challenged here will decrease the amount of state equalization aid which would otherwise be paid to one or more of the school districts within the Learning Community. We further assume without deciding that this decrease in equalization aid would save the State from committing additional aid from other sources. Based on these assumptions, the State may derive some financial benefit from the learning community legislation and, specifically, the common levy authorization. But the mere fact that a state-authorized tax supports a governmental purpose does not render it a tax for state rather than local purposes.[117] Indeed, the "mere granting of state aid does not render a school operation a state function."[118] Rather, given the commingled state and local purposes, the dispositive issue is whether achieving a reduction in state equalization aid in order to benefit the State as a whole was the controlling and predominant purpose of the legislation.[119]

In *Tallon I*, we struck down the proposed legislation under article VIII, § 1A, because, although state and local purposes were commingled, there was a "strong indication of [a] legislative purpose to benefit residents of the entire state as contrasted to residents of particular local areas."[120] In contrast, neither the language of the legislation before us nor its legislative history indicates that the Legislature's predominant purpose was to save money for the benefit of the state as a whole. Much of the learning community legislation demonstrates a predominantly

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[116] *Id*. at 25.

[117] *Swanson, supra* note 31; *Rock Cty., supra* note 48.

[118] *Tallon II, supra* note 30, 196 Neb. at 606, 244 N.W.2d at 186.

[119] See, *Swanson, supra* note 31; *Tallon II, supra* note 30; *Tallon I, supra* note 30.

[120] *Tallon I, supra* note 30, 192 Neb. at 211, 219 N.W.2d at 460.

local purpose in that operational control remains local and a learning community provides a number of distinctly local services. Similarly, when viewed as a whole, the legislative history makes it clear that the learning community legislation was enacted to resolve specific, local problems and that the predominant purpose of the legislation was not to benefit the state as a whole.

Our conclusion is bolstered by the fact that we upheld a taxing scheme nearly identical to that at issue in this case in *Swanson*, and we see no reason to deviate from that opinion. Under the legislation challenged in *Swanson*, state equalization aid to some school districts was decreased and the districts were allowed to increase their property tax requirements. The taxpayer challenging the legislation argued that the Legislature had effectively established a property tax for a state purpose by expanding property tax bases to allow redistribution of state aid. We rejected the argument, noting that the districts "maintain[ed] their autonomy and independence in all respects except their grouping for property tax support."[121]

We are required to presume a statute is constitutional.[122] In light of that presumption and based on the language of the learning community legislation and its legislative history, we cannot conclude that the controlling and predominant purpose of the legislation which authorized the common levy was to utilize property tax revenue to reduce or redistribute state equalization aid to schools, thereby saving the state as a whole sales and income tax dollars. Instead, viewing the statutory language, the legislative history, and the evidence before us, we conclude that the controlling and predominant purpose of the learning community legislation was to address complex educational issues presented within metropolitan school districts. We therefore conclude that the Learning Community's common levy for the general funds of its member school districts is a tax levied for substantially local purposes, and it does not contravene article VIII, § 1A, of the state Constitution.

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[121] *Swanson, supra* note 31, 249 Neb. at 478, 544 N.W.2d at 341.

[122] See, *Kiplinger, supra* note 26; *Yant, supra* note 26.

### 3. Prohibition of Commutation

The district court did not address the taxpayers' alternative arguments that the common levy is an unconstitutional commutation of property tax and/or a nonuniform tax that violates the Nebraska Constitution. Because these are issues of law based upon undisputed facts, and they have been briefed by the parties, we address and resolve them in the interest of judicial economy.

[12] Article VIII, § 4, of the Nebraska Constitution provides:

> [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 taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever[.]

This proscription against commuting a tax prevents the Legislature from releasing either persons or property from contributing a proportionate share of the tax.[123] A commutation occurs in violation of the Nebraska Constitution when tax funds raised in one district are diverted entirely to the benefit of another district.[124]

*Peterson v. Hancock*[125] is the only case in which we have found an unconstitutional commutation of taxes. That case involved a statute authorizing the levy of a property tax in all elementary school districts. To receive funds from the levy, however, a school district was required to have five or more pupils, and some of the districts taxed did not. We held, "The only conclusion that can logically be drawn is that districts having less than five pupils are required to pay the blanket levy on all their property into the fund for the sole benefit of districts with five or more pupils."[126] Although

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[123] *Kiplinger, supra* note 26.

[124] *Swanson, supra* note 31.

[125] *Peterson v. Hancock*, 155 Neb. 801, 54 N.W.2d 85 (1952).

[126] *Id.* at 812, 54 N.W.2d at 92.

we noted the Legislature's "laudable" intention of inducing smaller elementary districts to consolidate, we held the statute was unconstitutional because it was "levied upon one district of the county for the exclusive benefit and local purpose of other districts."[127]

[13] In *Swanson*, we rejected a claim that the school system's common levy resulted in an unconstitutional commutation of taxes. Citing the rule that a "commutation occurs in violation of the Nebraska Constitution when tax funds raised in one district are diverted entirely to the benefit of another district,"[128] we reasoned that the taxing district which imposed the common levy was the Class VI school system and that no commutation occurred, because the proceeds of the common levy benefited the taxpayer's district. Distinguishing the case from *Peterson*, we concluded, "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."[129] We applied this same principle in *Kiplinger*,[130] holding that landowners within certain natural resources districts who received a benefit from projects funded by an occupation tax imposed on irrigation within those districts did not establish that the tax violated the constitutional prohibition against commutation. The taxpayers ask that we reconsider and limit this principle, arguing that it would permit the Legislature to create expansive taxing districts in order to evade the constitution's prohibitions of commutation. But that is not the case before us, and this court does not issue advisory opinions.[131]

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[127] *Id.* at 813-14, 54 N.W.2d at 93.

[128] *Swanson, supra* note 31, 249 Neb. at 471, 544 N.W.2d at 337.

[129] *Id.* at 474, 544 N.W.2d at 339.

[130] *Kiplinger, supra* note 26.

[131] See *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

[14] As we noted in *Swanson*, the Legislature creates a taxing district when it grants an entity the power to require the county clerk to levy a tax for the support of the district.[132] Here, that taxing district is a learning community, a political subdivision with defined boundaries and specified authority to provide services and levy taxes within those boundaries. A learning community's common levy operates in a manner similar to that which we upheld in *Swanson*, in that it benefits not only the school district in which the taxpayers reside, but also other school districts within the learning community. None of the proceeds are expended outside the learning community.[133] We conclude that a learning community's common levy under § 77-3442(2)(b) does not violate the constitutional prohibition against commutation of taxes.

### 4. Uniformity Clause

[15] The uniformity clause of Neb. Const. art. VIII, § 1, provides: "Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution . . . ." The object of Nebraska's uniformity clause is accomplished if all of the property within the taxing jurisdiction is assessed and taxed at a uniform standard of value.[134]

As we have noted, a learning community, not its member school districts, is the taxing jurisdiction which imposes the common levy challenged here. *Swanson* involved a common levy by a school system comprised of several school districts. A learning community's common levy taxes all property within the learning community at the same rate. As in *Swanson*, because the member school districts within the learning community are part of the same taxing district and the levy is uniform throughout that district, the common levy is uniform and does not violate the uniformity clause.

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[132] *Swanson, supra* note 31.

[133] See § 79-1073.

[134] *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001); *Constructors, Inc. v. Cass Cty. Bd. of Equal.*, 258 Neb. 866, 606 N.W.2d 786 (2000).

## V. CONCLUSION

The district court erred in addressing the constitutionality of §§ 77-3442(2)(g) and 79-1073.01, because the issue was not presented by the pleadings. We have jurisdiction and an obligation to decide the constitutional questions presented to us, as they are not merely political questions. The statutory language, the legislative history, and the record as a whole demonstrate that a learning community's common general fund levy under § 77-3442(2)(b) serves a predominantly local purpose, not a state purpose. Because all members of a learning community receive benefits from the taxes levied and the levy is uniform throughout the community, no commutation occurs and there is no violation of the uniformity clause. The judgment of the district court is therefore reversed, and the cause is remanded to that court with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WRIGHT, GERRARD, and MILLER-LERMAN, JJ., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
LEROY J. PARMAR, APPELLANT.

808 N.W.2d 623

Filed February 10, 2012. No. S-10-648.

1. **Motions to Vacate: Motions for New Trial: DNA Testing: Appeal and Error.** Under the DNA Testing Act, an appellate court will not reverse a trial court's order determining a motion to vacate a judgment of conviction or grant a new trial absent an abuse of the trial court's discretion.
2. **DNA Testing: Appeal and Error.** Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.
3. **DNA Testing: Legislature: Intent.** In enacting the DNA Testing Act, the Legislature intended to provide (1) an extraordinary remedy—vacation of the judgment—for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy—a new trial—for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.
4. **Motions to Vacate: DNA Testing: Proof.** To warrant an order vacating a judgment of conviction under the DNA Testing Act, the movant must present DNA

testing results that, when considered with the evidence presented at the trial leading to conviction, show a complete lack of evidence to establish an essential element of the crime charged.

5. **Motions for New Trial: DNA Testing: Proof.** To warrant an order for a new trial under the DNA Testing Act, the movant must present DNA testing results that probably would have produced a substantially different result if the evidence had been offered and admitted at the movant's trial.
6. **DNA Testing.** Postconviction DNA evidence that does not falsify or discredit evidence that was necessary to prove an essential element of the crime does not exonerate the movant.
7. **DNA Testing: Witnesses.** Postconviction DNA evidence probably would have produced a substantially different result at trial if the evidence (1) tends to create a reasonable doubt about the defendant's guilt and (2) does not merely impeach or contradict the key eyewitness' testimony, but is probative of a factual situation different from that to which the witness testified.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Reversed and remanded for a new trial.

James R. Mowbray and Robert W. Kortus, 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.

Connolly, J.

## I. SUMMARY

The appellant, LeRoy J. Parmar, appeals from the district court's order that overruled his motion to vacate his conviction or receive a new trial. Parmar brought his motion under the DNA Testing Act.[1] He based his motion on DNA testing of blood samples found on a bedsheet at the murder scene. The court determined that the DNA evidence was inconclusive and did not exonerate Parmar or show a complete lack of evidence to establish an essential element of the crime. It also denied a new trial because the evidence would not have produced a substantially different result.

[1] Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008).

We reverse. We agree that the DNA evidence did not exonerate Parmar of guilt. But the DNA evidence excluded Parmar's DNA from a crucial piece of evidence and contradicted eyewitness testimony crucial to the State's conviction. Thus, we conclude that the DNA evidence probably would have produced a substantially different result if it had been available at trial. We remand the cause with directions for the court to grant Parmar a new trial.

## II. BACKGROUND

We note that the Legislature amended the DNA Testing Act since Parmar filed his motion for testing. But because none of the amendments are relevant, we refer only to the current statutes for convenience.

### 1. DNA Testing Act

Under § 29-4120, a convicted person in custody may request DNA testing of biological material that was related to the investigation or prosecution that resulted in the judgment. If the court authorizes testing, then under § 29-4123(2), any party may request a hearing when the DNA testing exonerates or exculpates the person in custody. If the court finds that the testing exonerates or exculpates the person, § 29-4123(2) authorizes the court to vacate the judgment and release the person. If the court does not vacate the judgment and release the person, then § 29-4123(3) permits any party to file a motion for a new trial under Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 2008).

Section 29-2101 permits a defendant to apply for a new trial for specified reasons that materially affect the defendant's substantial rights. Under § 29-2101(6), a defendant may seek a new trial for "newly discovered exculpatory DNA or similar forensic testing evidence obtained under the DNA Testing Act."

### 2. Underlying Facts From Parmar's Direct Appeal

A jury convicted Parmar of first degree murder for the 1987 killing of Frederick Cox, and the court sentenced him to a term of life imprisonment. In 1989, we affirmed his conviction

in *State v. Parmar* (*Parmar I*).[2] He later filed postconviction motions, which involved issues that are unrelated to this proceeding.[3] In deciding Parmar's motion for vacation of judgment or a new trial, the district court relied on the facts in *Parmar I*. Because the trial record is not part of the record for this proceeding, we also summarize the facts from his 1989 direct appeal.

Parmar lived with Lanetta Harrington in the same apartment complex as Cox. Lanetta's sister, Joyce Harrington, also lived in the complex, in an apartment that she shared with Truman Stevenson and Michelle Carrigan.

Cox told several people that he had received a $1,000 property settlement from his ex-wife. The day before he was found dead, Cox was out drinking with friends and returned home around 4:10 p.m. He continued to celebrate his good fortune with people in his apartment. Carrigan and Lanetta were in his apartment between 5 and 6 p.m. After Lanetta left, Carrigan performed a sexual act with Cox. Cox paid her with cash from underneath his mattress, and Carrigan saw that he had a large sum of cash.

Carrigan reported this information to Stevenson, Joyce, and Lanetta. Later that evening, Parmar also learned about the cash. Parmar, Lanetta, and Carrigan devised a plan to rob Cox. Carrigan was to knock on Cox's door, and after he answered, Parmar and Lanetta would push Carrigan into Cox, tie Cox up, and take his money. When Carrigan later went to Parmar and Lanetta's apartment, Carrigan saw them with some extension cord, rope, and pieces of cutoff panty hose. Parmar, Lanetta, and Carrigan carried out their plan at 2 a.m. As Parmar and Lanetta wrestled with Cox, another woman, Valerie Washington, came out of the bedroom. Washington testified that she recognized Parmar and Lanetta despite the panty hose over their faces and that Parmar "'pounded Fred Cox on the coffee table and to the

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[2] *State v. Parmar*, 231 Neb. 687, 437 N.W.2d 503 (1989), *overruled on other grounds, State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999).

[3] See, *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002); *State v. Parmar*, 249 Neb. 462, 544 N.W.2d 102 (1996).

ground.'"[4] Washington and Carrigan left Cox's apartment, but Carrigan later returned. She testified that she went into the bedroom and saw Lanetta tying Cox's legs and Parmar "'down by the top of Mr. Cox' but the bed obstructed her view."[5]

Cox's friend came the next morning to pick him up for work, but there was no answer when he knocked on Cox's door. Later that day, he and another friend entered Cox's apartment because Cox still had not responded to knocks. They discovered his body by the bed. There was evidence of a struggle, and Cox was face down on the carpet, wedged between the bed and the wall. His arms and ankles were bound. An autopsy revealed that he died of positional asphyxiation; i.e., because he was intoxicated and bound face down in a confined area, he was unable to move so that he could breathe.

At trial, both Carrigan and Washington testified that Parmar had physically assaulted Cox and was the only male present when Cox was robbed and killed. The State also charged Carrigan with first degree murder for Cox's death; Washington was an independent witness.[6]

### 3. Parmar Obtains Court Order for DNA Testing

In 2005, Parmar moved to have DNA testing performed on evidence used at trial. At the same time, he petitioned for an inventory of the trial evidence. Shortly afterward, a deputy county attorney for Douglas County submitted the Omaha Police Department's property reports as an inventory. One listed item was a sheet from the middle of Cox's bed. The police also found two other sheets inside the bedroom door and a sheet and pillow in the front room. All of these items had probable bloodstains.

In 2008, the court ordered the clerk of the Douglas County District Court to inventory the evidence in its possession and release all the trial exhibits to the University of Nebraska Medical Center for DNA testing. At the hearing on the motion,

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[4] *Parmar I, supra* note 2, 231 Neb. at 690, 437 N.W.2d at 506.

[5] *Id.*

[6] See *Parmar I, supra* note 2.

the court admitted an affidavit from the court reporter stating that although she had diligently searched for the trial evidence, she had found only one of two boxes containing the evidence. The box that the court reporter found contained two sheets.

### 4. DNA Testing Results

In 2009, the medical center's Human DNA Identification Laboratory issued a report on its DNA testing. The laboratory tested the two sheets that the court reporter had found. Its report referenced the evidence numbers used for these items in the police property reports. Those numbers indicate that the laboratory tested the sheet found in the front room and the sheet found on Cox's bed. Stains on those sheets tested positive for the presence of blood, and the laboratory analyzed them for DNA profiles of any contributors to the samples.

In sum, the laboratory's analysis of the DNA samples from the sheet found in the front room produced a partial DNA profile but was inconclusive about the profile of any contributors to the samples. But its analysis of six bloodstains found on Cox's bedsheet excluded Parmar as a contributor to the DNA found in those samples. Two of the six samples contained mixed DNA from two male contributors, but the analysis excluded Parmar as a contributor. For one of the mixed male samples, the analysis produced a major and minor contributor profile. The major profile matched Cox's profile, so the analysis did not exclude Cox as a contributor. But the analysis excluded Parmar as the minor contributor.

In his motion requesting the court to vacate his conviction or grant him a new trial, Parmar relied on the testing results of the DNA samples found on the sheet from Cox's bed. At the hearing, Parmar also submitted an affidavit from an investigator for the Nebraska Commission on Public Advocacy. The investigator stated that in 2006, a detective from the Omaha Police Department called him with the results of the department's search for evidence from Parmar's case. The detective informed him that a county attorney had checked out some of the evidence and did not return it. The investigator did not state the date that the county attorney had checked out the evidence.

### 5. Court's Order

In overruling Parmar's motion, the court concluded that Parmar was not entitled to have his conviction vacated because the DNA testing did not conclusively establish his innocence. The court stated that the test results showed only that one sample contained Cox's DNA mixed with the DNA from an unidentified male. Because it was unknown when the unidentified male's DNA was deposited in the sample, the court concluded that it was purely speculative whether the unidentified male was present during the crime and responsible for the murder.

The court also denied Parmar's motion for a new trial. The court noted that two eyewitnesses at the crime scene testified to Parmar's involvement and presence, and that circumstantial evidence connected him to the crime. It concluded that because of the eyewitness testimony and circumstantial evidence, the DNA evidence was not of such a nature that if Parmar had offered it at trial, it probably would not have produced a substantially different result.

Finally, the court noted that Parmar had argued that he was entitled to a new trial because of the missing evidence. The court concluded that Parmar's due process rights had not been violated by the court's loss of the evidence absent a showing of the State's bad faith.

## III. ASSIGNMENTS OF ERROR

Parmar assigns that the district court erred as follows:

(1) failing to conclude that the DNA testing exonerated him within the meaning of the DNA Testing Act;

(2) failing to conclude that he was entitled to a new trial under the DNA Testing Act;

(3) concluding that the DNA evidence would not have produced a different result if it had been admitted at trial;

(4) failing to grant a new trial because the court had failed to preserve and make available evidence committed to its custody; and

(5) applying a "bad faith" standard to the court's failure to preserve evidence entrusted to it.

## IV. STANDARD OF REVIEW

[1,2] Under the DNA Testing Act, an appellate court will not reverse a trial court's order determining a motion to vacate a judgment of conviction or grant a new trial absent an abuse of the trial court's discretion.[7] Under the DNA Testing Act, an appellate court will uphold a trial court's findings of fact unless such findings are clearly erroneous.[8]

## V. ANALYSIS

### 1. Parties' Contentions

Parmar contends that the DNA evidence discredits and contradicts the eyewitnesses' testimony at his trial. He claims that the State's theory and presentation of the trial evidence cannot be reconciled with DNA evidence that an unidentified male participated in the crime. The State contends that the DNA testing results do not warrant vacation of Parmar's conviction or a new trial because overwhelming non-DNA evidence supported his conviction. It argues that there was not a complete failure of evidence to support his conviction. And the State argues that a jury would have convicted Parmar even if it had known at his trial that an unknown male had donated a DNA specimen at an unknown time.

### 2. Movant's Burden of Production

[3] In enacting the DNA Testing Act, the Legislature intended to provide (1) an extraordinary remedy—vacation of the judgment—for the compelling circumstance in which actual innocence is conclusively established by DNA testing and (2) an ordinary remedy—a new trial—for circumstances in which newly discovered DNA evidence would have, if available at the former trial, probably produced a substantially different result.[9]

[4,5] Thus, to warrant an order vacating a judgment of conviction under the DNA Testing Act, the movant must present

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[7] See, *State v. Pratt*, 277 Neb. 887, 766 N.W.2d 111 (2009); *State v. El-Tabech*, 269 Neb. 810, 696 N.W.2d 445 (2005).

[8] See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[9] See *State v. Buckman*, 267 Neb. 505, 675 N.W.2d 372 (2004).

DNA testing results that, when considered with the evidence presented at the trial leading to conviction, show a complete lack of evidence to establish an essential element of the crime charged.[10] But to warrant an order for a new trial under the DNA Testing Act, the movant must present DNA testing results that probably would have produced a substantially different result if the evidence had been offered and admitted at the movant's trial.[11]

### 3. Analysis

#### (a) Motion to Vacate Judgment

[6] As noted, the court ruled that Parmar was not entitled to have his judgment vacated because the DNA testing did not conclusively establish his innocence. DNA evidence is usually relevant to a defendant's identity as the perpetrator. For some crimes, DNA testing that was not available at trial could potentially exonerate a person of the crime.[12] But postconviction DNA evidence that does not falsify or discredit evidence that was necessary to prove an essential element of the crime does not exonerate the movant.[13]

For example, in *State v. Buckman*,[14] the police seized some of Herman Buckman's clothing articles with blood samples during the original murder investigation. Before his 1989 trial, a state expert had consumed all or most of the blood samples from these articles. She concluded that the blood could have come from the victim but not Buckman. Later, the postconviction DNA testing failed to detect the presence of blood on the clothing articles or failed to produce a DNA profile. But these results were not inconsistent with other evidence of guilt produced at trial.

Similarly, another trial expert in *Buckman* had tested two cigarette butts found in the victim's car. He testified that Buckman

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[10] See *Pratt, supra* note 7.

[11] See *id.*

[12] See, generally, 6 Wayne R. LaFave et al., Criminal Procedure § 24.11(d) (3d ed. 2007).

[13] See *Buckman, supra* note 9.

[14] *Id.*

could not be excluded as a contributor of the genetic material found in either of the cigarettes. The brands were known, and one cigarette was a brand that Buckman was known to smoke. The expert testified that if only one person smoked Buckman's preferred cigarette, other suspects were excluded as contributors to the genetic material. But the trial evidence was not properly stored. The cigarettes from the victim's car were commingled in the same bag with the control-group cigarettes, and the brand for the cigarettes was no longer recognizable when postconviction testing was performed.

The postconviction DNA testing showed only inconclusive, partial DNA profiles for the material from two cigarette butts and no DNA profiles for the others. One of the profiles contained genetic material from more than one individual. The expert's final determination was that the results were inconclusive whether Buckman had been a contributor to the DNA sample in one of the tested cigarettes. In short, the inconclusive postconviction results did not exonerate Buckman of guilt or require a new trial.

Similarly, in *State v. Pratt*,[15] Juneal Pratt had been convicted of sodomy, rape, and robbery in 1975. Postconviction DNA testing of the victims' clothing articles did not conclusively exclude Pratt as a contributor to the DNA samples found in stains on the victims' shirts. None of the stains were found to be presumptively from semen. An analyst testified that Pratt was excluded as a contributor to one of the stains if it was not a mixture of DNA from more than one individual. But the results were inconclusive whether the sample was mixed. The testing of another stain was inconclusive as to how many males contributed DNA to the sample, but at least one male contributor was not Pratt. The testing did not exclude Pratt as a contributor to other mixed samples on one shirt.

Because the testing did not conclusively exclude Pratt as a contributor to the DNA samples, we held that the results were neither exonerating nor exculpating. We further held that the court was not clearly wrong in finding that the DNA material from another male could have been deposited on the clothing

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[15] *Pratt, supra* note 7.

articles because of improper handling or improper storage of the evidence. In contrast, the victims' trial testimony had strongly identified Pratt as the perpetrator.

These cases illustrate that postconviction DNA testing results that are not incompatible with trial evidence of the movant's guilt fail to exonerate the movant of guilt. In overruling Parmar's motion to vacate the judgment, the court reasoned that because it was unknown when the unidentified male's DNA was deposited in the sample, concluding that another male was present during the crime was too speculative. But we believe that this reasoning is properly directed to whether the evidence was sufficiently exculpatory to warrant a new trial. So we do not address it here. We agree with the court, however, that the DNA testing results did not exonerate Parmar.

It is true that the presence of an unidentified male's DNA commingled with the victim's DNA calls into question the State's evidence that Parmar was the sole assailant. But it does not prove that Parmar did not participate in the crime. Parmar could have participated without leaving DNA evidence at the scene. So we conclude that the trial court did not abuse its discretion in denying Parmar's motion to vacate the judgment and release him.

(b) Motion for New Trial

As explained earlier, to warrant an order for a new trial under the DNA Testing Act, the movant must present DNA testing results that probably would have produced a substantially different result if the evidence had been offered and admitted at the movant's trial. Relying on our decision in *State v. El-Tabech*,[16] the court reasoned that a single DNA specimen that belongs to neither the defendant nor the victim is not exculpatory evidence that would have produced a substantially different result at trial. Parmar argues that *El-Tabech* is distinguishable; the State contends that *El-Tabech* is controlling.

The State convicted Mohamed El-Tabech of murdering his wife by strangling her with a cloth bathrobe belt. A tuft of hair was found in a knot tied in the belt. A state expert testified at

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[16] *El-Tabech, supra* note 7.

trial that seven hairs found in the tuft were consistent with the victim's hair. But she testified that another hair that had fallen from the belt did not belong to the victim or El-Tabech. In contrast, the postconviction DNA testing showed that the hair that had fallen from the belt belonged to El-Tabech but that one of the hairs in the knot belonged to neither El-Tabech nor the victim. The district court concluded that because the unidentified hair was bound in the knot, it had been present before the murder and was insignificant evidence of guilt.

On appeal, we stated that although the unidentified hair was a different hair than the one the state expert had testified about at trial, the jury had nonetheless been presented with evidence that a hair belonging to neither the victim nor El-Tabech was found at the scene. Because of other trial evidence of El-Tabech's guilt, we concluded that it could not be said that the testing results probably would have produced a substantially different result.

But the postconviction DNA testing in Parmar's case produced results that are distinguishable from the results in *El-Tabech* and our other cases in two crucial respects. First, the testing results here completely excluded Parmar as a contributor to the DNA samples found on Cox's sheet and established the presence of an unidentified male's DNA. Second, the results were contrary to the testimonies of two key eyewitnesses against Parmar. We have previously addressed the significance of similar DNA evidence in a case deciding whether a district court should have ordered DNA testing. Our reasoning in that case is applicable here.

In *State v. White*,[17] Joseph White had been convicted of first degree murder for his role in a 1985 robbery, rape, and murder of a 68-year-old woman. An alleged accomplice, Thomas Winslow, and four other alleged participants pleaded no contest or guilty to lesser crimes. Three witnesses testified that White and Winslow sexually assaulted the victim. One of these witnesses allegedly suffocated the victim with a pillow. A witness testified that White was present during the crime.

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[17] *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007).

In 2006, the district court denied White's motion for DNA testing, concluding that even if the testing showed that the biological samples did not belong to White, it would not compel the conclusion that White was not present. The court reasoned that White could have been convicted as a participant in the felony robbery even if he had not sexually assaulted the victim. The court determined that evidence showing that the semen samples did not belong to White would not have precluded the jury from finding him guilty of murder based on other evidence.

We reversed the court's denial of White's request for DNA testing.[18]

> The heart of the State's case was the testimony of White's codefendants, . . . who each testified that they saw only White and Winslow sexually assault Wilson. We agree with White that if DNA testing showed that the semen samples belonged to neither White nor Winslow, such evidence would raise questions regarding the identity of the person or persons who actually contributed to the sample and who presumably committed the assault. Such a favorable test result could cause jurors to question the credibility of [the three codefendants.] Evidence that contradicted such witnesses' testimony that White and Winslow carried out the sexual assault could cause jurors to question their testimony regarding other matters. . . .
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> . . . DNA test results that excluded both White and Winslow could raise serious doubts regarding the testimony of the main witnesses against White. Although there was other evidence regarding White's presence at the crime scene and his involvement in planning the crime, the testimonies of [the three codefendants] were critical to the State's case against White resulting in White's conviction for first degree murder.[19]

In *White*, we also rejected the district court's reasoning that even if the testing results would exclude White as a contributor to the DNA samples, the evidence would be cumulative

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[18] See, also, *State v. Winslow*, 274 Neb. 427, 740 N.W.2d 794 (2007).

[19] *White, supra* note 17, 274 Neb. at 425, 740 N.W.2d at 806.

because the trial evidence failed to show that the semen samples belonged to White. We stated that a difference exists "between forensic evidence that fails to identify a person and DNA evidence that excludes the person."[20] We remanded the cause to the district court to determine whether the biological material had been retained under circumstances likely to safeguard its integrity.

[7] Other courts have similarly reasoned that DNA evidence warrants a new trial when it compromises key evidence that the prosecutor used against the defendant at trial.[21] As relevant here, we hold that postconviction DNA evidence probably would have produced a substantially different result at trial if the evidence (1) tends to create a reasonable doubt about the defendant's guilt and (2) "does not merely impeach or contradict [the key eyewitness'] testimony, but is probative of a factual situation different from that to which [the witness] testified."[22]

Like the conviction in *White*, the State's conviction of Parmar depended heavily upon the testimony of two eyewitnesses, one of whom was an accomplice. And the State's theory of the crime, as presented through these eyewitnesses, was that only Parmar assaulted Cox and that the only other participants in the crime were two women. Carrigan testified to seeing Parmar "'down by the top of Mr. Cox.'"[23] But the postconviction DNA testing results are clearly incompatible with the eyewitnesses' testimonies.

To recap, the testing showed that Cox's bedsheet had blood samples with DNA that matched Cox's DNA profile, indicating that he was on the bed at some point before his death. But the

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[20] *Id.* at 426, 740 N.W.2d at 806.

[21] See, *Arrington v. State*, 411 Md. 524, 983 A.2d 1071 (2009); *People v. Waters*, 328 Ill. App. 3d 117, 764 N.E.2d 1194, 262 Ill. Dec. 77 (2002). Compare, *State v. Peterson*, 364 N.J. Super. 387, 836 A.2d 821 (App. Div. 2003); *People v. Wise*, 194 Misc. 2d 481, 752 N.Y.S.2d 837 (N.Y. Sup. 2002).

[22] *Waters, supra* note 21, 328 Ill. App. 3d at 129, 764 N.E.2d at 1204, 262 Ill. Dec. at 87.

[23] *Parmar I, supra* note 2, 231 Neb. at 690, 437 N.W.2d at 506.

testing conclusively excluded Parmar as one of the male contributors to the mixed DNA found in two of those bloodstains. One of those mixed DNA bloodstains produced major and minor contributor profiles—and Parmar was neither contributor. These results are distinguishable from the test results in *Pratt*, which were inconclusive about the individual contributors' profiles.

So while the results did not exonerate Parmar, unlike our earlier cases, his DNA testing results tend to create a reasonable doubt that he was a participant. It is true that we cannot know with absolute certainty that the unidentified male's DNA was deposited on Cox's bedsheet when Cox was murdered. But the district court erred in reasoning that the presence of another male at the murder was too speculative to warrant a new trial.

Obviously, if the other male was not present at the murder, then his DNA was deposited on Cox's bedsheet before or after the murder. But the evidence at the hearing on Parmar's motion for vacation of judgment or a new trial did not support a finding that the other male's DNA was deposited on the sheet after the murder.

Unlike the facts presented in *Pratt*, the court reporter's affidavit stated that the trial evidence she found in a box was stored in separate bags. And no expert testified that improper handling of the evidence could have accounted for the laboratory's finding enough DNA from an unidentified male contributor to produce a separate minor contributor profile. "As a rule, a minor contributor to a mixture must provide at least 5% of the DNA for the mixture to be recognized."[24] Without expert testimony showing how a handler's DNA could have contaminated the sample to such a high percentage, we must assume that both contributors had left their DNA on the sheet before the evidence was gathered. So we conclude that the evidence at the hearing did not support a finding that

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[24] David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Evidence*, in Reference Manual on Scientific Evidence 485, 508 (Federal Judicial Center 2d ed. 2000).

the other male's DNA was deposited on the sheet because of improper handling.

Conversely, concluding that the other male could have deposited DNA on Cox's bedsheet before the murder in exactly the same spots where Cox's blood would later be found after he was murdered is more speculative than concluding that another male was present during the crime. Such a finding depends upon improbable coincidences. This is particularly true when the police found evidence of a struggle and items with probable bloodstains in both the front room and the bedroom.

In short, the DNA testing results here tend to create a reasonable doubt about Parmar's guilt and were probative of a factual situation different from that testified to by the State's two eyewitnesses against him. Both of these witnesses testified that Parmar was the only male present and the only person who physically assaulted Cox. Had Parmar presented DNA evidence showing that two males contributed their DNA to the bloodstains found on Cox's bedsheet and that neither of those males was Parmar, the jurors certainly would have questioned the factual account presented by the State's eyewitnesses.

Moreover, even if evidence excluding Parmar as a contributor to the bloodstains cannot prove that the witnesses' testimonies were false, it certainly makes their version of the facts less probable.[25] Our standard for evidence warranting a new trial does not require a movant to show that the DNA testing results undoubtedly would have produced an acquittal at trial.

We conclude that because the testimonies of the State's eyewitnesses were the key evidence against Parmar at trial, DNA testing results that were probative of a factual situation contrary to the eyewitnesses' version of the facts and tended to create a reasonable doubt about Parmar's guilt probably would have produced a substantially different result if the results had been available at trial. We therefore reverse the

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[25] See *People v. Dodds*, 344 Ill. App. 3d 513, 801 N.E.2d 63, 279 Ill. Dec. 771 (2003).

district court's order and remand the cause with directions to the district court to grant Parmar a new trial. Because we have instructed the court to grant Parmar a new trial, we do not address his argument that the State's loss of evidence warrants a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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HERITAGE BANK, A STATE BANKING CORPORATION, APPELLEE, v. JEROME J. BRUHA, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, AND PRIME TRADING COMPANY, INC., ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

812 N.W.2d 260

Filed February 10, 2012. No. S-10-1219.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Uniform Commercial Code: Interest.** Although the Uniform Commercial Code allows notes to have a variable interest rate, under Neb. U.C.C. § 3-104(a) (Cum. Supp. 2010), the principal amount must be fixed.
4. **Promissory Notes: Negotiable Instruments.** A fixed principal amount is an absolute requisite to negotiability.
5. ____: ____. To meet the fixed principal amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source. If reference to a separate instrument or extrinsic facts is needed to ascertain the principal due, the sum is not "certain" or fixed.
6. ____: ____. A note given to secure a line of credit under which the amount of the obligation varies, depending on the extent to which the line of credit is used, is not negotiable.
7. **Negotiable Instruments.** For a person to be a holder in due course, the instrument must be negotiable.
8. **Contracts: Fraud.** Fraud in the execution goes to the very existence of the contract, such as where a contract is misread to a party or where one paper is

surreptitiously substituted for another, or where the party is tricked into signing an instrument he or she did not mean to execute. 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.

9. **Banks and Banking: Contracts.** The doctrine established in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), generally applies to bar defenses or claims against federal regulators in those instances where a financial institution enters into an oral or secret agreement that alters the terms of an existing unqualified obligation.
10. **Negotiable Instruments.** The doctrine established in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), is separate from the doctrine of holder of due course; so, whether a document is negotiable is irrelevant.
11. **Banks and Banking: Assignments: Federal Acts.** The doctrine established in *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942), and its statutory codification at 12 U.S.C. § 1823(e) (2006) protect assignees of the Federal Deposit Insurance Corporation.
12. **Federal Acts: Contracts: Warranty: Fraud: Words and Phrases.** The word "agreement" in 12 U.S.C. § 1823(e) (2006) encompasses warranties made to induce a party to the contract, even if such warranties are made fraudulently.
13. **Federal Acts: Fraud.** Under 12 U.S.C § 1823(e) (2006), the defense of fraud in the inducement is barred unless the defense meets the requirements of the statute.
14. **Judgments: Interest.** Neb. Rev. Stat. § 45-103 (Reissue 2010) provides for a default interest rate but allows for the parties to contract otherwise. Neb. Rev. Stat. § 45-103.01 (Reissue 2010) states that that rate shall accrue on the judgment.
15. ____: ____. Although compound interest generally is not allowable on a judgment, it is established that a judgment bears interest on the whole amount from its date even though the amount is in part made up of interest.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Affirmed in part, and in part reversed and remanded.

Barry D. Geweke, of Stowell, Kruml & Geweke, P.C., L.L.O., for appellant.

Kent E. Rauert, of Svehla, Thomas, Rauert & Grafton, P.C., for appellee Heritage Bank.

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

CONNOLLY, J.

Heritage Bank (Heritage) sued Jerome J. Bruha on promissory notes that it had purchased from the Federal Deposit Insurance Corporation (FDIC). The FDIC had obtained the notes after it became a receiver for the failed bank that had initially lent the money to Bruha. The notes secured lines of credit for Bruha's benefit. The district court granted summary judgment to Heritage and awarded it $61,384.67 on one of the notes. Bruha appeals. The primary issues are whether either the holder-in-due-course rule of Nebraska's Uniform Commercial Code or federal banking law bars Bruha's defenses to the enforcement of the note. We conclude that federal law bars Bruha's defenses, and thus, we affirm in part. But because of a minor error in the court's calculation of interest, we reverse in part, and remand for correction.

## I. BACKGROUND

### 1. PROMISSORY NOTES

On four different occasions in 2008, Bruha signed promissory notes with Sherman County Bank. Although the district court ultimately granted summary judgment to Heritage on all four notes, Bruha's arguments relate only to the fourth and final note. So we will limit our discussion to the facts regarding this note. We will, however, provide some background to put the note in context.

The notes secured lines of credit under which Bruha could borrow money from Sherman County Bank. Bruha then apparently invested the money in accounts with a trading company, which allegedly shared management with Sherman County Bank. In brief, Bruha claims that Sherman County Bank misled him into borrowing money that, in turn, he invested with a trading company that generated trade commissions through risky and speculative commodity trading.

In an affidavit, Bruha claimed that representatives of Sherman County Bank repeatedly advised him against taking money out of his trading account, stating that he would lose more money if he did so than he would by leaving it in. Bruha claimed that the representatives often understated the potential losses he would suffer by staying in the account. Also, Bruha claims

he was told that the existing collateral would cover the credit he later took. Further, although he admittedly knew he was increasing his debt burden, he thought it was under one note as opposed to four. The record, however, contains no internal records or documents of Sherman County Bank evidencing any of the representations regarding his account that Bruha claims Sherman County Bank made.

Bruha signed the fourth note, No. 1723, on December 16, 2008. The note evidenced a promise to pay "the principal amount of Seventy-five Thousand & 00/100 ($75,000.00) or so much as may be outstanding, together with interest on the unpaid outstanding principal balance of each advance." The note stated that it "evidence[d] a revolving line of credit."

The note contained a variable interest rate. The rate was subject to change every month and calculated on an index maintained by Sherman County Bank. The interest rate on Bruha's note was 1 percentage point under the percentage on the index at any given time. The initial rate was 7.25 percent, and was later adjusted to 6.75 percent. On default, this interest rate would increase by 5 percentage points.

There are admittedly a few typographical errors on the note. Because Bruha claims these errors affect the validity of the note, we recount the details. For one, the maturity date on the note is February 1, 2008, which, read literally, means that the note would have matured about 10 months before Bruha signed it. We note that the three other notes had maturity dates of February 1, *2009*. In fact, when Bruha later extended the life of the notes with Sherman County Bank to August 1, 2009, the extension agreement listed an original maturity date for all notes, including note No. 1723, of February 1, 2009.

There are two other typographical errors on note No. 1723. They are both in a section titled "COLLATERAL." It reads: "Borrower acknowledges this Note is secured by an assignment of hedge account from Jerome Bruah [sic] to Sherman County Bank dated DATE [sic]." Thus, Bruha's name is misspelled and a line for a date is unfilled.

On note No. 1723, Bruha received the following advancements: He received $10,000 on December 16, 2008; $40,000 on December 17; and $1,000 on January 30, 2009. This

totaled $51,000. There is no dispute that Bruha received all of this money.

An affidavit also established the interest rate on the notes. It shows that the initial rate was 7.25 percent. This rate was adjusted to 6.75 percent on February 1, 2009. Then, on August 2, after Bruha defaulted, the rate increased to 11.75 percent.

Sherman County Bank eventually failed, and the FDIC was appointed as receiver. The FDIC then sold and assigned some of Sherman County Bank's assets to Heritage. These assets included the notes signed by Bruha.

Heritage sued Bruha to enforce the notes. The complaint alleged that Bruha owed Heritage on the four notes and that Heritage had received the notes from the FDIC after Sherman County Bank had been placed into receivership. But as mentioned, only note No. 1723 is the subject of this appeal. As to note No. 1723, Heritage claimed that the principal was $75,000 and that the initial interest rate was 8.25 percent. Heritage also alleged that the interest rate was to jump 5 percentage points upon default. Heritage alleged that it was a holder in due course and entitled to enforce the note.

In his amended answer, Bruha admitted that he signed note No. 1723 but claims that he did not do it voluntarily. He claimed that Sherman County Bank had procured his signature "by fraud and/or misrepresentation." Bruha admitted that he had not paid the note but denied that he was obligated to do so.

### 2. The District Court's Orders

Heritage moved for summary judgment, which the district court granted. The court began by discussing 12 U.S.C. § 1823(e) (2006), the text of which we reproduce below in our analysis. The gist of § 1823(e) is that for certain defenses to be asserted against the FDIC or its assignees, such a defense must comply with criteria set out in that statute. According to the district court, one of these criteria is that the defense be evidenced in writing. The court found that there was no evidence in writing of a defense that would invalidate the note. Apparently conflating § 1823(e) with the holder-in-due-course doctrine, the court concluded that because there were

no defenses that met the requirements of § 1823(e), the FDIC became a holder in due course.

The district court then cited an Eighth Circuit case, *Federal Deposit Ins. Corp. v. Newhart*,[1] for the proposition that the FDIC transfers its protected status to its assignees. In sum, because Bruha could not show anything in writing that would invalidate the note, Heritage was entitled to enforce them.

The court then recounted the interest rates on note No. 1723. The court recognized the variable interest rate and that the rate would increase by 5 percentage points upon default. The court noted that the interest rate was 7.75 percent from the day it was signed (this, as we later explain, was error), December 16, 2008, until February 1, 2009. From February 1 until August 2, the interest rate was 6.75 percent. Then from August 2 onward, the note had an interest rate of 11.75 percent.

In calculating the amount Bruha owed, the principal on the note was $10,000 from December 16 until December 17, 2008. On December 17, Bruha received an additional $40,000, which brought the principal to $50,000. On January 30, 2009, Bruha received a $1,000 advance, which brought the principal to $51,000. The court calculated the total accumulated interest on the note at $10,384.67. Adding this to the principal, the court concluded that Bruha owed Heritage $61,384.67 on note No. 1723. The court then ruled that postjudgment interest would be computed on this amount at 11.75 percent per annum.

## II. ASSIGNMENTS OF ERROR

Bruha assigns, restated and renumbered, that the district court erred in:

(1) granting summary judgment to Heritage;

(2) concluding that the FDIC and, in turn, Heritage were holders in due course of the notes;

(3) finding that there was no written documentation that would call the validity of note No. 1723 into question;

(4) applying the *D'Oench* doctrine[2] to this case; and

(5) calculating postjudgment interest on $61,384.67.

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[1] *Federal Deposit Ins. Corp. v. Newhart*, 892 F.2d 47 (8th Cir. 1989).

[2] *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942).

## III. STANDARD OF REVIEW

[1,2] 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.[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[4]

## IV. ANALYSIS

### 1. Because Note No. 1723 Was Not Negotiable, Heritage Is Not a Holder in Due Course

Bruha argues that Heritage is not a holder in due course. Similarly, he argues that the FDIC was not a holder in due course when it held the note. A holder in due course is, with some exceptions, "immune to defenses, claims in recoupment, and claims of title that prior parties to commercial paper might assert. The holder in due course always enjoys certain pleading and proof advantages."[5] So if Heritage were a holder in due course, it would enjoy an advantageous position in litigation with Bruha.

We conclude, however, that Heritage is not a holder in due course because the note was not "negotiable" and article 3 of the Uniform Commercial Code does not apply to this case.

Neb. U.C.C. § 3-104(a) (Cum. Supp. 2010) provides: "Except as provided in subsections (c) and (d), 'negotiable instrument' means an unconditional promise or order to pay *a fixed amount of money*, with or without interest or other charges described in the promise or order . . . ." (Emphasis supplied.) Here, the note fails to meet the definition of a

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[3] *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011).

[4] *Id.*

[5] 2 James J. White & Robert S. Summers, Uniform Commercial Code § 17-1 at 168-69 (5th ed. 2008).

"negotiable instrument" because it was not a promise "to pay a fixed amount of money."

[3,4] Although the Uniform Commercial Code allows notes to have a variable interest rate,[6] under § 3-104(a), the principal amount must be fixed.[7] "A fixed amount is an absolute requisite to negotiability."[8] This is because unless a purchaser can determine how much it will be paid under the instrument, it will be unable to determine a fair price to pay for it, which defeats the basic purpose for negotiable instruments.[9]

[5] We applied this principle in *Rodehorst v. Gartner*,[10] in which we stated that "[a] guaranty is not an agreement to pay a fixed amount and is therefore not a negotiable instrument subject to article 3 of the Nebraska Uniform Commercial Code." To meet the fixed amount requirement, the fixed amount generally must be determinable by reference to the instrument itself without any reference to any outside source.[11] If reference to a separate instrument or extrinsic facts is needed to ascertain the principal due, the sum is not "'certain'" or fixed.[12]

[6] Here, the text of the note states that Bruha "promises to pay . . . the principal amount of Seventy-five Thousand & 00/100 Dollars ($75,000.00) *or so much as may be outstanding* . . . ." (Emphasis supplied.) Further, the note states that it "evidences a revolving line of credit" and that Bruha could request advances under the obligation up to $75,000. This fails the "fixed amount of money" requirement of § 3-104(a); one looking at the instrument itself cannot tell how much Bruha has been advanced at any given time. So, the note is

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[6] See Neb. U.C.C. § 3-112 (Reissue 2001).

[7] See *id.*, comment 1. See, also, 6 William D. Hawkland & Lary Lawrence, Uniform Commercial Code Series § 3-104:7 (rev. 1999).

[8] 6 Hawkland & Lawrence, *supra* note 7 at 3-45.

[9] *Id.*

[10] *Rodehorst v. Gartner*, 266 Neb. 842, 848, 669 N.W.2d 679, 684 (2003).

[11] 4 William D. Hawkland & Lary Lawrence, Uniform Commercial Code Series § 3-106:2 (rev. 1999).

[12] See *id.* at 3-100. See, also, *Resolution Trust v. Oaks Apts. Joint Venture*, 966 F.2d 995 (5th Cir. 1992); *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E.2d 117 (1980).

not negotiable. Stated simply, "[a] note given to secure a line of credit under which the amount of the obligation varies, depending on the extent to which the line of credit is used, is not negotiable . . . ."[13]

[7] For a person to be a holder in due course, the instrument must be negotiable.[14] Because the note was not a negotiable instrument, neither the FDIC nor Heritage could ever become a holder in due course of it under Nebraska law. And further, because this note is not a negotiable instrument, article 3 does not apply.[15]

### 2. Bruha's Alleged Defenses

Having determined that the holder-in-due-course doctrine does not apply, we consider the defenses Bruha asserts against the enforcement of the note. We also point out that federal law, namely the *D'Oench* doctrine and § 1823(e), may still bar these defenses. We discuss this question later in our opinion.

Bruha argues that the note is invalid and unenforceable. He points to minor irregularities on the face of the note. He also asserts that he signed the note because he was the victim of fraud. There is no dispute that Bruha actually received every dollar that Heritage is claiming he owes on the principal.

#### (a) The Typographical Errors

Although the notes do contain a few minor irregularities, these appear to be the result of sloppy clerical work. The date on the note contains a typographical error that, taken literally, would mean that the loan had matured before Bruha had signed the note. Bruha's name is also misspelled as "Bruah" in one place. Finally, a line for a date is left blank.

Bruha, however, does not attempt to tie these mistakes to any sort of contract defense, such as mistake or fraud. He cites no case, statute, or regulation that would show how these

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[13] 11 Am. Jur. 2d *Bills and Notes* § 84 at 463-64 (2009). See, also, *Yin v. Society National Bank Indiana*, 665 N.E.2d 58 (Ind. App. 1996); *Farmers Production Credit Assoc. v. Arena*, 145 Vt. 20, 481 A.2d 1064 (1984).

[14] See Neb. U.C.C. § 3-302 (Reissue 2001).

[15] See Neb. U.C.C. § 3-102 (Reissue 2001).

minor irregularities invalidated the note. Similarly, Bruha does not explain what remedy he would be entitled to. Apparently, Bruha thinks that these minor errors on the face of the note have somehow transformed otherwise valid obligations into a winning lottery ticket—the proceeds of which are his to keep. Without any citation to any source of law whatsoever, we are unprepared to accept such a proposition.

(b) Allegations of Fraud

Bruha's brief also makes glancing, undeveloped references to fraud. Bruha's fraud allegations are sketchy at best.

[8] We begin by noting that there are potentially two different types of fraud at issue: fraud in the execution and fraud in the inducement.

> Fraud in the execution goes to the very existence of the contract, such as where a [contract] is misread to the [party] 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. . . . 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 . . . .[16]

In liberally construing his complaint, it appears that Bruha has alleged fraud in the inducement. Bruha submitted his own affidavit. The gist of the affidavit is that officials at Sherman County Bank repeatedly told Bruha he would be better off if he maintained his trading account rather than closing it. They allegedly induced Bruha into taking additional loans by misrepresenting the profitability of the trading accounts. But nowhere does Bruha claim that he was unaware that he was incurring additional debt in his negotiations with the bank, although he might have thought it was under one note instead of four notes. In sum, Bruha knew the character of the transactions he was entering, although he might have been led there

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[16] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 66, 803 N.W.2d 424, 442 (2011).

by false pretenses. This sounds in fraud in the inducement, not fraud in the execution.

### 3. § 1823(e) Bars Bruha's Fraud in the Inducement Defense

Having concluded that if Bruha has stated any defense, he has stated a defense of fraud in the inducement, we move on to Bruha's next argument. For this purpose, we assume, but do not decide, that Bruha could prove the elements of his fraud-in-the-inducement defense.

Bruha argues that the district court erred in applying the *D'Oench* doctrine and its codification at 12 U.S.C. § 1823(e). We begin our discussion of this issue with the U.S. Supreme Court case that gave rise to these rules.

In *D'Oench, Duhme & Co. v. F. D. I. C.*,[17] the U.S. Supreme Court recognized a common-law rule that barred the invocation of secret agreements to defeat a claim of the FDIC. The case involved the FDIC's efforts to enforce notes it had acquired from a failed bank. The signer of the notes and the bank, however, had secretly agreed that the bank would never seek to enforce the notes; the bank had taken the notes to make it appear in better financial shape than it actually was. The FDIC did not learn of this secret agreement until after it had demanded payment on the notes. When the FDIC sought to enforce one of the notes, the defendant pointed to the secret agreement, arguing that the parties had never intended the notes to be enforced and that the notes lacked consideration. Citing "a federal policy to protect [the FDIC], and the public funds which it administers, against misrepresentations as to the securities or other assets in the portfolios of the banks [that the FDIC] insures or to which it makes loans,"[18] the Court ruled that the defendant could not rely on the secret agreements in its defense.

[9,10] The *D'Oench* doctrine generally applies to bar defenses or claims against federal regulators in those instances where a financial institution enters into an oral or secret agreement that

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[17] *D'Oench, Duhme & Co., supra* note 2.

[18] *Id.*, 315 U.S. at 457.

alters the terms of an existing unqualified obligation.[19] The doctrine provides well-reasoned, unchallengeable finality to the lender's books and records when used by regulatory agencies to assess the lending institution's solvency. We stress that this doctrine is separate from the doctrine of holder in due course, so whether the document is negotiable is irrelevant.[20]

The *D'Oench* doctrine is codified at 12 U.S.C. § 1823(e), which provides in relevant part:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the Corporation unless such agreement—
>
> (A) is in writing,
>
> (B) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
>
> (C) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and
>
> (D) has been, continuously, from the time of its execution, an official record of the depository institution.

Section 1823(e)'s most obvious purpose "is to allow federal and state bank examiners to rely on a bank's records in evaluating the worth of the bank's assets."[21] These evaluations, which sometimes "must be made 'with great speed,'"[22] would be virtually impossible if "bank records contained seemingly

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[19] *Oaks Apts. Joint Venture, supra* note 12.

[20] See, e.g., *Resolution Trust Corp. v. Kennelly*, 57 F.3d 819 (9th Cir. 1995); *Randolph v. Resolution Trust Corp.*, 995 F.2d 611 (5th Cir. 1993); *Adams v. Madison Realty & Development, Inc.*, 937 F.2d 845 (3d Cir. 1991); *Federal Deposit Ins. Corp. v. P.L.M. Intern., Inc.*, 834 F.2d 248 (1st Cir. 1987).

[21] *Langley v. FDIC*, 484 U.S. 86, 91, 108 S. Ct. 396, 98 L. Ed. 2d 340 (1987).

[22] *Id.*, quoting *Gunter v. Hutcheson*, 674 F.2d 862 (11th Cir. 1982).

unqualified notes that [were] in fact subject to undisclosed conditions."[23]

[11] All courts agree that § 1823(e) is a codification of the *D'Oench* doctrine.[24] Further, courts agree this doctrine also protects assignees of the FDIC.[25] We note that there is an "open question whether the judicially created doctrine and its statutory counterpart are coterminous."[26] There is also a dispute whether subsequent U.S. Supreme Court case law[27] has effectively disapproved of the common-law rule.[28] But we need not decide these issues because § 1823(e) bars Bruha's defense; so deciding whether a common-law rule would provide greater protection for Heritage is unnecessary.

As mentioned, the only defense that Bruha has alleged is a defense of fraud in the inducement. We now consider whether under § 1823(e), Bruha may assert this defense against Heritage. Our starting point in this analysis is *Langley v. FDIC*,[29] the seminal case interpreting § 1823(e).

In *Langley*, a bank (later received by the FDIC) sued the defendants to collect on promissory notes that the defendants had signed in order to receive money to purchase land. The defendants argued that the bank had procured their signatures

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[23] *Id.*, 484 U.S. at 92.

[24] See, e.g., *Young v. F.D.I.C.*, 103 F.3d 1180 (4th Cir. 1997); *DiVall Insured Income v. Boatmen's First Nat. Bank*, 69 F.3d 1398 (8th Cir. 1995); *Vasapolli v. Rostoff*, 39 F.3d 27 (1st Cir. 1994); *Adams, supra* note 20.

[25] See, e.g., *Beal Bank, SSB v. Pittorino*, 177 F.3d 65 (1st Cir. 1999); *Caires v. JP Morgan Chase Bank*, 745 F. Supp. 2d 40 (D. Conn. 2010) (collecting cases); *AAI Recoveries, Inc. v. Pijuan*, 13 F. Supp. 2d 448 (S.D.N.Y. 1998); *Santopadre v. Pelican Homestead and Sav. Ass'n*, 782 F. Supp. 1138 (E.D. La. 1992); *OCI Mortg. Corp. v. Marchese*, 255 Conn. 448, 774 A.2d 940 (2001); *AGI v. Pacific Southwest Bank, F.S.B.*, 972 S.W.2d 866 (Tex. App. 1998).

[26] *Vasapolli, supra* note 24, 39 F.3d at 33 n.3.

[27] See, *Atherton v. FDIC*, 519 U.S. 213, 117 S. Ct. 666, 136 L. Ed. 2d 656 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S. Ct. 2048, 129 L. Ed. 2d 67 (1994).

[28] Compare, e.g., *DiVall Insured Income, supra* note 24, with *Motorcity of Jacksonville v. Southeast Bank N.A.*, 120 F.3d 1140 (11th Cir. 1997).

[29] *Langley, supra* note 21.

by misrepresentation. They claimed that the bank had misrepresented the size of the tract of land, the amount of mineral deposits on the land, and the lack of existing mineral leases on the land. The bank records, the minutes of the board of directors, and the minutes of the bank's loan committee, however, contained no evidence of such misrepresentations.

[12] The Court held that § 1823(e) barred the misrepresentation defense, which the Court characterized as fraud in the inducement. The Court reasoned that generally, the truthfulness of a warranty was a condition of a contract, and that the word "agreement" in § 1823(e) encompassed such warranties, even if such warranties were made fraudulently. So the terms of the agreement were subject to § 1823(e). And fraud in the inducement would not be a defense unless such fraud met the requirements of § 1823(e).

[13] Thus, *Langley* holds that § 1823(e) bars the defense of fraud in the inducement unless the defense meets the requirements of the statute. In this case, Bruha has failed to show that his defense does so.

To assert his defense of fraud in the inducement, Bruha must show that the agreement, including the allegedly fraudulent assertions made by Sherman County Bank regarding the profitability of the accounts, has met § 1823(e)'s requirements as follows: The agreement is in writing; was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution; was approved by the board of directors of the depository institution or its loan committee, with such approval reflected in the minutes of said board or committee; and has been, continuously, from the time of its execution, an official record of the depository institution.

Bruha does not point to anything regarding the fraud in any writing. Nor does he explain how the alleged fraudulent misrepresentations satisfy any of the other requirements of § 1823(e). Summed up, his defense does not meet the requirements § 1823(e).

Bruha does point to the minor irregularities in the note. But as we mentioned earlier, he does not explain how these

irregularities fit into any defense. As clearly explained in *Langley*, the "agreement"—which would include potential assertions about the profitability of an investment—would have to be found in writing. Here, it was not. Thus, § 1823(e) bars Bruha from asserting the defense against Heritage. Because Bruha has not alleged any other defense, the district court did not err in granting Heritage summary judgment.

### 4. Judgment Interest Rate Calculation

Bruha's final argument relates to the manner in which postjudgment interest is accruing on the judgment. As mentioned, the principal due on the note was $51,000. The court, however, determined that there was $10,384.67 of interest due on the note. Taken together, the total judgment was $61,384.67. The court then ruled that this total would accumulate interest at the rate of 11.75 percent per annum. Bruha argues this is error. He argues that the court should calculate postjudgment interest only on the overdue principal, which was $51,000. The parties agree that the interest rate applicable is 11.75 percent per annum. The question is whether this rate is applied to the judgment—which was $61,384.67 and included some accrued interest—or the outstanding principal of $51,000. We conclude that it is the former.

[14,15] Neb. Rev. Stat. § 45-103.01 (Reissue 2010) provides: "Interest as provided in section 45-103 shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until satisfaction of judgment." Neb. Rev. Stat. § 45-103 (Reissue 2010) provides for a default interest rate but allows for the parties to contract otherwise. The parties did so contract in this case. But § 45-103.01 states that that rate shall accrue on the judgment. Bruha is essentially claiming that the court should apply the rate to an amount other than the judgment; he is arguing that the court should apply the rate to only a single component of the judgment. But this argument belies the plain language of § 45-103.01, which, again, states that interest shall accrue on the judgment. In fact, the Nebraska Court of Appeals has already rejected Bruha's argument, and we now adopt its reasoning. "Although compound interest generally is not allowable on a judgment, it is established that a

judgment bears interest on the whole amount from its date even though the amount is in part made up of interest."[30]

Further, many courts have held that the interest due before judgment merges into that judgment and thus begins to accrue postjudgment interest.[31] The purpose of interest is to compensate the party for being deprived of the use of its money.[32] In this case, not only was Heritage deprived of its use of the overdue principal, it has also been deprived of the use of interest payments that should have been paid on that principal.

Thus, the district court did not err in stating that postjudgment interest would accrue on the total amount of the judgment owed to Heritage by Bruha. We do note, however, one error by the district court that the parties failed to raise. The district court stated in its order that the initial interest rate on note No. 1723 was 7.75 percent. This is incorrect; the initial rate was 7.25 percent. This interest rate was adjusted, as the district court correctly noted, to 6.75 percent on February 1, 2009. In all other respects, the district court's order appears to be correct. Accordingly, we remand the cause to the district court to calculate interest using the proper initial interest rate.

## V. CONCLUSION

We agree with the district court that § 1823(e) bars Bruha's defense. Because the court erred in applying an initial interest rate of 7.75 percent instead of 7.25 percent, we reverse in part, and remand to the district court to recalculate the interest on the judgment.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED.

WRIGHT and GERRARD, JJ., not participating in the decision.

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[30] *Valley Cty. Sch. Dist. 88-0005 v. Ericson State Bank*, 18 Neb. App. 624, 631, 790 N.W.2d 462, 468 (2010). See, also, *Ramaekers, McPherron & Skiles v. Ramaekers*, 4 Neb. App. 733, 549 N.W.2d 662 (1996).

[31] See, e.g., *Caffey v. Unum Life Ins. Co.*, 302 F.3d 576 (6th Cir. 2002); *Air Separation v. Lloyd's of London*, 45 F.3d 288 (9th Cir. 1995); *Quality Engineered Inst. v. Higley South*, 670 So. 2d 929 (Fla. 1996).

[32] See, e.g., *Air Separation, supra* note 31.

# Adam S. Martensen, appellee and cross-appellant, v. Rejda Brothers, Incorporated, appellant and cross-appellee.

808 N.W.2d 855

Filed February 10, 2012. No. S-11-010.

1. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
2. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
3. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
4. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
5. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
6. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
7. ____. The existence of a duty serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances.
8. ____. Duty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases.
9. **Negligence: Employer and Employee.** In negligence cases, an employer stands in a special relationship with its employee who is in imminent danger or injured and thereby helpless, and such employer owes the employee a duty of reasonable care with regard to risks that arise within the scope of the relationship.
10. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
11. **Costs.** The costs of litigation and expenses incident to litigation may not ordinarily be recovered unless provided for by statute or a uniform course of procedure.
12. **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.
13. **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.

14. **Prejudgment Interest.** Under Neb. Rev. Stat. § 45-103.02(1) (Reissue 2010), where the claim is unliquidated and the plaintiff's offer of settlement is exceeded by the judgment, prejudgment interest accrues on the full amount of the judgment starting on the date of the plaintiff's first offer of settlement which offer is exceeded by the judgment.

Appeal from the District Court for Custer County: KARIN L. NOAKES, Judge. Affirmed in part, and in part reversed and remanded with directions.

Justin R. Herrmann, Jeffrey H. Jacobsen, and David H. Kalisek, of Jacobsen, Orr, Nelson, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

The district court for Custer County entered judgment in favor of the appellee and cross-appellant, Adam S. Martensen, in his negligence action against the appellant, Rejda Brothers, Incorporated (Rejda). Martensen had alleged that he was injured in an accident when he was working in a pasture on a ranch owned and operated by Rejda and that Rejda, as his employer, was negligent when it failed to make a timely effort to search for, discover, and rescue him. On October 7, 2010, the court awarded damages based on the jury verdict of $750,000, plus taxable court costs of $168.56 and prejudgment interest of $4,724.16. A subsequent motion by Rejda for judgment notwithstanding the verdict or for a new trial was overruled.

Rejda appeals and claims, inter alia, that the court erred when it concluded that Rejda owed a legal duty to Martensen upon which recovery for negligence could be based and when it determined that the jury's verdict was supported by the evidence and not contrary to law. Martensen cross-appeals and claims, inter alia, that the court erred when it failed to award

the entire $3,417.29 of court costs that he claimed were taxable to Rejda and when it awarded prejudgment interest on $150,000 representing the portion of the $750,000 verdict that exceeded an unaccepted pretrial offer of judgment of $600,000 made by Martensen. With respect to the appeal, we affirm the award based on the jury verdict. With respect to the cross-appeal, we affirm the award of taxable costs; however, we conclude that the district court erred in its reading of Neb. Rev. Stat. § 45-103.02(1) (Reissue 2010), and we reverse the amount of prejudgment interest awarded, set aside the judgment, and remand for a recalculation of prejudgment interest consistent with this opinion.

## STATEMENT OF FACTS

Martensen worked as a farmhand on a ranch owned and operated by Rejda. On the afternoon of March 15, 2004, Martensen was repairing fences in a pasture on the ranch. He drove an all-terrain vehicle (ATV) to perform the work, and an accident occurred in which the ATV overturned and pinned Martensen's right leg. Martensen was not discovered until the next day. As a result of his injuries, Martensen underwent an above-knee amputation of his right leg.

As an agricultural employee, Martensen was not covered by the Nebraska Workers' Compensation Act. See Neb. Rev. Stat. § 48-106(2) (Reissue 2010). Martensen therefore filed this negligence action against Rejda. He alleged, inter alia, that Rejda was negligent when it failed to make a timely effort to search for, discover, and rescue him. Prior to trial, Martensen made an offer of settlement in which he stated he would accept $600,000. Rejda rejected the offer. The case proceeded to trial.

At trial, Martensen testified that on the day of the accident, he worked at repairing fences on adjacent pastures on the ranch. One pasture consisted of 80 acres, and the other pasture consisted of 400 acres. Martensen had lunch with Russell Rejda, the president of Rejda, and told him that he had a little work left to do on the 80-acre pasture and that he would then start on the 400-acre pasture. Martensen helped Russell move panels at the Rejda feedlot for 1 to 1½ hours after lunch.

Martensen then drove the ATV to the 80-acre pasture, intending to work on fences. As he was approaching the area where he intended to work, the ATV overturned on him, pinning his right leg. Martensen tried to push the ATV off but did not have the strength to do so. He felt sensation in his right leg until shortly after dark, when the leg started going numb, and he eventually did not feel it anymore. Martensen did not have a cellular telephone or other means to summon help, but he tried yelling to get someone's attention. Martensen thought that when he did not show up for supper, others would come looking for him; however, no one came until the next day. When he heard a loud vehicle, he yelled for attention and two people found him. Rescuers were summoned, and Martensen was taken by helicopter to a hospital.

Russell testified that he had lunch with Martensen on the day of the accident. He recalled talking about the fencework Martensen was doing, but he thought Martensen had completed or mostly completed work on the 80-acre pasture. Between 5 and 6 o'clock that afternoon, Russell was working in a calving barn and thought he heard an ATV driving by the barn. Russell thought that it was Martensen driving the ATV, but he did not see the ATV or its driver. That evening, Russell noted that Martensen, who was living in the basement of Russell's ranchhouse, had not returned. Russell discussed Martensen's absence with his father, Donald Rejda, a shareholder of Rejda, and told him that he thought he had heard Martensen drive by the barn. Russell checked with some bars in nearby towns where he thought Martensen might have gone that evening, but Martensen had not been seen in those places. Russell did not recall calling Martensen's friends or family or any law enforcement or emergency agencies that night.

Donald testified that at around 7 o'clock on the night of the accident, he talked to Russell and learned that Martensen had not come in yet. Donald considered whether they should search for him but decided it was not necessary after Russell said he thought he had heard the ATV earlier. Donald testified that around 10 o'clock the next morning, he and Russell searched the ranch for 45 minutes to an hour; however, they

concentrated on the fence line of the 400-acre pasture and did not find Martensen. While they were searching, Donald's wife notified Martensen's father that Martensen was missing. Martensen's father came to the ranch and organized a search party. Donald testified that after the search party was organized, members of the search party found Martensen within 10 minutes after beginning their search.

During direct examination at trial, Martensen's counsel asked Russell, "As President of Rejda[,] does the corporation accept any responsibility for not finding . . . Martensen sooner?" Rejda objected on the basis of relevance and because the question called for a conclusion. The court overruled the objection and instructed Russell to answer. Russell responded, "I'm trying to figure out the wording on that. I, you know, I guess so, yes." Later in the trial, the court sustained Rejda's objection when Martensen's counsel asked Donald, "As a primary shareholder and Vice President, do you believe the corporation is responsible for [Martensen's] loss of his leg?"

In a videotaped deposition played to the jury, the doctor who treated Martensen testified that the conditions that led to amputation of his right leg developed during the time his leg was pinned by the ATV and that if the ATV had been taken off immediately, such conditions would probably not have developed. The doctor estimated that amputation became inevitable between 6 and 8 hours after the onset of the trauma. Other witnesses placed the time of irreversible damage at different times.

Following the trial, the district court entered judgment based on the jury's verdict in favor of Martensen in the amount of $750,000. The court also awarded taxable court costs of $168.56 and prejudgment interest of $4,724.16. Prejudgment interest was awarded on the $150,000 amount by which the jury verdict exceeded the $600,000 offer of settlement which Rejda had not accepted. The court overruled Rejda's motion for judgment notwithstanding the verdict or for a new trial, in which Rejda argued, inter alia, that the court erred in finding that Rejda owed a duty to Martensen upon which a recovery for negligence could be based.

Rejda appeals, and Martensen cross-appeals.

## ASSIGNMENTS OF ERROR

Rejda claims, summarized and restated, that the district court erred when it (1) concluded that Rejda had a duty to come to the aid of Martensen, (2) overruled Rejda's objection to Martensen's questioning of Russell as to whether the company accepted responsibility for failing to find Martensen sooner, and (3) overruled Rejda's motion for judgment notwithstanding the verdict or for a new trial and entered judgment in favor of Martensen based on the jury's verdict.

In his cross-appeal, Martensen claims that the district court erred when it (1) awarded only a portion of the $3,417.29 court costs that Martensen asserted were taxable to Rejda and (2) misinterpreted § 45-103.02 and thereby awarded prejudgment interest limited to that portion of the judgment that exceeded Martensen's pretrial offer of settlement of $600,000 rather than on the entire amount of the $750,000 verdict. In the event the district court's judgment based on the jury's verdict is reversed and the cause remanded for a new trial, Martensen additionally claims that the court erred when it excluded expert testimony offered by Martensen. Because we affirm the jury verdict and remand only for a calculation of prejudgment interest, we do not reach the expert testimony issue raised by Martensen in his cross-appeal.

## STANDARDS OF REVIEW

[1] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Lacey v. State*, 278 Neb. 87, 768 N.W.2d 132 (2009).

[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. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011).

[3] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion. *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

[4] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an

independent, correct conclusion irrespective of the determination made by the trial court. *State ex rel. Wagner v. Gilbane Bldg. Co.*, 280 Neb. 223, 786 N.W.2d 330 (2010).

## ANALYSIS

### *Appeal: The District Court Did Not Err When It Concluded Rejda Owed a Duty to Martensen and Did Not Err in Its Evidentiary Ruling, and the Jury's Verdict Was Supported by Evidence.*

This case involving an agricultural employee is not covered under the Nebraska Workers' Compensation Act, specifically § 48-106(2); thus, Martensen brought his action in negligence. Rejda claims the district court erred in this negligence action when it concluded that Rejda owed a duty to Martensen. Rejda maintains that a duty does not arise until the employer has actual knowledge of the employee's helplessness or illness and that Rejda had no such knowledge until after Martensen's absence was noted on March 16, 2004. Rejda contends that it acted diligently in responding to Martensen's absence. In sum, Rejda contends that it initially had no duty and that upon the triggering of the duty, if any, it acted reasonably.

On appeal, Rejda asserts that it has no liability and that thus, the district court erred when it denied its various motions, including for judgment notwithstanding the verdict or for a new trial. Rejda also challenges various evidentiary rulings and asserts that the evidence was insufficient to support the jury's verdict in various respects, including a claim of failure of proof of causation. As explained below, we reject Rejda's description of the existence of the legal duty, find no prejudicial evidentiary rulings, and determine that the evidence supports the jury's verdict. We find no merit to the appeal.

[5,6] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012). The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id*. In *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010), we abandoned the risk-utility test and

adopted the duty analysis in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (Restatement (Third)). *A.W.* was decided prior to the jury trial of this case. More recently in *Ginapp, supra*, and *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011), we again followed the duty analysis in the Restatement (Third).

The parties assert that no modern Nebraska case has considered the duty analysis in the circumstances of this case, and we agree. The district court concluded that Rejda owed a duty to Martensen but did not elaborate on the contours of the duty. Rejda relies on the Restatement (Second) of Torts § 314B(2) (1965) and urges us to conclude that its duty did not arise until it had actual knowledge that Martensen was hurt. Martensen refers us to the "original" Restatement of Agency as the source of duty in this negligence action. Brief for appellee at 21. Based on the analytical framework we adopted in *A.W., supra*, we conclude that the legal duty applicable to the circumstances of this case is controlled by the principles stated in the Restatement (Third), *supra*, § 40(a) and (b) (Proposed Final Draft No. 1, 2005), entitled "Duty Based on Special Relationship with Another."

The Restatement (Second), *supra*, § 314B(2) at 122, upon which Rejda relies as the source for duty arising upon knowledge, provides:

> Duty to Protect Endangered or Hurt Employee
>
> . . . .
>
> . . . If a servant is hurt and thereby becomes helpless when acting within the scope of his employment and this is known to the master or to a person having duties of management, the master is subject to liability for his negligent failure or that of such person to give first aid to the servant and to care for him until he can be cared for by others.

The Restatement (Third), *supra*, § 40 at 752, provides:

> Duty Based on Special Relationship with Another
>
> (a) An actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship.
>
> (b) Special relationships giving rise to the duty provided in Subsection (a) include:

> . . . .
> (4) an employer with its employees who are:
> (a) in imminent danger; or
> (b) injured and thereby helpless[.]

The comment to subsection (b)(4), entitled "*Duty of employers*," contains the following explanation:

> This Subsection retains the requirements contained in the Restatement Second of Torts of imminent danger and helplessness. However, this Subsection rejects the requirement of knowledge or foreseeability of the danger as an aspect of the duty determination. This is consistent with the treatment of foreseeability throughout this Restatement as a matter encompassed within the negligence determination, and not in the threshold question of duty.

Restatement (Third), *supra*, § 40, comment *k*. (Tentative Draft No. 5, 2007).

[7,8] As a general matter, the existence of a duty serves as a legal conclusion that an actor must exercise that degree of care as would be exercised by a reasonable person under the circumstances. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). We have stated that "[d]uty rules are meant to serve as broadly applicable guidelines for public behavior, i.e., rules of law applicable to a category of cases." *Id.* at 212-13, 784 N.W.2d at 914-15. We have recognized that "whether a duty exists is a policy decision." *Id.* at 215, 784 N.W.2d at 916 (emphasis omitted). We have recognized that special relationships can give rise to a duty. See, *A.W., supra*; *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001). The employer-employee relationship can be a special relationship under the circumstances outlined in the Restatement (Third) and can give rise to a duty in negligence cases. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 40(a) and (b) (Proposed Final Draft No. 1, 2005), entitled "Duty Based on Special Relationship with Another."

In *A.W., supra*, we noted that, as explained in the Restatement (Third), "foreseeability" determinations are determinations of fact. Applying a similar analysis, we now note that determinations of actual "knowledge" are also fact specific. Thus, the

comment to the Restatement (Third) quoted above notes and we agree that the treatment of knowledge as it relates to the duty arising out of a special relationship between an employer and employee is a matter encompassed within the negligence fact determination but not in the threshold question of duty.

[9] We find the Restatement (Third) reasoning to be sound and consistent with our jurisprudence, and we adopt § 40(a) and (b)(4) of the Restatement (Third), *supra*. Thus, in negligence cases, an employer stands in a special relationship with its employee who is in imminent danger or injured and thereby helpless, and such employer owes the employee a duty of reasonable care with regard to risks that arise within the scope of the relationship. Such is the duty applicable to this negligence case.

Based on the foregoing analysis, we reject Rejda's contention that it had no duty to Martensen until it had actual knowledge that Martensen was hurt. On the contrary, Rejda had a duty to Martensen under the circumstances. Although our clarification of duty differs from that urged by the parties, such difference has no impact on the outcome of our appellate review. This is because Rejda successfully introduced all the evidence regarding knowledge, causation, and damages it relied on in its defense of the case under the theory of the case as it understood it. Such evidence went to the fact determinations within the province of the jury and is compatible with our analytical framework.

At trial, Rejda sought, through the introduction of extensive evidence, to establish the fact that it lacked knowledge of Martensen's predicament. The jury considered the evidence and decided this fact against Rejda. At trial, Rejda sought, through the introduction of extensive evidence, to establish the fact that its alleged breach of duty did not proximately cause damage to Martensen. In this regard, certain evidence introduced by Rejda to the effect that Martensen suffered irreversible damages shortly after the accident was meant to convince the jury that its failure of diligence, if any, did not proximately cause Martensen's injuries and damages. The jury considered this evidence and decided these facts against Rejda. Given the duty, the record shows that Martensen established causation and

damages, and Rejda's evidence to the contrary did not persuade the jury otherwise.

As one of its assignments of error, Rejda claims that the district court erred when it overruled its objection to a question put to Russell asking him, as president of Rejda, whether the corporation accepted responsibility for not finding Martensen sooner, to which Russell responded, "I guess so, yes." Rejda asserts that the question was irrelevant, called for an improper legal conclusion, and invaded the province of the jury. We reject this assignment of error.

[10] To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010). Whether or not it was error for the court to allow the question, we conclude that such error would not constitute reversible error.

At trial, Martensen's attorney asked, "As President of Rejda[,] does the corporation accept any responsibility for not finding . . . Martensen sooner?" The question was rather unclear, as evidenced by the witness' response, "I'm trying to figure out the wording on that. I, you know, I guess so, yes." Neither the question nor the answer stated that Rejda was legally liable for Martensen's injuries. Instead, it could be understood as stating that the witness regretted not finding Martensen sooner, but not necessarily admitting legal liability for his injuries. Furthermore, the court instructed the jury on the elements it must find in order to find Rejda liable for negligence, and the jury would have needed to find those elements rather than relying on the witness' expression of regret for not finding Martensen sooner. Noting that the question and answer were unclear and were not an acceptance of legal liability, we conclude that the court order overruling Rejda's objection to the question did not prejudice a substantial right of Rejda.

We have considered each of Rejda's assignments of error. Rejda moved for judgment notwithstanding the verdict or for a new trial. To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable

minds can draw but one conclusion. *Lacey v. State*, 278 Neb. 87, 768 N.W.2d 132 (2009). 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. *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). Each of these motions was based on assertions of errors which we have considered and we find to be without merit. The denials of these motions did not constitute error. The law and evidence supported the verdict. The district court's rulings and its acceptance of the verdict were not error.

*Cross-Appeal: The District Court Did Not Err in Its Award of Costs, but Did Err in Its Calculation of Prejudgment Interest.*

On cross-appeal, Martensen claims that the district court erred when it awarded him costs of $168.56 rather than the $3,417.29 which he sought and further erred in its calculation of prejudgment interest. We find no merit to the assignment of error regarding costs and affirm the costs ruling. However, we do find merit to the claim that the district court erred in the amount it awarded as prejudgment interest, and we reverse the prejudgment interest award, set aside the judgment, and remand for a recalculation of prejudgment interest consistent with this opinion.

[11] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion. *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011). In *Bartunek v. Gentrup*, 246 Neb. 18, 516 N.W.2d 253 (1994), a negligence action, we stated that the costs of litigation and expenses incident to litigation may not ordinarily be recovered unless provided for by statute or a uniform course of procedure. We continue to adhere to this principle. See *City of Falls City, supra*. The district court granted taxable costs in the amount of $168.56 representing the cost of the filing fee and subpoenas. There is no error in awarding these costs. See *id.* The remainder of the costs sought by Martensen involve deposition reporting and copying charges. Martensen does not direct us to authority which would warrant the award of these additional claimed costs, and we are not persuaded we should depart from *Bartunek*. We reject this assignment of error on

cross-appeal. The district court did not err in its costs award to Martensen, and we affirm the costs award.

On cross-appeal, Martensen also claims that the district court erred in the amount it awarded as prejudgment interest. Martensen specifically contends that the district court misinterpreted § 45-103.02 when it awarded prejudgment interest applicable only to the $150,000 amount by which the $750,000 jury verdict exceeded Martensen's pretrial $600,000 offer of settlement. We find merit to Martensen's argument on cross-appeal regarding prejudgment interest.

Section 45-103.02(1) regarding prejudgment interest on unliquidated claims is at issue with respect to this assignment of error on cross-appeal. Section 45-103.02(1) provides:

> Except as provided in section 45-103.04, interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met:
>
> (a) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (b) The offer is made not less than ten days prior to the commencement of the trial;
>
> (c) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (d) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

[12,13] 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). 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. *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). 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*.

With regard to the prejudgment interest issue, each party offers a conflicting interpretation of § 45-103.02(1), which provides that prejudgment interest "shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment" if certain conditions are met. Martensen asserts that the statute provides that when the final judgment exceeds the offer of settlement, interest is to be calculated on the entire amount of the judgment, whereas Rejda contends that prejudgment interest is available only on the amount by which the judgment exceeds the offer of settlement. The district court followed Rejda's approach. Although Rejda cites to § 6.b. of the introduction to chapter 4 of NJI2d Civ. to support its and the district court's interpretation, there does not appear to be a published opinion that addresses this question.

There is no dispute that Martensen served his offer of settlement for $600,000 on May 19, 2009, in compliance with § 45-103.02, and that the offer was not accepted by Rejda. The district court awarded prejudgment interest on the $150,000 amount by which the $750,000 verdict exceeded the $600,000 offer.

Offers to settle and offers of judgment are generally encouraged. We have stated that "it is the policy of the law to encourage rather than discourage the settlement of controversies by the parties out of court." *Tadros v. City of Omaha*, 273 Neb. 935, 942, 735 N.W.2d 377, 382 (2007). Ordinarily, prejudgment interest is unavailable on unliquidated damages, such as in the instant case. See *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). An unaccepted offer to settle proposed by a plaintiff which is later exceeded by a judgment exposes the party who is found liable and who

declined to settle to prejudgment interest on an unliquidated claim which otherwise might have been immune from prejudgment interest. See *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009).

Section 45-103.02(1) controls the award of prejudgment interest on an unliquidated claim where an offer has been refused and the judgment exceeds the offer. We focus on § 45-103.02(1), which we again quote:

> Except as provided in section 45-103.04, interest as provided in section 45-103 shall accrue on the unpaid balance of unliquidated claims from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the entry of judgment if all of the following conditions are met[.]

Although this statutory language is somewhat awkward, it is obviously intended to describe both the offer to which it applies and the time from which prejudgment interest begins to accrue on that offer. The district court misread the statute and concluded that the prejudgment interest that was due was limited to the "balance" of the judgment which exceeded the offer. This was an error of law.

[14] Contrary to the district court's reading of § 45-103.02(1), the phrase "which is exceeded by the judgment" characterizes and identifies the kind of "offer of settlement" to which prejudgment interest shall apply. Section 45-103.02(1) provides for prejudgment interest on the full amount of the judgment, and the phrase "the date of the plaintiff's first offer of settlement" sets the time from which prejudgment interest shall start accruing. This is a sensible reading of the statute. See *Walton v. Patil*, 279 Neb. 974, 783 N.W.2d 438 (2010). Thus, under § 45-103.02(1), where the claim is unliquidated and the plaintiff's offer of settlement is exceeded by the judgment, prejudgment interest accrues on the full amount of the judgment starting on the date of the plaintiff's first offer of settlement which offer is exceeded by the judgment. To the extent that § 6.b. of the introduction to chapter 4 of NJI2d Civ. is to the contrary, it is disapproved.

The district court misread § 45-103.02(1) and mistakenly concluded that prejudgment interest was available only on the

$150,000 amount by which the judgment exceeded the offer. This was error. Accordingly, we reverse the district court's ruling regarding the award of prejudgment interest and set aside the judgment. We remand with instructions to recalculate prejudgment interest on the entire $750,000 jury verdict, commencing on the date of Martensen's offer of settlement which was later exceeded by the judgment.

## CONCLUSION

For reasons explained above, we determine that the district court did not err when it accepted the jury verdict and awarded specified costs to Martensen, and we affirm these rulings. However, the district court erred in the manner by which it calculated prejudgment interest. We reverse this ruling and set aside the judgment, and we remand the cause with directions to the district court to recalculate prejudgment interest on the entire $750,000 award and direct that judgment thereafter be entered on the $750,000 award, costs as already determined, plus the recalculated amount of prejudgment interest.

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

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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# IN RE INTEREST OF S.C., ALLEGED TO BE A DANGEROUS SEX OFFENDER.
# S.C., APPELLANT, V. MENTAL HEALTH BOARD OF THE FIFTH JUDICIAL DISTRICT, APPELLEE.

810 N.W.2d 699

Filed February 10, 2012. No. S-11-186.

1. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
2. **Mental Health: Judgments: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record. In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.

3. **Due Process.** The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.
4. ____. A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
5. **Prisoners: Statutes.** Where a right may not otherwise have existed, a state may create prisoners' rights through the use of mandatory statutory language.
6. **Due Process.** There is a crucial distinction between being deprived of a liberty one has and being denied a conditional liberty that one desires.
7. **Convicted Sex Offender: Statutes: Intent.** One of the stated purposes of the Sex Offender Commitment Act, Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), is to encourage sex offenders to obtain voluntary treatment, but its primary purpose is the protection of the public from sex offenders who continue to pose a threat.
8. ____: ____: ____. Commitment under the Sex Offender Commitment Act, Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), is not dependent upon a subject's seeking or refusing treatment; instead, the focus is on whether a substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied.
9. **Appeal and Error.** An argument that does little more than to restate an assignment of error does not support the assignment, and an appellate court will not address it.

Appeal from the District Court for Butler County: Mary C. Gilbride, Judge. Affirmed.

Thomas J. Klein and Darren L. Hartman, of Haessler, Sullivan & Klein, Ltd., for appellant.

Jon Bruning, Attorney General, and Stephanie Caldwell for appellee.

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

Heavican, C.J.

## INTRODUCTION

S.C. appeals the decision of the Butler County District Court, affirming the decision of the Mental Health Board of the Fifth Judicial District (Board). The Board found S.C. to be

a dangerous sex offender under the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), and ordered him to undergo secure inpatient treatment. S.C. alleges that his due process rights were violated when the State did not allow him to undergo sex offender treatment while still incarcerated. S.C. further alleges that the State did not present clear and convincing evidence that he was a dangerous sex offender or that secure inpatient treatment was the least restrictive treatment alternative. We affirm the decision of the district court.

## BACKGROUND

In 2008, S.C. was convicted of sexual assault of a child in Butler County, Nebraska, and was sentenced to 5 years' imprisonment. Near the end of S.C.'s prison term, the State had the option of seeking to commit S.C. under SOCA, utilizing the Board. Dr. Mark Weilage, a licensed psychologist who works for the Department of Correctional Services at the Nebraska State Penitentiary, testified at the hearing before the Board.

Weilage completed his evaluation of S.C. on July 13, 2010, while S.C. was still incarcerated at the Nebraska State Penitentiary, and recommended that S.C. undergo sex offender treatment. S.C. apparently indicated that he was willing to participate in a sex offender treatment program prior to his release. According to Weilage, the treatment program was available only at the Lincoln Correctional Center. However, S.C. had a relative who worked at that facility and, according to Weilage, it is the policy of the Nebraska Department of Correctional Services not to place inmates in a facility at which a relative is employed. As a result, S.C. was not transferred from the Nebraska State Penitentiary to the Lincoln Correctional Center and thus did not receive treatment while incarcerated.

The State filed a petition on August 16, 2010, alleging S.C. to be a dangerous sex offender. A hearing was held before the Board on August 19. At the hearing, the State presented certified copies of S.C.'s prior convictions, which included three convictions for sexual assault of a child and one conviction for attempted kidnapping of a child.

Weilage testified regarding S.C.'s evaluation and stated that the following assessments were completed: the "Static 99R," the "Stable 2007," the "Sex Offender Risk Appraisal Guide," and the "Hare Psychopathy Checklist-Revised." Weilage conducted a clinical interview and a mental status examination, and he also reviewed S.C.'s institutional and mental health and treatment records.

The "Static 99R" assesses the risk of recidivism among sex offenders, and Weilage testified that S.C. scored in the medium-high risk range to reoffend. The "Stable 2007" assessment is a guided clinical interview that looks at relatively stable factors to measure the level of supervision a person would need to reduce the risk of reoffending. Weilage stated that S.C. fell in the highest risk range in that assessment. Weilage testified that S.C. was at high risk for sexual reoffense and had a high need for treatment.

The "Sex Offender Risk Appraisal Guide" measures overall risk of violent reoffending among sex offenders. Weilage testified that S.C. scored in the next-to-highest category for reoffending. Weilage stated that S.C.'s chances for violent reoffending within 7 years is 75 percent, and for reoffending within 10 years is 89 percent. Finally, the "Hare Psychopathy Checklist-Revised" measures a person's level of psychopathy. Weilage stated that S.C. scored 25 out of 40, which puts S.C. in a borderline range for psychopathic traits.

Weilage also diagnosed S.C. with alcohol dependency and stated that S.C. had abused other drugs in the past, including cocaine, amphetamines, and cannabis. Weilage stated that S.C.'s most pressing problem is antisocial personality disorder and that S.C. had not received treatment for that disorder.

Ultimately, Weilage testified that he believed S.C. met the criteria to be considered a dangerous sex offender and recommended that S.C. receive treatment at a secure inpatient facility. Weilage stated that such inpatient treatment was the least restrictive treatment option. Weilage also believed S.C. was substantially unable to control his criminal behavior.

S.C. did not present any evidence at the hearing. The Board found there was clear and convincing evidence that S.C. was a

dangerous sex offender and that secure inpatient treatment was the least restrictive alternative. The Board then committed S.C. to secure inpatient treatment.

S.C. appealed to the district court, and the district court affirmed the decision of the Board. S.C. appeals.

## ASSIGNMENTS OF ERROR

S.C. assigns the district court erred when it found that (1) S.C.'s due process rights under the 14th Amendment to the U.S. Constitution and Neb. Const. art. I, § 3, were not violated when the State of Nebraska failed to provide him with sex offender treatment services while he was incarcerated and (2) the Board's factual findings and commitment order were supported by clear and convincing evidence.

## STANDARD OF REVIEW

[1] On a question of law, an appellate court reaches a conclusion independent of the court below.[1]

[2] The district court reviews the determination of a mental health board de novo on the record.[2] In reviewing a district court's judgment, we will affirm unless we find, as a matter of law, that clear and convincing evidence does not support the judgment.[3]

## ANALYSIS

*State Did Not Violate S.C.'s Due Process Rights.*

We first note that S.C.'s assignments of error do not clearly state that he is alleging a violation of his substantive due process rights. S.C. does eventually specify that by not providing him treatment while he was still incarcerated, the State violated his right to substantive due process. However, S.C. fails to specify a remedy that would provide redress for the alleged violation.

As discussed below, S.C. must first establish that he has a protected liberty interest before this court can address what

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

[2] See *In re Interest of D.V.*, 277 Neb. 586, 763 N.W.2d 717 (2009).

[3] See *id.*

procedural protections are required.[4] Because we find that S.C. has no protected liberty interest in obtaining sex offender treatment while still incarcerated, S.C.'s substantive due process claim must fail.

[3-5] The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.[5] A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.[6] Where a right may not otherwise have existed, a state may create prisoners' rights through the use of mandatory statutory language.[7]

S.C. points to the stated policy purpose of SOCA, contained in § 71-1202, that "[i]t is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment." S.C. argues that the Nebraska Department of Correctional Services should not have been allowed to deny him treatment while he served his sentence and then commit him civilly upon his release. S.C. claims this was a violation of his substantive due process rights.

The only case S.C. cites in support of his argument is *Beebe v. Heil*,[8] a Colorado federal district court case. Under Colorado law, a sex offender is required to undergo "'appropriate'" treatment, and participation in a treatment program is an

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[4] See, *State v. Norman*, 282 Neb. 990, 808 N.W.2d 48 (2012); *State v. Cook*, 236 Neb. 636, 463 N.W.2d 573 (1990).

[5] *Beebe v. Heil*, 333 F. Supp. 2d 1011 (D. Colo. 2004).

[6] See, *Norman, supra* note 4; *Cook, supra* note 4.

[7] *Beebe, supra* note 5, citing *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

[8] *Beebe, supra* note 5.

absolute prerequisite for release on parole.[9] The defendant in *Beebe* started treatment, but his participation was terminated without notice or hearing. The federal district court overruled the defendant's motion for judgment on the pleadings, determining that the defendant had stated a claim for violation of his substantive due process rights because the defendant had a liberty interest in obtaining treatment. Without treatment, the defendant would not be eligible for release from prison. And under Colorado law, the State was required to provide treatment.[10]

*Beebe* is inapplicable here. The Colorado statutes make treatment a mandatory requirement for parole eligibility, and there are due process protections for denial of treatment.[11] In Nebraska, however, treatment is not a condition of release at the end of a criminal sentence, nor is there any statute mandating the State to provide treatment of any kind to inmates. As noted, § 71-1202 states that "[i]t is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment," but that language is merely suggestive. It does not create a liberty interest of which S.C. can claim he was deprived.

[6] Nor does such language create an additional barrier to S.C.'s release from prison, unlike the language in the Colorado statutes which made treatment a condition of release. While S.C. may have desired to begin treatment before being released from prison, he had no absolute right to such treatment. "There is a crucial distinction between being deprived of a liberty one has . . . and being denied a conditional liberty that one desires."[12]

We therefore find that S.C. had no substantive due process right to sex offender treatment while still incarcerated. We

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[9] *Id.* at 1012.

[10] *Id.*

[11] *Id.* See *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). See, also, *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009).

[12] *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 9, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979).

further note that SOCA is nonpunitive in nature and allows the State to seek civil commitment of a dangerous sex offender upon his or her release from incarceration upon a showing that he or she is a dangerous sex offender.[13]

[7] Although S.C. is correct in that one of SOCA's stated purposes is to encourage sex offenders to obtain voluntary treatment, its primary purpose is the protection of the public from sex offenders who continue to pose a threat.[14] As we have stated in the past, the subject of a civil commitment order has a protectable interest in his or her liberty, but procedural due process is satisfied by having a hearing before a mental health board, during which the State must prove that the subject is dangerous and that secure inpatient treatment is the least restrictive treatment alternative.[15] Such a civil commitment under SOCA is completely separate from the terms of incarceration subsequent to a criminal conviction.

[8] Furthermore, commitment under SOCA is not dependent upon a subject's seeking or refusing treatment; instead, the focus is on whether a "substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied."[16] As discussed below, the State provided clear and convincing evidence that S.C. was a dangerous sex offender and that secure inpatient treatment was the least restrictive alternative. We find S.C.'s first assignment of error to be without merit.

*District Court Did Not Err in Finding State Had Proved by Clear and Convincing Evidence That S.C. Was Dangerous Sex Offender.*

[9] In his second assignment of error, S.C. states that there was not clear and convincing evidence that he was a dangerous sex offender. S.C. offers no other argument, however, nor does he point to any facts that would negate the evidence offered by the State at the hearing. An argument that does little more than

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[13] See *In re Interest of J.R., supra* note 11.

[14] See § 71-1202.

[15] See *In re Interest of J.R., supra* note 11.

[16] *In re Interest of O.S.*, 277 Neb. 577, 584, 763 N.W.2d 723, 729 (2009).

to restate an assignment of error does not support the assignment, and this court will not address it.[17]

And, in any case, S.C.'s contention is without merit. S.C. had several prior convictions for violent sex offenses against children, and the State presented clear and convincing evidence that S.C. was substantially likely to engage in dangerous behavior in the future. Weilage testified that S.C.'s personality disorder, combined with his history of substance abuse and his failure to seek treatment outside of prison, increased the likelihood that S.C. would commit another violent sexual crime.

S.C.'s risk of reoffending was considered to be moderate to very high on the various psychological tests. Weilage testified that it was his opinion that S.C. was a dangerous sex offender and that secure inpatient treatment was the least restrictive alternative. S.C. offered no evidence to rebut that showing. We therefore reject S.C.'s second assignment of error.

## CONCLUSION

S.C. offers little support for the argument that his substantive due process rights were violated. Obtaining treatment was not necessary to affect S.C.'s release from prison, and no statutory language exists to create a substantive right to treatment. S.C. was committed under SOCA, which is civil and nonpunitive in nature. The State provided clear and convincing evidence that S.C. is a dangerous sex offender and that secure inpatient treatment is the least restrictive alternative.

We affirm the decision of the district court.

AFFIRMED.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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[17] *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

# John Doe, appellant, v. Board of Regents of the University of Nebraska et al., appellees.

809 N.W.2d 263

Filed February 17, 2012. No. S-11-214.

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. **Judgments: Appeal and Error.** An appellate court will affirm a lower court's ruling which reaches the correct result, albeit based on different reasoning.
4. **Colleges and Universities.** Deference should be given to the substantive decision to dismiss a medical student for academic reasons.

Appeal from the District Court for Lancaster County: Jodi Nelson, Judge. Affirmed.

John Doe, pro se.

Amy L. Longo and George T. Blazek, of Ellick, Jones, Buelt, Blazek & Longo, L.L.P., for appellees.

Heavican, C.J., Connolly, McCormack, and Miller-Lerman, JJ., and Sievers and Moore, Judges.

Miller-Lerman, J.

## NATURE OF CASE

John Doe filed a lawsuit arising from the termination of his enrollment as a medical student at the University of Nebraska Medical Center (UNMC) College of Medicine against the Board of Regents of the University of Nebraska (Board of Regents), UNMC, and the following UMNC faculty members in each individual's official and individual capacities: John Gollan, M.D., Ph.D.; Robert Binhammer, Ph.D.; Jeffrey Hill, M.D.; Gerald Moore, M.D.; David O'Dell, M.D.; Wendy Grant, M.D.; Sharon Stoolman, M.D.; and Michael Spann, M.D. (collectively defendants). The amended complaint filed December 21, 2009, is the controlling complaint.

During the pendency of the case, all causes of action except the claim for breach of contract were dismissed. The defendants filed a motion for summary judgment as to the remaining contract cause of action. On February 17, 2011, the district court for Lancaster County determined that Doe's dismissal was not in violation of the October 3, 2006, contract regarding the conditions of his continued enrollment. The district court sustained the defendants' motion for summary judgment and dismissed Doe's cause of action for breach of contract, thereby dismissing the case. Doe appeals. Because we determine that the district court did not err when it sustained the defendants' motion for summary judgment, we affirm.

## STATEMENT OF FACTS

This is Doe's second appearance before this court in connection with his dismissal from UNMC. In addition to the two state cases, Doe filed an action in the U.S. District Court for the District of Nebraska, which was dismissed without prejudice on October 27, 2010. The current case concerns only a breach of contract claim. In *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010) (*Doe I*), this court treated the breach of contract claim alleged therein as a reformulation of his due process claims and affirmed the dismissal of Doe's breach of contract claim as alleged therein. In *Doe I*, Doe did not rely on the October 3, 2006, agreement, whereas in the present appeal, he relies on the October 3 document, discussed below. Although the current breach of contract claim has not been previously considered by this court, certain facts and legal principles are common to both cases. Accordingly, we make reference to *Doe I* as it relates to the jurisprudence applicable to this case.

Doe began his enrollment as a medical student at UNMC in the 2003-04 academic year. During Doe's second year of medical school, UNMC granted Doe a leave of absence from school to receive treatment for depression, insomnia, and anxiety.

In the fall of 2005, Doe returned to UNMC and began his third year of medical school. During his third year, Doe received failing grades in his internal medicine clerkship and his obstetrics and gynecology clerkship. He also received a

near-failing grade in his pediatrics clerkship. Doe appealed his obstetrics and gynecology grade, which was upheld by both the obstetrics and gynecology department and UNMC. Doe did not appeal his pediatrics clerkship grade or his internal medicine clerkship grade. He alleges that O'Dell told him that his failure of the "NBME shelf exam," one component of his internal medicine clerkship grade, was not appealable and resulted in an automatic failure of the clerkship.

In July 2006, Hill, the associate dean for admissions and students, and Binhammer, the chair of the Scholastic Evaluation Committee (SEC), met with Doe to discuss his academic performance. The SEC had determined that Doe would have to repeat his third year of medical school. The SEC presented a contract to Doe that set forth terms for Doe's continued enrollment at UNMC. Doe did not sign this contract, and the matter was referred to the SEC for further consideration.

On October 3, 2006, the SEC held its regular meeting and placed Doe's academic issues on the agenda. Doe attended this meeting, and the SEC again presented him with a contract for continued enrollment. This time, the proposed contract contained a "professionalism clause," which stated: "I understand that any ratings of –2 or below on the professionalism ranking system, coupled with any negative comments concerning professional behavior, on any required clerkship or senior elective will be grounds for termination of enrollment." Doe signed this contract, and the SEC permitted Doe to continue his enrollment under the terms and conditions expressed in the October 3 contract. Throughout this case, the "rating" encompassed in the expression "ratings of –2 or below on the professionalism ranking system" has been referred to as the "checklist" and the expression "comments concerning professional behavior" has sometimes been referred to as an "evaluation."

In the fall of 2006, Doe was completing his surgery clerkship. During this time, Doe developed an umbilical hernia. Doe scheduled a surgery to repair the hernia for the afternoon of October 20, 2006. On the morning of October 20, all third-year medical students on surgery clerkship were scheduled to take the required surgical shelf exam.

Doe did not take the surgical shelf exam. Before the exam, Spann required Doe to participate in patient rounds, beginning at 6:30 a.m. Spann released Doe from rounds early so that Doe could take the surgery shelf exam. After rounds, Doe met with Grant, who was the associate director of medical student clerkships in the department of surgery. Grant gave Doe the option of taking the surgical shelf exam that morning or postponing the exam until after his pediatric clerkship, which would be several weeks later. Doe chose to postpone his exam. Grant informed Doe that she would review this decision with Hill or the SEC, because not taking the shelf exam would result in an incomplete or a failure grade for the rotation.

On November 7, 2006, the SEC held its regular meeting and again placed Doe's academic issues on its agenda. Doe was notified of the meeting, and he attended. At the meeting, the SEC determined that Doe violated the October 3, 2006, contract for continued enrollment and recommended the termination of Doe's enrollment at UNMC. By a letter from the SEC dated November 7, 2006, Doe was notified of the SEC's decision and was informed of his right to appeal.

Doe timely appealed the SEC's decision to the "Appeal Board." On December 19, 2006, the Appeal Board reviewed evidence and decided that dismissal was indicated. By a letter dated December 19, 2006, Gollan, the dean of the UNMC College of Medicine, agreed with the Appeal Board's decision and terminated Doe's enrollment at UNMC. Doe requested further review of the decision, but none was granted.

The present case is the second of three lawsuits Doe has filed regarding the termination of his enrollment at UNMC. The first two cases were filed in state court and the third was filed in federal court. Doe filed his first lawsuit in the district court for Douglas County against the Board of Regents, UNMC, and UNMC faculty members. This case resulted in *Doe I*. Doe sought damages for fraudulent concealment, alleged violations of his constitutional rights, and breach of contract. In that suit, the district court for Douglas County dismissed with prejudice Doe's complaint against the UNMC faculty members in their individual capacities, because Doe did not perfect service. The court also dismissed with prejudice Doe's complaint against

the Board of Regents, UNMC, and the UNMC faculty members in their official capacities. The court determined that Doe failed to state a claim for which relief can be granted or that his claims were barred by sovereign immunity.

Doe appealed the district court's decision to this court. In *Doe I*, this court affirmed in part, reversed in part, and remanded for further proceedings. This court concluded that Doe failed to state a claim for relief on his claims of fraudulent concealment, violations of due process, and breach of contract and affirmed the district court's decision in this regard. However, this court concluded that the district court erred when it dismissed Doe's lawsuit against the UNMC faculty members in their individual capacities without determining whether service by certified mail on the risk manager of UNMC was reasonably calculated to notify the members, in their individual capacities, of the lawsuit. This court also concluded that the district court erred when it dismissed Doe's claims under the Americans with Disabilities Act of 1990 and the Rehabilitation Act against the Board of Regents, UNMC, and the faculty members in their official capacities, based on our conclusion that the Americans with Disabilities Act of 1990 abrogates 11th Amendment immunity for title II claims against the State.

Doe filed the third lawsuit stemming from his termination as a medical student at UNMC in the U.S. District Court for the District of Nebraska, in case No. 8:10CV85, against the Board of Regents, UNMC, and UNMC faculty members. Doe filed a motion to dismiss that case on October 1, 2010, and the federal district court dismissed it without prejudice on October 27.

In the present case, Doe filed the initial complaint in the district court for Lancaster County against the defendants on July 31, 2009. On December 21, Doe filed a second amended complaint, which alleged five causes of action. Doe subsequently filed a motion to dismiss his causes of action one through four, which the district court sustained on September 24, 2010. Therefore, the only remaining cause of action considered by the district court and this court in the instant appeal concerns the fifth cause of action, in which Doe alleged that

the defendants breached the contract of October 3, 2006, when the SEC determined to dismiss him from the UNMC College of Medicine without sufficient proof he had violated its terms.

The contract upon which Doe relies is the October 3, 2006, document. Doe alleged that under the "professionalism clause" of the October 3 contract, the SEC could terminate Doe's enrollment only if both a "–2 or below" rating on a checklist and a negative comment concerning professional behavior on an evaluation were in existence and presented to the SEC at the time the SEC made its decision. There is no material dispute that the SEC had a negative evaluation before it. Doe alleged, however, that the undated "Professionalism Checklist" completed by Spann upon which the defendants rely, which contained more than one rating below –2, did not exist at the time the SEC terminated Doe's enrollment on November 7. Doe alleged that the defendants breached the October 3 contract when they dismissed him without proof before the SEC of both a negative checklist rating and a poor evaluation.

On August 18, 2010, the defendants moved for summary judgment. A hearing on the motion for summary judgment was held on December 20. During the hearing, the defendants offered exhibits that were received, including a "Primary Clerkship Clinical Evaluation Form" and a Professionalism Checklist concerning Doe's surgery clerkship. Spann completed the Primary Clerkship Clinical Evaluation Form and the Professionalism Checklist as part of Doe's plastic surgery clerkship. On the Primary Clerkship Clinical Evaluation Form, Spann commented that Doe was "often late for rounds, minimal active participation in [patient] care" and that Doe was "severely deficient in many areas: knowledge, patient care, team approach, communication, personal responsibility." On the Professionalism Checklist, Spann gave Doe four ratings of –3, one rating of –1, and one rating of "[p]redicted." Neither the Primary Clerkship Clinical Evaluation Form nor the Professionalism Checklist was dated. The defendants contended that this poor evaluation and this checklist established Doe's lack of professionalism and justified the recommendation of dismissal by the SEC under the October

3, 2006, contract. Doe questioned whether the checklist existed on November 7 and was presented to the SEC. Doe asserts throughout this case that the first time he saw the Professionalism Checklist was on December 18, which was after the November 7, 2006, SEC ruling but 1 day before his hearing with the Appeal Board.

At the hearing on the motion for summary judgment, the defendants also offered an e-mail from Spann to Grant dated October 20, 2006, which was received. In the e-mail, Spann provided a summary of Doe's performance during his plastic surgery rotation. Spann stated, "[Doe] continually demonstrated a lack of responsibility to the service and his education." Spann also stated that Doe "has critical weaknesses in many areas: knowledge base, communication, responsibility, motivation, and patient care."

On February 17, 2011, the district court sustained the defendants' motion for summary judgment and dismissed Doe's remaining cause of action for breach of contract. Although it expressed some doubt whether the October 3, 2006, agreement constituted a contract, the district court nevertheless proceeded to the merits, stating that the motion for summary judgment should not be sustained on the basis of an absence of a contract. Instead, the court found that there was no evidence to support Doe's claim the checklist was not before the SEC and that therefore, the defendants did not breach the contract. The court dismissed all the claims against all the defendants, including all persons named in their official and individual capacities.

Doe appeals.

## ASSIGNMENT OF ERROR

Doe claims, restated and summarized, that the district court erred when it granted the defendants' motion for summary judgment and dismissed Doe's remaining cause of action for breach of contract.

## 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. *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011). 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. *Id.*

## ANALYSIS

Doe claims that the district court erred when it sustained the defendants' motion for summary judgment. Doe contends that the October 3, 2006, contract ensured his continued enrollment unless both a negative checklist and a poor evaluation were presented to the SEC. Doe argues that the Professionalism Checklist completed by Spann was neither in existence nor before the SEC at its meeting on November 7 and that therefore, the SEC did not have evidence of both checklist "ratings of –2 or below on the professionalism ranking system" as well as an evaluation reflecting "negative comments concerning professional behavior." Doe asserts that because the SEC did not have evidence of checklist ratings of –2 or below when it terminated Doe's enrollment as a medical student at UNMC, the defendants breached the October 3 contract of continued enrollment. We reject Doe's argument.

[3] As explained below, regardless of whether the checklist was before the SEC, the negative checklist and a poor evaluation were before the Appeal Board and justified the dismissal. We believe the district court was in error when it states there was no evidence to support Doe's assertion that the Spann checklist was not before the SEC. To the contrary, there are inferences supporting Doe's claim. However, we will affirm a lower court's ruling which reaches the correct result, albeit based on different reasoning. See *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011) (affirming summary judgment for reasons different from that of lower court). Although our analysis differs from that of the district court, the district court did not err when it determined that the defendants did not breach

the October 3, 2006, contract and granted summary judgment in favor of the defendants.

As an initial matter, we note that there is no issue that Doe complied with the State Contract Claims Act, see Neb. Rev. Stat. § 81-8,304 (Reissue 2008), and that his contract-based case was filed in the district court for Lancaster County, see Neb. Rev. Stat. § 25-21,206 (Reissue 2008). He was entitled to pursue his contract cause of action in the district court for Lancaster County.

Although the district court expressed doubt whether the October 3, 2006, agreement constituted a contract, neither Doe nor the defendants challenge the existence or enforceability of the October 3 contract. It is commonplace to find a contractual relationship between a public postsecondary educational institution and a student. See *Kashmiri v. Regents of University of Cal.*, 156 Cal. App. 4th 809, 67 Cal. Rptr. 3d 635 (2007). We agree that the October agreement is a contract. Indeed, in *Doe I* in dicta, we referred to the October 3 agreement as a "contract" and distinguished it from the SEC guidelines, which permit an appeal and allegedly formed an additional "implicit contract between [Doe] and the Board [of Regents], UNMC, and the UNMC faculty members in their official capacities." 280 Neb. at 532, 788 N.W.2d at 294. The due process feature of the SEC guidelines, not the October 3 contract, was at issue in the breach of contract claim in *Doe I*.

In *Doe I*, we recognized that with regard to dismissed medical students, the U.S. Supreme Court has distinguished between "academic" and "disciplinary" dismissals. See *Board of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978). In *Doe I*, as in the instant case, Doe's claim of wrongful dismissal involves an academic dismissal. Courts have found that academic decisions made by universities are given deference. E.g., *Bell v. Ohio State University*, 351 F.3d 240 (6th Cir. 2003); *Abdullah v. State*, 771 N.W.2d 246 (N.D. 2009); *Gupta v. New Britain General Hosp.*, 239 Conn. 574, 687 A.2d 111 (1996).

[4] In *Abdullah, supra*, the Supreme Court of North Dakota concluded that the trial court properly applied deference to a medical school's decision to dismiss a student and that

the trial court did not err when it granted summary judgment against the student on his breach of contract claim. In *Abdullah*, the student was dismissed from a residency training program at a public educational institution for reasons involving professionalism and academic performance. In analyzing the student's breach of contract claim, relying on statements made by the U.S. Supreme Court, the North Dakota Supreme Court noted, "'Courts are particularly ill-equipped to evaluate academic performance.'" *Abdullah*, 771 N.W.2d at 254 (quoting *Horowitz, supra*). Additionally, the court stated, "'Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings . . . which . . . traditionally attached a full-hearing requirement.'" 771 N.W.2d at 254 (quoting *Horowitz, supra*). The court also stated, "'[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" 771 N.W.2d at 254 (quoting *Horowitz, supra*). In *Doe I*, we recognized that "expertise" is required in matters of academic judgment. 280 Neb. at 531, 788 N.W.2d at 294. It has been stated that deference should be given to the substantive decision to dismiss a medical student for academic reasons. See *Abdullah, supra.* We apply deference in this case.

The parties agree that the evaluation form completed by Spann was in existence and before the SEC at its November 7, 2006, meeting, when the SEC decided to terminate Doe's enrollment at UNMC for failure to meet professionalism standards. The evaluation form contains obvious negative comments concerning Doe's professional behavior. To the extent this decision and that of the Appeal Board were based on the evaluation, we give it deference.

Doe acknowledges that the evaluation was before the SEC. He asserts, however, that at its November 7, 2006, meeting, the SEC did not have evidence of any checklist ratings below –2, and that, given this lacuna in the evidence, the SEC could not have properly found that Doe violated the professionalism clause of the contract. At the summary judgment hearing

and again on appeal, Doe questions whether the checklist was in existence on November 7. Doe asserts that without the checklist rating, the SEC could not have properly found that he violated the professionalism clause of the October 3, 2006, contract and the defendants breached the October 3 contract when the SEC dismissed him.

The defendants contend that the greater weight of the evidence at the summary judgment hearing shows the Professionalism Checklist completed by Spann was in existence and before the SEC at its meeting on November 7, 2006, and that therefore, proof of the two bases for termination was present before the SEC, as the district court found. The defendants acknowledge that the checklist is undated but contend that there is other evidence from which it can be found that the checklist existed prior to November 7 and formed a basis upon which the SEC decided to terminate Doe's enrollment for failure to comply with the conditions for his continued enrollment, set forth in the October 3, 2006, contract. For example, the defendants refer us to the record and note that certain UNMC faculty members stated that the checklist was before the SEC at its November 7 meeting. However, there are inconsistencies among the witnesses as to which documents were presented to the SEC. The defendants also direct us to the termination letter sent to Doe from the SEC immediately after the November 7 meeting which states that Doe's termination was due to professionalism issues.

In reviewing a grant of summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence. See *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011). Contrary to the defendants' suggestion that the greater weight of the evidence supports a finding that the checklist ratings were before the SEC, in our analysis, we are required to give the reasonable inferences on this issue in favor of Doe as we review this appeal from a summary judgment ruling. As Doe contends, contrary to the defendants' argument and the district court's finding, a review of the record demonstrates that reasonable inferences can be made which favor

Doe to the effect that the Professionalism Checklist completed by Spann was neither in existence nor before the SEC at its November 7, 2006, meeting.

In addition to the inconsistencies among the witnesses, the evidence from which it can be inferred that the Spann checklist or other checklists did not exist before the SEC on November 7, 2006, includes but is not limited to the following facts. On October 20, 2006, Spann sent an e-mail to Grant which provided a "brief summary" of Doe's performance during his 2-week plastic surgery rotation. After providing the summary, Spann concludes, "I am available to discuss these issues in further detail if necessary." The statement suggests that Spann had completed his reporting and promises nothing further. The e-mail does not make reference to a Professionalism Checklist or ratings given on the professionalism ranking system. The transmittal does not include a checklist, and Spann does not suggest or promise to complete a checklist in the near future.

On October 22, 2006, Grant sent an e-mail to Hill, which stated that she had received but "not yet revie[w]ed two of the three evaluations from the 8 weeks, just the one from plastics, which is poor." The e-mail refers to the evaluation from Spann but does not make reference to having also received a checklist. One can reasonably infer that no checklists had been received on this date and that, as Doe contends, Grant was neither aware of nor awaiting a checklist.

The record shows that on November 6, 2006, in preparation for the meeting, a department of surgery employee indicated that she had Doe's evaluations, had no "ER information," and had found the checklist forms. Given the context, it can be inferred that the employee had discovered blank checklist forms. November 6 was the day before the SEC meeting in question. An inference can be made that no completed checklists had been received, had been anticipated, or were available for the SEC meeting on November 7.

On December 18, 2006, the coordinator for admissions and students faxed 31 pages consisting of many documents to the defendants' counsel, stating that all the information transmitted had been provided to the SEC at its meeting on

November 7, 2006, plus Doe's letter of termination. These documents contained several checklist ratings, including a Professionalism Checklist completed by Spann, a Primary Clerkship Clinical Evaluation Form completed by Spann, and a 2-week course evaluation completed by Dr. Kristine Bott. With the exception of the course evaluation completed by Bott, dated November 10, 2006, none of these documents contained a date. The date on Bott's evaluation is obviously after the SEC meeting held November 7 and casts doubt on the assertion that all these documents had been before the SEC. Doe suggests and we agree that, for purposes of summary judgment, it can be inferred that the remainder of the undated documents were not necessarily in existence or viewed by the SEC at its meeting on November 7, at which it determined to dismiss Doe. This group of documents was, however, before the Appeal Board.

Because we are required to view the evidence from the summary judgment hearing in the light most favorable to Doe as the nonmoving party, see *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011), inferences can be made that no checklist—in particular, Spann's Professionalism Checklist—was in existence or before the SEC at its November 7, 2006, meeting. Given this inference, we must assume that when the SEC decided to terminate Doe's enrollment at UNMC on November 7, it did not have evidence of a checklist rating of –2 or below on the professionalism ranking scale. There is no real dispute that the SEC had a poor evaluation before it when it met on November 7. However, given the inference that the SEC did not also have a negative checklist and lacked evidence that Doe had violated this aspect of the professionalism clause of the October 3, 2006, contract, the defendants were not warranted in terminating Doe's enrollment at this point in time. This determination, however, does not conclude our inquiry.

According to the SEC guidelines which are in evidence, Doe was entitled to a review by the Appeal Board of the SEC's decision to terminate his enrollment. Upon Doe's request, he was given a hearing before the Appeal Board. According to the SEC guidelines, if a student requests a personal appearance

before the Appeal Board, the request shall be granted. The SEC guidelines permit the receipt of additional evidence by the Appeal Board at its review.

The SEC guidelines state, "If a request for a tape recording of the meeting is made, the secretary shall arrange for a tape recording of the student's testimony and the testimony of any other witnesses and also prepare a digest of the hearing." The SEC guidelines further provide:

> After thorough consideration of all the presented written and/or oral testimony, the Appeal Board shall determine by secret ballot, either to sustain the original recommendation of the [SEC] or recommend its abrogation or modification. The decision of the Appeal Board, which will be based solely on the results of its investigation and, if a hearing has been held, the evidence presented at the hearing, shall be presented to the Dean of the College of Medicine as a recommendation. The Dean shall make the final decision.

According to the SEC guidelines, the Appeal Board makes its decision based on the results of its own investigation and evidence that is presented at the hearing. Referring to the guidelines concerning the appeal procedure, in *Doe I*, we described the procedural due process that Doe received thereunder as adequate. We reach the same conclusion here.

According to the SEC guidelines, the Appeal Board is not limited to the record made at the SEC; evidence consists of its own investigation, and such investigation can include additional evidence. Thus, the Appeal Board could consider the Professionalism Checklist completed by Spann, even if it was not before the SEC.

Allowing new evidence to be presented on review, although not commonplace, finds support within our jurisprudence. For example, in *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009), a group of taxpayers sought review in the district court of the decision of the county freeholder board which had approved the transfer of property from one school district to another. We concluded that according to statute and case law, the district court was allowed to accept new evidence on the appeal, because the appeal was taken as a trial

de novo before the district court. In *Koch*, we explained the trial de novo:

> "When an appeal is conducted as a 'trial de novo,' as opposed to a 'trial de novo on the record,' it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal."

276 Neb. at 1019, 759 N.W.2d at 473 (quoting *In re Covault Freeholder Petition*, 218 Neb. 763, 359 N.W.2d 349 (1984)). Thus, allowing an appellate body to accept new evidence on appeal is allowable where provided for by statute or internal guidelines which are consistent with due process. We read the SEC guidelines as permitting the taking of such evidence as is available at the time the Appeal Board meets.

In the present case, there is no dispute that the Professionalism Checklist completed by Spann was in existence and before the Appeal Board at the December 19, 2006, hearing. The parties agree that the Appeal Board received the negative checklist document and considered it in its decision to dismiss Doe from UNMC. Because the Appeal Board had the checklist showing that Doe had received ratings below –2 on the professionalism ranking system as well as the negative evaluation, it had before it the two necessary items which supported the determination that Doe violated the professionalism clause in the October 3, 2006, contract. UNMC did not breach its contract with Doe when it terminated his enrollment. Although our reasoning differs somewhat from that of the district court, the district court did not err when it determined that the defendants did not violate the October 3 contract and sustained the defendants' motion for summary judgment.

## CONCLUSION

The district court did not err when it sustained the defendants' motion for summary judgment and dismissed the complaint. Accordingly, we affirm.

AFFIRMED.

WRIGHT and STEPHAN, JJ., not participating.

# In re Interest of Ryder J., a child under 18 years of age. State of Nebraska, appellee, v. Randal R., appellant.

809 N.W.2d 255

Filed February 17, 2012. No. S-11-482.

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. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Criminal Law: Minors.** Intentional child abuse that causes severe bodily injuries, regardless whether the injuries result in permanent damage or disability, qualifies as aggravated circumstances.
3. **Criminal Law: Minors: Appeal and Error.** In a case of intentional child abuse, an appellate court determines whether aggravated circumstances exist on a case-by-case basis.
4. **Criminal Law: Minors.** The list of aggravated circumstances in Neb. Rev. Stat. § 43-292(9) (Cum. Supp. 2010) is not exhaustive. Aggravated circumstances exist when a child suffers severe, intentional physical abuse.
5. **Parental Rights: Proof.** Under Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010), once the State shows that statutory grounds for termination of parental rights exist, the State must then show that termination is in the best interests of the child.
6. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.
7. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
8. **Parental Rights.** A court need not wait for a disaster to strike before taking protective steps in the interests of a minor child.
9. ____. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights.
10. ____. In a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration.
11. ____. Although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered.

Appeal from the County Court for Lincoln County: Kent D. Turnbull, Judge. Affirmed.

Luke T. Deaver, of Person Law Office, for appellant.

Rebecca Harling, Lincoln County Attorney, and Jennifer Wellan for appellee.

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

Connolly, J.

Randal R. is the father of Ryder J. The State twice charged Randal for abusing Crue J., Ryder's half brother, but not Randal's child. Randal pled no contest both times. The State moved to terminate Randal's parental rights to Ryder, arguing that the repeated abuse of Crue was grounds for termination. Following trial, the county court, sitting as a juvenile court, terminated Randal's parental rights. Because sufficient statutory grounds existed for the termination, and because the State proved that Randal was an unfit parent and that termination was in Ryder's best interests, we affirm.

## BACKGROUND

### Basis for Motion to Terminate Parental Rights

Ryder was born in November 2008. Randal is his father, and Natasha J. is his mother. Natasha has another child, Crue, from a prior relationship. Crue was born in May 2005. Randal lived with Natasha, Crue, and Ryder at various times in 2008 and 2009.

In April 2008, Natasha took Crue to a local hospital with significant physical injuries, which medical personnel determined were the result of nonaccidental trauma. In sum, Crue had been physically abused. Crue sustained the injuries while in the care and custody of Randal. Randal pled no contest to attempted child abuse, a Class II misdemeanor, and received probation. Following this incident, Randal ceased living with Natasha and Crue.

But in early 2009, Randal moved back in with Natasha, Crue, and Ryder. Randal and Natasha had gone to counseling, Crue had received therapy, and at the time, Natasha did not believe that Randal had hurt Crue. In October 2009, Crue was again

taken to the hospital with significant physical injuries, which medical personnel determined were the result of nonaccidental trauma. Crue sustained the injuries while in the care and custody of Randal. Randal pled no contest to attempted child abuse, a Class IV felony. A district court sentenced Randal to a term of 1⅔ to 4 years' incarceration.

Because of these two incidents, the county attorney petitioned the juvenile court to adjudicate Ryder as a child under the Nebraska Juvenile Code. The county attorney then filed a motion, later amended, to terminate Randal's parental rights. The motion alleged Randal had subjected "the juvenile or another minor child to aggravated circumstances, including, but not limited to[,] abandonment, torture, chronic abuse or sexual abuse" under Neb. Rev. Stat. § 43-292(9) (Cum. Supp. 2010). The motion also alleged Randal had "committed a felony assault that resulted in serious bodily injury to the juvenile or another minor child of the parent" under § 43-292(10).

## The Trial

Much of the evidence at trial detailed the extent of Crue's injuries in 2008 and 2009. Michael Gallentine, M.D., a urologist, examined Crue following the April 2008 incident. Gallentine testified that Crue "had a significant amount of swelling and bruising, [and] some degree of some redness" in his genital area. Gallentine testified that these types of injuries could only have been caused by significant trauma, through the "striking or grabbing, [or] twisting" of the genitals. He testified that such injuries can potentially cause chronic discomfort, loss of a testicle, and fertility issues, although it appeared that Crue would not suffer from such long-term effects. Gallentine opined that Crue's injuries were caused by physical abuse. Gallentine also saw Crue following the October 2009 incident. He observed that Crue had injuries similar to those incurred in 2008 and again concluded that Crue's injuries were caused by physical abuse.

Kathy Lopez, M.D., a pediatrician, also testified regarding the extent of Crue's injuries. She explained that Crue was admitted to the hospital for 4 days following the April 2008 incident. In addition to the injuries to his genital area, Crue

had significant bruising to his jaw and hemorrhages in both eyes. Lopez opined that these injuries indicated that Crue had been strangled. Lopez explained that the strangulation could have caused permanent disability or death. Lopez opined that Crue's injuries were caused by nonaccidental trauma. Lopez also saw Crue following the October 2009 incident. She explained that the injuries were "[v]ery similar" to those suffered in 2008 and opined that Crue's injuries were again the result of physical abuse.

Lee Kimzey, Ph.D., a clinical psychologist, diagnosed Randal with dependent personality disorder. He testified that the only treatment for the disorder was long-term therapy. From his evaluation of Randal, he concluded that despite Randal's desire to parent Ryder, he was "'currently ill-equipped to manage the child and frustrations inherent in parenting and the risk [for] harm to Ryder, if left unsupervised, exceed[ed] a reasonable threshold of safety.'" He was also concerned with Randal's apparent lack of remorse for Crue's injuries and his failure to accept responsibility for causing those injuries. And Kimzey explained that the inherent frustrations of child rearing, combined with Randal's impulsiveness and lack of concern for others, created an unreasonable risk of danger for Crue, or any child of similar age. He testified, however, that with therapy and supervised visits, he believed the risk to Ryder would be minimal.

### The Juvenile Court's Order

The court terminated Randal's parental rights to Ryder. Under § 43-292(9), the court found, by clear and convincing evidence, that Randal had subjected another minor child, Crue, to aggravated circumstances "including torture and chronic abuse." The court found that grounds for termination existed under § 43-292(10) because Randal caused serious bodily injury to Crue. The court rejected Randal's argument that § 43-292(10) did not apply because Randal's was not Crue's parent. The court then found that termination of Randal's parental rights was in Ryder's best interests. The court emphasized Randal's impulsive behavior, his inability to cope with the stress of raising a child, his need for extensive

psychotherapy, and Kimzey's belief that Ryder would be unsafe if left alone with Randal. Furthermore, the court determined that Randal was an unfit parent. The court emphasized Randal's extremely violent reaction to the normal stress of raising a child, his refusal to acknowledge his behavior, and the likelihood that Randal would repeat this type of behavior. The court terminated Randal's parental rights to Ryder.

## ASSIGNMENTS OF ERROR

Randal assigns, restated, that the court erred in:

(1) finding that Randal had subjected Crue to "aggravated circumstances" under § 43-292(9);

(2) violating the Ex Post Facto Clauses of the Nebraska and U.S. Constitutions when it terminated Randal's parental rights based in part upon the 2008 abuse, which occurred before the Legislature amended § 43-292(9);

(3) determining that Randal was Crue's "parent" for purposes of § 43-292(10);

(4) finding that the termination of Randal's parental rights was in Ryder's best interests; and

(5) finding that Randal was an unfit parent.

## 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] When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[2]

## ANALYSIS

### "Aggravated Circumstances" Under § 43-292(9)

[2] Randal argues that Crue's injuries do not rise to the level of "aggravated circumstances" under § 43-292(9) because Crue's injuries will likely have no long-term effects. But

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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 Jac'Quez N.*, 266 Neb. 782, 669 N.W.2d 429 (2003).

intentional child abuse that causes severe bodily injuries, regardless whether the injuries result in permanent damage or disability, qualifies as aggravated circumstances.

Section 43-292 states, in relevant part:

> The court may terminate all parental rights between the parents or the mother of a juvenile born out of wedlock and such juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (9) The parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse, or sexual abuse.

The court terminated Randal's parental rights to Ryder, in part because Randal had subjected Crue, "another minor child," to aggravated circumstances under § 43-292(9). The court based its decision on both the 2008 and 2009 incidents of abuse. But the relevant language of § 43-292(9), "or another minor child," was added in 2009.[3] Because the 2008 abuse occurred before that language was added, Randal argues that when the court considered the 2008 abuse, it violated the Ex Post Facto Clauses of the Nebraska and U.S. Constitutions. But under our de novo review of the record, we conclude that the 2009 abuse, which occurred after the Legislature amended the statute, is sufficient to conclude that Randal subjected Crue to aggravated circumstances. So we do not consider the Ex Post Facto Clause issue.

[3] We determine whether aggravated circumstances exist on a case-by-case basis.[4] Although the Legislature has not defined in the juvenile code the phrase "aggravated circumstances," this is not the first time we have addressed its meaning. For example, in *In re Interest of Jac'Quez N.*,[5] we cited with approval

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[3] See 2009 Neb. Laws, L.B. 517, § 2. Compare § 43-292(9) (Reissue 2008) with § 43-292(9) (Cum. Supp. 2010).

[4] See *In re Interest of Jac'Quez N., supra* note 2.

[5] *Id.*

the New Jersey Superior Court, stating that "'where the circumstances created by the parent's conduct create an unacceptably high risk to the health, safety and welfare of the child, they are "aggravated" . . . .'"[6] We then concluded that aggravated circumstances existed where the parent delayed seeking medical attention for 2 days when the child had suffered obvious, serious physical injuries.[7] In *In re Interest of Hope L. et al.*,[8] we found that aggravated circumstances existed where the parents starved two of their children and, by false medical reports, obtained unnecessary medical operations for three of their children. And most recently, in *In re Interest of Jamyia M.*,[9] we again concluded that aggravated circumstances existed where the child suffered severe physical injuries through intentional abuse.[10]

[4] Here, the juvenile court determined that Randal subjected Crue to torture and chronic abuse, which were "aggravated circumstances" under § 43-292(9). We reiterate that, in contrast to the juvenile court, we are looking only at the 2009 abuse. And the 2009 abuse, by itself, is not chronic abuse, because it was a single event. Furthermore, we are hesitant to term the abuse, although severe, as torture on this record. The examples provided under § 43-292(9), however, are not an exhaustive list,[11] and we have determined that aggravated circumstances exist when a child suffers severe, intentional physical abuse.[12] Here, the State has met that standard. Crue's injuries in 2009 were severe—Gallentine opined that Crue had bruising, swelling, and abrasion to his genitals and the surrounding area. Both Gallentine and Lopez explained that Crue had petechial hemorrhaging across his face, significant

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[6] *Id.* at 791, 669 N.W.2d at 436, quoting *New Jersey Div. v. A.R.G.*, 361 N.J. Super. 46, 824 A.2d 213 (2003).

[7] See *id.*

[8] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[9] *In re Interest of Jamyia M., supra* note 1.

[10] See *id.*

[11] See *In re Interest of Jac'Quez N., supra* note 2.

[12] See *In re Interest of Jamyia M., supra* note 1.

bruises on several areas of his body, and a hemorrhage in his right eye. Lopez concluded that Crue had been strangled. Both Gallentine and Lopez opined that Crue had been intentionally, physically abused. Thus, we conclude that Randal subjected Crue to aggravated circumstances within the meaning of § 43-292(9).

But Randal asserts that our previous cases interpreting the meaning of aggravated circumstances have all involved children who were permanently injured. Randal argues that the abuse of Crue does not constitute aggravated circumstances because Crue suffered no permanent injury or disability. We disagree. We first note that while the extent of a child's injury is relevant to determining whether aggravated circumstances exist, we have never stated that aggravated circumstances exist *only* when permanent injury is inflicted. On the contrary, in *In re Interest of Jamyia M.*, we stated that aggravated circumstances existed where the record "support[ed] the finding that [the child was subjected] to severe, intentional physical abuse."[13]

Furthermore, Randal's approach would benefit parents whose abusive conduct, by dumb luck, did not permanently harm their children. We are unwilling to place a child in a position to be harmed again (or for the first time) simply because the child had the good fortune to escape permanent disability in the first instance. This case is a good example. Crue suffered severe physical injuries in 2009, and Lopez explained that his injuries could have resulted in death, loss of vision, or permanent disability and disfigurement. Crue's fortunate avoidance of long-term, debilitating effects from his injuries does not lessen the terrible nature of the abuse. The lack of permanent injury or disability to Crue is a distinction without a difference.

Because statutory grounds for the termination of Randal's parental rights to Ryder exist under § 43-292(9), we need not address Randal's claim that the court erred in concluding that grounds existed under § 43-292(10).[14] Instead, we move to the

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[13] *Id.* at 975, 800 N.W.2d at 268.

[14] See, e.g., *In re Interest of Jac'Quez N., supra* note 2.

next phase of the analysis and determine whether Randal was an unfit parent and whether termination of Randal's parental rights was in the best interests of Ryder.

### Parental Fitness and Best Interests of the Child

Randal argues that his abuse of Crue, while terrible, is of limited significance in determining whether the court should terminate his parental rights to Ryder. Randal asserts that the evidence shows that he and Ryder have a strong father-son relationship and that less drastic remedies exist that would allow that relationship to continue without endangering Ryder's well-being. In short, Randal argues that the State failed to prove both that he was an unfit parent and that termination was in Ryder's best interests. Again, we disagree.

[5-7] Under § 43-292, once the State shows that statutory grounds for termination of parental rights exist, the State must then show that termination is in the best interests of the child. But that is not all. A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.[15] And there is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that "'fit parents act in the best interests of their children,'" this presumption is overcome only when the State has proved that the parent is unfit.[16] Obviously, both the best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.

It is true that Randal's friends and family members testified on his behalf and that their testimony indicated Randal and Ryder had a normal father-son relationship. Further, their testimony showed that they believed Randal to be a capable parent. But on cross-examination, several of those same

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[15] See *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[16] *Id.* at 349, 740 N.W.2d at 25, quoting *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

witnesses testified that they did not believe that Randal had twice abused Crue—acts to which Randal had pled no contest and been found guilty. We give no weight to their testimony. As to Randal's remaining witnesses, we do not doubt their sincerity, but their opinions are significantly outweighed by the testimony regarding Crue's abuse, the circumstances surrounding it, and Kimzey's clinical opinions.

[8] We recognize that Randal has never abused Ryder. But there is no dispute that Randal seriously abused Crue. And in our view, the abuse of *any* child by an adult—regardless of whether it is the adult's own child or the child of another—calls that adult's ability to parent into serious question. This is particularly true here. The record shows that the 2009 abuse was preceded by a relatively ordinary child-rearing event: Crue, a 4-year-old at the time, wet the bed and tried to hide his soiled pajamas. The abuse, from this record, was apparently Randal's way of dealing with the bed-wetting. Obviously, physical abuse is not an appropriate response to the stress of parenting. We note that the types of events that led to Crue's abuse, such as bed-wetting, had not yet become an issue with Ryder—so Randal had not experienced the same situations with Ryder that apparently prompted the abuse of Crue. So, the fact that Randal has not yet abused Ryder is inconsequential. We need not wait for a disaster to strike before taking protective steps in the interests of a minor child.[17]

We also recognize that Crue is not related to Randal and that Ryder is Randal's biological child. While Kimzey acknowledged that parents often treat their biological children differently from their unrelated children, he concluded that if *any* child about Crue's age (3 to 5 years old) were left unsupervised with Randal, that child would be exposed to an unreasonable risk of harm. Kimzey explained that the stress of raising any child, and not just Crue, could potentially result in Randal's "lashing out at the child." Essentially, Kimzey opined that Randal could not appropriately deal with the stress of raising a child independently; when confronted with that stress, Randal could and did respond with violence.

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[17] See *In re Interest of S.L.P.*, 230 Neb. 635, 432 N.W.2d 826 (1988).

[9] Moreover, we have stated that "where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights."[18] Kimzey diagnosed Randal with dependent personality disorder. In short, the diagnosis indicated that Randal could not take care of Ryder without supervision. Kimzey testified that no medication is available to treat this type of disorder and that the only remedy is long-term therapy for an indeterminate time. As such, this weighs in favor of termination of Randal's parental rights.

[10,11] Lastly, we note that Randal is currently incarcerated. We have stated that "in a case involving termination of parental rights, it is proper to consider a parent's inability to perform his or her parental obligations because of incarceration."[19] If a parent is in jail, he or she necessarily has a more limited role in raising a child. So, although incarceration alone cannot be the sole basis for terminating parental rights, it is a factor to be considered.[20] Here, a district court sentenced Randal to a term of 1⅔ to 4 years' incarceration, after he violated his probation and pled no contest to attempted child abuse, a Class IV felony. This also weighs in favor of termination of Randal's parental rights.

Taken together, these facts show that Randal is not a fit parent for Ryder and that termination of his parental rights is in Ryder's best interests. We emphasize the severe nature of the abuse inflicted upon Crue and that the abuse was apparently in response to the normal stress of raising a child. Furthermore, Kimzey testified that the risk to Ryder, if left unsupervised with Randal, was unreasonable. The court did not err in terminating Randal's parental rights to Ryder.

## CONCLUSION

In our de novo review of the record, we conclude that sufficient statutory grounds existed for the court to terminate

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[18] *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 56, 638 N.W.2d 510, 520 (2002).

[19] *Id.* at 57, 638 N.W.2d at 521.

[20] See *id.*

Randal's parental rights to Ryder. We also conclude that Randal is an unfit parent and that terminating Randal's parental rights to Ryder was in Ryder's best interests. We affirm the judgment of the juvenile court.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOHN P. ELLIS, RESPONDENT.

808 N.W.2d 634

Filed February 24, 2012. No. S-10-986.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Appeal and Error.** In an attorney discipline case, the Nebraska Supreme Court reaches its conclusion independent of the findings of the referee. However, 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.
3. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
4. **Disciplinary Proceedings.** In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances.
5. ____. The Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances and considers the attorney's acts both underlying the events of the case and throughout the proceeding.
6. ____. In determining the appropriate sanction in an attorney disciplinary proceeding, the Nebraska Supreme Court considers the discipline imposed in similar circumstances.
7. ____. In evaluating attorney discipline cases, the Nebraska Supreme Court considers aggravating and mitigating circumstances.
8. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of disbarment.

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

James C. Morrow, of Morrow, Willnauer, Klosterman & Church, L.L.C., and, on brief, Kurt D. Maahs for respondent.

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

PER CURIAM.

## NATURE OF CASE

The Counsel for Discipline filed formal charges against John P. Ellis, alleging he violated his oath of office as an attorney, Neb. Rev. Stat. 7-104 (Reissue 2007), and several of the Nebraska Rules of Professional Conduct. Ellis filed an answer admitting certain factual allegations but denying he violated the rules of professional conduct. This court appointed a referee. After holding an evidentiary hearing, the referee determined Ellis had violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence); 3-501.4(a)(1) through (4) and (b) (communications); 3-501.15(d) and (e) (safekeeping property); 3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. Based on the seriousness of the offenses and given Ellis' similar past behavior for which he had been previously disciplined, the referee recommended disbarment. Ellis 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.

## FACTS

Ellis was admitted to the practice of law in Nebraska in 1982. In 2003, he entered a conditional admission to charges filed by the Counsel for Discipline. Those charges alleged that due to Ellis' neglect, a client's case was dismissed. Ellis subsequently misled the client regarding the status of that case and gave false information to the Counsel for Discipline's office during the following investigation. We accepted Ellis' conditional admission and suspended him for 1 year. *State ex rel. Special Counsel for Dis. v. Ellis*, 265 Neb. 788, 659 N.W.2d 829 (2003). Ellis was reinstated in 2004.

At all relevant times, Ellis was engaged in the private practice of law in Omaha under the jurisdiction of the Committee on Inquiry of the Second Disciplinary District, which determined reasonable grounds existed to discipline Ellis. Accordingly,

formal charges were filed. Given Ellis' answer, we appointed a referee.

With respect to the current case, the referee found facts substantially as described below. Following our de novo review of the record, we determine there is clear and convincing evidence in the record to support these facts. In 2006, Stephen and Cindy Fuller met with Ellis to talk about collecting damages as a result of personal injuries Stephen Fuller (Fuller) suffered in 2004. Ellis was hired on a one-third contingency fee contract and presented a claim to an insurance company, which denied liability. Before proceeding with the case, Ellis required a $1,000 deposit. Fuller made the deposit, and in May 2007, the funds were placed in Ellis' trust account. In June 2007, Ellis filed suit in the district court for Douglas County, and discovery began.

Around March 10, 2008, the district court sent a notice to Ellis stating that Fuller's suit would be dismissed in 30 days for lack of prosecution. Ellis did not send Fuller a copy of this notice of impending dismissal. The statute of limitations ran on Fuller's claim in February 2008. Fuller's case was dismissed with prejudice on April 10, 2008. Ellis claimed he told the Fullers about the notice of impending dismissal on March 24, 2008, when he met with them to discuss their upcoming depositions. The referee did not find this testimony credible. Ellis also claimed he sent a letter to Fuller on March 28 about the impending dismissal. The referee found that Ellis falsely claimed this letter had been sent and, on the contrary, that the evidence showed the letter "was created by [Ellis] to mislead and deceive [the] Counsel for Discipline in the investigation of this matter." These findings by the referee are supported by the record.

The March 28, 2008, letter was not sent by certified mail. It included the statement, "If I do not hear back from you, I will assume you agree [that your case would not likely be successful] and understand that the matter will be dismissed." The file copy of the March 28 letter resembled "a copy of a copy." The letter did not discuss reinstatement of the case or mention the expired statute of limitations. The referee did not find it credible that the March 28 letter would include so

little about the consequences of dismissal and the difficulty of reinstatement.

Ellis' firm uses "Worldox," a document management system which assigns numbers sequentially to documents. The March 28, 2008, letter was allegedly numbered 60119, while a March 26 letter was numbered 60201. Two copies of the letter in two exhibits in the case bore no document number.

In connection with the investigation of Fuller's grievance, the Assistant Counsel for Discipline met Ellis at Ellis' office on May 3, 2010, and asked for the March 28, 2008, letter. The letter was not found in the computer system. A search for the document numbered 60119 retrieved a letter dated March 20, 2008, to a different client. A hard copy of the March 20 letter could not be found. Ellis claimed he gave the March 20 letter directly to the client; the referee determined that it was more likely the letter was used to recreate an obsolete letterhead.

Fuller stated he never received the March 28, 2008, letter and was never told of the notice of impending dismissal or the actual dismissal of his case. Unaware of the April 2008 dismissal, the Fullers continued to contact Ellis about the case through the rest of 2008 and 2009. These contacts support Fuller's claim he did not know his case had been dismissed. Although, as the referee noted, Fuller did not have a good memory for dates, he could recall facts in sequence and was able to refresh his memory from several exhibits. The referee found that Fuller was credible and that the March 28 letter was fabricated.

On July 3, 2008, Ellis sent Fuller a letter about locating a possible witness. In 2009, Ellis met Fuller and the witness, despite Ellis' apparent knowledge that the case probably could not be reinstated 1½ years after it had been dismissed. This witness did not add to Fuller's case. Fuller called Ellis multiple times from October through December 2009 and left messages for Ellis.

On January 8, 2010, Fuller looked at his case file at the Douglas County District Court and learned his case had been dismissed in 2008. Fuller attempted to contact Ellis, but his calls were not returned. Fuller filed a grievance on January 12, 2010.

The remainder of Fuller's $1,000 payment was not returned until May 2010, over 2 years after the case was dismissed and only after the grievance had been filed. Ellis' employer ordered the refund. However, the referee determined that it was unclear that the failure to refund the money was due to an attempt to mislead Fuller or due to a lack of review processes at the firm for the rare case of an advance payment on a contingency fee contract.

The referee determined that Ellis did not tell Fuller his case was subject to dismissal and, once dismissed, could be reinstated only at the district court's discretion. The referee also determined that Ellis failed to advise Fuller that if the case was not reinstated, it could not be refiled, because the statute of limitations had run. The referee determined that Ellis did not explain the matter to Fuller such that Fuller could make informed decisions regarding dismissal or take action to avoid dismissal or reinstate the case. The referee determined that although Ellis had a duty to properly account for client funds, the refund was not made until well after the case was dismissed. The referee described Ellis' conduct as involving "dishonesty, fraud, deceit and misrepresentation" as well as "prejudic[e] to the administration of justice." Upon our de novo review, we find these determinations are supported by the record.

The referee determined Ellis violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence); 3-501.4(a)(1) through (4) and (b) (communications); 3-501.15(d) and (e) (safekeeping property); 3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. The referee recommended disbarment. Ellis filed exceptions to the referee's report.

## ASSIGNMENTS OF ERROR

Ellis assigns, renumbered, restated, and consolidated, that the referee erred when he (1) found Ellis did not tell the Fullers about the impending dismissal notice or dismissal order, tell them of the probability that the lawsuit could not be reinstated once it was dismissed, or explain the matter to the extent reasonably necessary to allow Fuller to make an informed decision regarding dismissal; (2) found Ellis created the March 28,

2008, letter to mislead and deceive the Counsel for Discipline; (3) found Ellis did not take diligent action to avoid dismissal or reinstate the case or communicate with Fuller to get informed consent; (4) found Ellis violated the Nebraska Rules of Professional Conduct and his oath of office as an attorney; (5) allowed or considered evidence relating to Ellis' prior conduct and disciplinary action; and (6) determined disbarment was an appropriate sanction.

## STANDARDS OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011). We reach our conclusion independent of the findings of the referee. *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011). However, 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. *Id.*

## ANALYSIS

[3-5] Violation of a disciplinary rule concerning the practice of law is a ground for discipline, *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009), and disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Herzog*, 281 Neb. 816, 805 N.W.2d 632 (2011). In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances. *Thew, supra*. We evaluate each attorney discipline case in light of its particular facts and circumstances, *id.*, and consider the attorney's acts both underlying the events of the case and throughout the proceeding. *State ex rel. Counsel for Dis. v. Samuelson*, 280 Neb. 125, 783 N.W.2d 779 (2010).

The goal of attorney disciplinary proceedings is not as much punishment as determination of whether it is in the public interest to allow an attorney to keep practicing law. See *Orr, supra*. We consider 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. *Thew, supra*.

The referee determined and we agree that Ellis violated the following provisions of the Nebraska Rules of Professional Conduct:

> § 3-501.3. Diligence.
>
> A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> . . . .
>
> § 3-501.4. Communications.
>
> (a) A lawyer shall:
>
> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) [and] promptly comply with reasonable requests for information[.]
>
> . . . .
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> . . . .
>
> § 3-501.15. Safekeeping property.
>
> . . . .
>
> (d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

. . . .

§ 3-501.16. Declining or terminating representation.

. . . .

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

. . . .

§ 3-508.4. Misconduct.

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;

. . . .

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice. Once a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person's race, national origin, gender, religion, disability, age, sexual orientation or socio-economic status. This subsection does not preclude legitimate advocacy when these factors are issues in a proceeding.

Several facts are clearly established by the record: Ellis represented Fuller. Ellis never sent Fuller a copy of the impending dismissal notice. The case was dismissed for failure to prosecute. Ellis never attempted to reinstate the case.

The evidence also shows that rather than telling his client the case was dismissed, Ellis strung Fuller along for nearly 2 years. The case was dismissed in April 2008. In July 2008, Ellis sent Fuller a letter asking that he look for a potential witness. That letter mentioned nothing about the dismissal which had occurred. Ellis never sent the Fullers a letter telling them the case was dismissed. Ellis was often nonresponsive to requests for information on the case. Ellis acted as if the case was active and it was important to talk to the witness. Well after the case had been dismissed, Ellis met with Fuller and the witness in his office in 2009.

Throughout these proceedings, Ellis claims he told the Fullers about the impending dismissal notice on March 24, 2008, and claims that the March 28 letter is genuine. The referee believed the Fullers' version of events and determined the March 28 letter was a fabrication. The referee's determination about the relative credibility of the Fullers and Ellis was sound and consistent with the evidence. Having reviewed the record de novo, we agree with the referee that the March 28 letter was a fabrication.

We also note the referee found that the remainder of Fuller's advance payment was not returned to him until May 2010, over 2 years after the case had been dismissed. Ellis failed in his responsibility to oversee those funds regardless of whether he intentionally withheld the funds to lead the Fullers to believe the case was still active or simply did not have appropriate procedures in place to account for those funds.

We agree with the referee that there is clear and convincing evidence that Ellis violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence); 3-501.4(a)(1) through (4) and (b) (communications); 3-501.15(d) and (e) (safekeeping property); 3-501.16(d) (declining or terminating representation); and 3-508.4(a), (c), and (d) (misconduct); and his oath of office as an attorney. We determine that Ellis committed the acts alleged

in the formal charges without consideration of his prior discipline. Accordingly, we need not address Ellis' assigned error that the referee impermissibly considered his prior discipline in connection with his analysis of whether Ellis violated the rules of professional conduct. However, Ellis' prior disciplinary case is relevant in determining the appropriate sanction.

[6] In determining the appropriate sanction, we consider the discipline imposed in similar circumstances. See *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010). We have previously disbarred attorneys who neglected their client's cases, failed to respond to the Counsel for Discipline, and were previously disciplined for similar conduct. For example, we disbarred an attorney who neglected a client's case and court schedules, did not cooperate with the Counsel for Discipline in a separate case, and had received a previous prior reprimand for similar conduct. *State ex rel. Counsel for Dis. v. Hart*, 270 Neb. 768, 708 N.W.2d 606 (2005). Neglect of client cases and failure to cooperate with the Counsel for Discipline are grounds for disbarment. *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006). We disbarred an attorney who neglected his clients' cases—in one instance, causing a client's claim to be time barred—and did not communicate with his clients. See *id.* We noted that "a pattern of neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public." *Id.* at 322, 710 N.W.2d at 866.

In this case, Ellis' neglect cost Fuller the opportunity to pursue his claim, regardless of whether that claim would have succeeded. Ellis compounded this error by stringing his client along for nearly 2 years and attempting to deceive the Counsel for Discipline. Ellis' actions warrant a strong sanction such as disbarment for the protection of the public and preservation of the bar's reputation. See *Hart, supra*.

[7] In evaluating attorney discipline cases, we consider aggravating and mitigating circumstances. See *State ex rel. Counsel for Dis. v. Petersen*, 272 Neb. 975, 725 N.W.2d 845 (2007). Ellis asserts that he cooperated with the Counsel for Discipline

and that such cooperation should serve as a mitigating factor. See *Switzer, supra*. However, Ellis' purported cooperation was tainted by fabricating evidence intended to deceive the Counsel for Discipline and bolster his chosen defense. Ellis also raises a lack of prejudice to Fuller as a mitigating factor. The referee noted that, without regard to prejudice, Fuller should have had the opportunity to pursue his claim further than Ellis' actions permitted. We agree with the referee's analysis and find Ellis' asserted mitigating factors to be entitled to little weight.

[8] Ellis also argues that any prior offense is remote in time and should not be considered in imposing discipline. An isolated instance of misconduct can be a mitigating factor. *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010). However, the referee did not find Ellis' previous disciplinary offense remote in time, and we agree with the referee that Ellis' previous suspension is an aggravating factor. See *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009). Ellis previously neglected a client's case, misled the client as to the case's status, made false statements to the Counsel for Discipline to cover up his negligence, entered a conditional admission, and was suspended for 1 year. *State ex rel. Special Counsel for Dis. v. Ellis*, 265 Neb. 788, 659 N.W.2d 829 (2003). His conduct in this case is similar. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions, *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011), including disbarment. See *Switzer, supra*. We believe that Ellis' acts caused his client harm, see *State ex rel. Counsel for Dis. v. Jones*, 270 Neb. 471, 704 N.W.2d 216 (2005), to the extent it denied Fuller the ability to pursue his claim. By fabricating the March 28, 2008, letter, Ellis interfered in a discipline investigation, thus meriting a severe sanction. See *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008). The referee found dishonesty, fraud, deceit, and misrepresentation, and upon our review of the record, we find these determinations are established by the record. Upon due consideration, we conclude that disbarment is the appropriate sanction.

## CONCLUSION

We find that Ellis should be and hereby is disbarred from the practice of law in Nebraska, effective immediately. Ellis 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. Ellis 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.

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ALISHA C., APPELLEE, V.
JEREMY C., APPELLANT.

808 N.W.2d 875

Filed February 24, 2012. No. S-11-233.

1. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.
2. **Parent and Child: Paternity: Presumptions: Evidence.** Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born during wedlock is presumed, and this presumption may be rebutted only by clear, satisfactory, and convincing evidence.
3. **Jurisdiction: Divorce: Paternity: Child Support.** The district court has jurisdiction to determine whether the husband is the biological father of a child to be supported as a result of a dissolution decree.
4. **Divorce: Paternity: Child Support.** Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.
5. **Divorce: Paternity: Child Support: Res Judicata.** A dissolution decree that orders child support is res judicata on the issue of paternity.
6. **Divorce: Modification of Decree: Paternity: Evidence: Res Judicata.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father.
7. **Statutes.** Statutes relating to the same subject are in pari materia and should be construed together.
8. ____. A statute is not to be read as if open to construction as a matter of course.
9. ____. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.

10. ____. In the absence of ambiguity, courts must give effect to statutes as they are written.
11. **Statutes: Legislature: Presumptions.** In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.
12. **Parent and Child: Paternity.** Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.
13. **Statutes: Legislature: Public Policy.** It is properly the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Reversed and remanded for further proceedings.

James H. Hoppe and Jerrod P. Jaeger for appellant.

Kevin Ruser, of University of Nebraska Civil Clinical Law Program, and Troy J. Bird and Austin A. Leighty, Senior Certified Law Students, for appellee.

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

MCCORMACK, J.

## I. NATURE OF CASE

Jeremy C. and Alisha C. were married in September 2001. By 2006, they were separated. Throughout their separation, they would periodically reunite, only to separate again. One such reunion occurred on February 14, 2007.

In March 2007, Alisha discovered that she was pregnant and that the baby had been conceived sometime around February 14. Alisha did not recall having intercourse with anyone other than Jeremy during the period of conception. She was recovering from a methamphetamine addiction, however, and testified that this affected her memory.

Alisha informed Jeremy that he was going to be a father. When Jeremy expressed doubts about his paternity, Alisha told him she was "110 percent sure" he was the father because she had been with no one else during that time. Alisha told Jeremy that if he did not believe her, he could get a paternity test once

the baby was born. Jeremy, however, lacked the funds to pay for genetic testing.

Brady C. was born in November 2007. After further reassurances from Alisha that she was "110 percent sure" he was the father, and inquiries into whether the child looked like him, Jeremy signed the birth certificate as Brady's father. Jeremy was not asked to sign a notarized acknowledgment of paternity as described by Neb. Rev. Stat. § 43-1408.01 (Reissue 2008). After Brady's birth, Jeremy saw Brady approximately once a week. He still had doubts as to whether he was Brady's father, but Alisha continuously assured him that he was.

In January 2009, Alisha filed for dissolution of the marriage. On August 11, Jeremy signed a property settlement and custody agreement which had attached to it a parenting plan. The agreement referred to Brady as "the minor child of the parties." Jeremy agreed to visitation with Brady one evening a week and on Jeremy's birthday and Father's Day. Jeremy agreed to pay $498 per month in child support commencing August 1 and to be responsible for 70 percent of childcare expenses. He agreed to pay Brady's health insurance in the event Medicaid coverage became unavailable.

The district court entered a decree of dissolution on September 17, 2009, when Brady was almost 2 years old. Jeremy was not present or represented at the dissolution hearing, but he had previously entered a voluntary appearance on January 28, 2009. The court noted that one child, Brady, was born as issue of the marriage. The court found the terms and provisions of the property settlement and custody agreement to be fair and equitable and incorporated the provisions of the agreements into its decree of dissolution.

Approximately 1 month later, Jeremy's mother agreed to pay for a paternity test. The test was conducted shortly thereafter, and the parties agree the test demonstrated that Jeremy is not Brady's biological father. On November 17, 2009, 61 days after the dissolution decree, Jeremy filed a "Complaint to Set Aside Legal Determination of Paternity." The determination of paternity referred to in the complaint was the decree of dissolution. Jeremy alleged that a decree modifying or setting aside the custody and child support order was warranted on the grounds

of fraud or newly discovered evidence, or under the provisions of Neb. Rev. Stat. §§ 43-1401 to 43-1418 (Reissue 2008).

The district court denied the complaint. The court found that the evidence did not support a claim of fraud and that the claim of newly discovered evidence did not afford relief because Jeremy failed to exercise due diligence in raising the issue of paternity in a timely manner. The court found that the provisions of §§ 43-1401 to 43-1418 did not apply as a matter of law to a child born during the course of a marriage. An order of garnishment in aid of execution of Jeremy's child support obligations was issued in March 2010.

Jeremy appeals the district court's February 18, 2011, order denying his "Complaint to Set Aside Legal Determination of Paternity," insofar as it sought relief under § 43-1412.01.

## II. ASSIGNMENT OF ERROR

Jeremy assigns that the district court erred in finding that §§ 43-1401 to 43-1418 do not apply to minor children born during a marriage.

## III. STANDARD OF REVIEW

[1] The meaning of a statute is a question of law, which an appellate court resolves independently of the trial court.[1]

## IV. ANALYSIS

The sole issue in this appeal is whether the disestablishment of paternity provision, § 43-1412.01, applies to adjudicated fathers who were married to the child's biological mother at the time of conception. This presents an issue of first impression for our court. To better understand the arguments currently before us, we explore the law before the passage of § 43-1412.01, the statutory scheme in which § 43-1412.01 is found, and similar statutory provisions in other states.

### 1. Nebraska Law Before Passage of § 43-1412.01

#### (a) Presumption of Paternity

[2] Under Nebraska common law, later embodied in Neb. Rev. Stat. § 42-377 (Reissue 2008), legitimacy of children born

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[1] *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

during wedlock is presumed. This presumption may be rebutted only by clear, satisfactory, and convincing evidence.[2] The testimony or declaration of a husband or wife is not competent to challenge the paternity of a child.[3]

The marital presumption of paternity has a long history that derives from what became known as Lord Mansfield's Rule. At a time when biological paternity was difficult to establish,[4] Lord Mansfield's Rule protected children from illegitimacy by assuming a child born during the marriage belonged to the husband and prohibiting the husband and wife from testifying against each other to overcome this presumption.[5]

With the advent of genetic testing, this marital presumption of paternity can now be overcome by scientifically reliable evidence that the husband is not the biological father of the child.[6] Genetic testing can also establish paternity of children born out of wedlock.[7]

(b) Dissolution Decrees and Res Judicata

[3] The parentage of a child born during a marriage is traditionally contested, if at all, in dissolution proceedings.[8] The marital presumption of paternity can be rebutted at that time.[9] The district court has jurisdiction to determine whether the husband is the biological father of a child to be supported as a result of a dissolution decree.[10]

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[2] See, *Helter v. Williamson*, 239 Neb. 741, 478 N.W.2d 6 (1991); *Perkins v. Perkins*, 198 Neb. 401, 253 N.W.2d 42 (1977).

[3] *Id.*

[4] Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 Md. L. Rev. 246 (2006).

[5] Kristen K. Jacobs, *If the Genes Don't Fit: An Overview of Paternity Disestablishment Statutes*, 24 J. Am. Acad. Matrim. Law. 249 (2011) (citing *Goodright v. Moss*, (1777) 98 Eng. Rep. 1257 (K.B.); 2 Cowp. 591).

[6] See, e.g., *Quintela v. Quintela*, 4 Neb. App. 396, 544 N.W.2d 111 (1996).

[7] See § 43-1412.

[8] See, *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974); *Houghton v. Houghton*, 179 Neb. 275, 137 N.W.2d 861 (1965). See, also, *Schmidt v. State*, 110 Neb. 504, 194 N.W. 679 (1923).

[9] See *id.*

[10] *Younkin v. Younkin*, 221 Neb. 134, 375 N.W.2d 894 (1985).

[4] Even if paternity is not directly placed in issue or litigated by the parties to a dissolution proceeding, any dissolution decree which orders child support implicitly makes a final determination of paternity.[11] When the parties fail to submit evidence at the dissolution proceeding rebutting the presumption of paternity, the dissolution court can find paternity based on the presumption alone. In *DeVaux v. DeVaux*,[12] we explained that a trial court necessarily makes such a finding when it orders child support, for "the trial court could not have ordered child support without finding that [the presumed father] was the father of the child."

[5] As a result, any dissolution decree that orders child support is res judicata on the issue of paternity.[13] Under common law, it cannot be relitigated except under very limited circumstances through a motion to vacate or modify the decree. Accordingly, in *DeVaux*, we held that the district court erred in failing to grant the ex-husband's demurrer to the mother's application to modify the decree to reflect that the ex-husband was not the child's biological father.[14] As a matter of policy, we said: "'There is no more forceful example of the rationale underlying the requirement of finality of judgments than the chaos and humiliation which would follow from allowing [persons] to challenge, long after a final judgment has been entered, the legitimacy of children born during their marriages.'"[15]

A party to any final judgment can make a motion to vacate or modify the judgment on the grounds of fraud by the successful party or "newly discovered material evidence which

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[11] *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). But see, *R.E. v. C.E.W.*, 752 So. 2d 1019 (Miss. 1999); *Cornelius v. Cornelius*, 15 P.3d 528 (Okla. Civ. App. 2000); *McDaniels v. Carlson*, 108 Wash. 2d 299, 738 P.2d 254 (1987).

[12] *DeVaux v. DeVaux, supra* note 11, 245 Neb. at 616, 514 N.W.2d at 644. See, also, *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999).

[13] See *DeVaux v. DeVaux, supra* note 11.

[14] *Id.*

[15] *DeVaux v. DeVaux, supra* note 11, 245 Neb. at 619-20, 514 N.W.2d at 646 (quoting *Hackley v Hackley*, 426 Mich. 582, 395 N.W.2d 906 (1986)).

could neither have been discovered with reasonable diligence before trial nor have been discovered with reasonable diligence in time to move for a new trial."[16] But the standard for showing fraud or newly discovered evidence is high. In *DeVaux*, we explained that the mother's awareness of her extramarital sexual relations meant that she could not file a successful motion for new trial on the basis of newly discovered evidence that her former husband was not the biological father of her child. Neither the mother's former ignorance of blood testing availability nor her belated realization regarding possible parentage was sufficient to show due diligence as required for a motion for new trial.[17] "'[R]easonable diligence,'" we explained, "means appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful."[18]

Similarly, to demonstrate fraud, the party seeking to set aside the judgment must prove that he or she exercised due diligence at the former trial and was not at fault or negligent in the failure to secure a just decision.[19] In *In re Estate of West*,[20] we said that in order to vacate a judgment or order under § 25-2001(4) because of fraud, the movant must prove: (1) the judgment or order has been obtained or produced through fraud; (2) it is inequitable or against good conscience to enforce the judgment or order; (3) failure to secure a just decision is not the result of the vacating party's fault, neglect, or lack of diligence; and (4) the party seeking to vacate has exercised due diligence in discovering the fraud which resulted in the judgment or order in question.

In *McCarson v. McCarson*,[21] we reversed the trial court's grant of summary judgment in favor of the ex-husband who sought to modify a dissolution decree and child support order,

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[16] See Neb. Rev. Stat. § 25-2001(4)(c) (Reissue 2008).

[17] *DeVaux v. DeVaux, supra* note 11.

[18] *Id*. at 623, 514 N.W.2d at 648.

[19] See *Nielsen v. Nielsen*, 275 Neb. 810, 749 N.W.2d 485 (2008).

[20] *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987).

[21] *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002).

on the basis of fraud, to reflect he was not the child's father. The dissolution decree had been entered after a voluntary appearance, but while the ex-husband was stationed in Japan. The ex-husband, who was not represented by counsel, signed the decree. It was undisputed that the ex-wife committed fraud insofar as she knew at the time of filing for dissolution that the child was not her husband's. Yet she did not reveal that information to the court or to her husband.

Nevertheless, we found that the ex-husband did not make a successful claim of fraud, because he failed to rebut evidence introduced by the ex-wife that he knew or should have known he was not the child's biological father.[22] This evidence consisted of the ex-husband's previous initiation of a "punishment proceeding" against the ex-wife for adulterous conduct.[23] Also, the ex-wife submitted an affidavit in which she testified that the ex-husband had told her many times he knew the child could not be his. Finally, in a previously dismissed petition for dissolution filed by the ex-husband shortly after the child's birth, the ex-husband alleged he was not the child's biological father.

Concurrent independent equity jurisdiction allows the court to modify its own decrees, but such authority is similarly rarely utilized.[24] Where a party to a divorce action, represented by counsel, voluntarily executes a property settlement agreement which is approved by the court and incorporated into a divorce decree from which no appeal is taken, ordinarily the decree will not thereafter be vacated or modified, in the absence of fraud or gross inequity.[25] There are no published cases in Nebraska where a paternity determination in a dissolution and support decree was set aside under the court's independent equity jurisdiction.

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[22] *Id.*

[23] *Id.* at 542, 641 N.W.2d at 70.

[24] See, *DeVaux v. DeVaux, supra* note 11; *Portland v. Portland*, 5 Neb. App. 364, 558 N.W.2d 605 (1997).

[25] See, *Pascale v. Pascale*, 229 Neb. 49, 424 N.W.2d 890 (1988); *Klabunde v. Klabunde*, 194 Neb. 681, 234 N.W.2d 837 (1975).

### 2. § 43-1412.01

[6] Subsequent to our decisions in *McCarson* and *DeVaux*, the Legislature passed 2008 Neb. Laws, L.B. 1014. Section 43-1412.01, derived from that bill, provides a means to "set aside" a "final" legal determination of paternity, including an obligation to pay child support. Section 43-1412.01 thus clearly overrides res judicata principles and allows, in limited circumstances, an adjudicated father to disestablish a prior, final paternity determination based on genetic evidence that the adjudicated father is not the biological father. The question is whether an adjudicated father who was married to the child's biological mother at the time of conception may take advantage of the provisions of § 43-1412.01.

Section 43-1412.01 states in full:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian ad litem to represent the interest of the child. The filing party shall pay the costs of such test. A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pending complaint for relief from a determination of paternity under this section, but only from the date that notice of the complaint was served on the nonfiling party. A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01, (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.

It is conceded that Jeremy does not fall under any of the three exclusions set forth in § 43-1412.01. Most notably, Jeremy did

not sign a notarized acknowledgment of paternity. The statute itself is broadly worded as applicable to "[a]n individual," who "may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity." Nevertheless, Alisha argues we should read § 43-1412.01 as applying only to legally determined fathers who were not married to the child's mother at the time of conception or birth. Stated differently, Alisha believes that § 43-1412.01 applies to paternity determinations concerning only out-of-wedlock children. She argues it has no applicability to determinations of paternity regarding children born during a marriage.

In making this argument, Alisha relies on the applicable definitions section of the statutory scheme in which § 43-1412.01 is found. Those definitions, adopted in 1941 and last modified in 1994, state that "[f]or purposes of sections 43-1401 to 43-1418," a "[c]hild shall mean a child under the age of eighteen years born out of wedlock."[26] Further, a

> [c]hild born out of wedlock shall mean a child whose parents were not married to each other at the time of birth, except that a child shall not be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth.[27]

While § 43-1412.01 admittedly makes no reference to the term "child" as such, Alisha argues we must read § 43-1412.01 in pari materia[28] with the definitions section. Doing so, we must exclude its application to paternity determinations that were not of a "child" as defined in § 43-1401(1). Alisha points out that the final reading of L.B. 1014 includes the provision that "[t]he Revisor of Statutes shall assign . . . section 47 of this act within sections 43-1401 to 43-1418 and any reference to such sections shall be deemed to include section 47 of this act . . . ."[29] Thus, Alisha argues it was the Legislature's intent

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[26] § 43-1401(1).

[27] § 43-1401(2).

[28] See *Mahnke v. State*, 276 Neb. 57, 751 N.W.2d 635 (2008).

[29] 2008 Neb. Laws, L.B. 1014, § 73, p. 702.

that § 43-1412.01 be viewed as part of a statutory scheme which deals exclusively with out-of-wedlock births and simply has no applicability to children born or conceived during a marriage.

(a) Statutory Scheme

We agree that many of the provisions of §§ 43-1401 to 43-1418 concern the child support obligations of the "father of *a child* whose paternity is established either by judicial proceedings or by acknowledgment."[30] Many of the statutes provide a means of establishing paternity of "a child."[31] And they are meant to establish liability for the child's support "in the same manner as the father of a child born in lawful wedlock is liable for its support."[32] Many of these provisions were enacted before genetic testing became the principal means of establishing paternity. In 1984, the Legislature passed additional provisions relating to genetic testing "[i]n any proceeding to establish paternity . . . ."[33] Section 43-1414 states that the court, on its own motion, or upon request by a party, the Department of Health and Human Services, or other authorized attorney, shall require "the child, the mother, and the alleged father to submit to genetic testing."[34] The cost of the testing is borne by the requesting party, and if testing is by the court's own motion, the assessment of cost is determined by the court.[35] Additional laws were passed in 1994 requiring hospital officials to present an unwed mother and the child's father, if readily available, with documents and written instructions for a notarized acknowledgment of paternity. Some of these provisions were intended to comply with federal welfare reform which required expedited procedures for establishing support obligations on out-of-wedlock fathers.[36]

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[30] § 43-1402 (emphasis supplied).

[31] See §§ 43-1402, 43-1403, 43-1406, 43-1407, 43-1408.01, and 43-1411.

[32] § 43-1402.

[33] § 43-1414(1). See, also, §§ 43-1414 to 43-1418.

[34] § 43-1414(1) and (2).

[35] § 43-1418.

[36] See 42 U.S.C. § 666 (2006).

Section 43-1409 states that the signatory to a notarized acknowledgment of paternity can rescind the acknowledgment within the earlier of 60 days or the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order. After the rescission period, the acknowledgment becomes a legal finding which may be challenged only on the basis of fraud, duress, or material mistake of fact, with the burden of proof upon the challenger.[37]

(b) Virginia Has Language Similar to That of § 43-1412.01

Section 43-1412.01 is one of the most recent additions to the paternity laws in Nebraska. The legislative history pertaining to § 43-1412.01 is not helpful. We observe, however, that the language of § 43-1412.01 appears to have been modeled after a Virginia statute adopted in 2001. Va. Code Ann. § 20-49.10 (2008) states in full:

> An individual may file a petition for relief and, except as provided herein, the court may set aside a final judgment, court order, administrative order, obligation to pay child support or any legal determination of paternity if a scientifically reliable genetic test performed in accordance with this chapter establishes the exclusion of the individual named as a father in the legal determination. The court shall appoint a guardian ad litem to represent the interest of the child. The petitioner shall pay the costs of such test. A court that sets aside a determination of paternity in accordance with this section shall order completion of a new birth record and may order any other appropriate relief, including setting aside an obligation to pay child support. No support order may be retroactively modified, but may be modified with respect to any period during which there is a pending petition for relief from a determination of paternity, but only from the date that notice of the petition was served on the nonfiling party.

[37] § 43-1409.

> A court shall not grant relief from determination of paternity if the individual named as father (i) acknowledged paternity knowing he was not the father, (ii) adopted the child, or (iii) knew that the child was conceived through artificial insemination.

Few opinions have been issued in Virginia interpreting § 20-49.10, and no reported decision in Virginia has involved the issue of disestablishment of a presumed father's paternity. However, in 2004, the Circuit Court of Virginia, Spotsylvania County, determined in an unreported decision that the paternity of a child born within wedlock and established by a dissolution and support decree could be set aside under § 20-49.10.[38] In *Taylor v. Taylor*,[39] after a de novo hearing, the court reversed the juvenile court's determination that the presumed father of a 12-year-old child should not be granted relief from child support obligations pursuant to § 20-49.10. Although the dissolution decree and award of child support were res judicata, the court found that § 20-49.10 granted relief and allowed further exploration of the issue of paternity when a scientifically reliable genetic test established that the petitioner was excluded as the father. The court observed that this statutory avenue to set aside the final determination of paternity appeared applicable "regardless of lapse of time."[40]

The court also observed that the statute stated a court "'may'" set aside an earlier paternity adjudication.[41] The parties agreed the statute thereby required consideration of the child's best interests before setting aside a paternity determination.

The court ultimately found that the paternity determination should be set aside and the child support obligation terminated. The court considered the totality of the circumstances and the

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[38] *Taylor v. Taylor*, Nos. CH03-926, CH03-929, 2004 WL 1462261 (Va. Cir. June 3, 2004) (unpublished opinion). See, also, Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 Ariz. St. L.J. 809 (2006).

[39] *Taylor v. Taylor, supra* note 38.

[40] *Id.*, 2004 WL 1462261 at *1.

[41] *Id.*

fact that genetic tests conclusively showed that the petitioner was not the father of the child. The court stated that the ex-husband's decision "to allow his anger at [his ex-wife] to disrupt his relationship with this 12-year-old boy" was "unfortunate," but it also noted that the ex-husband had already ceased all contact with the boy.[42] The court concluded that "refusing to grant [the ex-husband] the statutory relief will not of itself mend the broken bond, nor will it magically create a father-son relationship that does not exist."[43]

(c) Reading § 43-1412.01

[7-10] We find that the plain language of § 43-1412.01 similarly indicates a broad application that encompasses paternity determinations of children born during a marriage. While statutes relating to the same subject are in pari materia and should be construed together,[44] we do not view § 43-1412.01 as open to construction. A statute is not to be read as if open to construction as a matter of course.[45] If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[46] In the absence of ambiguity, courts must give effect to statutes as they are written.[47]

On its face, § 43-1412.01 broadly applies to "[a]n individual." It plainly encompasses setting aside "a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination." We

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[42] *Id.* at *2.

[43] *Id.*

[44] See *Mahnke v. State, supra* note 28.

[45] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[46] *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[47] *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

have said that a dissolution decree which orders child support is a legal determination of paternity.[48]

[11] And it is precisely because many other paternity statutes expressly refer to "a child"—defined as a child born out of wedlock in § 43-1401(1)—that it is significant § 43-1412.01 does not use that term. In enacting a statute, the Legislature must be presumed to have knowledge of all previous legislation upon the subject.[49] The Legislature is also presumed to know the language used in its statutes, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.[50] The Legislature, fully cognizant of the other paternity statutes, could have easily limited the applicability of § 43-1412.01 to children born out of wedlock in any number of ways. The statute could have said it was applicable to "[a]n individual" who has been adjudicated as the father of "a child." It could have limited disestablishment to setting aside "a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity" of "a child." It could have limited the statute's scope to an adjudicated father of "a child." It instead stated broadly that it was applicable to "[a]n individual" seeking to set aside "any" legal determination of paternity. We cannot read into the statute a limitation which plainly is not there.

We further observe that if § 43-1412.01 is not applicable to adjudicated fathers of children born during a marriage, it is unclear to whom it would apply. As discussed, § 43-1412.01 does not apply to fathers by notarized acknowledgment. Indeed, in *Cesar C. v. Alicia L.*,[51] we held that a mother in a custody dispute could not introduce evidence negating the paternity of a father who had signed a notarized acknowledgment. And we

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[48] See, e.g., *DeVaux v. DeVaux, supra* note 11; *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992).

[49] *Bass v. Saline County*, 171 Neb. 538, 106 N.W.2d 860 (1960).

[50] See *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[51] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

said that "'"it would be unreasonable to allow a man . . . to undo his voluntary acknowledgment years later . . . when his paternity was based *not on a mere marital presumption* that he was the child's father but on the conscious decision to accept the legal responsibility of being the child's father."'"'"[52]

Paternity of out-of-wedlock children is usually established through DNA testing. Although there are other procedures for establishing paternity of out-of-wedlock children, it is hard to imagine, as a practical matter, a circumstance after 2008 in which an out-of-wedlock child's paternity would be established by means other than notarized acknowledgment or genetic testing. In fact, procedures for using genetic testing to establish paternity were enacted in 1984, rendering it unlikely that the biological relationship of any child currently the subject of a child support order was not established by those means.

Thus, the only people for whom genetic testing would likely disestablish paternity under § 43-1412.01 are those men whose paternity was decreed in a dissolution order based on the presumption of paternity and without resort to genetic testing. If § 43-1412.01 were read as inapplicable to those presumed fathers, it would be largely meaningless.

We can presume that the Legislature, having already written a limited procedure for setting aside notarized acknowledgment of paternity, sought to provide a means of relief for other kinds of adjudicated fathers. The legislative history, sparse as it is, lends support to our reading of the statute as being applicable to both adjudicated fathers who were married to the child's mother and those who were not. The legislative history refers broadly to "individual[s]" who may seek relief under the statute in the same manner as the statute does itself.[53]

Furthermore, the Legislature is deemed to be aware of existing Supreme Court precedent when it enacts legislation.[54]

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[52] *Id.* at 990, 800 N.W.2d at 257 (emphasis supplied) (quoting *In re Parentage of G.E.M.*, 382 Ill. App. 3d 1102, 890 N.E.2d 944, 322 Ill. Dec. 25 (2008)).

[53] L.B. 1014, § 47, p. 687.

[54] *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

It is reasonable to surmise that the Legislature, in enacting § 43-1412.01, sought to provide a possible remedy to ex-husbands like the one in *McCarson*[55] and like the present appellant—men with no biological ties to the child who have become bound by a final child support determination as a result of ignorance of the law and transient wishful thinking.

We see no reason why the common-law presumption of paternity is inconsistent with our reading of § 43-1412.01 as being broadly applicable to men who were married to the biological mother at conception. Generally, statutes which effect a change in the common law are to be strictly construed.[56] But even if § 43-1412.01 were open to construction, the presumption does not mean that fathers of children born during a marriage have more value than those of children born out of wedlock. In other words, the presumption does not indicate that adjudicated fathers who were married to the biological mother should be bound by final adjudications of paternity, while fathers of children born out of wedlock should not. The presumption of paternity merely creates a default assumption absent sufficient evidence to the contrary. And § 43-1412.01 effects no change in that presumption or the kind of evidence deemed sufficient to overcome the presumption.

We observe that the presumption of paternity has never been placed on all men who had sexual relations with the child's mother around the time of conception, presumably because it would be impractical to do so. But genetic testing can now relieve presumed fathers of their traditional support obligations, while at the same time imposing support obligations on men who engaged in out-of-wedlock relations which resulted in the child's conception. While the presumption of paternity has not changed, its role in protecting children has become less vital with the advent of genetic testing and the shifting focus of the law from marital to biological ties.[57]

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[55] *McCarson v. McCarson, supra* note 21.

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

[57] See Jacobs, *supra* note 5.

(d) Other Jurisdictions

Disestablishment of paternity statutes allowing courts to set aside paternity determinations for children born during a marriage are not uncommon. Several states have adopted disestablishment of paternity statutes which explicitly allow men to ask a court to set aside a final adjudication based on the marital presumption of paternity.[58] Some other states' statutes do not explicitly include paternity determinations of children born during a marriage, but are interpreted as including presumed fathers under the broad language of the statutes.[59]

Such statutes have largely been in response to a "disestablishment movement" which began after high profile cases in which men felt defrauded by the child support system which forced them to support children they were not genetically related to.[60] However, they represent a "wide variety of approaches and vary in terms such as time limits, standing, requirements for filing, allotted discretion of the court, and the statutes' effects on child support regarding past and future obligations."[61]

For instance, Oregon sets forth a 1-year statute of limitations for any disestablishment action when the original paternity determination was the result of neglect, and 1 year from the discovery of fraud or other misconduct if the original determination was obtained by fraud, misrepresentation, or

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[58] See, Iowa Code Ann. § 600B.41A (West Cum. Supp. 2011); Mo. Ann. Stat. § 210.826 (West 2010); Mont. Code. Ann. § 40-6-105(3) (2007). See, also, Ga. Code Ann. § 19-7-54 (Supp. 2009); La. Civ. Code Ann. art. 187 to 189 (2007); Ohio Rev. Code Ann. §§ 3119.961 and 3119.962 (LexisNexis 2008); Or. Rev. Stat. § 109.072 (2007); Va. Code Ann. § 20-49.10. Compare, Ala. Code § 26-17-607 (2009); Ariz. Rev. Stat. Ann. § 25-812 (Cum. Supp. 2009); La. Code Ann. § 9:399.1 (Cum. Supp. 2012).

[59] See, *Ex parte State ex rel. A.T.*, 695 So. 2d 624 (Ala. 1997); *Johnston v. Johnston*, 979 So. 2d 337 (Fla. App. 2008); *Ashley v. Mattingly*, 176 Md. App. 38, 932 A.2d 757 (2007).

[60] See Jacobs, *supra* note 5 at 257.

[61] *Id.* at 259. See, also, Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. Va. L. Rev. 547 (2000).

misconduct.[62] Florida and Iowa, on the other hand, allow a disestablishment action to be brought any time before the child reaches the age of majority.[63] Alabama, Maryland, and Virginia appear to impose no time limits to their disestablishment of paternity actions.[64]

Some state laws impose a best interests analysis on the court before it may grant a presumed father's request to disestablish paternity. Oregon mandates that the court shall vacate a judgment of paternity upon proof that the man is not the biological father—unless the court finds that to do so would be substantially inequitable, giving consideration to the interests of the parties and the child.[65] Iowa law provides that the court, upon proof that the established father is not the biological father, may preserve the paternity determination only if it finds that it is in the best interests of the child to do so. This analysis considers the child's age, the length of time since the establishment of paternity, the previous relationship between the child and the established father, and the possibility that the child could benefit from establishing the child's actual paternity.[66]

Maryland has also read its statutes as allowing the court to set aside a paternity determination of children born during a marriage only after consideration of the child's best interests.[67] In *Ashley v. Mattingly*,[68] the court rejected an argument that the broadly worded disestablishment of paternity statutes were

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[62] Or. Rev. Stat. § 109.072(2)(d). See, also, Mo. Ann. Stat. § 210.854 (West Cum. Supp. 2012) (2-year statute of limitations).

[63] Fla. Stat. Ann. § 742.18(2)(g) (West 2010); Iowa Code Ann. § 600B.41A(3)(a).

[64] See, Ala. Code § 26-17-607; Md. Code Ann., Fam. Law § 5-1038 (LexisNexis 2006); Va. Code Ann. § 20-49.10; *Taylor v. Taylor, supra* note 38. See, also, Jacobs, *supra* note 38.

[65] Or. Rev. Stat. § 109.072(7).

[66] Iowa Code Ann. § 600B.41A(6).

[67] See *Ashley v. Mattingly, supra* note 59. See, also, *Kamp v. Department of Human Services*, 410 Md. 645, 980 A.2d 448 (2009). But see *Martin v. Pierce*, 370 Ark. 53, 257 S.W.3d 82 (2007).

[68] *Ashley v. Mattingly, supra* note 59.

applicable only to out-of-wedlock children. Maryland law states that a declaration of paternity in a final order can be set aside if scientific testing establishes that the named father is not the biological father.[69] A subsection of that statute states: "Except for a declaration of paternity, the court may modify or set aside any order or part of an order under this subtitle as the court considers just and proper in light of the circumstances and in the best interests of the child."[70] The court in *Ashley* noted that these provisions are found in Maryland's paternity act, which is largely aimed at addressing putative fathers of children born outside of marriage. Nevertheless, implicit paternity determinations of presumed fathers in dissolution decrees could be set aside under the plain language of the act. But the act required consideration of the child's best interests before setting aside a paternity determination for a child born in wedlock. It did not impose such a best interests analysis for children born out of wedlock.[71]

Other state statutes do not set forth a best interests analysis in the context of disestablishment of paternity. At least one court has held that unless a statute provides to the contrary, "the 'best interests of the child' standard generally has no place in a proceeding to reconsider a paternity declaration."[72]

### (e) § 43-1412.01 Imposes Best Interests Analysis

[12] We do not consider Jeremy's petition, filed after the dissolution decree, as having been filed out of time. And we conclude that, like the disestablishment of paternity statutes in Virginia and other states, § 43-1412.01 gives the court discretion to determine whether disestablishment of paternity is appropriate in light of both the adjudicated father's interests and the best interests of the child.

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[69] Md. Code Ann., Fam. Law § 5-1038.

[70] § 5-1038(b).

[71] See, *Ashley v. Mattingly, supra* note 59; *Kamp v. Department of Human Services, supra* note 67.

[72] *Langston v. Riffe*, 359 Md. 396, 425, 754 A.2d 389, 404 (2000).

Section 43-1412.01 provides that the court

> *may* set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination.

(Emphasis supplied.) "Unless such construction would be inconsistent with the manifest intent of the Legislature . . . [w]hen the word may appears, permissive or discretionary action is presumed."[73] Section 43-1412.01 also states that the "court shall appoint a guardian ad litem to represent *the interest of the child*." (Emphasis supplied.)

We read the statute as thus granting discretion to the trial court in determining whether to grant disestablishment. The court's discretion should consider both the adjudicated father's and the child's interests. While the statute fails to precisely detail what circumstances should be considered in weighing the interests of the parties, we believe it would be appropriate for the court to consider the child's age, the length of time since the establishment of paternity, the previous relationship between the child and the established father, and the possibility that the child could benefit from establishing the child's actual paternity. Because the district court believed it was prohibited as a matter of law from granting relief under § 43-1412.01, it did not consider the respective interests of the parties in the case. The matter will need to be remanded for further proceedings.

(f) Public Policy Is Province of Legislature

[13] It is apparent that a child can be harmed when an adjudicated father seeks to set aside a previously final paternity determination. But the harm is no greater for a child born during a marriage than for a child born out of wedlock. With changing societal values regarding illegitimacy and the advent of genetic testing, the marital presumption has become less important as

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[73] Neb. Rev. Stat. § 49-802 (Reissue 2010).

a tool for ensuring a child's support by both parents,[74] and the legal environment has become more concerned with biological ties to fatherhood.[75] Ultimately, the Legislature has determined that an adjudicated father—of a child born either in or out of wedlock—may ask that a court set aside a support order if genetic testing proves he is not the child's biological father. The Legislature has determined that the trial court has discretion in determining whether to grant such relief, considering the interests of both the adjudicated father and the child. It is properly the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.[76]

## V. CONCLUSION

The district court erred in concluding that Jeremy could not rely on § 43-1412.01 as a matter of law because he was married to the child's mother when the child was conceived. However, no evidence was presented and considered with regard to the respective interests of Jeremy and Brady. We reverse the judgment and remand the cause for further proceedings in accordance with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

GERRARD, J., not participating in the decision.

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[74] See Jacobs, *supra* note 5.

[75] See, *id.*; Singer, *supra* note 4.

[76] *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

# In re Interest of Charlicia H., a child under 18 years of age. State of Nebraska, appellee, v. Charlicia H., appellee, and Nebraska Department of Health and Human Services, appellant.

# In re Interest of Jauvier P., a child under 18 years of age. State of Nebraska, appellee, v. Jauvier P., appellee, and Nebraska Department of Health and Human Services, appellant.

809 N.W.2d 274

Filed February 24, 2012. Nos. S-11-450, S-11-451.

1. **Juvenile Courts: Appeal and Error.** In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.
2. **Juvenile Courts: Judgments: Child Custody: Appeal and Error.** Placement orders in juvenile cases are dispositional in nature and therefore final orders for purposes of appeal.

Appeals from the Separate Juvenile Court of Douglas County: Vernon Daniels, Judge. Affirmed.

Jon C. Bruning, Attorney General, and John M. Baker, Special Assistant Attorney General, for appellant.

Donald W. Kleine, Douglas County Attorney, Cody Miltenberger, and Kailee Smith, Senior Certified Law Student, for appellee State of Nebraska.

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

Heavican, C.J.

## INTRODUCTION

The sole question presented by this appeal is whether the juvenile court had the authority to discharge the Office of Juvenile Services (OJS) and instead place the juveniles at issue in the instant cases on probation. We conclude that the juvenile court does have such power and accordingly affirm.

## BACKGROUND

The facts are undisputed. The juveniles in these two cases, Charlicia H. and Jauvier P., were both adjudicated for law violations. Charlicia was adjudicated for shoplifting, and Jauvier was adjudicated as being an accessory to a felony.

For Charlicia, who was adjudicated under Neb. Rev. Stat. § 43-247(1) (Reissue 2008), a predispositional investigation was done by the Office of Probation Administration (Probation), followed by a temporary placement with OJS, an agency of the Nebraska Department of Health and Human Services (DHHS), for an evaluation. Following that evaluation, Charlicia was placed with OJS. Subsequently, the juvenile court discharged OJS and Charlicia was transferred to juvenile probation.

Jauvier's path was similar, though not identical. Following a predispositional investigation, Jauvier, who was adjudicated under § 43-247(2), was temporarily placed with DHHS at OJS for an evaluation. Following that evaluation, the juvenile court placed Jauvier with Probation. The juvenile court subsequently also committed Jauvier to the temporary custody of OJS for placement. Jauvier was then placed first in the parental home, then with an aunt. Following that placement, the juvenile court discharged OJS and transferred Jauvier to Probation.

DHHS appealed, arguing that the juvenile court lacked jurisdiction to transfer a juvenile from OJS to Probation. DHHS does not contend that the placements with Probation are harmful to the juveniles or not in their best interests. We consolidated these cases and moved them to our docket.

## ASSIGNMENT OF ERROR

DHHS assigns, restated and consolidated, that the juvenile court lacked the jurisdiction to discharge a juvenile from OJS and instead place that juvenile on probation.

## STANDARD OF REVIEW

[1] In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's rulings.[1]

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[1] *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004).

## ANALYSIS

*Juvenile Court's Authority.*

In these cases, DHHS concedes that the juvenile court has the authority to place a juvenile on probation, but then subsequently revoke that probation and place the juvenile with OJS. However, DHHS argues that there is no legislative authority to do the opposite and that the juvenile court was without the authority to discharge OJS and place Charlicia and Jauvier with Probation.

We begin with a primer on the relevant statutes. Under § 43-247, the juvenile court has jurisdiction over certain categories of juveniles. Once the court adjudicates a juvenile under § 43-247(1) or (2), the court has the ability to order a predispositional investigation under Neb. Rev. Stat. § 43-281 (Reissue 2008). Following a predispositional investigation, a juvenile appears for disposition. In these cases, because both Charlicia and Jauvier were accused of law violations, disposition occurred under Neb. Rev. Stat. § 43-279 (Reissue 2008).

The juvenile court has the ability under Neb. Rev. Stat. § 43-286 (Supp. 2011) to order several different dispositions: It may (1) place the juvenile on probation subject to the supervision of a probation officer[2]; (2) permit the juvenile to remain in the family home, but under the supervision of a probation officer;[3] (3) place the juvenile in a suitable family home or institution, again subject to the supervision of a probation officer; or (4) place the juvenile with OJS.[4] This court has noted that it is permissible to order both OJS and Probation to be simultaneously involved in the dispositional plan for a juvenile.[5]

If the juvenile court places a juvenile on probation under § 43-286(1)(a), it retains the authority, as it would under the criminal code, to revoke that probation.[6] The possible results of that revocation are as follows:

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[2] § 43-286(1)(a)(i).

[3] § 43-286(1)(a)(ii).

[4] § 43-286(1)(b).

[5] See *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[6] § 43-286(5)(b).

> If the juvenile is found by the court to have violated the terms of his or her probation or supervision or an order of the court, the court may modify the terms and conditions of the probation, supervision, or other court order, extend the period of probation, supervision, or other court order, or enter any order of disposition that could have been made at the time the original order was entered[.][7]

If, instead of probation, the juvenile court chooses to place a juvenile with OJS, the juvenile court then orders an initial level of treatment[8] and continues to monitor the juvenile until the juvenile is legally discharged or attains the age of 19.[9] The monitoring includes the ability to change treatment options[10] and to determine whether in-home or out-of-home placement is in the best interests of the juvenile.[11]

Throughout this process, the juvenile court's jurisdiction

> shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code and the court shall have power to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.[12]

According to § 43-412(1), "[e]very juvenile committed to [OJS] shall remain committed until he or she attains the age of nineteen or is legally discharged."

We turn to DHHS' argument that the juvenile court lacks jurisdiction to place a juvenile on probation after it has committed the juvenile to OJS. DHHS acknowledges that upon adjudication, the court may elect to place the juvenile on probation or commit him or her to OJS,[13] and that if probation is ordered but later revoked, the juvenile court may exercise any

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[7] § 43-286(5)(b)(v).

[8] Neb. Rev. Stat. § 43-408(2) (Reissue 2008).

[9] Neb. Rev. Stat. § 43-412(1) (Reissue 2008).

[10] § 43-408(3).

[11] *Id.*

[12] Neb. Rev. Stat. § 43-295 (Reissue 2008).

[13] See § 43-286.

of its original disposition options, including commitment to OJS.[14] But, DHHS contends, when a juvenile court commits a juvenile to OJS, it has no authority to subsequently revoke the commitment and place the juvenile on probation.

We find both §§ 43-295 and 43-412 relevant to our resolution of this question. When Charlicia and Jauvier were committed to OJS, § 43-412 provided in full:

> (1) Every juvenile committed to [OJS] pursuant to the Nebraska Juvenile Code or pursuant to subsection (3) of section 29-2204 shall remain committed until he or she attains the age of nineteen or is legally discharged.
>
> (2) The discharge of any juvenile pursuant to the rules and regulations or upon his or her attainment of the age of nineteen shall be a complete release from all penalties incurred by conviction or adjudication of the offense for which he or she was committed.

DHHS argues that § 43-412 explicitly provides that a juvenile committed to OJS remains committed until he or she attains the age of 19 or is legally discharged. The crux of DHHS' argument, then, is that once the juvenile court has placed a juvenile with OJS, it cannot undo that placement. We disagree that § 43-412 should be read as such.

To begin, we find DHHS' interpretation of § 43-412 to be inconsistent with the juvenile court's ongoing power to monitor a juvenile's progress while he or she is under the juvenile court's authority as set forth in § 43-408 and, in particular, with the juvenile court's powers under § 43-295. That section provides:

> Except when the juvenile has been legally adopted, the jurisdiction of the court shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code and the court shall have power to order a change in the custody or care of any such juvenile if at any time it is made to appear to the court that it would be for the best interests of the juvenile to make such change.

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[14] See § 43-286(5)(b)(v).

Nor do we believe that DHHS' proposed interpretation is consistent with our recent decisions suggesting that a flexible approach must be taken in juvenile cases similar to these cases. Recently in *In Re Interest of Katrina R.*,[15] we were presented with the question of whether a juvenile adjudicated under § 43-247(3)(b) could be simultaneously committed to DHHS and placed on probation. We reasoned that the juvenile court had been vested with the authority to order both types of dispositions and noted that concurrent supervision was envisioned by the relevant statutory provisions. We declined to adopt DHHS' narrow interpretation of the relevant statutes because we felt that to do so would "fail[] to maintain a sensible scheme which gives effect to every provision of the [Nebraska Juvenile] Code."[16]

Particularly when the question is considered in light of the discretion given by § 43-295, we conclude that a sensible reading of § 43-412 would limit its application to a procedural one, setting forth the consequences of discharge from OJS. We do not believe that § 43-412 should be read as a policy statement regarding OJS' perpetual involvement in juvenile court cases. Nor do we believe that the juvenile court's action in placing these juveniles with Probation equates with discharge as contemplated by § 43-412.

In *In re Interest of Katrina R.*, we reasoned that "[a]bsent any provision affirmatively stating otherwise, it is within the juvenile court's discretion to issue whatever combination of statutorily authorized dispositions . . . the court deems necessary to protect the juvenile's best interests."[17] There is nothing to explicitly prevent the juvenile court from doing what it did in these cases. And the juvenile court has been vested with the power to place a juvenile with either OJS or Probation. Because of this, and because there is no contention that the juvenile court's action harmed either of these juveniles or was not in their best interests, we conclude that the juvenile court

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[15] *In re Interest of Katrina R., supra* note 5.

[16] *Id.* at 915, 799 N.W.2d at 679.

[17] *Id.*

had the authority to discharge OJS and place these juveniles with Probation. We accordingly affirm the decisions of the juvenile court.

*State's Arguments on Appeal.*

In addition to the arguments made in its brief filed in case No. S-11-451 pertaining to the issues discussed above, the State also argues that the juvenile court erred on December 16, 2010, when it originally placed Jauvier on probation. The State contends that the juvenile court was without authority to place Jauvier on probation and set the matter for continued disposition. According to the State,

> [h]ad it not been for the court committing plain error on December 16, 2010, in setting the matter for continued disposition after entering a [§] 43-286 dispositional order, the April 15, 2011 order and all subsequent orders would not have been issued as they were. Accordingly, the juvenile should never have been removed from probation and placed in OJS custody because the court failed to utilize the applicable statutory procedure which constituted plain error.[18]

[2] We decline to reach the State's arguments regarding the December 16, 2010, order. First, this order would be appropriately appealed within 30 days following entry of the December 16 order, which as a placement order is dispositional in nature and therefore final.[19] No such appeal was taken. And even if the December 16 order was not final, the proper avenue for raising an argument such as the one raised here by the State would be by cross-appeal.[20] This was not done.

## CONCLUSION

The decisions of the juvenile court are affirmed.

AFFIRMED.

WRIGHT, J., not participating.

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[18] Brief for appellee State in No. S-11-451 at 20.

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

[20] Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2008). See, also, *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

# Mahnaz Beigi Hossaini, appellee, v. Adel Vaelizadeh, appellant.

808 N.W.2d 867

Filed February 24, 2012. Nos. S-11-508, S-11-509.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Contempt: Words and Phrases.** When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
3. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.

Appeals from the District Court for Lancaster County: Jeffre Cheuvront, Judge. Judgment in No. S-11-508 affirmed in part and in part reversed, and cause remanded with directions. Judgment in No. S-11-509 affirmed.

Matthew Stuart Higgins and John J. Heieck, of Higgins Law, for appellant.

Terrance A. Poppe and Benjamin D. Kramer, of Morrow, Poppe, Watermeier & Lonowski, P.C., for appellee.

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

Stephan, J.

These consolidated appeals arise from a paternity action in which the court issued a parenting time order. The district court for Lancaster County found that the father, Adel Vaelizadeh, was in contempt of the parenting time order and ordered him to pay certain related expenses incurred by the mother, Mahnaz Beigi Hossaini. The court also found Hossaini in "technical contempt" of the parenting time order but did not impose any

sanction on her. In case No. S-11-508, Vaelizadeh appeals the denial of sanctions against Hossaini. In case No. S-11-509, he appeals the finding that he was in contempt and the subsequent imposition of a monetary sanction.

## BACKGROUND

Vaelizadeh and Hossaini are the unmarried parents of Amir A. Vaelizadeh, who was born in 2008. Vaelizadeh is a Florida resident, and Hossaini resides in Nebraska. In a paternity action initiated by Hossaini, the court awarded joint legal custody to the parents and physical custody to Hossaini, subject to Vaelizadeh's reasonable rights of parenting time as set forth in a parenting plan. Initially, Vaelizadeh was granted 5 days' parenting time in Lincoln, Nebraska, every January, March, May, July, September, and November and an additional 15 days in Florida every February, April, June, August, October, and December. The order was subsequently modified to permit Vaelizadeh to exercise all 20 of his parenting days in Florida every other month, provided that he pay all associated expenses.

### October and November 2010

Vaelizadeh was to begin a 20-day visit in Florida with Amir on October 15, 2010. On October 2, Hossaini left for Iran to visit her ailing mother. Hossaini left Amir in Nebraska with her former husband Zia Hossaini and Amir's half brother. According to Vaelizadeh, Zia called him on or about October 11 and asked him to come pick up Amir. Zia denied making that request. At or about the same time, Vaelizadeh spoke on the telephone with Zia's former wife Mary Hossaini and told her he was concerned that Amir was being abused or neglected by Zia. Mary assured Vaelizadeh that Zia was not abusing Amir but may have acknowledged that Amir had some bruises on his body.

Vaelizadeh picked up Amir from Zia's residence around 7 p.m. on October 13, 2010. Just before 9 o'clock that evening, Vaelizadeh telephoned the Lincoln Police Department to report possible child neglect. An officer went to the Lincoln hotel where Vaelizadeh and Amir were staying. The officer spoke

with Vaelizadeh, who was excited and emotional, and examined Amir. The officer saw "small bruises on the — part of his forearm and also around his knee area" which he characterized as "smaller than a dime." The officer saw nothing about the bruises that caused him concern. He photographed the bruises and completed a police report, but did not issue a citation.

Vaelizadeh subsequently took Amir to Florida. On October 26, 2010, the Lincoln police officer telephoned Vaelizadeh regarding the allegation of neglect. Vaelizadeh told the officer he had taken Amir to a doctor in Florida for a complete evaluation, including x rays, and that the results were "negative." Vaelizadeh encouraged the officer to contact the doctor. On October 27, Vaelizadeh sent additional photographs of Amir to the police officer via e-mail, but the officer saw nothing in these photographs which he considered significant, and he did not attempt to contact the Florida doctor. Vaelizadeh did not send a report from the doctor to the officer and did not offer any medical reports or records at trial. Eventually, the officer told Vaelizadeh that the case was being made inactive because there was insufficient evidence of neglect. It is unclear from the record when this final communication occurred. Sometime prior to November 5, Vaelizadeh filed an emergency petition under the Uniform Child Custody Jurisdiction and Enforcement Act in Broward County, Florida. He generally sought an emergency order from the Florida court authorizing him to retain custody of Amir to protect Amir from abuse in Nebraska.

Hossaini returned from Iran on October 31, 2010, a Sunday, and contacted Vaelizadeh on Monday, November 1, to make arrangements for Amir's return on Tuesday, November 2. Vaelizadeh told her on the telephone that Amir had been abused and urged her to contact her lawyer. Hossaini testified that after contacting her lawyer and "figur[ing] out that [Vaelizadeh was] not bringing Amir" back, she obtained an ex parte order from a Nebraska court directing Vaelizadeh to return Amir. The Nebraska order is file stamped November 3. Hossaini then flew to Florida on Thursday, November 4, and filed the ex parte order. She testified that while filing the order, she was

informed by court staff that a hearing was scheduled for the next day, Friday, November 5, on Vaelizadeh's emergency petition. Hossaini was able to secure Florida counsel and attended the hearing, but Vaelizadeh did not attend. At the conclusion of the hearing, the emergency petition was summarily dismissed because it appeared to be "a blatant attempt at forum shopping." The Florida court also noted that even if the allegations in the petition were true, they were not sufficient to invoke its subject matter jurisdiction. Amir was returned to Hossaini the afternoon of November 5, and they returned to Nebraska on Saturday, November 6.

Contrary to Hossaini's testimony, Vaelizadeh testified that Hossaini was served with the emergency petition prior to the time she obtained the ex parte order on November 3, 2010. It is undisputed that on Thursday, November 4, after she had already obtained the ex parte order, Hossaini sent an e-mail message to Vaelizadeh, with "Amir" in the subject line, stating, "Bring him home[.] I'm expecting him[.] U have till Sunday [November 7]. Thanks." Hossaini testified that she sent this message before she knew of the emergency petition and that it was simply her way of giving Vaelizadeh an opportunity to bring Amir back voluntarily.

On November 12, 2010, Hossaini filed a motion for an order to show cause in the Nebraska paternity action, requesting that Vaelizadeh be found in contempt for not returning Amir on time, and for an order awarding her the attorney fees and expenses she incurred in retrieving Amir from Florida.

### February 2011

In late November or early December 2010, Hossaini moved to suspend Vaelizadeh's parenting time with Amir, presumably based on the November 2010 Florida incident detailed above. After a December 17 hearing, the district court ordered that Vaelizadeh could still exercise 20 days' parenting time every other month, but that he must exercise it in Lancaster County and could not take Amir to Florida. Apparently because of this dispute, Vaelizadeh did not exercise his parenting time with Amir in December 2010. The order declining to suspend Vaelizadeh's parenting time but requiring that it be exercised in Nebraska was entered on January 3, 2011.

On February 10, 2011, Vaelizadeh sent a text message to Hossaini informing her that he planned to pick up Amir on the morning of February 14 in order to exercise his parenting time in Nebraska. Vaelizadeh testified that although the two communicated about various other matters between February 10 and 14, Hossaini never told him that he could not exercise his parenting time on February 14. Vaelizadeh traveled from Florida and arrived at Hossaini's residence early on the morning of February 14, bearing Christmas presents and Amir's favorite toys. While parked in Hossaini's driveway at 7:50 a.m., Vaelizadeh received a text message from Hossaini stating that she was away but would return home soon. At 8 a.m., a sheriff arrived and served Vaelizadeh with summons in a lawsuit which Hossaini had recently filed. When Vaelizadeh called Hossaini, she told him to call his lawyer. Hossaini never produced Amir for parenting time and admitted that she had led Vaelizadeh to believe that she would do so. She explained that she did not think Vaelizadeh was entitled to visit Amir because he had contacted only her, and she understood that he had to arrange visitation with the parties' lawyers.

Vaelizadeh filed a motion for an order to show cause on March 4, 2011. He requested that Hossaini be found in contempt for refusing him parenting time and that he be awarded costs, attorney fees, and makeup visitation time.

## Disposition by District Court

The district court held a trial on both contempt motions on March 25, 2011. After hearing the evidence, it issued an order finding that Vaelizadeh was in willful contempt for failing to timely return Amir to Hossaini's custody in November 2010. The court ordered Vaelizadeh to reimburse Hossaini for her Florida travel expenses and her attorney fees, later determined to be $7,512.87. The district court also found Hossaini in "technical contempt" for denying Vaelizadeh parenting time in February 2011, but did not impose sanctions, reasoning that Hossaini's "reluctance" to allow Vaelizadeh to exercise his visitation rights was "understandable" in light of Vaelizadeh's November 2010 actions. Vaelizadeh filed timely appeals from the contempt order and the subsequent order determining the amount of the sanction. The appeals were consolidated and

moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

In case No. S-11-508, Vaelizadeh assigns, restated, that the district court erred in holding Hossaini in "technical contempt" and in not imposing sanctions against her for willfully violating the parenting time order. In case No. S-11-509, Vaelizadeh assigns that the district court erred in finding him in willful contempt of the parenting time order and in imposing a monetary sanction for that contempt.

## STANDARD OF REVIEW

These appeals are from orders entered by the district court in postjudgment proceedings after each party asked the court to utilize its contempt jurisdiction to enforce rights arising from prior court orders governing parenting time. Each party sought compensation for expenses incurred as a result of the other party's alleged willful noncompliance with those orders. In *Smeal Fire Apparatus Co. v. Kreikemeier*,[2] we characterized such contempt proceedings as civil in nature and overruled prior cases to the extent they held that a final civil contempt order from a postjudgment proceeding is nonappealable and may be attacked only through a habeas corpus proceeding.

[1] In *Smeal Fire Apparatus Co.*, we stated that civil contempt orders in postjudgment proceedings are reviewed on appeal "for errors appearing on the record"[3] and that factual findings in such contempt proceedings are to be upheld unless clearly erroneous. But we now hold that the "errors on the record" standard is incorrect. We do so because this standard was derived from cases decided under prior law, when only

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

[2] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[3] *Id.* at 698, 782 N.W.2d at 876.

criminal contempt orders were appealable.[4] We explained in *In re Contempt of Liles*[5] that such "judgments of [criminal] contempt are reviewable in the same manner as in criminal cases," with appellate review confined to "errors appearing on the record." Such a standard should not apply, however, when the contempt is civil. Other state and federal appellate courts employ an abuse of discretion standard when reviewing a trial court's determinations of whether to find a party in civil contempt and of the sanction to be imposed.[6] We conclude that an abuse of discretion standard of review is both workable and appropriate in this type of case, but that the traditional standards for reviewing a trial court's findings of fact and resolution of questions of law should be retained. Accordingly, we hold that in a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion. To the extent that *Smeal Fire Apparatus Co.* and the cases listed in footnote 4 of this opinion employ a different standard of review, they are disapproved.

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[4] See, *Schwartz v. Schwartz*, 275 Neb. 492, 747 N.W.2d 400 (2008), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *Dunning v. Tallman*, 244 Neb. 1, 504 N.W.2d 85 (1993), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2; *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 2.

[5] *In re Contempt of Liles, supra* note 4, 217 Neb. at 416, 349 N.W.2d at 378.

[6] See, e.g., *Sizzler Fam. Steak Houses v. Western Sizzlin Steak*, 793 F.2d 1529 (11th Cir. 1986); *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376 (9th Cir. 1986); *In re Stasz*, 387 B.R. 271 (2008); *Czaja v. Czaja*, 208 W. Va. 62, 537 S.E.2d 908 (2000); *Smith v. Smith*, 136 Idaho 120, 29 P.3d 956 (Idaho App. 2001); *In re Contempt of ACIA*, 243 Mich. App. 697, 624 N.W.2d 443 (2000).

## ANALYSIS

[2,3] The following general principles govern our resolution of the issues presented in these appeals: When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily a civil contempt, which requires willful disobedience as an essential element.[7] "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[8] Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.[9] With these principles in mind, we turn to Vaelizadeh's specific assignments of error.

### November 2010 Parenting Time

Vaelizadeh argues that the district court erred in finding him in contempt and imposing a sanction with respect to the November 2010 incident in which Vaelizadeh failed to return Amir to Nebraska at the end of his parenting time in Florida. The district court made the following factual findings, summarized and restated: (1) Vaelizadeh asked a Lincoln police officer to view the bruises on Amir's body; (2) Vaelizadeh was dissatisfied with the officer's conclusion that the bruises were not indicative of neglect; (3) Vaelizadeh then took Amir to Florida, had him examined by a doctor there, and commenced custody proceedings in a Florida court; (4) Vaelizadeh did not return Amir to Lincoln by November 2; and (5) Hossaini was required to travel to Florida in order to retrieve Amir. These findings are not clearly erroneous.

But Vaelizadeh argues that these facts do not establish a violation of the parenting time order. First, he argues that the duration of the parenting time was made ambiguous by the circumstances. He contends that he and Hossaini had originally agreed that it would be from October 15 to November 4, 2010, and that because he actually picked Amir up on October 13, it was unclear whether November 4 remained the end date.

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[7] *Smeal Fire Apparatus Co., supra* note 2; *Schwartz, supra* note 4.

[8] *Id.*

[9] *Smeal Fire Apparatus Co., supra* note 2.

Vaelizadeh relies upon *In re Rush*,[10] an unpublished opinion from the Washington Court of Appeals. *In re Rush* involved language in a parenting plan which provided that Thanksgiving visitation would "'begin Wednesday after school dismissal.'"[11] Subsequently, the school policy changed so that the dismissal occurred on the Monday preceding the holiday. The court found that the parenting plan was ambiguous as to whether the visitation period was to begin on the Wednesday preceding the holiday or on Monday, when the child was dismissed from school. We find no such ambiguity in the visitation provision before us in these cases; the order clearly states that the duration of Vaelizadeh's parenting time was to be 20 days.

Alternatively, Vaelizadeh argues that Hossaini was equitably estopped from objecting to an extended parenting time period by her e-mail message sent on November 4, 2010, which instructed Vaelizadeh to return Amir by November 7. But as the district court correctly found, Amir should have been returned to his mother by November 2, so Vaelizadeh was already in violation of the order on November 4. And, as the court correctly found, the November 7 date was immaterial because it was clear from the legal proceedings which Vaelizadeh commenced in Florida that he did not intend to return Amir to Nebraska. The doctrine of equitable estoppel has no application to these facts.

Finally, Vaelizadeh argues that if he did violate the parenting time order, he did not do so willfully. He contends that he did not return Amir to Nebraska because of his valid concerns about abuse. But the record does not support this argument. There is no competent evidence to rebut the police officer's testimony that the minor bruising which he observed was not indicative of abuse or neglect.

We conclude that the district court's factual findings were not clearly erroneous and that based upon those findings, it did not abuse its discretion in determining Vaelizadeh to be in contempt of the parenting time order when he failed to return Amir

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[10] *In re Rush*, No. 61022-8-I, 2009 WL 151665 (Wash. App. Jan. 20, 2009) (unpublished opinion).

[11] *Id*. at *1.

to Nebraska at the end of the 20-day parenting time. Further, we conclude that the district court did not abuse its discretion in imposing a monetary sanction to compensate Hossaini for her expense in securing Amir's return from Florida.

### February 2011 Visitation

Vaelizadeh next argues that the district court erred in finding Hossaini to be in only "technical contempt" of the parenting time order and in not imposing a sanction. At issue is the district court's reasoning for not imposing a sanction on Hossaini. The court stated that "in view of the actions of [Vaelizadeh] in filing an unwarranted action in the Florida courts, her reluctance to allow [Vaelizadeh] to take possession of [Amir] is understandable."

But that reluctance is presumably what motivated Hossaini to file a motion requesting the court to suspend Vaelizadeh's parenting time following Amir's return to Nebraska in November 2010. As noted, the district court's order of January 3, 2011, denied that request but required that Vaelizadeh exercise his parenting time solely in Lancaster County, Nebraska. Several weeks later, Vaelizadeh attempted to exercise his parenting time in compliance with that order. Hossaini led him to believe that she would make Amir available for visitation, but after Vaelizadeh had traveled to Nebraska, she refused to do so.

There is a logical inconsistency in the two rulings by the district court. In its January 3, 2011, order, the court concluded that Vaelizadeh's conduct in November 2010 did not warrant suspension of his parenting time, provided that it was exercised in Nebraska. But in its subsequent order of March 25, 2011, the court found Hossaini's refusal to comply with the January 3 order "understandable" based upon the same events. The second order effectively negates the first without modifying or revoking it.

Moreover, we perceive no material difference in the conduct and relative culpability of the parties. Indeed, in its ruling from the bench, the district court stated: "They are both in contempt to a minor degree." The record reflects that both parents willfully violated unambiguous court orders with respect to parenting time. Both attempted to justify their conduct based upon

their concern for the welfare of their child. Each subjected the other to unnecessary travel and expense. We conclude that having imposed a compensatory sanction upon Vaelizadeh for his contempt, the district court abused its discretion in not imposing a similar sanction upon Hossaini for her subsequent, comparable contempt.

## CONCLUSION

The district court did not abuse its discretion in finding both parties in contempt of orders pertaining to parenting time; nor did it abuse its discretion in imposing a monetary sanction against Vaelizadeh for his contempt. However, for the reasons discussed, the court did abuse its discretion in not imposing a monetary sanction against Hossaini for her contempt. Accordingly, we affirm the judgment of the district court in case No. S-11-509. In case No. S-11-508, we affirm the finding of contempt, but reverse, and remand to the district court with directions to determine the appropriate sanction to be imposed for Hossaini's contempt.

JUDGMENT IN NO. S-11-508 AFFIRMED IN PART AND IN PART REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENT IN NO. S-11-509 AFFIRMED.

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# PROJECT EXTRA MILE ET AL., APPELLEES, V. NEBRASKA LIQUOR CONTROL COMMISSION AND HOBERT RUPE, ITS EXECUTIVE DIRECTOR, APPELLANTS.

810 N.W.2d 149

Filed March 2, 2012. No. S-11-157.

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. **Appeal and Error.** An appellate court independently reviews a lower court's rulings on questions of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Standing: Jurisdiction: Parties.** A party's standing to commence an action presents a jurisdictional issue.

5. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
6. **Administrative Law: Standing.** Generally, Neb. Rev. Stat. § 84-911 (Reissue 2008) requires a plaintiff to have common-law standing to challenge an agency's regulation or its threatened application.
7. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
8. **Declaratory Judgments.** Neb. Rev. Stat. § 84-911 (Reissue 2008) does not limit a plaintiff to seeking only declaratory relief.
9. **Declaratory Judgments: Pleadings.** When a plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a court may order relief that is clearly within the scope of its declaratory judgment.
10. **Immunity: Declaratory Judgments.** The only limitations placed on the relief that a plaintiff can obtain in a declaratory judgment action authorized under Neb. Rev. Stat. § 84-911 (Reissue 2008) are the limitations imposed by sovereign immunity principles.
11. **Immunity: Public Officers and Employees.** State sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.
12. **Immunity: Public Officers and Employees: Declaratory Judgments: Injunction.** Neither Neb. Rev. Stat. § 84-911 (Reissue 2008) nor sovereign immunity bars injunctive relief in a declaratory judgment action authorized by § 84-911 when such relief would not require state officials to expend public funds.
13. **Actions: Taxation.** A taxpayer's interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing obedience to the law.
14. **Taxation: Equity.** Taxpayers have an equitable interest in public funds, including state public funds.
15. **Actions: Taxation: Standing: Proof: Public Officers and Employees.** A taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax. But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action.
16. **Administrative Law: Taxation: Standing.** In an action brought under Neb. Rev. Stat. § 84-911 (Reissue 2008), a taxpayer has standing to challenge an agency's unlawful regulation that negates the agency's statutory duty to assess taxes.
17. ____: ____: ____. No other potential parties are better suited than a taxpayer to claim that a state agency or official has violated a statutory duty to assess taxes when the persons or entities directly and immediately affected by the alleged violation are beneficially, instead of adversely, affected.
18. **Administrative Law: Statutes.** A rule of deferring to agency interpretations does not apply when the agency's regulation contravenes the plain language of its governing statutes.

19. **Administrative Law: Courts: Statutes: Appeal and Error.** In determining whether an agency's governing statute is ambiguous, an appellate court is guided by its own principles of statutory construction.
20. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with any related statutes.
21. **Statutes: Appeal and Error.** Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
22. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court determines and gives effect to the legislative intent behind the enactment.
23. **Statutes: Legislature: Intent**. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
24. **Administrative Law: Liquor Licenses: Statutes: Legislature: Intent.** Under the Nebraska Liquor Control Act, the Legislature did not intend for a beer product to include beverages containing distilled alcohol in an amount constituting up to 49 percent of the total alcohol content.
25. **Administrative Law.** An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer. It may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.
26. ____. An administrative agency has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
27. ____. An administrative agency cannot employ its rulemaking authority to adopt regulations contrary to the statutes that it is empowered to enforce.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellants.

Vincent M. Powers and Amanda M. Lightner, Senior Certified Law Student, of Vincent M. Powers & Associates, for appellees.

Marc E. Sorini and Jeffrey W. Mikoni, of McDermott, Will & Emery, L.L.P., and James P. Fitzgerald, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for amicus curiae Flavored Malt Beverages Coalition.

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

CONNOLLY, J.

## I. SUMMARY

We are asked to decide whether a flavored malt beverage is a beer or spirit under the Nebraska Liquor Control Act.[1] It makes a difference. Beer is taxed at 31 cents per gallon; spirits are taxed at $3.75 per gallon. The question presented is not whether the Legislature could classify and tax beverages containing distilled alcohol as beer. It could. The question is whether the Nebraska Liquor Control Commission and its executive director (collectively the Commission) exceeded its statutory authority in classifying and taxing these beverages as beer despite legislative inaction.

The Commission argues two issues: First, it contends that the district court erred in concluding that the appellees had standing to challenge its regulation. Second, it contends that the court erred in ruling that flavored malt beverages are spirits under the Nebraska Liquor Control Act.

We conclude that appellee Mary Doghman had taxpayer standing. The court correctly determined that the Commission exceeded its statutory authority by classifying and taxing flavored malt beverages as beer. The Nebraska Liquor Control Act plainly defines spirits as beverages that contain alcohol obtained by distillation. Up to 49 percent of the alcohol in flavored malt beverages is distilled alcohol. Therefore, a flavored malt beverage is a spirit. We affirm.

## II. BACKGROUND

### 1. PROCEDURAL HISTORY

Of the four appellees in this case, three are Nebraska nonprofit organizations: Project Extra Mile, the Public Health Association of Nebraska, and Pride-Omaha, Inc. (collectively the nonprofits). The other appellee, Doghman, is a resident taxpayer.

The appellees alleged that Doghman had taxpayer standing because the Commission had spent public funds and would spend public time and money to implement and enforce an unlawful classification. They also alleged that the

[1] See Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010 & Supp. 2011).

classification would result in reduced tax revenues for the State; thus, it would increase the tax burden for Doghman and other taxpayers.

The appellees further alleged that the nonprofits had standing because of their status as Nebraska nonprofit corporations. The appellees' only factual allegations of injury from the regulation referred to Project Extra Mile's organizational purpose. They alleged that Project Extra Mile's primary mission and purpose was to address the issue of underage drinking. And they alleged that the Commission's actions would harm Project Extra Mile's mission.

The appellees sought a declaration that the Commission's regulations were illegal and void because the Commission had exceeded its authority under the Nebraska Liquor Control Act by classifying flavored malt beverages as beer. The appellees also sought a writ of mandamus compelling the Commission to classify and tax flavored malt beverages as spirits instead of beer.

The Commission moved to dismiss the action. It argued that (1) the appellees lacked standing, (2) sovereign immunity barred their action, and (3) a writ of mandamus was not an appropriate remedy.

The court ruled that Doghman had standing as a resident taxpayer to challenge the classification because she had alleged an illegal expenditure of public funds. It also ruled that she did not have to make a demand on the Commission before bringing her action because the demand would be useless.

In ruling that the nonprofits had representative standing, the court relied on the U.S. Supreme Court's decision in *Hunt v. Washington Apple Advertising Comm'n.*[2] The court reasoned that the nonprofits' members would have standing as resident taxpayers, the same as Doghman. The court, however, ruled that sovereign immunity barred the appellees' request for a writ of mandamus and dismissed that claim.

In their amended complaint, the appellees sought only a declaration that the regulation was invalid under the Nebraska

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[2] *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

Liquor Control Act. In its answer, the Commission affirmatively alleged that the appellees lacked standing and had failed to state a cause of action. It also alleged that the court lacked subject matter jurisdiction over any claim against its director. Finally, it alleged that the Commission's regulations were within the Commission's statutory authority.

### 2. Court's Order

The court found that the nonprofits were all seeking to prevent underage alcohol consumption. It again ruled that all the appellees had standing.

The court also ruled that the Commission's disputed regulation, 237 Neb. Admin. Code, ch. 1, § 009.01 (2009), violated the plain language of § 53-103(2) (Cum. Supp. 2008) of the Nebraska Liquor Control Act, which defines "spirits." The disputed regulation adopted federal regulations issued by the Alcohol and Tobacco Tax and Trade Bureau (the TTB) of the U.S. Treasury Department. The federal regulations permitted products that contained both fermented alcohol and distilled alcohol to be classified as malt beverages. The court rejected the Commission's argument that the Nebraska Liquor Control Act's definition of beer could include the federal regulatory definition of flavored malt beverages. It concluded that these beverages were clearly "spirits" under the Nebraska Liquor Control Act because they were a beverage that contained alcohol obtained by distillation, mixed with water and other substances.

## III. ASSIGNMENTS OF ERROR

The Commission assigns that the court erred in overruling its motion to dismiss the appellees' complaint because Doghman and the nonprofits lack standing to challenge the Commission's regulation. The Commission also assigns that the court erred in declaring that flavored malt beverages are spirits under the Nebraska Liquor Control Act and that the Commission had exceeded its authority in promulgating the regulation.

## IV. STANDARD OF REVIEW

[1-5] 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.[3] But we independently review a lower court's rulings on questions of law.[4] Statutory interpretation presents a question of law.[5] A party's standing to commence an action presents a jurisdictional issue.[6] And we determine jurisdictional questions that do not involve a factual dispute as a matter of law.[7]

## V. ANALYSIS

### 1. Standing

The Commission argues that the court erred in concluding that Doghman and the nonprofits had standing to challenge its regulation. But because we conclude that Doghman has taxpayer standing to assert this claim, it is unnecessary for us to consider whether the nonprofits also have standing.[8] We address only the Commission's arguments regarding Doghman's standing.

Under Neb. Rev. Stat. § 84-911(1) (Reissue 2008), "[t]he validity of any rule or regulation may be determined upon a petition for a declaratory judgment . . . if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner."

[6,7] Generally, § 84-911 requires a plaintiff to have common-law standing to challenge an agency's regulation

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[3] *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011); *Nebraska Pub. Advocate v. Nebraska Pub. Serv. Comm.*, 279 Neb. 543, 779 N.W.2d 328 (2010).

[4] See *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[5] *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

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

[7] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[8] See, *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 102 S. Ct. 205, 70 L. Ed. 2d 309 (1981), citing *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977), and *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

or its threatened application.[9] Common-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent.[10] But a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.[11] Here, the issue is whether we should recognize the taxpayer exception to common-law standing requirements under § 84-911. The Commission argues that we should not.

First, the Commission argues that we have recognized taxpayer standing only when the taxpayer seeks to enjoin an illegal expenditure of public funds. Second, it argues that in challenges to an agency's regulations, § 84-911 authorizes a plaintiff to seek only declaratory relief, not injunctive relief. Thus, it argues that Doghman cannot have taxpayer standing under § 84-911 because our case law precludes her from seeking anything but injunctive relief, which is not permitted under § 84-911.

### (a) § 84-911 Does Not Limit Plaintiffs to Declaratory Relief

[8,9] Section 84-911 does not limit a plaintiff to seeking only declaratory relief. It provides that a plaintiff may challenge the validity of a rule or regulation in a declaratory judgment action. We have held that § 84-911 provides a limited waiver of sovereign immunity that permits a court to determine the validity of administrative rules and regulations.[12] But when a plaintiff's pleadings in a declaratory judgment action put the defendant on notice of the remedy sought, a court may order relief that is clearly within the scope of its declaratory

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[9] See *H.H.N.H., Inc. v. Department of Soc. Servs.*, 234 Neb. 363, 451 N.W.2d 374 (1990).

[10] See, *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011); *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011); *Schauer v. Grooms*, 280 Neb. 426, 786 N.W.2d 909 (2010).

[11] *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[12] *Galyen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997).

judgment.[13] Enjoining a government entity or official from enforcing a regulation that the court has declared invalid would obviously be within the scope of the court's declaratory judgment. And under Neb. Rev. Stat. § 25-21,156 (Reissue 2008), even if a party's requested relief is not within the scope of a court's declaratory judgment, the court can grant such relief if the plaintiff applies for supplemental relief.[14]

[10,11] So when § 84-911 is read consistently with the declaratory judgment statutes, the only limitations placed on the relief that a plaintiff can obtain in a declaratory judgment action authorized under § 84-911 are the limitations imposed by sovereign immunity principles. But state sovereign immunity does not bar actions to restrain state officials or to compel them to perform an act they are legally required to do unless the prospective relief would require them to expend public funds.[15] The Commission's statutory argument is without merit.

(b) Taxpayers Can Seek Declaratory Relief in an Action Against a State Agency

Contrary to the Commission's contention, we have permitted a taxpayer to seek declaratory relief in an action against state officials when the taxpayer alleged an unauthorized expenditure of public funds.[16] The appellees also correctly contend that in *Chambers v. Lautenbaugh*,[17] we held that a taxpayer has standing to seek declaratory relief. The defendant in *Chambers* specifically claimed on appeal that the plaintiff lacked taxpayer standing to seek a declaratory judgment. We rejected that argument. The Commission points to no case in which we have held that a plaintiff can only seek injunctive relief in an action against state officials if the plaintiff relies on taxpayer standing to bring the action.

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[13] *Wetovick, supra* note 4.

[14] See *id.*

[15] See, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999).

[16] See *Myers, supra* note 11. See, also, *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[17] *Chambers, supra* note 16.

[12] It is true that the action in *Chambers* was not brought under § 84-911. But recognizing the taxpayer exception to standing requirements under § 84-911 is consistent with the reason for recognizing taxpayer standing in *Chambers* and in other actions brought against state officials. If state agencies could unlawfully promulgate rules that waste public funds with impunity, following the law would be "irrelevant to those entrusted to uphold it."[18] We hold that neither § 84-911 nor sovereign immunity bars injunctive relief in a declaratory judgment action authorized by § 84-911 when such relief would not require state officials to expend public funds.

(c) Taxpayers Can Challenge an Unlawful Regulation That Reduces State Revenues in Contravention of an Agency's Governing Statutes

The only remaining issue is whether a taxpayer has standing to assert a claim that a state agency has unlawfully promulgated a rule that results in reduced tax revenues. As noted, the Commission also argues that the mere promulgation of a rule is not an expenditure of public funds. A complaint's allegations are normally insufficient to confer taxpayer standing if the taxpayer alleges a general interest common to all members of the public.[19] Our decision in *Chambers*,[20] however, supports a conclusion that a resident taxpayer has standing to challenge a state action that allegedly violates statutory law as an unlawful expenditure or waste of public funds.

In *Chambers*, the plaintiff sought injunctive relief and a declaration that the Douglas County election commissioner had exceeded his statutory authority in redrawing the legislative districts for Omaha's city council elections. The trial court determined that the commissioner had acted lawfully. On appeal, we concluded that the plaintiff had standing because he had alleged an illegal expenditure of public funds. We pointed to the following allegations:

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[18] *Rath v. City of Sutton*, 267 Neb. 265, 281, 673 N.W.2d 869, 885 (2004).

[19] See *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[20] *Chambers, supra* note 16.

> [The plaintiff] alleges, "Employees in the office of the Douglas County Election Commission have spent and will spend in the future public time and money to implement the new district boundary lines, when such new boundary lines are not authorized by law." Finally, in his prayer for relief, [the plaintiff] asks the district court to "declar[e] that the commitment of employee time and the expenditure of tax monies for such purposes is unlawful and not authorized by law . . . ."[21]

The county election commissioner's alleged misapplication of state statutes in *Chambers* is the same as the appellees' claim that the Commission promulgated a rule in contravention of its governing statutes. In both cases, the allegation is that a statutorily created official or government entity took an unlawful action under its governing statutes. So, under *Chambers*, preventing the use of public time and money to implement and enforce allegedly invalid rules is a sufficient interest to confer taxpayer standing to challenge the rules. In other cases, however, we have held that a claim of unauthorized government action is insufficient to confer taxpayer standing when the plaintiff has not shown an individualized injury in fact.[22]

This conflict occurs because of the competing considerations frequently presented by taxpayer actions. Primarily, government officials must perform their duties without fear of being sued whenever a taxpayer disagrees with their exercise of authority.[23] But courts also recognize that a taxpayer may be the only party who would challenge an unlawful government action because the persons or organizations directly affected by the government action have benefited from it.[24] Additionally, a taxpayer's action sometimes raises matters of great public

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[21] *Id.* at 928, 644 N.W.2d at 548.

[22] See, e.g., *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000); *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[23] See *State ex rel. Reed, supra* note 19.

[24] See, *Ritchhart, supra* note 22; *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988).

concern that far exceed the type of injury in fact that an individual could normally assert in an action against government officials or entities.[25]

These competing concerns explain the tension between *Chambers* and our cases holding that an allegation of unlawful government action is insufficient to show an illegal expenditure of public funds. Arguably, *Chambers* would have been more correctly presented as raising a matter of great public concern: If true, the county election commissioner's alleged statutory violation would have unlawfully altered the way that the city's residents elected their city council representatives. But we need not resolve here the tension between *Chambers* and our cases requiring a plaintiff to show an illegal expenditure of public funds. Instead, our conclusion that Doghman has standing rests on her allegation that under the disputed regulation, the Commission has failed to assess state taxes required under its governing statutes.

[13] We reaffirm our previous holding that a taxpayer's interest in challenging an unlawful state action must exceed the common interest of all taxpayers in securing obedience to the law.[26] But the reason for permitting taxpayer actions challenging an unlawful expenditure of public funds exists here. A good deal of unlawful government action would otherwise go unchallenged.[27] And a claim that state officials have unlawfully expended public funds mirrors a claim that state officials have failed to impose or collect statutorily required taxes. Both claims alleged an unlawful act that depletes the State's coffers.

[14] We have held that taxpayers have an equitable interest in public funds, including state public funds.[28] And we

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[25] *Cunningham v. Exxon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

[26] See, *Neb. Against Exp. Gmblg., supra* note 22; *Consumer Party of Pennsylvania v. Com.*, 510 Pa. 158, 507 A.2d 323 (1986), *abrogated on other grounds, PA Against Gambling Expansion Fund v. Com.*, 583 Pa. 275, 877 A.2d 383 (2005).

[27] *Sprague, supra* note 24.

[28] See, *Rath, supra* note 18; *Rein v. Johnson*, 149 Neb. 67, 30 N.W.2d 548 (1947).

have held that a taxpayer can challenge the tax-exempt status of another property when the taxpayer can show that public officials have a clear duty to tax the property.[29] Most important, denying taxpayer standing here would mean that a government entity's unlawful failure to impose taxes on, or collect taxes from, favored individuals or organizations is unreviewable in court: The only persons or groups directly affected by the government action would have no incentive to challenge it.

[15-17] We hold that a taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax.[30] But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action.[31] In an action brought under § 84-911, this rule means a taxpayer has standing to challenge an agency's unlawful regulation that negates the agency's statutory duty to assess taxes. We further hold that no other potential parties are better suited than a taxpayer to claim that a state agency or official has violated a statutory duty to assess taxes when the persons or entities directly and immediately affected by the alleged violation are beneficially, instead of adversely, affected.[32]

Doghman has met this burden. She alleged that the Commission's regulation is contrary to the statutory taxation requirements for flavored malt beverages. And because the parties most directly affected by the regulation are beneficially

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[29] Compare *State v. Drexel*, 75 Neb. 751, 107 N.W. 110 (1906), with *McClellan v. Board of Equal. of Douglas Cty.*, 275 Neb. 581, 748 N.W.2d 66 (2008).

[30] See *Drexel, supra* note 29. Accord, *Vasquez v. State of California*, 105 Cal. App. 4th 849, 129 Cal. Rptr. 2d 701 (2003); *Sonoma Cty. v. State Bd. of Equalization*, 195 Cal. App. 3d 982, 241 Cal. Rptr. 215 (1987); *Mtr of Dudley v Kerwick*, 52 N.Y.2d 542, 421 N.E.2d 797, 439 N.Y.S.2d 305 (1981).

[31] See, *Ritchhart, supra* note 22; *Consumer Party of Pennsylvania, supra* note 26.

[32] See *Consumer Party of Pennsylvania, supra* note 26.

affected, they have no incentive to challenge it. No better suited party exists to assert the public's interests in challenging the Commission's alleged failure to assess statutorily required taxes. The court did not err in ruling that Doghman had taxpayer standing to challenge the regulation.

### 2. The Commission's Regulations Exceeded Its Statutory Authority

We come at last to the merits of the case. The Commission's disputed regulation states the following: "For the purpose of the classification of flavored malt beverages, the . . . Commission shall utilize the same classification as adopted by the [TTB] found at 27 CFR Parts 7 and 25 . . . which went into effect January 3, 2006."[33] As the TTB's regulations show, the Commission's adoption of the federal regulations through its own regulation permits beverages containing a significant amount of distilled alcohol (up to 49 percent of the alcohol content) to be classified as beer under the Nebraska Liquor Control Act. The court ruled that the Commission's classification violated the plain language of the Nebraska Liquor Control Act (hereinafter the Act) because such beverages were clearly spirits under those statutes.

At the heart of our inquiry is whether the Commission's adoption of federal regulations that classify flavored malt beverages as beer is permitted under the Act's definition of beer or whether under the Act, the beverages must be classified as spirits. In short, the Act defines beer as a "beverage obtained by alcoholic fermentation"[34] and spirits as a "beverage which contains alcohol obtained by distillation."[35]

#### (a) The TTB's Regulations

The TTB amended two parts of its regulations, parts 7 and 25, to permit beverages containing ingredients with distilled alcohol to be produced in breweries and marketed as beer products. Part 7 deals with the labeling and advertising of

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[33] 237 Neb. Admin. Code, ch. 1, § 009.01.

[34] § 53-103(4) (Cum. Supp. 2008) (now codified as § 53-103.03).

[35] § 53-103(2) (now codified as § 53-103.38).

malt beverages.[36] Part 25 deals with the operation of breweries.[37] The TTB amended part 25 to allow breweries to use "flavors and other nonbeverage ingredients containing alcohol" to contribute up to 49 percent of the alcohol content of a finished beer product.[38] It similarly amended part 7 of its regulations so that the definition of malt beverages would include beverages produced with distilled alcohol ingredients, contributing up to 49 percent of the total alcohol content in the beverages.[39]

The regulations specified that the distilled alcohol in these beverages is "from the addition of flavors and other nonbeverage ingredients containing alcohol."[40] Neither part 7 nor part 25 of the TTB's regulations defines "flavors" or "alcohol." But in other parts of its regulations, the TTB defines alcohol as distilled alcohol.[41] In addition, the comments to its final rule amending these regulations provide a description of the production process. Importantly, the description clarifies that the "flavorings" that producers are permitted to add to these beverages contain distilled spirits:

> Although flavored malt beverages are produced at breweries, their method of production differs significantly from the production of other malt beverages and beer. In producing flavored malt beverages, brewers brew a fermented base of beer from malt and other brewing materials. Brewers then treat this base using a variety of processes in order to remove the malt beverage character from the base. For example, they remove the color, bitterness, and taste generally associated with beer, ale, porter, stout, and other malt beverages. This leaves a base product to which brewers add various flavors, *which*

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[36] See 27 C.F.R., part 7 (2011).

[37] See *id.*, part 25.

[38] *Id.*, § 25.15(b) at 681.

[39] *Id.*, § 7.11(a)(1).

[40] See *id.* at 92-93.

[41] See *id.*, §§ 1.10 and 4.10.

*typically contain distilled spirits*, to achieve the desired taste profile and alcohol level.[42]

(b) The Parties' Contentions

The Commission contends that the court incorrectly ruled that its regulation violated the plain language of the Act. The Commission stipulated that under its adoption of the TTB's regulations, up to 49 percent of the alcohol content in flavored malt beverages may be flavorings with distilled alcohol. But it contends that it could properly classify the TTB's definition of a "malt beverage" as beer under the Act. It argues that the beer classification is permitted because the distilled alcohol in these beverages comes from flavorings and other nonbeverage ingredients, not from the direct addition of distilled spirits. It cites the TTB regulations that specifically prohibit the products from being labeled or advertised in a manner that gives the impression that they contain distilled spirits.

Additionally, the Commission argues that even if flavored malt beverages could be classified as spirits under the Act, they could also be classified as beer because they are a hybrid; i.e., they contain both fermented alcohol and distilled alcohol. The Commission argues that the court conceded in its order that these beverages could be classified as either beer or spirits. So the Commission argues that its regulation cannot be invalid. It cites a case in which we deferred to an agency's interpretation of a statute that the agency was charged with enforcing.

The appellees contend that it is irrelevant that the beverages satisfy the TTB's regulations because the beverages are clearly distilled spirits under the Act. We agree.

(c) Analysis

*(i) No Deference Is Afforded the Commission's Interpretation of the Act*

We reject the Commission's argument that we should defer to its interpretation of the Act. It is true that we have occasionally stated the following rule: "Although construction of a

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[42] See Flavored Malt Beverage and Related Regulatory Amendments (2002R-044P), 70 Fed. Reg. 195 (Jan. 3, 2005) (emphasis supplied).

statute by a department charged with enforcing it is not controlling, considerable weight will be given to such a construction. This is particularly so when the Legislature has failed to take any action to change such an interpretation."[43] But this rule was obviously not intended to permit agencies to adopt regulations that directly conflict with the Legislature's decision not to adopt the rules that the agency purports to find through statutory interpretation. That happened here.

In 2005, the General Affairs Committee of the Legislature voted to amend the definition of beer to conform to the TTB's approved regulations by adding "flavored malt beverages" to the definition of beer. Additionally, that bill would have specifically provided that a "[f]lavored malt beverage means a beer that derives not more than forty-nine percent of its total alcohol content from flavors or flavorings containing alcohol obtained by distillation."[44] The TTB regulations were approved in December 2004 and took effect in January 2006.[45] But the General Affairs Committee's proposed bill was indefinitely postponed in April 2006.[46] In August 2006, the Commission announced that it would adopt the TTB's regulations. The Attorney General approved the regulation in 2009.

This history does not show the Legislature's acquiescence in an agency's interpretation of its governing statutes. On the contrary, it shows an agency's attempt to achieve through regulations what the Legislature declined to enact through proposed statutory amendments. We are not inclined to give any deference to the Commission's interpretation of its governing statutes.

[18] More important, a rule of deferring to agency interpretations does not apply when the agency's regulation contravenes the plain language of its governing statutes. We make

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[43] See *Capitol City Telephone v. Nebraska Dept. of Rev.*, 264 Neb. 515, 527, 650 N.W.2d 467, 477 (2002).

[44] See First Reading, L.B. 563, General Affairs Committee, 99th Leg., 1st Sess. (January 18, 2005).

[45] See Flavored Malt Beverage and Related Regulatory Amendments (2002R-044P), *supra* note 42.

[46] Legislative Journal, 99th Leg., 2d Sess. 1726 (Apr. 13, 2006).

independent conclusions on the meaning and interpretation of statutes.[47] Thus, we have stated that deference to an agency's interpretation of its governing statutes is improper when the statutes are unambiguous:

> [W]hile we agree that an administrative agency's interpretation of a statute may be helpful to this court when reaching its independent conclusion concerning the meaning of a statute, this court has long held: "'Resort to contemporaneous construction of a statute by administrative bodies is neither necessary nor proper where the language used is clear, or its meaning can be ascertained by the use of intrinsic aids alone.'"[48]

So any deference that we afford an agency's interpretation of its governing statutes does not apply when we can clearly discern the Legislature's intent and whether an agency's regulations are contrary to that intent. Contrary to the Commission's arguments, these statutes are not ambiguous.

*(ii) The Act Unambiguously Requires Flavored Malt Beverages to Be Classified as Spirits*

[19,20] In determining whether an agency's governing statute is ambiguous, we are guided by our own principles of statutory construction.[49] A statute is ambiguous when the language used cannot be adequately understood from the plain meaning of the statute or when considered in pari materia with any related statutes.[50]

[21-23] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[51] In construing a statute, we determine and give effect to the legislative intent

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[47] See, e.g., *Cotton v. State*, 281 Neb. 789, 810 N.W.2d 132 (2011).

[48] *Ameritas Life Ins. v. Balka*, 257 Neb. 878, 888, 601 N.W.2d 508, 515 (1999). See, also, *Cox Cable of Omaha v. Nebraska Dept. of Revenue*, 254 Neb. 598, 578 N.W.2d 423 (1998).

[49] See *Cox Cable of Omaha, supra* note 48.

[50] See *Agena v. Lancaster Cty. Bd. of Equal.*, 276 Neb. 851, 758 N.W.2d 363 (2008).

[51] *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

behind the enactment.[52] Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[53]

The Commission's argument that these beverages can be classified as beer conflicts with both the plain language of the Act's definition of beer and the Legislature's intent to exclude beverages containing a significant amount of distilled alcohol from the definition of beer. This intent is clear when the Act's provisions are read consistently.

First, we reject the Commission's argument that these beverages can be classified as beer because they also contain fermented alcohol. Even if distilled spirits are only indirectly added to the beverages through "flavorings" during production, the Act does not define beer to include beverages that contain distilled alcohol. Instead, the Act defines beer to mean a "beverage obtained by alcoholic fermentation of an infusion or concoction of barley or other grain, malt, and hops in water and includes, but is not limited to, beer, ale, stout, lager beer, porter, and near beer."[54] Even though this list of beer products is not exclusive, a beverage containing alcohol obtained through fermentation—not distillation—is obviously the definitive criteria for beer under the Act.

In contrast, the Act defines spirits to mean "any beverage which contains *alcohol obtained by distillation, mixed with water or other substance in solution*, and includes brandy, rum, whiskey, gin, or other spirituous liquors and such liquors when rectified, blended, *or otherwise mixed with* alcohol or *other substances*."[55] The Act's definition of spirits is not limited to beverage solutions containing the direct addition of distilled spirits. It includes any beverage solution containing distilled

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[52] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011), *cert. denied* ___ U.S. ___, 132 S. Ct. 341, 181 L. Ed. 2d 214.

[53] *Travelers Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

[54] § 53-103(4) (now codified as § 53-103.03).

[55] § 53-103(2) (now codified as § 53-103.38) (emphasis supplied).

alcohol. When this definition is read consistently with a statutory exception for alcohol used in flavorings, the definition of spirits includes any beverage containing more than an insignificant amount of alcohol used for flavoring.

As the Commission argues, the Act does not apply to alcohol in products such as flavoring extracts and food products unfit for beverages.[56] The Flavored Malt Beverages Coalition, as amicus curiae, argues that many beers and soft drinks contain small amounts of alcohol because these flavorings are added. The coalition further argues that unlike most states, Nebraska's statutes do not have a minimum threshold of alcohol content that a beverage may contain without being classified as an alcoholic beverage. So the coalition contends that the court's judgment will require all beverages containing even insignificant amounts of distilled alcohol to be classified and taxed as spirits. We disagree.

Despite the Act's exception for flavoring extracts and food products unfit for beverages, the same section specifically provides that the Act applies to alcohol used to make confections and candy if the alcohol content exceeds one-half percent of the product's ingredients.[57] This section of the Act shows that the Legislature did not intend the Act to apply to insignificant amounts of distilled alcohol used for flavoring, but that it did intend for it to apply if a significant amount of distilled alcohol was used for flavoring.

So if the court had ruled that an insignificant amount of distilled alcohol used for flavoring in a beer product did not render the beverage a spirit, we would agree that this was a reasonable interpretation of the Act. But the court was not asked to decide that question. And the Act cannot be reasonably interpreted as permitting the alcohol in a beer product to have up to 49 percent distilled alcohol.

[24] In sum, in reading the Act's provisions consistently, it is obvious that the Legislature did not intend for a beer product to include beverages containing distilled alcohol in an amount constituting up to 49 percent of the total alcohol content.

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[56] See § 53-103(5) (now codified as § 53-103.02(2)).

[57] See *id.*

Because the TTB regulations describe flavored malt beverages as a solution containing fermented alcohol and the distilled alcohol in these beverages is not an insignificant amount used for flavoring, the beverages clearly fall within the Act's definition of spirits. Moreover, contrary to the Commission's argument, the court did not concede that flavored malt beverages could be classified as either beer or wine. That argument takes the court's statement out of context. Its order simply reflects its decisionmaking process. It reached the same decision that we reach here. The statutes are not ambiguous when read consistently.

*(iii) The Commission Exceeded Its Authority*

[25,26] An administrative agency is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer. It may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute.[58] It has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.[59]

Section 53-117(2) gives the Commission the following power:

> To fix by rules and regulations the standards of manufacture of alcoholic liquor not inconsistent with federal laws in order to [e]nsure the use of proper ingredients and methods in [such] manufacture . . . . The Legislature intends, by the grant of power to adopt and promulgate rules and regulations, that the commission have broad discretionary powers to govern the traffic in alcoholic liquor and *to enforce strictly all provisions of the act* in the interest of sanitation, purity of products, truthful representations, and honest dealings in a manner that generally will promote the public health and welfare.

(Emphasis supplied.) While the Legislature has given the Commission broad discretion to promulgate regulations, it

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[58] *Upper Big Blue NRD v. State*, 276 Neb. 612, 756 N.W.2d 145 (2008); *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008).

[59] See *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010).

clearly intended the Commission to exercise that discretion to strictly enforce the Act for the public's benefit.

[27] We note that the comments to the TTB regulations show that the federal agency did not intend to preempt state law.[60] But even if a change in Nebraska's laws were necessary to avoid a conflict with federal law, the decision to make that change falls to the Legislature. An administrative agency cannot employ its rulemaking authority to adopt regulations contrary to the statutes that it is empowered to enforce. We conclude that the court correctly ruled that the Commission had exceeded its statutory authority.

## VI. CONCLUSION

We conclude that the court correctly ruled that Doghman had taxpayer standing to challenge the Commission's regulation. We hold that the taxpayer standing rules apply to a declaratory judgment action authorized by § 84-911. We expand the rule that a taxpayer may seek to enjoin state officials from unlawfully expending public funds to permit a taxpayer in an action brought under § 84-911 to challenge an agency's failure to comply with a clear statutory duty to assess or collect taxes. But the taxpayer must show that no other potential party is better suited to challenge the rule. Here, the only persons or entities directly affected by the Commission's regulation were beneficially affected by it and had no incentive to challenge it. So no better suited party existed to assert the public's interests in having the Commission comply with its duty to assess statutorily required taxes.

The court correctly determined that the Commission had exceeded its statutory authority in classifying flavored malt beverages as beer. We give no deference to the Commission's interpretation of these statutes because they are unambiguous. The statutory definition of beer is limited to beverages that contain alcohol obtained by fermentation. In contrast, the statutory definition of spirits includes any beverage that contains distilled alcohol. When these sections of the Act are read

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[60] Flavored Malt Beverage and Related Regulatory Amendments (2002R-044P), *supra* note 42.

consistently with an exception for alcohol used in flavorings, the Act unambiguously required the Commission to define any beverage containing more than an insignificant amount of distilled alcohol used for flavoring as a "spirit" and to tax it accordingly.

AFFIRMED.

GERRARD, J., not participating in the decision.
WRIGHT, J., not participating.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. PAUL W. SEYLER, RESPONDENT.

809 N.W.2d 766

Filed March 2, 2012. No. S-11-252.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.
3. ____. Neb. Ct. R. § 3-304 provides that attorney misconduct shall be grounds for disbarment, suspension, probation in lieu of or subsequent to suspension, censure and reprimand, or temporary suspension by the court, or private reprimand by the Committee on Inquiry or Disciplinary Review Board.
4. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.
6. ____. With respect to the imposition of attorney discipline in an individual case, the Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
7. ____. In an attorney disciplinary proceeding, it is necessary to consider the discipline that the Nebraska Supreme Court has imposed in cases presenting similar circumstances.

Original action. Judgment of suspension.

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

Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for respondent.

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

PER CURIAM.

## INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent, Paul W. Seyler. After a formal hearing, the referee found that Seyler had violated various provisions of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. The referee recommended a public reprimand. The Counsel for Discipline filed exceptions to the referee's recommendation and asks this court to suspend Seyler from the practice of law.

## BACKGROUND

Seyler was admitted to the practice of law in 1997. Between 1997 and 2004, he worked as a staff attorney, vice president of operations, or marketing officer for various life insurance companies. Beginning in 2004 and continuing to the time of the hearing, Seyler was working as the director of operations for a life insurance brokerage. Seyler also practiced law in an office-sharing arrangement with two other attorneys, beginning in 2003. Most of his legal work was in the area of estate planning. Seyler testified that he handled one breach of contract case, but that it was ultimately dismissed and did not go to trial. Before September 2006, Seyler had never represented a client with a personal injury claim. He admitted that he had little litigation experience.

In September 2006, Seyler agreed to represent Tonja Peterson-Wendt and Jason Wendt in a personal injury action. Peterson-Wendt asked Seyler to represent her because she was working with an insurance adjuster and had been having trouble resolving a claim arising from a traffic accident.

Seyler filed a complaint on behalf of Peterson-Wendt and Wendt on July 28, 2008, after researching examples and

looking at form books. Seyler stated that his original impression was that Peterson-Wendt wanted her attorney to talk to the insurance adjuster to try to settle the case and avoid going to court.

The complaint named Charles Wilkinson as the defendant. Wilkinson's attorney, Stephen Ahl, filed an answer on Wilkinson's behalf on August 21, 2008, and served initial discovery requests on Seyler that same day. Seyler did not timely respond to the discovery requests, and Ahl wrote Seyler on November 7 and December 1, asking about the status of the overdue responses. When no response was received, Ahl filed a motion to compel answers to discovery, and a hearing was scheduled for December 29. During this time, Seyler did not send copies of Ahl's discovery requests to his clients, nor did he inform his clients of the motion to compel.

Seyler failed to attend the hearing on the motion to compel on December 29, 2008, and on December 31, the court issued an order directing Seyler's clients to produce discovery responses within 14 days. The order indicated that Seyler's clients could be barred from introducing evidence if they did not comply. On January 7, 2009, Seyler informed his clients of the need to respond to discovery requests, but he did not provide them with a copy of the order. Seyler sent his discovery answers to Ahl on January 14.

On June 12, 2009, Ahl served a second set of discovery requests on Seyler, who failed to respond. Ahl sent a followup letter to Seyler on July 23, requesting the overdue responses. Seyler did not respond to the letter, and Ahl filed a motion to compel answers on August 11. The hearing on the motion to compel was set for September 4. Seyler did not file a response to the discovery requests, nor did he attend the hearing or request a continuance.

The district court entered an order sustaining Ahl's motion to compel discovery and ordered Peterson-Wendt and Wendt to produce the discovery responses within 10 days. The court warned that failure to comply could result in being barred from introducing evidence. Seyler received a copy of the order, but did not send a copy to his clients or inform them of the order's contents. Seyler also failed to comply with the order.

Ahl filed a motion for sanctions against Peterson-Wendt and Wendt on September 28, 2009. Ahl requested that the court preclude the introduction of evidence regarding loss of income from Peterson-Wendt's cosmetics business. A hearing on the motion for sanctions was set for October 9. Seyler once again failed to inform his clients about the motion and hearing and failed to attend the hearing.

The district court entered an order precluding introduction of evidence of Peterson-Wendt's loss of income, diminution of earning capacity, or financial losses of any type. Seyler did not send a copy of the sanction order to his clients. At no point did Peterson-Wendt tell Seyler that she would limit or forgo her claim for lost income. Peterson-Wendt testified that Seyler told her the claim for lost income had been thrown out by the court because it was baseless.

Eventually, Seyler took Peterson-Wendt's claim to mediation and settled for $30,000, even though her Medicare costs were in excess of that amount. The settlement was not apportioned as part of the agreement, and Peterson-Wendt now has another attorney assisting her in sorting out Medicare subrogation claims and liens. Seyler did not bill Peterson-Wendt from the beginning of his representation in September 2006 through the mediation in 2010. He ultimately waived his attorney fees and out-of-pocket expenses.

During the hearing before the referee on the disciplinary charges, Seyler could offer no explanation for his failure to attend the hearings and failure to comply with discovery requests, except to state that he did not read the documents closely enough, did not schedule the case properly, and was not diligent enough in keeping on top of the case.

The Counsel for Discipline filed formal charges against Seyler, alleging that his actions constituted violations of his oath of office as an attorney under Neb. Rev. Stat. § 7-104 (Reissue 2007) and the following provisions of the Nebraska Rules of Professional Conduct:

> § 3-501.1. Competence.
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal

knowledge, skill, thoroughness, preparation and judgment reasonably necessary for the representation.

. . . .

§ 3-501.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

. . . .

§ 3-501.4. Communications.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) [and] promptly comply with reasonable requests for information[.]

. . . .

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

. . . .

§ 3-508.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct[,] knowingly assist or induce another to do so or do so through the acts of another;

. . . .

(d) engage in conduct that is prejudicial to the administration of justice.

The referee found clear and convincing evidence that Seyler violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1, 3-501.3, 3-501.4, and 3-508.4, as well as his oath of office, by failing to competently represent Peterson-Wendt, failing to act with reasonable diligence, failing to properly communicate with Peterson-Wendt, and engaging in conduct prejudicial to the administration of justice. The referee recommended Seyler be

issued a public reprimand. Both Seyler and the Counsel for Discipline took exception to the referee's report.

## ASSIGNMENTS OF ERROR

The Counsel for Discipline contends that the referee's recommended sanction of a public reprimand is too lenient and that Seyler should be suspended from the practice of law for no less than 90 days.

## ANALYSIS

[1-3] A proceeding to discipline an attorney is a trial de novo on the record.[1] The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.[2] Neb. Ct. R. § 3-304 provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Seyler does not contest that the specific misconduct alleged in the formal charges supports the referee's finding that Seyler violated his duties of competence, diligence, and communications. Thus, the issue before us is the appropriate discipline to be imposed.

[4-6] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, this court considers the following factors: (1) the nature of the

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[1] *State ex rel. Counsel for Dis. v. Bouda*, 278 Neb. 380, 770 N.W.2d 648 (2009).

[2] *State ex rel. Counsel for Dis. v. Wintroub*, 281 Neb. 957, 800 N.W.2d 269 (2011).

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.[3] 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.[4] With respect to the imposition of attorney discipline in an individual case, we evaluate each attorney discipline case in light of its particular facts and circumstances.[5]

The referee relied on *State ex rel. Counsel for Dis. v. Orr*[6] to recommend that the appropriate discipline for attorney incompetence, without other misconduct, is a public reprimand. The Counsel for Discipline argues that the appropriate discipline in this case is not limited by *Orr*, because Seyler was found to have violated rules in addition to the rule regarding competence. Specifically, Seyler was also found to have failed to act with reasonable diligence and promptness in representing his clients (§ 3-501.3), failed to reasonably communicate with his clients (§ 3-501.4), and engaged in conduct that was prejudicial to the administration of justice (§ 3-508.4(d)). In contrast, the attorney in *Orr* was found only to have violated the rule regarding competence.

In *Orr*, the attorney was asked to assist two clients in franchising a business.[7] The attorney had limited experience in the field of franchising law. Over a period of several years, the clients used documents prepared by the attorney which did not conform to requirements of the Federal Trade Commission. The franchising of the business was virtually ended as a result of the legal difficulties arising from the attorney's representation.

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[3] *Bouda, supra* note 1.

[4] *Wintroub, supra* note 2.

[5] *Bouda, supra* note 1.

[6] *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[7] *Id.*

Formal charges were brought against the attorney, alleging that he provided incompetent representation. The referee found the attorney in violation of the disciplinary rules and recommended a public reprimand. We accepted the recommendation and issued a public reprimand.[8]

In *Orr*, this court expressed concern about an attorney attempting a legal procedure without ascertaining the law governing that procedure.[9] We found it inexcusable that the attorney, who had practiced law for 40 years, did little or no research into state or federal franchising law until long after he received notice of a problem with the franchising documents. "We take this opportunity to caution general practitioners against taking on cases in areas of law with which they have no experience, unless they are prepared to do the necessary research to become competent in such areas or associate with an attorney who is competent in such areas."[10] This court stated, "We have found no support in the case law for a suspension for incompetence without other misconduct, such as dishonesty."[11] Seyler urges this court to impose the same discipline as that imposed in *Orr* because both cases involve an attorney's competence. The Counsel for Discipline seeks additional discipline in the form of suspension.

[7] As noted above, in attorney discipline cases, we evaluate each case in light of its particular facts and circumstances.[12] However, we have also said that it is necessary to consider the discipline imposed in cases presenting similar circumstances.[13]

In a matter involving an attorney who represented competing interests and mishandled a real estate case, this court

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[8] *Id.*

[9] *Id.*

[10] *Id.* at 110, 759 N.W.2d at 709.

[11] *Id.* at 109, 759 N.W.2d at 708.

[12] *Bouda, supra* note 1.

[13] *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010).

imposed a 90-day suspension.[14] The attorney misrepresented the status of estate proceedings and the legal status of real property, engaged in multiple employments which involved different interests, and neglected legal proceedings. We found that the attorney's actions violated several disciplinary rules as well as his oath of office as an attorney. Mitigating factors included his cooperation during the disciplinary proceeding, his continuing commitment to the legal profession and the community, and the lack of evidence of any harm to the clients. Factors weighing against the attorney included his lack of willingness to take responsibility for his conduct and a prior reprimand.[15]

We also imposed a 90-day suspension in a case in which an attorney who practiced insurance defense left employment with a law firm and retained three files he believed warranted settlement.[16] When one of the cases he believed should be settled was set for trial, the attorney failed to inform his client about the trial and never contacted anyone at the insurance company about the need to settle the suit. The attorney did not file a motion to continue, he was not prepared to go to trial, and he did not have the authority to settle the case. The attorney continued as though he had authority to settle, and he made multiple false statements to opposing counsel and the court.[17]

A 90-day suspension was imposed in a case in which the attorney had a conflict and failed to obtain informed consent from his client or the opposing client.[18] A custodial father hired the attorney to seek a modification in a custody agreement so that he could move his children out of the state. In addition to failing to properly address the conflict, the attorney failed to prepare and file a witness list, which led the court to refuse to allow the client to take his children out of state. The

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[14] *State ex rel. Counsel for Dis. v. Koenig*, 264 Neb. 474, 647 N.W.2d 653 (2002).

[15] *Id.*

[16] *Bouda, supra* note 1.

[17] *Id.*

[18] *State ex rel. Counsel for Dis. v. Sellers*, 280 Neb. 488, 786 N.W.2d 685 (2010).

attorney was found to have violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), 3-501.7 (conflict of interest), 3-501.10 (imputation of conflicts of interest), and 3-508.4 (misconduct).[19]

An attorney who accepted representation of a medical malpractice case although he had little experience in handling such actions was suspended from the practice of law for 4 months.[20] The attorney accepted payments from the client and obtained medical records, but he did little other work on the case. The attorney eventually notified the client that he was ending his representation, but he did so without ever having filed a lawsuit, advising the client as to the statute of limitations, or helping her secure another attorney. Although the attorney eventually repaid the client her advance payments for costs, he failed to deposit one of her payments into his attorney trust account.[21]

A 30-day suspension was ordered for an attorney who was retained to help an organization obtain nonprofit corporation status, even though he primarily practiced in the areas of domestic relations and criminal law.[22] The attorney failed to complete the matter and failed to notify the organization that he was unable to do so. He closed his office and moved out of state without informing the organization. He repaid some of the fee and expenses the organization had paid him, but not until after formal disciplinary charges had been filed against him.[23]

We have also issued a public reprimand, rather than imposing a suspension, in a case involving the failure to adequately pursue a legal matter.[24] The attorney was retained to represent

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[19] *Id.*

[20] *State ex rel. Counsel for Dis. v. Muia*, 266 Neb. 970, 670 N.W.2d 635 (2003).

[21] *Id.*

[22] *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008).

[23] *Id.*

[24] *State ex rel. Counsel for Dis. v. Hart*, 265 Neb. 649, 658 N.W.2d 632 (2003).

a client in an employment discrimination case, but he failed to contact relevant agencies about her claims, failed to discuss her claims with her former employer or coworkers, failed to review documents, failed to conduct research, and failed to advise the client of any statute of limitations issues. In issuing the public reprimand, this court noted that the misconduct was an isolated matter and that the attorney had cooperated with the disciplinary proceeding.[25]

In addition to a public reprimand, this court imposed an 18-month period of probation for an attorney who drafted a settlement agreement in a dissolution action, but then neglected the case.[26] The client had repeatedly attempted to contact the attorney for several months and eventually terminated the attorney-client relationship. We ordered that the attorney be monitored by an attorney during the probationary period.[27]

We imposed the same discipline—public reprimand and 18-month probation—in a case in which the attorney unduly delayed completing legal matters in the representation of two separate clients.[28] The attorney also failed to deposit a retainer in her attorney trust account. In a second case, the same attorney was given a public reprimand and ordered to serve a 12-month period of probation to run consecutively to the previous probationary period.[29] The charges in the second case were similar to the first, although they involved distinct clients. The events in both cases occurred during the same timeframe and occurred before discipline was imposed in the first case.[30]

We consider a number of factors in determining the appropriate discipline to impose. Seyler's misconduct arose from his failure to litigate a personal injury claim of Peterson-Wendt.

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[25] *Id.*

[26] *State ex rel. Counsel for Dis. v. Kleveland*, 270 Neb. 52, 703 N.W.2d 244 (2005).

[27] *Id.*

[28] *State ex rel. Counsel for Dis. v. Waggoner*, 267 Neb. 583, 675 N.W.2d 686 (2004).

[29] *State ex rel. Counsel for Dis. v. Waggoner*, 268 Neb. 895, 689 N.W.2d 316 (2004).

[30] *Id.*

From the time Seyler was hired to the date of mediation 4 years later, Seyler's only action was to file a complaint. He then failed on several occasions to respond to discovery requests from opposing counsel. He failed to attend hearings and offered no explanation, except to state that he was not diligent enough.

Seyler failed to inform his clients about the status of the case, including the order imposing sanctions. Seyler did not explain to his clients the reason they could not present evidence of lost profits. As the referee determined, Seyler had little to no experience in litigating a personal injury claim and seemed to have no understanding of the proof that was necessary to demonstrate that Peterson-Wendt had lost profits from her business. There was also evidence that at least at the time of the hearing before the referee, Seyler's incompetence had resulted in Peterson-Wendt's inability to recover the full amount of her medical bills. Seyler offered no explanation for his failure to appear at court hearings.

We also take into consideration any aggravating and mitigating factors. As to mitigating factors, we find that Seyler has had no prior disciplinary complaints. He did not charge Peterson-Wendt for his services and worked, without charge, with her and new counsel during the mediation. Seyler cooperated with the Counsel for Discipline. He expressed remorse and stated that he wished he had handled the case to achieve a better outcome. Seyler offered two letters of support as character references. Both letters support his good standing in the community. Seyler stated that he would no longer accept any cases for which he is not qualified.

As aggravating factors, we note that although Seyler expressed some remorse, he seemed unwilling to accept full responsibility for his actions. He did not immediately address the problem, continuing to ignore discovery requests and to intimate to Peterson-Wendt that the case was proceeding in a positive manner. Seyler did not explain to his client the reason she was not allowed to present evidence of lost profits. According to Peterson-Wendt's testimony, Seyler told her that the lost profits claim had been thrown out because it was baseless. Seyler did not tell Peterson-Wendt about the sanction

imposed by the trial court. Based on Seyler's mishandling of the case, Peterson-Wendt was precluded from offering any evidence of lost profits or other economic damages, and the settlement did not cover her medical bills.

Seyler argues that the facts of his case are similar to those in *Orr*[31] and that he should receive only a public reprimand. We disagree. In *Orr*, the attorney was found to have provided incompetent representation in attempting to handle a franchising agreement. In the case at bar, Seyler was found by the referee to have provided incompetent representation in attempting to handle a personal injury claim. Seyler's incompetence may have resulted in a financial loss to his client because he did not understand the importance of proving damages. Seyler's failures in responding to discovery requests and failing to attend hearings had an impact on the opposing party, his counsel, and the court.

Seyler admitted that he never informed the court he did not plan to attend the hearings and that he never requested a continuance. The misconduct in *Orr* impacted the attorney's clients, as did Seyler's actions. But his failure to attend hearings and to notify the court of his intent not to attend also resulted in court resources being expended unnecessarily.

Seyler continued to misrepresent the progress of the case, failed to inform his client about the sanctions, and apparently did not competently handle the mediation. He agreed to accept a personal injury case, even though he had no experience in that area of law. Seyler did not file a complaint until 2 years after he accepted the case. He admitted that he drafted the complaint after looking at form books and other examples, but he did not consult with any other attorneys who had experience with similar types of cases.

In addition, the referee found, and Seyler did not dispute, that Seyler violated his duty of diligence, that he violated his responsibility to communicate with his client, and that he engaged in misconduct. Thus, Seyler violated several rules of professional conduct, while in *Orr*, the attorney was found to have violated only one rule.

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[31] *Orr, supra* note 6.

We find that a public reprimand is too lenient given the facts and circumstances of this case. We therefore impose a 30-day suspension from the practice of law.

## CONCLUSION

Based upon our consideration of the record in this case, this court finds that Seyler has violated §§ 3-501.1, 3-501.3, 3-501.4, and 3-508.40 and his oath of office as an attorney. We order that Seyler should be and hereby is suspended from the practice of law for a period of 30 days, effective immediately. Seyler shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court.

At the end of the 30-day suspension period, Seyler shall be automatically reinstated to the practice of law, provided that he has demonstrated his compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Seyler has violated any disciplinary rule during his suspension. We also direct Seyler to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. SERVIO DIAZ, APPELLANT.

808 N.W.2d 891

Filed March 2, 2012. No. S-11-254.

1. **Judgments: Proof: Appeal and Error.** One seeking a writ of error coram nobis has the burden to prove entitlement to such relief.
2. **Judgments: Appeal and Error.** The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
4. **Judgments: Constitutional Law: Legislature: Appeal and Error.** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101

(Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature.

5. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented.
6. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.
7. **Judgments: Evidence: Appeal and Error.** A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
8. **Judgments: Appeal and Error.** The writ of error coram nobis is not available to correct errors of law.
9. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.

Appeal from the District Court for Colfax County: Mary C. Gilbride, Judge. Affirmed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Connolly, Stephan, McCormack, and Miller-Lerman, JJ., and Irwin and Moore, Judges.

Miller-Lerman, J.

## NATURE OF CASE

Servio Diaz appeals the order of the district court for Colfax County which denied his motion for a writ of error coram nobis. Diaz sought relief on the basis that his counsel was ineffective when counsel failed to advise Diaz of potential deportation consequences of the plea that he entered in connection with his plea-based conviction in 2000. The court determined

that Diaz had not established entitlement to relief and denied the motion. We conclude that the error asserted by Diaz is not an appropriate basis for relief by a writ of error coram nobis. Therefore, although based on different reasoning, we affirm the district court's denial of Diaz' motion.

## STATEMENT OF FACTS

Diaz is a Honduran disaster refugee with authorization to reside in the United States. He has resided in the United States since 1994. In 2000, pursuant to a plea agreement, Diaz pled guilty to misdemeanor charges of attempted possession of a controlled substance, cocaine, and driving while intoxicated. He was sentenced to 2 years' probation, and his probation was terminated in 2002.

On September 30, 2010, Diaz filed a motion by which he sought to vacate the plea-based judgment. Diaz asserted that "his attorney failed to correctly advise him of the presumptively mandatory consequences he would face with regard to deportation when he entered his guilty plea." Diaz asserted that his conviction for attempted possession of cocaine was a deportable offense under federal law. Diaz asserted that he had received ineffective assistance of counsel and cited *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010), in which the U.S. Supreme Court stated that "counsel must inform her client whether his plea carries a risk of deportation." Diaz finally asserted that he was "currently in removal proceedings pending removal to Honduras as a result of the conviction in this matter." Diaz prayed the court to vacate the judgment, thus allowing him to withdraw the plea.

In an order granting an evidentiary hearing, the court characterized Diaz' motion and stated that "his motion is, in essence, a writ of error coram nobis." Following the hearing, the court entered an order denying the relief requested by Diaz. The court noted that Diaz was no longer in custody and therefore not eligible for postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 2008). The court determined that evidence adduced at the hearing demonstrated that under federal law, Diaz was deportable as a result of the conviction for attempted

possession of cocaine. However, the court determined that Diaz had not demonstrated that he was not advised that his conviction could have immigration consequences. The court stated that counsel should be presumed to have rendered competent advice at the time of a plea, and the court noted that "[t]he only evidence on this allegation is [Diaz'] self-serving statement that he received no advisement." The court noted that Diaz had not shown "that deportation proceedings have been initiated or that such proceedings are reasonably certain to be initiated" and that he had offered no evidence, other than his own testimony, regarding his immigration status. The court determined that Diaz had not established entitlement to relief by a writ of error coram nobis and denied the motion.

Diaz appeals the denial of his motion.

## ASSIGNMENT OF ERROR

Diaz claims that the district court erred when it denied his motion for a writ of error coram nobis.

## STANDARDS OF REVIEW

[1,2] One seeking a writ of error coram nobis has the burden to prove entitlement to such relief. See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). In postconviction appeals, a defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). We logically extend this standard to the findings of the district court in connection with its ruling on a motion for a writ of error coram nobis, and such findings will not be disturbed unless they are clearly erroneous.

## ANALYSIS

As an initial matter, we note that the State suggests that Diaz' motion should be considered by this court as a motion to withdraw his plea rather than a motion for a writ of error coram nobis and contends that the district court lacked jurisdiction. We reject this suggestion. The State argues that because Diaz completed his sentence in 2002, the district court in 2010 lacked jurisdiction over a motion to withdraw his plea. The

State cites *State v. Rodriguez-Torres*, 275 Neb. 363, 368, 746 N.W.2d 686, 690 (2008), for the proposition that absent a legislatively authorized procedure, there is no recourse for defendants to withdraw their pleas and vacate judgments "years after having completed [their] sentences."

In response, Diaz argues that the State ignores our discussion of *Rodriguez-Torres* in *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). In *Yos-Chiguil*, we noted that the sole basis alleged by the defendant for withdrawal of the plea in *Rodriguez-Torres* was Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), which requires the trial court, before accepting a plea, to advise a defendant that a conviction may have immigration consequences. In *Yos-Chiguil*, we further commented that in *Rodriguez-Torres*, we had held that § 29-1819.02 "did not create a statutory procedure pursuant to which a plea entered before July 20, 2002, could be withdrawn after the person convicted of the crime had already served his sentence." 278 Neb. at 595, 772 N.W.2d at 578. We further noted in *Yos-Chiguil* that "[b]ecause the issue was not presented to us [in *Rodriguez-Torres*], we did not address whether a common-law remedy existed for withdrawal of the plea in that circumstance." 278 Neb. at 595, 772 N.W.2d at 578. The issue was also not presented or decided in *Yos-Chiguil*.

We recently decided *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012), involving a motion to withdraw a plea. In *Gonzalez*, the defendant asserted that she received ineffective assistance of counsel in connection with a plea because counsel failed to inform her of the immigration consequences of her plea. We concluded in *Gonzalez* that, even after final judgment, the trial court had jurisdiction to consider the defendant's motion to withdraw her plea on the basis of such alleged ineffective assistance of counsel. Regardless of whether the distinction makes a difference, we note that the defendant in *Gonzalez* had not completed her sentence at the time she filed her motion to withdraw her plea, whereas Diaz had completed his sentence years before he sought relief in the case before us.

[3] Contrary to the State's argument, we do not consider the present case as involving a ruling on a motion to withdraw a plea; instead, it involves the appeal from an order

denying a request for a writ of error coram nobis, and we analyze it on this basis. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

The district court stated in an order granting the evidentiary hearing that Diaz had urged that his motion be considered as a motion for a writ of error coram nobis, and the court thereafter treated and disposed of the motion on this basis. Therefore, we consider only whether the court properly denied Diaz' motion for a writ of error coram nobis. We do not speculate on whether the court had authority to consider Diaz' claim through some other mechanism such as the motion to withdraw a plea that we recently found viable in *State v. Gonzalez, supra*, wherein the defendant had not completed her sentence.

Considering Diaz' motion as a motion for a writ of error coram nobis, as explained below, we conclude that error coram nobis was not a proper mechanism to raise the issue asserted by Diaz. Although our reasoning differs from that of the district court, we conclude that the district court properly denied the motion.

Diaz cites federal cases such as *U.S. v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), *abrogated on other grounds, Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and *U.S. v. Esogbue*, 357 F.3d 532 (5th Cir. 2004), in support of his position that coram nobis relief is available for a defendant facing deportation to withdraw his or her plea on the basis of ineffective assistance of counsel. Diaz also notes that at least one state holds a similar view of the availability of coram nobis relief. See *State v. Tran*, 145 N.M. 487, 200 P.3d 537 (N.M. App. 2008) (relying on state rule of civil procedure that abolished and replaced common-law coram nobis). However, the common law in Nebraska and other states has not taken the same approach as the federal law in the development of coram nobis. See *People v. Hyung Joon Kim*, 45 Cal. 4th 1078, 202 P.3d 436, 90 Cal. Rptr. 3d 355 (2009). See, also, *Com. v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011).

[4-6] The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 2010), which

adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *Id*. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. *Id*. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. See *id*. It is not enough to show that it might have caused a different result. *Id*.

[7,8] We have stated that a writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987). See *State v. Wilson*, 194 Neb. 587, 234 N.W.2d 208 (1975) (discussing fact not in existence at time of conviction). The writ of error coram nobis is not available to correct errors of law. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). Regarding errors of law in the coram nobis context, we have concluded that where a criminal defendant alleged he was denied the right to be present at a suppression hearing, the "allegations present[ed] no fact or facts unknown to the defendant and his counsel and not reasonably discoverable by the defendant, and the existence of which would have prevented the judgment," and that, instead, the allegations "present[ed] at most a question of error of law, which is not reachable by writ of error coram nobis." *State v. Turner*, 194 Neb. 252, 257-58, 231 N.W.2d 345, 349 (1975). Although the instant case does not concern a motion alleging legal error by a trial court, for completeness, we note that we have also concluded that a writ of error coram nobis is not the appropriate remedy for an alleged failure of the trial court to properly inform a defendant of his or her constitutional rights,

because such error would clearly be an error of law. *State v. Wilson, supra*.

[9] Diaz seeks coram nobis relief based on his assertion that his counsel provided ineffective assistance when counsel failed to advise him of potential deportation consequences. We have stated that a claim that defense counsel provided ineffective assistance presents a mixed question of law and fact and that, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). Granting relief to Diaz would run contrary to *State v. Schnatz*, 194 Neb. 516, 518, 233 N.W.2d 778, 780 (1975), in which the defendant sought to vacate his original county court judgment "because his attorney did not fully explain his legal rights"; we stated that the issue was a question of law that "is not cognizable under a writ of error coram nobis." Similar to the appellant in *Schnatz*, Diaz seeks relief from an error of law, not an error of fact, and his claim is not cognizable under a writ of error coram nobis.

Courts in other states agree that claims of ineffective assistance of counsel are not appropriate for coram nobis relief. The California Supreme Court observed: "That a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule." *People v. Hyung Joon Kim*, 45 Cal. 4th 1078, 1104, 202 P.3d 436, 454, 90 Cal. Rptr. 3d 355, 376 (2009). See, also, *Com. v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011) (stating that alleged ineffective assistance of counsel with regard to immigration consequences is not error of fact). Because Diaz' challenge to his plea-based conviction involves a question of law and not solely an error of fact, relief was not available in a motion for a writ of error coram nobis.

The California Supreme Court, in a case where the defendant sought coram nobis relief from a plea-based conviction, observed:

> To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. . . . New facts

> that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment.

*People v. Hyung Joon Kim*, 45 Cal. 4th at 1103, 202 P.3d at 453, 90 Cal. Rptr. 3d at 375. We agree with the reasoning in *Hyung Joon Kim* and apply it to this case.

If Diaz had been aware of the possible deportation consequences of his plea, it might have caused him to make different strategic choices, but it would not have prevented the court from rendering judgment. Diaz did not claim that judgment could not be entered due to an overriding legal impediment or flaw that would have prevented the court from rendering judgment. Diaz' motion for a writ of error coram nobis was not an appropriate method to resolve the issue he raises.

Because the ineffective assistance of counsel claim Diaz raises is not cognizable by a writ of error coram nobis, the district court should have denied the motion on this basis. Nevertheless, its denial was not error. In view of our analysis and disposition, we find it unnecessary to review the factual findings made by the trial court.

## CONCLUSION

We conclude that a writ of error coram nobis was not an appropriate method for Diaz to raise a challenge to his plea-based conviction on the basis that he received ineffective assistance when counsel allegedly failed to advise him of potential immigration consequences of his plea. Because coram nobis was not an appropriate vehicle for Diaz' claims, we conclude that the district court properly denied the motion. Although our reasoning differs from that of the district court, we affirm the denial of Diaz' motion for a writ of error coram nobis.

AFFIRMED.

WRIGHT, J., not participating.

# State of Nebraska, appellant, v. Oscar Hernandez, appellee.

809 N.W.2d 279

Filed March 2, 2012. No. S-11-414.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation presents a question of law upon which an appellate court reaches a conclusion independent of the trial court.
2. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court's objective is to determine and give effect to the legislative intent of the enactment.
3. **Statutes: Appeal and Error.** When construing a statute, an appellate court looks to the statute's purpose and gives to the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.
4. ____: ____. Absent a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
5. **Statutes.** To the extent there is a conflict between two statutes, the specific statute controls over the general statute.
6. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Exception overruled.

Joe Kelly, Lancaster County Attorney, and Daniel Packard for appellant.

Heidi M. Hayes, of Morrow, Poppe, Watermeier & Lonowski, P.C., L.L.O., for appellee.

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

Connolly, J.

The district court for Lancaster County acquitted Oscar Hernandez of driving during revocation under Neb. Rev. Stat. § 60-6,197.06 (Reissue 2010), concluding that the statute did not apply to Hernandez' conduct. The State concedes that double jeopardy would bar a subsequent trial. Nevertheless, the State appeals under Neb. Rev. Stat. § 29-2315.01 (Reissue 2008) and asks this court to provide an exposition of the law for future cases. Because we agree with the district court and

conclude that § 60-6,197.06 does not apply to the facts of this case, we overrule the State's exception.

## BACKGROUND

Because of Hernandez' third conviction for driving under the influence, the Nebraska Department of Motor Vehicles revoked his license. The revocation began on December 16, 2009, and was to last for 2 years. Hernandez, however, received an ignition interlock permit from the Nebraska Department of Motor Vehicles. An ignition interlock permit allows a person to operate a motor vehicle that is equipped with an ignition interlock device in limited circumstances.[1] To receive the permit, Hernandez had to show that an ignition interlock device had been installed in his vehicle. Hernandez showed proof that the device had been installed in a 2002 Dodge Ram.

On May 5, 2010, Hernandez was involved in a car accident. He was driving a 1992 Dodge Ram Wagon van that did not have an ignition interlock device. Hernandez admitted to the responding officer that he could drive only vehicles with interlock devices.

The State charged Hernandez with driving during revocation under § 60-6,197.06. The court found Hernandez not guilty. The court concluded that another statute, Neb. Rev. Stat. § 60-6,211.05(5) (Supp. 2009), applied and that § 60-6,197.06 did not. We set out these statutes and the district court's reasoning in detail below.

## ASSIGNMENT OF ERROR

The State takes exception under § 29-2315.01 and argues that the district court erred in concluding that § 60-6,197.06 did not apply to Hernandez' conduct.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law upon which an appellate court reaches a conclusion independent of the trial court.[2]

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[1] See Neb. Rev. Stat. §§ 60-480(12) (Reissue 2010) and 60-4,118.06 (Supp. 2009) and § 60-6,211.05.

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

## ANALYSIS

The statute under which the State charged Hernandez, § 60-6,197.06, provides in part:

> (1) Unless otherwise provided by law pursuant to an ignition interlock permit, any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to section 28-306, section 60-698, subdivision (4), (5), (6), (7), (8), (9), or (10) of section 60-6,197.03, or section 60-6,198, or pursuant to subdivision (2)(c) or (2)(d) of section 60-6,196 or subdivision (4)(c) or (4)(d) of section 60-6,197 as such subdivisions existed prior to July 16, 2004, shall be guilty of a Class IV felony, and the court shall, as part of the judgment of conviction, revoke the operator's license of such person for a period of fifteen years from the date ordered by the court and shall issue an order pursuant to section 60-6,197.01.

The court concluded that instead of § 60-6,197.06, § 60-6,211.05(5) applied to Hernandez' conduct. Section 60-6,211.05(5) provides:

> A person who tampers with or circumvents an ignition interlock device installed under a court order while the order is in effect, *who operates a motor vehicle which is not equipped with an ignition interlock device in violation of a court order made pursuant to this section*, or who otherwise operates a motor vehicle equipped with an ignition interlock device in violation of the requirements of the court order under which the device was installed shall be guilty of a Class II misdemeanor.

(Emphasis supplied.)

The court reasoned that the first clause of § 60-6,197.06(1)—"Unless otherwise provided by law pursuant to an ignition interlock permit"—removed from the statute's coverage those persons who had valid ignition interlock permits. The court concluded that § 60-6,211.05(5) applied to persons who had violated the terms of an ignition interlock permit. Because Hernandez had an ignition interlock permit but had violated its terms by operating a vehicle not equipped with such a device,

the court ruled that § 60-6,211.05 was the only statute under which the State could charge him.

This appeal presents an issue of statutory interpretation. The question is whether a person who is required to have an ignition interlock device but drives a vehicle without one may be charged under § 60-6,197.06.

The State rests its argument on the introductory clause of § 60-6,197.06(1). The State contends that this clause, which reads "Unless otherwise provided by law pursuant to an ignition interlock permit," means that if a person complies with the terms of the ignition interlock permit, a person cannot be charged with driving during revocation under § 60-6,197.06. But if he or she violates the permit's terms—for instance, by driving a vehicle that is not equipped with an ignition interlock device—the permitholder is driving during a period of revocation and can be charged under § 60-6,197.06(1) for committing a Class IV felony.

Hernandez sees it differently. He argues that the court correctly determined that the introductory clause of § 60-6,197.06(1) precludes permitholders, even those who violate the terms of the permit, from being prosecuted under this statute for driving during revocation. Hernandez contends that other statutes provide the appropriate crime and punishment for those who violate the terms of their ignition interlock permits. We agree.

[2-4] In construing a statute, our objective is to determine and give effect to the legislative intent of the enactment.[3] We look to the statute's purpose and give to the statute a reasonable construction that best achieves that purpose, rather than a construction that would defeat it.[4] Absent a statutory indication to the contrary, we give words in a statute their ordinary meaning.[5]

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[3] *Mena-Rivera, supra* note 2.

[4] *Id.*

[5] *Id.*

[5,6] Further, to the extent there is a conflict between two statutes, the specific statute controls over the general statute.[6] Finally, components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[7]

Section 60-6,211.05(5), which deals specifically with ignition interlock permits, clearly and unambiguously states that one "who operates a motor vehicle [that] is not equipped with an ignition interlock device in violation of a court order" is guilty of a Class II misdemeanor. The Legislature was clear in expressing its intent that an ignition interlock permitholder who operates a vehicle without an ignition interlock device be punished only as a misdemeanant. The State asks us to read an ambiguous clause to authorize a more severe punishment for the same act. We reject the State's request because doing so would be inconsistent with the Legislature's clear and unambiguous intent in § 60-6,211.05(5). Such a reading would render the statutory scheme inconsistent and disharmonious.

As mentioned, the State bases its argument on the introductory clause of § 60-6,197.06(1). As the State reads it, the clause means that permitholders who comply with the terms of their permits are not driving during revocation. But once they do violate the terms, they are not acting "pursuant to an ignition interlock permit"[8] and are in effect driving during revocation. We read the introductory clause differently. We read it to say that other statutes provide the appropriate crimes with which to charge a person who violates the terms of his or her ignition interlock permit. In other words, we read "Unless otherwise provided by law pursuant to an ignition interlock permit"[9] to mean simply "unless a person has an interlock permit." This

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[6] See *Davio v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 263, 786 N.W.2d 655 (2010).

[7] *Id.*

[8] § 60-6,197.06(1).

[9] *Id.*

clause excludes ignition interlock permitholders from the coverage of § 60-6,197.06.

## CONCLUSION

We agree with the district court's interpretation of the statute. Section 60-6,197.06 does not provide the penalty for a driver who has a valid ignition interlock permit but operates a vehicle not equipped with such a device. That conduct is a Class II misdemeanor under § 60-6,211.05(5). We overrule the State's exception.

EXCEPTION OVERRULED.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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WILLIAM A. FITZGERALD ET AL., ON BEHALF OF KELLOM HEIGHTS ASSOCIATES LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, AND CUMING STREET CORPORATION, A NEBRASKA CORPORATION, APPELLEES AND CROSS-APPELLANTS, V. COMMUNITY REDEVELOPMENT CORPORATION, A NEBRASKA CORPORATION, AND OMAHA ECONOMIC DEVELOPMENT CORPORATION, A NEBRASKA NONPROFIT CORPORATION, APPELLANTS AND CROSS-APPELLEES.

811 N.W.2d 178

Filed March 9, 2012. No. S-10-624.

1. **Limitations of Actions.** Which statute of limitations applies is a question of law.
2. **Judgments: Appeal and Error.** An appellate court reaches a conclusion regarding questions of law independently of the trial court's conclusion.
3. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
4. **Contracts: Appeal and Error.** The interpretation 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.
5. **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.
6. **Statutes.** Statutory interpretation presents a question of law.
7. **Prejudgment Interest: Appeal and Error.** Whether prejudgment interest should be awarded is reviewed de novo on appeal.

8. **Limitations of Actions: Fraud.** An action for fraud does not accrue until there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery.
9. **Estoppel.** The doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit.
10. **Appeal and Error.** An issue not passed on by the trial court is not appropriate for consideration on appeal.
11. **Judgments: Final Orders: Words and Phrases.** A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist.
12. **Judgments: Final Orders.** Orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown.
13. ____: ____. A conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be.
14. **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.
15. **Judgments: Attorney Fees: Derivative Actions: Partnerships.** Under Neb. Rev. Stat. § 67-291 (Reissue 2009), the court may award expenses, including attorney fees, as a separate component of the judgment. The statute then requires that in a derivative action, the plaintiff may retain the portion of the judgment awarded as expenses, but any additional proceeds of the judgment that the plaintiff receives must be remitted to the partnership.
16. **Prejudgment Interest: Claims.** Prejudgment interest under Neb. Rev. Stat. § 45-103.02 (Reissue 2010) is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery.

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

Donald J. Buresh, of Stalnaker, Becker & Buresh, P.C., for appellant Community Redevelopment Corporation.

Lyman L. Larsen, Sean W. Colligan, and Geoffrey L. Gross, of Stinson, Morrison & Hecker, L.L.P., for appellant Omaha Economic Development Corporation.

Andrew T. Schlosser, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., and Matthew F. Heffron, of Brown & Brown, P.C., L.L.O., for appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

The dispute in this case revolves around Kellom Heights Associates Limited Partnership (Kellom Heights), a limited partnership formed to provide financing for the redevelopment of property in Omaha, Nebraska. The appellees are Kellom Heights, Cuming Street Corporation (Cuming Street), and "Class A" limited partners in Kellom Heights. The appellants are Community Redevelopment Corporation (CRC), the general partner, and Omaha Economic Development Corporation (OEDC), a "Class B" limited partner. CRC is a subsidiary of OEDC. The appellees became dissatisfied with the operation of Kellom Heights and filed this complaint asserting various causes of action. The district court for Douglas County found for the appellees on certain causes of action and entered a judgment in their favor in the amount of $918,228 plus costs and interest. In addition to the judgment, the court awarded attorney fees of $336,614. The court denied the appellees' request for prejudgment interest.

OEDC and CRC, the appellants, appeal various orders of the district court and make various assignments of error, including that the district court erred when it rejected their statute of limitations defenses to certain claims. The appellees cross-appeal and claim that the district court erred when it denied their request for prejudgment interest. We affirm in part, and in part reverse and remand for further proceedings.

## STATEMENT OF FACTS

Kellom Heights was formed in 1981 for the purposes of providing financing for and carrying out a redevelopment plan north of Cuming Street between 25th and 27th Streets in Omaha, near the Creighton University campus. OEDC was in charge of the redevelopment, which included construction of

a 132-unit apartment complex with 20 percent of the apartment units set aside for U.S. Department of Housing and Urban Development Section 8 subsidized housing. Government financing and grants were obtained to cover much of the cost of the project, but additional funds of approximately $600,000 were needed. OEDC considered forming a limited partnership that would provide investors income tax savings based on expected losses that would be allocated to the limited partners for approximately the first 15 years of the project.

OEDC and CRC executed a partnership agreement for Kellom Heights on June 4, 1981. CRC was designated the general partner, and OEDC was designated a Class B limited partner with no voting rights. OEDC and CRC executed amendments to the agreement on May 1, 1982, and September 29, 2003. The validity of the May 1, 1982, amendment is among the issues in this case. A private placement memorandum (PPM) was provided to potential investors in 1981 and 1982. In the PPM, 60 Class A limited partnership interests were offered. Each investor was offered a minimum and maximum of two partnership interest units for an investment of $20,200. The partnership agreement provided that the Class A limited partners would have a 99-percent interest in the net income or losses and a one-third interest in the net cashflow of Kellom Heights. Thirty individuals, including the appellees in this case, subscribed to become Class A limited partners. A certificate of limited partnership was filed with the Nebraska Secretary of State on May 6, 1982, and with the Douglas County clerk in June 1982.

After approximately 20 years with no cashflow from Kellom Heights, some limited partners became dissatisfied with its operation. The appellees in this case include William A. Fitzgerald, Jerome F. Sherman, Norman Veitzer, and Loyal Borman, who are Class A limited partners who filed this action as a derivative action on behalf of Kellom Heights and on behalf of Cuming Street, a corporation they sought to have admitted as a general partner. The appellees filed the original complaint in this action on January 20, 2006. In the operative second amended complaint, the appellees set forth six causes of action, including actions for the following: (1) an accounting, (2) injunctive

and declaratory relief to appoint Cuming Street as an additional general partner, (3) injunctive and declaratory relief and a temporary restraining order to set aside a $350,000 note payable to OEDC and to halt a $12,000 increase in annual supervisory fees paid to CRC, (4) unjust enrichment to recover interest paid to OEDC on the $350,000 note, (5) injunctive relief and a temporary restraining order to prevent OEDC and CRC from paying their own attorney fees from Kellom Heights funds, and (6) injunctive and declaratory relief to declare that the May 1, 1982, amendment to the partnership agreement (hereinafter Amendment 1) is unenforceable and to prohibit OEDC and CRC from carrying out the provisions of Amendment 1. In their answer, OEDC and CRC raised affirmative defenses, including assertions that the appellees' claims were barred by the statute of limitations and the doctrine of laches and that certain claims were not claims of Kellom Heights and therefore were not properly asserted in a derivative action.

Following a bench trial, the district court entered orders on August 10, 2009, and February 12 and March 11, 2010, determining various issues in this action. OEDC and CRC appealed these orders to the Nebraska Court of Appeals. The Court of Appeals dismissed the appeal in a decision without opinion on May 25, 2010, case No. A-10-247, after it concluded that the district court had explicitly reserved certain matters for determination and therefore had not disposed of all claims. On remand, the district court entered an order on June 17, in which it determined additional matters and stated that all issues in the action had been resolved and that any outstanding motions or issues that may not have been resolved were overruled. A summary of each claim, the court's resolution of each claim, and the court's resolution of other matters follow.

*Statutes of Limitations and Other Affirmative Defenses.*

In their answer, OEDC and CRC asserted affirmative defenses, including an assertion that the action was barred by the statute of limitations. In the August 10, 2009, order, the district court noted that for a 4-year statute of limitations to apply, the appellees must have known or should have known they had

a cause of action. With regard to the increased supervisory fees, the court noted that the increase occurred within 4 years prior to the filing of this action. With regard to the appointment of Cuming Street as a general partner, the court noted that it was an ongoing process and that therefore, the statute of limitations did not apply. With regard to the remaining claims, including those involving Amendment 1 and interest charged on the $350,000 note, the court found that the appellees were never given adequate notice of the facts giving rise to the existence of the claims and that the appellees filed their action within the 4-year statute of limitations after they learned of the claims. The court found against OEDC and CRC with respect to the statute of limitations defense and also found against OEDC and CRC with respect to their other affirmative defenses.

*Accounting.*

The appellees asserted that as general partner, CRC had control over the books and records of Kellom Heights and that for the duration of Kellom Heights, CRC had not provided a full and complete accounting of Kellom Heights' assets, income, and expenditures, particularly expenditures the appellees believed to be irregular and improper. The appellees sought an order requiring CRC to account to them "for all assets, income and expenditures" of Kellom Heights, "particularly for all profits and monies received, disbursed and retained by" Kellom Heights since its formation and to make available to the appellees "all books and records" of Kellom Heights since its formation. The appellees also sought, after the accounting was completed, a judgment against OEDC and CRC "for the balance found due" to the appellees.

In the August 10, 2009, order, the district court granted the appellees' request for an accounting and required OEDC and CRC "to make available to the Plaintiffs all books and records of [Kellom Heights] since [its] formation." The court stated that once the accounting was completed, the court would make a decision as to fees and costs. The court also found that from 1986 through 2001, Kellom Heights had earned interest on funds that it held in various bank accounts but that OEDC had taken for itself the interest earned on the accounts. Beginning

in 1986, financial statements for Kellom Heights referred to the interest earned on the bank accounts as "incentive income" payable to OEDC. The court concluded that the partnership agreement did not grant OEDC authority to take the interest. The court concluded that the interest taken from Kellom Heights from 1986 through 2001, which totaled $88,228, should be returned to Kellom Heights with additional interest.

*Appointment of Cuming Street as General Partner.*

The appellees asserted that under the partnership agreement, the Class A limited partners had a right to approve an entity to become an additional general partner. They asserted that the Class A limited partners had approved by a majority vote the admission of Cuming Street as a general partner but that CRC had unreasonably refused to perform the actions necessary under the agreement to allow the admission of Cuming Street as a general partner. The appellees sought a declaration that admission of Cuming Street as a general partner was in conformity with the law and with the partnership agreement. They also sought to enjoin CRC from refusing to complete additional steps required by the agreement and by law to admit Cuming Street as a general partner and to enjoin CRC from interfering with Cuming Street's exercise of its full rights and power as a general partner.

In the August 10, 2009, order, the district court addressed OEDC and CRC's argument that the appellees had not yet complied with all the requirements to make Cuming Street a general partner. The court found that one of the requirements was an opinion from Kellom Heights' legal counsel that admission of the general partner was in conformity with the applicable statutes and would not cause the termination or dissolution of Kellom Heights or affect its federal tax status. The court noted that on October 17, 2006, counsel had opined that there was authority for Cuming Street to become a general partner and that admission of Cuming Street as a general partner would not cause termination or dissolution of Kellom Heights or affect its tax status. The court noted, however, that counsel opined that there had not yet been compliance with the partnership

agreement's requirements that (1) Cuming Street accept the partnership agreement and (2) admission of Cuming Street as a general partner be approved by the Department of Housing and Urban Development. The court concluded that once these two requirements were met, Cuming Street would become a general partner. The court therefore denied, "at this time," the appellees' claims for declaratory and injunctive relief which would have appointed Cuming Street as a general partner.

*Increase in Annual Supervisory Fee.*

The appellees asserted that pursuant to the PPM, Kellom Heights was authorized to pay CRC $24,000 annually as a supervisory fee but that, without notice to the Class A limited partners, CRC began paying itself an additional $12,000 per year from Kellom Heights funds. The appellees sought an order declaring that the $12,000 increase in the supervisory fee was invalid and unenforceable and an order enjoining CRC from paying itself more than $24,000 in supervisory fees annually.

In the August 10, 2009, order, the district court found that pursuant to the PPM, CRC was allowed a fee of $12,000 per year for supervisory duties it performed as general partner and an additional fee of $12,000 per year after it took over the duties of manager of Kellom Heights. The court noted that in 2001, CRC began receiving an additional $12,000 per year for a total annual fee of $36,000 for management and supervision. The court rejected CRC's argument to the effect that although the PPM may have limited Kellom Heights' manager fee to $12,000 per year, it did not limit the supervisory fee that CRC received as general partner. The court reasoned that the language of the PPM, although not necessarily the language of the partnership agreement, limited fees to the amounts specified and concluded that the procedures required by the partnership agreement to approve an increase in fees were not followed and that proper notice of the increased fee was not provided to the partners. Having found a violation of the partnership agreement, the court concluded that CRC must return to Kellom Heights the sum of $60,000, representing the additional $12,000 fee for the 5 years it was taken, plus interest.

*Note Payable and Interest on Note Payable.*

The appellees asserted that in 1982, the city of Omaha gave OEDC a grant of $350,000 with the requirement that OEDC in turn grant, rather than loan, the $350,000 to Kellom Heights. The appellees asserted that OEDC mischaracterized the transfer of $350,000 to Kellom Heights as a loan with interest payable and that OEDC memorialized such characterization in a promissory note. They asserted that CRC paid OEDC $35,000 in interest on the note annually despite the fact that the partnership agreement prohibited the payment of interest from Kellom Heights to OEDC. The appellees sought a declaration that the $350,000 note payable was invalid and unenforceable, and they sought to enjoin CRC from making further payments on the note. The appellees further asserted that OEDC had been unjustly enriched by receiving $35,000 in interest annually on the $350,000 note, and they sought a judgment in the amount of the interest paid.

In the August 10, 2009, order, the district court found that § 6.9 of the partnership agreement allowed Kellom Heights to borrow funds from any person, including the general partner, but required that any loan from the general partner or an affiliate must be without interest. The court rejected OEDC and CRC's argument that other sections of the partnership agreement implied that interest could be charged on a loan from an affiliate; the court concluded that such sections did not negate the clear requirement of § 6.9 that no interest be paid. The court also rejected OEDC and CRC's argument that the appellees knew or should have known that interest was being charged on the note, because Kellom Heights' financial statements for the years 1982 through 1984 disclosed that the note bore interest. The court concluded that OEDC and CRC had a fiduciary duty to advise the other partners of any act that violated the partnership agreement and that OEDC and CRC failed to disclose to the other partners that interest was being paid on the note in violation of the partnership agreement. The court found that the annual interest paid on the note was $35,000, calculated as 10 percent of $350,000, and that a total of $770,000 had been paid over 22 years. The court concluded that the $770,000, with additional interest, should be repaid to

Kellom Heights. The court, however, rejected the appellees' claim that the loan itself was improper, after it found nothing that would have prevented the loan.

*Payment of OEDC and CRC's Attorney Fees and Costs From Kellom Heights' Funds.*

The appellees asserted that OEDC's and CRC's actions in connection with the other claims asserted in the complaint constituted bad faith or reckless disregard of their duties to Kellom Heights and that, therefore, pursuant to the partnership agreement, OEDC and CRC were not entitled to indemnification or payment from Kellom Heights of their costs and attorney fees to defend this action. The appellees sought to enjoin OEDC and CRC from paying attorney fees or other defense costs from Kellom Heights' funds.

In the August 10, 2009, order, the court ordered that "any costs or fees or judgments" that were awarded to Kellom Heights and against OEDC and CRC were to be paid from the appellants' own funds and not from Kellom Heights' funds. The court stated that the purpose of the order was so that Kellom Heights would not be damaged by this action and that "[t]o do otherwise would defeat the purpose and integrity of this judgment."

In the February 12, 2010, order, the court rejected the appellants' argument that Neb. Rev. Stat. § 67-291 (Reissue 2009) of the Nebraska Uniform Limited Partnership Act required that attorney fees and expenses were to come out of the judgment rather than being awarded in addition to the judgment. The appellants argued that the statute required the appellees to take their attorney fees and costs out of the judgment awarded on their claims and remit the remainder of the judgment to Kellom Heights. The court disagreed with the appellants' interpretation of § 67-291 and concluded that, consistent with § 67-291, attorney fees and expenses awarded to the appellees were to be paid by the appellants in addition to the judgment.

*Amendment 1.*

The appellees asserted that by executing Amendment 1 to the partnership agreement in 1982, OEDC and CRC sought

to (1) double the percentage of net cashflow to which CRC was entitled; (2) give OEDC and CRC a much greater portion of the proceeds from a sale, refinancing, or liquidation; and (3) allow repayment to OEDC of the $350,000 note. The appellees asserted that provisions of the partnership agreement regarding amendments were not followed with respect to Amendment 1, including requirements for notice to and consent from the limited partners. The appellees sought a declaration that Amendment 1 was not adopted in compliance with the partnership agreement and was therefore unenforceable. The appellees further sought to enjoin OEDC and CRC from enforcing or acting in accordance with the provisions of Amendment 1.

In the August 10, 2009, order, the district court found that § 12.1 of the partnership agreement required that for an amendment to be accepted, "'it shall have been consented to by a Majority Vote of the Class A Limited Partners'" and that there was no vote on Amendment 1 by the Class A limited partners. The court rejected OEDC and CRC's argument that Amendment 1 was adopted before Kellom Heights commenced, which occurred when the certificate of limited partnership was filed with the county clerk in June 1982. The court found that letters sent to the limited partners "never fully informed the partners what the terms [of Amendment 1] were" and that the text of Amendment 1 stated it was to be adopted pursuant to § 12.1. The court reasoned that regardless of when Amendment 1 was adopted, by its own terms, its adoption required a majority vote of the limited partners. The court concluded that Amendment 1 was never adopted and that it was unenforceable.

*Attorney Fees and Costs.*

With respect to each cause of action, the appellees asked the district court to award them the costs of the action, including attorney fees pursuant to § 67-291 regarding derivative actions.

In the February 12, 2010, order, the court noted that OEDC and CRC asserted that certain of the appellees' causes of action were direct actions for the benefit of the individual

appellees rather than derivative actions for the benefit of Kellom Heights and that the appellants contended an award of attorney fees for such claims was inappropriate under § 67-291. The appellants also asserted that the actions for an accounting, for the challenge to Amendment 1, and for the appointment of Cuming Street as a general partner were not derivative actions but direct claims to benefit the appellees. The court rejected the appellants' arguments with respect to each of the specified claims.

With regard to the accounting, the court noted that under Nebraska law, partners may bring an action for an accounting as a derivative action when the purpose is to obtain the return of money to the partnership. The court concluded that the action for an accounting in this case was a derivative action, because the appellees sought an accounting in order to determine what moneys should be returned to Kellom Heights and that the appellees did not have an injury separate and distinct from the injury to Kellom Heights as a whole.

With regard to Amendment 1, the court concluded that the action was a derivative action because the purpose was to enjoin the appellants from acting in contravention of the partnership agreement by adopting the amendment in a manner not in compliance with the agreement.

With regard to the action to appoint Cuming Street as a general partner, the court concluded that the appellees sought to enforce the requirements of the partnership agreement with respect to admitting a general partner and that therefore, the action was a derivative action. The court further noted that classification of the Cuming Street claim might have been unnecessary because it had denied relief on the claim.

The district court rejected OEDC and CRC's argument that attorney fees were inappropriate because they were relying on the advice of counsel when they took the actions at issue in the appellees' claims. OEDC and CRC cited a case from Missouri for the proposition that in a derivative action, a party relying on the advice of counsel cannot be held liable for attorney fees. The court found that the Missouri case was not applicable because it involved a provision of the specific partnership agreement in that case, and the court found

no law from Nebraska or federal law to support the appellants' proposition.

The court concluded that the reasonable amount of attorney fees to be awarded the appellees was $336,614. Such amount reflected the time spent multiplied by a reasonable hourly rate.

*Prejudgment Interest.*

The appellees asserted that they were entitled to prejudgment interest under Neb. Rev. Stat. §§ 45-103.02(2) and 45-104 (Reissue 2010). In the February 12, 2010, order, the district court concluded that prejudgment interest was not recoverable under § 45-104. The court further noted that in order to recover prejudgment interest under § 45-103.02, it must be shown that there is no dispute as to (1) the amount due and (2) the plaintiff's right to recover. The court noted that in this case, a trial was required to determine both liability and damages. The court concluded that because neither requirement had been met, prejudgment interest should not be awarded under § 45-103.02.

*Later Orders.*

On March 11, 2010, the district court entered an order on the appellants' motion to confirm the final judgment and to fix a supersedeas bond. The court found that the total amount of the judgment was $1,254,842, which consisted of $770,000 for interest charged on the loan from OEDC, $60,000 for the additional supervisory fee paid to CRC, $88,228 for the interest from Kellom Heights' bank accounts paid to OEDC, and the $336,614 award of attorney fees to the appellees. The court also estimated additional costs, including approximately $7,015 of court costs and interest accruing on the judgment of approximately $41,256, and $200 of costs awarded on appeal. The court fixed a supersedeas bond at $1,303,313.

As noted above, the appellants filed an appeal following the March 11, 2010, order. The Court of Appeals dismissed the appeal because the district court had not yet ruled on fees and costs for the accounting and thus had not disposed of the entire case. On remand, the district court entered an order on

June 17 in which it stated that the accounting action and all issues in the case had been resolved and that any outstanding motions or issues that may not have been specifically resolved were overruled.

*Current Appeal.*

OEDC and CRC appealed the August 10, 2009, and February 12, March 11, and June 17, 2010, orders to the Court of Appeals. The appellees filed a cross-appeal. We granted the appellees' petition to bypass the Court of Appeals and moved the appeal to our docket.

## ASSIGNMENTS OF ERROR

In their appeal, OEDC and CRC claim, renumbered and restated, that the district court erred when it (1) rejected their estoppel and statute of limitations defenses with regard to interest charged on the $350,000 note and adoption of Amendment 1, (2) found that Amendment 1 was invalid and unenforceable, (3) found that the additional supervisory fee required approval of the partners and was not valid, (4) rejected their estoppel and statute of limitations arguments with regard to the interest income from bank accounts paid to OEDC, (5) ordered an accounting, (6) issued an advisory opinion regarding the steps necessary for Cuming Street to become a general partner, and (7) awarded attorney fees to the appellees and required that such attorney fees be paid out of OEDC's and CRC's own funds rather than out of the judgment.

In their cross-appeal, the appellees claim that the district court erred when it denied their request for prejudgment interest.

## STANDARDS OF REVIEW

[1,2] Which statute of limitations applies is a question of law. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). We reach a conclusion regarding questions of law independently of the trial court's conclusion. *Id.*

[3] The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless

clearly wrong. *Bellino v. McGrath North*, 274 Neb. 130, 738 N.W.2d 434 (2007).

[4] The interpretation 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. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[5] On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion. *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

[6] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id*.

[7] Whether prejudgment interest should be awarded is reviewed de novo on appeal. *RSUI Indemnity Co. v. Bacon*, 282 Neb. 436, 810 N.W.2d 666 (2011).

## ANALYSIS

*Statute of Limitations.*

We first address the appellants' arguments that certain claims were barred by the statute of limitations. If such claims were barred, then we need not consider other assignments of error with regard to such claims. Because there are certain common issues regarding the application of the statute of limitations to each of the claims, we discuss such common issues in this section, and in later sections, we discuss whether each of the specified claims is barred by the applicable statute of limitations.

The district court rejected the appellants' affirmative defenses regarding the statute of limitations with regard to all claims. On appeal, the appellants claim that the court erred when it rejected the statute of limitations defenses with regard to three specific claims—the claim that the $350,000 note payable and the interest paid thereon were improper, the claim that Amendment 1 was adopted in contravention of the partnership agreement, and the claim that the interest on bank accounts held by Kellom Heights was improperly taken by OEDC as

"incentive income." The appellants do not assert on appeal that any of the other claims were barred by the statute of limitations, and therefore, we consider statute of limitations issues only in connection with the specified claims.

With regard to each of the three claims that the appellants argue are barred by the statute of limitations, the appellees on appeal characterize the entire action as an action for an equitable accounting between partners. As such, they note that an action for an equitable accounting is subject to a 4-year statute of limitations, and they argue that they filed their action within such 4-year period. The appellees assert that there is no Nebraska precedent for when the statute of limitations period begins to run in an action for an accounting among the partners in a limited partnership, but they argue that the statute begins to run either at the dissolution of the partnership or at the time of a demand for an accounting. Because Kellom Heights, the partnership in this case, is not being dissolved, they argue that the statute of limitations did not begin to run until they filed this action for an accounting.

The appellees' reliance on law related to an accounting action is misplaced. We note first that Kellom Heights is not being dissolved and that therefore, this action is not one for an accounting in connection with the dissolution of a partnership. Although on appeal, the appellees characterize the entire action as one for an equitable accounting, the appellees brought the action as a derivative action on behalf of Kellom Heights against the appellants.

Neb. Rev. Stat. § 67-288 (Reissue 2009), of the Nebraska Uniform Limited Partnership Act, provides:

> A limited partner or an assignee of a limited partner may bring an action in the name of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

Pursuant to Neb. Rev. Stat. § 67-290 (Reissue 2009), "In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort."

In the operative second amended complaint in this case, the appellees alleged, "This is a derivative action brought by various Class A Limited Partners of Kellom Heights . . . on behalf of [Kellom Heights]." The appellees further alleged in the second amended complaint:

> Plaintiffs have not made a demand upon General Partner, Defendant CRC, to bring this derivative action on behalf of [Kellom Heights], as such a demand would be futile, since Defendant CRC is a named defendant in this action, has participated in or has benefited from the actions alleged in this Amended Complaint and previously has refused the reasonable demands of the Class A Limited Partners.

It is therefore clear that the appellees fashioned this action as a derivative action on behalf of Kellom Heights rather than an action they brought as individual partners against the partnership or against other partners. Therefore, this is not an action under Neb. Rev. Stat. § 67-425(2) (Reissue 2009), which provides, "A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business . . . ."

Instead, this is an action brought by the appellees under § 67-425(1), which provides, "A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership." The appellees brought the action as a derivative action under the authority of § 67-288. In each claim, the appellees assert that CRC, the general partner, and OEDC, a limited partner, breached the partnership agreement or violated a duty to Kellom Heights and caused harm to Kellom Heights in some respect. Although one of the claims set forth by the appellees is characterized as "an accounting," see § 67-425(2), in substance, the appellees asserted that as general partner, CRC violated its fiduciary duty to provide a full and complete accounting of Kellom Heights' financial transactions. This is an action "against a partner." See § 67-425(1).

We note the appellants raise no statute of limitations issue with regard to the claim that CRC violated its duty to provide an accounting, and we need not determine the applicable

statute of limitations for that claim. But the claims for which the appellants raised statute of limitations issues are also claims brought under § 67-425(1) asserting breaches of the partnership agreement or fiduciary duties. As the appellants note, § 67-425(3) provides in part, "The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law." We read this to mean that the accrual of and time limitation for an action brought under § 67-425(1) is not set by the statute itself but instead is to be determined by reference to other law, depending on the type of claim made by the partnership against the partner. With this understanding, we can analyze the proper statute of limitations applicable to each claim at issue.

*Statute of Limitations: Note Payable and Interest Thereon.*

OEDC and CRC first claim that the district court erred when it rejected their statute of limitations defense as to the claims regarding the $350,000 promissory note and interest paid thereon. We conclude that the limited partners had notice of the claims and that therefore, the statute of limitations ran before they filed this action. The district court's ruling to the contrary was error, and in particular, its award of $770,000 plus interest to the appellees is reversed and set aside.

The appellees' claims with respect to the note payable were, inter alia, that OEDC mischaracterized the 1982 transfer of $350,000 from OEDC to Kellom Heights as a loan rather than a grant and that the partnership agreement prohibited the payment of interest from Kellom Heights to OEDC. Which statute of limitations applies is a question of law. *Mandolfo v. Mandolfo*, 281 Neb. 443, 796 N.W.2d 603 (2011). We read these claims as claims for fraud to which the 4-year statute of limitations under Neb. Rev. Stat. § 25-207(4) (Reissue 2008) applies.

[8] In *Bowling Assocs. Ltd. v. Kerrey*, 252 Neb. 458, 562 N.W.2d 714 (1997), limited partners in 1993 brought a derivative action on behalf of the partnership against the general partners alleging that in 1983, the general partners had received a $25,000 payment from the partnership that was

not authorized by the partnership agreement. We concluded that the claim was an action for relief on the ground of fraud subject to § 25-207(4), which provides that such action "can only be brought within four years" but that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud." We described the time of accrual of such action to be when "there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Bowling Assocs. Ltd.*, 252 Neb. at 461, 562 N.W.2d at 717. We concluded in *Bowling Assocs. Ltd.* that copies of the 1983 financial statements that were received by the limited partners in 1984 and that clearly indicated the payment of the $25,000 "would have put a person of ordinary intelligence and prudence on inquiry notice which, if pursued, would lead to discovery of a potential cause of action." *Id*. We further noted that the "appellants received no new information with regard to the payment since receiving the financial statements for 1983" and that the appellants "failed to demonstrate why what was sufficient to put them on notice in 1992 was insufficient to put them on notice in 1984." *Id.*

Similarly, in the present case, we conclude that the claims related to the note payable and the interest thereon were time barred. The note and interest were reported in the annual financial statements provided to the limited partners between 1982 and 1984. The district court noted in the August 10, 2009, order that the financial statements for those years disclosed that OEDC was a limited partner and that the note payable bore interest at 10 percent. As discussed below, the district court erred in assessing the legal significance of these facts.

The district court did not find that the limited partners did not have knowledge of the note payable and the fact that it bore interest. Instead, the court stated that OEDC and CRC had a fiduciary duty to advise the other partners that the act of charging interest on the note violated the partnership agreement. We disagree that such notification was necessary in order for these claims to accrue. Instead, a cause of action

for fraud accrues under § 25-207(4) when "there has been a discovery of the facts constituting the fraud, or facts sufficient to put a person of ordinary intelligence and prudence on an inquiry which, if pursued, would lead to such discovery." *Bowling Assocs. Ltd*, 252 Neb. at 461, 562 N.W.2d at 717. The necessary facts in this instance were that a note payable to OEDC had been issued, that OEDC was a partner, and that the note bore interest. Such facts would be enough to lead to a discovery that the note was in violation of a prohibition on interest-bearing notes; the limited partners did not need to be specifically advised that these facts constituted a violation, as long as pursuit of such facts would lead to the discovery of fraud.

The appellees argue that there was not notice because the appellants could not prove that all the limited partners received the financial statements from 1982 through 1984. Because this action was brought as a derivative action on behalf of Kellom Heights, the relevant issue is whether it had notice of the transactions. And because this action asserts fraud committed by OEDC and CRC, their knowledge is not relevant as knowledge of Kellom Heights.

The question before us is whether knowledge by some, but not necessarily all, limited partners is knowledge by the partnership. We look to the Nebraska Uniform Limited Partnership Act, Neb. Rev. Stat. § 67-233 et seq. (Reissue 2009), as enacted, and we note that the uniform act has been revised since Nebraska's version was enacted but that such revisions, not having been enacted in Nebraska, do not control our analysis. The Nebraska Uniform Limited Partnership Act does not contain a provision regarding whether notice to limited partners is notice to the partnership. This differs from the Uniform Limited Partnership Act (2001), not adopted by Nebraska, which provides that a general partner's knowledge, notice, or receipt of a notification of a fact is effective as to the limited partnership, but that a limited partner's notice is not. See Unif. Limited Partnership Act (2001) § 103(h), 6A U.L.A. 363-64 (2008). We note that § 67-294 of the Nebraska Uniform Limited Partnership Act as enacted in Nebraska provides, "In any case not provided for in the Nebraska Uniform Limited Partnership Act, the Uniform

Partnership Act of 1998 shall govern." We therefore rely on the Uniform Partnership Act of 1998, Neb. Rev. Stat. § 67-401 et seq. (Reissue 2009), for our analysis.

With regard to notice and knowledge of a partnership, § 67-403(6) of the Uniform Partnership Act of 1998 provides:

> A partner's knowledge, notice, or receipt of a notification of a fact relating to the partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Because the Nebraska Uniform Limited Partnership Act does not specifically address whether notice to a general or limited partner is effective as to the partnership, pursuant to § 67-294, we look to § 67-403(6) of the Uniform Partnership Act of 1998 and conclude that it applies to this limited partnership issue. Under § 67-403(6), notice to any partner is effective as notice to the partnership. Whether this principle is applicable in other contexts, given the statutes adopted by the Legislature, we conclude that it applies to this notice issue in a derivative action brought by limited partners on behalf of the partnership against a general partner. Although the appellees point out that some limited partners claim to have not seen the 1982 through 1984 financial statements, the appellants demonstrated that at least some of the limited partners had received the financial statements, and thus, applying § 67-403(6) of the Uniform Partnership Act of 1998 as we must, the appellants established that there was notice on some limited partners, and notice to any partner was effectively notice to Kellom Heights.

We conclude that the facts known to some of the limited partners in 1982 through 1984 would have put them on inquiry to a potential fraud. The district court therefore should have found in favor of the appellants on their affirmative defense based on the statute of limitations regarding payment of interest on the note payable. The district court should have dismissed these claims as time barred. We therefore reverse that portion of the August 10, 2009, order in which the court concluded that payment of interest on the note payable was in violation of the partnership agreement and that therefore, the

$770,000 OEDC or CRC received from Kellom Heights as interest should be repaid with additional interest. We set aside this award.

In view of our disposition of this issue, we need not consider the appellants' other assignments of error and arguments with regard to the note payable and the interest paid thereon.

*Statute of Limitations: Validity and Enforceability of Amendment 1.*

OEDC and CRC next claim that the district court erred when it rejected their statute of limitations defense to the appellees' claim that Amendment 1 was adopted in contravention of the partnership agreement. We conclude that this claim was time barred and that the district court's ruling to the contrary was error.

Like the claims related to the note payable and interest thereon just discussed, these are essentially claims of fraud to which the 4-year statute of limitations under § 25-207(4) applies. See *Bowling Assocs. Ltd. v. Kerrey*, 252 Neb. 458, 562 N.W.2d 714 (1997). As explained below, the limited partners learned of the purported adoption of Amendment 1 and the changes made thereby at the latest in 1982. The appellees therefore filed their claim relative to Amendment 1 long after the statute had run on it.

In its August 10, 2009, order, the court noted that the limited partners were advised of Amendment 1 in letters sent October 7, 1981, and April 28, 1982. The April 28, 1982, letter indicated that Amendment 1 was enclosed with the letter and was sent to all limited partners. The appellants argue that the court erred when it determined that the October 1981 letter did not provide sufficient notice of the proposed changes to Class A limited partner subscribers and when it further found that a letter to subscribers enclosing the entire text of Amendment 1 in April 1982 "advised less [about Amendment 1] than the letter of October 7, 1981." Finally, with respect to Amendment 1, the appellants contend that the court erred in failing to properly consider the appellants' proof of yet a third notice to Class A limited partners of the changes made by Amendment 1 in May 1982, when a copy of

the certificate of limited partnership reflecting those changes was mailed to the limited partners.

Similar to the claims regarding the note payable, the appellants showed that in 1982, the limited partners as a group were informed that Amendment 1 had been adopted and of the contents of Amendment 1. Upon receipt of Amendment 1 as adopted, the limited partners would have known whether or not they voted on Amendment 1. Therefore, to the extent the appellees claim that Amendment 1 could not be adopted without their approval, they had notice of the facts necessary which with due inquiry would have advised them of a cause of action.

We conclude that the cause of action with regard to Amendment 1 was time barred. The district court should have dismissed the cause of action related to the adoption of Amendment 1 as time barred. We therefore reverse that portion of the August 10, 2009, order in which the district court found that Amendment 1 was not adopted and concluded that it was unenforceable. In view of our disposition of this issue, we need not consider the other arguments with regard to Amendment 1.

*Statute of Limitations: Award of Interest From Bank Accounts.*

OEDC and CRC next claim that the district court erred when it rejected their statute of limitations and estoppel defenses to the appellees' claim regarding interest on reserves that was taken by OEDC as "incentive income." We conclude that the district court did not err when it rejected these defenses and directed the appellants to return such interest.

We reject the appellants' argument that this claim was time barred. Similar to the claims regarding the note payable and Amendment 1, these claims are essentially claims that the appellants committed a fraud. The claim was therefore subject to the 4-year statute of limitations. See *Bowling Assocs. Ltd., supra*. The statute does not begin until the fraud was discovered or should have been discovered. *Id.*

The appellants argue that the decision to pay account interest to OEDC occurred over 20 years prior to trial and ceased

in 2001, well before this dispute arose. We conclude, however, that because the limited partners did not receive financial information during the period the payments were made, they did not have notice of the claim until they received financial information in connection with this action. Therefore, the statute of limitations did not run before they filed this action and the district court did not err in so ruling.

The district court found that from 1986 through 2001, OEDC took interest that had been earned on funds held by Kellom Heights in various bank accounts. The court concluded that the partnership agreement did not authorize OEDC to take the interest, and the court therefore ordered OEDC to return the $88,228 that had been taken from 1986 through 2001 with additional interest. In contrast to the appellees' claims regarding the $350,000 note payable and the interest paid thereon, for which the limited partners received financial statements from 1982 through 1984 that gave them notice of the note and the interest being charged thereon, the appellants provided no evidence to support their defense that the limited partners were given financial statements between 1986 and 2001 that would have informed them that OEDC was taking the interest paid on accounts as "incentive income." The record indicates that the limited partners did not learn of the payments until after the present action had begun and the court had ordered OEDC and CRC to provide financial information to the limited partners. Because the limited partners did not have knowledge of the transactions and OEDC and CRC's knowledge is not effective as to Kellom Heights because they are alleged to have been defrauding Kellom Heights, the claim did not accrue until the limited partners learned of the transactions in connection with this action. The claim therefore was not time barred.

[9] We also reject the appellants' assertion that this claim was barred by equitable estoppel. The appellants cite *Baye v. Airlite Plastics*, 260 Neb. 385, 390, 618 N.W.2d 145, 150 (2000), in which we stated:

> Under Nebraska law, the doctrine of equitable estoppel is frequently applied to transactions in which it is found that it would be unconscionable to permit a person to

> maintain a position inconsistent with one in which he or she has acquiesced or of which he or she has accepted any benefit. . . .
>
> The acceptance of any benefit from a transaction or contract, with knowledge or notice of the facts and rights, will create an estoppel.

(Citations omitted.) Equitable estoppel is not applicable in this case, because as noted above, the limited partners did not have knowledge of the transactions and therefore could not have acquiesced, nor did the limited partners benefit from the appellants' taking interest from Kellom Heights.

The appellants make no other assignments of error with regard to this claim. We therefore affirm that portion of the August 10, 2009, order in which the court concluded that interest taken from Kellom Heights from 1986 through 2001 totaling $88,228 should be returned to Kellom Heights with additional interest.

*Validity of Additional Supervisory Fee.*

OEDC and CRC next claim that the district court erred when it concluded that CRC improperly increased its annual supervisory fee by $12,000 to a total of $36,000. They argue that the partnership agreement did not prohibit the increase, that the disclosure in the PPM of initial fees totaling $24,000 per year was not a contractual limitation of fees, and that the increase was not a breach of CRC's fiduciary duty because the increase was fair. We conclude that the court erred when it concluded that the increased fee breached the partnership agreement and awarded $60,000. We reverse and set aside this award; however, we remand the cause to the district court to determine whether the increase breached a fiduciary duty that CRC owed to Kellom Heights.

As the court noted, § 5.2 of the PPM stated that the general partner would receive a fee of $12,000 per year for providing "overall supervision services" and that to the extent the general partner began performing the function of Kellom Heights' manager in future years, the general partner would be entitled to compensation for those services in an amount not to exceed the amount then being paid for such services. Section 5.3 of the

PPM stated that the manager of Kellom Heights would be paid a fee of $12,000 per year. As general partner, CRC received the $12,000 annual supervisory fee; after the first year of the formation of Kellom Heights, CRC took over the duties of the individual who had originally served as Kellom Heights' manager and began receiving the $12,000 annual management fee. The court did not find, and the appellees did not assert, that it was improper for CRC to receive $24,000 per year for management and supervision.

The court noted, however, that Kellom Heights' financial statements show that beginning in 2001, Kellom Heights paid CRC a "Partnership management fee" of $36,000 per year. The court concluded that § 5.2 of the PPM limited the management fee to the amount being paid at the time of the PPM and that the fee was increased by $12,000 in 2001 without following proper procedures under the partnership agreement and without proper notice sent to the partners.

OEDC and CRC argue that the partnership agreement does not bar an increase in the supervisory fees. They note that § 6.1 of the partnership agreement provides that except to the extent that the consent of the limited partners is required under the agreement, the general partner has "full, complete and exclusive discretion to manage and control the business of [Kellom Heights]." They note further that § 67-239 of the Nebraska Uniform Limited Partnership Act provides that a partner may "transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner." OEDC and CRC argue that the PPM is not a contractual obligation and therefore does not limit the amount of supervisory fees that can be paid. The appellants note that the PPM itself provides and warns that statements in the PPM "in no way modify or amend the Partnership Agreement." The appellants further argue that the partnership agreement does not require the consent of limited partners to determine a management fee and that pursuant to § 67-239, Kellom Heights could determine a management fee to be paid to CRC as it would to any other person who was not a partner. They further argue that the increased fee was reasonable and not a breach

of fiduciary duty because the increase came after 20 years and was not in excess of inflation.

The appellees argue in response that because the partnership agreement does not specifically address the payment of supervisory or management fees, the PPM controls the issue and limits such fees to the total of $24,000. They also assert that the increased fee was a self-dealing transaction and that pursuant to § 67-404(2)(c)(ii) of the Uniform Partnership Act of 1998, "a specific act or transaction that otherwise would violate the duty of loyalty" may be authorized by the partners "after full disclosure of all material facts." They argue that the self-dealing transaction was not authorized or ratified by the partners after full disclosure.

Interpretation of a contract is a question of law. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011). We conclude that the district court erred when it concluded by reference to the PPM that the increase in supervisory fees was prohibited by the partnership agreement. By its terms, the PPM was not part of the partnership agreement; instead, it provided disclosures to potential investors regarding the future operation of Kellom Heights and referred potential investors to the partnership agreement. In any event, the quoted sections of the PPM disclosed the payment of supervisory fees to the general partner and the possibility that management fees would be paid to the general partner at the rate currently paid to another individual if the general partner subsequently took over such duties. The court and the appellees do not cite any provision of the actual partnership agreement that either limited the fees that could be paid or required the approval of the limited partners before the fees paid to the general partner could be increased.

[10] Although we conclude that the court erred when it found the increase violated the partnership agreement, we note that because of such resolution, the district court did not consider whether the amount of the increase nevertheless violated a fiduciary duty that CRC had to Kellom Heights. OEDC and CRC argue to this court that the increase did not breach a fiduciary duty because it was fair in light of inflation. However, because the district court did not reach such issue, we will not

determine this fairness issue on appeal. An issue not passed on by the trial court is not appropriate for consideration on appeal. See *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011). Therefore, we determine that the district court's conclusion that the fee increase was improper under the partnership agreement by reference to the PPM was error and reverse the $60,000 award. We remand the cause to the district court to determine whether the fee increase breached a fiduciary duty to Kellom Heights.

*Accounting.*

OEDC and CRC next claim that the district court erred when it granted the appellees' request for an accounting because OEDC and CRC had met such demand and had produced audited financial statements for every year of Kellom Heights' existence, as well as other detailed financial information of Kellom Heights, and therefore had satisfied the appellees' demand for an accounting. We conclude that the court did not err when it ordered the appellants to comply with their duty to provide financial information to the partners.

The appellees claimed that CRC had a fiduciary duty to provide financial information regarding Kellom Heights to the limited partners and that it had failed to provide such information. They requested an accounting for "all assets, income and expenditures of [Kellom Heights], and particularly for all profits and monies received, disbursed and retained by [Kellom Heights] since [its] formation." The district court granted the request and ordered the appellants to "make available to the Plaintiffs all books and records of [Kellom Heights] since [its] formation."

OEDC and CRC claim that it was improper for the court to order an accounting. CRC asserts that it had provided all the information the appellees demanded and that the appellees did not meet the requirements for an additional accounting.

We conclude that it was proper for the court to order the appellants to provide financial information to the appellees. As discussed earlier, this action was not in essence an action for an accounting in the sense such term is understood in connection with the dissolution of a partnership.

Instead, the appellees brought a derivative action on behalf of Kellom Heights in which they asserted that the appellants had breached certain fiduciary duties. Among those was a duty to provide financial information regarding Kellom Heights. The court found that CRC had failed to provide such information over the years and therefore ordered the appellants to comply with their duties and make the information available to the limited partners. OEDC and CRC make no argument that the limited partners were not entitled to the information. Furthermore, to the extent the appellants assert that they have already provided the information, there is no prejudice to the appellants and there would be nothing to be gained from reversing the order.

We conclude that the district court did not err when it ordered the appellants to make financial information regarding Kellom Heights available to the limited partners, and we therefore affirm such portion of the order.

*Steps for Cuming Street to Become a General Partner.*

OEDC and CRC next claim that the district court erred when it issued an advisory opinion concerning the status of Cuming Street's efforts to become an additional general partner. We conclude that because the court denied the appellees' claims seeking an order directing Cuming Street to be appointed as a general partner and that CRC be enjoined from interfering with Cuming Street's exercise of general partner powers, the court should not have opined on what further steps Cuming Street needed to take, and we therefore vacate that portion of the order addressing such additional steps.

The appellees sought a declaration that admission of Cuming Street as a general partner was in conformity with law and with the partnership agreement. They also sought to enjoin CRC from refusing to complete additional steps necessary to admit Cuming Street as a general partner and to enjoin CRC from interfering with Cuming Street's exercise of its rights and powers as a general partner. The district court ultimately denied the appellees' claims for declaratory and injunctive relief "at this time," because it concluded that although there

had been compliance with most of the requirements, there were additional steps that needed to be completed for Cuming Street to become a general partner.

We conclude that portions of the court's order with respect to Cuming Street were conditional orders. The record indicates that steps were being taken to make Cuming Street a general partner but that not all steps had been completed. For that reason, the court denied the appellees' claims for declaratory and injunctive relief. However, the court went further by stating that when certain additional steps were taken, Cuming Street would become a general partner.

[11-13] A "judgment" is a court's final consideration and determination of the respective rights and obligations of the parties to an action as those rights and obligations presently exist. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). Thus, we have held that orders purporting to be final judgments, but that are dependent upon the occurrence of uncertain future events, do not operate as "judgments" and are wholly ineffective and void as such. *Id*. These "conditional judgments" are not final determinations of the rights and obligations of the parties as they presently exist, but, rather, look to the future in an attempt to judge the unknown. *Id*. We have held that a conditional judgment is wholly void because it does not "perform in praesenti" and leaves to speculation and conjecture what its final effect may be. See *id*. While conditional orders will not automatically become final judgments upon the occurrence of the specified conditions, they can operate in conjunction with a further consideration of the court as to whether the conditions have been met, at which time a final judgment may be made. *Id*.

In the present case, the district court's denial of declaratory and injunctive relief was the judgment based on conditions as they then existed. The court's statement that Cuming Street would become a general partner upon the completion of outlined additional steps was a conditional judgment because it was not based on conditions that presently existed but looked to future events. To the extent the court's order judged future events, it is void. The court cannot make such determination until the steps have been completed.

We therefore affirm the portion of the August 10, 2009, order in which the court denied the appellees' claims for declaratory and injunctive relief regarding Cuming Street's becoming a general partner, but we strike that portion of the August 10 order in which the court opined that Cuming Street would become an additional general partner when the specified steps were taken.

*Attorney Fees.*

OEDC and CRC finally claim that the district court erred when it granted the appellees' requests for attorney fees. They argue that

> (1) under the statute by which Appellees claimed a right to fees, the fees should have been paid from the common fund and not by Appellants as a separate award; (2) the court failed to reduce the fee award for claims on which Appellees did not prevail, for claims that were individual rather than derivative, and for claims challenging actions the General Partner took on advice of counsel and for which it is entitled to immunity under the Partnership Agreement.

Brief for appellants at 22. Because of our disposition of other assignments of error on appeal, we reverse the district court's award of attorney fees and remand the cause for a new award of attorney fees. However, we comment on certain issues raised by OEDC and CRC.

[14] Because we reverse the district court's rulings on certain claims and are remanding for further proceedings on certain claims, we reverse the award of attorney fees and remand the cause to the district court to determine appropriate attorney fees considering the claims on which the appellees are ultimately successful. However, we address certain issues with regard to attorney fees, because such issues will likely recur on remand. 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. *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

The present action was a derivative action brought by the appellees on behalf of Kellom Heights. Section 67-291 provides:

> If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him or her to remit to the limited partnership the remainder of those proceeds received by him or her.

The statute authorizes an award of reasonable attorney fees when the derivative action is successful in whole or in part. The appellees' derivative action has been successful at least in part, and therefore reasonable attorney fees may be awarded to the appellees reasonably commensurate with their success.

OEDC and CRC argue that certain claims were not derivative and that therefore, no fees should be awarded with respect to such claims. They specifically argue that the claims regarding Amendment 1, the appointment of Cuming Street, and the request for an accounting were not derivative claims and that therefore, fees should not be awarded in connection with such claims. We note, however, that whether or not the claims with regard to Amendment 1 or Cuming Street were derivative, the appellees were not ultimately successful on either claim. As we decided above, the Amendment 1 claim was time barred. Also, the appellees' claims with regard to the appointment of Cuming Street were denied by the district court. Therefore, the court should not on remand award attorney fees with respect to those claims. With regard to the accounting, as noted above, this request was in fact a claim that CRC failed in its fiduciary duty to report financial information to the limited partners. This was a proper derivative claim, and the appellees were successful; therefore, they should be awarded attorney fees associated with this claim.

OEDC and CRC also argue that no attorney fees should be awarded with regard to three claims: Amendment 1, interest on the note payable, and admission of Cuming Street, because they took the disputed actions with respect to those claims on the advice of counsel. As noted above, the appellees were not ultimately successful on Amendment 1 because we found it time barred. The same is true with regard to interest on the note payable. In addition, as noted above, the district court denied

the relief the appellees requested with regard to the appointment of Cuming Street. Therefore, regardless of whether OEDC and CRC relied on the advice of counsel and regardless of whether an advice of counsel exception would apply, the appellees should not be awarded attorney fees relative to those claims, because they were not successful.

Finally, we agree with the district court's determination that the attorney fees should be awarded in addition to the judgment rather than being taken out of the judgment. OEDC and CRC argue that the language in § 67-291 stating that "the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him or her to remit to the limited partnership the remainder of those proceeds received by him or her" means that the appellees must take their attorney fees out of the judgment and then remit the remainder to Kellom Heights. We disagree with this interpretation.

[15] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id*. We read § 67-291 as providing that the court may award expenses, including attorney fees, as a separate component of the judgment. The statute then requires that in a derivative action, the plaintiff may retain the portion of the judgment awarded as expenses, but any additional proceeds of the judgment that the plaintiff receives must be remitted to the partnership.

We therefore agree with the district court's conclusion that attorney fees are properly awarded as a separate item within the overall judgment. However, we reverse and set aside the award of attorney fees in this case and remand the cause for a new order regarding an appropriate amount of fees in light of the action taken on remand pursuant to the remainder of this opinion.

*Cross-Appeal: Prejudgment Interest.*

The appellees claim in their cross-appeal that the district court erred when it denied their request for prejudgment interest. We conclude that the court did not err when it denied prejudgment interest.

Due to our resolution of the assignments of error on appeal, the only remaining claims on which the appellees could potentially recover prejudgment interest are the judgment of $88,228 for interest taken from Kellom Heights from 1986 through 2001, which judgment we affirmed, and the potential for a judgment of $60,000 for increased supervisory fees in the event that on remand, the court finds that the increased fees were not proper. As noted above, the judgment for $770,000 of interest on the note payable was reversed and set aside because the claim was time barred. Therefore, we consider whether the appellees are entitled to prejudgment interest on the affirmed $88,228 judgment for interest taken by the appellants from Kellom Heights from bank accounts and on the potential judgment of $60,000 for additional supervisory fees.

[16] The appellees argued to the district court that they should be awarded prejudgment interest under both § 45-103.02(2) and § 45-104. Interpretation of a statute is a question of law. *Downey, supra*. Section § 45-103.02(2) provides that prejudgment interest "shall accrue on the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment." Prejudgment interest under § 45-103.02 is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to either the plaintiff's right to recover or the amount of such recovery. *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010). A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both. *Id*. In denying prejudgment interest under § 45-103.02(2), the district court noted that in this case, a trial was required to determine both liability and damages. The court concluded that neither requirement of § 45-103.02 had been met and that prejudgment interest should not be awarded.

With regard to both the claim for the interest taken and the claim for increased supervisory fee, although there was no serious dispute as to the amount at issue, there was a reasonable controversy with respect to liability, and accordingly, we conclude that the district court did not err in refusing to award prejudgment interest under § 45-103.02.

Section 45-104 provides:

> Unless otherwise agreed, interest shall be allowed at the rate of twelve percent per annum on money due on any instrument in writing, or on settlement of the account from the day the balance shall be agreed upon, on money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof, and on money loaned or due and withheld by unreasonable delay of payment. Unless otherwise agreed or provided by law, each charge with respect to unsettled accounts between parties shall bear interest from the date of billing unless paid within thirty days from the date of billing.

The district court concluded that prejudgment interest was not recoverable under § 45-104.

Section 45-104 applies to four types of judgments: (1) money due on any instrument in writing; (2) settlement of the account from the day the balance shall be agreed upon; (3) money received to the use of another and retained without the owner's consent, express or implied, from the receipt thereof; and (4) money loaned or due and withheld by unreasonable delay of payment. In this case, the claims for interest taken and for additional supervisory fees are not claims related to an instrument in writing, settlement of an account, or money loaned and due and withheld by unreasonable delay. However, the appellees argue that they are claims related to "money received to the use of another and retained without the owner's consent" under § 45-104.

With regard to the claims of interest taken and of additional supervisory fees, the appellees claimed that OEDC and/or CRC fraudulently took Kellom Heights' money for their own use and retained such money without Kellom Heights' consent. We conclude that these claims are not within the operation of § 45-104. In this case, the appellees did not allege that the appellants received money on behalf of Kellom Heights and diverted it and retained it for themselves; instead, they alleged that the appellants fraudulently took money that was already in the hands of Kellom Heights. We therefore conclude that the

district court did not err when it denied the appellees' request for prejudgment interest under § 45-104.

## CONCLUSION

Regarding the appellants' statute of limitations defenses, we conclude that the district court erred when it rejected the appellants' statute of limitations defenses as to the claims regarding the note payable and the interest thereon and the claim regarding Amendment 1. We therefore reverse the court's rulings on these claims and remand the cause with directions to set aside the judgment on these claims and to dismiss these claims. However, we affirm the court's judgment denying the statute of limitations and other defenses to the claim regarding interest on bank accounts and we affirm the court's judgment on that claim.

With regard to the claim concerning additional supervisory fees, we conclude that the court erred when it referred to the PPM in its disposition of this claim and erred when it concluded that the increase was specifically prohibited by the partnership agreement. We therefore reverse its ruling that the additional supervisory fees were not permitted and set aside the judgment on this claim. Because of its disposition of the claim, the court did not consider whether the increase breached a fiduciary duty that CRC had to Kellom Heights, and we therefore remand the cause to the district court to consider that issue.

We affirm the district court's order directing the appellants to make financial information regarding Kellom Heights available to limited partners. We also affirm the portion of the August 10, 2009, order in which the court denied the appellees' claims regarding making Cuming Street a general partner, but we strike that portion of the order in which the court opined that Cuming Street would become an additional general partner when specified steps were taken.

We affirm the district court's determination that attorney fees were properly awarded to the appellees separate from the judgment, but we reverse and set aside the award of attorney fees and remand the cause for a new order regarding an appropriate amount of fees in light of the remainder of this opinion.

Finally, concerning the appellees' cross-appeal, we conclude that the court did not err when it denied the appellees' request for prejudgment interest, and we affirm such denial.

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

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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## CITY OF WAVERLY, NEBRASKA, APPELLEE, V. RICHARD M. HEDRICK, APPELLANT.

810 N.W.2d 706

Filed March 9, 2012. No. S-11-333.

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. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
3. **Courts: Eminent Domain.** The powers conferred upon the county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.
4. **Eminent Domain: Words and Phrases: Appeal and Error.** Only when the appraiser's report is appealed to the district court do condemnation proceedings become judicial.
5. **Eminent Domain: Pleadings: Statutes.** The statutes relating to condemnation proceedings contemplate the filing of pleadings and the framing of any issues—other than damages to the condemnee—for the first time in the judicial proceeding in district court.
6. **Judgments: Evidence.** Determination of questions of fact upon evidence, or the exercise of discretion in ascertaining or fixing an amount to be allowed, generally involves judicial rather than ministerial acts.
7. **Eminent Domain: Liens: Interest.** The existence and amount of a lien, the amount of accrued interest, and whether there should be a setoff from the condemnation award involve judicial, rather than ministerial, determinations.
8. **Eminent Domain: Courts: Jurisdiction.** Because the eminent domain statutes do not confer upon county courts the power to hear motions for setoff, they lack jurisdiction to do so.
9. **Eminent Domain: Courts: Jurisdiction: Appeal and Error.** In condemnation proceedings, the district court has original as well as appellate jurisdiction over

the subject matter and can determine matters beyond the question of the valuation of the land or interests taken.

10. **Courts: Equity: Judgments.** District courts have the inherent power in the administration of justice and, governed by the principles of equity, to order setoff from an award or judgment.
11. **Eminent Domain.** The general eminent domain statutes prescribe the manner and method by which condemnors may exercise the power of eminent domain.
12. **Eminent Domain: Parties.** It is generally true that failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party.
13. **Eminent Domain.** A condemnor cannot condemn its own property interest.
14. **Eminent Domain: Liens.** Condemnation money stands in place of the land, and belongs to a lienholder, to the extent of the value of the lien.

Appeal from the District Court for Lancaster County, Robert R. Otte, Judge, on appeal thereto from the County Court for Lancaster County, Susan I. Strong, Judge. Judgment vacated in part and in part reversed, and cause remanded with directions.

Donald J. Pepperl, P.C., L.L.O., for appellant.

Mark A. Fahleson and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellee.

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

McCormack, J.

## NATURE OF CASE

This case concerns a city's preexisting lien on land eventually condemned and whether the city can file a motion in either county or district court for setoff of the lien amount from the condemnation award. The landowner argues that the city must condemn the lien, as well as the subject property, in order to claim the land in condemnation proceedings. The landowner also argues that it was error for the county court in this case to grant such a setoff, because county courts lack jurisdiction to make judicial determinations in condemnation proceedings.

## BACKGROUND

The City of Waverly, Nebraska (City), as condemnor, filed a petition in the Lancaster County Court for appointment of appraisers to assess damages that the condemnee, Richard M. Hedrick, would sustain when the City condemned a fee simple interest in 5.504 acres of Hedrick's land. The petition stated that the site was selected for construction of a park, public grounds, public emergency services buildings, a municipal maintenance shop, and other public buildings near several recently approved residential developments. The petition stated that the City was unable to reach an agreement with Hedrick concerning acquisition of the property. The City sent notice to Hedrick, and the county court issued an order appointing three appraisers.

On December 14, 2005, the appraisers returned a "fee taking" valuation of $86,000. This valuation was filed in county court as a "Return of Appraisers" and signed by a county court judge. In its assessment of damages, the return did not consider any outstanding liens on the property.

On December 21, 2005, the City filed a motion in the county court requesting that the county court deduct a preexisting statutory lien against the property from the appraisers' return. According to the motion, the City had a lien which was filed with the Lancaster County register of deeds in 2004. The lien was in the amount of $8,500 and represented the cost the City incurred abating a nuisance on Hedrick's property as of March 27, 1997. Hedrick never paid the lien, and it incurred interest at the rate of 14 percent per annum, pursuant to Neb. Rev. Stat. § 45-104.01 (Reissue 2010). The City alleged that as of December 14, 2005, the lien amount, including interest, was $18,874.12.

The county court had not yet ruled on the City's December 21, 2005, setoff motion when, on December 29, Hedrick filed a notice of appeal to the district court on the ground that the $86,000 valuation was inadequate. The City filed another motion in district court to set off the statutory lien, and Hedrick filed a motion to deny the setoff.

On March 26, 2010, the district court ordered that any setoff would be made by the county court following a jury trial in the district court to determine the proper valuation of Hedrick's

land. The district court explained that the county court would address the City's setoff motion in the course of disbursing the condemnation proceeds. The district court accordingly found that Hedrick's motion to deny the setoff was moot.

The jury valued the taking at $117,400, and the district court entered judgment in favor of Hedrick in that amount. On May 4, 2010, the district court further awarded Hedrick interest on the condemnation award in the amount of $37,092.07. The district court then remanded the matter to the county court to determine what amount of the condemnation award, if any, should be reduced to account for the City's lien interest.

At hearings before the county court, the City introduced an affidavit of the city administrator, who testified as to the events leading up to the City's lien against Hedrick. The administrator further testified that as of June 4, 2010, the amount of the lien plus interest equaled $48,029.87. The lien, as recorded, was attached to the affidavit. The City entered into evidence numerous additional exhibits pertaining to the validity of the 1997 lien.

Hedrick argued that Nebraska law did not allow setoff. Hedrick pointed out that under Neb. Rev. Stat. § 77-209 (Reissue 2009), a lien is on the real estate and is not a personal liability. According to Hedrick, the City should have listed itself as a condemnee in order to condemn the lien and make it part of the appraisers' valuation. Otherwise, the City's only remedy was to bring a separate foreclosure action on the lien. The City responded that condemnation money stands in place of the land and belongs to the lienholder to the extent of the value of the lien. The City also pointed out that any right to foreclose after condemnation was illusory because it could not foreclose against itself as the owner of both the property and the lien.

On September 20, 2010, the county court granted the City's motion for setoff. The court concluded that the City did not have to name itself as a party condemnee in order to have its interest in the lien on the condemned property ascertained. The court set off the condemnation award by $24,547.07. That amount represented the original $8,500 lien plus $16,047.07 in interest pursuant to § 45-104.01.

Hedrick appealed the September 20, 2010, setoff order to the district court. In addition to the arguments Hedrick presented in county court, Hedrick asserted that the county court lacked jurisdiction to grant the City's setoff motion because a county court has no jurisdictional authority to hear motions or enter orders. The district court rejected Hedrick's arguments and affirmed the order of the county court.

## ASSIGNMENTS OF ERROR

Hedrick asserts, summarized and restated, that the district court erred in failing to conclude that (1) the county court lacked subject matter jurisdiction to hear the City's motion for setoff and (2) the City waived recovery of its lien interest by failing to condemn the lien as part of the condemnation proceedings.

## STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.[1]

[2] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[2]

## ANALYSIS

Hedrick makes two arguments as to why we must reverse the judgment below. First, he asserts that the county court, being a court of limited jurisdiction, lacked the power to determine a setoff. Second, Hedrick asserts that the City is procedurally barred from obtaining compensation for its interest in the land, because the City failed to name itself as condemnee in the petition for appointment of appraisers. We agree that the county court did not have subject matter jurisdiction to determine the setoff, but we disagree that the City

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[1] *Armstrong v. County of Dixon*, 282 Neb. 623, 808 N.W.2d 37 (2011).

[2] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

was procedurally barred from obtaining a setoff in district court. Accordingly, we remand the matter of the setoff for determination in district court.

## Jurisdiction

[3] We have explained that the powers conferred upon the county court judge by the condemnation statutes are not judicial powers or duties, but are instead purely ministerial in character.[3] No trial is conducted before a judge who pronounces a judgment.[4] No evidence is received, and no record is made.[5] Instead, the court appoints the appraisers, which appointment is a ministerial act.[6] And the hearing is before the appraisers, not the county court.[7] The issues in county court are limited to the amount of the damages.[8] In addition, Neb. Rev. Stat. § 76-726 (Reissue 2009) confers upon the county court jurisdiction to award costs and fees incurred by a party resisting a condemnation.

[4,5] "There can be no variance in the issues because no pleading, except the petition of the condemner, is contemplated in the administrative proceeding [before the county court]."[9] Only when the appraiser's report is appealed to the district court do the proceedings become "judicial."[10] The statutes

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[3] See, e.g., *Weiner v. State*, 179 Neb. 297, 137 N.W.2d 852 (1965); *Lane v. Burt County Rural Public Power Dist.*, 163 Neb. 1, 77 N.W.2d 773 (1956).

[4] See, *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975); *Lane v. Burt County Rural Public Power Dist., supra* note 3.

[5] *Estate of Tetherow v. State, supra* note 4.

[6] See *Scheer v. Kansas-Nebraska Natural Gas Co.*, 158 Neb. 668, 64 N.W.2d 333 (1954).

[7] *Id.*

[8] See *id.*

[9] *Id.* at 675, 64 N.W.2d at 337.

[10] See, e.g., *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010); *Lane v. Burt County Rural Public Power Dist., supra* note 3; *Higgins v. Loup River Public Power Dist.*, 157 Neb. 652, 61 N.W.2d 213 (1953); *Ditter v. Nebraska Bd. of Parole*, 11 Neb. App. 473, 655 N.W.2d 43 (2002).

relating to condemnation proceedings contemplate the filing of pleadings and the framing of any issues—other than damages to the condemnee—for the first time in the judicial proceeding in district court.[11]

Thus, in *Higgins v. Loup River Public Power Dist.*,[12] we explained that the issue of whether a condemnor had attempted to negotiate a sale prior to commencing condemnation proceedings, as required by law, was a judicial question which the county court lacked the power to decide. Similarly, in *Scheer v. Kansas-Nebraska Natural Gas Co.*,[13] we indicated that the question of whether a gas company took more land than described in the description of an easement in a condemnation petition was a judicial matter outside the county court's jurisdiction.

[6-8] Determination of questions of fact upon evidence, or the exercise of discretion in ascertaining or fixing an amount to be allowed, generally involves judicial rather than ministerial acts.[14] The existence and amount of a lien, the amount of accrued interest, and whether there should be a setoff from the condemnation award involve judicial, rather than ministerial, determinations. Because the eminent domain statutes do not confer upon county courts the power to hear motions for setoff, they lack jurisdiction to do so.

[9,10] But the district court has original as well as appellate jurisdiction over the subject matter and can determine matters beyond the question of the valuation of the land or interests taken.[15] The Nebraska Constitution, article V, § 9, confers upon the district courts general powers in both law and equity

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[11] See, *Armstrong v. County of Dixon, supra* note 1; *Estate of Tetherow v. State, supra* note 4; *Jensen v. Omaha Public Power Dist.*, 159 Neb. 277, 66 N.W.2d 591 (1954); *Scheer v. Kansas-Nebraska Natural Gas Co., supra* note 6.

[12] *Higgins v. Loup River Public Power Dist., supra* note 10.

[13] *Scheer v. Kansas-Nebraska Natural Gas Co., supra* note 6.

[14] See *Allen v. Miller*, 142 Neb. 469, 6 N.W.2d 594 (1942).

[15] See, *Armstrong v. County of Dixon, supra* note 1; *Estate of Tetherow v. State, supra* note 4; *Jensen v. Omaha Public Power Dist., supra* note 11; *Scheer v. Kansas-Nebraska Natural Gas Co., supra* note 6.

to make judicial determinations.[16] And district courts have the inherent power in the administration of justice and, governed by the principles of equity, to order setoff from an award or judgment.[17] The district court had the jurisdictional power to order a setoff from the condemnation award.

## Procedure

[11] Hedrick points out, however, that the general eminent domain statutes prescribe the manner and method by which condemnors may exercise the power of eminent domain.[18] And Hedrick asserts that the condemnation statutes do not contemplate setoff. Rather, the statutes require lienholders to be named as condemnees and have their interests determined by the appraisers. Hedrick argues that courts cannot derogate from prescribed procedure. He also argues that because the City did not name itself as condemnee and obtain valuation of its interest before the valuation of the condemnation award became final, the City is now procedurally barred from obtaining relief in these eminent domain proceedings.

[12] It is generally true that failure to designate in the petition and to make a party respondent the owner of any interest in the land taken whose title appears of record or is otherwise ascertainable on reasonable inquiry renders the proceedings ineffectual to transfer such interest to the condemning party.[19] But there is no need to transfer to the City something it already owns. Indeed, Neb. Rev. Stat. § 76-704.01 (Reissue 2009) provides that the petition in eminent domain shall include the title, right, or interest in the property "to be acquired."

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[16] See, also, *K N Energy, Inc. v. City of Scottsbluff*, 233 Neb. 644, 447 N.W.2d 227 (1989); *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982).

[17] See, *Sherwood v. Salisbury*, 139 Neb. 838, 299 N.W. 185 (1941); *Dalton State Bank v. Eckert*, 135 Neb. 500, 282 N.W. 490 (1938).

[18] *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001).

[19] See *Papio-Missouri River NRD v. Willie Arp Farms*, 15 Neb. App. 984, 739 N.W.2d 776 (2007).

The parties focus on whether the City is a "[c]ondemnee" as defined by Neb. Rev. Stat. § 76-701(2) (Reissue 2003). The City claims that it cannot be a "person, partnership, limited liability company, corporation, or association" as described by § 76-701(2). This is incorrect. The law in Nebraska is clear that a public entity may be considered a "condemnee" under the eminent domain statutes.[20]

[13] Nevertheless, we agree with the City that it cannot condemn its own property interest. While all parties having an interest in the land may be "owners" within the meaning of the condemnation statutes,[21] the City is not a condemnee as that term is defined by § 76-701(2). Condemnee "means any person, partnership, limited liability company, corporation, or association owning or having an encumbrance on any interest in property *that is sought to be acquired by a condemner* or in possession of or occupying any such property."[22] As already stated, the City's interest is not one that "is sought to be acquired by a condemner."[23] One cannot "acquire" something one already has. We have been unable to find any cases in our long history of eminent domain jurisprudence in which the condemnor has also been the condemnee of its own property interest.

To the contrary, in *State v. Missouri P. R. Co.*,[24] we implicitly accepted the argument that it would be inconsistent for the State to condemn its own tax lien. The State in *Missouri P. R. Co.* had sued a railroad company to recover under a statutory tax lien on property acquired by the railroad company through condemnation proceedings. The railroad company argued that the condemnation had extinguished the lien. We disagreed and said that if the railroad company had wished to extinguish the tax lien upon condemnation, it should have joined the State

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[20] See *State v. Missouri P. R. Co.*, 75 Neb. 4, 105 N.W. 983 (1905).

[21] See *Ehlers v. Chicago, B. & Q. R. Co.*, 118 Neb. 477, 225 N.W. 468 (1929).

[22] § 76-701(2) (emphasis supplied).

[23] *Id.*

[24] *State v. Missouri P. R. Co., supra* note 20.

in the condemnation action. In so concluding, we rejected the railroad's argument that it would have been inconsistent for the railroad, as a representative of the State, to condemn its "own" lien. We held that the railroad company did not act as an agent of the State when condemning the property and that the profit resulting from the condemnation did not "inure to the treasury of the state."[25] The property condemned remained "private property the same as before."[26] "There is therefore no inconsistency in bestowing the power of eminent domain upon railway companies without at the same time giving to the railway company the power to annul . . . all tax liens upon the property it may desire to so take."[27]

[14] The eminent domain statutes do not explicitly contemplate a scenario where the condemnor has a lien interest in the land acquired. But we conclude that it is appropriate for a district court to consider the question of a setoff in such instances—upon a timely motion by the condemnor. It is well established that the condemnation money stands in place of the land, and belongs to the lienholder, to the extent of the value of the lien.[28]

Hedrick argues that allowing setoff falls afoul of the proposition that statutes prescribing proceedings for condemnation of property and the assessment of compensation must be strictly construed against the condemnor and in favor of the landowner.[29] We disagree. We find no reason to construe the statutes so as to bestow a windfall upon a condemnee. If the district court does not account for the City's preexisting lien on the property, the City's security for the debt Hedrick has refused to pay will be forever lost. As the City points out, it cannot foreclose against itself any more than it can condemn its own property.

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[25] *Id.* at 7, 105 N.W. at 984.

[26] *Id.* at 6, 105 N.W. at 984.

[27] *Id.* at 7, 105 N.W. at 984.

[28] See, e.g., *Omaha Bridge & Terminal R. Co. v. Reed*, 69 Neb. 514, 96 N.W. 276 (1903).

[29] See *Webber v. City of Scottsbluff*, 155 Neb. 48, 50 N.W.2d 533 (1951).

## CONCLUSION

The district court erred in remanding the matter of the setoff to the county court. Determining the City's lien and whether and to what amount it should be deducted from the condemnation award was a judicial matter within the jurisdiction of the district court. It was properly presented to the district court through a timely motion by the City. We vacate the county court's order of setoff. We reverse, and remand to the district court to determine the extent to which the proceeds from the award should be given to the City in payment of its lien on the condemned property.

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

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# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DAVID M. WALOCHA, RESPONDENT.

811 N.W.2d 174

Filed March 9, 2012. No. S-11-422.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. In imposing attorney discipline, the Nebraska Supreme Court evaluates each case in light of its particular facts and circumstances.
5. ____. In imposing attorney discipline, the Nebraska Supreme Court considers the discipline that it has imposed in cases presenting similar circumstances.
6. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding.
7. ____. When determining appropriate discipline of an attorney, the Nebraska Supreme Court considers aggravating and mitigating factors.

8. ____. Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions. Cumulative acts of misconduct can, and often do, lead to disbarment.

Original action. Judgment of disbarment.

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

Robb N. Gage for respondent.

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

PER CURIAM.

The Counsel for Discipline filed formal charges against David M. Walocha, accusing him of practicing law for over a decade on a suspended license. The Counsel for Discipline asks that we disbar Walocha. Because we conclude that no other sanction adequately disciplines Walocha for his years of violations, we disbar him.

## BACKGROUND

All we have before us are the formal charges filed by the Counsel for Discipline and Walocha's admissions to them. Walocha has admitted all of the formal charges that the Counsel for Discipline has alleged against him. The Counsel for Discipline moved for judgment on the pleadings.[1] The only issue before us is the appropriate sanction.

Walocha was admitted to the bar on September 22, 1994. On June 21, 1996, however, we suspended his license for failure to pay his bar dues. We never reinstated it.

Nevertheless, beginning in 1998 and continuing through 2011, Walocha engaged in the practice of law. He entered appearances in at least 65 criminal cases in Douglas County, Nebraska. At least one of these cases involved felony charges. He provided legal advice and charged his clients fees for his appearances. Further, in pleadings he filed, he represented himself to be a licensed attorney—which was not true.

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[1] See Neb. Ct. R. § 3-310(I).

## STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[2]

## ANALYSIS

[2,3] The basic issues in a disciplinary proceeding against an attorney are whether we should impose discipline and, if so, the appropriate discipline under the circumstances.[3] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[4]

[4-6] In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances.[5] But we consider the discipline that we imposed in cases presenting similar circumstances.[6] And in determining the proper discipline of an attorney, we consider the attorney's acts both underlying the events of the case and throughout the proceeding.[7]

[7,8] When determining appropriate discipline, we consider aggravating and mitigating factors.[8] Because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions.[9] "'Cumulative acts of misconduct can, and often do, lead to disbarment.'"[10]

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[2] *State ex rel. Counsel for Dis. v. Switzer*, 280 Neb. 815, 790 N.W.2d 433 (2010).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] See *id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 822, 790 N.W.2d at 439, quoting *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009).

As mentioned, Walocha's misconduct spans over a decade. In fact, his violations occurred under two separate codes of ethics. His violations before September 1, 2005, constituted violations of his oath of office as an attorney; Neb. Rev. Stat. § 7-101 (Reissue 2007), which is a statute imposing a criminal sanction for the unauthorized practice of law; and the following provisions of the Code of Professional Responsibility: Canon 1, DR 1-102 (attorney misconduct), Canon 3, DR 3-101 (unauthorized practice of law), and Canon 7, DR 7-102.

His violations after September 1, 2005, again constituted violations of his oath of office; § 7-101; and certain provisions of the Nebraska Rules of Professional Conduct we adopted in 2005,[11] namely, Neb. Ct. R. of Prof. Cond. §§ 3-505.5 (rev. 2012) (unauthorized practice of law) and 3-508.4 (attorney misconduct).

The only allegations the Counsel for Discipline alleges against Walocha are that he practiced law during suspension. As mentioned, an important part of determining what discipline to impose is to consider the discipline we have imposed in similar circumstances. We generally, but not always, disbar attorneys who continue to practice law despite their suspensions.[12] Walocha argues that some of these cited cases involved other unethical conduct in addition to practicing on a suspended license. His stress on the particular facts of each case is well placed, as we evaluate each case in light of its particular facts and circumstances.[13]

Nonetheless, we do not think the differences between this case and our earlier cases are sufficient to lead to a different

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[11] See *State ex rel. Counsel for Dis. v. Thew*, 281 Neb. 171, 794 N.W.2d 412 (2011).

[12] See, *Switzer, supra* note 2; *Carbullido, supra* note 10; *State ex rel. Counsel for Dis. v. Villarreal*, 267 Neb. 353, 673 N.W.2d 889 (2004); *State ex rel. NSBA v. Stansel*, 248 Neb. 63, 531 N.W.2d 927 (1995); *State ex rel. NSBA v. Schafer*, 234 Neb. 862, 453 N.W.2d 389 (1990); *State ex rel. NSBA v. Frank*, 219 Neb. 271, 363 N.W.2d 139 (1985); *State ex rel. NSBA v. Thierstein*, 218 Neb. 603, 357 N.W.2d 442 (1984). But see, *State ex rel. Counsel for Dis. v. Frye*, 278 Neb. 527, 771 N.W.2d 571 (2009); *State ex rel. NSBA v. Garvey*, 235 Neb. 737, 457 N.W.2d 297 (1990); *State ex rel. NSBA v. Schafer*, 227 Neb. 449, 418 N.W.2d 228 (1988).

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

result. Walocha's (at least) 65 instances of misconduct spanned over a decade. Every pleading, every court appearance, every meeting with a client constituted a separate act of dishonesty. He continuously lied to clients, to other attorneys, and to courts. "'Cumulative acts of misconduct can, and often do, lead to disbarment.'"[14] His misconduct is egregious and unacceptable.

Under Neb. Ct. R. § 3-304, we may impose the following sanctions for misconduct: disbarment, suspension, probation, or censure and reprimand. We conclude that of these possible sanctions, disbarment is the only sanction that reflects the seriousness of Walocha's deceitful misconduct.

Given the quantity of serious violations, a censure, reprimand, or suspension is inadequate discipline. Walocha's license has been suspended since June 1996, which, at this point, is almost 16 years ago. If we were to continue to suspend his license, we would be returning Walocha to the status quo, which is really no sanction at all. Further, suspending Walocha was not enough to keep him from engaging in misconduct and putting the interests of his clients at risk in the past. We see no reason to assume that this has changed. Our attorney disciplinary system is, in large part, based on self-reporting and honesty. Walocha's conduct made a mockery of such concepts.

Accordingly, no sanction less than disbarment adequately reflects the seriousness of Walocha's misconduct. Walocha willfully flew under the radar for over a decade. We conclude that disbarment is the appropriate sanction for Walocha's transgressions. Walocha shall comply with all the terms of Neb. Ct. R. § 3-316, and upon failure to do so, shall be subject to punishment for contempt of this court. Further, Walocha is ordered to pay the costs and expenses of this proceeding in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

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[14] *Id.* at 822, 790 N.W.2d at 439, quoting *Carbullido, supra* note 10.

# State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Theresa A. Gase, respondent.

811 N.W.2d 169

Filed March 9, 2012. No. S-11-814.

Original action. Judgment of suspension.

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

Per Curiam.

## INTRODUCTION

Respondent, Theresa A. Gase, was admitted to the practice of law in the State of Nebraska on March 9, 2001. At all relevant times, she was engaged in the private practice of law in Omaha, Nebraska. On November 8, 2011, the Counsel for Discipline of the Nebraska Supreme Court filed amended formal charges consisting of three counts against respondent. In the three counts, it was alleged that by her conduct with respect to three different client matters, respondent had violated her oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2007); Neb. Ct. R. §§ 3-303(B) (violation of disciplinary rule) and 3-309(E) (rev. 2011) (failure to respond); and Neb. Ct. R. of Prof. Cond. §§ 3-508.1(b) (bar admission and disciplinary matters) and 3-508.4(a) and (d) (misconduct). Also on November 8, the Counsel for Discipline filed additional formal charges consisting of a fourth count against respondent. In the fourth count, it was alleged that by respondent's conduct with respect to a client matter, she had violated her oath of office as an attorney and Neb. Ct. R. of Prof. Cond. §§ 3-501.4(a)(2), (3), and (4) (communications) and 3-501.5(f)(1) and (2) (fees).

On January 11, 2012, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which she knowingly chose not to challenge or contest the truth of the matters set forth in the amended formal charges and the additional formal charges and waived all proceedings against her in connection therewith in exchange for a judgment of suspension for 1 year and, following reinstatement, 1 year of probation, including monitoring. In the conditional admission,

it is specified that monitoring shall be by an attorney licensed to practice law in the State of Nebraska and who shall be approved by the Counsel for Discipline. The monitoring plan shall include but not be limited to the following: Respondent shall provide the monitor with copies of all fee agreements with clients; respondent shall provide the monitor with a monthly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began, the general type of the case, the date of the last contact with the client, the last type and date of the work completed on file (pleading, correspondence, document preparation, discovery, court hearing), the next type of work and date that work should be completed on the case, and any applicable statute of limitations and its date; during the first 6 months of probation, respondent will personally meet with the monitor on a monthly basis to review the case list and the status of the cases; respondent will review with the monitor her office practices and continue to work to develop efficient office procedures that protect the clients' interests; the monitor shall have the right to contact respondent with any questions the monitor may have regarding respondent's then-pending cases; and if at any time the monitor believes respondent has violated the Nebraska Rules of Professional Conduct or has failed to comply with the terms of probation, he or she shall report such violation or failure to the Counsel for Discipline. Finally, respondent shall pay all the costs in this case, including the fees and expenses of the monitor, if any.

The proposed conditional admission included a declaration by the Counsel for Discipline stating that respondent's request for suspension and probation "appears to be appropriate under the facts of this case."

Upon due consideration, we approve the conditional admission, and we order a 1-year suspension and, following reinstatement, 1 year of probation and monitoring.

## FACTS

*Count I.*

With respect to count I, the amended formal charges state that on December 13, 2010, the Counsel for Discipline received

a grievance letter from Marshall Berg, generally alleging that Berg had paid respondent to represent him in certain matters and that respondent had failed to complete the work and failed to communicate with the client. On that same date, a copy of Berg's letter was sent to respondent, along with a letter advising respondent that the Counsel for Discipline was conducting a preliminary investigation into the allegations and that respondent should submit a written response addressing the issues raised in Berg's letter.

By January 18, 2011, respondent had not responded, so the Counsel for Discipline sent a reminder. On February 3, an additional reminder was sent to respondent. By March 15, respondent still had not responded to Berg's grievance letter, so the Counsel for Discipline upgraded the matter to formal grievance status. The March 15 letter advised respondent that she had 15 working days to submit a written response and that her failure to do so could result in discipline. Respondent received this letter on March 26. On May 3, another reminder letter was sent to respondent. On July 15, respondent filed a response.

The amended formal charges allege that respondent's actions constitute violations of her oath of office as an attorney as provided by § 7-104, disciplinary rules §§ 3-303(B) and 3-309(E), and conduct rules §§ 3-508.1(b) and 3-508.4(a) and (d).

*Count II.*

With respect to count II, the amended formal charges state that on March 18, 2011, the Counsel for Discipline received a grievance letter from Mark Huss. The Counsel for Discipline sent respondent a copy of the grievance letter from Huss, along with a letter that directed respondent to submit an appropriate written response addressing Huss' concerns. The letter from the Counsel for Discipline further advised respondent that failure to respond to the inquiry could constitute a basis for discipline. Respondent received the letter on March 19.

By May 3, 2011, respondent had failed to submit a written response, so a reminder letter was sent. Respondent filed her response to Huss' grievance on July 21.

The amended formal charges allege that respondent's actions constitute violations of her oath of office as an attorney as

provided by § 7-104, disciplinary rules §§ 3-303(B) and 3-309(E), and conduct rules §§ 3-508.1(b) and 3-508.4(a) and (d).

*Count III.*

With respect to count III, the amended formal charges state that on May 26, 2010, the Counsel for Discipline sent respondent a copy of a grievance letter received from Roger Gast. The Counsel for Discipline directed respondent to submit a written response addressing Gast's concerns.

By June 29, 2010, respondent had not submitted a response, so a reminder letter was sent. A second reminder letter was sent on July 14. On that same date, respondent faxed a letter to the Counsel for Discipline advising that she would submit her response to the Gast matter by July 26. The Counsel for Discipline received respondent's response on July 20.

On September 2, 2010, the Counsel for Discipline sent a letter to respondent requesting that respondent call to arrange a time when the Counsel for Discipline could review her file concerning Gast. On September 11, respondent advised that Gast's file was in long-term storage in Texas and that she would not be able to retrieve it until around the Thanksgiving holiday. On November 23, the Counsel for Discipline sent respondent an e-mail message reminding her to obtain Gast's file when she was in Texas for the holiday.

On December 15, 2010, respondent and the Counsel for Discipline met to discuss the Gast matter and review the documents that respondent found. Respondent had not located the actual file. During their discussion, respondent indicated that she would obtain statements from two employees who had assisted her in the review of Gast's case file.

As of January 24, 2011, respondent still had not provided the requested file or statements from her employees; the Counsel for Discipline sent a letter to her reminding her to submit the requested information. As of February 22, respondent had not responded to the January 24 letter, nor had she provided the requested information. The Counsel for Discipline sent another reminder letter.

By April 1, 2011, respondent had not responded. As a result, the Gast matter was upgraded to formal grievance status and a letter was sent to respondent advising her of this and further requesting that she furnish the information and documents previously requested. Respondent received this letter on April 14. On April 19, respondent furnished some of the requested documents and a letter of explanation.

The amended formal charges allege that respondent's actions constitute violations of her oath of office as an attorney as provided by § 7-104, disciplinary rules §§ 3-303(B) and 3-309(E), and conduct rules §§ 3-508.1(b) and 3-508.4(a) and (d).

*Count IV.*

The additional formal charges allege that on or about March 24, 2008, respondent was retained by Gast, the same client from count III of the amended formal charges, to evaluate Gast's criminal case to determine whether there were grounds for possible postconviction relief. At the time respondent was retained, Gast's fiance, Mary Davis, paid respondent $1,200 of an agreed upon fee of $2,500 and by the terms of the agreement, the balance was to be paid within 90 days. No further payments were made by Gast or Davis.

Gast made numerous attempts to contact respondent throughout the spring and summer of 2008 to determine the results of respondent's efforts in reviewing his case. Gast did not hear from respondent by either mail or telephone calls until October 3, 2008, when respondent sent Gast a letter stating that she would respond to him in writing within 5 days. She further apologized for the lack of communication.

On October 29, 2008, respondent wrote to Gast and advised him that she had completed some research regarding his case, but that she would not perform any further work until he paid the balance of the agreed upon retainer.

Respondent did not correspond again with Gast until February 17, 2009, at which time respondent again advised Gast that she would not do any more work on his case until the balance of the agreed-upon fee was paid.

On May 18, 2009, according to the additional formal charges, respondent sent a letter to Gast advising him that she had met

with Davis and had advised Davis that "since less than half of the agreed upon amount had been paid, it was difficult to render half an opinion." In the letter, respondent also advised Gast regarding his upcoming parole board hearing.

On July 2, 2009, respondent returned Gast's documents to him, but she did not provide him with the results of her research or an evaluation of his case. Despite Gast's requests, respondent never provided Gast with an accounting of her time.

The additional formal charges allege that respondent's actions constitute violations of her oath of office as an attorney as provided by § 7-104 and conduct rules §§ 3-501.4(a)(2), (3), and (4) and 3-501.5(f)(1) and (2).

## ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (B) At any time after the Clerk has entered a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of the Formal Charge in exchange for a stated form of consent judgment of discipline as to all or part of the Formal Charge pending against him or her as determined to be appropriate by the Counsel for Discipline or any member appointed to prosecute on behalf of the Counsel for Discipline; such conditional admission is subject to approval by the Court. The conditional admission shall include a written statement that the Respondent knowingly admits or knowingly does not challenge or contest the truth of the matter or matters conditionally admitted and waives all proceedings against him or her in connection therewith. If a tendered conditional admission is not finally approved as above provided, it may not be used as evidence against the Respondent in any way.

Pursuant to § 3-313, and given the conditional admission, we find that respondent knowingly does not challenge or contest the matters set forth in the amended formal charges and additional formal charges. We further determine that

by her conduct with respect to counts I through III of the amended formal charges, respondent violated disciplinary rules §§ 3-303(B) and 3-309(E) and conduct rules §§ 3-508.1(b) and 3-508.4(a) and (d), as well as her oath of office as an attorney licensed to practice law in the State of Nebraska. We further determine that by her conduct with respect to count IV of the additional formal charges, respondent violated conduct rules §§ 3-501.4(a)(2), (3), and (4) and 3-501.5(f)(1) and (2), as well as her oath of office as an attorney. Respondent has waived all additional proceedings against her in connection herewith, and upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

## CONCLUSION

Respondent is suspended from the practice of law for a period of 1 year, effective 30 days after the filing of this opinion. Should respondent apply for reinstatement, her reinstatement shall be conditioned upon respondent's being on probation for a period of 1 year, including monitoring following reinstatement, subject to the terms agreed to by respondent in the conditional admission and outlined above. Respondent shall comply with Neb. Ct. R. § 3-316, and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.

# Dwight Trumble, appellant and cross-appellee, v. Sarpy County Board et al., appellees, and Douglas County School District 0001, also known as Omaha Public Schools, appellee and cross-appellant.

810 N.W.2d 732

Filed March 16, 2012. No. S-10-1235.

1. **Motions to Dismiss: Jurisdiction: Appeal and Error.** Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject to a de novo review.
2. **Judgments: Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court.
3. **Constitutional Law: Declaratory Judgments: Taxes.** The proper means of challenging the constitutionality of a tax statute is a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 (Reissue 2008).
4. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes: Legislature.** When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling.
7. **Statutes.** To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute.
8. **Taxes: Statutes: Words and Phrases.** A tax can meet the specific definition of "illegal" in Neb. Rev. Stat. § 77-1735 (Reissue 2009) if it is either collected for a purpose that is "unauthorized" or levied because of conduct that was "fraudulent."
9. **Statutes: Legislature: Intent.** In discerning the meaning of 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. ____: ____: ____. When considering a series or collection of statutes pertaining to a certain subject matter, which statutes are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.
11. **Statutes: Legislature: Presumptions.** In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law.
12. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When an appellate court judicially construes a statute and that construction fails to evoke an amendment, it is presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Matthew V. Rusch and Thomas J. Culhane, of Erickson & Sederstrom, P.C., for appellant.

Kenneth W. Hartman, Elizabeth Eynon-Kokrda, and Kelly R. Dahl, of Baird Holm, L.L.P., for appellee Douglas County School District 0001.

Patrick J. Sullivan and Benjamin E. Maxell, of Adams & Sullivan, P.C., for appellee School District No. 1 of Sarpy County.

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

WRIGHT, J.

## NATURE OF CASE

At all times relevant to this case, Dwight Trumble owned property in Sarpy County, Nebraska. On December 31, 2009, he paid two levies for the support of school districts in the Learning Community of Douglas and Sarpy Counties (Learning Community): a general fund levy and a special building fund levy.

On April 26, 2010, Trumble brought suit under Neb. Rev. Stat. § 77-1735 (Reissue 2009) against the school districts in the Learning Community, claiming the levies, which were authorized by Neb. Rev. Stat. § 77-3442(2)(b) and (g) (Reissue 2009), were unconstitutional. Douglas County School District 0001, also known as Omaha Public Schools (OPS), and School District No. 1 of Sarpy County (Bellevue) moved to dismiss, and Trumble moved for summary judgment. The district court determined it did not have jurisdiction and dismissed the case. Because Trumble alleged the unconstitutionality of a statute, he appealed directly to this court. For the reasons set forth herein, we affirm.

## SCOPE OF REVIEW

[1,2] Aside from factual findings, the granting of a motion to dismiss for a lack of subject matter jurisdiction is subject

to a de novo review. *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011). To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach its conclusion independent of the trial court. *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010).

## FACTS

The levies at issue in this case were also challenged in *Sarpy Cty. Farm Bureau v. Learning Community, ante* p. 212, 808 N.W.2d 598 (2012). They empower the Learning Community to levy up to $0.95 per $100 of taxable valuation for the general fund budgets of Learning Community school districts and $0.02 per $100 of taxable valuation for special building funds for Learning Community school districts.

In August 2009, the Learning Community adopted a $0.95 general fund levy and a $0.01 special building fund levy, and in October, the Sarpy County Board of Equalization included these levies in the county's 2009 tax levies. Trumble paid the Sarpy County levies on December 31, 2009. On January 11, 2010, Trumble made a written demand to the Sarpy County treasurer for the return of that portion of his property tax attributable to the Learning Community levies. He made this demand under § 77-1735, claiming the Learning Community levies were unconstitutional. Under § 77-1735(1),

> if a person makes a payment to any county or other political subdivision of any property tax . . . and claims the tax or any part thereof is illegal for any reason other than the valuation or equalization of the property, he or she may, at any time within thirty days after such payment, make a written claim for refund of the payment from the county treasurer to whom paid. . . . If the payment is not refunded within ninety days thereafter, the claimant may sue the county board for the amount so claimed. . . . For purposes of this section, illegal shall mean a tax levied for an unauthorized purpose or as a result of fraudulent conduct on the part of the taxing officials.

The Sarpy County treasurer did not respond to Trumble's request for repayment, and Trumble filed suit on April 26,

2010. He alleged that § 77-3442(2)(b) and (g) and Neb. Rev. Stat. §§ 79-1073 and 79-1073.01 (Supp. 2009), which authorized the collection and dictated the distribution of general fund and special building fund levies for a learning community, were unconstitutional. Trumble sought a judgment that these statutes were unconstitutional and that the taxes he paid under the statutes had to be returned pursuant to § 77-1735 and Neb. Rev. Stat. § 77-1736.06 (Reissue 2009).

On September 24, 2010, OPS and Bellevue each moved to dismiss for lack of subject matter jurisdiction, failure to state a claim on which relief could be granted, and failure to join a necessary party. Trumble moved for summary judgment on September 27. On October 18, the district court overruled a motion filed by OPS to continue Trumble's summary judgment motion and took OPS' and Bellevue's motions to dismiss under advisement. The next day, the district court heard Trumble's summary judgment motion.

[3] The district court issued its order on December 14, 2010. It determined that "unconstitutional" taxes were not "illegal" taxes that could be recovered under § 77-1735 and that the proper means of challenging the constitutionality of a tax statute was a declaratory judgment action under Neb. Rev. Stat. § 25-21,149 (Reissue 2008). That section states in part: "Any action or proceeding seeking a declaratory judgment that any tax, penalty, or part thereof is unconstitutional shall be brought in the tax year in which the tax or penalty was levied or assessed." *Id*. The district court held that it lacked jurisdiction because Trumble had not alleged the collection of an "unauthorized" or "illegal" tax under § 77-1735 and because Trumble filed the action outside the tax year when the taxes were levied.

The district court relied on *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993). The district court concluded that in *AMISUB*, this court determined that Neb. Rev. Stat. § 77-1736.04 (Cum. Supp. 1992), rather than § 77-1735, was the proper means of challenging the constitutionality of a tax already paid. The district court recognized that § 77-1736.04 has since been repealed, but determined that the interpretation in *AMISUB* of § 77-1735

was still good law following the repeal of § 77-1736.04. The district court granted the motions to dismiss, denied Trumble's request for summary judgment, and dismissed the complaint. Trumble appealed.

## ASSIGNMENTS OF ERROR

Trumble alleges the district court erred in determining it lacked jurisdiction and dismissing the complaint. On cross-appeal, OPS alleges the district court lacked jurisdiction because Trumble's complaint raised nonjusticiable political questions. OPS also alleges the district court erred in denying OPS' motion to continue the hearing on Trumble's summary judgment motion.

## ANALYSIS

### Mootness

We first consider whether this case is moot because of our decision in *Sarpy Cty. Farm Bureau v. Learning Community, ante* p. 212, 808 N.W.2d 598 (2012). In *Sarpy Cty. Farm Bureau*, the taxpayers sought a declaratory judgment that the levy was unconstitutional. We upheld the constitutionality of § 77-3442(2)(b) against the same challenges that Trumble raises here. However, in *Sarpy Cty. Farm Bureau*, this court specifically refused to rule on the constitutionality of §§ 77-3442(2)(g) and 79-1073.01 because that issue was not raised before the trial court. Because Trumble questioned the constitutionality of §§ 77-3442(2)(g) and 79-1073.01 before the district court, this cause is squarely in front of this court and is not moot.

### Jurisdiction

[4,5] Before any court can determine the constitutionality of a tax statute, the court must have subject matter jurisdiction. Trumble argues the district court should have ruled in his favor under § 77-1735. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *AMISUB, supra*. In assessing the meaning of a statute, we are guided by the principle that in the absence of anything to the contrary,

statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011).

[6,7] Trumble contends that an "unconstitutional" tax is an "illegal" tax under § 77-1735. Section 77-1735(1) provides its own definition of "illegal" for purposes of this section. When the Legislature provides a specific definition for purposes of a section of an act, that definition is controlling. See *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993). This is a natural extension of the principle that "[t]o the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute." *Id.* at 663, 508 N.W.2d at 832.

[8] A tax can meet the specific definition of "illegal" in § 77-1735 if it is either collected for a purpose that is "unauthorized" or levied because of conduct that was "fraudulent." "[F]raudulent" means "given to or using fraud, as a person; cheating; dishonest . . . characterized by, involving, or proceeding from fraud, as actions, enterprise, methods, gains, etc." Webster's Encyclopedic Unabridged Dictionary of the English Language 564 (1989). An "unconstitutional" tax would not fit within this definition. "[U]nauthorized," however, means "not authorized," Webster's Third New International Dictionary of the English Language, Unabridged 2482 (1993), or "[d]one without authority," Black's Law Dictionary 1663 (9th ed. 2009). Trumble's argument in support of his claim that this lawsuit is allowed under § 77-1735 requires three steps: (1) The taxes permitted by § 77-3442(2)(b) and (g) are unconstitutional; (2) since they are unconstitutional, they are "unauthorized"; and (3) since they are "unauthorized," they fall within the § 77-1735 definition of "illegal."

[9] In discerning the meaning of 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. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002). There is support in the text of § 77-1735 for excluding constitutional

challenges under that statute. The fact that "unauthorized" is used together with "fraudulent" in the definition of "illegal" indicates that "unauthorized" should be interpreted in light of the meaning of "fraudulent" to avoid reading the statute to say more than the Legislature intended. See *U.S. v. Stanko*, 491 F.3d 408 (8th Cir. 2007).

As late as 1993, this court determined that § 77-1735 could be used to challenge an unconstitutional tax. See *First Data Resources v. Howell*, 242 Neb. 248, 494 N.W.2d 542 (1993). After *First Data Resources*, the Legislature amended § 77-1735. See *AMISUB, supra*. The amendments eliminated language allowing for the recovery of "invalid" taxes and instead allowed for recovery of "illegal" taxes, with the term "illegal" defined as it is under the current statute. See, *id.*; § 77-1735. Following these textual changes, this court determined that § 77-1735 had a different meaning. *AMISUB, supra*.

In *AMISUB*, this court rejected the argument that an "unconstitutional" tax was an "unauthorized" tax and therefore an "illegal" tax that could be challenged under the amended version of § 77-1735. That determination was heavily influenced by § 77-1736.04, which once allowed for the recovery of illegal taxes. See *AMISUB, supra*. The same bill that changed "invalid" to "illegal" in § 77-1735 (1989 Neb. Laws, L.B. 762) also changed "illegal" to "unconstitutional" in § 77-1736.04. The Legislature later amended § 77-1736.04, but the statute continued to provide the procedure for challenging "unconstitutional" taxes. See *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

[10] When considering a series or collection of statutes pertaining to a certain subject matter, which statutes are in pari materia, they may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *Id.* To the extent there is a conflict between two statutes on the same subject, a specific statute prevails over a general statute. *Id.* Considering §§ 77-1735 and 77-1736.04 together, this court concluded in *AMISUB* that the Legislature meant to treat refunds for "unconstitutional" taxes differently than refunds for "unauthorized" taxes or taxes that were

fraudulently levied. Accordingly, § 77-1735 was determined to be an improper means for challenging "unconstitutional" taxes. *AMISUB, supra*.

Shortly after the *AMISUB* opinion was filed, the Legislature repealed § 77-1736.04 entirely. See 1992 Neb. Laws, L.B. 1, § 44. Trumble claims that with the repeal of § 77-1736.04, § 77-1735 once again allows a lawsuit to recover "unconstitutional" taxes. We are not persuaded by this argument.

In *AMISUB*, this court noted that the more important legislative changes brought about by L.B. 762 occurred in § 77-1736.04 rather than § 77-1735. We do not read §§ 77-1735 and 77-1736.04 as being so closely connected that the repeal of § 77-1736.04 also nullified this court's reading of § 77-1735 in *AMISUB*.

The *AMISUB* court interpreted two statutes that had been amended by the same bill. See L.B. 762, §§ 3 and 4. The Legislature has since made several changes to § 77-1735, none of which eliminated the term "illegal" from the statute or gave the term a different definition. See, 1991 Neb. Laws, L.B. 829, § 13; 1992 Neb. Laws, L.B. 1, § 16; 1995 Neb. Laws, L.B. 490, § 166; 2007 Neb. Laws, L.B. 334, § 81.

[11] In enacting an amendatory statute, the Legislature is presumed to have known the preexisting law. *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980). This court determined in *AMISUB, supra*, that § 77-1735 did not allow for the recovery of "unconstitutional" taxes. Then the Legislature repealed § 77-1736.04. Twice after that, the Legislature amended § 77-1735, and both times, it retained the term "illegal" and left the definition of "illegal" unchanged. See, L.B. 490, § 166; L.B. 334, § 81.

[12] Trumble would have us read §§ 77-1735 and 77-1736.04 to be so connected that when the Legislature repealed § 77-1736.04, it changed the meaning of § 77-1735 without changing the definition of "illegal" in § 77-1735. This court assumes the opposite. When we judicially construe a statute and that construction fails to evoke an amendment, we presume that the Legislature has acquiesced in our determination of its intent. See *Underhill v. Hobelman*, 279 Neb. 30, 776 N.W.2d 786 (2009). And we presume that when we have construed

a statute and the same statute is substantially reenacted, the Legislature gave to the language the significance we previously accorded to it. *Id.* In other words, we presume that the meaning of a statute does not change unless the Legislature changes its text. Because the Legislature retained the relevant text of § 77-1735 following *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993), the Legislature acquiesced in this court's interpretation of that text and the *AMISUB* court's interpretation of § 77-1735 remains good law.

We conclude that § 77-1735 is not applicable because it allows recovery for fraudulently levied taxes, but does not allow recovery for unconstitutional taxes.

We have considered the applicability of § 77-1735 in situations where the question of the constitutionality of a tax statute was not before us. In *Boettcher v. Balka*, 252 Neb. 547, 567 N.W.2d 95 (1997), the plaintiff brought a declaratory judgment action instead of filing suit under § 77-1735. This court determined that § 77-1735 provided another "equally serviceable remedy," see 252 Neb. at 552, 567 N.W.2d at 99, which made a declaratory judgment action inappropriate. However, *Boettcher* does not control the case at bar. The plaintiff in *Boettcher* did not follow the procedures required by § 77-1735 or assign any constitutional errors for review, and this court did not discuss *AMISUB* or whether a suit could be brought under § 77-1735 to recover unconstitutional taxes.

Similarly, *Rawson v. Harlan County*, 247 Neb. 944, 530 N.W.2d 923 (1995), does not control the result here. In *Rawson*, the taxpayer requested a declaratory judgment to determine that the tax was illegal and unauthorized. In that context, we determined that § 77-1735 was a proper way to challenge a tax that had been paid and that, therefore, the district court lacked jurisdiction to hear a declaratory judgment action. This court did not reach the question whether the challenged tax was "illegal" or "unauthorized." We did not discuss *AMISUB* or determine whether a suit could be brought under § 77-1735 to recover "unconstitutional" taxes.

The case at bar presents what *Boettcher* and *Rawson* lacked: a plaintiff who sought relief under § 77-1735 and raised a

constitutional claim. This case presents us with the question whether a suit can be brought under § 77-1735 to recover "unconstitutional" taxes. We answer that question in the negative. The district court correctly determined it did not have jurisdiction under § 77-1735.

Section 77-1735 does not provide an adequate remedy for recovering an unconstitutional tax. A declaratory judgment is the proper method to challenge the constitutionality of a tax statute. See, *Boettcher, supra*; *Rawson, supra*. Such an action would have to be brought within the time constraints of § 25-21,149, which requires that declaratory judgment actions challenging the constitutionality of tax statutes have to be brought in the same tax year in which the taxes are levied or assessed. For completeness, we note that Trumble's argument that *Francis v. City of Columbus*, 267 Neb. 553, 676 N.W.2d 346 (2004), supports his position fails because *Francis* addressed Neb. Rev. Stat. § 16-637 (Reissue 2007) rather than § 77-1735.

In this case, the relevant tax year is calendar year 2009. Trumble's tax bills were received and paid in 2009. The receipts for Trumble's tax payments were dated 2009. Nebraska property taxes are due on December 31 of the calendar year in which they are levied, and they become a first lien on the property until paid or extinguished. See Neb. Rev. Stat. § 77-203 (Reissue 2009). The taxes at issue here were levied in tax year 2009, and Trumble's suit was filed in 2010. Because the suit was not brought in the same tax year in which the taxes were levied or assessed, the district court did not have jurisdiction under § 25-21,149. The district court lacked jurisdiction under §§ 25-21,149 and 77-1735, and it properly dismissed the complaint.

## Cross-Appeal

Because the district court lacked jurisdiction, we need not consider OPS' cross-appeal.

## CONCLUSION

Based on the text of § 77-1735; this court's opinion in *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); and subsequent legislative

amendments, we conclude that a suit to recover unconstitutional taxes cannot be brought under § 77-1735. Trumble filed suit outside the tax year in which the challenged taxes were levied or assessed, so the district court did not have jurisdiction under § 25-21,149. Since the district court lacked jurisdiction, it properly dismissed the action. The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., not participating in the decision.
MILLER-LERMAN, J., not participating.

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BIG JOHN'S BILLIARDS, INC., APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES.

811 N.W.2d 205

Filed March 16, 2012. No. S-11-077.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
5. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
6. **Jurisdiction: Final Orders: Appeal and Error.** The first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.
7. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.
8. **Summary Judgment.** A summary judgment motion does not invoke a special proceeding. Instead, a summary judgment proceeding is a step in the overall action.

9. **Summary Judgment: Appeal and Error.** Orders granting partial summary judgment are not appealable unless the order affects a substantial right and, in effect, determines the action and prevents a judgment.
10. **Final Orders: Appeal and Error.** To be a final order under the first category of Neb. Rev. Stat. § 25-1902 (Reissue 2008), the order must dispose of the whole merits of the case and leave nothing for the court's further consideration.
11. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
12. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken.
13. **Final Orders.** Substantial rights under Neb. Rev. Stat. § 25-1902 (Reissue 2008) include those legal rights that a party is entitled to enforce or defend.
14. ____. An order that completely disposes of the subject matter of the litigation in an action or proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.
15. **Summary Judgment: Final Orders.** Partial summary judgments are usually considered interlocutory. They must ordinarily dispose of the whole merits of the case to be considered final.
16. **Final Orders.** An order resolving all the issues raised in an independent special proceeding is a final, appealable order.
17. **Constitutional Law: Statutes: Moot Question: Final Orders.** If a plaintiff's other claims in an action are rendered moot by the court's ruling that a statute is unconstitutional, the trial court's order completely disposes of the subject matter of the litigation. Such an order both is final and affects a substantial right.
18. **Final Orders: Appeal and Error.** The primary reason for requiring a final order to dispose of all the issues presented in an action is to avoid piecemeal appeals arising out of the same operative facts.
19. ____: ____. To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.

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

Jon Bruning, Attorney General, Dale A. Comer, Lynn A. Melson, and Natalee J. Hart for appellants.

Theodore R. Boecker, Jr., of Boecker Law, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

## SUMMARY

In this declaratory judgment action, we are asked to decide whether certain exemptions under the Nebraska Clean Indoor Air Act (the Act)[1] are constitutional. The district court determined that the exemptions were unconstitutional. We do not reach the issue because we conclude that the State has not appealed from a final order.

## BACKGROUND

Big John's Billiards, Inc. (Big John), filed this action against the State of Nebraska, the Department of Health and Human Services; Kerry Winterer, the department's chief executive officer; the Nebraska Liquor Control Commission; Hobart Rupe, the commission's executive director; and the Douglas County Health Department (collectively the State). In its operative complaint, Big John sought a declaration that the Act was special legislation, violated Nebraska's equal protection clause, and constituted a regulatory taking. In sum, it claimed that the Act's exemptions granted a privilege or immunity to a select class of businesses. It claimed that no rational basis existed for distinguishing these businesses from other public places or places of employment which were subject to and adversely affected by the Act or local regulations. In addition, Big John alleged that the Act deprived it of a property interest by prohibiting it from allowing its customers to smoke. It asked for a temporary restraining order and injunction until the issues were decided, but the court denied that request.

The State originally moved to dismiss the complaint under Neb. Ct. R. Pldg. § 6-1112(b)(1), (2), and (7). But after Big John filed an amended complaint, the State filed an answer, generally denying Big John's constitutional claims and affirmatively alleging that the complaint failed to state a cause of action. The State also alleged that the court lacked subject matter jurisdiction over this action as against the state defendants. It asked the court to dismiss the complaint with prejudice. Big

[1] Neb. Rev. Stat. §§ 71-5716 to 71-5734 (Reissue 2009 & Cum. Supp. 2010).

John then moved for partial summary judgment on its special legislation claim. The State moved for summary judgment on all issues.

The court specifically limited the hearing to the special legislation issue raised by Big John's motion for partial summary judgment. Nothing in the record indicates that the court dismissed Big John's other constitutional claims that the Act constituted a regulatory taking and violated Nebraska's equal protection clause.

The court concluded that the legislative history clearly showed that the Act's purpose was to protect employees and the public from secondhand smoke by eliminating smoking in public places and places of employment—not to create separate facilities for smokers. It determined that the exemptions for designated hotel rooms, cigar bars, and retail cigarette outlets directly conflicted with the Act's public health purpose. It also concluded that the cigar bar exemption gave those businesses an economic advantage over similar businesses. Big John had argued that the legislative history showed that the Act would not have passed without the exemptions. Therefore, it argued that the court should strike down the Act in its entirety despite its severability provision.[2] But the court implicitly rejected that argument. It concluded that the exemptions under § 71-5730(1), (3), and (4) were unconstitutional special legislation but severable from the rest of the Act, which was still valid. It sustained in part and in part overruled Big John's motion for partial summary judgment. It overruled the State's motions for summary judgment "on the issue of special legislation." It did not direct entry of a final judgment under Neb. Rev. Stat. § 25-1315 (Reissue 2008).

## ASSIGNMENTS OF ERROR

The State assigns, restated, that the court erred as follows:

(1) entertaining the parties' motions for summary judgment because it lacked subject matter jurisdiction as to any claims against the state defendants;

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[2] See 2008 Neb. Laws, L.B. 395, § 21.

(2) applying a special legislation test that focused on the purpose of the Act instead of the purpose of the exemptions; and

(3) determining that § 71-5730(1), (3), and (4) were unconstitutional special legislation.

## STANDARD OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law.[3] We independently review questions of law decided by a lower court.[4]

## ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] Big John argues that we lack jurisdiction over this appeal because the State did not appeal from a final order. For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[6]

[5,6] Additionally, the State contends that the court lacked subject matter jurisdiction to decide any claim raised in Big John's complaint. This claim also presents an issue of appellate jurisdiction. If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[7] But when an appeal presents these two distinct jurisdictional issues, the first step in determining the existence of appellate jurisdiction is to determine whether the lower court's order was final and appealable.[8]

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[3] *Johnson v. Johnson*, 282 Neb. 42, 803 N.W.2d 420 (2011).

[4] *Id.*

[5] *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

[6] *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420, *cert. denied* ___ U.S. ___, 132 S. Ct. 1016, 181 L. Ed. 2d 736 (2012).

[7] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

[8] *Pennfield Oil Co. v. Winstrom*, 267 Neb. 288, 673 N.W.2d 558 (2004).

## The Order Is Not Final

[7] Under Neb. Rev. Stat. § 25-1902 (Reissue 2008), the three types of final orders that an appellate court may review are (1) an order that affects a substantial right and that determines the action and prevents a judgment, (2) an order that affects a substantial right made during a special proceeding, and (3) an order that affects a substantial right made on summary application in an action after a judgment is rendered.[9]

The State contends that an order granting a motion for partial summary judgment can be a final order when it affects a substantial right. It contends that the court's order declaring subsections of § 77-5730 unconstitutional affected a substantial right because the State has a strong interest in defending the constitutionality of state statutes. It argues that the court's order clearly diminished its defenses and that we should review a partial summary judgment declaring a statute unconstitutional.

[8-10] A summary judgment motion does not invoke a special proceeding.[10] Instead, a summary judgment proceeding is a step in the overall action.[11] And as a step in an action, a motion for summary judgment is not a summary application made in an action after a judgment is rendered. So orders granting partial summary judgment are not appealable unless the order affects a substantial right and, in effect, determines the action and prevents a judgment.[12] To be a final order under the first category of § 25-1902, the order must dispose of the whole merits of the case and leave nothing for the court's further consideration.[13]

[11-14] A substantial right under § 25-1902 is an essential legal right.[14] And a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing

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[9] *In re Adoption of Amea R., supra* note 5.

[10] See, *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007); *Cerny v. Longley*, 266 Neb. 26, 661 N.W.2d 696 (2003).

[11] See, e.g., *Williams, supra* note 10.

[12] See *Cerny, supra* note 10.

[13] See *Mumin v. Dees*, 266 Neb. 201, 663 N.W.2d 125 (2003).

[14] See *In re Adoption of Amea R., supra* note 5.

a claim or defense that was available to an appellant before the order from which an appeal is taken.[15] It follows from these principles that substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend.[16] Therefore, an order that completely disposes of the subject matter of the litigation in an action or proceeding both is final and affects a substantial right because it conclusively determines a claim or defense.

[15] Obviously, partial summary judgments are usually considered interlocutory.[17] They "must ordinarily dispose of the whole merits of the case" to be considered final.[18] The cases cited by the State do not persuade us that we should treat this order differently.

One of the cases the State relies on is *Dorshorst v. Dorshorst*,[19] decided in 1963. That was a probate case where a party's appeal of a probate order to the district court was treated as a new trial and the parties were required to file new pleadings.[20] The issue was whether the decedent's surviving spouse was entitled to a "widow's allowance," a statutory allowance for support from the estate during administration. The district court sustained the surviving spouse's motions for a judgment on the pleadings and summary judgment. But it reserved deciding the size of the allowance.

The administrator appealed, assigning that the district court erred in failing to rule that a prenuptial agreement precluded the support allowance. The surviving spouse argued that we should

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[15] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[16] Compare *In re Adoption of Amea R., supra* note 5.

[17] See, e.g., *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009); *Cerny, supra* note 10; *O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[18] *Connelly, supra* note 17, 278 Neb. at 318, 769 N.W.2d at 400. Accord, e.g., *City of Omaha v. Morello*, 257 Neb. 869, 602 N.W.2d 1 (1999).

[19] See *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963).

[20] See, *Mitchell v. Tucker*, 183 Neb. 155, 158 N.W.2d 614 (1968), *overruled, Hornung v. Hatcher*, 205 Neb. 449, 288 N.W.2d 276 (1980); *In re Estate of Normand*, 88 Neb. 767, 130 N.W. 571 (1911); *In re Estate of Sehi*, 17 Neb. App. 697, 772 N.W.2d 103 (2009).

dismiss the appeal for lack of a final order. We explained the finality of the order as follows:

> The only contested issue raised by the pleadings is the sufficiency of the antenuptial agreement as a defense to the petition for the widow's allowances. The judgment of the district court finally determines that question and is an appealable order. It affects a substantial right. Its effect is to determine the action by preventing a judgment for the defendants. . . . An order is final and appealable when the substantial rights of the parties to the action are determined, even though the cause is retained for the determination of matters incidental thereto.[21]

In short, in *Dorshorst*, we treated the size of the allowance as an incidental issue. But we would not analyze the finality of the order the same way today.

[16] Probate proceedings are special proceedings under § 25-1902's second category of final orders.[22] We will entertain appeals from probate orders resolving claims for statutory allowances and a surviving spouse's elective share before the final probate judgment is entered.[23] In effect, a claimant's petition for these statutory rights invokes a proceeding that is independent from the overall probate proceeding because the claimant's rights exist independent of any distributive interest the claimant has in the probate estate.[24] But unlike the decision in *Dorshorst*, we now require the order appealed from to have disposed of all the issues related to the claim or defense.[25] This is consistent with our recent holding that an order resolving all the issues raised in an independent special proceeding is a final, appealable order.[26]

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[21] *Dorshorst, supra* note 19, 174 Neb. at 888, 120 N.W.2d at 33.

[22] See *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010).

[23] See, e.g., *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007); *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

[24] See Neb. Rev. Stat. §§ 30-2317, 30-2318, and 30-2322 to 30-2324 (Reissue 2008).

[25] See *In re Estate of Rose, supra* note 23.

[26] See *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

But these cases provide no support for the State's position that this partial summary judgment is a final order. The court's order did not resolve an issue that is distinct from the issues in the overall action; it resolved one of Big John's claims, leaving two other claims to be decided. Even under the rule stated in *Dorshorst*,[27] unresolved, additional claims in an action are not incidental issues.

Similarly, the order here is not like the order that we considered in *In re 1983-84 County Tax Levy*.[28] There, residents and taxpayers in a Class I school district (a grade school only district) challenged a county tax levy to support high school education in Class III school districts as unconstitutional. The plaintiffs also contended that the levy exceeded the county's needs and was made for an unlawful and unnecessary purpose. The court ruled that the statute was unconstitutional in its entirety, and the defendants appealed.

The plaintiffs claimed that the defendants had not appealed from a final order because the court had determined only the constitutional issue. We agreed that an order determining only some of the issues in an action is ordinarily not a final order. But we concluded that because the court determined that the statute was unconstitutional, then in the absence of an appeal, it would determine nonresident high school tuition under the previous statute and have no need to determine the other challenges to the levy.

In *In re 1983-84 County Tax Levy*, the plaintiffs' additional claims were subsumed within their constitutional challenge.[29] So the court's ruling that the statute was unconstitutional rendered their additional claims moot. That is, after the ruling, the plaintiffs no longer had a legally cognizable interest in having the trial court resolve their claims that the levy was invalid for additional reasons.[30]

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[27] *Dorshorst, supra* note 19.

[28] *In re 1983-84 County Tax Levy*, 220 Neb. 897, 374 N.W.2d 235 (1985).

[29] *Id.*

[30] *Id.* See, also, *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010).

[17] Unless an exception applies, a court or tribunal must dismiss a moot case.[31] So if a plaintiff's other claims in an action are rendered moot by the court's ruling that a statute is unconstitutional, the trial court's order completely disposes of the subject matter of the litigation. Such an order both is final and affects a substantial right.

This same mootness reasoning was implicitly applied in our recent opinion, deciding a constitutional challenge to a common levy for the school districts in a learning community. In *Sarpy Cty. Farm Bureau v. Learning Community*,[32] the district court ruled that a common levy violated Nebraska's constitutional proscription of levying property taxes for a state purpose. It did not reach the plaintiffs' alternative constitutional challenges to the statutory scheme. But the court's order rendered the remaining challenges moot. The mootness reasoning also applies to our decision in *Sarpy County v. City of Springfield*,[33] another case on which the State relies.

But the mootness reasoning does not apply here. It is true that the court's ruling rendered moot Big John's other challenge to the same exemptions under the Act. But Big John's regulatory taking claim is not limited to the exemptions that the Act gives to other persons or entities. Big John claims that the smoking ban per se deprives it of a property interest by reducing its customer base and, thus, the revenues its business generates. The facts and legal arguments relevant to this claim have not been presented or addressed, and the claim is not moot because of the court's special legislation ruling. The court specifically determined that the Act's unconstitutional exemptions were severable, so Big John's regulatory taking claim was alive and pending when this appeal was filed.

[18] The primary reason for requiring a final order to dispose of all the issues presented in an action is to avoid

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[31] *Westovick, supra* note 30.

[32] *Sarpy Cty. Farm Bureau v. Learning Community, ante* p. 212, 808 N.W.2d 598 (2012).

[33] *Sarpy County v. City of Springfield*, 241 Neb. 978, 492 N.W.2d 566 (1992).

piecemeal appeals arising out of the same operative facts.[34] We conclude that the effect of this partial summary judgment does not wholly determine the action or prevent a judgment on all the remaining claims. Accordingly, it is not a final order.

Because the district court has not entered a final order, this court does not have appellate jurisdiction over this appeal. We therefore do not decide whether the district court had jurisdiction over the subject matter.[35]

### Collateral Order Doctrine Does Not Apply to the State's Appeal on the Merits

The State alternatively argues that we can immediately review the order under the collateral order doctrine because the State raised sovereign immunity as a defense to this action. It relies on our decision in *StoreVisions v. Omaha Tribe of Neb*.[36] There, we held that an order denying an Indian tribe's motion to dismiss a breach of contract action for lack of jurisdiction was not a final order. But because the court had denied the tribe's motion to dismiss on sovereign immunity grounds, we exercised jurisdiction over the sovereign immunity issue under the collateral order doctrine.

[19] To fall within the collateral order doctrine, an order must (1) conclusively determine the disputed question, (2) resolve an important issue *completely separate from the merits of the action*, and (3) be effectively unreviewable on appeal from a final judgment.[37] In *StoreVisions*, the tribe appealed from an order denying its motion to dismiss on sovereign immunity grounds. Here, in contrast, the State did not renew its motion to dismiss after Big John filed an amended complaint. So the State is not appealing from an order requiring it to litigate. It has already litigated the special legislation issue and cannot ask us to review the merits of that claim under the

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

[35] See *Pennfield Oil Co., supra* note 8.

[36] *StoreVisions, supra* note 6.

[37] *Id.*

collateral order doctrine. We conclude that this claim is without merit.

## CONCLUSION

We conclude that because the district court has not entered a final order, we lack appellate jurisdiction over this appeal. We therefore dismiss.

APPEAL DISMISSED.

GERRARD, J., not participating in the decision.
WRIGHT, J., not participating.

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# IN RE INTEREST OF S.J., ALLEGED TO BE A DANGEROUS SEX OFFENDER.
# S.J., APPELLANT, V. MENTAL HEALTH BOARD OF THE FOURTH JUDICIAL DISTRICT, APPELLEE.

810 N.W.2d 720

Filed March 16, 2012. No. S-11-314.

1. **Mental Health: Judgments: Appeal and Error.** The district court reviews the determination of a mental health board de novo on the record. In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment.
2. **Constitutional Law: Due Process.** The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
4. **Due Process.** The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest.
5. ____. A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due.
6. **Due Process: Mental Health: Convicted Sex Offender.** A liberty interest is implicated if a subject is committed to inpatient treatment pursuant to the Sex Offender Commitment Act.

7. **Due Process: Notice.** Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.
8. **Due Process: Administrative Law: Recusal: Presumptions: Proof.** Due process requires a neutral, or unbiased, adjudicatory decisionmaker. Such decisionmakers serve with a presumption of honesty and integrity. A party seeking to disqualify an adjudicator because of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellant.

Jeffrey J. Lux, Deputy Douglas County Attorney, for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and SIEVERS and CASSEL, Judges.

MILLER-LERMAN, J.

## NATURE OF CASE

S.J. appeals the order of the district court for Douglas County which affirmed the order of the Mental Health Board of the Fourth Judicial District (the Board) committing S.J. as a dangerous sex offender. The court rejected S.J.'s arguments that his due process rights had been violated and concluded that the State had met its burden to prove by clear and convincing evidence that S.J. was a dangerous sex offender and that continued inpatient treatment was the least restrictive alternative available. We affirm.

## STATEMENT OF FACTS

The Douglas County Attorney filed a petition with the Board alleging that S.J. was a dangerous sex offender within the meaning of Nebraska's Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009). Following an initial hearing held April 30, 2009, the Board found that S.J. had been convicted of two sex offenses, that he suffered from the mental illness pedophilia, that such illness made him likely

to engage in repeat acts of sexual violence, and that he was substantially unable to control his criminal behavior. The Board therefore concluded that S.J. was a dangerous sex offender. But the Board rejected the inpatient treatment plan recommended by the State because it found that inpatient treatment was too restrictive and not warranted by the evidence. The Board ordered the county attorney and the public defender to develop an outpatient treatment plan; the Board indicated it would seek assistance from the Department of Health and Human Services (DHHS) in developing an outpatient program.

At a July 2, 2009, review hearing, it was reported that despite extensive efforts, an appropriate outpatient program had not been found due to problems with cost and availability of providers. The Board therefore ordered S.J. to be conditionally placed at the Norfolk Regional Center (NRC) for inpatient treatment but ordered DHHS to undertake all necessary efforts to place S.J. in a suitable outpatient program. On October 29, it was reported to the Board that S.J. was still being held in inpatient treatment at NRC. The Board ordered DHHS to continue searching for suitable outpatient treatment and ordered that if an appropriate outpatient plan was not arranged by December 28, the commitment would be dismissed.

On December 10, 2009, NRC staff who had evaluated S.J. filed a report with the Board in which they collectively opined that S.J. presented a high risk of recidivism and that the least restrictive treatment for him was continued inpatient treatment at NRC. The Board therefore set a hearing for January 12, 2010.

At the January 12, 2010, hearing, a psychologist from NRC testified that during testing at NRC, several additional risk factors came to light that had not been noted in previous testing of S.J. and that such additional factors raised S.J.'s risk to reoffend to high compared to the medium risk at which he had previously been assessed. The psychologist testified that such factors warranted therapeutic attention and opined that the least restrictive alternative for S.J. which would provide appropriate therapy was inpatient treatment. A psychiatrist from NRC also testified at the hearing and concurred in the opinion that inpatient treatment was the least restrictive alternative for S.J.

The psychiatrist testified that S.J.'s high risk to reoffend "really waives" the option of outpatient treatment and that an inpatient alternative was required for effective treatment. Following the hearing, the Board concluded that inpatient treatment at NRC was the least restrictive alternative presently "available" and inpatient commitment was ordered.

S.J. appealed the Board's January 12, 2010, order to the district court for Douglas County. He asserted that his procedural due process rights, his substantive due process rights, and his right to an adjudication before an impartial decisionmaker had been violated. He also asserted that the Board erred when it found by clear and convincing evidence that he was a dangerous sex offender and that inpatient treatment was the least restrictive treatment alternative.

In its order filed March 20, 2011, as an initial matter, the district court noted its awareness of § 71-1209(6) of SOCA which provides that inpatient treatment should "only be considered as a treatment alternative of last resort." The court reviewed the procedures and protections required under SOCA and concluded that such procedures "provide subjects with a meaningful opportunity to be heard regarding their commitment as a dangerous sex offender, both prior to and after that determination is made." The district court concluded that SOCA provided adequate procedural due process in connection with commitment decisions thereunder.

As to the instant case, the court noted that S.J. made no claim that he had been denied any of the procedures required by SOCA. The court specifically rejected S.J.'s argument that SOCA violates procedural due process because it treats inpatient and outpatient treatment as equivalent alternatives, thus allowing commitment to either program based on what is available. The court disagreed with S.J.'s reading of SOCA and found that SOCA did not authorize the Board to arbitrarily order treatment solely on the basis of availability but instead required the Board to consider all treatment alternatives and order the appropriate available treatment that imposed the least restraint on liberty. The court also rejected S.J.'s argument that SOCA does not provide procedural due process because the State elects to make only the most restrictive level

of treatment available. The court found that SOCA's provision that the Board order the least restrictive treatment alternative did not mean that the State must make less restrictive alternatives available or pay for such alternatives and that such provision was not a denial of due process.

With regard to the least restrictive treatment alternative, the district court distinguished *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009), in which this court reversed the district court's affirmance of a commitment order because the State presented no evidence regarding alternative treatment options. In contrast to *In re Interest of O.S.*, the court found that in the instant case, "the Board had an abundance of evidence before it regarding the various treatment alternatives offered in communities throughout Nebraska, as well as the programs available through DHHS."

The court concluded that no substantive due process violation occurred, because the infringement on S.J.'s liberty was narrowly tailored to serve a compelling state interest in rehabilitating S.J. and protecting the community. The court found that continued inpatient treatment at NRC was the least restrictive treatment alternative available. The court noted that although the Board initially ordered outpatient treatment, additional risk factors came to light during therapy which indicated that inpatient treatment was necessary. Upon a de novo review of the record, the court found, based on evidence which included opinions of mental health professionals, that inpatient treatment was the least restrictive alternative available for the appropriate treatment of S.J. The court concluded, therefore, that the infringement of S.J.'s liberty interest was narrowly tailored.

The court next concluded that SOCA complied with the constitutional requirement of an impartial decisionmaker. The court rejected S.J.'s argument that SOCA was unconstitutional because it provided for commitment decisions to be made by the Board rather than by a court. The court reasoned that the Board could be impartial even if it was not a court and noted that S.J. made no allegation that the Board was biased. The court further noted that SOCA provided "generous procedures for judicial review of the Board's decisions."

The court finally found that the record contained clear and convincing evidence to support the Board's finding that S.J. was a dangerous sex offender. The court interpreted the definition of "[d]angerous sex offender" in Neb. Rev. Stat. § 83-174.01 (Reissue 2008), which included references to a subject's being "likely to engage in repeat acts of sexual violence" and "substantially unable to control his or her criminal behavior," to mean that an individual's propensity to commit sex offenses "coupled with an inability or unwillingness to control that propensity" would justify civil commitment. The court concluded that the record contained clear and convincing evidence that S.J. was both "'likely to engage in repeat acts of sexual violence'" and "'substantially unable to control his criminal behavior'" and that the Board's finding that S.J. was a dangerous sex offender was not erroneous.

Based on the evidence and the opinions of mental health professionals, the court found that the record contained clear and convincing evidence to support the Board's determination that inpatient treatment at NRC was the least restrictive treatment alternative available.

Having rejected S.J.'s assignments of error, the court affirmed the Board's commitment order.

S.J. appeals.

## ASSIGNMENTS OF ERROR

As framed by S.J., he claims that the district court erred when it concluded that (1) his substantive due process rights were not violated when the Board ordered him to an inpatient treatment program after it had initially determined that outpatient treatment was appropriate, (2) SOCA did not violate procedural due process when it permitted commitment to a treatment program that was more restrictive than necessary based solely on availability, (3) SOCA did not violate procedural due process when it allowed commitment by a Board that contained only one legally trained member, (4) there was clear and convincing evidence that S.J. was substantially unable to control his criminal behavior, and (5) there was clear and convincing evidence that inpatient treatment was the least restrictive available alternative.

## STANDARDS OF REVIEW

[1] The district court reviews the determination of a mental health board de novo on the record. *In re Interest of S.C., ante* p. 294, 810 N.W.2d 699 (2012). In reviewing a district court's judgment, an appellate court will affirm unless it finds, as a matter of law, that clear and convincing evidence does not support the judgment. *Id.*

[2,3] The determination of whether procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011). On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Id.*

## ANALYSIS

### *Supplemental Transcript Should Not Be Considered on Appeal Because Evidence Contained Therein Was Not Before the Board and the District Court When They Made the Decisions Being Appealed.*

We note first that the Board filed a supplemental transcript in this court containing materials that the Douglas County Attorney submitted to the Board after the Board entered the January 12, 2010, order from which the appeal to the district court was taken. S.J. filed with this court a motion to strike the supplemental transcript in which he asserts that none of these filings "appear in the record from the hearings concluded on January 12, 2010, from which this appeal was taken." Before this appeal was moved to this court's docket on a petition to bypass, the Nebraska Court of Appeals overruled the motion but reserved ruling on whether the materials were properly before the appellate court. We now rule that they are not.

We note that the materials in question were not provided to the Board prior to its decision and therefore were not considered by the Board when it reached its decision of January 12, 2010, from which the appeal to the district court was taken. We further note that the materials in question were not admitted in the appeal to the district court and that the district court did not reference such materials in its order affirming the Board's commitment order.

The district court considered S.J.'s appeal de novo on the record. See *In re Interest of S.C., supra*. We recently distinguished between an appeal conducted as a "trial de novo" and an "appeal de novo on the record" in *Doe v. Board of Regents, ante* p. 303, 317, 809 N.W.2d 263, 274 (2012), in which we stated:

> "'When an appeal is conducted as a "trial de novo," as opposed to a "trial de novo on the record," it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.'"

(Quoting *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).) The district court's review of the propriety of the Board's decision of January 12, 2010, was properly limited to consideration of the previous record made before the Board prior to the Board's decision. Consideration of materials that found their way into the Board's files after the Board's decision are not properly considered by a district court in its de novo review on the record of a mental health board appeal such as the instant case, nor are such materials proper for our consideration of the district court's ruling.

We therefore conclude that the materials in the supplemental transcript are not properly before us on appeal, and we will not consider those materials in our review of the district court's determinations.

*Clear and Convincing Evidence Supported Finding That S.J. Was Substantially Unable to Control His Behavior.*

We first consider S.J.'s assignments of error regarding the sufficiency of evidence to support the district court's findings; we note that our resolution of these assignments of error makes consideration of certain other assignments of error unnecessary. S.J. first asserts that the district court erred when it found that there was clear and convincing evidence that S.J. was substantially unable to control his criminal behavior. We affirm the court's ruling.

We note that before committing a person under SOCA, the Board must find "clear and convincing evidence that the subject is a dangerous sex offender." § 71-1208. See, also, § 71-1209. We have observed that "Section 71-1203(1) of SOCA incorporates the definition of '[d]angerous sex offender' found in § 83-174.01(1) . . . ." *In re Interest of D.H.*, 281 Neb. 554, 558, 797 N.W.2d 263, 267 (2011). "Dangerous sex offender" is defined in § 83-174.01(1) to include a person who (1) suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, (2) has been convicted of one or more sex offenses, and (3) is substantially unable to control his or her criminal behavior. S.J. does not dispute the findings with regard to the first two requirements but asserts that the evidence failed to establish that he was substantially unable to control his criminal behavior.

S.J. notes that the definition of "dangerous sex offender" requires distinct findings that a mental illness makes the person likely to engage in repeat acts of sexual violence and that the person is substantially unable to control his or her criminal behavior. S.J. argues that because the two are distinct requirements, they must mean something different, and that "substantially unable to control his or her criminal behavior" cannot mean that the person is merely "likely to engage in repeat acts of sexual violence." See § 83-174.01. S.J. posits that "substantially unable to control his or her criminal behavior" distinguishes between ordinary recidivists who are merely likely to engage in repeat acts and those who cannot control their desire to commit sexually violent acts.

We note that the two requirements are distinguished from one another in § 83-174.01, which, in subsection (2), defines "likely to engage in repeat acts of sexual violence" to refer to a person's propensity, whereas subsection (6) provides that "[s]ubstantially unable to control his or her criminal behavior means having serious difficulty in controlling or resisting the desire or urge to commit sex offenses." The first refers to a person's propensity, while the second refers to a person's ability to control that propensity. Both requirements were established in the record, and we, therefore, reject S.J.'s contention that the second component was not established by the evidence.

The Board in its April 30, 2009, order and the district court in its order affirming the commitment noted the testimony of a clinical psychologist, which testimony supported the finding that S.J. was a dangerous sex offender. The clinical psychologist testified that she believed that S.J. was substantially unable to control his criminal behavior. In this regard, she noted that even after he was subjected to legal sanctions for his first offense, S.J. committed a subsequent offense. She further noted that S.J. committed two offenses in homes where other adults were present and that in one instance, he returned the same night to sexually assault the victim a second time. She testified that S.J. had not exhibited behavioral controls and that he had not received treatment to develop such controls. Such testimony supports a finding that S.J. had "serious difficulty in controlling or resisting the desire or urge to commit sex offenses" and that he is substantially unable to control his criminal behavior. See § 83-174.01(6).

On appeal, S.J. points to other portions of the clinical psychologist's testimony and contends that such testimony undermines her opinion regarding his ability to control his behavior. However, the district court considered that the Board saw and heard the clinical psychologist's testimony and observed her demeanor and the court gave weight to the Board's judgment regarding her credibility. We also give great weight to the Board's judgment as to credibility, see *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009), and we therefore agree with the district court's determination that there was clear and convincing evidence to support the finding that S.J. was substantially unable to control his criminal behavior. We reject this assignment of error.

*Clear and Convincing Evidence Supported Finding That Inpatient Treatment Was the Least Restrictive Alternative.*

S.J. next claims that the district court erred when it found that there was clear and convincing evidence before the Board that inpatient treatment was the least restrictive alternative. We reject this assignment of error.

S.J. asserts that the Board originally determined that outpatient treatment was appropriate and that the Board ordered

the more restrictive inpatient treatment only because it was the only treatment available and outpatient treatment was not available. This assertion is contrary to the evidence.

In the April 30, 2009, order, the Board concluded that inpatient treatment was too restrictive and that outpatient treatment was appropriate, and in the July 2 order, the Board ordered S.J. to be conditionally placed at NRC until an appropriate outpatient treatment program could be identified. However, by the time of the issuance of the January 12, 2010, order from which the appeal was taken, NRC staff had examined S.J. on an inpatient basis and determined that inpatient treatment was required based on additional risk factors that had come to light and that had not been noted in previous evaluations. Therefore, at the time the Board ordered inpatient treatment on January 12, there was clear and convincing evidence that inpatient rather than outpatient treatment was appropriate. Because outpatient treatment was not appropriate, it was not a viable alternative, and inpatient treatment was the least restrictive alternative. Although the Board had earlier expressed frustration at the limited treatment options available, the Board did not order inpatient treatment on January 12 merely because there was no less restrictive alternative available.

S.J. also argues that the evidence failed to establish that inpatient treatment was the least restrictive alternative, because the NRC staff who testified that inpatient treatment was appropriate testified that they did not have knowledge of other treatment programs. S.J. cites *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009), in which this court reversed the affirmance of a commitment order because the State presented no evidence regarding alternative treatment options. By contrast, in this case, although the NRC staff did not have knowledge of other alternatives, the State presented evidence regarding treatment alternatives through other sources. The district court stated that "the Board had an abundance of evidence before it regarding the various treatment alternatives offered in communities throughout Nebraska, as well as the programs available through DHHS." Based on the evidence noted, we conclude that the record contained clear and convincing evidence that inpatient treatment at NRC was the least restrictive

alternative and that the Board and the district court did not err in so finding.

*We Need Not Consider Certain of S.J.'s Due Process Claims With Regard to SOCA.*

S.J. assigns error to the district court's rejection of certain due process challenges he made regarding the application of SOCA in his case. Two of his challenges were (1) that his substantive due process rights were violated when the Board ordered him to an inpatient treatment program after it had earlier determined that outpatient treatment was appropriate and (2) that SOCA violates procedural due process in that it permits commitment to a treatment program that is more restrictive than necessary based solely on availability. These challenges are based on S.J.'s assertion that the Board ordered S.J. to an inpatient treatment despite concluding that a less restrictive outpatient treatment was the appropriate treatment and that SOCA permitted the Board to order S.J. to treatment that was more restrictive than necessary based solely on the fact that less restrictive treatment was not available. These assertions are not supported by the facts or the law and arguments based on these faulty assertions are without merit.

We do not analyze these due process issues because they are not supported by the record in this case. As we concluded above, there was clear and convincing evidence to support the district court's determination that inpatient treatment as ordered by the Board was the appropriate treatment option for S.J. Although the Board initially determined that outpatient treatment was indicated, by the time of the January 12, 2010, order, the Board concluded based on the evidence then before it, that inpatient treatment was the appropriate treatment and that outpatient treatment would not meet S.J.'s needs. The choice of inpatient treatment was based on what was appropriate for S.J., and the Board did not order S.J. to inpatient treatment because no appropriate less restrictive treatment option was available.

S.J.'s first two due process challenges were premised on the faulty basis that the Board ordered S.J. to a more restrictive

than necessary treatment option based solely on availability. As to the first challenge asserting in part that the Board actually determined a less restrictive treatment was warranted, the basis for this claim is inaccurate, and we reject this assignment of error. Further, we need not consider whether there would be a due process violation if in fact S.J. had been ordered into treatment that was more restrictive than necessary based solely on availability.

As to the second due process challenge involving SOCA's provisions, we note that contrary to S.J.'s assertion that SOCA invites the Board to commit an offender to a more restrictive alternative than is necessary, SOCA instead provides in § 71-1209(6) that a "treatment order by the mental health board under this section shall represent the appropriate available treatment alternative that imposes the least possible restraint upon the liberty of the subject" and that "[i]npatient hospitalization or custody shall only be considered as a treatment alternative of last resort." While the statute refers to "available" treatment, it also makes clear that the treatment ordered must be "appropriate" and must impose the least possible restraint and that inpatient treatment is to be considered a treatment alternative of last resort. Contrary to S.J.'s claim, SOCA does not invite placement based solely on availability, and in any event, as applied to this case, placement was not ordered based solely on availability.

*SOCA's Provision Regarding the Composition of the Board Is Consistent With Due Process Requirements.*

S.J. also claims that the district court erred when it concluded that SOCA's provision allowing commitment by a Board that contained only one legally trained member did not violate procedural due process. S.J. was committed by the Board, whose composition was consistent with the requirements of SOCA, and therefore this due process challenge, unlike the two just discussed, is properly presented on the facts of this case. However, we reject S.J.'s argument that the statutory composition of the Board violated his due process rights.

Pursuant to Neb. Rev. Stat. § 71-915(2) (Supp. 2011),

> Each mental health board shall consist of an attorney licensed to practice law in this state and any two of the following but not more than one from each category: A physician, a psychologist, a psychiatric nurse, a licensed clinical social worker or a licensed independent clinical social worker, a licensed independent mental health practitioner who is not a social worker, or a layperson with a demonstrated interest in mental health and substance dependency issues.

Under § 71-915(3), "[a]ny action taken at any mental health board hearing shall be by majority vote."

S.J. argues that the statutory composition of the Board violates due process requirements in a commitment determination. S.J. contends that such determination should be made by a court and asserts that statutes in other states related to placement decisions require a court determination. He further argues that the composition of the Board creates a risk of deprivation of constitutional rights, because a majority of the Board consists of members who are not legally trained and the Board order need not be unanimous.

[4,5] The Due Process Clause applies when government action deprives a person of liberty or property; accordingly, when there is a claimed denial of due process, a court must consider the nature of the individual's claimed interest. *In re Interest of S.C., ante* p. 294, 810 N.W.2d 699 (2012). A claim that one is being deprived of a liberty interest without due process of law is typically examined in three stages. The question in the first stage is whether there is a protected liberty interest at stake. If so, the analysis proceeds to the second stage, in which it is determined what procedural protections are required. Upon the resolution of that issue, the analysis moves on to the third and final stage, in which the facts of the case are examined to ascertain whether there was a denial of that process which was due. *Id.*

[6] Our first query then is whether there is a protected liberty interest at stake. Under SOCA, the Board decides whether a subject should be committed to inpatient or outpatient treatment. Clearly, a liberty interest is implicated if a subject is

committed to inpatient treatment. See *Vitek v. Jones*, 445 U.S. 480, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980) (commitment to mental hospital produces massive curtailment of liberty and, in consequence, requires due process protection). Because a protected liberty interest is at stake, appropriate due process is required in connection with the commitment decision involving S.J. under SOCA.

[7] We next consider what procedural protections are required in connection with the commitment decision. Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it. *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004). We must therefore consider whether SOCA's provision regarding the composition of the Board meets the requirements of due process.

[8] S.J. argues that the composition of the Board under SOCA does not meet due process requirements, because the decision is not made by a court but instead is made by the Board and a majority of the members are not trained in the law. We have not held that such decisions must be made by a court in order to meet due process requirements. Instead, we have stated that due process requires a neutral, or unbiased, adjudicatory decisionmaker. *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011). Such decisionmakers serve with a presumption of honesty and integrity. *Id*. A party seeking to disqualify an adjudicator because of bias or prejudice bears the heavy burden of overcoming the presumption of impartiality. *Id*.

S.J. makes no convincing argument that the Board as composed pursuant to SOCA would inherently be biased or prejudiced, and we find no reason that the Board would be biased or prejudiced because of its statutory composition. We further reject S.J.'s argument that the Board could not properly make a commitment decision because a majority of the members are not trained in the law. Due process does not require that initial decisions be made by a court or other legally trained persons.

We note in this regard that although a commitment decision is initially made by the Board, SOCA provides for judicial review of the Board's treatment orders. See § 71-1214. Therefore, SOCA provides those subject to a commitment order the opportunity to present legal arguments to a court. We conclude that the district court did not err when it rejected S.J.'s due process challenge.

## CONCLUSION

We first note that, as determined above, the materials contained in the supplemental transcript were not considered by the Board in making its commitment decision nor properly considered as evidence in the district court on appeal; we therefore did not consider such materials in our review of the district court's decision. We conclude that the record before the Board and properly before the district court contained clear and convincing evidence to support the findings of the Board as affirmed by the district court that S.J. was substantially unable to control his criminal behavior and that inpatient treatment was the least restrictive alternative. We reject S.J.'s due process challenges to the proceedings before the Board under SOCA. We therefore affirm the judgment of the district court which affirmed the Board's commitment order.

AFFIRMED.

WRIGHT, J., not participating.

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SOUTHWIND HOMEOWNERS ASSOCIATION, A CORPORATION, APPELLEE, V. DAVID BURDEN AND WILAI BURDEN, HUSBAND AND WIFE, APPELLANTS.

810 N.W.2d 714

Filed March 16, 2012. No. S-11-373.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.

3. **Restrictive Covenants.** If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.
4. ____. Restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.
5. **Restrictive Covenants: Injunction: Proof.** Where there has been a breach of a restrictive covenant, it is not necessary to prove that the injury will be irreparable in order to obtain injunctive relief.
6. **Restrictive Covenants.** Nebraska has consistently enforced restrictive covenants so long as they are unambiguous.

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

Marion F. Pruss for appellants.

Larry R. Forman, of Hillman, Forman, Childers & McCormack, for appellee.

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

HEAVICAN, C.J.

## INTRODUCTION

David Burden and Wilai Burden provide childcare services in their home in Sarpy County, Nebraska. The Southwind Homeowners Association filed suit against the Burdens, alleging that the childcare services as provided violated several restrictive covenants applicable to the premises and asking that the Burdens be enjoined from providing those services. The district court found that the childcare services were in violation of several restrictive covenants and granted an injunction. The Burdens appeal. We affirm.

## FACTUAL BACKGROUND

The facts of this case are largely undisputed. The Burdens purchased the property in question, located in La Vista, Nebraska, on November 30, 2007. At the time of the purchase, a certified copy of various covenants, conditions, restrictions, and easements of the Southwind development was on file with the Sarpy County register of deeds. There is no dispute that the Burdens were given at least constructive notice of these

covenants. Moreover, the Burdens do not contend that they had no notice of the covenants.

As relevant, the covenants limit the use of the subject premises as follows:

> 1. Each lot shall be used exclusively for single-family residential purposes . . . .
>
> . . . .
>
> 5. . . . No business activities of any kind whatsoever shall be conducted on any Lot including home occupations as defined in the Zoning Code of the City of LaVista, Nebraska . . . .
>
> 6. No obnoxious or offensive activity shall be carried on upon any Lot, nor shall anything be done thereon which may be, or may become, an annoyance or nuisance to the neighborhood, including, but not limited to, odors, dust, glare, sound, lighting, smoke, vibration, and radiation.

Apparently, since shortly after they purchased the residence, the Burdens have provided daytime childcare to between four and six children, ages 6 months to 10 years, Mondays through Saturdays from 6 a.m. to 6 p.m. Two of the children for whom they provide care are related to them. The Burdens charge a fee to provide this care. In 2008, the Burdens had a net income from childcare services of $2,625, and in 2009, the net income was $45. In 2010, the Burdens apparently earned less than $1,000. Wilai is licensed through the State of Nebraska to care for up to eight children full time and another two children part time.[1]

Written notice was given to the Burdens on July 7, 2008, informing them that the use of the property as a daycare was in violation of the covenants. The Burdens continued to provide childcare services, and the Southwind Homeowners Association brought suit on September 17, 2010, asking that the court find the Burdens in violation of the covenants and enter an order enjoining the Burdens from continuing to operate the daycare.

On February 3, 2011, the Southwind Homeowners Association filed a motion for summary judgment. Following

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[1] See Neb. Rev. Stat. § 43-2609 (Reissue 2008).

a hearing on March 25, that motion was granted on March 30. In granting the motion, the district court noted the language of the covenant prohibiting "'business activities of any kind.'" The district court also rejected the Burdens' argument that they were authorized to provide childcare services on the premises by the Quality Child Care Act.[2] The Burdens appeal.

## ASSIGNMENT OF ERROR

The Burdens assign that the district court erred in granting the Southwind Homeowners Association's motion for summary judgment.

## STANDARD OF REVIEW

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

## ANALYSIS

The issue presented by this case is whether the Burdens' conduct of providing childcare under these facts violated the restrictive covenants on their property.

[2-5] Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.[4] If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.[5] However, restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.[6] Where there has been a breach of a restrictive covenant, it is

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[2] Neb. Rev. Stat. §§ 43-2601 to 43-2625 (Reissue 2008).

[3] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[4] *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002).

[5] See *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

[6] See, *Knudtson v. Trainor*, 216 Neb. 653, 345 N.W.2d 4 (1984); *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980).

not necessary to prove that the injury will be irreparable in order to obtain injunctive relief.[7]

While this court has not been presented with the issue of whether a home daycare is a violation of these types of restrictive covenants, this issue has been litigated in other jurisdictions.[8] The prevailing weight of that authority suggests that the operation of a daycare is a violation of restrictive covenants allowing only single-family or residential use and/or prohibiting the operation of a trade or business.[9]

For example, in *Terrien v. Zwit*,[10] a Michigan Supreme Court case, the applicable covenants prohibited any use other than for "'residential purposes'" and further stated that "'[n]o part . . . shall be used for any commercial, industrial, or business enterprises.'" The court held that the daycare in question violated these prohibitions.[11] The court also rejected the defendants' contention that the operation of a family home daycare was a "'favored use'" and that thus, a covenant restricting that activity was in violation of public policy.[12] In rejecting this argument, the court noted that assuming the operation of a daycare was part of Michigan's public policy, also part of public policy was a property holder's right to improve his or her property,

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[7] *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988).

[8] See Annot., 81 A.L.R.5th 345 (2000).

[9] *Williams v. Tsiarkezos*, 272 A.2d 722 (Del. Ch. 1970); *Chambers v. Gallaher*, 257 Ga. 795, 364 S.E.2d 576 (1988); *Lewis-Levett v. Day*, 875 N.E.2d 293 (Ind. App. 2007); *Berry v. Hemlepp*, 460 S.W.2d 352 (Ky. App. 1970); *Woodvale Condominium Trust v. Scheff*, 27 Mass. App. 530, 540 N.E.2d 206 (1989); *Terrien v. Zwit*, 467 Mich. 56, 648 N.W.2d 602 (2002); *Ginsberg v. Yeshiva of Far Rockaway*, 74 Misc. 2d 391, 344 N.Y.S.2d 602 (1973); *Walton v. Carignan*, 103 N.C. App. 364, 407 S.E.2d 241 (1991); *Hill v. Lindner*, 769 N.W.2d 427 (N.D. 2009); *Martellini v. Little Angels Day Care, Inc.*, 847 A.2d 838 (R.I. 2004); *Metzner v. Wojdyla*, 125 Wash. 2d 445, 886 P.2d 154 (1994). But see, *Shoaf v. Bland*, 208 Ga. 709, 69 S.E.2d 258 (1952); *Stewart v. Jackson*, 635 N.E.2d 186 (Ind. App. 1994); *Beverly Island Ass'n v Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982).

[10] *Terrien v. Zwit, supra* note 9, 467 Mich. at 60, 648 N.W.2d at 605.

[11] *Terrien v. Zwit, supra* note 9.

[12] *Id.* at 69, 648 N.W.2d at 609.

including the adoption of covenants which would enhance the value of that property.[13] The court stated that there were no "'definite indications'" in Michigan law of any public policy against such a covenant.[14]

Other courts have also held that daycare facilities violated covenants similar to the ones at issue in this case.[15] The Rhode Island Supreme Court, in *Martellini v. Little Angels Day Care, Inc.*,[16] held that a covenant limiting the use of the property to "'single family private residence purposes'" was violated by the operation of a daycare. In that case, the court distinguished an earlier case, which held that allowing a group home was not a violation of a similar covenant. The court noted that while residents of the group home were not a traditional family unit, the residents would operate as such, as distinguished from a daycare, which would be composed of several occupants that did not reside there or engage in the traditional family activities outside of the hours when they paid for care.[17] The court also rejected the defendant's public policy argument.[18]

The Burdens direct us to this court's decision in *Knudtson v. Trainor*[19] and contend that that decision supports their position. We disagree. We held in *Knudtson* that the operation of a group home did not violate a covenant restricting the use of property to only a residential purpose. We read the term "residential" as meaning where people reside or dwell and distinguished it from use for commercial or business purposes. We noted that the home in question would continue to look like a

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[13] *Terrien v. Zwit, supra* note 9.

[14] *Id.* at 72, 648 N.W.2d at 611.

[15] See *Martellini v. Little Angels Day Care, Inc., supra* note 9. See, also, *Williams v. Tsiarkezos, supra* note 9; *Chambers v. Gallaher, supra* note 9; *Lewis-Levett v. Day, supra* note 9; *Berry v. Hemlepp, supra* note 9; *Woodvale Condominium Trust v. Scheff, supra* note 9; *Ginsberg v. Yeshiva of Far Rockaway, supra* note 9; *Walton v. Carignan, supra* note 9; *Hill v. Lindner, supra* note 9; *Metzner v. Wojdyla, supra* note 9.

[16] *Martellini v. Little Angels Day Care, Inc., supra* note 9, 847 A.2d at 841.

[17] *Martellini v. Little Angels Day Care, Inc., supra* note 9.

[18] *Id.*

[19] *Knudtson v. Trainor, supra* note 6.

single-family home and that people would continue to reside in it; thus, the use was in compliance with the covenant.

While it is true that the Burdens' home will continue to be a single-family residence, look like one, and have a family (the Burdens) living in it, the character of the home, for at least part of the day, will be different from any other single-family home. At least 5 days a week between the hours of 6 a.m. and 6 p.m., five children will become temporary residents. The amount of traffic will increase at child dropoff and pickup times and, to a lesser extent, between those times. This is compared to the group home in *Knudtson*, where the residence might not be used to house a traditional family, but nevertheless those residents will live together much in the same way that a traditional family would. We also note that in *Knudtson*, the only covenant at issue was one limiting the use to residential purposes, and not one explicitly prohibiting business or commercial activities.

The covenants in this case require that the property be used for a single-family dwelling only and expressly prohibit the operation of a business on the property. Where unambiguous, the terms of a restrictive covenant should be enforced by their terms. These terms are unambiguous; moreover, our conclusion is supported by the greater weight of case law. And no matter how the Burdens characterize the operation, the couple is running a daycare for profit (no matter how little profit it might generate) at their home. We conclude that this is a business purpose, which is prohibited by the covenants.

Because the terms are unambiguous and must therefore be enforced, the Burdens' arguments that the residential nature of the neighborhood is not impaired by their daycare are unavailing. The Southwind Homeowners Association need not prove irreparable damage in order to obtain an injunction and in turn enforce their covenants.[20]

Finally, the Burdens' argument that public policy would prohibit the enforcement of these covenants is also unpersuasive. It is true that the Legislature has adopted legislation with respect to family home daycares like the one operated by the

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[20] See *Breeling v. Churchill, supra* note 7.

Burdens,[21] including § 43-2616, which permits the establishment of a family home daycare in any "residential zone within the exercised zoning jurisdiction of any city or village."

But as the Burdens acknowledge, while the Quality Child Care Act "established a public policy in favor of permitting" family home daycares, § 43-2616 "does not specifically ban the enforcement of restrictive covenants prohibiting the establishment" of family home daycares.[22] Thus, it would appear, as in *Terrien*, that there are no "'definite indications'" that covenants which would prohibit the operation of family home daycares would be against that public policy.[23]

[6] Moreover, as is noted above, Nebraska has consistently enforced restrictive covenants so long as they are unambiguous.[24] And we have recognized a strong policy favoring the freedom to contract, which is really what a covenant is: "'"It is not the province of courts to emasculate the liberty of contract by enabling parties to escape their contractual obligations on the pretext of public policy unless the preservation of the public welfare imperatively so demands."'"[25]

We note that in their amended answer and in response to one interrogatory, and again at oral argument, the Burdens assert that the Southwind Homeowners Association selectively enforces the restrictive covenants at issue. There is no evidence in the record to support that assertion; we therefore find that contention to be without merit.

Turning then to the ultimate question, whether summary judgment was appropriate, we conclude that it was. The Burdens argue that there remain several genuine issues of material fact—namely, whether what they are really running is a business. But while the Burdens maintain these are issues of fact, they are really issues of law—whether the Burdens'

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[21] See §§ 43-2601 to 43-2625.

[22] Brief for appellants at 15.

[23] See *Terrien v. Zwit, supra* note 9, 467 Mich. at 72, 648 N.W.2d at 611.

[24] *Boyles v. Hausmann, supra* note 5.

[25] *Parkert v. Lindquist*, 269 Neb. 394, 397, 693 N.W.2d 529, 532 (2005) (quoting *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980)).

undisputed activities on the property violate the covenants. Having concluded that the Burdens' activities are a violation, summary judgment was appropriate.

## CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

McCORMACK, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
VICTOR VELA-MONTES, APPELLANT.

810 N.W.2d 749

Filed March 23, 2012. No. S-10-1043.

Petition for further review from the Court of Appeals, IRWIN, CASSEL, and PIRTLE, Judges, on appeal thereto from the District Court for Douglas County, J. MICHAEL COFFEY, Judge. Judgment of Court of Appeals affirmed.

Daniel R. Stockmann, of Dunn & Stockmann, L.L.O., for appellant.

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

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

PER CURIAM.

Having reviewed the briefs and record and having heard oral arguments, we conclude on further review that the decision of the Nebraska Court of Appeals in *State v. Vela-Montes*, 19 Neb. App. 378, 807 N.W.2d 544 (2011), is correct, and accordingly, we affirm the decision of the Court of Appeals which affirmed as modified the ruling of the district court.

AFFIRMED.

# State of Nebraska, appellee, v. Benjamin J. Sprunger, appellant.

811 N.W.2d 235

Filed March 23, 2012. No. S-11-100.

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. **Search and Seizure.** Application of the good faith exception to the exclusionary rule is a question of law.
3. **Constitutional Law: Search Warrants: Probable Cause.** The execution of a search warrant without probable cause is unreasonable and violates the Fourth Amendment.
4. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit that establishes probable cause.
5. **Search Warrants: Probable Cause: Words and Phrases.** Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
6. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at the time.
7. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
8. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence that emerges after the warrant is issued has no bearing on whether the warrant was validly issued. An appellate court's review is guided by the principle that sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others.
9. **Search Warrants: Probable Cause.** The requirement of particularity for a search warrant is closely related to the requirement of probable cause.
10. **Search Warrants.** A purpose of the particularity requirement for a search warrant is to prevent the issuance of warrants on loose, vague, or doubtful bases of fact.
11. **Search Warrants: Probable Cause: Proof.** To establish probable cause for the issuance of a search warrant, it must be probable that (1) the described items

are connected with criminal activity and (2) they are to be found in the place to be searched.

12. **Constitutional Law: Search and Seizure.** A general search for evidence of any crime is unconstitutional.
13. ____: ____. That a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.
14. **Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant.
15. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Evidence suppression is appropriate if one of four circumstances exists: (1) The magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) the issuing magistrate wholly abandoned his judicial role; (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.
16. **Search and Seizure: Police Officers and Sheriffs.** The good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.
17. **Police Officers and Sheriffs: Presumptions.** Officers are assumed to have a reasonable knowledge of what the law prohibits.
18. **Search Warrants: Affidavits: Police Officers and Sheriffs: Appeal and Error.** In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.
19. **Search Warrants: Affidavits: Police Officers and Sheriffs: Probable Cause: Appeal and Error.** When evaluating whether a warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer, considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.
20. **Search Warrants: Probable Cause: Evidence.** A magistrate's signature cannot render reasonable an objectively unreasonable failure to support a warrant application with evidence necessary to demonstrate probable cause.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded for further proceedings.

Jason E. Troia, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

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

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

CONNOLLY, J.

The State charged Benjamin J. Sprunger with 20 counts of possessing child pornography. After a bench trial, a court convicted him of four of those counts. The court sentenced him to 18 months of probation on each conviction, with the terms to run concurrently. Sprunger appeals; he challenges the search that uncovered the images and the sufficiency of the evidence to support the convictions. We conclude that the affidavit for the warrant failed to establish probable cause. Further, we also conclude that the officers' belief that the information contained in the affidavit had created probable cause was not objectively reasonable. We reverse, and remand for proceedings consistent with this opinion.

## BACKGROUND

On July 25, 2009, the Washington County, Nebraska, sheriff's office received a complaint of credit card fraud from a man in Blair, Nebraska. The man reported that about 2 weeks earlier, someone had used his bank debit/check card without his authorization to purchase computer equipment from a California company.

The deputies contacted the California company, and the company confirmed the purchase on the man's card. The computer equipment was sent to an address in New Jersey. The deputies later learned, however, that the Internet protocol (IP) address used to make the purchase belonged to Sprunger at his apartment in Gretna, Nebraska.

Deputies from Washington and Sarpy Counties then went to Sprunger's apartment for a "knock-and-talk." There, they questioned Sprunger about the purchase. Sprunger denied any knowledge of the purchase. The deputies, however, observed several computers and other computer equipment in his apartment. When the deputies asked if he would allow them to take

the computers, Sprunger denied permission and told them that they would need a warrant to take his computers.

In talking with Sprunger, the deputies learned that Sprunger worked at a bank data processing center, where he had access to account information. In addition, they also learned that Sprunger was going to school to become a computer technician and, thus, was likely well versed in computers.

The deputies left and applied for a search warrant. Their supporting affidavit recounted the facts that we have set out. On October 29, 2009, the county court issued a warrant to seize "[a]ny and all computer equipment" at Sprunger's apartment.

The deputies later returned to execute the warrant. While they were executing the warrant, the deputies learned additional facts that led them to request a second search warrant. When the deputies told Sprunger that they were there to take his computers, Sprunger asked if he could delete some files before the deputies took his computers. The deputies denied him permission. Then, one deputy asked Sprunger if he had any child pornography on his computers. When Sprunger said he did not, the deputy told Sprunger that if there was no child pornography on the computers, Sprunger had nothing to worry about. A few days later, a lawyer representing Sprunger called the deputies. The lawyer asked about the child pornography case the deputies were working on. The lawyer stated that Sprunger had told him "his computers had been taken to look for Child Pornography."

Using these additional facts—Sprunger's request to delete some files and the call from his attorney—the deputies applied for a second search warrant. On November 5, 2009, the county court granted a second warrant. It authorized a search of the computers for evidence of child pornography.

The deputies did not uncover any evidence of the credit card crime. But they did find what they believed to be child pornography. The State charged Sprunger with 20 counts of possession of child pornography.[1]

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[1] See Neb. Rev. Stat. § 28-813.01 (Cum. Supp. 2010).

Sprunger moved to suppress the results of the search warrants. Regarding the first warrant, Sprunger challenged the information as stale because 3 months had passed between the alleged fraud and the application for the warrant. Sprunger claimed that the affidavit did not state why the deputies believed evidence would still be on his computers. Sprunger also claimed that the deputies were required to explain the significance of an IP address and had failed to do so. Regarding the second warrant, Sprunger claimed the affidavit simply did not establish probable cause.

The court issued a separate order for each search warrant. The court concluded that probable cause supported the first warrant. It rejected Sprunger's argument that the 3-month window between the alleged fraud and the application for the search warrant rendered the information stale. The court reasoned that the information would still have been on the computers unless Sprunger had deleted it. Further, the court reasoned that finding the user's physical address from the computer's IP address would take time. The court thus ruled that the information was not stale. The court also rejected Sprunger's argument that the deputies were required to explain the significance of an IP address. The court ruled that because "computers are now prevalent in our society," it could take judicial notice of the significance of an IP address. In sum, the court rejected Sprunger's arguments challenging the warrant and found that probable cause supported it.

The court also overruled Sprunger's motion to suppress the second search. The court agreed that probable cause did not support the warrant for the child pornography search. But the court concluded that the good faith exception[2] saved the search. The court determined that there would be little deterrent effect from excluding the evidence because Sprunger had not alleged maliciousness or intentional misconduct. The court recognized that the inquiry into good faith must be conducted from the vantage point of the officer. The court concluded that the possibility that Sprunger's attorney called the deputies about a child

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[2] See, *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

pornography investigation because Sprunger had mentioned having child pornography on his computer to his attorney was reasonable enough to allow the deputies to rely on the warrant in good faith.

The court found Sprunger guilty of four counts of possessing child pornography. The court sentenced Sprunger to four concurrent 18-month terms of probation.

## ASSIGNMENTS OF ERROR

Sprunger assigns, restated, that the district court erred as follows:

(1) in denying Sprunger's motions to suppress the fruits of the searches; and

(2) in concluding that there was sufficient evidence to convict Sprunger beyond a reasonable doubt.

## STANDARD OF REVIEW

[1,2] 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.[3] Regarding historical facts, we review the trial court's findings for clear error.[4] 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.[5] Further, application of the good faith exception to the exclusionary rule is a question of law.[6]

## ANALYSIS

[3-8] Sprunger challenges the validity of the search warrant that uncovered the images. We begin with some general propositions of law that relate to search warrants.

> The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

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[3] *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

[4] *Id.*

[5] *Id.*

[6] See, e.g., *U.S. v. Nolan*, 199 F.3d 1180 (10th Cir. 1999); *Marshall v. State*, 415 Md. 399, 2 A.3d 360 (2010).

> searches and seizures . . . ," and further provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." . . . The execution of a search warrant without probable cause is unreasonable and violates [the Fourth Amendment]. Accordingly, a search warrant, to be valid, must be supported by an affidavit [that] establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at the time. In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
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> In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence [that] emerges after the warrant is issued has no bearing on whether the warrant was validly issued. . . . Our review is guided by the principle that "[s]ufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."[7]

As litigated by the parties in this court, the search that uncovered the images depends on either the second warrant itself or the officers' good faith reliance on it. The State does not contend that the officers happened upon (or would have happened upon) the child pornography while searching for

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[7] *Nuss, supra* note 2, 279 Neb. at 652-54, 781 N.W.2d 65-66.

evidence of the credit card fraud. So, this case turns on whether probable cause supported the second warrant authorizing the search for child pornography or, if probable cause did not support the warrant, whether the officers' reliance on the warrant was objectively reasonable.

The district court concluded that probable cause did not support the second search warrant. Nonetheless, the court denied Sprunger's motion to suppress, based upon the good faith exception to the exclusionary rule found in *United States v. Leon*.[8] On appeal, the State argues that probable cause supported the warrant but, if not, exclusion of the evidence is inappropriate because of the *Leon* good faith exception. Sprunger argues that not only was the warrant lacking probable cause, it was lacking probable cause to such a degree that reliance on the warrant was not objectively reasonable, and so exclusion is appropriate.

## Probable Cause

The State contends that two facts contained in the affidavit for the second warrant establish probable cause: (1) Sprunger's request to delete files when the deputies came to seize his computers and (2) Sprunger's lawyer's call to the sheriff's office in the days after the deputies executed the first warrant.

The district court concluded that there were two possible explanations—both of which the court considered "reasonable"—for the call from Sprunger's lawyer. First, that Sprunger had told his attorney what a deputy had said and that his attorney called based on this fact. Second, that Sprunger had admitted to his lawyer he had child pornography on his computers and that the lawyer unwittingly alerted the deputies to this fact. We interpret the district court's order as concluding that there was no probable cause because the State did not present any evidence to show that Sprunger had admitted to his lawyer that he had child pornography on his computers. We agree.

The fact that Sprunger's lawyer called the deputies about their investigation does not establish that Sprunger had admitted to possessing child pornography. First, believing that a

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[8] See *Leon, supra* note 2.

lawyer would unwittingly suggest to investigators that a client may have committed a crime without knowing the reason for their investigation requires a leap of faith; the lawyer would have to be living in a mental darkroom. But more important, a deputy had told Sprunger that he "should have nothing to worry about" if no child pornography was found on his computers. Unsurprisingly, Sprunger then talked to a lawyer, as a reasonable person would do after law enforcement had seized that person's property. The lawyer likely would have inquired about what the deputies said and did during the search. And the lawyer would have reasonably interpreted the one deputy's statement to mean that Sprunger was under investigation for possessing child pornography. So the attorney's inquiry did not establish probable cause. It merely reflected the deputy's statement. We conclude that Sprunger's attorney's call to the deputies does not add to a finding of probable cause to search for child pornography.

This leaves only Sprunger's request that he be allowed to delete some files before the deputies took his computers away. But because this fact alone does not create probable cause for finding any particular evidence on the computers, it is insufficient.

The Fourth Amendment contains a particularity requirement, stating that "no Warrants shall issue, but upon probable cause . . . and *particularly describing the place to be searched, and the persons or things to be seized*." (Emphasis supplied.) The Founding Fathers' abhorrence of the English King's use of general warrants—which allowed royal officials to engage in general exploratory rummaging in a person's belongings[9]—was the impetus for the adoption of the Fourth Amendment.[10] Simply put, the Fourth Amendment prohibits "fishing expeditions."

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[9] 79 C.J.S. *Searches* § 229 n.11 (2006).

[10] See, e.g., *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011); *Virginia v. Moore*, 553 U.S. 164, 128 S. Ct. 1598, 170 L. Ed. 2d 559 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990). See, also, Samantha Trepel, *Digital Searches, General Warrants, and the Case for the Courts*, 10 Yale J.L. & Tech. 120 (2007).

[9-11] The requirement of particularity for a search warrant is closely related to the requirement of probable cause.[11] A "purpose [of] the particularity requirement . . . is to prevent 'the issuance of warrants on loose, vague or doubtful bases of fact.'"[12] This case illustrates this connection. To establish probable cause for the issuance of a search warrant, it must be probable that (1) the described items are connected with criminal activity and (2) they are to be found in the place to be searched.[13] Based only on the fact that Sprunger wanted to delete some files, the deputies could never say with particularity what it was that they wanted to seize. They had no idea what files Sprunger might have wanted to delete. How could the deputies have had probable cause to believe that what they were looking for would be found on his computers when they did not even know what they were looking for?

[12] To allow a search based only on the fact that Sprunger wanted to hide something would sanction the type of general exploratory rummaging the Founders wished to prohibit. As we have stated before, "'[a] general search for evidence of any crime,'" such as the one that would be issued based solely on this fact, is unconstitutional.[14]

It is true that the fact Sprunger asked to delete some files might have raised a suspicion. But this suspicion did not amount to a fair probability that child pornography would be found on his computers. Based solely on this fact, the deputies would have no idea what would be found. Their search would have amounted to a rummaging through a treasure trove of information. "'[T]he modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into

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[11] 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.6(a) (4th ed. 2004).

[12] *Id.* at 606, quoting *Go-Bart Co. v. United States*, 282 U.S. 344, 51 S. Ct. 153, 75 L. Ed. 374 (1931).

[13] 2 *LaFave*, *supra* note 11.

[14] *State v. Thomas*, 240 Neb. 545, 561, 483 N.W.2d 527, 538 (1992).

a person's private affairs.'"[15] It thus makes the particularity and probable cause requirements all the more important. To sanction a search based solely on Sprunger's request to delete some unknown files would trivialize the protections of the Fourth Amendment.

Summed up, the call from Sprunger's attorney to the deputies established nothing more than that the deputy had made an offhand remark that led Sprunger to believe he was being investigated for child pornography. And Sprunger's desire to delete some files does not mean that any particular evidence would be found. Taken together, there was no probable cause to support the warrant.

Accordingly, we agree with Sprunger and with the district court that the affidavit did not establish probable cause. We now consider whether the officers' reliance on the warrant was objectively reasonable.

## Good Faith

[13] That a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies.[16] The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands.[17] The U.S. Supreme Court has held that for the exclusionary rule to apply, the benefits of its deterrence must outweigh its costs.[18]

[14,15] Recognizing that the benefits of deterrence often do not outweigh the social costs of exclusion, the U.S. Supreme Court created the good faith exception[19] to the exclusionary

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[15] *Mink v. Knox*, 613 F.3d 995, 1010 (10th Cir. 2010), quoting *U.S. v. Otero*, 563 F.3d 1127 (10th Cir. 2009).

[16] *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

[17] *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).

[18] See, e.g., *Herring, supra* note 16.

[19] See, *Davis v. United States*, 564 U.S. 229, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011); *Herring, supra* note 16; *Evans, supra* note 17; *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987); *Massachusetts v. Sheppard*, 468 U.S. 981, 104 S. Ct. 3424, 82 L. Ed. 2d 737 (1984); *Leon, supra* note 2.

rule. The good faith exception provides that even in the absence of a valid affidavit to support a search warrant, evidence seized under the warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant.[20] Nevertheless, evidence suppression will still be appropriate if one of four circumstances exist: (1) the magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) the issuing magistrate wholly abandoned his judicial role; (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.[21] Here, Sprunger argues that the affidavit was so lacking in indicia of probable cause as to render the deputies' belief in its existence unreasonable.

[16,17] The "good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization."[22] Officers are assumed to "have a reasonable knowledge of what the law prohibits."[23]

[18,19] In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.[24] When evaluating whether the warrant was based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable, an appellate court should address whether the officer,

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[20] *Nuss, supra* note 2; *State v. Tompkins*, 272 Neb. 547, 723 N.W.2d 344 (2006), *modified on denial of rehearing* 272 Neb. 865, 727 N.W.2d 423 (2007).

[21] See *Leon, supra* note 2. Accord *Nuss, supra* note 2.

[22] *Leon, supra* note 2, 468 U.S. at 922 n.23.

[23] *Id.*, 468 U.S. at 919 n.20.

[24] *State v. Edmonson*, 257 Neb. 468, 598 N.W.2d 450 (1999).

considered as a police officer with a reasonable knowledge of what the law prohibits, acted in objectively reasonable good faith in relying on the warrant.[25]

We have already explained why the facts in the affidavit do not establish probable cause. Summed up, the only reasonable explanation for the attorney's call to the deputies was that the deputies had led Sprunger to believe they were taking his computers to search for child pornography. This establishes nothing more than what the deputies said to Sprunger; it did not show that Sprunger had admitted to possessing child pornography on his computers. Similarly, Sprunger's request to delete some files does not create probable cause either, because it does not create a likelihood of finding any particular evidence on the computers. We believe that a reasonably trained officer should know that "'a general search for evidence of any crime'" is unsupported by probable cause.[26]

Moreover, not only would a reasonable officer know that a general search warrant was illegal, a reasonable officer would also know that telling a person that he had "nothing to worry about" if he had no child pornography on his computer would lead that person to believe he was being investigated for child pornography. The deputy had effectively planted the idea in Sprunger's head. Given this, we do not see how the deputies could have objectively relied on the warrant. The deputies knew—or certainly should have known—that the only fact showing any connection to child pornography was of their own making.

[20] Here, "the evidence offered in the warrant application [was] so deficient as to preclude reasonable belief in the existence of probable cause."[27] And "a magistrate's signature cannot render reasonable an objectively unreasonable failure to support a warrant application with evidence necessary to demonstrate probable cause."[28]

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[25] See *id.*

[26] See *Thomas, supra* note 14, 240 Neb. at 561, 483 N.W.2d at 538.

[27] See *U.S. v. Doyle*, 650 F.3d 460, 473 (4th Cir. 2011).

[28] *Id.* at 476.

In this case, excluding the evidence serves the deterrence aim of the exclusionary rule by forbidding the use of evidence obtained through an obvious Fourth Amendment violation. Conversely, to ignore such a blatant lack of probable cause would set a low bar for future police conduct.[29]

We conclude that the deputies' reliance on the warrant was not reasonable and thus did not bring it within the *Leon* good faith exception to the exclusionary rule. The court erred in overruling Sprunger's second motion to suppress.

## CONCLUSION

We conclude that probable cause did not support the warrant to search Sprunger's computers for child pornography. We also conclude that it was lacking probable cause to such a degree that reliance on the warrant was not objectively reasonable. Accordingly, the court should have suppressed fruits of the search. We reverse, and remand for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

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[29] See *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010).

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# EDWARD M. SMALLEY, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT AND CROSS-APPELLEE.

811 N.W.2d 246

Filed March 23, 2012. No. S-11-151.

1. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
2. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

3. **Medical Assistance: Federal Acts: States.** The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.
4. ____: ____: ____. The Medicaid program provides federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons.
5. ____: ____: ____. A state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.
6. **Medical Assistance: Federal Acts.** Based in part on its third-party liability provisions, Medicaid has been characterized as a "payer of last resort." Therefore, all other available resources must be used before Medicaid pays for the medical care of an individual enrolled in a Medicaid program.
7. **Ordinances: Presumptions: Proof.** In considering the validity of regulations, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.
8. **Administrative Law.** Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Reversed and remanded with directions.

Jon Bruning, Attorney General, and Michael J. Rumbaugh for appellant.

William R. Settles, of Lamson, Dugan & Murray, L.L.P., Dean T. Jennings, of Jennings Law Firm, and G. Michael Fenner, of Creighton University School of Law, for appellee.

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

STEPHAN, J.

This case arises from the settlement of a personal injury lawsuit filed by Edward M. Smalley, who was seriously injured in a motor vehicle accident in December 2007. Although Smalley qualified for Medicaid as a result of the accident, the Nebraska Department of Health and Human Services (DHHS), Nebraska's Medicaid administrator, took the position that it would not pay Smalley's outstanding medical bills prior to the disposition of his third-party liability claims. In order to facilitate a settlement of those claims, Smalley's attorney agreed that if DHHS paid the medical bills at the

discounted Medicaid rate, Smalley would reimburse DHHS dollar-for-dollar out of the settlement proceeds. After DHHS paid the bills as agreed, Smalley objected to full reimbursement as contrary to federal law. The disputed funds were held in escrow, and the dispute was tried to the district court for Cass County. The court determined that under federal law, DHHS was entitled to reimbursement of only a portion of the Medicaid payments it had made. The court denied Smalley's requested relief under 42 U.S.C. §§ 1983 and 1988 (2006). DHHS appeals, and Smalley cross-appeals. We conclude that DHHS is entitled to full reimbursement and therefore reverse the judgment of the district court.

## BACKGROUND

### Accident

Shortly before 10 p.m. on December 20, 2007, Smalley was standing outside a vehicle parked on a snow- and ice-packed road in Cass County. Smalley was talking with the owner of the vehicle, who was giving him a ride home from a bar. Both were struck by a vehicle operated by Jerome G. Speck and owned by Mark Morehead Construction, Inc. (Morehead). Smalley was treated at a hospital in Omaha, Nebraska. He sustained serious injuries, including amputation of his legs. The other party also suffered injuries in the accident.

### Submission and Denial of Medicaid Claim

Smalley was determined eligible for Medicaid during his hospital stay. In February 2008, he filed a personal injury lawsuit against Speck and Morehead, alleging they were responsible for his injuries. In March, the hospital submitted medical bills in excess of $400,000 to DHHS for payment under Medicaid. DHHS sets maximum reimbursement rates for Medicaid services, and pursuant to statutory regulations and its provider agreement with the hospital, DHHS could fully resolve Smalley's medical bills with a payment of approximately $131,000.[1] Emil Spicka, a medical claims investigator

[1] See 471 Neb. Admin. Code, ch. 2, § 001.03(4) and ch. 3, § 002.02A (2005).

for DHHS, refused to pay the hospital bill on the ground that "third party resources" might be available, such as the liability insurance of Speck and Morehead. The total liability coverage available to satisfy the claim of Smalley and the other person injured in the accident was $1,025,000. At the time DHHS denied payment of Smalley's medical bills, Smalley's claims against Speck and Morehead had not been resolved.

### Agreement Between Smalley's Attorney and DHHS

Speck and Morehead agreed to mediate the personal injury lawsuit. Prior to the mediation session, Spicka told Smalley's attorney that DHHS would pay Smalley's outstanding medical bills at the discounted Medicaid rate if Smalley would agree to reimburse DHHS for the full amount of its payments out of the settlement proceeds. After receiving a proffered settlement of $800,000, Smalley's attorney agreed to this proposal because it disposed of the medical bills at a substantially reduced rate, thereby maximizing Smalley's net settlement proceeds. However, the attorney testified that he had reservations about whether DHHS could legally insist upon full reimbursement and that he intended to seek a legal resolution of this issue before consummating the settlement. Smalley's attorney did not mention this portion of his strategy to Spicka when the agreement was reached. Sometime after May 15, 2008, DHHS paid approximately $131,000 to resolve Smalley's outstanding medical bills. DHHS anticipated it would be fully reimbursed out of the settlement proceeds pursuant to its agreement.

### Disposition of Medicaid Subrogation Claim

On May 27, 2008, Smalley added DHHS as a defendant in his pending personal injury action against Speck and Morehead. Smalley asserted that fully reimbursing DHHS out of the proceeds of the settlement would be contrary to federal law as applied by the U.S. Supreme Court in *Arkansas Dept. of Health and Human Servs. v. Ahlborn*[2] and that he could not accept the

[2] *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

pending offer to settle his personal injury claim until this issue had been resolved. He sought both declaratory and injunctive relief against DHHS and asserted that DHHS was liable under 42 U.S.C. §§ 1983 and 1988. A few days after Smalley added DHHS as a defendant, the parties entered into a stipulation which permitted Smalley to settle his claims against Speck and Morehead for $805,000. A portion of the settlement amount was placed into a special needs trust for Smalley's benefit, and Smalley's attorney fees and expenses were paid. An amount just over $130,000, representing the reimbursement claimed by DHHS and disputed by Smalley, was deposited in escrow pending disposition of the issue by the district court. DHHS filed an answer and a counterclaim asserting it was entitled to $130,000, representing partial reimbursement of the Medicaid payments it made to Smalley's health care providers.

The district court conducted a bench trial at which Smalley was represented by new counsel. Smalley's original attorney testified, as did Spicka and another representative of DHHS. Over a foundational objection, Smalley's original attorney testified that in his professional opinion, Smalley's personal injury claim was worth at least $6 million. He admitted that he never intended to honor his agreement to fully reimburse DHHS and that he entered into the agreement in order to induce DHHS to pay Smalley's medical expenses at the discounted Medicaid rate. Spicka testified that based upon the representations of Smalley's counsel, he expected DHHS to be fully reimbursed for the Medicaid payments it made on Smalley's behalf. He further testified that in the absence of the agreement, DHHS would have continued its "cost avoidance approach," leaving Smalley to negotiate with the hospital regarding the outstanding bill.

The district court held that DHHS' right to reimbursement was limited by *Ahlborn*,[3] in which the U.S. Supreme Court held that a state Medicaid program is entitled to reimbursement from only that part of a personal injury settlement that represents payment for medical care expenses. Applying a formula used in *Ahlborn*, the district court concluded that Smalley's

[3] *Id.*

claim had a value of $6 million and that the settlement amount of $805,000 represented approximately 13.4 percent of the total value of Smalley's claim. Applying this percentage to the Medicaid payments made by DHHS, the court determined that DHHS was entitled to reimbursement in the amount of $17,420. The court determined that enforcement of DHHS' claim for any greater portion of the settlement proceeds would be inconsistent with *Ahlborn* and enjoined DHHS from pursuing such enforcement efforts. The district court denied Smalley's § 1983 claim and held that he was not entitled to attorney fees pursuant to § 1988.

Smalley filed a motion for a new trial with respect to the denial of his § 1983 claim and his request for attorney fees. The court overruled the motion. DHHS then perfected this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the dockets of the appellate courts of this state.[4]

## ASSIGNMENTS OF ERROR

DHHS assigns that the district court abused its discretion in (1) denying full dollar-for-dollar recovery pursuant to the agreement, (2) applying *Ahlborn* to this case, and (3) overruling its objection to the testimony of Smalley's original counsel regarding the value of Smalley's personal injury claim.

On cross-appeal, Smalley assigns that the district court erred in (1) denying his § 1983 claim, (2) denying his request for attorney fees under § 1988, (3) finding unique circumstances existed that made an award of attorney fees unjust, and (4) denying his motion for a new trial on the issue of attorney fees.

## STANDARD OF REVIEW

[1,2] The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.[5] To the extent that the

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

[5] *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010); *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008).

meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[6]

## ANALYSIS

The parties' dispute arises from an agreement, the existence and terms of which are not disputed. The record reflects that (1) Smalley, through his attorney, promised DHHS that if it paid Smalley's medical expenses at the discounted Medicaid rate, it would be reimbursed in full from the proceeds of the personal injury settlement; (2) in reliance on this promise, DHHS made the requested payments; and (3) the promised reimbursement was not made. DHHS contends that it relied to its detriment upon Smalley's agreement and that it was defrauded into making the payments by a promise which Smalley and his attorney did not intend to keep. But Smalley contends that DHHS was legally obligated to pay his medical expenses and therefore could not have been induced to do so by a promise of full reimbursement. Smalley also argues that full reimbursement would violate federal law as interpreted and applied in *Ahlborn*. In resolving these issues, we do not comment on the tactic employed by Smalley's counsel in securing payment of Smalley's medical expenses. We are concerned here only with its legal consequence, which must be determined in the context of state and federal statutes and regulations which govern Medicaid. We begin by summarizing those provisions applicable to this case.

### Medicaid and Third-Party Liability

[3-5] The Medicaid program provides joint federal and state funding of medical care for individuals whose resources are insufficient to meet the cost of necessary medical care.[7] The program provides "federal financial assistance to States

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[6] *Children's Hospital v. State*, 278 Neb. 187, 768 N.W.2d 442 (2009).

[7] *Ahlborn, supra* note 2; *Pohlmann v. Nebraska Dept. of Health & Human Servs.*, 271 Neb. 272, 710 N.W.2d 639 (2006).

that choose to reimburse certain costs of medical treatment for needy persons."[8] A state is not obligated to participate in the Medicaid program; however, once a state has voluntarily elected to participate, it must comply with standards and requirements imposed by federal statutes and regulations.[9] Nebraska elected to participate in the Medicaid program when it enacted the Medical Assistance Act.[10] DHHS is responsible for administering the program in this state.[11]

Among the federal statutes and regulations which govern that administration are those relating to third-party liability for medical expenses that would otherwise be paid by Medicaid. States participating in Medicaid are required by federal law to have a plan providing that the state agency administering the program "will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under [Medicaid]."[12] The state plan must provide that

> in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability.[13]

And, to the extent that a third party is legally liable for a payment which has been made under Medicaid, states are required to have laws through which the state acquires "the rights of such [Medicaid recipient] to payment by any other party for

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[8] *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). See, also, *Ahlborn, supra* note 2.

[9] See, *Ahlborn, supra* note 2; *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007); *Pohlmann, supra* note 7.

[10] See Neb. Rev. Stat. §§ 68-901 to 68-971 (Reissue 2009, Cum. Supp. 2010 & Supp. 2011). See, also, *Thorson, supra* note 9.

[11] *Thorson, supra* note 9. See *Pohlmann, supra* note 7.

[12] 42 U.S.C. § 1396a(a)(25)(A) (2006).

[13] § 1396a(a)(25)(B).

such health care items or services."[14] Federal law further mandates that states require individuals seeking Medicaid benefits "to assign the State any rights . . . to payment for medical care from any third party."[15] Any amount collected by a state under such an assignment must "be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed."[16] Any remaining amount is to be paid to the individual.[17]

Pursuant to these federal mandates, Nebraska's Medical Assistance Act provides that an application for Medicaid benefits must include an assignment to DHHS of

> any rights to pursue or receive payments from any third party liable to pay for the cost of medical care and services arising out of injury, disease, or disability of the applicant or recipient or other members of the assistance group which otherwise would be covered by medical assistance [Medicaid].[18]

Further, Neb. Rev. Stat. § 68-716 (Reissue 2009) provides:

> An application for medical assistance shall give a right of subrogation to [DHHS] or its assigns. Subject to sections 68-921 to 68-925, subrogation shall include every claim or right which the applicant may have against a third party when such right or claim involves money for medical care. The third party shall be liable to make payments directly to [DHHS] or its assigns as soon as he or she is notified in writing of the valid claim for subrogation under this section.

[6] Based in part on its third-party liability provisions, Medicaid has been characterized as a "'payer of last resort.'"[19]

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[14] § 1396a(a)(25)(H).

[15] 42 U.S.C. § 1396k(a)(1)(A) (2006).

[16] § 1396k(b).

[17] *Id.*

[18] § 68-916.

[19] *Ahlborn, supra* note 2, 547 U.S. at 291, quoting S. Rep. No. 99-146 (1985), *reprinted in* 1986 U.S.C.C.A.N. 42, 280.

Therefore, "'all other available resources must be used before Medicaid pays for the medical care of an individual enrolled in a Medicaid program.'"[20] But, as the U.S. Supreme Court noted in *Ahlborn*, it "does not mean . . . that Congress meant to authorize States to seek reimbursement from Medicaid recipients themselves."[21] The federal Medicaid statutes include an "anti-lien provision" which provides that "[n]o lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid" under Medicaid, except in certain limited circumstances.[22] Also, federal law provides that "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except" in certain specific circumstances.[23]

In *Ahlborn*, the U.S. Supreme Court considered federal Medicaid statutes in the context of an attempt by the State of Arkansas to recover Medicaid payments from a personal injury settlement. The client sustained a disabling brain injury in a motor vehicle accident. Arkansas paid Medicaid benefits of approximately $215,000 on her behalf. The client filed suit against the parties she claimed to have caused the accident and received a settlement of $550,000. Arkansas sought reimbursement from the settlement of all Medicaid benefits it had paid, based on a state statute. In affirming the holding of a lower appellate court, the Supreme Court held that Arkansas' claim against the settlement for all the Medicaid benefits it paid "squarely conflict[ed] with the anti-lien provision of the federal Medicaid laws."[24] The Court reasoned that the federal anti-lien provision allowed Arkansas to assert a lien on only that portion of the settlement proceeds representing medical expenses.

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[20] *Miller v. Gorski Wladyslaw Estate*, 547 F.3d 273, 278 (5th Cir. 2008), quoting *Caremark, Inc. v. Goetz*, 480 F.3d 779 (6th Cir. 2007).

[21] *Ahlborn, supra* note 2, 547 U.S. at 291.

[22] 42 U.S.C. § 1396p(a)(1) (2006).

[23] § 1396p(b)(1) (Supp. IV 2010).

[24] *Ahlborn, supra* note 2, 547 U.S. at 280.

### Accrual of Obligation to Pay Medicaid Benefits

As noted, although Smalley admits to the terms of the reimbursement agreement and further admits that he never intended to hold to its terms, he contends that DHHS has no claim for detrimental reliance or fraudulent misrepresentation because DHHS had an independent legal obligation, existing at the time the reimbursement agreement was entered into, to pay Smalley's outstanding medical bills. His theory is that "'[o]ne suffers no damage where he is fraudulently induced to do something which he is under legal obligation to do . . . .'"[25] Our initial task, therefore, is to determine whether DHHS was legally obligated to pay Smalley's medical expenses at the time it entered into the reimbursement agreement.

Federal Medicaid regulations require state Medicaid agencies to follow certain procedures with respect to the payment of claims involving third-party liability.[26] For purposes of these regulations, "[*t*]*hird party* means any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan."[27] The regulations specify two procedures for paying Medicaid claims. Under 42 C.F.R. § 433.139(b)(1),

> [i]f the agency has established the probable existence of third party liability at the time the claim is filed, the agency must reject the claim and return it to the provider for a determination of the amount of liability. The establishment of third party liability takes place when the agency receives confirmation from the provider or a third party resource indicating the extent of third party liability. When the amount of liability is determined, the agency must then pay the claim to the extent that payment allowed under the agency's payment schedule exceeds the amount of the third party's payment.

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[25] *Beltner v. Carlson*, 153 Neb. 797, 800, 46 N.W.2d 153, 155 (1951), quoting 23 Am. Jur. *Fraud and Deceit* § 177 (1939).

[26] 42 C.F.R. § 433.139(a) (2011).

[27] 42 C.F.R. § 433.136 (2011).

This procedure is known as cost avoidance.[28] The second procedure is derived from 42 C.F.R. § 433.139(c), which provides, "If the probable existence of third party liability cannot be established or third party benefits are not available to pay the recipient's medical expenses at the time the claim is filed, the agency must pay the full amount allowed under the agency's payment schedule." This procedure, known as pay and chase, seeks reimbursement from liable third parties after the claim is paid and therefore can only occur after Medicaid pays for services.[29] It is clear from the record that DHHS was aware of Smalley's pending third-party liability claims when it initially denied his request that it pay his outstanding medical bills. But Smalley argues that because there was no "'confirmation from the provider or a third party resource indicating the extent of third party liability'"[30] when his Medicaid claim was filed, DHHS was obligated under 42 C.F.R. § 433.139(c) to pay the claim and "chase" the third parties alleged to be liable.

Smalley does not cite any authority for his interpretation of the federal regulations. And it conflicts with regulations duly promulgated by DHHS which provide that DHHS does not pay a Medicaid claim if there is any possibility that a third party could be liable for the amounts due. According to 471 Neb. Admin. Code, ch. 3, § 004 (2005):

> All third party resources available to a Medicaid client must be utilized for all or part of their medical costs before Medicaid. Third party resources (TPR) are any individual, entity, or program that is, or may be, contractually or legally liable to pay all or part of the cost of any medical services furnished to a client. Third party resources include, but are not limited to —
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> 1. Private health insurance;
> 2. Casualty insurance, including medical payment provisions;

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[28] *Miller, supra* note 20.

[29] *Id.*

[30] Brief for appellee at 19, quoting 42 C.F.R. § 433.139(b)(1).

> . . . .
>
> 12. Liable third parties who are not insurance carriers;
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> . . . .
>
> 14. Any other party contractually or legally liable to pay medical expenses.
>
> *. . . Medicaid payment is made only after all third party resources have been exhausted or met their legal contractual or legal obligations to pay. Medicaid is the payor of last resort.*

(Emphasis supplied.) Further, 471 Neb. Admin. Code, ch. 3, § 004.03 (2005), provides in part:

> Medicaid clients who have third party resources must exhaust these resources before Medicaid considers payment for any services. Medicaid shall not pay for medical services as a primary payor if a third party resource is contractually or legally obligated to pay for the service.
>
> Providers shall bill all third party resources and/or the client . . . for services provided to the client . . . . Medicaid is the payor of last resort.

Particularly instructive is 471 Neb. Admin. Code, ch. 3, § 004.06C (2003), which is captioned "Timely Filing of Claims with Casualty Insurance," and specifies in part:

> Providers must submit claims within 24 months of the date of service. In some casualty third party situations, [DHHS] recognizes that it may take longer than 24 months to resolve the third party obligation. In these situations, [DHHS] can make payment beyond the 24 months if the provider can document that action was taken to obtain payment from the third party. If a provider has received a denial from [DHHS] due to the existence of casualty insurance coverage and the provider has sought payment from the third party, then the provider can request [DHHS] to reconsider payment if the provider has waited 24 months and the third party has not paid the provider.

And 471 Neb. Admin. Code, ch. 3, § 004.06D (2003), states that "[p]roviders shall bill [DHHS] only when all third party resources have failed to cover the service or when a portion of the cost of the service has been paid." Further, § 004.06D1c

provides that DHHS "will recognize and consider payment on claims involving casualty coverage denial," but expressly states that "[*t*]*he insurer's statement that payment cannot be made at this time due to a pending liability determination or litigation is not a valid denial*." (Emphasis supplied.) And 471 Neb. Admin. Code, ch. 3, §§ 004.06F and 004.06G (2003), state, respectively, "[t]he provider shall resolve all third party resources before Medicaid can consider paying a claim even when Medicaid prior authorization has been given" and "[t]he provider shall resolve all third party resources before Medicaid can consider paying a claim even though the client is eligible for Medicaid."

[7,8] In considering the validity of regulations, courts generally presume that legislative or rulemaking bodies, in enacting ordinances or rules, acted within their authority, and the burden rests on those who challenge their validity.[31] There is no such challenge in this case, and we are not free to disregard the regulations upon which DHHS bases its position. Agency regulations that are properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[32] Thus, Nebraska's Medicaid regulations summarized above are controlling law on the question of whether DHHS was obligated to pay Smalley's medical expenses at the time it entered into the agreement with Smalley's attorney. Based upon those regulations, we find that it was not. Instead, DHHS was legally entitled to refrain from paying Smalley's medical bills until the third-party liability claims were resolved.

### Effect of *Ahlborn*

Smalley's alternative argument is that even if he fraudulently induced DHHS to enter into the reimbursement agreement, DHHS cannot premise recovery on his promise of full reimbursement, because full reimbursement violates the federal anti-lien provision as discussed in *Ahlborn*. He argues that

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[31] *Scofield v. State*, 276 Neb. 215, 753 N.W.2d 345 (2008); *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002).

[32] *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008).

"[a] party cannot, by contractual agreement with another party, obtain the power to do something the law forbids."[33]

*Ahlborn* held that the federal Medicaid statutes forbid state Medicaid programs from imposing a lien on any portion of a personal injury judgment or settlement which does not represent payments for medical care. It did not, however, hold that a state Medicaid administrator is never entitled to full reimbursement, and thus the facial terms of the reimbursement agreement do not violate federal law.

And the facts in this case are substantially different than *Ahlborn*. In *Ahlborn*, the state Medicaid provider, presumably pursuant to state regulations, adopted a "pay and chase" strategy and paid the client's medical bills while the client's third-party claims were pending. After the client settled those claims for $550,000, the Medicaid provider asserted a lien for approximately $215,000, which represented the full amount of medical expenses it had paid on behalf of the client. The parties stipulated that the client's entire claim was reasonably valued at approximately $3 million and that the settlement reached amounted to approximately one-sixth of that sum. They further stipulated that, based upon this percentage allocation, approximately $35,000 of the settlement amount constituted reimbursement for medical payments made. On these stipulated facts, the Court was asked to determine whether the Medicaid provider could recover $215,000 or $35,000. Based on its finding that the state could not assert an interest in a portion of the settlement that was not reimbursement for medical payments, it awarded the latter.

Here, DHHS, pursuant to its regulations, adopted a "cost avoidance" strategy and did not pay Smalley's outstanding medical bills while the third-party liability claims were pending. At the time DHHS entered into the reimbursement agreement and ultimately paid Smalley's outstanding medical bills, it had no legal obligation to do so. The record conclusively shows that DHHS—knowing Smalley had been offered a settlement of $800,000—paid the medical bills, based on

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[33] Brief for appellee at 21, citing *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

Smalley's promise that he would reimburse DHHS the full amount of its payment. All parties agree that DHHS' payment of the medical bills at the reduced Medicaid rate resulted in a benefit to Smalley, in that it increased his net recovery of the settlement proceeds.

The district court found that *Ahlborn* limited DHHS' reimbursement "to the pro rata share of the past medical expenses paid by [DHHS] as the same relates to the total value of [Smalley's] claim." In doing so, the court erred as a matter of law. Courts in other jurisdictions have recognized that the pro rata formula applied in *Ahlborn* was simply a result of the factual stipulation entered into by the parties.[34] These jurisdictions consider the pro rata formula as one means of determining the portion of a settlement related to medical expenses, and do not consider the formula itself law.[35] Instead, states are generally free to employ any reasonable means to determine what portion of a settlement relates to medical expenses and is therefore recoverable by a state Medicaid administrator.[36]

Based on the unique facts of this case, the district court should have looked no further than the agreement between the parties. By promising that the $130,000 would be reimbursed in full if DHHS paid his outstanding medical bills at the reduced rate, Smalley agreed that $130,000 of the proffered $800,000 settlement related to medical expenses. This agreement is both consistent with *Ahlborn* and reasonable under the undisputed facts. The district court erred in further reducing the amount DHHS could recover from the settlement proceeds. DHHS is entitled to the full $130,000 held in escrow.

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[34] See, *I.P. ex rel. Cardenas v. Henneberry*, 795 F. Supp. 2d 1189 (D. Colo. 2011); *Armstrong v. Cansler*, 722 F. Supp. 2d 653 (W.D.N.C. 2010); *Morales v. HHC*, 34 Misc. 3d 835, 935 N.Y.S.2d 850 (2011); *Russell v. Agency for Health Care Admin.*, 23 So. 3d 1266 (Fla. App. 2010); *Edwards v. Ardent Health Services, L.L.C.*, 243 P.3d 25 (Okla. Civ. App. 2010); *McMillian v. Stroud*, 166 Cal. App. 4th 692, 83 Cal. Rptr. 3d 261 (2008).

[35] *Id.*

[36] *Id.*

## CONCLUSION

The district court erred in not permitting DHHS to recover the full amount of its counterclaim, to be satisfied from the funds withheld from the settlement proceeds pursuant to the stipulation of the parties. The judgment of the district court is reversed, and the cause is remanded with directions to enter judgment in accordance with this opinion. Because DHHS is entitled to the full amount of its counterclaim, Smalley's assignments of error on cross-appeal need not be addressed.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
WILLIAM D. KINSER, JR., APPELLANT.

811 N.W.2d 227

Filed March 23, 2012. No. S-11-558.

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 determination made by the court below.
2. **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.
3. **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.

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

Brian J. Lockwood and Richard L. DeForge, Deputy Scotts Bluff County Public Defenders, for appellant.

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

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

STEPHAN, J.

## NATURE OF CASE

A jury found William D. Kinser, Jr., guilty of felony flight to avoid arrest. After finding that Kinser had five previous felony convictions, the district court for Scotts Bluff County found Kinser to be a habitual criminal and sentenced him to a term of not less than 18 nor more than 30 years' imprisonment with the Nebraska Department of Correctional Services (DCS) for that crime. Kinser contends that the habitual criminal determination was erroneous because the flight to avoid arrest conviction was enhanced from a misdemeanor to a felony based upon Kinser's willful reckless operation of a motor vehicle and that any further enhancement under the habitual criminal statute would result in an improper double enhancement. Kinser also argues that the sentencing order must be reversed because the district court intended for him to be eligible for parole after 10 years, whereas, under the sentence imposed for his flight to avoid arrest conviction, he will not be eligible for parole for 14 years. We find no merit to either contention and therefore affirm.

## BACKGROUND

On the evening of December 23, 2010, Deputy Lanny Hanks was observing traffic on Lake Minatare Road in Scotts Bluff County, Nebraska. He saw a vehicle exceeding the speed limit and undertook pursuit. Hanks initially activated only his patrol car's overhead lights, but when he realized the vehicle was not stopping, he activated his car's siren. After a chase of approximately 10 miles, Hanks was able to immobilize the vehicle. Kinser was identified as the operator of the vehicle.

The State charged Kinser with felony operation of a motor vehicle to avoid arrest; driving under revocation, first offense; and driving while under the influence of alcohol (DUI), second offense. The State alleged that Kinser's flight to avoid arrest involved willful reckless operation of a motor vehicle, which made the offense a Class IV felony under Neb. Rev. Stat.

§ 28-905(3)(a)(iii) (Reissue 2008). The State also alleged that Kinser was a habitual criminal under Neb. Rev. Stat. § 29-2221 (Reissue 2008). A jury trial was held on the flight to avoid arrest and driving under revocation charges. The jury found Kinser guilty of both offenses.

Prior to sentencing, the State notified Kinser and the court that it would present evidence that Kinser was a habitual criminal. At the hearing, the State introduced five prior convictions: (1) a 1983 conviction for burglary, (2) a 1993 conviction for failure to appear, (3) a 1993 conviction for theft, (4) a 1995 conviction for second degree assault, and (5) a 1995 conviction for assault on a police officer in the third degree. Certified records showed that Kinser received a sentence of at least 1 year's imprisonment for each of these convictions and that Kinser was represented by counsel at the time of each conviction and each sentencing.

The trial court considered and rejected Kinser's argument that a habitual criminal enhancement would result in an impermissible double enhancement. The court noted that the flight to avoid arrest conviction was a felony because of the additional element of willful reckless operation of a motor vehicle and that the increase from a misdemeanor to a felony was not based on prior convictions for the same offense. The court also noted that this was somewhat similar to being charged with a felony that had a misdemeanor lesser-included offense. The court stated, "You would have to commit the misdemeanor lesser included, then something in addition to that to get the felony status and those have been used in the past for purposes of [a habitual criminal] enhancement . . . ." The court found there were five valid and usable prior convictions and sentenced Kinser as a habitual criminal on the felony flight to avoid arrest conviction. During sentencing, the court stated:

> [Kinser] will . . . be sentenced to serve sentences in an institution under the jurisdiction of [DCS] as follows: On Count II [driving under revocation], which is the misdemeanor, six months, and there's a one year revocation of his license. On Count I [fleeing to avoid arrest], which is the felony, not less than 18 years and not more than 30 years. The minimum will include the mandatory

> minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served.

Kinser filed a timely notice of appeal.

## ASSIGNMENTS OF ERROR

Kinser assigns the district court erred in sentencing him as a habitual criminal and in imposing an erroneous sentence for his flight to avoid arrest conviction.

## STANDARD OF REVIEW

[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.[1] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.[2]

## ANALYSIS

### Kinser Was Properly Sentenced as Habitual Criminal

[3] Subject to exceptions not applicable to this case, the habitual criminal statute in part provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state or by the United States or once in this state and once at least in any other state or by the United States, for terms of not less than one year each shall, upon conviction of a felony committed in this state, be deemed to be a habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years . . . .[3]

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

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[1] *State v. Jimenez, ante* p. 95, 808 N.W.2d 352 (2012).

[2] *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

[3] § 29-2221(1).

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.[4] The district court concluded that there were five valid and usable convictions for purposes of the habitual criminal enhancement. Kinser does not challenge this conclusion, which is fully supported by the record. Instead, Kinser argues that using his felony flight to avoid arrest conviction to trigger a habitual criminal enhancement would result in an improper double enhancement.

Felony flight to avoid arrest is criminalized under § 28-905, which in relevant part provides:

> (1) Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest.
>
> (2)(a) Except as otherwise provided in subsection (3) of this section, any person who violates subsection (1) of this section shall be guilty of a Class I misdemeanor.
>
> . . . .
>
> (3)(a) Any person who violates subsection (1) of this section shall be guilty of a Class IV felony if, in addition to the violation of subsection (1) of this section, one or more of the following also applies:
>
> (i) The person committing the offense has previously been convicted under this section;
>
> (ii) The flight to avoid arrest results directly and proximately in the death of or injury to any person if such death or injury is caused directly and proximately by the vehicle being driven by the person fleeing to avoid arrest; or
>
> (iii) The flight to avoid arrest includes the willful reckless operation of the motor vehicle.

Kinser was convicted of a Class IV felony under § 28-905(3)(a)(iii), based on his willful reckless operation of

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[4] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

the vehicle during the flight to avoid arrest. Kinser argues he was improperly sentenced as a habitual criminal because the "enhancement" from a misdemeanor to a felony under § 28-905(3)(a)(iii) plus the habitual criminal enhancement results in an impermissible double enhancement under this court's holding in *State v. Chapman*.[5] Evaluating this argument requires a discussion of *Chapman* and its progeny.

The defendant in *Chapman* was convicted of third-offense DUI. He was sentenced as a habitual criminal under § 29-2221 then in effect based upon his prior felony convictions for malicious destruction of property and third-offense DUI. This court concluded the district court erred in sentencing him as a habitual criminal. We reasoned that his prior conviction for third-offense DUI was not a prior felony for purposes of a habitual criminal enhancement because the offense became a felony solely due to his prior DUI convictions. The statute prohibiting third-offense DUI in relevant part provided, "[I]f such conviction is for a third offense, or subsequent offense thereafter, such person shall be imprisoned . . . for not less than one year nor more than three years . . . ."[6] After noting a reluctance "to apply an expansive reading to the Habitual Criminal Act," this court held in *Chapman* that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties under the habitual criminal statute."[7] We noted the language of the statute evidenced a legislative intent that "convictions for third offense and all subsequent offenses . . . should be treated similarly"[8] and that the "weight of authority [was] against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute."[9]

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[5] *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980).

[6] Neb. Rev. Stat. § 39-669.07(3) (Reissue 1974). See *State v. Chapman, supra* note 5.

[7] *State v. Chapman, supra* note 5, 205 Neb. at 370, 287 N.W.2d at 698.

[8] *Id*. at 371, 287 N.W.2d at 699.

[9] *Id*. at 370, 287 N.W.2d at 699.

This court later extended the *Chapman* holding in *State v. Hittle*.[10] The defendant in that case was convicted of felony flight to avoid arrest and felony driving under a 15-year license suspension. Based on a prior conviction for operating a motor vehicle with a suspended or revoked license and convictions from a single proceeding for possessing a stolen firearm and a controlled substance, he was sentenced as a habitual criminal. The statute criminalizing driving under a revoked license at the time of his offenses, Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993), provided, "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section [after two previous DUI convictions] shall be guilty of a Class IV felony." On appeal, this court acknowledged that *Chapman* was distinguishable because a conviction under § 60-6,196(6) was a felony whether or not the defendant was previously convicted of the same offense. But we stated that *Chapman* rested upon two general principles:

> (1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's DUI statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.[11]

We reasoned that driving under a revoked license was criminalized under the same statutory scheme as DUI and that a person could become a felon for driving under a suspended license only by first committing multiple DUI offenses. Thus, we observed that the penalty for driving under a revoked license was "enhanced by virtue of the defendant's prior violations of other provisions within the same statute."[12] Based on this reasoning, we held that a conviction under § 60-6,196(6) could not be used as either the offense triggering a habitual

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[10] *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999).

[11] *Id*. at 355, 598 N.W.2d at 29.

[12] *Id*. at 356, 598 N.W.2d at 29.

criminal enhancement or a prior felony for purposes of the enhancement.

This court next considered the holdings of *Chapman* and *Hittle* in *State v. Taylor*.[13] The defendant in that case was convicted of third degree assault on an officer under Neb. Rev. Stat. § 28-931 (Reissue 1995), which at the time of the offense, provided:

> (1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer or employee of [DCS] while such officer or employee is engaged in the performance of his or her official duties.
>
> (2) Assault on an officer in the third degree shall be a Class IV felony.

That felony conviction served as the trigger for a habitual criminal enhancement. On appeal, the defendant argued he should not have been convicted under § 28-931 and sentenced as a habitual criminal under § 29-2221 because that resulted in an improper double enhancement. He contended that third degree assault under Neb. Rev. Stat. § 28-310 (Reissue 2008) was a misdemeanor and that his conviction was enhanced to a felony based on the status of his victim, a DCS employee.

After noting that the defendant's argument presented "a question of statutory interpretation as to whether the Legislature enacted § 28-931 as a 'specific subsequent offense statute' for general third degree assault, or as a separate crime,"[14] this court rejected the defendant's argument "because § 28-931 [was] not a specific subsequent offense statute."[15] We explained:

> Nothing contained in the plain language of § 28-931 enhances the penalties for third degree assault upon a DCS employee based on subsequent offenses. A comparison of the plain language of §§ 28-310 and 28-931 indicates that the Legislature enacted these statutes to

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[13] *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001).

[14] *Id*. at 647, 634 N.W.2d at 750.

[15] *Id*. at 647, 634 N.W.2d at 751.

> punish two separate and distinct crimes with separate and distinct elements. Under § 28-931, the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement.[16]

The same reasoning applies to this case, despite the fact that misdemeanor and felony flight to avoid arrest are defined in the same statute. Section 28-905(3)(a)(iii) is not a specific subsequent offense statute. Reading § 28-905 as a whole, the offense of flight to avoid arrest is a misdemeanor if it involves fleeing in a motor vehicle in an effort to avoid arrest, whereas the offense becomes a felony under § 28-905(3)(a)(iii) if the State alleges and proves the additional element of willful reckless operation of a motor vehicle. This additional fact pertains to the manner in which the offense was committed, and not to prior criminal conduct. Thus, Kinser was not subjected to an impermissible double enhancement and the district court did not err in sentencing him as a habitual criminal. We express no opinion as to whether the result would be the same if Kinser had been convicted of felony flight to avoid arrest under § 28-905(3)(a)(i), as that issue is not presented in this case.

### District Court Did Not Impose Erroneous Sentence

Kinser argues that the sentencing order must be reversed as erroneous because of a discrepancy between the sentence imposed for his flight to avoid arrest conviction and the court's statements at the sentencing hearing regarding his eligibility for parole. Relying upon the following statement, Kinser asserts the trial court intended for him to be parole eligible after 10 years:

> So the defendant will be sentenced to serve an indeterminate or terms — let me rephrase that because we have a mandatory minimum. He'll be sentenced to serve sentences in an institution under the jurisdiction of [DCS] as follows: On Count II [driving under revocation], which is the misdemeanor, six months, and there's a one year revocation of his license. On Count I [fleeing to avoid arrest],

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[16] *Id.*

> which is the felony, not less than 18 years and not more than 30 years. The minimum will include the mandatory minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served. Costs will be taxed to the defendant. He will not be parole eligible until he has served the mandatory minimum of 10 and [DCS] can indicate the time period but he will be eligible for parole. I'll revoke his bond and remand him then back to custody.

The State argues this language fails to show "an intention that Kinser be parole eligible in 10 years."[17] It contends that the district court expressly left the issue of parole eligibility to DCS, but informed Kinser that he would serve the mandatory minimum of 10 years.

Subject to an exception not applicable here, in imposing an indeterminate sentence upon an offender, a court is required by Neb. Rev. Stat. § 29-2204 (Reissue 2008) to "[f]ix the minimum and maximum limits of the sentence,"[18] to "[a]dvise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost,"[19] and to "[a]dvise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost."[20] We agree with the State that the sentencing court did not clearly state that Kinser would be eligible for parole after serving 10 years. But even if it had, the question would be resolved by § 29-2204(1), which provides, "If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility . . . the statement[] of the minimum limit . . . shall control the calculation of the offender's term."

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[17] Brief for appellee at 13.

[18] § 29-2204(1)(a)(ii)(A).

[19] § 29-2204(1)(b).

[20] § 29-2204(1)(c).

Although this court has not had occasion to apply this provision, the opinion of the Nebraska Court of Appeals in *State v. Glover*[21] is instructive. The defendant in that case argued for a reduction in her sentence or, alternatively, for a resentencing, based on an incorrect statement made by the district court at sentencing. The trial judge sentenced her to a term of 21 to 30 months' imprisonment, but stated that on the low end, she would serve about 9 months. The Court of Appeals acknowledged the trial court's misstatement, explaining that assuming no loss of good time, the defendant would serve 10½ months before becoming eligible for parole. However, the court rejected her argument, reasoning that under the plain language of § 29-2204(1), the minimum sentence of 21 months controlled the calculation of her term, which determined her parole eligibility.

We agree with the Court of Appeals' interpretation and application of § 29-2204(1) in *Glover*. In this case, any discrepancy between the minimum sentence of 18 years for Kinser's flight to avoid arrest conviction and the statements of the sentencing court regarding parole eligibility would be controlled by the former. Under our holding in *Johnson v. Kenney*,[22] good time credit would not reduce the 10-year mandatory minimum portion of Kinser's sentence for that crime. Thus, assuming no loss of good time credit, Kinser would serve the 10-year mandatory minimum plus 4 of the remaining 8 years of the minimum sentence, less credit for time served, before becoming eligible for parole.[23]

## CONCLUSION

For the reasons discussed, Kinser was properly sentenced as a habitual criminal and the sentence imposed for his flight to avoid arrest conviction was not erroneous. The judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating in the decision.

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[21] *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

[22] *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

[23] See Neb. Rev. Stat. §§ 83-1,107 (Supp. 2011) and 83-1,110 (Reissue 2008).

# In re Estate of Virginia Lee Cushing, deceased. Lawrence Cushing, Jr., Personal Representative of the Estate of Virginia Lee Cushing, deceased, appellant, v. Nebraska Department of Health and Human Services, appellee.

810 N.W.2d 741

Filed March 23, 2012. No. S-11-614.

1. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
2. **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. **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.
4. **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.
5. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the County Court for Douglas County: Craig Q. McDermott, Judge. Affirmed as modified.

Hugh I. Abrahamson, of Abrahamson Law Office, for appellant.

Ronald L. Sanchez, Special Assistant Attorney General, and Matthew G. Dunning for appellee.

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

Stephan, J.

The Nebraska Department of Health and Human Services (DHHS) provided Medicaid benefits for Virginia Lee Cushing

(Cushing) during the final years of her life. After her death, DHHS filed a claim against Cushing's estate for recovery of the benefits pursuant to Neb. Rev. Stat. § 68-919 (Reissue 2009). The personal representative of the estate appeals from an order of the county court for Douglas County allowing the claim and awarding interest. The principal issues are whether DHHS timely presented its claim and, if so, whether it was proved as a matter of law. We conclude the claim was both timely presented and proved as a matter of law. But we modify the award of interest.

## BACKGROUND

The claim which is the subject of this appeal was made pursuant to Nebraska's Medicaid estate recovery statute, § 68-919, which provides in relevant part:

> (1) The recipient of medical assistance under the medical assistance program shall be indebted to [DHHS] for the total amount paid for medical assistance on behalf of the recipient if:
>
> (a) The recipient was fifty-five years of age or older at the time the medical assistance was provided . . . .
>
> . . . .
>
> (2) The debt accruing under subsection (1) of this section arises during the life of the recipient but shall be held in abeyance until the death of the recipient. Any such debt to [DHHS] that exists when the recipient dies shall be recovered only after the death of the recipient's spouse, if any, and only when the recipient is not survived by a child who either is under twenty-one years of age or is blind or totally and permanently disabled as defined by the Supplemental Security Income criteria.

The relevant facts are undisputed. DHHS administers the State of Nebraska's medical assistance program, commonly known as Medicaid. From April 6, 1997, to May 5, 2010, DHHS paid $78,594.45 on behalf of Cushing for drugs, medical supplies, and medical services covered by Medicaid. Cushing was over the age of 55 during this period. She died testate on May 9, 2010, and Lawrence J. Cushing, Jr., was appointed as the personal representative of the estate. Cushing was not survived

by a spouse, a child who was under the age of 21, or a child who was blind or totally and permanently disabled.

Beginning on July 2, 2010, notice of the informal probate of Cushing's will was published in an Omaha newspaper. The notice stated that creditors of the estate "must file their claims with [the county court for Douglas County] on or before September 2, 2010 or be forever barred." (Emphasis omitted.) Proof of publication of this notice was filed with the county court on July 16.

On September 14, 2010, DHHS filed a demand for notice with the county court, indicating it had a Medicaid estate recovery claim pursuant to § 68-919. The attorney for the estate sent DHHS the published notice to creditors on September 24.

On January 18, 2011, DHHS filed a claim against the estate, seeking a payment of $78,594.15 pursuant to § 68-919. The personal representative filed a notice of disallowance of the claim on March 10. DHHS then filed a petition for allowance of the claim, alleging it paid $78,594.15 for medical assistance received by Cushing when she was 55 years of age or older.

DHHS moved for summary judgment on the petition and sought interest pursuant to Neb. Rev. Stat. § 30-2488(e) (Reissue 2008). DHHS asserted that its claim against the estate was timely filed because it was not given notice in accordance with Neb. Rev. Stat. §§ 25-520.01 and 30-2483 (Reissue 2008), which meant that under Neb. Rev. Stat. § 30-2485(a)(2) (Cum. Supp. 2010), it had 3 years from Cushing's death to file its claim. The county court granted DHHS' motion for summary judgment and entered judgment against the estate in the amount of $78,594.15, with interest at a rate of 2.188 percent per annum, from and after November 1, 2010. The personal representative filed a timely notice of appeal.

## ASSIGNMENTS OF ERROR

The personal representative assigns, restated, that the county court erred in (1) finding DHHS timely filed its claim against the estate, (2) granting summary judgment to DHHS on its claim against the estate, and (3) taxing and calculating interest and court costs against the estate.

## STANDARD OF REVIEW

[1] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[1]

[2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2]

## ANALYSIS

### Timeliness of Claim

In evaluating the personal representative's first assignment of error, we must apply § 30-2485, which sets time limitations for filing claims against an estate. The statute provides in relevant part:

> (a) All claims against a decedent's estate which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate . . . unless presented as follows:
>
> (1) Within two months after the date of the first publication of notice to creditors if notice is given in compliance with sections 25-520.01 and 30-2483 . . . . If any creditor has a claim against a decedent's estate which arose before the death of the decedent and which was not presented within the time allowed by this subdivision, including any creditor who did not receive notice, such creditor may apply to the court within sixty days after the expiration date provided in this subdivision for additional

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[1] *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[2] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

time and the court, upon good cause shown, may allow further time not to exceed thirty days;

(2) Within three years after the decedent's death if notice to creditors has not been given in compliance with sections 25-520.01 and 30-2483.

(b) All claims . . . against a decedent's estate which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate . . . unless presented as follows:

(1) A claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(2) Any other claim, within four months after it arises.

Our first task is to determine when the claim in question arose. If it arose before Cushing's death, the time limitations set forth in § 30-2485(a) apply. If it arose at or after Cushing's death, the time limitations set forth in § 30-2485(b) apply. Relying upon *In re Estate of Tvrz*,[3] the personal representative argues that the claim arose after Cushing's death. The Medicaid reimbursement statute which we construed in *In re Estate of Tvrz* in part provided that "[t]he estate of a decedent who has received medical assistance benefits . . . shall be indebted" to DHHS.[4] In rejecting the contention in *In re Estate of Tvrz* that the debt arose during the lifetime of the recipient, we noted the absence of language in the statute to support the contention. To the contrary, we concluded that the language of the statute "focuses on one point in time, i.e., the death of the recipient, and requires a determination of whether the recipient's estate is obligated to reimburse DHHS as of that point."[5]

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[3] *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001).

[4] Neb. Rev. Stat. § 68-1036.02(1) (Reissue 1996). See *In re Estate of Tvrz, supra* note 3.

[5] *In re Estate of Tvrz, supra* note 3, 260 Neb. at 999, 620 N.W.2d at 762.

In response to our decision in *In re Estate of Tvrz*,[6] the Legislature amended the Medicaid estate recovery statute,[7] which is now codified in § 68-919. As noted, the statute now provides that the debt is owed by the "recipient"[8] of medical assistance benefits and "arises during the life of the recipient but shall be held in abeyance until the death of the recipient."[9] Thus, *In re Estate of Tvrz* is no longer authoritative on when DHHS' claim arises. Instead, the statute now clearly states that indebtedness to DHHS resulting from its payment of medical assistance benefits arises during the life of the recipient. Accordingly, DHHS' claim arose before Cushing's death and is therefore subject to the time limitations set forth in § 30-2485(a).

Whether the claim is subject to the 2-month limitations period set forth in § 30-2485(a)(1) or the 3-year period set forth in § 30-2485(a)(2) depends upon whether DHHS was given notice "in compliance with sections 25-520.01 and 30-2483."[10] Section 30-2483 requires "the clerk of the court upon the appointment of a personal representative [to] publish a notice once a week for three successive weeks in a newspaper of general circulation." The notice must "announc[e] the appointment and the address of the personal representative, and notify[] creditors of the estate to present their claims within two months after the date of the first publication of the notice or be forever barred."[11] Moreover,

> [t]he party instituting or maintaining the proceeding or his or her attorney is required to mail the published notice and give proof thereof in accordance with section 25-520.01. If the decedent was fifty-five years of age or older or resided in a medical institution as defined in

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[6] See Floor Debate, 97th Leg., 1st Sess. 1374 (Feb. 20, 2001).

[7] 2001 Neb. Laws, L.B. 257, § 1.

[8] § 68-919(1).

[9] § 68-919(2).

[10] § 30-2485(a)(1). Accord § 30-2485(a)(2).

[11] § 30-2483.

> subsection (1) of section 68-919, the notice shall also be mailed to [DHHS].[12]

Section 25-520.01 in relevant part provides:

> In any action or proceeding . . . where a notice by publication is given as authorized by law, a party instituting or maintaining the action or proceeding with respect to notice or his attorney shall within five days after the first publication of notice send by United States mail a copy of such published notice to each and every party appearing to have a direct legal interest in such action or proceeding whose name and post office address are known to him. Proof by affidavit of the mailing of such notice shall be made by the party or his attorney and shall be filed with the officer with whom filings are required to be made in such action or proceeding within ten days after mailing of such notice.

We held in *In re Estate of Emery*[13] that a creditor who did not receive mailed notice pursuant to §§ 25-520.01 and 30-2483 was entitled to the 3-year period provided by § 30-2485(a)(2), notwithstanding the fact that the creditor had not sought the 60-day extension provided for in § 30-2485(a)(1). Similarly, in *Baye v. Airlite Plastics Co.*,[14] we held that creditors who did not receive the notice required by §§ 25-520.01 and 30-2483 had 3 years from the date of the decedent's death to file their claims against the estate.

Here, the personal representative argues he gave the requisite notice to DHHS on September 24, 2010. But by that date, the deadline for creditors to file claims against the estate had passed. We read § 30-2483 to require that the notice to DHHS comply with § 25-520.01, which requires mailing within 5 days of first publication, so that DHHS will have the same opportunity as other creditors to file a timely claim against the estate. Because the notice to DHHS was not mailed within 5 days of July 2, 2010, the date the notice to creditors was first

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[12] *Id.*

[13] *In re Estate of Emery*, 258 Neb. 789, 606 N.W.2d 750 (2000).

[14] *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

published, the personal representative failed to comply with §§ 25-520.01 and 30-2483 and the 3-year limitations period of § 30-2485(a)(2) applies. DHHS' filing date of January 18, 2011, was well within this time period. The personal representative's first assignment of error is without merit.

### Summary Judgment

[3] In his second assigned error, the personal representative contends that the county court erred in granting summary judgment in favor of DHHS. Here, DHHS moved for summary judgment. As the party moving for summary judgment, DHHS had the burden to show that no genuine issue of material fact existed and to produce sufficient evidence to demonstrate that it was entitled to judgment as a matter of law.[15]

[4] DHHS offered evidence that Cushing was 55 years of age or older when the medical assistance benefits were provided. This established a prima facie showing that Cushing was indebted to DHHS pursuant to § 68-919(1)(a). DHHS also offered evidence that Cushing was not survived by a spouse, a child under the age of 21, or a child who was blind or totally and permanently disabled. This established that the debt became recoverable after Cushing's death, pursuant to § 68-919(2). Finally, DHHS offered its payment records authenticated in the manner required by § 68-919(4), thereby establishing the total amount paid on Cushing's behalf. Thus, DHHS presented evidence which, if uncontroverted, would entitle it to judgment for the amount of the indebtedness as a matter of law. After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.[16] Here, the personal representative offered no evidence showing the existence of a genuine issue of material fact as to

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[15] See, *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011); *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

[16] *Id.*

any of the essential elements of DHHS' claim. Accordingly, the county court did not err in granting the motion for summary judgment and the personal representative's second assigned error is without merit.

### Interest

[5] Finally, the personal representative assigns error to the county court's award of costs and prejudgment interest to DHHS. We address only that portion of this assignment dealing with interest, because the personal representative makes no argument with respect to costs. To be considered by this court, an alleged error must be both specifically assigned and *specifically argued* in the brief of the party asserting the error.[17]

In its July 1, 2011, order granting summary judgment to DHHS, the county court awarded interest at an annual rate of 2.188 percent, from and after November 1, 2010. The personal representative asserts this award was improper based on § 30-2488(e). That subsection provides:

> Unless otherwise provided in any final judgment in any court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

Under § 68-919(3), the statutory debt owed by a Medicaid recipient to DHHS "shall not include interest." Thus, any award of interest must be based upon § 30-2488(e), which we have not previously interpreted. The North Dakota Supreme Court interpreted a nearly identical statute in *In re Estate of Kiesow*.[18] That case addressed whether interest could be awarded on a claim for reimbursement for medical assistance benefits under a statute[19] which provided:

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

[18] *In re Estate of Kiesow*, 615 N.W.2d 538 (N.D. 2000).

[19] N.D. Cent. Code § 30.1-19-06(5) (2010).

> Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case allowed claims bear interest in accordance with that provision.

The court looked to North Dakota's nonclaim statute, which set forth time limitations for filing claims against an estate, to determine when the time for original presentation of the claim had expired. North Dakota's statute, like § 30-2485, provided for a 3-year period of limitations for claims against a decedent's estate which arose before the death of the decedent, if notice to creditors was not published and mailed. The Supreme Court of North Dakota determined that the time for original presentation of the claim was 3 years, because no notice to creditors was mailed or published.

The facts in this case are slightly different, in that notice to creditors was published and mailed to some creditors, not including DHHS. But we conclude that the language in § 30-2488(e) which fixes the date at which interest begins to run as "sixty days after the time for original presentation of the claim" is specific to the claim of the creditor seeking interest, in this case DHHS. Pursuant to our application of § 30-2485 above, the time for original presentation of DHHS' claim was 3 years from Cushing's death. The 3-year period would extend to May 9, 2013, and no interest could begin to accrue under § 30-2488(e) until 60 days after that date, which is July 8. We are not persuaded by the argument of DHHS that the county court had discretion to vary the date on which interest would begin to accrue under the facts presented here.

## CONCLUSION

DHHS' claim for medical assistance benefits provided to Cushing arose before her death and was enforceable against her estate following her death. DHHS timely filed its claim and made a sufficient showing, which was uncontroverted by the personal representative, that it was entitled to judgment as a matter of law. However, interest does not begin to

accrue on the judgment "from and after November 1, 2010," as ordered by the county court, but, rather, from and after July 8, 2013. We modify the judgment to that extent and affirm as modified.

AFFIRMED AS MODIFIED.

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# IN RE INTEREST OF KARLIE D., A CHILD UNDER 18 YEARS OF AGE.
# STATE OF NEBRASKA, APPELLANT, V. GARY D., APPELLEE, AND MARTHA D., INTERVENOR-APPELLEE.

811 N.W.2d 214

Filed March 23, 2012. No. S-11-616.

1. **Juvenile Courts: Evidence: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.
2. **Juvenile Courts: Jurisdiction: Appeal and Error.** In juvenile cases, as elsewhere, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Juvenile Courts: Adoption: Child Custody.** A juvenile court, except where an adjudicated child has been legally adopted, may always order a change in the juvenile's custody or care when the change is in the best interests of the juvenile.
4. **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.
5. **Final Orders: Words and Phrases.** A substantial right is an essential legal right, not a mere technical right.
6. **Final Orders: Appeal and Error.** A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.
7. **Juvenile Courts: Final Orders: Constitutional Law: Parent and Child.** The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child.

8. **Juvenile Courts: Words and Phrases.** The State's right in juvenile cases is derived from its parens patriae interest in the proceedings. This means, in essence, that the State has a right to protect the welfare of its resident children.
9. **Juvenile Courts: Jurisdiction.** The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child. This same purpose forms the foundation for the State's parens patriae interest; thus, once the child is adjudicated, the State's interest in protecting the child becomes greater and more necessary.
10. **Statutes: Time.** Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.
11. **Statutes: Words and Phrases.** A procedural amendment simply changes the method by which an already existing right is exercised, while a substantive amendment creates a right or remedy which did not previously exist.
12. **Juvenile Courts: Minors.** The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.
13. **Juvenile Courts: Jurisdiction: Child Custody.** Once a child has been adjudicated under Neb. Rev. Stat. § 43-247(3) (Reissue 2008), the juvenile court ultimately decides where a child should be placed. Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.
14. **Juvenile Courts: Child Custody.** The Nebraska Juvenile Code clearly expresses a preference for placement with blood relatives.

Appeal from the Separate Juvenile Court of Douglas County: VERNON DANIELS, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Sarah Breen, Senior Certified Law Student, for appellant.

Christine P. Costantakos for intervenor-appellee.

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

MCCORMACK, J.

The issue in this case is where Karlie D., a minor child, should live. Karlie's mother voluntarily relinquished her parental rights to Karlie. While termination proceedings against the biological father were pending, he died. The Nebraska Department of Health and Human Services (Department) placed Karlie in foster care. But Karlie's paternal grandmother, Martha D., moved to have Karlie placed with her and her husband and to become

Karlie's guardian. The juvenile court adopted a transition plan, against the Department's recommendation, which permanently moved Karlie to live with her grandparents. Because the court's order affected a substantial right of the State, the order was final and appealable. And because Martha is fully capable of caring for Karlie, has established a relationship with her, and is her grandmother, we conclude it is in Karlie's best interests to be placed with Martha. We affirm.

## I. BACKGROUND

Karlie was born in August 2007 to Kara B. The State immediately petitioned the juvenile court to adjudicate Karlie, and moved for her to be placed in the Department's temporary custody, because Karlie tested positive for drugs at birth. The juvenile court granted temporary custody of Karlie to the Department, who placed her in foster care a few days after her birth. At the time, the father's identity was unknown.

On September 10, 2007, Gary D. moved to intervene in the proceedings, claiming that he was Karlie's father. Gary also asked for Karlie to be placed with him. The juvenile court adjudicated Karlie under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2006), with temporary custody to remain with the Department. The juvenile court ordered that Karlie remain in the Department's custody, and thus with her foster parents, because Gary had not yet established that he was Karlie's father. However, Gary was granted visitation, and Martha would sometimes get to accompany Gary during his visits.

Following a positive paternity test and in light of successful supervised visitation, the juvenile court placed Karlie with Gary in August 2008. At the time, Gary was working second shift, from 3 p.m. to 1:30 a.m., 6 days a week. He was unable to find a daycare which was open until 2 a.m., so he arranged for Martha to watch Karlie while he was at work. The Department knew of this arrangement and approved it. If the weather was poor, Karlie would stay overnight at Martha's home. The Department never expressed any concern over Karlie's staying with Martha.

On March 23, 2009, the Department discovered that Gary had tested positive for methamphetamines. A test of Karlie's

hair also came back positive for methamphetamines. Karlie's first caseworker asked Martha whether it would be all right if Karlie stayed with her for a few days until a safety assessment could be completed. Martha said yes. Gary likewise agreed to this arrangement, and Karlie was sent to live with Martha on a temporary basis.

But just a few days later, on March 26, 2009, the Department removed Karlie from Martha's home and placed her back with her foster parents. Karlie's current caseworker testified that the Department removed Karlie from Martha's home because of the earlier positive drug tests. But Martha testified that the Department removed Karlie because it had received a call accusing Karlie's uncle of having sexually molested Karlie. At the time, Karlie's uncle lived in Martha's basement apartment. Although the basis for the removal is disputed, it is undisputed that someone made a sexual abuse allegation against Karlie's uncle, that the allegation was false, and that the Department's investigation of the allegation lasted no more than a few days.

Martha further testified that the Department did not notify her that the investigation had been resolved until several months after Karlie had been removed. At that point, Martha asked the Department to return Karlie to her, but the Department refused. The Department explained that it did not wish to further traumatize Karlie with another home change. Martha then asked for visitation with Karlie, which was granted. Martha's visitation included two mornings each week and two overnight visits each month.

In November 2009, Martha filed a motion to intervene in the juvenile proceedings, which the juvenile court granted. Afterward, the State moved to terminate Gary's parental rights to Karlie. Martha then moved to have Karlie placed with her. The juvenile court proceeded to trial on both issues; namely, whether to place Karlie with Martha and whether to terminate Gary's parental rights. Over the course of several days during 2010, the juvenile court heard testimony and received exhibits, which will be discussed in more detail below. During these proceedings, Martha filed an amended motion to also be named as Karlie's guardian.

Following the hearings, but before the court's ruling, Gary died. As a result, the State moved to dismiss its motion to terminate Gary's parental rights to Karlie, which the court granted. This left pending before the court only Martha's motion to have Karlie placed in her home and to be named as Karlie's guardian.

On March 31, 2011, the juvenile court entered its order. The juvenile court determined that it could not

> find by a preponderance of the evidence that it would be inconsistent with the best interest, safety, and welfare of Karlie if permanency occur[red] with Martha . . . . By a preponderance of the evidence, the court finds Martha . . . to be a reputable citizen of good moral character. . . .
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> However, before the court removes the Department as the guardian, the Department shall submit a transition plan to the court by May 15, 2011. Also, by May 15, 2011, the Department shall assess whether a subsidy or Medicaid coverage for the care of Karlie is consistent with Karlie's best interests, safety, and welfare.

A hearing on the above was scheduled for June 16, 2011.

The State appealed the March 31, 2011, order. While that appeal was pending before the Nebraska Court of Appeals, the juvenile court held the scheduled June 16 hearing. At the hearing, the Department presented its transition plan to the court. The transition plan set forth a graduated, increasing visitation schedule between Martha and Karlie which, over the course of about 1½ months, ended with Karlie's permanently living with Martha. That same day, the court ordered that the transition plan be adopted, although the court did not remove Karlie from the Department's custody or appoint Martha as her guardian.

The State also appealed the June 16, 2011, order. Later, the Court of Appeals determined that the juvenile court's March 31 order was not a final, appealable order and dismissed the case.[1] It is the appeal of the second order, issued on June 16, which is before us now.

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[1] See *In re Interest of Karlie D.*, 19 Neb. App. 135, 809 N.W.2d 510 (2011).

## II. ASSIGNMENT OF ERROR

The State assigns, restated, that the juvenile court erred in finding that Karlie's best interests were served by permanent placement with Martha.

## III. STANDARD OF REVIEW

[1] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over the other.[2]

## IV. ANALYSIS

### 1. Jurisdiction

[2] In juvenile cases, as elsewhere, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[3] Martha argues that for an order to be final and appealable, it must affect a substantial right of the appealing party, and that no substantial right of the State was affected by this order. This is because the order left Karlie in the Department's custody and did not remove the Department as Karlie's guardian. Furthermore, although the court adopted the transition plan, Martha asserts that the court could still "change its mind and stop the process at any . . . point" upon a showing that such a change would be in Karlie's best interests.[4] For those reasons, Martha claims that the order is not final and appealable and that we lack jurisdiction to reach the merits of this case.[5]

[3] At the outset, we note that a juvenile court, except where an adjudicated child has been legally adopted, may *always* order a change in the juvenile's custody or care when the

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[2] See *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

[3] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

[4] Brief for intervenor-appellee at 2.

[5] See *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

change is in the best interests of the juvenile.[6] Obviously, this would include the juvenile's placement. But the court's ability to do so has no bearing on whether the court's order is final and appealable, despite Martha's argument to the contrary. Concluding otherwise would result in no orders of the juvenile courts' being final and appealable, since the court could always "change its mind." We reject Martha's argument in that regard.

[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.[7]

We recognize that our final order jurisprudence is difficult to follow—it has been criticized in the past for a lack of clarity,[8] and understandably so. Here, only the second type of final order—an order affecting a substantial right made during a special proceeding—is at issue. We have long held that juvenile court proceedings are special proceedings.[9] So we are tasked with determining whether the juvenile court's order affected a substantial right.

[5,6] We have defined a "substantial right" in various ways. For example, we have stated that a substantial right is an essential legal right, not a mere technical right.[10] We have also explained that a substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which the appeal is taken.[11] But the application of these

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[6] See Neb. Rev. Stat. § 43-295 (Reissue 2008).

[7] See *In re Adoption of David C., supra* note 5.

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

[9] See *In re Adoption of David C., supra* note 5.

[10] *Id.*

[11] *Id.*

definitions in juvenile cases—where the best interests of the child are the primary concern—is not always clear. Most of our cases dealing with the finality of juvenile court orders involve the substantial right of a parent.[12] Here, it is the substantial right of the State, if any, which is at issue. For purposes of this analysis, the Department and the State are one and the same because the Department is a state agency.

[7,8] The substantial right of a parent in juvenile proceedings is a parent's fundamental, constitutional right to raise his or her child.[13] The State's right in juvenile cases, however, is derived from its parens patriae interest in the proceedings.[14] This means, in essence, that the State has a right to protect the welfare of its resident children.[15] We have addressed the scope of the State's parens patriae interest in juvenile proceedings before. In *In re Interest of Anthony G.*,[16] we held that an order denying continued detention of a juvenile pending adjudication did not affect a substantial right of the State.

We explained that the filing of an abuse and neglect proceeding pursuant to § 43-247(3) subjected the juvenile to the jurisdiction of the juvenile court but did not automatically confer custody rights upon the State.[17] Furthermore, the denial of a request for temporary custody pending adjudication did not affect any then-existing right of the State. Rather, such a finding indicated only that removal of the juvenile from parental custody, pending adjudication, was not warranted on the facts

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[12] See, e.g., *id.*; *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003); *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000); *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999); *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998).

[13] See, *In re Interest of Anthony G.*, 255 Neb. 442, 586 N.W.2d 427 (1998); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991), *disapproved on other grounds, O'Connor v. Kaufman*, 255 Neb. 120, 582 N.W.2d 350 (1998).

[14] See *In re Interest of Anthony G., supra* note 13.

[15] See *In re Interest of R.G., supra* note 13.

[16] *In re Interest of Anthony G., supra* note 13.

[17] *Id.*

before the juvenile court. We said that the order did not foreclose the State, in its parens patriae role, from pursuing adjudication and disposition, nor did it foreclose the State from taking other measures to protect the child pending adjudication.[18] In short, the order in *In re Interest of Anthony G.* did not confer any custody right on the State, it did not end or foreclose a discrete phase of the juvenile proceeding, and it did not affect any then-existing right of the State. For those reasons, the order did not affect a substantial right of the State.[19]

But those factors we found lacking in *In re Interest of Anthony G.* are present in this case. Karlie has been adjudicated under § 43-247(3); the juvenile court granted the Department, and thus the State, custody of Karlie; and by statute, the Department became Karlie's guardian.[20] As Karlie's guardian and custodian, the Department had the right to recommend where Karlie should live[21] and had already placed Karlie in state-sponsored foster care. So the order permanently moving Karlie to live with her grandparents did affect an existing right of the State.

Furthermore, the order, in effect, terminated the dispositional phase of the juvenile proceeding. While a juvenile court may always change the care or custody of an adjudicated child when such a change is in the child's best interests,[22] it can be assumed that no such change would be ordered absent a material change in the child's circumstances. Logically, once the juvenile court has found that one living arrangement is in a child's best interests, that finding would remain the same unless the original circumstances had changed. In that sense, then, the dispositional order moving Karlie to permanently live with her grandmother put an end to the dispositional phase of the juvenile proceedings. Thus, the order is final, as that term is ordinarily understood, and explains why we have

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[18] See *id.*

[19] See *id.*

[20] Neb. Rev. Stat. § 43-285(1) (Reissue 2008).

[21] *Id.*

[22] § 43-295.

previously stated that, as a rule, dispositional orders are final and appealable.[23]

[9] While we have not yet addressed a factual situation similar to the one before us now, the Court of Appeals has. In *In re Interest of Tanisha P. et al.*,[24] the State appealed from a decision of a juvenile court which approved the return of the adjudicated child, Tanisha P., to the home of her grandmother and legal guardian. The Court of Appeals distinguished its case from *In re Interest of Anthony G.* and explained that Tanisha had already been adjudicated as a juvenile under § 43-247(3) at the time of the order. The purpose of the adjudication phase of a juvenile proceeding is to protect the interests of the child.[25] This same purpose forms the foundation for the State's parens patriae interest; thus, once the child is adjudicated, the State's interest in protecting the child becomes greater and more necessary.[26] The Court of Appeals explained that the order was "entered subsequent to Tanisha's adjudication and her placement in State-sponsored foster care, [which] affected an existing right of the State."[27] Therefore, the Court of Appeals determined that the order affected a substantial right of the State and was final and appealable.[28] We approve of this reasoning.

We conclude that the juvenile court's order on June 16, 2011, affected a substantial right of the State, making its

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[23] See, *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008); *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999); *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987), *overruled on other grounds, State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993); *In re Interest of V.T. and L.T.*, 220 Neb. 256, 369 N.W.2d 94 (1985). See, also, Lenich, *supra* note 8 (arguing that order which ends distinct phase of multifaceted special proceeding, such as juvenile proceeding, ought to be treated as final order).

[24] *In re Interest of Tanisha P. et al.*, 9 Neb. App. 344, 611 N.W.2d 418 (2000).

[25] *Id.* See *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996).

[26] See *In re Interest of Tanisha P. et al., supra* note 24.

[27] *Id.* at 351, 611 N.W.2d at 423.

[28] See *In re Interest of Tanisha P. et al., supra* note 24.

order final and appealable. The State's interest in this case is greater than in *In re Interest of Anthony G.*, because Karlie has been adjudicated and placed in the Department's custody and the Department is Karlie's guardian. The order denied the Department, as Karlie's guardian and custodian, its recommended placement. And the court's order ended the dispositional phase of the juvenile proceeding. For these reasons, we conclude that the juvenile court's order is final and appealable. We have jurisdiction to reach the merits of this appeal.

### 2. Best Interests Analysis

#### (a) Burden of Proof

At the time of these proceedings, recommendations made by the Department were legally presumed to be in the best interests of the child over other possible courses of action.[29] But that changed in August 2011, when L.B. 648 came into effect. Before L.B. 648, § 43-285(2) contained the following sentence: "If any other party . . . proves by a preponderance of the evidence that the department's plan is not in the juvenile's best interests, the court shall disapprove the department's plan." L.B. 648 struck that sentence from the statute.[30] The Court of Appeals has concluded that this change shifted the burden of proof to the State to show that the Department's proposed action was in the best interests of the juvenile.[31] We agree. Someone must have the burden of proof. The Legislature decreed that it shall not be on those opposed to the Department's plan; logically, then, the burden is now on the State. The initial question is whether L.B. 648 applies to this case on appeal.

[10,11] Procedural amendments to statutes are ordinarily applicable to pending cases, while substantive amendments are not.[32] A procedural amendment simply changes the method by which an already existing right is exercised, while a substantive amendment creates a right or remedy which did not

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[29] See § 43-285(2) (Cum. Supp. 2010).

[30] 2011 Neb. Laws, L.B. 648.

[31] See *In re Interest of Ethan M.*, 19 Neb. App. 259, 809 N.W.2d 804 (2011).

[32] *Harris v. Omaha Housing Auth.*, 269 Neb. 981, 698 N.W.2d 58 (2005).

previously exist.[33] The amendment to § 43-285(2) did not create a new right or remedy, but only altered the way an existing right is exercised. Thus, this was a procedural amendment which is applicable here on our de novo review. It is the State's burden to show that its plan is in Karlie's best interests.

(b) Merits

The State argues that Karlie's placement with Martha is not in Karlie's best interests and that Karlie should remain with her foster parents. Specifically, the State claims that Martha's advanced age and deteriorating health make her unable to care for a growing child. The State also asserts that Karlie suffered behavioral problems as a result of her contact with Martha and that Karlie has already bonded with her foster parents. We recognize that Martha is older, but that alone is not enough to disqualify her as a potential caretaker for Karlie. Furthermore, the record is insufficient to conclude that Martha's health is deteriorating or that Karlie's behavioral problems were caused by contact with Martha. And while we recognize that Karlie is affectionate toward her foster parents, the record also supports a finding that Karlie has established a bond with Martha. We therefore affirm the juvenile court's placement order.

[12,13] The foremost purpose and objective of the Nebraska Juvenile Code is to promote and protect the juvenile's best interests, and the code must be construed to assure the rights of all juveniles to care and protection.[34] Once a child has been adjudicated under § 43-247(3), the juvenile court ultimately decides where a child should be placed.[35] Juvenile courts are accorded broad discretion in determining the placement of an adjudicated child and to serve that child's best interests.[36]

We do not doubt that Karlie's foster parents have been good to her and wish to adopt her. But the juvenile court exercised its discretion in this case and determined that Karlie should

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[33] See *id.*

[34] See *In re Interest of Veronica H.*, 272 Neb. 370, 721 N.W.2d 651 (2006).

[35] See § 43-285(2) (Supp. 2011).

[36] See *In re Interest of Veronica H., supra* note 34.

live with Martha. In doing so, the court made numerous factual findings which, after our de novo review, we find to be amply supported by the record.

The State does not contest that Martha is a reputable citizen of good moral character. Nor does the State question Martha's motive—it is undisputed that Martha wishes to have Karlie placed with her, because Martha loves Karlie and believes that Karlie should remain with family. Martha is interested in adopting Karlie. Evidence also indicates that Martha is able to financially provide for Karlie.

Even so, the State claims that Martha's advanced age and deteriorating health make her a poorer choice to care for Karlie than Karlie's foster parents. In our de novo review, we are unwilling to exclude Martha as a viable caretaker for Karlie because of her age. While being older may create some difficulties in raising a child, it also has its advantages. Martha has a wealth of experience to draw upon in raising Karlie. Indeed, the record shows that Martha has raised 6 children and has 14 grandchildren. She has also successfully provided foster care for two other children, including one of her other grandchildren. Certainly, Martha's advanced age means that she may not live as long as younger individuals like Karlie's foster parents. But that is not enough to disqualify her as a caretaker for Karlie. Nothing in life is certain, least of all whether a person will be around tomorrow, and this is true regardless of age. We do not view Martha's age with the same trepidation as the State.

Nor are we convinced that health problems detrimentally affect Martha's ability to care for Karlie. There was no expert medical testimony detailing any current health issues that Martha (or her husband) may have had. While the record shows that Martha has had a number of surgeries in the past, all of the testimony at trial indicated that she was fully recovered and fit. And while her husband, Karlie's grandfather, might have health concerns as well, there is no indication that he is unable to care for Karlie. In fact, the record shows that he was employed as a nighttime security guard.

The State claims Karlie's behavior was negatively affected by her visits with her grandparents. But the juvenile court

specifically found no causal link between Karlie's behavioral problems and those visits. The evidence presented was that Karlie had sleeping problems, some difficulty in her relationship with her foster parents' other child, and a speech impairment. The only evidence of causation was her foster mother's testimony that these behaviors occurred or worsened upon Karlie's return from staying with her grandparents. But, as noted by the juvenile court, there could be many causes for this behavior, and we cannot attribute these behavioral changes to the grandparents without more definitive proof of causation.

The State also argues that Karlie has bonded with her foster parents, and so Karlie should remain in their home. We do not doubt that Karlie has bonded with her foster parents. She has lived with them for a significant time, and the evidence shows that Karlie feels affection for her foster parents. Karlie's current caseworker opined that Karlie should remain with her foster parents for that reason. But the evidence also shows that Karlie has a strong bond with her grandparents. Martha has been involved with Karlie since her birth and has had consistent visitation with Karlie, including overnight visits. Martha testified that those visits have gone well and that Karlie is a "happy little girl." This is reinforced by numerous photographs admitted into evidence which depict Karlie obviously enjoying her time with her grandparents.

The State also argues that its expert testimony showed that Karlie should remain with her foster parents. Notably, Amanda Schraut, a therapist and early childhood consultant, opined that it was in the best interests of Karlie to remain with her foster parents. This was based on her evaluation of Karlie's individual interaction with her grandparents and foster parents, along with collateral interviews and other background information regarding Karlie. The juvenile court gave this testimony little weight, and, after our de novo review of the record, we likewise give little weight to this testimony.

Schraut conducted a parent-child relationship assessment. The purpose of the assessment was to make recommendations regarding Karlie's permanency planning and to identify any therapy treatment that Karlie might need. The record

demonstrates that the assessment, as a whole, lacked reliability, and the resulting recommendations were suspect at best. Notably, Schraut was not provided with all of the information she requested to conduct the assessment. Schraut did not receive home studies for each family, Child Protective Services investigation records, court reports, or case plans. Schraut testified that such information is helpful in completing the assessment because it provides a better picture of the family situation and the child's history. Schraut never observed Karlie within each of the homes, but only in a neutral setting. Furthermore, the study does not account for the many variables that come with dealing with a toddler. For example, on cross-examination, Schraut testified that she did not know where Karlie stayed the night before the examination, when she went to bed, or whether she had eaten beforehand. Schraut testified that those variables could all affect Karlie's mood and the resulting analysis.

The juvenile court also questioned Schraut as to the repeatability of the assessment's results; in other words, whether the results would remain the same or fluctuate from day to day. Schraut testified that the scores used in her assessment could fluctuate from day to day depending on the maturity, mood, and activity of the child. And, as noted on cross-examination, because Karlie had been living with her foster parents on a full-time basis, and had only relatively sparse visitation with Martha, the foster parents had an inherent advantage in this assessment. As a result, we give little weight to Schraut's recommendations in our analysis.

[14] The Nebraska Juvenile Code clearly expresses a preference for placement with blood relatives. For example, under Neb. Rev. Stat. § 43-246(5) (Cum. Supp. 2010), when separation from the juvenile's home is necessary, relatives are to be considered "as a preferred potential placement resource." And Neb. Rev. Stat. § 43-533 (Reissue 2008) lists a number of principles to guide the actions of state government and its departments and agencies, one of which, stated in subsection (4), is "to give preference to relatives as a placement resource" when a child cannot remain with his or her parents. That preference is also expressed in the Department's own administrative rules

and regulations.[37] Martha, Karlie's grandmother, wishes to care for and ultimately adopt Karlie. The record shows that Martha is physically, financially, and in all other ways able to care for Karlie on a permanent basis, and we are not convinced by the State's arguments otherwise. Karlie's best interests are served by placement with Martha.

## V. CONCLUSION

We conclude that the juvenile court's order was a final, appealable order. And in our de novo review of the record, we find that the placement of Karlie with her grandparents is in her best interests. We affirm the judgment of the juvenile court.

AFFIRMED.

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[37] 390 Neb. Admin. Code, ch. 7, § 004.01A (2000).

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NEBRASKA REPUBLICAN PARTY, APPELLANT, V.
JOHN A. GALE, SECRETARY OF STATE OF THE
STATE OF NEBRASKA, APPELLEE, AND
BOB KERREY, INTERVENOR-APPELLEE.

812 N.W.2d 273

Filed March 26, 2012. No. S-12-237.

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

Steve Grasz, of Husch Blackwell, L.L.P., and, of Counsel, Bobby R. Burchfield and Brandon H. Barnes, of McDermott, Will & Emery, L.L.P., for appellant.

Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Alan E. Peterson for intervenor-appellee.

Robert F. Bartle and Jeffry D. Patterson, of Bartle & Geier Law Firm, for appellee.

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

PER CURIAM.

This is an appeal from a March 21, 2012, order of the district court for Lancaster County in a special proceeding brought pursuant to Neb. Rev. Stat. § 32-624 (Reissue 2008). That order dismissed with prejudice a "Petition for Review of Secretary of State Determination Opinion" filed by appellant, the Nebraska Republican Party, against the Nebraska Secretary of State, John A. Gale.

The district court proceeding arose from a March 6, 2012, objection filed by appellant with the Nebraska Secretary of State in which it challenged, pursuant to § 32-624, the candidate filing of Bob Kerrey for the U.S. Senate. On March 16, the Secretary of State issued his determination opinion concluding that Kerrey's name could appear on the May 15, 2012, primary election ballot.

On March 20, 2012, appellant herein filed its petition in the district court for review of the Secretary of State's determination opinion. Section 32-624 permits a "political party committee or other interested party" to file an "application" for a summary review of the Secretary of State's decision to "a judge of the county court, district court, Court of Appeals, or Supreme Court." The petition filed in this case avers that pursuant to § 32-624, the "statutory deadline for reversing a finding by Secretary Gale is fifty-five days prior to the primary election, or March 21, 2012." An expedited summary adjudication was sought in the district court. A judgment was filed by the district court at 7:18 p.m. on March 21, 2012, with the case being dismissed with prejudice.

Upon filing of that March 21, 2012, judgment, the Nebraska Republican Party electronically filed a notice of appeal and docket fee in the district court on that same date. On March 22, the district court for Lancaster County electronically filed the appeal with the Clerk of the Supreme Court, and the appeal was then docketed in the Nebraska Court of Appeals on March 22. This court thereafter, on its own motion, moved the appeal

to its docket pursuant to its authority under Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

For the sake of completeness, the court notes that appellant filed in this court a notice pursuant Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) and asserts therein that this is an appeal which "involves the constitutionality of Nebraska statutes." Appellant's brief on appeal fails to assign as error an issue regarding the unconstitutionality of any specific state statute.[1] This court finds that this is not an appeal involving the constitutionality of a Nebraska statute.

This court entered an order to show cause on March 22, 2012, directing that the parties address its jurisdiction in this matter. Further, the parties were ordered to address the issue of whether § 32-624, which requires that an order shall be made by a judge "'on or before the fifty-fifth day preceding the election'" in order to reverse a decision of the Secretary of State, would prohibit this court from granting relief to appellant after that 55-day limitation period had run, because such relief would violate the legislative mandate of § 32-624.

In response to the order to show cause, all parties responded to the court's order and the issues raised therein.

Past reported decisions of the Nebraska Supreme Court support the view that appellate jurisdiction seems to exist in this "§ 32-624" type of proceedings, albeit under the predecessor statutes to current Nebraska law, at least where such appeal is taken from a judge of the district court.[2]

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[1] See *Alegent Health Bergan Mercy Med. Ctr. v. Haworth*, 260 Neb. 63, 615 N.W.2d 460 (2000) (where brief contains no assignment of error based upon alleged unconstitutionality of statute, argued error will not be considered by appellate court).

[2] See, *State, ex rel. Quinn, v. Marsh*, 141 Neb. 436, 3 N.W.2d 892 (1942); *State, ex rel. Meissner, v. McHugh*, 120 Neb. 356, 233 N.W. 1 (1930) (single-justice opinion); *Porter v. Flick,* 60 Neb. 773, 84 N.W. 262 (1900). But see *State ex rel. Chambers v. Beermann*, 229 Neb. 696, 428 N.W.2d 883 (1988) (special proceeding resulting in October 18, 1988, order of Acting Chief Justice Boslaugh denying appeal to full court from order of single justice of Supreme Court under Neb. Rev. Stat. § 32-517 (Reissue 1984), predecessor statute to § 32-624, stating "[n]o procedure for appeal to this or any other court is authorized by [§ 32-517]").

Despite the uncertainty in our case law and orders of this court in appeals from such proceedings, we will assume without deciding that subject matter jurisdiction does exist in the matter before this court today. But the relief sought by appellant is not available under the election scheme as provided for by the Legislature.

A court may have subject matter jurisdiction in a matter over a certain class of case, but it may nonetheless lack the authority to address a particular question or grant the particular relief requested.[3] We have stated:

> Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action or proceeding before the court and the particular question which it assumes to determine. But the question of a court's subject matter jurisdiction does not turn solely on the court's authority to hear a certain class of cases. It also involves determining whether a court has authority to address a particular question that it assumes to decide or to grant the particular relief requested.[4]

Section 32-624 directs that a decision of the Secretary of State shall become final unless an order shall be made by a judge "on or before the fifty-fifth day preceding the election" changing that decision. An order by any court made after that time period would violate such legislative mandate, and no relief may be afforded to the party from such an order after the 55th day.

In election cases, this court has no authority to grant relief where the Legislature has established by statute strict deadlines which must be met in order to guarantee that the state's election process is safeguarded against uncertainty and disruption.

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[3] *In re Interest of Trey H.*, 281 Neb. 760, 798 N.W.2d 607 (2011). See, also, *In re Estate of Hockemeier*, 280 Neb. 420, 786 N.W.2d 680 (2010).

[4] *In re Interest of Trey H., supra* note 3, 281 Neb. at 766, 798 N.W.2d at 613. See, *State ex rel. Lamm v. Nebraska Bd. of Pardons*, 260 Neb. 1000, 620 N.W.2d 763 (2001); *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999).

Section 32-624 and Neb. Rev. Stat. § 32-801 (Reissue 2008) are such statutes. As stated in the affidavit of the Secretary of State, attached to his response to this court's order to show cause,

> [i]n reliance on Neb. Rev. Stat. § 32-624, and on the Order of the District Court for Lancaster County entered March 21, 2012, [he] began certification of the May 15, 2012 primary election ballot at approximately noon on Thursday, March 22, and completed the process of ballot certification on that same day for all 93 Nebraska counties at approximately 1:30 p.m.

That certification duty is imposed upon the Secretary of State by § 32-801, and no one asserts he should disregard that statutory obligation.

Thus, for the reasons stated above, this court determines that under the statutory procedure established by the Legislature, it lacks authority to grant the relief sought by appellant. This appeal is therefore dismissed.

APPEAL DISMISSED.

WRIGHT and STEPHAN, JJ., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
TYLER W. BRITT, APPELLANT.

813 N.W.2d 434

Filed March 30, 2012. No. S-10-998.

1. **Constitutional Law: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error.
2. **Constitutional Law: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination.
3. ____: ____. Statements that are nontestimonial can be admitted without further Confrontation Clause analysis.
4. ____: ____. The initial step in a Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. If the statements are nontestimonial, then no further Confrontation Clause analysis is required.

5. **Appeal and Error.** Consideration of plain error occurs at the discretion of an appellate court.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Dawson County, JAMES E. DOYLE IV, Judge, on appeal thereto from the County Court for Dawson County, CARLTON E. CLARK, Judge. Judgment of Court of Appeals affirmed.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellant.

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

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

MILLER-LERMAN, J.

## NATURE OF CASE

Tyler W. Britt was convicted in the county court for Dawson County of first-offense driving under the influence with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath. The district court for Dawson County affirmed the conviction. On appeal, the Nebraska Court of Appeals concluded, inter alia, that the admission of a certificate containing a chemical analysis certification of the alcohol breath simulator solution used to test the machine that was used to test Britt's breath did not violate the Confrontation Clause and affirmed the district court order. We granted Britt's petition for further review. We affirm.

## STATEMENT OF FACTS

Britt was charged on February 20, 2009, in the county court with first-offense driving under the influence over .15 stemming from events occurring on February 13. Prior to trial, Britt filed a second motion in limine asking the court to prohibit the State from offering into evidence the results of any chemical test unless the person who prepared the breath simulator solution which was used to calibrate the breath testing device was

available for cross-examination. Britt relied on *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), in support of his assertion that admission of a certificate regarding such matter would violate his right of confrontation. The State argued at a hearing on the motion in limine that a certificate signed by Cecil B. Garner, the person who prepared the known breath simulator solution used to test the device that was used to test Britt's breath, was admissible, because in *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), we held that such certificate was nontestimonial and not prepared for the purpose of trial and that therefore, it was not subject to the Confrontation Clause. The county court denied Britt's motion in limine.

Britt renewed his motion in limine at the start of trial and made a continuing objection based on the motion. He specifically objected to exhibits 16 and 18. Exhibit 16 is a report of a 190-day check of the breath testing device. Exhibit 18 is a certificate sworn to by Garner on August 7, 2008, certifying the analysis of the solution prepared on the same date. It is entitled "Chemical Analysis Certification of Alcohol Breath Simulator Solution." This solution was later used to test the device. The county court admitted both exhibits over Britt's objections based on hearsay and confrontation. The jury found Britt guilty.

After sentencing, Britt appealed the county court judgment to the district court. Britt asserted on appeal to the district court that the county court erred when it, inter alia, denied his motion in limine and admitted exhibits 16 and 18, in violation of his confrontation rights. Britt did not assert error based on his hearsay objections. The district court concluded that, even taking into consideration *Melendez-Diaz, supra*, which was decided in 2009, our opinion in *Fischer, supra*, filed in 2007, "remains good law." The district court rejected Britt's arguments and affirmed his conviction and sentence on September 14, 2010.

Britt appealed the affirmance to the Court of Appeals. He assigned error to, inter alia, the district court's determination that Garner's certificate was not testimonial and that therefore, Britt did not have a right to confront and cross-examine Garner.

Britt also asserted that the county court erred when it concluded that exhibits 16 and 18 were not inadmissible hearsay. The Court of Appeals rejected Britt's assignments of error and affirmed the district court's order affirming his conviction and sentence. *State v. Britt*, No. A-10-998, 2011 WL 4388224 (Neb. App. Sept. 13, 2011) (selected for posting to court Web site). Britt does not assign error in his petition for further review of the Court of Appeals' ruling on any issue other than his confrontation and hearsay objections to Garner's certificate, and therefore no other issues are discussed herein.

We granted Britt's petition for further review.

## ASSIGNMENTS OF ERROR

Britt claims on further review that the Court of Appeals erred when it (1) concluded that Garner's certificate was not testimonial in nature and (2) failed to conclude that plain error occurred when the county court admitted the certificate over his hearsay objection.

## STANDARDS OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause and reviews the underlying factual determinations for clear error. *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009).

## ANALYSIS

### *The Court of Appeals Did Not Err When It Concluded That the Certificate Was Not Testimonial and Therefore Not Subject to the Confrontation Clause.*

Britt first claims that the Court of Appeals erred when it concluded that Garner's certificate was not testimonial in nature. We conclude that, based on our holding in *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), which holding was not abrogated by subsequent case law, the Court of Appeals did not err in its determination that the certificate was not testimonial and therefore not subject to confrontation analysis.

[2-4] The Confrontation Clause, U.S. Const. amend. VI, provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the

witnesses against him . . . .” In *Crawford v. Washington*, 541 U.S. 36, 61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court held that where “testimonial” statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there had been a prior opportunity for cross-examination. Later, in *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006), the Court determined that statements that were nontestimonial could be admitted without further Confrontation Clause analysis. We have therefore stated that the initial step in our Confrontation Clause analysis is to determine whether the statements at issue are testimonial in nature and subject to a Confrontation Clause analysis. *Fischer, supra*. If the statements are nontestimonial, then no further Confrontation Clause analysis is required. *Id*.

As the Court of Appeals noted, *Fischer* involved “the same issue and virtually the same facts” as in the present case. *Britt*, 2011 WL 4388224 at *4. *Fischer* was filed in 2007. In *Fischer*, after reviewing existing precedent regarding the meaning of testimonial for Confrontation Clause purposes, we concluded that a certificate verifying the concentration of simulator solution was not testimonial in nature and therefore not subject to confrontation analysis. We noted that the statements in the certificate did not occur in the context of structured police questioning and did not pertain to any particular pending matter. We further noted that the primary purpose of the certification was to ensure that a solution used to calibrate breath testing devices was of the proper concentration and that such certification was required for administrative reasons regardless of whether the certificate would later be used in a criminal proceeding. We reasoned that the certificate did not pertain to any particular pending criminal matter and was too attenuated from the prosecution of charges against the defendant to be considered testimonial in the sense required under *Crawford, supra*; *Davis, supra*; and the Confrontation Clause. *Fischer, supra.*

Britt argues that *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), requires a different result from that in *Fischer*. We do not agree.

*Melendez-Diaz* involved a prosecution for distribution and trafficking in cocaine. In *Melendez-Diaz*, the U.S. Supreme Court concluded that certificates containing the results of forensic analyses of a seized substance showing that the substance was cocaine were testimonial in nature and that the analysts who made the certificates used to establish the results were witnesses for Confrontation Clause purposes and thus required to be present. The Court reasoned that the certificates were prepared under circumstances such that it was reasonably understood they would be used at a later trial and that the sole purpose of the certificates was to provide evidence for the identified prosecution. The Court made it clear that not all testing-related evidence is testimonial. In a footnote in *Melendez-Diaz*, the Court stated:

> [W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the . . . accuracy of the testing device, must appear in person as part of the prosecution's case. . . . Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.

129 S. Ct. at 2532 n.1.

Britt argues that the Court of Appeals erred when it focused on the *Melendez-Diaz* footnote and erred when it concluded that the certificate in this case was not testimonial. He notes that another part of the same footnote stated that "what testimony [regarding steps in the chain of custody] is introduced must, 'if the Appellant objects', be introduced live." Brief on petition for further review for appellant at 2. He argues that the Garner certificate regarding the solution in the instant case was testimony regarding "the chain of custody" and was therefore subject to confrontation analysis. *Id.* Britt misconstrues *Melendez-Diaz*, which involved forensic tests performed on a seized substance, which tests determined that the substance was cocaine. The substance being tested in *Melendez-Diaz* was principal evidence for the prosecution, and therefore its chain of custody was vital. We read the "chain of custody" comment in footnote 1 in *Melendez-Diaz* as referring to principal evidence sought to be introduced by the prosecution; it was not a reference to evidence in general.

We note that *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011), is a case decided after *Melendez-Diaz*. *Bullcoming* involved a prosecution for driving under the influence, and the principal evidence consisted of a forensic laboratory report certifying that the defendant's blood alcohol concentration was above the legal limit. The report was made specifically for the case, was intended to substitute for testimony, and was critical evidence. The report was deemed testimonial, and the Court concluded that the defendant had a right to confront the analyst who made the report. A concurring opinion refers favorably to footnote 1 in *Melendez-Diaz*, discussed above, and again stresses that "it is not the case 'that anyone whose testimony may be relevant in establishing the chain of custody . . . or accuracy of the testing device, must appear in person as part of the prosecution's case . . . .'" 131 S. Ct. at 2721 n.2 (Sotomayor, J., concurring in part).

In contrast to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), and *Bullcoming, supra*, in the instant case, the solution itself is not principal evidence and its chain of custody is not at issue; instead, the solution is merely used as part of the routine testing of the accuracy of the breath testing device, and Garner's certificate merely concerns the concentration of the solution. The solution is not evidence of the crime; it was analyzed on August 7, 2008, which was more than 6 months before the complaint was filed on February 20, 2009, charging a crime committed on February 13, 2009. The language Britt relies on from footnote 1 in *Melendez-Diaz* is not applicable. The Court of Appeals correctly relied on the relevant language from the *Melendez-Diaz* footnote regarding documents prepared in connection with the accuracy of testing devices and properly concluded the Garner certificate was not testimonial.

We agree with the Court of Appeals and the district court in this case that Garner's certificate was essentially identical to the certificate in *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007), and was not testimonial. The decisions in *Melendez-Diaz* and *Bullcoming* did not abrogate our reasoning in *Fischer*. The certificate was not created in preparation

for a trial and did not pertain to any particular pending matter. Instead, it related to the maintenance process and accuracy of the testing device to ensure that the solution used to calibrate and test the breath testing device was of the proper concentration, and the certificate would have been prepared regardless of whether or not it would later be used in a criminal proceeding. The preparation of the certificate was too attenuated from the prosecution of charges against Britt to be considered testimonial. We conclude that, like the certificate in *Fischer*, the certificate in this case was not testimonial.

Britt asserts that if a defendant does not have a right to examine the individual who prepared the certificate at trial, then the defendant would never be able to challenge the accuracy of a certificate regarding the solution used to test a breath testing device. We disagree. The confrontation analysis under consideration relates to the evidentiary issue of whether the certificate may be admitted as evidence in lieu of live testimony. If the defendant has a basis to call the certificate into question, the defendant could challenge the accuracy of the certificate by presenting such evidence. The defendant could depose the person who prepared the certificate in order to discover evidence to challenge its accuracy. The conclusion that the certificate is not subject to Confrontation Clause analysis does not necessarily prevent the defendant from challenging the accuracy of the certificate.

We conclude that the Court of Appeals did not err when it concluded that Garner's certificate was not testimonial, and therefore not subject to confrontation analysis, and affirmed the district court's decision to the same effect. We reject Britt's assignment of error on further review.

*The Court of Appeals Did Not Abuse Its Discretion When It Did Not Find Plain Error in the Trial Court's Overruling Britt's Hearsay Objection.*

Britt also claims that the Court of Appeals erred when it failed to note plain error in the county court's rejection of his hearsay objection to the admission of the certificate. Because Britt did not preserve the objection in his appeal to the district court and because the hearsay issue is not encompassed by

Britt's assignment of error regarding a Confrontation Clause violation, we conclude that the Court of Appeals did not abuse its discretion when it did not note plain error with regard to Britt's hearsay objections.

The Court of Appeals noted that although Britt made hearsay objections to the admission of exhibits 16 and 18 at trial in the county court, he failed to assign error in the overruling of his hearsay objections on appeal to the district court. The district court therefore did not address the hearsay issue. The Court of Appeals concluded that because the issue had not been properly presented to and passed upon by the district court, it could not be raised on appeal to the Court of Appeals.

[5] Britt argues that the certificate was clearly hearsay and that it was clear no exception applied and that therefore, the Court of Appeals should have noted such plain error. We have stated that "[c]onsideration of plain error occurs at the discretion of an appellate court." *State v. Young*, 279 Neb. 602, 612, 780 N.W.2d 28, 37 (2010). Because Britt did not preserve the hearsay issue by raising it on appeal to the district court, the Court of Appeals was not required to consider the hearsay issue, and we conclude that the Court of Appeals did not abuse its discretion when it did not find plain error.

Britt alternatively argues that he preserved the confrontation issues and that because the hearsay analysis is a "first cousin" to the confrontation analysis, he effectively preserved the hearsay issue and the Court of Appeals should have considered his hearsay arguments on appeal. Brief on petition for further review for appellant at 8. We note that although under *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), and its progeny, there was a great deal of overlap between confrontation analysis and hearsay analysis, beginning with *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the U.S. Supreme Court overruled *Ohio v. Roberts* and "divorced" the Confrontation Clause from the hearsay rule. See Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause From the Hearsay Rule*, 56 S.C. L. Rev. 185 (2004). Because confrontation analysis

and hearsay analysis are not the same, we conclude that Britt's preserving the confrontation issue did not also preserve the hearsay issue and that hearsay issues were not encompassed by Britt's assignments of error regarding a purported confrontation violation. The Court of Appeals did not err when it did not consider Britt's hearsay arguments as plain error.

## CONCLUSION

We conclude that the Court of Appeals did not err when it determined that the certificate was not testimonial and not subject to confrontation analysis. We further conclude that the Court of Appeals did not abuse its discretion when it did not note plain error with regard to Britt's hearsay objections. We therefore affirm the decision of the Court of Appeals which determined that the admission of the certificate was not error and affirmed the decision of the district court which affirmed Britt's conviction and sentence.

AFFIRMED.

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# IN RE INTEREST OF SHALEIA M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SHALEIA M. AND JANE M. MCNEIL, GUARDIAN AD LITEM, APPELLEES, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

812 N.W.2d 277

Filed March 30, 2012. Nos. S-11-532, S-11-553.

1. **Judgments: Justiciable Issues: Appeal and Error.** Justiciability issues that do not involve a factual dispute present a question of law, for which an appellate court reaches a conclusion independent of the court below.
2. **Moot Question: Appeal and Error.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
3. **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.

Appeals from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Appeals dismissed.

Carla Heathershaw Risko, Special Assistant Attorney General, for appellant.

Thomas C. Riley, Douglas County Public Defender, and Allyson A. Mendoza for appellee Shaleia M.

Jane M. McNeil, of McNeil Law Office, P.C., L.L.O., guardian ad litem.

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

MCCORMACK, J.

## NATURE OF CASE

The juvenile court signed a written order committing a juvenile to the Youth Rehabilitation and Treatment Center (YRTC) in Geneva, Nebraska, and further written orders transferring her to the YRTC. The orders were made in error and did not reflect the court's orally pronounced intention to pursue foster placement for the juvenile. In a subsequent written order, the court vacated and corrected the erroneous orders, but the juvenile had already been transferred to the YRTC. Despite the court's insistence that the juvenile be returned, the Nebraska Department of Health and Human Services (DHHS) refused to do so and appealed the juvenile court's corrected order. While the appeal was pending, DHHS obtained an order from the Nebraska Court of Appeals staying the juvenile court's corrected order. This left the juvenile in the YRTC, where she completed her program, was paroled, and was subsequently discharged from parole. We dismiss the case as moot.

## BACKGROUND

Shaleia M. was adjudicated under Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 2006) as a juvenile who had committed an act other than a traffic offense which would constitute a misdemeanor or infraction under state law or a violation of a city or village ordinance. She was being held at the Douglas County

Youth Center (DCYC) pending disposition. At the dispositional hearing held on May 17, 2011, DHHS and the county attorney recommended that Shaleia be sent to the YRTC. The guardian ad litem (GAL) argued that Shaleia should be placed in foster care or Boys Town instead. The court agreed, stating it was "going to hold off on [the YRTC in] Geneva." From the bench, the court ordered DHHS to apply with Boys Town for Shaleia to be placed there. The court's written order on May 26, however, committed Shaleia to the YRTC.

The May 26, 2011, order stated that Shaleia should remain in the custody of DHHS and the Office of Juvenile Services (OJS) until discharged, as provided by law, and that the jurisdiction of the juvenile court was terminated. An order issued that same date authorized Shaleia's release from the DCYC to the custody of DHHS for transportation to the YRTC. A mittimus order filed May 27, 2011, authorized the Douglas County Sheriff's Department to transport her to the YRTC. In accordance with these orders, Shaleia was transferred to the YRTC.

Soon thereafter, the GAL alerted the juvenile court that its written orders did not reflect the court's stated intention at the dispositional hearing. On June 3, 2011, the juvenile court issued an order vacating and setting aside the May 26 order on the ground that it was made in error. The court then set forth its "true and intended Order" that Shaleia remain at the DCYC until further order of the court and that DHHS apply with Boys Town for a placement for Shaleia. The court stated that DHHS' recommendations for commitment to the YRTC were still "under advisement" and ordered a "Placement Status Check hearing" for June 13.

At the hearing on June 13, 2011, the court discovered Shaleia was still at the YRTC. DHHS explained to the court that it did not believe the juvenile court had jurisdiction to correct its order committing Shaleia to the YRTC. DHHS asserted that when a mistaken order operates to terminate the juvenile court's jurisdiction, there is no longer jurisdiction to correct that order.

The juvenile court disagreed. The court stated it had an "ethical obligation" to correct the mistake, which it considered

a clerical error. The court further explained that it had made an assurance to a child and that it did not "believe in breaking promises to children." The court said: "I stand by my order to return this child to Douglas County and to make application to the full Boys Town continuum, group home on up, and appropriate foster care." DHHS continued to object, noting that Boys Town had, in fact, rejected its application and that there were no foster care placements available. The court responded: "[Y]ou will bring her back here to the [DCYC], as I ordered weeks ago."

On June 22, 2011, the court issued a written order finding that the June 3 order still stood and ordering DHHS to comply with that order.

In case No. S-11-532, DHHS appealed the June 3, 2011, order. In case No. S-11-553, DHHS appealed the June 22 order. Subsequently, the two appeals were consolidated.

While the case was pending in the Court of Appeals, DHHS asked the court to stay the juvenile court's June 3 and 22, 2011, orders. DHHS explained that Shaleia was still at the YRTC. DHHS argued that it was in Shaleia's best interests to continue at the YRTC pending the outcome of DHHS' appeals. The YRTC offered services and treatment, while the DCYC did not. Furthermore, if DHHS complied with the order to transport Shaleia back to the DCYC, she would not be given "'credit'" for the work she had accomplished since arriving at the YRTC. On July 8, the Court of Appeals granted the stay, subject to reconsideration upon timely objection. No objection was filed.

On December 7, 2011, we moved the consolidated case to our docket. All parties agree that Shaleia has now completed her program at the YRTC. She was paroled from the YRTC on August 26. Shaleia was discharged from parole and from the custody of OJS in September.

## ASSIGNMENTS OF ERROR

DHHS assigns that the juvenile court erred in (1) entering a subsequent order after terminating its jurisdiction over the case and (2) entering a nunc pro tunc order which substantially changed the original order.

## STANDARD OF REVIEW

[1] Justiciability issues that do not involve a factual dispute present a question of law, for which an appellate court reaches a conclusion independent of the court below.[1]

## ANALYSIS

[2] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[2] The underlying question in this appeal was whether the juvenile court had jurisdiction to correct its mistaken orders which sent Shaleia to the YRTC instead of to foster care. The Court of Appeals' stay effectively determined the outcome of that question.

Because of the stay, the previous orders committing Shaleia to the YRTC remained in effect while the appeal was pending. Shaleia completed the YRTC program and was discharged from OJS before this case came on for argument. No one proposes that in addition to a fully completed program through OJS, Shaleia could now be committed to foster care for the same offense for which she was adjudicated. Therefore, what remains is an abstract question of a juvenile court's jurisdiction to vacate prior erroneous orders—a question which no longer rests upon existing facts or rights of the parties.

Shaleia's attorney and DHHS argue that we should accordingly dismiss DHHS' appeals as moot. DHHS has obtained the outcome it desired, and Shaleia is content to be done. Shaleia and DHHS concede they no longer have any legally cognizable interest in the outcome of this litigation, and both assert that no exception to the mootness doctrine applies.

But the GAL, an appellee in this case, argues that exceptions to the mootness doctrine apply and that we should address the merits of the underlying issues presented by DHHS' assignments of error.

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[1] See *In re Interest of Justin V.*, 18 Neb. App. 960, 797 N.W.2d 755 (2011).

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

The GAL first argues that the collateral consequences exception applies. According to the GAL, because of Shaleia's commitment to the YRTC, Shaleia will have to apply to have her juvenile record sealed. But if she had been committed to foster care, the records would have been sealed automatically. Furthermore, the GAL points out that any sealed record is accessible for certain law enforcement purposes and for sentencing criminal defendants.[3] According to the GAL, commitment to the YRTC, unlike commitment to foster care, "carries a message to all knowledgeable prosecutors, probation officers and judges that this person is not amenable to treatment and services."[4] Commitment to the YRTC is, according to the GAL, "a proverbial black eye on a person's record."[5]

The GAL asserts that these collateral consequences are similar to those justifying the collateral consequences exception to the mootness doctrine in *In re Interest of Justin V.*[6] In that case, the juvenile had been discharged from OJS. Nevertheless, the juvenile argued that he should be allowed to proceed with the appeal seeking to set aside his admission to the underlying charges that formed the basis for his adjudication. The Court of Appeals agreed. The court explained that there were various collateral consequences as a result of having a juvenile record.[7] These include consideration of juvenile records if the juvenile is later subjected to sentencing in an adult criminal case and a lifelong duty to divulge the dispositional order on various admissions and applications.[8] Therefore, the court considered the merits of the juvenile's appeal, despite the fact that he had been discharged from the juvenile system while the appeal was pending.

Shaleia may have similar consequences from having a juvenile record, but being sent to foster care versus the YRTC will

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[3] See Neb. Rev. Stat. § 43-2,108.05(3) (Supp. 2011).

[4] Brief for appellee GAL in case No. S-11-532 at 11.

[5] *Id.*

[6] *In re Interest of Justin V., supra* note 1.

[7] *Id.*

[8] *Id.*

not change the fact that Shaleia has a juvenile record. The GAL fails to cite any case where the collateral consequence that justified an exception to the mootness doctrine concerned one disposition over another for the adjudicated juvenile. As illustrated by the Court of Appeals' discussion in *In re Interest of Justin V.*, the collateral consequences exception usually warrants review of a moot case when the underlying issue to be addressed could exonerate the juvenile—and thus result in the absence of a juvenile record at all.[9]

There is no issue here that Shaleia was properly adjudicated under § 43-247(1) and that her case thus demanded some dispositional order. Furthermore, upon our review of the statutes pertaining to sealing juvenile records, we find no discernible difference between the rights of juveniles committed to foster care and those committed to the YRTC.[10] This leaves us with only the stigma alleged by the GAL of a YRTC commitment versus a foster home placement. Even if this is so, it is an insufficient collateral consequence to compel our review of an appeal which has ceased to present an actual case or controversy.

The GAL also argues that a public interest exception to the mootness doctrine should apply to this case. The GAL argues that our determination of the question of juvenile court jurisdiction to correct erroneous orders can provide guidance to the juvenile court and the parties usually before it. 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.[11]

However, an application of the public interest exception to the mootness doctrine is inappropriate when the issue presented on appeal does not inherently evade appellate review.[12] Not all commitments to the YRTC and the custody of OJS are so short

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[9] See *id.*

[10] See Neb. Rev. Stat. §§ 43-2,108.01 to 43-2,108.05 (Supp. 2011).

[11] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

[12] *Johnston v. Nebraska Dept. of Corr. Servs.*, 270 Neb. 987, 709 N.W.2d 321 (2006).

as Shaleia's. To the extent that this scenario is likely to recur, and we hope it does not, the GAL has not demonstrated it will likely again evade review.

[3] The GAL is frustrated by the fact that DHHS has obtained its desired outcome through obstinacy and procedural maneuverings. But such complaints fail to provide an exception to the mootness doctrine. Shaleia, the party whose interests are most at stake, asks that we dismiss the appeals. In the absence of an actual case or controversy requiring judicial resolution, it is not the function of our court to render a judgment that is merely advisory.[13] We dismiss the appeals as moot.

APPEALS DISMISSED.

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[13] *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JOSEPH LOPEZ WILSON, RESPONDENT.

811 N.W.2d 673

Filed April 6, 2012. No. S-10-1246.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. **Disciplinary Proceedings: Proof.** Disciplinary charges against an attorney must be established by clear and convincing evidence.
3. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
4. ____. Each attorney discipline case is evaluated in light of its particular facts and circumstances, and consideration is given to the attorney's acts underlying the events of the case and throughout the proceedings.
5. ____. 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.
6. ____. The determination of an appropriate penalty to be imposed on an attorney in a disciplinary proceeding requires the consideration of any aggravating or mitigating factors.

Original action. Judgment of public reprimand.

John W. Steele, Assistant Counsel for Discipline, for relator.

Darnetta L. Sanders, of Sanders Law Office, for respondent.

Joseph Lopez Wilson, pro se.

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

Per Curiam.

## INTRODUCTION

On December 30, 2010, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Joseph Lopez Wilson, respondent, alleging that respondent violated Neb. Ct. R. of Prof. Cond. § 3-501.1 (competence) and his oath of office as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 2007). Respondent filed an answer to the charges, and a referee was appointed. In his report and recommendation, the referee recommended a public reprimand. Neither the Counsel for Discipline nor respondent filed exceptions to the referee's report. The Counsel for Discipline moved for judgment on the pleadings as to the facts under Neb. Ct. R. § 3-310(L) of the disciplinary rules. We granted the motion and set the matter of discipline for oral argument. For the reasons that follow, we find that respondent should be and hereby is publicly reprimanded. Further, we find that respondent shall be on monitored probation for a period of 2 years, subject to the terms set forth below.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 17, 1986. At all times relevant to these proceedings, he has practiced in Omaha and Bellevue, Nebraska. Respondent has been involved in practicing primarily immigration law for the past 25 years.

The following is a summary of the substance of the referee's findings, which the record supports. In April 2009, respondent was hired by a client to represent him in formal immigration

proceedings and to seek cancellation of removal so the client could legally stay in the United States. In order to achieve this, respondent had to file a "Form EOIR-42B" ("Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents") on behalf of the client with a U.S. immigration court.

On April 14, 2009, a hearing was held before the immigration court. At the hearing, the immigration court directed respondent to file the form EOIR-42B on or before June 12 in preparation for the next hearing, which was to be held June 23. The immigration court advised respondent that if the form EOIR-42B was not filed with the immigration court by June 12, the immigration court would deem the client's claim for cancellation of removal to be abandoned.

On May 8, 2009, respondent filed the form EOIR-42B with the Texas Service Center for the U.S. Citizenship and Immigration Services, which is an administrative agency, and not a court. Respondent failed to file the form EOIR-42B with the immigration court.

At the hearing on June 23, 2009, the immigration court noted that the form EOIR-42B was not in the court file and that the district counsel had not received a copy. Because respondent failed to file the form EOIR-42B with the immigration court, the immigration court deemed the client's claim for cancellation of removal abandoned. The order granted the client voluntary departure from the United States, which was conditioned upon the posting of a $500 bond within 5 days. The order stated in the alternative that if the client failed to post the required bond, the grant of voluntary departure would be withdrawn, and he would be removed from the United States to Mexico.

On June 23, 2009, members of the client's family obtained a $500 cashier's check for the bond. On June 24, respondent's staff began preparing the bond application. On June 25, a member of the client's family posted the bond with the U.S. Immigration and Customs Enforcement.

Respondent timely filed an appeal with the Board of Immigration Appeals (BIA) on behalf of the client. One of the appellate rules in immigration court is that a bond receipt must be filed in the appellate court to fully perfect the appeal.

After the client's family posted the bond, respondent failed to obtain the bond receipt from the client's family or to ensure that the client's family filed the bond receipt. Therefore, the bond receipt was filed late with the appellate court. Based on the lack of proof of timely payment, the BIA vacated the grant of voluntary departure and ordered that the client be removed from the United States to Mexico pursuant to the immigration court's alternate order of removal.

A new lawyer for respondent's client attempted to avoid the client's removal by filing a motion to reopen the case, which was denied. Accordingly, the client was ordered to leave the United States. For completeness, we note that the client appeared at the disciplinary hearing in this case, but was not called to testify.

On December 30, 2010, the Counsel for Discipline filed formal charges alleging respondent violated his oath of office as an attorney and conduct rule § 3-501.1 (competence). Respondent filed his answer, and a referee was appointed. On May 13, 2011, respondent submitted a conditional admission, which was rejected by this court. On June 23, a hearing was held before the referee, at which respondent testified.

In his report filed July 11, 2011, the referee found that respondent violated conduct rule § 3-501.1 (competence), as well as his oath of office as an attorney. The referee noted in his report that respondent fully cooperated with the Counsel for Discipline during the course of the disciplinary proceedings and that respondent had rearranged his office procedures to ensure in the future that immigration filings are done properly. The referee noted the severe nature of missed filing deadlines in the area of immigration law. The referee stated that because respondent has practiced primarily immigration law for 25 years, respondent knew or should have known about the seriousness of missing deadlines. As an aggravating factor, the referee noted that respondent has had two previous disciplinary matters. One matter resulted in a 2-year suspension from the practice of law for hostile, threatening, and disruptive conduct directed toward a client. See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 262 Neb. 653, 634 N.W.2d 467 (2001). The other matter resulted in a private reprimand for the failure to

timely and properly file the form EOIR-42B with the immigration court, a failure he has repeated and which gives rise to the present case. The referee stated that he did not question respondent's present or future fitness to continue with immigration law. As for the discipline imposed, the referee recommended a public reprimand. No exceptions were taken to the referee's report.

The relator filed a motion for judgment on the pleadings as to the facts under § 3-310(L) of the disciplinary rules. On September 30, 2011, this court granted the motion for judgment on the pleadings as to the facts and set the matter of discipline for oral argument. On February 15, 2012, this court entered an order for the parties to submit a proposed monitored probation plan. On March 5, the Counsel for Discipline and respondent moved the court to accept their jointly submitted proposed probation plan, the terms of which are set forth below.

## ANALYSIS

[1-3] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Bouda*, 282 Neb. 902, 806 N.W.2d 879 (2011). Disciplinary charges against an attorney must be established by clear and convincing evidence. *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 808 N.W.2d 342 (2011). Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Wintroub*, 281 Neb. 957, 800 N.W.2d 269 (2011).

Because the motion for judgment on the pleadings as to the facts was granted, the only issue before us is the appropriate discipline. See *Bouda, supra*. In attorney discipline cases, the basic issues are whether discipline should be imposed and, if so, the type of discipline under the circumstances. *Id.*

[4-6] This 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. *Bouda, supra*. We consider 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. *Id*. 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. *State ex rel. Counsel for Dis. v. Seyler, ante* p. 401, 809 N.W.2d 766 (2012). We have considered prior discipline including reprimands as aggravators. *State ex rel. Counsel for Dis. v. Nich*, 279 Neb. 533, 780 N.W.2d 638 (2010). We have often said that because cumulative acts of attorney misconduct are distinguishable from isolated incidents, they justify more serious sanctions. *Bouda, supra*.

The evidence presented in this case establishes that respondent failed to timely file the form EOIR-42B with the immigration court and the bond receipt with the BIA on behalf of his client. The harshness of missed deadlines in the area of immigration law was known or should have been known to respondent, because he has practiced immigration law for 25 years. Respondent's failure demonstrated a lack of competence with regard to the matter involved in the representation of his client. Additionally, respondent has had two previous disciplinary matters, one which resulted in a 2-year suspension and the other which resulted in a private reprimand arising from this same issue. However, we note as mitigating factors that respondent has fully cooperated with the Counsel for Discipline during the disciplinary proceedings and has taken steps to ensure future immigration filings are done properly.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court finds that respondent should be and hereby is publicly reprimanded. Further, the court finds that respondent shall be placed on probation for a period of 2 years. The court accepts the parties' jointly proposed monitored probation plan. Respondent's monitored probation is therefore subject to the following terms:

(1) Respondent will initially be monitored by Darnetta L. Sanders, a Nebraska attorney, who has agreed to abide by the terms of this probation plan, including that she will report

any violations of this probation plan or the Nebraska Rules of Professional Conduct to the Counsel for Discipline;

(2) Respondent freely, knowingly, and specifically waives any attorney-client privilege between himself and his monitoring attorney, and respondent agrees to obtain a waiver of attorney-client privilege by a client only to the extent necessary to permit the monitoring attorney to access the case file;

(3) Respondent will provide his monitoring attorney with a monthly list of cases for which respondent is then currently responsible, said list to include the following information for each case:

(a) the date the attorney-client relationship began;

(b) the general type of case (i.e., immigration, divorce, adoption, probate, contract, real estate, civil litigation, criminal);

(c) the date of last contact with the client;

(d) the last type and date of work completed on the file (pleadings, correspondence, document preparation, discovery, court hearing);

(e) the next type of work and date the work should be completed on the case;

(f) any applicable statute of limitations and its date; and

(g) the identification of all funds received from the clients to be paid over to the government as bonds or filing fees (e.g., asylum, cancellation of removal).

(4) Respondent will reconcile his trust account within 7 working days of receiving the bank statement for his trust account and shall furnish a copy of the reconciliation to his monitoring attorney within 3 days of completing the reconciliation;

(5) During the period of his monitored probation, respondent will have written fee agreements with all clients and, if it is an immigration matter, then the fee agreement shall specifically set forth the form of relief that respondent is attempting to achieve for the client (e.g., asylum, cancellation of removal);

(6) Respondent will provide the monitoring attorney with copies of all contingency fee agreements and settlement sheets during the term of probation. Included with the settlement sheets shall be copies of all trust account checks written to or for the benefit of the identified client;

(7) The monitoring attorney shall submit a quarterly compliance report to the Counsel for Discipline;

(8) Respondent will review with the monitoring attorney respondent's office practices, and respondent will continue to work to develop efficient office procedures that protect the clients' interests; and

(9) Respondent agrees not to violate the Nebraska Rules of Professional Conduct.

## CONCLUSION

We find that respondent violated conduct rule § 3-501.1 and his oath of office as an attorney. See § 7-104. It is the judgment of this court that respondent should be and hereby is publicly reprimanded. It is the further judgment of this court that respondent shall be placed on monitored probation for a period of 2 years, subject to the terms set forth above. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 2007), as well as § 3-310(P) and Neb. Ct. R. § 3-323 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PUBLIC REPRIMAND.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BART A. CHAVEZ, RESPONDENT.

812 N.W.2d 282

Filed April 6, 2012. No. S-11-070.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Bart A. Chavez, on February 22,

2012. The court accepts respondent's voluntary 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 Kansas on April 26, 1991, and in the State of Nebraska on September 8, 1992. In 1997, respondent sought and obtained permission to transfer his license in Kansas to inactive status.

In considering whether to accept respondent's voluntary surrender tendered in the current case, we refer initially to prior disciplinary matters which are of public record. Respondent was previously disciplined by this court. *State ex rel. Counsel for Dis. v. Chavez*, 279 Neb. 183, 776 N.W.2d 791 (2010). On July 1, 2009, the Counsel for Discipline of the Nebraska Supreme Court filed a motion for reciprocal discipline pursuant to Neb. Ct. R. § 3-321. On May 4, 2009, respondent had received a public censure from the U.S. Department of Justice Executive Office for Immigration Review (EOIR) "for having engaged in contumelious or otherwise obnoxious conduct while representing a client before an immigration court." *Chavez*, 279 Neb. at 184, 776 N.W.2d at 792. Respondent had engaged in three confrontational telephone conversations with an immigration court administrator using offensive and disrespectful language directed at the administrator and the court. *Chavez, supra.*

The motion for reciprocal discipline alleged that respondent's actions resulting in the public censure from the EOIR constituted a violation of the following provisions of the Nebraska Rules of Professional Conduct: Neb. Ct. R. of Prof. Cond. §§ 3-504.4 (respect for rights of third persons) and 3-508.4 (misconduct). *Chavez, supra.* On July 1, 2009, respondent filed a conditional admission under Neb. Ct. R. § 3-313, in which he knowingly did not challenge or contest the facts set forth in the motion for reciprocal discipline and waived all proceedings against him in connection therewith. *Chavez, supra*. Upon due consideration, the court approved the conditional admission and found that respondent had violated §§ 3-504.4 and 3-508.4. Accordingly, respondent was

publicly reprimanded and directed to pay all costs in the case. *Chavez, supra*.

On July 23, 2010, the office of the Disciplinary Administrator of the Kansas Supreme Court filed a formal complaint against respondent alleging violations of the Kansas Rules of Professional Conduct. *In re Chavez*, 292 Kan. 45, 251 P.3d 628 (2011). The allegations were based on the same actions of respondent discussed above that resulted in a public censure from the EOIR and a public reprimand from the Nebraska Supreme Court. A hearing was held before a panel of the Kansas Board for Discipline of Attorneys, and the hearing panel determined that respondent had violated the following Kansas Rules of Professional Conduct: "3.5(d) (2010 Kan. Ct. R. Annot. 557) (engaging in undignified or discourteous conduct degrading to a tribunal) and 8.4(d) (2010 Kan. Ct. R. Annot. 603) (engaging in conduct prejudicial to the administration of justice)." *In re Chavez*, 292 Kan. at 45, 251 P.3d at 629. On April 11, 2011, the Kansas Supreme Court found the evidence supported the panel's determinations and ordered that respondent be disciplined by public censure and ordered costs of the proceedings be assessed to respondent. *In re Chavez, supra*.

The current case commences on January 25, 2011, on which date the Committee on Inquiry of the Fourth Disciplinary District filed an application to place respondent on disability inactive status. Respondent did not object to the application. On January 27, this court ordered that respondent be placed on disability inactive status pursuant to Neb. Ct. R. § 3-311 until further order of the court.

On February 16, 2012, the Counsel for Discipline filed a motion to appoint a trustee to take custody of the files and trust account of respondent. On February 23, upon respondent's request that Subhash Chandra be appointed as trustee, this court sustained the motion and appointed Chandra as trustee.

On February 22, 2012, respondent filed a voluntary surrender in which he admitted that the Counsel for Discipline is investigating a number of grievances that have been filed against him. Respondent further stated that he freely,

knowingly, and voluntarily chose not to contest the truth of the allegations being made against him in the current case. He further stated that he freely, knowingly, and voluntarily surrendered his privilege to practice law in the State of Nebraska. Respondent further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. 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.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JEREMY R. SHIRK, ALSO KNOWN AS JEREMY R. MUCKEY-SHIRK, RESPONDENT.

810 N.W.2d 749

Filed April 6, 2012. No. S-12-012.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Jeremy R. Shirk, also known as Jeremy R. Muckey-Shirk, on January 9, 2012. The court accepts respondent's voluntary 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 June 16, 2010. On January 9, 2012, respondent filed a voluntary surrender in which he admitted that the Counsel for Discipline of the State of Nebraska is investigating three grievances that have been filed against him alleging that respondent has neglected the affairs of various clients. Respondent further stated that he freely, knowingly, and voluntarily chose not to contest the truth of the allegations being

made against him. He further stated that he freely, knowingly, and voluntarily surrendered his privilege to practice law in the State of Nebraska. Respondent further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. 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.

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# IN RE 2007 ADMINISTRATION OF APPROPRIATIONS OF THE WATERS OF THE NIOBRARA RIVER.
# JACK BOND AND JOE MCCLAREN RANCH, APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT AND DEPARTMENT OF NATURAL RESOURCES, APPELLEES.

820 N.W.2d 44

Filed April 13, 2012. No. S-11-006.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, the appellate court is obligated to reach its conclusions independent of the legal conclusions made by the director.
2. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage.
3. ____: ____. The law-of-the-case doctrine is a rule of discretion, not jurisdiction.
4. **Actions: Final Orders: Appeal and Error.** The law-of-the-case doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.
5. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.
6. **Administrative Law: Waters.** The Department of Natural Resources is the official agency of the state in connection with water resources development and has the authority to resolve disputes, investigate the validity of water rights, engage in water administration, and issue and enforce orders.
7. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
8. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.

9. **Administrative Law: Waters: Proof.** Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006) states that the burden of proof in a hearing before the Department of Natural Resources shall be on the person making the complaint, petition, or application.
10. **Legislature: Administrative Law: Waters: Jurisdiction.** The Legislature has given the Department of Natural Resources jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute.
11. **Administrative Law: Waters: Jurisdiction.** The Department of Natural Resources has jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights.
12. **Administrative Law.** Administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
13. **Administrative Law: Estoppel.** Normally, equitable estoppel has not been applied in administrative proceedings.
14. **Administrative Law: Waters: Time.** Two methods of loss of appropriation rights exist independent of statutory procedure for cancellation by the Department of Natural Resources. These two methods may be classified as abandonment of water rights or nonuser of such rights for the period of statutory limitations relating to real estate.
15. **Statutes: Legislature: Presumptions: Judicial Construction.** When the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.
16. **Statutes: Intent.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
17. **Administrative Law: Waters: Evidence.** In a proceeding before the Department of Natural Resources pursuant to Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006), the department shall receive any evidence relevant to the matter and also has the discretion to conduct additional investigation to settle the issues raised by the parties.

Appeal from the Department of Natural Resources. Reversed and remanded with directions.

Donald G. Blankenau and Thomas R. Wilmoth, of Blankenau Wilmoth, L.L.P., for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and Marcus A. Powers for appellee Department of Natural Resources.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Nebraska Public Power District.

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

MCCORMACK, J.

## I. NATURE OF CASE

Junior river water appropriators Jack Bond and Joe McClaren Ranch filed a request for hearing before the Nebraska Department of Natural Resources (Department), challenging the validity of the Department's administration of water in response to a call for administration placed by the Nebraska Public Power District (NPPD). The Department joined the matter as a party litigant against the junior appropriators. Following a hearing, the director of the Department determined that the water administration was proper and denied the junior appropriators' challenge to the sufficiency of the closing notices issued to upstream junior appropriators. The junior appropriators appealed. The main question on appeal is whether the issues of nonuse and abandonment alleged by the junior appropriators were properly before the Department. For the following reasons, we reverse the order and remand the cause with directions.

## II. BACKGROUND

### 1. OVERVIEW OF SURFACE WATER RIGHTS

Before setting forth the specific facts of this case, we begin with an overview of controlling Nebraska law. Nebraska's laws governing surface water management, regulation, and allocation present a mosaic of private and public rights.[1]

An appropriation right is the right to divert unappropriated streamwater for beneficial use.[2] Under the prior-appropriation system, each appropriator's right to divert unappropriated

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[1] See *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[2] Neb. Rev. Stat. § 46-204 (Reissue 2010).

waters from a stream for a beneficial purpose receives a date of priority. An appropriation's priority date is the date when the Department approves the appropriator's right to divert water.

In a perfect world, there would be sufficient water to satisfy all appropriations for a given stream.[3] But when a stream has insufficient water to satisfy all appropriation rights on it, the appropriator first in time is first in right.[4] That is, a senior appropriator with an earlier priority date has the right to continue diverting water against a junior appropriator with a later appropriation date when both appropriators are using the water for the same purpose.[5]

When the appropriators use the water for different purposes, however, a junior appropriator may nonetheless have a superior preference right over senior appropriators. Under the Nebraska Constitution and statutes, when there is insufficient water to satisfy all appropriations, certain water uses take preference over others, despite the appropriators' priority dates.[6] So, in times of shortage, aggrieved water users with superior preference rights may exercise their constitutional preference to obtain relief when the prior-appropriation system would otherwise deny such users access to water.[7]

Those using the water for domestic purposes have preference over those claiming it for any other purpose.[8] And those using water for agricultural purposes have preference over those using it for manufacturing and power purposes.[9] Thus, the junior appropriators' use of the diverted water for agricultural purposes took preference over NPPD's use of the water for power generation.[10]

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[3] *In re 2007 Appropriations of Niobrara River Waters, supra* note 1.

[4] Neb. Rev. Stat. § 46-203 (Reissue 2010).

[5] § 46-204. See, also, *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940).

[6] See, Neb. Const. art. XV, § 6; § 46-204; Neb. Rev. Stat. § 70-668 (Reissue 2009).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] See *id.*

Simply having a superior preference right does not give that appropriator unfettered use of the water. An appropriator having a superior preference right, but a junior appropriation right, can use the water to the detriment of a senior appropriator having an inferior preference right. But the junior appropriator must pay just compensation to the senior appropriator.[11] So, although NPPD's appropriation right was senior to that of the junior appropriators, the junior appropriators could continue to divert water if they compensated NPPD.[12]

Under Nebraska's statutes, if an irrigation district or appropriator with a superior preference right cannot agree with a power generator on the compensation for use of the water, then the appropriator can commence a condemnation proceeding in county court to determine the compensation.[13] In a condemnation proceeding, the county court appoints appraisers, who then return an award.[14] The compensation award cannot be greater than the cost of replacing the power that the power plant would have generated if it had retained use of the water.[15] For the Department, whether the parties agree on the compensation or the junior appropriators obtain a condemnation award, the result is the same. The Department cannot order the junior appropriators to cease diverting water to satisfy the senior appropriation for the period agreed to by the parties or contained in the condemnation award.

Additionally, in Nebraska, water rights may be lost by nonuse,[16] abandonment,[17] or statutory forfeiture.[18] The question presented in this appeal is whether, under the governing statutory scheme, a junior appropriator may allege abandonment

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[11] Neb. Rev. Stat. § 70-669 (Reissue 2009).

[12] See *id.* See, also, Neb. Rev. Stat. § 76-711 (Reissue 2009).

[13] Neb. Rev. Stat. § 70-672 (Reissue 2009). See, generally, Neb. Rev. Stat. §§ 76-701 to 76-726 (Reissue 2009).

[14] § 76-706.

[15] § 70-669.

[16] See *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956).

[17] *Id.*

[18] Neb. Rev. Stat. § 46-229 (Reissue 2010).

and statutory forfeiture to challenge the validity of a senior appropriator's rights before the Department.

### 2. Administrative Proceeding

We now turn to the specific facts presented in this appeal. The junior appropriators own real property in Cherry County, Nebraska. In 2006, the Department granted them surface water appropriation rights on the Niobrara River. The rights granted each junior appropriator the ability to divert certain quantities of water from the river for agricultural use.

NPPD owns and operates a hydropower facility on the Niobrara River near Spencer, Nebraska, which is located approximately 145 miles downstream from the junior appropriators' properties. NPPD's predecessor acquired certain appropriations of water from the Niobrara River, which NPPD currently holds. NPPD currently holds three appropriations, A-359R, A-1725, and A-3574, which amount to a total of 2,035 cubic feet per second (cfs).

On March 2, 2007, NPPD placed a written call for administration. NPPD claimed that the Niobrara River lacked sufficient water to satisfy all the appropriation rights and requested that the Department administer the water on the Niobrara River to satisfy NPPD's senior appropriations for the Spencer facility. When the Department determines water administration is necessary, the Department sends closing notices to individuals holding junior water rights upstream from the senior appropriator, which directs the individuals to cease diverting surface water so the water will reach the senior appropriator.

When a call for administration is received, the Department reviews its records to determine whether the calling appropriator is using water according to its permits. The Department then measures the riverflow at or near the calling appropriator's point of diversion to determine whether the calling appropriator is receiving the full allocation of surface water under the permits.

On March 12 and April 3, 5, and 23, 2007, the Department measured the flow of the Niobrara River to determine whether the Spencer facility was receiving flows sufficient to satisfy

its appropriations. The measurements taken on March 12 and April 3 and 23 established that no administration was required, as streamflows were high enough to satisfy NPPD's appropriations. The April 5 measurements revealed that flows were trending downward, but the Department determined that it was not necessary to administer water, because the Spencer facility was closed for maintenance and thus no beneficial use of water would be made.

On April 30, 2007, the Department conducted a stream measurement which indicated the total discharge of water to be 1,993.73 cfs, which was insufficient for the permits associated with the Spencer facility which allows NPPD to divert 2,035 cfs. The Department concluded that there was insufficient water for all appropriations. On May 1, the Department issued closing notices to individuals holding junior water rights upstream of the Spencer facility. The junior appropriators and about 400 other junior water users received closing notices. The closing notices directed them to cease water diversions for the benefit of NPPD's Spencer facility.

On May 11, 2007, the junior appropriators filed an administrative hearing request with the Department to determine whether the closing notices were validly issued pursuant to Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006). The junior appropriators alleged that NPPD may have abandoned its appropriation rights, in whole or in part, and that if it had, then no valid appropriation right justified the closing notices. Alternatively, the junior appropriators alleged that they were not subject to the closing notices under the futile call doctrine—even if NPPD had a valid appropriation right, any call for water would be futile, because it would not result in additional water reaching NPPD's facility.

The Department appeared as a party in the proceeding to advocate for the validity of the closing notices issued. The junior appropriators objected to the Department's appearing as a party litigant. The Department then appointed an independent attorney to act as hearing officer in the matter, who ruled that the Department was a proper party.

The Department mailed opening notices in early May, allowing the junior appropriators to continue diverting water from

the river. And NPPD requested that the Department withhold water administration until August 1, 2007, "to allow time for NPPD to get in place Subordination Agreements with junior upstream irrigators, should they so desire."

On July 31, 2007, while the proceeding was still pending, the Department measured the flow of the Niobrara River near Butte, Nebraska, and determined the total discharge measurement was 902.72 cfs. The Department issued new closing notices to the junior appropriators on August 1.

On August 17, 2007, the junior appropriators filed a petition for condemnation of NPPD's water rights in the Boyd County Court. In their petition, the junior appropriators stated that they still disputed the validity of NPPD's appropriation right, but that "[b]ecause resolution of this issue may take several irrigation seasons," they elected to exercise their preference rights. The county court appointed appraisers who established a compensation award for NPPD for 20 years. NPPD appealed the appraisers' valuation of the condemnation award to the district court. That appeal has been stayed pending resolution of the present appeal.

On October 1, 2007, the Department informed the junior appropriators that the August 1 closing notices were lifted until further notice, due to maintenance at the Spencer facility. Based on the condemnation award, the junior appropriations have remained "open" and no further closing notices have been issued.

Following the condemnation proceeding, NPPD filed a motion to dismiss the administrative proceeding before the Department, arguing the condemnation award had mooted the appropriation controversy. The Department dismissed the proceeding for lack of jurisdiction, and the junior appropriators appealed. In a previous appeal in this case, we reversed the Department's order and determined that the case was not moot.[19]

We recognized that the junior appropriators' condemnation award provides them with a 20-year superior preference over NPPD. However, because the junior appropriators must

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[19] *In re 2007 Appropriations of Niobrara River Waters, supra* note 1.

compensate NPPD for the water they divert from the river, a determination that NPPD had abandoned or forfeited its appropriations would immediately benefit the junior appropriators. Accordingly, the cause was remanded for further proceedings before the Department.

On remand, the junior appropriators objected to the reappointment of the independent attorney who conducted the original hearing. The Department appointed a second independent attorney to sit as hearing officer for the proceedings. The junior appropriators then moved for leave to amend their request for hearing. The junior appropriators sought to add a claim based on estoppel, and asserted that they had obtained information that established that NPPD had not called for water in over 50 years and that the Department had never issued a closing notice for NPPD's benefit. The hearing officer overruled the junior appropriators' motion to amend. Thereafter, NPPD filed a request to impose rules of evidence and a motion in limine seeking to preclude the introduction of evidence that the Spencer facility allegedly wastes water through leakage and disrepair. The hearing officer granted both of NPPD's motions, over the junior appropriators' objections.

The final hearing was held on the merits of the junior appropriators' original request in the administrative proceeding on July 27 and 28, 2010. The junior appropriators challenged the form of the proceeding, challenged the Department's administration of the call placed by NPPD which resulted in the issuance of the closing notices, and sought a determination of the validity of NPPD's water appropriations on the bases that NPPD had abandoned or statutorily forfeited all or a portion of its appropriations and that NPPD's appropriations do not form a legally sufficient foundation for the closing notices. The junior appropriators also argued that the Department's administration of NPPD's call was faulty, because the junior appropriators are not subject to the closing notices under the doctrine of futile call.

The hearing officer reserved ruling on exhibits 17, 18, 26, and 46, which were offered by the junior appropriators. Exhibits 17, 18, and 26 are copies of the 2006, 2007, and

2008 "Annual Evaluation of Availability of Hydrologically Connected Water Supplies," respectively. Exhibit 46 is a photograph of Spencer Dam. On August 10, 2010, the hearing officer issued a written order overruling the objections to the exhibits and received each into evidence. On December 20, the director issued his final order and found for the Department and NPPD. In the order, the director stated that the hearing officer had reserved ruling on exhibits 17, 18, 26, and 46; determined the exhibits were not relevant to the issues presented; and sustained the objections to their admission. The final order did not address the hearing officer's previous order which had received the exhibits into evidence.

The director determined that the junior appropriators had initiated a challenge to the Department's administration of their water rights pursuant to § 61-206. The director determined that the proceeding qualified as a "contested case" and assigned the burden of proof to the junior appropriators because they initiated the action by filing the request for hearing before the Department. According to the director, NPPD did not bear the burden of proof because the call for water administration was an informal request for Department investigation which did not initiate the proceeding. The director also determined that the Department was a proper party to the proceeding, because the junior appropriators' allegations challenged the Department's method of carrying out its ministerial duty of water administration as provided by § 61-206.

The director noted that the junior appropriators did not invoke the Department's jurisdiction over NPPD pursuant to Neb. Rev. Stat. §§ 46-229 to 46-229.05 (Reissue 2010). The director thus determined that the junior appropriators did not properly question NPPD's water rights as provided under §§ 46-229 to 46-229.05. A determination of whether NPPD's water rights should be canceled or modified was therefore deemed irrelevant to the action brought under § 61-206.

However, the director also stated that the junior appropriators failed to offer any evidence that NPPD or its predecessors had evidenced any intent to abandon the water rights. The director further noted that there was no limitation on appropriation A-359R due to NPPD's failure to obtain a lease

agreement with the State, because A-359R was issued prior to the statute requiring appropriators to enter into a contract with the State to lease the use of all water appropriated. The junior appropriators did not offer evidence to establish prescription, and the director stated that the doctrine of prescription has not been recognized in Nebraska. The director stated that had the junior appropriators sought a determination under §§ 46-229 to 46-229.05, their claims would have failed as a result of a lack of proof.

The director ultimately found that the junior appropriators failed to meet their burden of proof to challenge the Department's futile call analysis and denied their challenge to the propriety of the closing notices issued against them. The junior appropriators timely appealed.

## III. ASSIGNMENTS OF ERROR

The junior appropriators assign that the director erred in (1) aligning the Department as a party litigant; (2) assigning the burden of proof to the junior appropriators; (3) granting NPPD's motion in limine precluding evidence that part of the water called for was being wasted; (4) refusing to allow the junior appropriators to amend their request for hearing and refusing to hear evidence on the issue of whether the Department and NPPD should be estopped from calling for water administration; (5) "ejecting" certain exhibits from the record after the hearing officer had received them into evidence and the hearing had concluded; (6) ruling that the junior appropriators' claims directed at NPPD's rights were precluded because the junior appropriators did not independently initiate a proceeding pursuant to §§ 46-229 to 46-229.05; (7) ruling that NPPD had not lost a portion of its appropriations allowing it to call for water administration; (8) concluding that NPPD could call for the full amount of its appropriations without regard to subordination agreements, stream gauge error, and explicit limitations contained in A-359R; and (9) concluding that the Department conducted a proper futile call analysis to determine whether water used by the junior appropriators would reach the NPPD's Spencer facility in beneficially usable amounts.

## IV. STANDARD OF REVIEW

[1] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, the appellate court is obligated to reach its conclusions independent of the legal conclusions made by the director.[20]

## V. ANALYSIS

We first address the junior appropriators' procedural objections to the form of the proceedings below. The junior appropriators argue that the Department erred in aligning itself as a party litigant in the proceedings below, rather than acting as a neutral arbiter. The junior appropriators also claim that the Department erred in assigning the burden of proof to the junior appropriators below. The junior appropriators claim that the hearing officer erred in failing to allow them to amend their original petition. Finally, the junior appropriators assert that the Department inappropriately limited the scope of the proceeding to exclude the issues of nonuse and abandonment.

### 1. Law-of-the-Case Doctrine

NPPD asserts that the junior appropriators' assignments of error relating to the burden of proof and the Department's alignment as a party are barred under the law-of-the-case doctrine. NPPD argues that because there was an adverse decision prior to the original appeal, the junior appropriators were required to raise the issues at that time. Because the issues were not raised, NPPD contends both are barred and the determinations below must stand.[21]

[2] The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should

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[20] See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

[21] See *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

not be relitigated at a later stage.[22] Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings 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.[23]

[3,4] However, the law-of-the-case doctrine is a rule of discretion, not jurisdiction.[24] And the doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.[25]

As a general rule, administrative determinations are not final when they are interlocutory, incomplete, provisional, or not yet effective.[26] And this court has recognized that in administrative proceedings, review of preliminary or procedural orders is generally not available, primarily on the ground that such a review would afford opportunity for constant delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions.[27]

During the proceedings that took place prior to the original appeal in this case, the junior appropriators objected to the form of the proceedings, asserting the arguments discussed above. The original hearing officer issued an "Order on Objection to Form of Proceedings" on July 25, 2007. In the order, the hearing officer determined that the Department was a proper party and that the junior appropriators bore the burden of proof. Following those determinations, the director dismissed the case for lack of jurisdiction. The junior appropriators timely appealed and assigned that the director erred in determining that the Department lacked subject matter jurisdiction in

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[22] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, ante* p. 369, 808 N.W.2d 867 (2012).

[23] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[24] *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 22.

[25] *Id.*

[26] *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 235 N.W.2d 223 (1975).

[27] *Houk v. Beckley*, 161 Neb. 143, 72 N.W.2d 664 (1955).

dismissing the case. The junior appropriators did not argue that the hearing officer erred in overruling its objections to the form of the proceeding. NPPD now asserts that the junior appropriators are bound by the hearing officer's procedural rulings. We disagree.

The hearing officer's "Order on Objection to Form of Proceedings" was not a final order from which the junior appropriators could appeal. The order was an interlocutory order limited to the junior appropriators' procedural objections. And the hearing officer's procedural rulings were not addressed by the director in the final order which dismissed the case. Nor were they relevant to the final order. Thus, the procedural rulings were not the subject of a final, appealable order at the time of the previous appeal. And our determination in the previous appeal did not conclusively settle these matters, either expressly or by necessary implication. Accordingly, the law-of-the-case doctrine does not apply to bar the issues. As the junior appropriators are not bound by the procedural rulings, we now address the merits of the procedural assignments of error.

### 2. Department as Proper Party

The junior appropriators first argue that the director erred in aligning the Department as a party litigant. In support of their argument, the junior appropriators rely on the plain language of § 61-206. Section 61-206(1) provides that when a hearing is requested following a Department decision, the Department "shall receive any evidence relevant to the matter under investigation." The junior appropriators argue that this indicates that the Department's role is limited to factfinding in the instant case.

[5,6] An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.[28] However, when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.[29] The Department is the official agency

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[28] *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006).

[29] *Id.* (citing *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995)).

of the state in connection with water resources development and has the authority to resolve disputes, investigate the validity of water rights, engage in water administration, and issue and enforce orders.[30]

In the final order, the director addressed the junior appropriators' continuing objection to the Department's acting as a party:

> [T]he Appropriators' Request challenged the facts found by the Department and the manner in which it carried out its ministerial duties. [T]he action filed by the Appropriators should have been labeled as a complaint against the Department. The substance of the original pleading is challenging the Department's method of carrying out its ministerial duty. Therefore, the Department is a proper party to this proceeding. NPPD may make a request for administration, but the Department determines when administration is to occur. NPPD would not have the facts gathered by the Department prior to initiating water administration—only Department employees have that knowledge. The [Administrative Procedure Act] and the Department's *Rules of Practice and Procedure* describe procedures to follow in those situations in which the Department may be both a party and a neutral fact finder.

The junior appropriators' request for hearing followed the Department's issuance of closing notices for the purpose of administering water. The junior appropriators challenged the validity of the closing notices and, necessarily, the validity of the Department's water administration. The Department is the primary civil enforcement agency charged with the administration and enforcement of water rights. Accordingly, it was proper for the Department to advocate for the validity of its administration. We agree with the director's determination that the Department is a proper party to these proceedings. The junior appropriators' arguments to the contrary are without merit.

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[30] See § 61-206(2) and (3).

In addition, the junior appropriators appear to argue that the Department's alignment as a party amounts to a violation of due process. Procedural due process limits the ability of the government to deprive people of interests which constitute "'liberty'" or "'property'" interests within the meaning of the Due Process Clause.[31] A right of appropriation is not one of ownership of surface water prior to capture.[32] Although the interest does not equate to ownership, we have nevertheless recognized that an appropriation right is a property right which is entitled to the same protection as any other property right.[33] Thus, the adjudication proceedings below involved important property interests of the appropriators.

[7,8] In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.[34] Administrative adjudicators serve with a presumption of honesty and integrity.[35] But combining prosecutorial and adjudicative functions presents a danger to the due process requirement of impartiality.[36] When advocacy and decisionmaking roles are combined, "'true objectivity, a constitutionally necessary characteristic of an adjudicator,'" is compromised.[37]

But the mere fact that investigative, prosecutorial, and adjudicative functions are combined within one agency does not

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[31] *Murray v. Neth*, 279 Neb. 947, 955, 783 N.W.2d 424, 432 (2010) (citing *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008)).

[32] *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[33] *Loup River P. P. D. v. North Loup River P. P. & I. D.*, 142 Neb. 141, 5 N.W.2d 240 (1942).

[34] *Murray v. Neth, supra* note 31.

[35] *Id.*

[36] *Id.* (Miller-Lerman, J., concurring in part, and in part dissenting; Connolly, J., joins) (citing *Botsko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841 (Iowa 2009)).

[37] *Murray v. Neth, supra* note 31, 279 Neb. at 963, 783 N.W.2d at 437 (Miller-Lerman, J., concurring in part, and in part dissenting; Connolly, J., joins) (quoting *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196 (1992)).

give rise to a due process violation.[38] In addition, the fact that an agency adjudicator has a supervisory role over agency actors involved in the investigatory or prosecutorial functions of the agency does not establish a procedural due process claim.[39] Such combinations inhere in the very nature of the administrative process before an agency.[40] In considering what due process requires, we must bear in mind "'the way particular procedures actually work in practice.'"[41]

The separation of functions within an administrative agency, allotting the prosecutorial function to a staff of attorneys or other personnel who will not participate in the eventual decision, is a common and recommended feature of administrative enforcement activity.[42] It has been recognized that there can never be a merger of prosecutorial and judicial functions in an administrative agency exercising quasi-judicial functions.[43] Further, it has sometimes been concluded that some mixture of judicial and prosecutorial functions is acceptable in administrative proceedings where the person performing the quasi-prosecutorial function is not also a member of the decisionmaking board or tribunal.[44]

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[38] *Botsko v. Davenport Civil Rights Com'n, supra* note 36; *Morongo Band v. State Water Control Bd.*, 45 Cal. 4th 731, 199 P.3d 1142, 88 Cal. Rptr. 3d 610 (2009); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008); *PERS v. Stamps*, 898 So. 2d 664 (Miss. 2005).

[39] *R. A. Holman & Co. v. Securities and Exchange Commission*, 366 F.2d 446 (2d Cir. 1966); *Botsko v. Davenport Civil Rights Com'n, supra* note 36.

[40] *Botsko v. Davenport Civil Rights Com'n, supra* note 36; *Alcoholic Beverage Control v. Appeals Bd.*, 40 Cal. 4th 1, 145 P.3d 462, 50 Cal. Rptr. 3d 585 (2006); *Martin-Erb v. MO Com'n on Human Rights*, 77 S.W.3d 600 (Mo. 2002).

[41] *Murray v. Neth, supra* note 31, 279 Neb. at 960, 783 N.W.2d at 435 (Miller-Lerman, J., concurring in part, and in part dissenting; Connolly, J., joins) (quoting *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).

[42] *La Petite Auberge v. R. I. Com'n for Human Rights*, 419 A.2d 274 (R.I. 1980).

[43] *Phillips v. Bd. of Fire and Police Comm'rs*, 24 Ill. App. 3d 242, 320 N.E.2d 355 (1974).

[44] *Ladenheim v. Union County Hospital Dist.*, 76 Ill. App. 3d 90, 394 N.E.2d 770, 31 Ill. Dec. 568 (1979).

Here, the record does not indicate that the Department improperly combined the roles of advocate and adjudicator. The record shows that the proceedings were conducted by an independent attorney not employed by the Department. The director issued the final order in the case, and a Department staff member, who is an attorney, represented the Department at the hearing.

The record does not reflect, and the junior appropriators do not argue, that the director or the Department attorney had any communication regarding the outcome of these proceedings or that the director requested the attorney to gather or present specific evidence. Accordingly, the record does not reflect that the advocacy and adjudicatory roles were impermissibly combined below to affect the fairness and impartiality of the director in making the ultimate adjudication. The Department's alignment as a party thus did not violate the requirements of procedural due process.

### 3. Burden of Proof

The junior appropriators assert that NPPD should have the burden of proving the validity of its appropriations pursuant to § 61-206(1), because it initiated this action with its call for water administration. Because the junior appropriators raised issues outside the call for administration, we determine the junior appropriators bear the burden of proving their allegations.

[9] The Department is authorized to hold hearings on complaints, petitions, or applications, and if a final decision is made without a hearing, "a hearing shall be held at the request of any party to the proceeding."[45] Section 61-206(1) states that the burden of proof in a hearing before the Department shall be on the person making the complaint, petition, or application.[46]

The director determined:

> The proceeding before the Department was initiated by the Appropriators filing the May 11, 2007, Request[.]

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[45] § 61-206(1).

[46] See, also, *In re Applications T-851 & T-852, supra* note 20.

> The contents of the Appropriators' Request, when read in full, is a complaint about the Department's factual determinations which led to water administration affecting the Appropriators. The bases of the Request concern facts that were investigated by the Department to determine whether water administration should occur. Those include, but are not limited to, whether the calling water rights exist and whether the doctrine of futile call when applied to NPPD's call would negate closing of Appropriators' rights. Thus, the Appropriators brought the action, the action is a complaint regarding the Department's administration of water rights on the Niobrara River, and the Appropriators bear the burden of proof.

Regarding the junior appropriators' argument that NPPD initiated the proceeding with its call for water administration, the director found:

> NPPD's letter . . . requesting the Department honor its "call" for water administration was not a complaint, petition, or application as defined in the statutes and rules governing the Department. Under the provisions of the Department's *Rules of Practice and Procedure*, 454 *Neb. Admin. Code* Chapter 7, a contested case proceeding would not have started with a letter asking for water administration. Under Chapter 7, § 003.02, informal proceedings are allowed. NPPD's letter . . . was an informal request that the Department conduct ongoing investigations relative to Spencer Hydropower Plant for purposes of determining when water administration should occur based upon the plant's surface water appropriations.

The term "application" has consistently been limited to circumstances where a party applies for a new right or seeks to modify existing rights. For example, in *Central Platte NRD v. State of Wyoming*,[47] this court determined that the applicant bore the burden of proof under the predecessor to

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[47] *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). See, also, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

§ 61-206, where the party was applying for a new instream flow appropriation. We have also determined that NPPD bore the burden of proof when filing an application with the Department to transfer two existing water rights to new locations.[48] Surface water administration does not require a party's application, as administration is a ministerial duty of the Department.[49] That being the case, we agree that NPPD did not initiate the proceeding below.

Furthermore, as will be discussed fully below, because the junior appropriators sufficiently raised additional issues regarding the validity of NPPD's appropriations, the "request for hearing" was more akin to a petition in the general sense. Accordingly, we agree that the junior appropriators initiated the proceeding and thus bore the burden of proof on the issues raised in the request for hearing.

### 4. Request to Amend Pleading

The junior appropriators assert that the director erred in refusing to allow them to amend their request for hearing and refusing to hear evidence or argument that the Department and NPPD should be estopped from calling for water administration. We determine that the director correctly determined the Department is without general equitable jurisdiction, and the denial of the junior appropriators' request to amend therefore does not amount to an abuse of discretion.

The administrative regulations which govern the Department state that "[a] petition may be amended at any time before an answer is filed or is due if notice is given to the Respondent or his or her attorney. In all other cases, a Petitioner must request permission to amend from the Hearing Officer."[50] The hearing officer's grant of such a request is discretionary:

> A Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A Hearing Officer may also permit

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[48] See *In re Applications T-851 & T-852, supra* note 20.

[49] See *State, ex rel. Cary, v. Cochran, supra* note 5.

[50] 454 Neb. Admin. Code, ch. 7, § 007.04A (2005).

> amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.[51]

On remand, the junior appropriators filed a "Motion for Leave to File First Amended Request for Hearing Concerning May 1, 2007 Closing Notices and Stay of Issuance of Future Closing Notices." With this motion, the junior appropriators sought to amend their original pleading to allege that "both [the Department] and NPPD should be equitably [e]stopped from issuing or requesting any further Closing Notices." The junior appropriators argued that the Department should be equitably estopped from issuing closing notices in favor of NPPD and that NPPD should be estopped from requesting any further closing notices.

NPPD objected to the junior appropriators' request to amend, which the hearing officer sustained. The hearing officer reasoned that an amendment would be futile, because the junior appropriators failed to allege sufficient facts to support a theory of equitable estoppel, the Department lacks the authority to grant equitable relief, and the Department cannot be estopped from performing its statutorily defined duties.

[10,11] The Legislature has given the Department jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute."[52] In cases involving disputes arising under this statutory scheme, we have noted that the Department has jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights.[53] However, we do not read § 61-206(1) as authorizing the Department to exercise general equitable jurisdiction.

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[51] *Id.*, § 007.04B.

[52] § 61-206(1). See *In re 2007 Appropriations of Niobrara River Waters, supra* note 1.

[53] *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979); *Hickman v. Loup River Public Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

[12,13] The Department has no independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators.[54] As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.[55] Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that is "'within the general power of the court'" to provide.[56] Equity jurisdiction exists independently of statute and comes from the Constitution, a higher source than a legislative enactment.[57] And, normally, equitable estoppel has not been applied in administrative proceedings.[58]

Because we agree the Department lacks the authority to grant equitable relief, we determine that the junior appropriators' proposed amendment would have been futile and that therefore, the hearing officer did not err in denying the request. In addition to its futility, the amendment would have materially changed the claims raised in the original pleading. The junior appropriators' original pleading did not assert a theory of equitable estoppel, and the amendment was requested almost 3 years after the original pleading was filed. It was within the hearing officer's discretion to deny the junior appropriators' request to amend. The junior appropriators' arguments to the contrary are without merit.

### 5. Scope of Proceedings

The junior appropriators assert that the director erred in limiting the scope of the proceeding to exclude their claims that NPPD had abandoned or statutorily forfeited its appropriations. The director determined that the junior appropriators failed to

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[54] *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 699 N.W.2d 372 (2005).

[55] *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998) (citing *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994)).

[56] *Id.* at 492, 577 N.W.2d at 281 (quoting *Ventura v. State, supra* note 55).

[57] *Hall v. Hall*, 123 Neb. 280, 242 N.W. 607 (1932).

[58] See *Furstenberg v. Omaha & C. B. Street R. Co.*, 132 Neb. 562, 272 N.W. 756 (1937).

properly initiate a cancellation proceeding to determine the validity of NPPD's appropriations pursuant to §§ 46-229 to 46-229.05 and that therefore, the proceedings were limited by the provisions of § 61-206(1). The director noted:

> [T]he modification of the adjudication statute § 46-229 in 1993 made the cancellation of an appropriation the sole authority of the Director of the Department and sets out the process that must be followed to cancel a water appropriation. Consequently, unlike in the past, no automatic loss of water rights occurs under the current statutory framework.

The director further stated:

> Had Appropriators requested an adjudication of NPPD's water rights by referencing §§ 46-229 through 46-229.05, then the Department would have followed the provisions the Legislature has prescribed. . . . However, that was not the process the Appropriators chose to pursue. Instead, they challenged the Department's administration of the call requested by NPPD.

We find no authority to support the director's determination that the junior appropriators' request for hearing pursuant to § 61-206(1) prevented the Department from determining the validity of NPPD's appropriations in regard to the allegations of abandonment and forfeiture. Furthermore, the statutory process for cancellation is not the sole method by which appropriations may be challenged. Thus, the director erred in refusing to address the issues raised by the junior appropriators in this regard.

(a) Methods of Cancellation

NPPD asserts that "Nebraska statutes clearly state that appropriations may be canceled only under the statutory procedure laid out in **Neb. Rev. Stat.** §§ 46-229.02 to 46-229.05, and recent case law uses the statutory procedure exclusively."[59] This is an incorrect statement of law. While the statutes do provide the Department with a cancellation procedure, the statutes do not abrogate the common-law methods of cancellation.

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[59] Brief for appellee NPPD at 41.

[14] The current language of § 46-229 was amended in 1993. Prior to that amendment, in *State v. Nielsen*,[60] this court recognized two methods of loss of appropriation rights independent of statutory procedure for cancellation by the Department. "These two methods may be classified as abandonment of water rights, or nonuser of such rights for the period of statutory limitations relating to real estate."[61] *Nielsen* defined abandonment as "'"the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right."'"[62]

At the time *Nielsen* was decided, § 46-229 provided that in the event that an appropriation ceased to be used for a beneficial or useful purpose, that right ceased. Section 46-229.02 provided the cancellation procedure for the Department in the event of such statutory forfeiture. However, we stated that the procedure referred to in §§ 46-229 to 46-229.05 is not exclusive.[63] In addition, we noted that the common-law methods of canceling appropriation rights were independent of the statutory procedure for cancellation.[64]

In 1993, the Legislature amended § 46-229 to state:

> All appropriations for water must be for some beneficial or useful purpose and, except as provided in sections 46-290 to 46-294, when the appropriator or his or her successor in interest ceases to use it for such purpose for more than three consecutive years, the right may be terminated only by the Director of [the Department] following a hearing pursuant to sections 46-229.02 to 46-229.05.[65]

NPPD and the Department claim this amendment, because it states "only by the Director of [the Department] following a

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[60] *State v. Nielsen, supra* note 16. See, also, *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989).

[61] *State v. Nielsen, supra* note 16, 163 Neb. at 381, 79 N.W.2d at 728.

[62] *Id.* (citing *State v. Oliver Bros.*, 119 Neb. 302, 228 N.W. 864 (1930)).

[63] *State v. Nielsen, supra* note 16.

[64] *Id.*

[65] 1993 Neb. Laws, L.B. 302, § 2 (codified at § 46-229 (Reissue 1993)).

hearing pursuant to sections 46-229.02 to 46-229.05," has abrogated the common-law methods providing the cancellation of appropriation rights. We disagree.

[15] When the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.[66] As this court previously determined in *Nielsen*, because § 46-229 did not provide the exclusive method by which an appropriation could be lost, the Legislature is presumed to have had that knowledge when it enacted L.B. 302. We will not read the statute to effect a change in that interpretation absent specific language which compels it.

[16] Furthermore, statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.[67] The plain and unambiguous language of §§ 46-229 to 46-229.05 merely provides the procedure by which the Department must abide when terminating an owner's or a successor's appropriation right. This language does not explicitly address the common-law theories of abandonment and nonuse. Absent express statutory provision, we must construe § 46-229 in a manner which does not restrict or remove the common-law method of cancellation. As such, we determine that § 46-229 is a procedural provision that does not abrogate the common law. NPPD and the Department's assertions to the contrary are without merit.

(b) Adjudicating Cancellation

The junior appropriators argue that § 61-206(1) does not limit the issues presented in their request for hearing to the

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[66] *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994).

[67] *Stoneman v. United Neb. Bank, supra* note 55; *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998), *abrogated on other grounds, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010); *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996). See, also, *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007); *Spear T Ranch v. Knaub, supra* note 32.

validity of the Department's water administration and related closing notices. They assert that §§ 46-229 to 46-229.05 were referenced throughout the proceeding and that the substance of the request effectively raised these issues before the Department and provided the requisite notice to the parties. The junior appropriators state that § 61-206(1) was utilized simply because the Department had already rendered a decision by issuing closing notices to the junior proprietors and that this procedure does not limit what issues the hearing may address.

Section 46-229.02 imposes procedural obligations by which the Department must abide prior to canceling appropriations sua sponte:

> (1) If, based upon the results of a field investigation or upon information, however obtained, the department makes preliminary determinations (a) that an appropriation has not been used, in whole or in part, for a beneficial or useful purpose or having been so used at one time has ceased to be used, in whole or in part, for such purpose for more than five consecutive years and (b) that the department knows of no reason that constitutes sufficient cause, as provided in section 46-229.04, for such nonuse or that such nonuse has continued beyond the additional time permitted because of the existence of any applicable sufficient cause, the department shall serve notice of such preliminary determinations upon the owner or owners of such appropriation and upon any other person who is an owner of the land under such appropriation.

When the Department makes a preliminary determination of nonuse for more than 5 years, the Department is then required to give notice to the appropriator, provide the appropriator reasons for the Department's preliminary determination, and allow the appropriator the opportunity to contest that determination.[68] Based on the appropriator's response, the Department may issue an order canceling the appropriation in whole or in part,[69] inform the appropriator that it has provided sufficient

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[68] § 46-229.02(1).

[69] § 46-229.02(2).

information for the Department to conclude that the appropriation should not be canceled,[70] or issue an order canceling the appropriation in part, based on and to the extent of the owner's agreement.[71] If none of these foregoing circumstances apply, the Department must hold a hearing on the cancellation of the appropriation.[72]

But the junior appropriators' challenge is not predicated on a preliminary determination by the Department. The above procedural provisions thus are not binding on the junior appropriators here. The junior appropriators filed their request for hearing pursuant to § 61-206(1), which states in relevant part:

> The Department . . . is given jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute. . . . It may have hearings on complaints, petitions, or applications in connection with any of such matters. . . . Upon any hearing, the [D]epartment shall receive any evidence relevant to the matter under investigation and the burden of proof shall be upon the person making the complaint, petition, and application.

The director correctly stated that §§ 46-229 to 46-229.05 provide the procedure the Department must follow to cancel appropriations. But the statutes do not preclude a party from challenging the validity of an appropriator's rights before the Department, and there is no provision dictating how such challenge may be initiated.

Section 46-229.02 provides that the Department can raise the issue of whether a party's water rights should be canceled or modified sua sponte, "upon information, *however obtained*." (Emphasis supplied.) Thus, another landowner should be able to raise such an issue in hearings before the Department brought under § 61-206(1). When information regarding forfeiture has been obtained by the Department, the statutory

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[70] § 46-229.02(3).

[71] § 46-229.02(4).

[72] § 46-229.02(5).

scheme directs the Department to make a preliminary determination as to whether such appropriations should be canceled pursuant to statute. In addition, when a party alleges abandonment, the Department should conduct proceedings to determine those issues.

[17] Moreover, § 61-206(1) plainly provides a method by which a landowner may request adjudicatory proceedings before the Department. The language of § 61-206(1) contains no limitation on the issues which may be raised at such proceedings. It states, "Upon any hearing, the [D]epartment shall receive any evidence relevant to the matter under investigation . . . ." Neb. Rev. Stat. § 61-201(1) (Reissue 2009) also allows the Department to conduct additional investigation on matters raised before rendering a final decision. Accordingly, in a proceeding before the Department pursuant to § 61-206(1), the Department shall receive any evidence relevant to the matter and also has the discretion to conduct additional investigation to settle the issues raised by the parties. In the final order, the director effectively concluded that forfeiture is irrelevant to priority. But common sense dictates that a right that has been abandoned cannot take priority over one that has not.

We see no reason why the Department should require appropriators to jump through additional hoops when seeking a determination of the status of this significant property interest. When relevant to a hearing before the Department, the issue of abandonment or forfeiture should be heard and decided. The manner in which the proceeding was initiated does not limit the Department's authority to do so.

In *In re Applications T-61 and T*-62,[73] we similarly held that it was improper for the Department to limit the scope of the issues determined based on the procedure used to initiate the proceeding. The appellant there contended that consideration of nonuse in a hearing on an application for transfer is not a proper procedure.[74] We disagreed:

> When an application is made to transfer water rights which no longer exist because of nonuse, the director may

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[73] *In re Applications T-61 and T-62, supra* note 60.

[74] *Id.*

> cancel the rights in the transfer proceeding if the evidence shows that the rights have expired through nonuse. It should be obvious that a right which does not exist should not be transferred.[75]

We find no authority limiting the relevant issues raised in a hearing brought pursuant to § 61-206(1), as long as such issues fall under the Department's authority as provided by statute.

(c) Pleading Abandonment and Statutory Forfeiture

There is no indication that §§ 46-229 to 46-229.05 have been applied or should be interpreted to impose special pleading requirements on a party. Sections 46-229 to 46-229.05 do not prohibit a junior appropriator from challenging the validity of a senior appropriation. The junior appropriators properly raised a challenge to NPPD's appropriations based on the common-law theory of abandonment. In addition, the junior appropriators properly raised a statutory challenge pursuant to § 46-229. Thus, we determine the director's decision to limit the scope of the proceeding to exclude the cancellation issue and any relevant evidence was contrary to law.

As Nebraska is a notice-pleading jurisdiction, the junior appropriators were not required to plead legal theories or cite appropriate statutes, so long as the pleading gave fair notice of the claims asserted.[76] The junior appropriators' request for hearing specifically alleged that NPPD had "abandoned or statutorily forfeited all or a portion" of its appropriations. Thus, because the Department and NPPD had notice of the issues of abandonment and forfeiture, the issues were sufficiently raised. Accordingly, it was error for the Department to refuse to determine the validity of NPPD's appropriations based on these allegations and any relevant evidence.

The final order notes that "[e]ven if the Appropriators brought this matter to the attention of the Department by challenging NPPD's appropriations instead of challenging the Department's administration, their claims would fail as a

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[75] *Id.* at 324, 440 N.W.2d at 471.

[76] *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

result of a lack of proof." It is unclear whether the director intended this statement to operate as a hypothetical determination of the issue or as a binding determination of the issue on the merits.

The Department is directed to fully address the issue on remand. Because the Department improperly limited this issue and excluded potentially relevant evidence, we are unable to address the merits of the junior appropriators' arguments that NPPD's appropriations should be terminated in whole or in part.

It should be noted that in a proceeding canceling water appropriations for statutory nonuse, the Department bears the burden to establish nonuse for the statutory period.[77] However, the proceeding below was not a proceeding canceling appropriations. The junior appropriators invoked the Department's authority to challenge the validity of NPPD's appropriations on the theories of abandonment and statutory forfeiture. The junior appropriators therefore bear the burden of proof to establish the allegations contained in their petition.

Our conclusion is dispositive of this appeal, and we decline to consider the remaining assignments of error.

## VI. CONCLUSION

We conclude the Department erred in refusing to determine the junior appropriators' challenge to the validity of NPPD's appropriations. On remand, the Department is directed to determine whether NPPD's appropriations have been abandoned or statutorily forfeited in whole or in part.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

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[77] *In re Water Appropriation A-4924*, 267 Neb. 430, 674 N.W.2d 788 (2004); *In re Water Appropriation A-5000*, 267 Neb. 387, 674 N.W.2d 266 (2004).

# Valara Mamot, appellant and cross-appellee, v. Kevin B. Mamot, appellee and cross-appellant.

813 N.W.2d 440

Filed April 13, 2012. No. S-11-516.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Antenuptial Agreements: Proof.** The party opposing enforcement of a premarital agreement has the burden of proving that the agreement is not enforceable.
4. **Antenuptial Agreements.** Nebraska's courts are governed by Nebraska's version of the Uniform Premarital Agreement Act, which authorizes parties who are contemplating marriage to contract with respect to matters including the rights and obligations of each party in any property of the other, the disposition of property upon divorce, and the modification or elimination of spousal support.
5. ____. A premarital agreement cannot be in violation of public policy or in violation of statutes imposing criminal penalties.
6. ____. A premarital agreement is not enforceable if the party against whom enforcement is sought proves that (1) that party did not execute the agreement voluntarily or (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party (a) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (b) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (c) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
7. **Judgments: Antenuptial Agreements.** An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
8. ____: ____. Factors that a court might consider in determining whether a premarital agreement was entered into voluntarily include (1) coercion that may arise from the proximity of execution of the agreement to the wedding or from surprise in the presentation of the agreement; (2) the presence or absence of independent counsel or of an opportunity to consult independent counsel; (3) inequality of bargaining power, in some cases indicated by the relative age and sophistication of the parties; (4) whether there was full disclosure of assets; and (5) the parties' understanding of the rights being waived under the agreement or at least their awareness of the intent of the agreement.
9. **Antenuptial Agreements.** An inequality of bargaining power may be shown by the relative age and sophistication of the parties or by a disparity in the parties'

income and their respective assets at the time they entered into the premarital agreement.

10. **Judgments: Child Support: Appeal and Error.** Domestic matters such as child support are entrusted to the discretion of trial courts. A trial court's determinations on such issues are reviewed de novo on the record to determine whether there has been an abuse of discretion. Under this standard, an appellate court conducts its own review of the record to determine whether the trial court's judgment is untenable.
11. **Child Support: Rules of the Supreme Court: Appeal and Error.** Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
12. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines anticipate the contingency of fluctuating incomes.
13. ____: ____. The Nebraska Child Support Guidelines provide that income during the immediate past 3 years may be averaged.

Appeal from the District Court for Howard County: MARK D. KOZISEK, Judge. Reversed and remanded for further proceedings.

Sam Grimminger for appellant.

Barry D. Geweke, of Stowell, Kruml & Geweke, P.C., L.L.O., for appellee.

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

HEAVICAN, C.J.

The Howard County District Court entered a decree of dissolution of the marriage of Kevin B. Mamot and Valara Mamot. The court determined that the premarital agreement entered into by the parties, although unconscionable, was valid and enforceable. The court divided the assets and entered an order regarding child support. Valara appeals, and Kevin has filed a cross-appeal. We reverse, and remand for further proceedings.

## I. BACKGROUND

Kevin and Valara began living together in Kevin's house near St. Libory, Nebraska, in 2003. Valara had two children from a previous relationship, and Kevin had one child from a

previous relationship who lived with him. Kevin and Valara had two children together, twin daughters who were born on June 30, 2008.

The couple planned to get married on June 17, 2006, and discussed signing a premarital agreement prior to the marriage. Kevin testified that he and Valara had talked about his financial worth from the beginning of their relationship and that Valara knew from the time they started dating that his net worth was more than $1 million. Valara testified that she was unaware of the actual value of Kevin's assets, but she believed one of his businesses was worth more than $2 million. The parties eventually signed a premarital agreement, the contents of which will be discussed below, but Valara claimed that she did not see Kevin's financial statement prior to signing the agreement.

On April 28, 2010, Valara filed a petition for legal separation, in which she alleged that the premarital agreement was invalid because (1) it was not executed as contemplated by the parties, (2) it is unconscionable as a matter of law, (3) it is against public policy, and (4) the parties subsequently waived its terms and provisions.

On July 21, 2010, Kevin filed a counterclaim for dissolution of marriage. Kevin asked the court to (1) divide the assets and debts under the premarital agreement; (2) set aside his premarital and nonmarital property; (3) deny alimony; (4) grant joint legal custody of the parties' daughters and primary custody to Valara with reasonable rights of visitation for Kevin; (5) order child support, with credit for the support Kevin paid for his child from a previous marriage; (6) apportion nonreimbursed reasonable and necessary children's health care costs; and (7) allocate the dependency exemptions.

The trial court entered a decree of dissolution on May 27, 2011. The court determined that Valara executed the premarital agreement voluntarily; that she had time for an independent review of the premarital agreement, although she chose not to consult with independent counsel; that there was no convincing evidence that Valara was surprised that Kevin would require the premarital agreement; and that there was no evidence of an inequality of bargaining power between the parties. The trial

court also found that Valara did not meet her burden to establish Kevin's failure to fully disclose his assets.

The court then considered whether the premarital agreement was unconscionable. It found that the language of the premarital agreement "clearly defies the basic underpinnings of the marital relationship." The court also found that the premarital agreement as written "truly makes Valara an 'indentured servant', toiling with day-to-day activities with no possibility of accumulating any assets under the circumstances existing and the agreement as written." The court determined that the premarital agreement "is one-sided, evidences overreaching, and demonstrates sharp dealing not consistent with the obligations of marital partners to deal fairly with each other." The court found that the premarital agreement is unconscionable, but that "unconscionability alone does not make the [agreement] unenforceable."

The court found that Valara did not carry her burden to prove that before execution of the premarital agreement, (1) she was not provided a fair and reasonable disclosure of Kevin's property or financial obligations; (2) she did not voluntarily and expressly waive, in writing, any right to disclosure; and (3) she did not have, or reasonably could not have had, an adequate knowledge of Kevin's property or financial obligations.

Each party was awarded all property in his or her possession, subject to all encumbrances, including one-half of the 2009 federal and state tax refunds and the property described in the parties' joint property statement. Each was ordered to pay the debts incurred personally since the separation, and the debts on the joint property statement were divided. Neither party was ordered to pay alimony. Kevin was ordered to pay costs and an attorney fee of $9,500.

The parties were awarded joint legal custody of their twin daughters, and Valara was awarded physical custody subject to the parties' parenting plan. After determining that Kevin's average monthly income was $19,357 and Valara's average monthly income was $2,769.37, the court ordered Kevin to pay child support of $2,417 per month for two children. Kevin was also ordered to pay 86 percent of the childcare expenses and unreimbursed health care expenses.

## II. ASSIGNMENTS OF ERROR

Valara assigns nine errors, which in summary assert that the trial court erred in finding that the premarital agreement was a valid, enforceable contract and in failing to award the parties' property in a fair and equitable manner.

On cross-appeal, Kevin argues, consolidated, that the trial court erred in (1) finding that the premarital agreement was unconscionable; (2) failing to use a 5-year average of commodity trading gains and losses in calculating Kevin's income for child support purposes; (3) determining that Kevin's monthly income for child support purposes was $19,357; and (4) ordering him to pay 86 percent of childcare expenses and unreimbursed health care expenses.

## III. STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[1]

[2] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[2]

[3] The party opposing enforcement of a premarital agreement has the burden of proving that the agreement is not enforceable.[3]

## IV. ANALYSIS

[4,5] The primary issue before us is the enforceability of the premarital agreement. We are governed by Nebraska's version

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[1] *Reed v. Reed*, 277 Neb. 391, 763 N.W.2d 686 (2009).

[2] *Shearer v. Shearer*, 270 Neb. 178, 700 N.W.2d 580 (2005).

[3] *Edwards v. Edwards*, 16 Neb. App. 297, 744 N.W.2d 243 (2008), citing Neb. Rev. Stat. § 42-1006(1) (Reissue 2008) and *In re Estate of Peterson*, 221 Neb. 792, 381 N.W.2d 109 (1986).

of the Uniform Premarital Agreement Act,[4] which was adopted by Nebraska in 1994.[5] The act authorizes parties who are contemplating marriage to contract with respect to matters including the rights and obligations of each party in any property of the other, the disposition of property upon divorce, and the modification or elimination of spousal support.[6] The contract cannot be in violation of public policy or in violation of statutes imposing criminal penalties.[7]

[6,7] Specifically, § 42-1006 provides, in pertinent part:

> (1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:
>
> (a) That party did not execute the agreement voluntarily; or
>
> (b) The agreement was unconscionable when it was executed and, before execution of the agreement, that party:
>
> (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (ii) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other party.
>
> . . . .
>
> (3) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

As the party opposing enforcement of the premarital agreement, Valara has the burden to prove that the premarital agreement is not enforceable.[8] Pursuant to § 42-1006, Valara must prove *either* that she did not voluntarily execute the premarital

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[4] Neb. Rev. Stat. §§ 42-1001 to 42-1011 (Reissue 2008).

[5] See 1994 Neb. Laws, L.B. 202.

[6] See §§ 42-1002 and 42-1004.

[7] § 42-1004.

[8] *Edwards v. Edwards, supra* note 3.

agreement *or* that the premarital agreement was unconscionable when it was executed. If she seeks to prove that the premarital agreement was unconscionable, Valara must prove three conditions: that before execution of the agreement, (1) she was not provided a fair and reasonable disclosure of Kevin's property or financial obligations; (2) she did not voluntarily and expressly waive, in writing, her right to disclosure of Kevin's property and financial obligations beyond the disclosure provided; and (3) she did not have, or reasonably could not have had, an adequate knowledge of Kevin's property or financial obligations.

### 1. Did Valara Voluntarily Sign Agreement?

[8] We turn first to the question of whether Valara voluntarily executed the premarital agreement. Neither the Uniform Premarital Agreement Act nor corresponding Nebraska statutes define "voluntarily," and this court has not previously considered the term as related to a premarital agreement. The Nebraska Court of Appeals was asked to review such an agreement in *Edwards v. Edwards*.[9] That court relied on the California Supreme Court's interpretation of "voluntarily" as used in the Uniform Premarital Agreement Act.[10] The California court identified the following factors that a court might consider:

(1) "coercion that may arise from the proximity of execution of the agreement to the wedding, or from surprise in the presentation of the agreement";

(2) "the presence or absence of independent counsel or of an opportunity to consult independent counsel";

(3) "inequality of bargaining power—in some cases indicated by the relative age and sophistication of the parties";

(4) "whether there was full disclosure of assets"; and

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[9] *Id.*

[10] *Id.*, *citing In re Marriage of Bonds*, 24 Cal. 4th 1, 5 P.3d 815, 99 Cal. Rptr. 2d 252 (2000) (superseded by statute as stated in *In re Marriage of Cadwell-Faso and Faso*, 191 Cal. App. 4th 945, 119 Cal. Rptr. 3d 818 (2011)).

(5) the parties' understanding of the "rights being waived under the agreement or at least their awareness of the intent of the agreement."[11]

The Nebraska Court of Appeals noted that other jurisdictions have also relied on the California court's interpretation of "voluntarily."[12] We shall use these factors in our review of the Mamot agreement.

(a) Coercion or Surprise

Kevin and Valara lived together for 3 years prior to their marriage. Their wedding was scheduled to be held June 17, 2006. Both had signed premarital agreements for earlier marriages. They each testified as to the sequence of events that led to the premarital agreement at issue.

Valara testified that Kevin hinted about a premarital agreement several times before the marriage, but that the subject was usually dropped. Valara said she eventually agreed to a premarital agreement and told Kevin that if he had an agreement drawn up, she would have it reviewed by the attorney who drafted the premarital agreement for her previous marriage.

Valara stated that around June 9, 2006, Kevin came home for lunch and presented Valara with two copies of the premarital agreement, which Kevin told her she needed to read and sign. Valara noted that there was no signature page and was no financial statement listing the parties' assets, which she believed were normally included in a premarital agreement. Kevin also testified that no financial statements were attached to the copy he presented to Valara. Kevin told Valara he would obtain a financial statement form for her. Valara said that she and Kevin signed the premarital agreement and that Kevin took both copies with him, preventing her from further reviewing the document. That evening, Kevin gave Valara a financial statement form to complete, and she filled it out that night. Valara said she had no part in the preparation of the

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[11] *In re Marriage of Bonds, supra* note 10, 24 Cal. 4th at 18, 5 P.3d at 824-25, 99 Cal. Rptr. 2d at 262.

[12] *Edwards v. Edwards, supra* note 3.

premarital agreement and did not have any contact with the attorney who drafted it.

Valara stated that Kevin returned a few days later with one copy of the premarital agreement, which had a signature page attached. Valara told Kevin that they needed to list their assets and that she needed to have her attorney review the agreement, but Kevin said there was no time. Kevin reportedly said, "You've got to get this signed otherwise we're not getting married Saturday." Kevin did not contradict this statement, and he testified that Valara had had "plenty of time" to have the document reviewed by an attorney because she was not working outside the home at the time.

Valara signed the document on June 12, 2006, but it was not notarized. Valara said that she asked for a copy of the signed document but that she did not receive it until a month or two later. She stated that the copy she received did not have any financial attachments or a signature page.

Kevin said he and Valara began talking about the premarital agreement 3 or 4 months before the marriage because Valara had been married previously and he had been married twice, and both had used premarital agreements in their previous marriages. A letter dated June 3, 2006, which accompanied the premarital agreement, directed the parties to attach financial statements, sign the premarital agreement, and return the original to Kevin's attorney. Each party retained a copy.

Kevin testified that Valara had sufficient time to have an attorney review the premarital agreement before she signed it because she was not working outside the home. Kevin acknowledged that the premarital agreement was not notarized because there was not enough time to go to town to have it signed. Kevin said that he was in a hurry to sign it, but that Valara "had all day if she wanted somebody to look at it or go through it" and that Valara "could have had anybody look at it that she wanted."

The record suggests that Valara may not have been surprised at the idea of a premarital agreement, but it appears that she was surprised when Kevin actually presented it to her. The parties had discussed an agreement, but there is no indication that there had been recent discussions regarding the matter.

In order to get married in the Catholic church, which was Kevin's faith, it was necessary for Kevin to obtain an annulment of his second marriage. Valara testified that they started the annulment process in 2003 and that it was completed in 2006. Once the annulment was approved, Kevin and Valara set their wedding date for June 17, 2006, and she began making wedding plans.

Valara testified that she and Kevin each had two attendants at the wedding. About 20 members of their immediate families were at the church, and about 150 guests were present at the reception, which included a dance with music provided by a diskjockey. The parties' children were involved in the wedding.

The signed copy of the premarital agreement is dated June 12, 2006, which was the Monday prior to the wedding. Based on these facts, it is reasonable to find that Valara felt coerced into signing the agreement when Kevin presented it to her during the noon hour and told her she needed to sign it immediately or there would be no wedding. Kevin did not dispute these facts, which indicate a level of coercion. By that date, Valara had already paid for or made commitments to pay for invitations, the reception hall, flowers, a diskjockey, and wedding attire for the children. If the wedding were canceled, Valara would have been subjected to public embarrassment and possible financial loss.

At the time of the wedding, Valara had quit her job and was a homemaker taking care of three children. Kevin and Valara lived on an acreage outside of St. Libory, an unincorporated community in Howard County. Although Kevin testified that she had time to have the agreement reviewed by a professional, the reality is that she had only a few hours between when Kevin presented her with the agreement and when he returned and expected her to sign it. During that short time, she would have been required to attempt to find an attorney who would immediately review the agreement and advise her as to whether she should sign it. It is reasonable to believe that Valara felt she had no choice but to sign the agreement or the wedding would not take place as planned. Valara has met her burden to show that she was coerced into signing

the premarital agreement after Kevin delivered the ultimatum that she needed to sign the agreement or there would be no wedding.

(b) Independent Counsel

The record shows that the premarital agreement was prepared by Kevin's attorney at Kevin's request. Valara was not represented by independent counsel. Although Valara testified that she told Kevin she would have her attorney review the agreement, she stated that once Kevin presented the document to her, she did not have an opportunity to have it reviewed. Valara stated that Kevin told her that his attorney would "take care" of her. Kevin testified that he told Valara to consult with her own lawyer. Because both parties were busy, Valara told Kevin to have an agreement prepared because they both wanted such an agreement.

The dated copy of the agreement was signed on June 12, 2006, which was 5 days prior to the wedding. That time might have been sufficient for Valara to consult with an attorney. However, according to Valara's testimony, Kevin did not allow sufficient time for review when he first presented the premarital agreement to her. Kevin gave the document to her when he was home for lunch and expected her to sign it immediately. Kevin did not dispute Valara's testimony and asserted that Valara "had all day" if she wanted someone to review the agreement.

As noted above, Kevin and Valara lived on an acreage outside a small community. In order to obtain professional advice about the premarital agreement, Valara would have been required to first locate an attorney who would be willing to review it. The attorney would be required to agree to review the document in a short period of time. Valara would possibly have had to travel to meet with the attorney. A premarital agreement can be a complicated legal document that requires careful consideration of its provisions. At best, Kevin expected Valara to sign the agreement with only a few hours to consider it. Valara had fewer than 5 days before the wedding in which to seek legal advice—5 days in which she was also planning the wedding. The record supports a finding

that Valara did not have a sufficient opportunity to have the premarital agreement reviewed by independent counsel. Thus, Valara has met her burden to show this factor, which weighs in favor of finding that Valara did not voluntarily sign the agreement.

(c) Inequality in Bargaining Power

[9] The California Supreme Court identified inequality of bargaining power as another factor for a court to consider.[13] It noted that in some cases, this inequality may be shown by the relative age and sophistication of the parties. A California appeals court has also considered a disparity in the parties' income and their respective assets at the time they entered into a premarital agreement as an indication of an inequality of bargaining power.[14] We therefore review the record to consider whether there was an inequality of bargaining power.

Prior to the marriage, Valara worked for 6 years in medical administration and medical underwriting. She worked full time until January 1, 2006, when she began working 30 hours per week. In May, Valara's employer asked her to return to full-time work. But she quit on June 1 because Kevin said, "There's plenty to do around the house, you can fix it up, you can keep the yard up." Valara stated that she was not pleased about quitting and that she "love[d her] job."

Valara said that during the marriage, she had no way to earn income except by helping her grandmother on a farm and keeping financial records for her father. Valara said she earned about $1,500 to $2,000 per year from her grandmother and $2,000 to $3,000 per year from her father. She used that money to pay for gas, school lunches, clothing for the children, and groceries. Kevin provided her with $1,000 per month, which she used to pay the mortgage on a house she was renting out.

Valara spent a great deal of time working with Kevin's 14-year-old son from a previous marriage who had difficulties

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[13] *In re Marriage of Bonds, supra* note 10.

[14] *In re Marriage of Howell*, 195 Cal. App. 4th 1062, 126 Cal. Rptr. 3d 539 (2011).

at school and was eventually given psychiatric medication. Valara claimed to have worked with him for 4 to 6 hours each night until he was in the sixth grade. Valara stated that she helped Kevin in his professional life by doing whatever he asked of her, whether it was driving a truck or preparing meals for employees.

Kevin owns interests in three business organizations: one-half of a trucking company, one-half of a land and cattle company, and one-third of a feedlot company. There was also evidence that Kevin actively trades in the commodities market. Thus, it appears that Kevin is more sophisticated in business matters than is Valara. She was an employee in the insurance industry while Kevin was self-employed and actively involved in three business interests.

The record also suggests a disparity in the parties' income and assets at the time they entered into the agreement. Kevin had a much greater net worth at the time the agreement was signed. Testimony was offered that he was worth more than $1 million and possibly more than $2 million when the parties married. Prior to the marriage, Valara earned between $23,000 and $32,000 annually and had a retirement account worth $18,000. Valara quit her job just prior to the wedding.

There was also an inequality in the bargaining power of the two parties. While Valara had some business experience, she worked as an hourly employee for an insurance company. Kevin had partial ownership in three companies, serving as president of at least one of them, and traded in the commodities market. After Valara quit working outside the home, she was a homemaker who took care of five children as well as the house. Valara met her burden to show an inequality in the bargaining power of the two parties.

(d) Full Disclosure

The parties disputed whether there was adequate disclosure of assets prior to the signing of the premarital agreement and whether financial statements were attached to the premarital agreement when it was signed.

Valara stated that she did not see Kevin's financial statement before she signed the agreement and that she had no idea

that Kevin had a net worth in excess of $2 million. However, Kevin said that he and Valara had talked about his financial worth from the beginning of their relationship and that she understood she would be "financially set." Kevin believed Valara knew from the time they started dating that he had a net worth in excess of $1 million. Kevin asserted that Valara had an opportunity to see his financial statement before signing the premarital agreement. Although Valara admitted that she completed a financial statement, she maintained it was not a part of the premarital agreement.

The trial court noted that Valara testified she reminded Kevin on more than one occasion that the financial statements needed to be attached to the premarital agreement. Kevin provided the financial statement form for Valara to complete. There is no definitive evidence to show whether Kevin fully disclosed his assets to Valara prior to the signing of the premarital agreement. We have only the conflicting testimony of the two parties. As the trial court noted, the attorney who drafted the premarital agreement was not called as a witness to help explain whether the financial statements were attached to the premarital agreement.

In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[15] We determine that Valara did not meet her burden to show that she was not aware of the extent of Kevin's financial holdings before the agreement was signed.

### (e) Parties' Understanding of Rights Being Waived or Awareness of Intent of Agreement

It is clear that both parties were aware of the purpose and intent of premarital agreements because each had entered into such agreements in earlier marriages. Valara demonstrated an understanding that assets are "[u]sually" listed "within the [agreement]." However, having an understanding of the intent of a premarital agreement and understanding the rights

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[15] *Shearer v. Shearer, supra* note 2.

being waived by the actual language of the agreement are not the same.

The premarital agreement provided that each party would retain sole ownership of all his or her property, "now owned or hereafter acquired by him or her, free and clear of any claim of the other." In the event of divorce, the parties agreed that neither would make any claim

> to any property now owned or hereafter acquired by the other party or to any separate property of the other party or to any appreciation or increase in value of such property during the marriage or to any property generated, earned or purchased by the other party as his or her sole and separate property.

The separate property of the parties was defined as all property belonging to each party at the commencement of the marriage, property "acquired by a party out of the proceeds or income from property owned at the commencement of the marriage or attributable to appreciation in value of said property, whether the enhancement in value is due to market conditions or to the services, skills or efforts of either party." The agreement also provided that any property "now owned or hereafter acquired in a party's name alone" shall be that party's separate property.

As the trial court determined, the agreement purported to "isolate as separate property" that which was owned by Kevin at the time of the marriage, but it also sought "to reach into the future to prevent any marital interest arising from income produced as a result of his ownership of these assets." The agreement left Valara as a homemaker who took care of the children with "no possibility of accumulating any assets under the circumstances existing and the agreement as written."

The trial court stated that the language of the agreement "defies" the basic underpinnings of the marital relationship, which should be "a partnership where both parties through their mutual efforts obtain assets subject to equitable division in the event of a dissolution." Under this agreement, Valara was an "'indentured servant.'"

The premarital agreement is a complex legal document which uses specialized terminology that might not be easily

comprehended by a person unfamiliar with the law. We find no evidence to suggest that Valara fully understood the terms of the agreement. Valara met her burden to demonstrate that she did not have a complete understanding of the rights she was waiving in signing the premarital agreement.

### 2. Agreement Was Not Voluntarily Signed

This court reviews the trial court's determinations de novo, but we are also reminded that the trial court's determinations are initially entrusted to its discretion and will normally be affirmed absent an abuse of that discretion.[16] As noted above, in a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.[17]

We have reviewed the record as it relates to the question of whether Valara voluntarily entered into the premarital agreement, and we find that the trial court abused its discretion in finding that she did. Taking into consideration the factors identified in *Edwards*,[18] we find that Valara was coerced into initially signing the document, during a lunch hour just a few days before the wedding and after the wedding invitations had been sent and she had already spent money on wedding preparations. Kevin told her she needed to sign the agreement or the wedding would not take place. Valara did not have an adequate opportunity to have independent counsel review the document. Although Kevin testified that Valara "had all day," that she had "plenty of time" to have the agreement reviewed because she was not working outside the home at the time, and that "she could have went [sic] to town" and "could have had anybody look at it that she wanted," it is unrealistic to believe Valara had the time and wherewithal to adequately review the agreement.

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[16] *Reed v. Reed, supra* note 1.

[17] *Shearer v. Shearer, supra* note 2.

[18] *Edwards v. Edwards, supra* note 3.

The record supports a finding that there was a disparity in the parties' income and their respective assets at the time they entered into the agreement, which indicates an inequality of bargaining power. Valara met her burden to show that she did not understand that by signing the agreement, she was waiving her right to full disclosure of Kevin's premarital property and giving up any claim to Kevin's property obtained during the marriage. The sole factor for which Valara did not meet her burden is whether there was a full disclosure of assets prior to the signing of the agreement. The evidence on that issue is in conflict.

After completing our de novo review, we find that Valara met her burden to show that she did not sign the premarital agreement voluntarily, and therefore, it is unenforceable.

Pursuant to § 42-1006, the party challenging a premarital agreement must show *either* that the agreement was not signed voluntarily *or* that it was unconscionable. If the challenging party seeks to show that the agreement was unconscionable, that party must also prove that he or she was not provided a fair and reasonable disclosure of the other party's property or financial obligations; that the challenging party did not voluntarily and expressly waive, in writing, any right to disclosure of the other party's property or financial obligations beyond the disclosure provided; and that the challenging party did not have, or reasonably could not have had, an adequate knowledge of the other party's property or financial obligations. Because we find that Valara did not sign the agreement voluntarily, we need not further address whether it was unconscionable.

## V. CROSS-APPEAL

On cross-appeal, Kevin asserts that the trial court erred in (1) its determination of Kevin's child support, specifically by failing to use a 5-year average of income including commodity trading gains and losses in calculating his monthly income, and (2) its percentage allocations of childcare and unreimbursed health care expenses. Because we are remanding this case for further proceedings, we decline to reach Kevin's second argument on cross-appeal. But because the first is likely to recur on remand, we address it here.

A witness who had been Kevin's accountant since 1993 testified that Kevin had engaged in commodity trading over the duration of the marriage and had made profits in certain years and suffered losses in other years. He determined that Kevin's average yearly income for 2005 through 2010, including actual commodity losses and depreciation, was $115,952.

The trial court used information from four pay periods to determine that Valara's monthly income was $2,769.37. Because Kevin's income fluctuated substantially based on the nature of his businesses, the court determined that it should use the previous 4 years to calculate Kevin's monthly income, beginning with 2007, the first full year that the parties were married. The information included 2 years of gains and 2 years of losses. The court also determined that Kevin's actual income, rather than his reported income for tax purposes, should be used. The court then found that Kevin's income was as follows:

| Year | Annual Income | Monthly Average |
|---|---|---|
| 2007 | ($ 48,542) | ($ 4,045) |
| 2008 | 9,874 | 823 |
| 2009 | 561,793 | 46,816 |
| 2010 | 405,989 | 33,832 |

Based on these figures, Kevin's average monthly income over the 4 years was $19,357.

The court then ordered Kevin to pay child support of "$2,417.00 per month when there are two children subject to the order, and $1,777.00 per month when there is one child subject to the order." Kevin was ordered to pay 86 percent of the childcare expenses and 86 percent of unreimbursed health care expenses after the initial $480 per calendar year.

Kevin argues that the trial court should have used a 5-year average in calculating his income, which would have resulted in a monthly income of $12,016, rather than $19,357.

[10,11] Domestic matters such as child support are entrusted to the discretion of trial courts.[19] A trial court's determinations on such issues are reviewed de novo on the record to

[19] See *Gress v. Gress*, 274 Neb. 686, 743 N.W.2d 67 (2007).

determine whether there has been an abuse of discretion.[20] Under this standard, an appellate court conducts its own review of the record to determine whether the trial court's judgment is untenable.[21] Interpretation of the Nebraska Child Support Guidelines presents a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[22]

[12,13] We have noted that the child support guidelines anticipate the contingency of fluctuating incomes.[23] The guidelines provide that income during the immediate past 3 years may be averaged. In *Gress v. Gress*,[24] we found it proper for the trial court to use income averaging to calculate child support. The father in *Gress* was a farmer, and he urged the court to use an 8-year average. We noted that both in Nebraska and in other jurisdictions, a 3-year average tended to be the most common approach, and that even if a longer period is used, courts are reluctant to use more than a 5-year average. We approved the 3-year average as used by the trial court.

In the case at bar, the trial court used Kevin's income from 4 years, beginning with 2007, the first full year of the parties' marriage. The 4-year period included 2 years of gains and 2 years of losses. Kevin argues that the court should have included his 2006 income. However, testimony was received from a certified public accountant that in averaging investment income, current years should be weighed more heavily, "because the further back you get in a volatile kind of an investment like commodities, the less valu[able] the information becomes."

We find no abuse of discretion in the trial court's use of 4 years of income to determine Kevin's child support obligation. The court used the first full year of the marriage as the starting

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[20] See *id.*

[21] See *id.*

[22] *Id.*

[23] See *id.*

[24] *Id.*

point and averaged Kevin's income. Those 4 years showed both profits and losses.

## VI. CONCLUSION

The judgment of the district court finding that the premarital agreement is enforceable is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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STATE OF NEBRASKA, APPELLEE, V. PATRICK B. BAULDWIN, APPELLANT.

811 N.W.2d 267

Filed April 20, 2012. No. S-10-1217.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Miranda Rights: Police Officers and Sheriffs.** When a person is in custody and interrogated by government officials, *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires a now-familiar set of warnings: The police must notify a person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to an attorney, either retained or appointed.
3. **Constitutional Law: Miranda Rights: Self-Incrimination.** The *Miranda* warnings exist to shield individuals from the inherently compelling pressures of custodial interrogation. They also ensure that the Fifth Amendment privilege against compelled self-incrimination is protected.
4. **Self-Incrimination.** A suspect has the right to control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.
5. **Miranda Rights: Police Officers and Sheriffs: Self-Incrimination.** Police officers are not required to guess whether a suspect wishes to end the interrogation; instead, the police must cease questioning the suspect only if the suspect's invocation of the right to remain silent is unambiguous, unequivocal, or clear.

6. **Miranda Rights: Self-Incrimination: Appeal and Error.** In determining whether a suspect clearly invoked his right to remain silent, an appellate court reviews the totality of the circumstances of the alleged invocation to assess the words in context.
7. **Miranda Rights: Police Officers and Sheriffs: Self-Incrimination.** Once a person has invoked his right to remain silent, the police must scrupulously honor that right.
8. ____: ____: ____. *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), requires a three-factor analysis in determining whether the police scrupulously honored the right to remain silent. Those factors are (1) whether the police immediately ceased the interrogation once the defendant invoked his right to remain silent; (2) whether the police resumed the interrogation after a significant time and a renewal of the *Miranda* warnings; and (3) whether the police restricted the renewed interrogation to content not covered by the first interrogation.
9. **Constitutional Law: Police Officers and Sheriffs: Confessions.** The test under *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), focuses on what law enforcement did, and when, and not on the suspect's response or lack thereof. Similar to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *Mosley* imposes obligations on the police, not the suspect, to protect individuals against the inherently coercive nature of custodial interrogation.
10. **Constitutional Law: Convictions: Appeal and Error.** Even constitutional error does not automatically require reversal of a conviction if that error was a trial error and not a structural defect.
11. **Trial: Evidence: Confessions: Appeal and Error.** The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error analysis.
12. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
13. **Miranda Rights.** *Miranda* protections apply only when a person is both in custody and subject to interrogation.
14. **Arrests.** Whether an individual is in custody requires an examination of all the circumstances surrounding the interrogation. In making that determination, the test is whether a reasonable person in the defendant's situation would have felt free to leave, and if not, then a defendant is considered to be in custody.
15. **Miranda Rights: Police Officers and Sheriffs: Words and Phrases.** "Interrogation" under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), refers not only to express questioning, but also to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect.
16. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.

17. **Rules of Evidence: Expert Witnesses.** A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology may properly be applied to the facts in issue.
18. **Courts: Expert Witnesses.** In evaluating the admissibility of expert scientific testimony, a trial judge considers a number of factors. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in a particular technique, there exists a high known or potential rate of error; whether standards exist for controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding. Different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.
19. **Trial: Evidence.** DNA evidence without the accompanying probability assessment would be inadmissible because it would not aid the trier of fact.
20. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the rules control admissibility of the evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. When the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
21. **Trial: Rules of Evidence.** A trial court exercises its discretion in determining whether evidence is relevant and whether its probative value is outweighed by its prejudicial effect.
22. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.
23. **Rules of Evidence.** Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.
24. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
25. **Homicide: Photographs.** In a homicide prosecution, a court may receive photographs of a victim into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
26. **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. And in its review, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.

27. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
28. **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.
29. **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 amount of violence involved in the commission of the crime.
30. ____. 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.

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

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

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

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

CONNOLLY, J.

The State charged Patrick B. Bauldwin with the first degree murder of Pasinetta Prince. The State contended that Bauldwin physically assaulted and strangled Prince, resulting in her death. A jury convicted Bauldwin of second degree murder, and the court sentenced him to a term of life to life in prison. Although Bauldwin raises several issues, the primary issue is whether the police violated his *Miranda* rights. We conclude that such a violation occurred—Bauldwin clearly invoked his right to remain silent during his interrogation, and the police did not scrupulously honor that right. But based on the record before us, we conclude this error was harmless. And because we find no merit to Bauldwin's other assigned errors, we affirm his conviction and sentence.

## I. BACKGROUND

The State contended that Bauldwin murdered Prince on a weekend in February 2006, sometime between Saturday night and Sunday morning. At the time of Prince's death, Bauldwin and Prince were in a relationship and living together. The State's theory of the case hinged on showing that Bauldwin was possessive of Prince, that they had a rocky relationship, and that a number of events over the course of the weekend led to a struggle between Bauldwin and Prince, resulting in Prince's death. The relevant timeline is helpful to provide context for Bauldwin's assigned errors, and so we provide an overview of the weekend's events.

### 1. The Weekend's Events

Prince's son also lived with Bauldwin and Prince. On Friday, February 24, 2006, following school, her son came home to grab some clothes and asked Prince if he could spend the night at a friend's house. Prince said yes, and he left for the night. That evening, Bauldwin and Michelle Troxclair, his adopted sister, shared a birthday party at a club. The party started about 9 p.m. Prince could not attend because she had a role in an upcoming play in a local theater and had play rehearsal that same evening.

So Bauldwin and Prince went their separate ways, with Bauldwin going to the party and Prince going to rehearsal. Prince owned two vehicles, a Chevrolet Impala and a white van. Prince drove the van to her rehearsal, and Bauldwin had the Impala. The party ended at about 1 a.m. when the club closed. Following the party, Bauldwin went to his brother's house for an after-hours party. That party ended somewhere between 2 and 3 a.m., and Bauldwin then went home. Telephone records show that on Saturday, February 25, 2006, between 2:21 and 3:22 a.m., 19 telephone calls were made to Prince's cellular telephone number from Prince's home telephone number. The record shows that Bauldwin made these calls.

Meanwhile, after play rehearsal ended, Prince and a few friends went to a bar. They stayed there until the bar closed at 1 a.m. Prince then went to a party with friends, and she stayed there until about 3:30 to 3:45 a.m., when she left to return

home. At the party, Prince ran into a friend, Michael Scott, who offered to escort her home. After Scott saw Prince pull into her driveway, he continued on his way.

But Scott testified that he saw Prince's Impala parked a block or two away from Prince's house. Finding this odd, Scott stopped to investigate. Scott testified that he parked his vehicle behind the Impala, looked to make sure it had not been vandalized, and then walked to Prince's house to check on her. Scott knocked on the side door, and Prince answered, with Bauldwin standing behind her. Prince told Scott that she was fine and, in answer to Bauldwin's questioning him, Scott explained that he was just concerned for Prince's safety. Scott left, but then called Prince again to make sure she was okay; she said she was. Bauldwin then called Scott and told him to quit following his girlfriend.

Prince and Bauldwin presumably spent that Saturday morning and most of the afternoon at the house. Several telephone calls throughout the day indicated that Prince was alive and well. Prince's mother spoke with Prince on the telephone that morning. A friend of Prince spoke with Prince sometime during that morning or early afternoon. And Prince's son stopped by that afternoon to pick up more clothes to spend the night at his friend's house again on Saturday night. He saw Prince, but not Bauldwin. Troxclair testified that finally, at about 4:30 p.m., she received a call from Bauldwin and heard Prince in the background. This was the last time anyone heard from Prince.

Bauldwin's 4:30 p.m. telephone call to Troxclair was about another birthday party, this time for Troxclair's two younger children. The party was to take place at a hotel that night with friends and family. Following the telephone call, at around 5 p.m., Bauldwin drove Prince's van to Troxclair's house to help prepare for the party. The party lasted until about 9 p.m. Bauldwin helped clean up after the party and then asked to use Troxclair's car at about 9:30 or 10 p.m. Troxclair agreed to let him use her car, but asked him to also take her daughter's cellular telephone with him in case she needed to contact him. Bauldwin left the hotel between 10:30 and 11 p.m.

At around 2 a.m., Troxclair woke to change her child's diaper, but she realized she had left her baby supplies in the trunk of her car. She called Bauldwin to ask him to come back, which Bauldwin agreed to do. Bauldwin arrived back at the hotel within 20 minutes, and he then fell asleep in the hotel room. The record fails to show Bauldwin's whereabouts during that approximately 3- to 4-hour period on Saturday night into Sunday morning.

That Sunday morning, February 26, 2006, Bauldwin and other members of his family had breakfast and checked out of the hotel, and then Bauldwin headed back to Troxclair's house, where he fell asleep on the couch. Later that afternoon, Bauldwin attended a barbecue at his brother's house, with several other family members.

### 2. Prince's Body Discovered

Meanwhile, Prince's family became worried because she had not shown up at church. This was unusual, because Prince had a major role in a church play that was to take place after the service. Friends and family members tried to contact Prince throughout the day Sunday, but to no avail.

Prince's mother testified that she became worried enough that she went to Prince's house at about 5:30 p.m. When she arrived, she knocked on the door, but no one answered. There were no lights on inside or outside the house. She then called the police, and officers arrived shortly thereafter. The officers discovered Prince's body in the basement of her home.

During this time, Bauldwin was still at the barbecue. Eventually, Bauldwin and his family became aware that the police were at Prince's house. One of Bauldwin's brothers, along with Troxclair, went to Prince's house to investigate, but they had Bauldwin stay at the barbecue. Upon arriving at Prince's house, they were notified that Prince was dead. They returned to the barbecue, and then Bauldwin and two of his brothers went to the police station.

The police interviewed Bauldwin for about 3 hours and audio-recorded the interview. During this interview, Bauldwin was agitated and explained to the police that he had been drinking at the barbecue and was "blazed." Although the police

asked Bauldwin questions, Bauldwin mainly led the interview. He made several references to wanting a lawyer and was eventually allowed to speak to his lawyer on the telephone. About that time, however, Bauldwin was told that he could not leave until the police had photographed his body and taken DNA swabs. After speaking with his lawyer, Bauldwin agreed to those procedures. The photographs showed numerous small injuries on Bauldwin's body. Bauldwin did not confess to any crime during the interview, but certain statements and his overall demeanor could be considered incriminating. Following the interview, the police did not arrest Bauldwin and he was released.

### 3. The Police Investigation and Pretrial Motions

The police continued with their investigation and recovered several pieces of evidence from the scene. A pathologist conducted an autopsy and concluded that Prince had been strangled. Although the crime occurred in February 2006, no arrest warrant was issued until June 2009. A police spokesperson explained that financial constraints limited the department's ability to close the case quickly. Additionally, a rash of homicides occurred around that time, which meant that the detectives assigned to Prince's case could not give the case their undivided attention.

This changed in 2008, when the Omaha Police Department created the "Cold Case Unit." The purpose of this unit was to solve older cases that, for whatever reason, had gone unsolved. Det. Michael T. Kozelichki, who had originally worked on the Prince case, was assigned to the unit, and chose to work the Prince case. Kozelichki reinterviewed witnesses, interviewed many new witnesses, and evaluated evidence of the crime. Following this investigation, on June 23, 2009, the police arrested Bauldwin.

When the police arrested Bauldwin, he asked to speak to the detective working the case. Upon hearing of this request, Kozelichki brought Bauldwin to the police station to interrogate him. Police videotaped the interrogation, which lasted about 5 hours. The first 3½ to 4 hours of this interrogation

were led by Bauldwin; Bauldwin simply told his side of the story, with few questions from Kozelichki. Then Bauldwin ended the interview, and Kozelichki left the room. About 4 minutes later, Kozelichki reentered the room and began confronting Bauldwin with pieces of the State's evidence and challenging Bauldwin's version of events. Bauldwin never admitted to killing Prince, but did make several incriminating statements.

Before trial, Bauldwin moved to suppress this interrogation, along with the audio recording from 2006, asserting that the police had violated his *Miranda* rights in both instances. Specifically, Bauldwin claimed that the 2009 interrogation was inadmissible because he had invoked his right to remain silent, which the police failed to honor. And Bauldwin claimed that the 2006 audio recording was also inadmissible because he had invoked his right to counsel, which the police similarly failed to honor. The district court denied Bauldwin's motion, and at trial, both the audio recording and the videotape were played to the jury.

Bauldwin also moved to exclude the testimony of the State's DNA experts, asserting that their testimony failed to meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] adopted by this court in *Schafersman v. Agland Coop*.[2] This motion challenged the reliability of the methodology employed by the State to identify Bauldwin's DNA on certain pieces of evidence. The court denied this motion and received the relevant evidence at trial. Most notably, DNA analysis did not exclude Bauldwin as a contributor to apparent bloodstains on the shirt worn by Prince at the time of her death. And a pair of Bauldwin's jeans, found at Prince's house, had apparent blood on them, from which Prince was not excluded as a contributor. The jury found Bauldwin guilty of second degree murder. The court sentenced Bauldwin to a term of life to life in prison.

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

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

## II. ASSIGNMENTS OF ERROR

Bauldwin assigns, restated, that the district court erred in

(1) denying Bauldwin's motion to exclude his statements to law enforcement;

(2) denying Bauldwin's motion in limine regarding the reliability of the State's DNA evidence and allowing evidence on that subject to be introduced at trial;

(3) admitting exhibit 154, a photograph which depicted Prince's tongue, throat, and larynx, because it was not relevant and was unfairly prejudicial;

(4) accepting the jury's guilty verdict, because the evidence adduced at trial was insufficient to support the verdict; and

(5) imposing an excessive sentence.

## III. ANALYSIS

### 1. Bauldwin's 2009 Statement

On June 23, 2009, police arrested and interrogated Bauldwin and videotaped the interrogation. This videotape was played in full to the jury. Bauldwin claims that the district court erred in failing to suppress this statement because the police, in obtaining it, violated his *Miranda* rights.

#### (a) Standard of Review

[1] In reviewing a motion to suppress a statement based on its claimed involuntariness, including claims that law enforcement procured it by violating the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*,[3] we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. Whether those facts meet constitutional standards, however, is a question of law, which we review independently of the trial court's determination.[4]

#### (b) Analysis

[2,3] When a person is in custody and interrogated by government officials, *Miranda* requires a now-familiar set

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

[4] See *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

of warnings: The police must notify a person that he has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has a right to an attorney, either retained or appointed.[5] These warnings exist to shield individuals from the inherently compelling pressures of custodial interrogation.[6] They also ensure that the Fifth Amendment privilege against compelled self-incrimination is protected.[7]

Regarding Bauldwin's 2009 statement, there is no question that the police subjected Bauldwin to custodial interrogation and that *Miranda* applies. And there is no dispute that at the start of the interrogation, Kozelichki read Bauldwin his *Miranda* rights and that Bauldwin executed a valid waiver. Instead, the issue is whether—following the waiver—Bauldwin clearly invoked his right to remain silent and, if so, whether the police scrupulously honored that right.

*(i) Clear Invocation of Right to Remain Silent*

[4,5] Whether a suspect clearly invoked his right to remain silent is not a novel issue. We have addressed it before, in various iterations, and the relevant principles remain unchanged. We have explained that a suspect has the right to "'control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.'"[8] In other words, a suspect has the right to cut off questioning at any time.[9] Even so, police officers are not required to guess whether a suspect wishes to end the interrogation; instead, the police must cease questioning the suspect only if "the suspect's invocation of the right to remain silent [is] 'unambiguous,' 'unequivocal,' or 'clear.'"[10]

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[5] See *Miranda, supra* note 3.

[6] See *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[7] See *id.*

[8] *Id.* at 64, 760 N.W.2d at 58, quoting *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

[9] See *Mosley, supra* note 8.

[10] *Rogers, supra* note 6, 277 Neb. at 64, 760 N.W.2d at 58.

[6] In making that determination, we review the totality of the circumstances of the alleged invocation to assess the words in context.[11] For example, we examine the actual questions which drew the statement from the defendant and the officer's response to that statement.[12] And because in this case the facts of the alleged invocation are recorded in the videotape and are not in dispute, this issue presents solely a question of law.[13]

Bauldwin claims that he invoked his *Miranda* rights multiple times during the interrogation. We disagree. Most of the instances cited by Bauldwin do not show unequivocal invocations of a *Miranda* right, but are, at best, ambiguous. For example, at one point Bauldwin stated, "I mean, I could flood you with possibilities that I . . . I'm a . . . uh, have to tell my lawyer, but I can flood you with these things." At another point, Bauldwin said, "I shouldn't be in these shackles if I'da talked to you, uh, six, eight . . . months ago. So, we're gonna have to end this interview to save . . . save me." But after Kozelichki said, "Okay," Bauldwin immediately continued speaking at length. And at yet another point, Bauldwin explained that he was leaving out certain parts of the story because they were "for [his] lawyer's ear." Nevertheless, Bauldwin continued talking. These statements were not clear invocations of a *Miranda* right, and so Kozelichki was not required to cease questioning Bauldwin based on those statements.[14]

But about 4 hours into the interview, the following back-and-forth conversation took place:

> [Kozelichki]: . . . I'd like to talk to you about that Friday a little bit, going into Saturday, if you'd be willing.
> [Bauldwin]: [SIGHS] . . . man . . . [whisper]
> Q: And I'll give you my take on that.
> A: I know what your take is [Kozelichki].

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[11] See *Schroeder, supra* note 4.

[12] See *Rogers, supra* note 6.

[13] See *Schroeder, supra* note 4.

[14] See, e.g., *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004), *abrogated on other grounds, Rogers, supra* note 6.

> Q: You don't know anything about my take on that, so.
>
> A: Your take is . . . well, . . . well it . . . it's the . . . ah . . . as my grandmother used to say, bless her soul, sh . . . she's passed, "Proof is in the pudding."
>
> Q: Uh hmm. [Affirmative]
>
> A: And no matter how you spin it, that's your job to . . . to . . . to . . . to spin things, but I've given you what I'm gonna give you.
>
> Q: 'Kay.

At that point, Kozelichki got up to leave the room and Bauldwin said, "No matter how you spin it . . . but it's kinda warm in here, can you at least try to get me outta here as quick as possible?" Kozelichki then left the room and closed the door. About 4 minutes later, Kozelichki reentered the room, and the following conversation took place:

> [Kozelichki]: [Bauldwin], we're gonna go here in a second. Do you have anything more you want to talk about?
>
> [Bauldwin]: No. I think, um . . .
>
> Q: . . . I gotta get my . . .
>
> A: . . . so you about to leave me here for a while?
>
> Q: No. No. Just want to know if there's anything more you want to talk about, is there any questions that you have or if there's anything that you want me to tell you?
>
> A: Well, you not gonna tell me what I wanna hear.
>
> Q: 'Kay. It . . . ta', uh . . . uh . . .
>
> [OFFICER SHUTS DOOR]
>
> Q: See, when you . . . when you . . . when you make a statement like that, I'm just gonna ask what do you want to hear.

The interrogation then continued for about another hour, during which Kozelichki confronted Bauldwin with discrepancies in his story and with portions of the State's evidence against him. Following this exchange, the incriminating portions of the interrogation occurred.

Recently, in *State v. Rogers*,[15] we explained that although a determination of whether an invocation was clear and

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[15] *Rogers, supra* note 6.

unequivocal is dependent on the circumstances of each particular case, patterns have emerged from the case law that provide context to our application of these rules.[16] None of these patterns are seen here. Bauldwin's statement that "I've given you what I'm gonna give you" was not prefaced with "words of equivocation such as 'I think,' 'maybe,' or 'I believe.'"[17] Nor can Bauldwin's statement reasonably be interpreted to show only that he had finished his colloquy of events[18]; instead, Bauldwin's statement was made in response to Kozelichki's offer to give his take on what happened that weekend. When viewed in context, Bauldwin's statement showed a desire to stop the interrogation altogether. And Bauldwin's refusal to talk was not limited to a specific topic, qualified by temporal words, or immediately followed by a statement that was inconsistent with a desire to remain silent.[19]

Moreover, Kozelichki's response to Bauldwin also provides context to the meaning of his statement. When Bauldwin stated, "I've given you what I'm gonna give you," Kozelichki left the room. Bauldwin's tone and demeanor indicated that he had ended the interrogation. And Kozelichki's reaction to Bauldwin's statement showed that he understood that to be Bauldwin's intent. Kozelichki replied, "'Kay," got up, left the room, and did not return until 4 minutes later. Thus, the videotape shows that not only *should* Kozelichki have reasonably understood that Bauldwin had invoked his right to remain silent, but that he *actually* understood that to be the case. Furthermore, once Kozelichki got up from his chair, Bauldwin asked, "[B]ut it's kinda warm in here, can you at least try to get me outta here as quick as possible?" This statement signaled that both Kozelichki and Bauldwin understood that Bauldwin had ended the questioning by clearly invoking his right to remain silent.

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[16] *Id.*

[17] See *id.* at 65, 760 N.W.2d at 58.

[18] See *Rogers, supra* note 6.

[19] See *id.*

*(ii) Scrupulously Honored*

[7] While Bauldwin clearly invoked his right to remain silent, that determination does not end our inquiry. The remaining issue is whether the police "'scrupulously honored'" Bauldwin's right to remain silent.[20] In *Miranda v. Arizona*,[21] the U.S. Supreme Court set out the following rule: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease."[22] In *Michigan v. Mosley*,[23] however, the Court explained that the phrase "interrogation must cease" does not mean that no further interrogation may ever be commenced. This would be an unreasonable burden on legitimate police investigation. But neither does it allow for only a "momentary cessation" of the interrogation.[24] Such an interpretation would render the right to remain silent meaningless because the police could simply continue questioning a suspect immediately after the right was invoked. Instead, the Court understood *Miranda* to mean that once a person has invoked his right to remain silent, the police must scrupulously honor that right.[25]

Obviously, this is a fact-specific inquiry. In *Mosley*, the Court held that the police had scrupulously honored the defendant's right to remain silent. In making this determination, the Court emphasized that once the defendant invoked his right to remain silent, the officer "immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade [the defendant] to reconsider his position."[26] Furthermore, more than 2 hours elapsed between the two

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[20] See *Mosley, supra* note 8, 423 U.S. at 103, quoting *Miranda, supra* note 3.

[21] *Miranda, supra* note 3.

[22] *Id.*, 384 U.S. at 473-74.

[23] *Mosley, supra* note 8.

[24] *Id.*, 423 U.S. at 102.

[25] See *id.*

[26] *Id.*, 423 U.S. at 104.

interrogations, and a different officer conducted the second interrogation, regarding an unrelated crime. Finally, the second interrogation began with another recitation of *Miranda* rights. Under those circumstances, the Court concluded that the police had scrupulously honored the defendant's right to remain silent.[27]

The *Mosley* decision does not offer a simple, bright-line rule. And while the overarching holding of *Mosley*—law enforcement must scrupulously honor a suspect's invocation of his right to remain silent—is easy to state, it is not always easy to apply. This is demonstrated by the variety of approaches taken by lower courts that have applied *Mosley*.[28] Some courts read *Mosley* to require a totality-of-the-circumstances analysis, where the factors listed in *Mosley* are neither exclusive nor exhaustive.[29] Some courts emphasize whether the suspect received *Miranda* warnings again before the onset of the second interrogation.[30] Others emphasize the length of time between the interrogations.[31] And still others follow *Mosley* relatively strictly, looking toward only the three (or four) factors which the *Mosley* court deemed important.[32]

[8] We have applied *Mosley*'s principles in several cases.[33] And in *State v. Pettit*,[34] we concluded that *Mosley* required a

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[27] See *Mosley, supra* note 8.

[28] See Quinten Bowman, *Issues in the Third Circuit: Constitutional Law—When Coerced Statements Lead to More Evidence: The "Poisonous Tree" Blooms Again in the Fifth Amendment*, 44 Vill. L. Rev. 843 (1999). See, e.g., *Fleming v. Metrish*, 556 F.3d 520 (6th Cir. 2009); *U.S. v. Schwensow*, 151 F.3d 650 (7th Cir. 1998); *U.S. v. Cody*, 114 F.3d 772 (8th Cir. 1997); *West v. Johnson*, 92 F.3d 1385 (5th Cir. 1996); *U.S. v. Hsu*, 852 F.2d 407 (9th Cir. 1988); *United States v. Finch*, 557 F.2d 1234 (8th Cir. 1977).

[29] See, e.g., *Schwensow, supra* note 28.

[30] See, e.g., *Hsu, supra* note 28.

[31] See, e.g., *West, supra* note 28.

[32] See, e.g., *Cody, supra* note 28; *Finch, supra* note 28.

[33] See, *Rogers, supra* note 6; *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987); *State v. Pettit*, 227 Neb. 218, 417 N.W.2d 3 (1987); *State v. Bridgeman*, 212 Neb. 469, 323 N.W.2d 102 (1982); *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 293 N.W.2d 383 (1980).

[34] *Pettit, supra* note 33.

three-factor analysis in determining whether the police scrupulously honored the right to remain silent. Those factors were (1) whether the police immediately ceased the interrogation once the defendant invoked his right to remain silent; (2) whether the police resumed the interrogation after a significant time and a renewal of the *Miranda* warnings; and (3) whether the police restricted the renewed interrogation to content not covered by the first interrogation.[35] Absent a contrary indication from the U.S. Supreme Court, we see no reason to change our approach.

Analyzing those factors here compels us to conclude that the police did not scrupulously honor Bauldwin's right to remain silent. While the police did immediately cease the interrogation once Bauldwin invoked his right to remain silent, the rest of the factors weigh against the police's action. Kozelichki, after leaving the room, waited only 4 minutes before reentering and continuing his interrogation. Kozelichki did not provide a fresh set of *Miranda* warnings to Bauldwin before continuing the interrogation. And the subsequent interrogation dealt with the same general subject matter as the first; namely, Bauldwin's alleged involvement in Prince's death.

In particular, we emphasize that the 4 minutes that passed between Bauldwin's invocation of his right to remain silent and Kozelichki's continued questioning was an extraordinarily short interval. This is in stark contrast to the 2-hour interval that was deemed acceptable in *Mosley*. Courts that have been confronted with a comparable short interval have generally found that it weighed heavily against determining law enforcement officers scrupulously honored a suspect's Fifth Amendment right.

For example, in *Charles v. Smith*,[36] the police attempted to interrogate a suspect about a crime "just a few minutes" after the suspect had previously invoked his right to remain silent. The same officer conducted the second interrogation, regarding

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[35] See, *Lee, supra* note 33; *Pettit, supra* note 33. See, also, *Cody, supra* note 28; *Finch, supra* note 28.

[36] *Charles v. Smith*, 894 F.2d 718, 726 (5th Cir. 1990).

the same crime. The Fifth Circuit concluded that the officer had not scrupulously honored the suspect's right to remain silent.[37] Similarly, in *United States v. Sippola*,[38] the federal district court determined that law enforcement had not scrupulously honored the suspect's right to remain silent when only 5 minutes had passed. This was true even though a different law enforcement officer conducted the second interrogation and provided another set of *Miranda* warnings.[39] And in *Shaffer v. Clusen*,[40] the federal district court determined that the police had failed to scrupulously honor a suspect's rights when only 9 minutes had passed before the suspect was interrogated again regarding the same subject following the provision of another set of *Miranda* warnings.

Cases in which courts have found no *Mosley* violation after a comparable short interval are rare and distinguishable from this case.[41] For example, in *Mills v. Com.*,[42] the court described the interval as "not more than ten or twenty minutes." And while that short of an interval gave the court "some concern," the court determined, when the circumstances were taken as a whole, that the police had scrupulously honored the suspect's right to remain silent.[43] Importantly, however, an officer again gave the *Miranda* warnings to the suspect before starting the subsequent interrogation, and the interrogation was conducted by a different officer.[44] That is not the case here.

[9] We do not ignore that the videotape presents an individual, Bauldwin, who was intelligent and, for a significant

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[37] *Id.*

[38] *United States v. Sippola*, No. 2:10-cr-21, 2010 U.S. Dist. LEXIS 67866 (W.D. Mich. July 7, 2010).

[39] *Id.*

[40] *Shaffer v. Clusen*, 518 F. Supp. 963 (E.D. Wis. 1981).

[41] See, e.g., *State v. Roquette*, 290 N.W.2d 260 (N.D. 1980); *State v. Shaffer*, 96 Wis. 2d 531, 292 N.W.2d 370 (Wis. App. 1980).

[42] *Mills v. Com.*, 996 S.W.2d 473, 483 (Ky. 1999), *overruled on other grounds, Padgett v. Com.*, 312 S.W.3d 336 (Ky. 2010).

[43] *Id.*

[44] *Id.*

portion of the videotape, controlled the flow of the interrogation. And it is true that Bauldwin could have simply continued to remain silent when faced with Kozelichki's questions. But the *Mosley* test focuses on what law enforcement did, and when, and not on the suspect's response or lack thereof.[45] And this makes sense. Similar to *Miranda*, *Mosley* imposes obligations *on the police*, not the suspect, to protect individuals against the inherently coercive nature of custodial interrogation.[46] And in this case, the detective's conduct did not comport with the law.

We also understand that Kozelichki's question—"Do you have anything more you want to talk about?"—may appear innocuous. But our review of the record convinces us that Kozelichki asked that question in the hope that Bauldwin would continue speaking to his detriment. While such questions are not overtly coercive, they undermine the *Miranda* warnings, which inform a suspect both that he has the right to remain silent and, implicitly, that law enforcement will honor his choice to invoke it. The U.S. Supreme Court has cautioned that "'illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure.'"[47] Such a deviation occurred here. Bauldwin clearly invoked his right to remain silent, and the police failed to scrupulously honor that right.

*(iii) Harmless Error*

[10,11] The trial court's failure to suppress Bauldwin's 2009 statement was constitutional error. But even constitutional error does not automatically require reversal of a conviction if that error was a "'trial error'" and not a "structural defect."[48] The admission of an improperly obtained statement is a trial error, and so its erroneous admission is subject to harmless error

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[45] See *U.S. v. Barone*, 968 F.2d 1378 (1st Cir. 1992).

[46] See *id.*

[47] *Miranda, supra* note 3, 384 U.S. at 459, quoting *Boyd v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

[48] *Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991). Accord *Rogers, supra* note 6.

analysis.[49] Here, after considering the entire record, we conclude that this error was harmless.

[12] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[50]

The inherent difficulties in harmless error analysis are really twofold. First, the appellate court must make its determination from a "cold" record—the court does not have the opportunity to view the evidence and hear the testimony in the same way that the jury did.[51] Second, making a harmless error determination necessarily involves some speculation—an appellate court cannot know for certain whether the jury did or did not rely on certain pieces of evidence.[52] Despite these difficulties, it is the court's duty to review the whole record and determine whether the jury's verdict was surely unattributable to the error.[53]

We conclude that the jury's verdict was surely unattributable to the erroneous admission of Bauldwin's statements. We first emphasize the limited incriminating nature of Bauldwin's statement. The first 3½ to 4 hours of the interrogation consisted simply of Bauldwin's telling his side of the story. It was not until Kozelichki confronted Bauldwin with pieces of the State's evidence that the interrogation became incriminating, and even then, only a few of Bauldwin's statements were incriminating. This was not a full, "smoking gun" confession. But Bauldwin

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[49] See, *Fulminante, supra* note 48; *Milton v. Wainwright*, 407 U.S. 371, 92 S. Ct. 2174, 33 L. Ed. 2d 1 (1972).

[50] *Rogers, supra* note 6; *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated in part on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010); *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002).

[51] See Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. Rev. 1167, 1169 (1995).

[52] See *id.*

[53] See, e.g., *State v. Chavez*, 281 Neb. 99, 793 N.W.2d 347 (2011).

did change his story about the nature of his and Prince's relationship—he admitted that he and Prince had "fought a thousand times." And when confronted with pieces of the State's evidence, Bauldwin was unable to offer satisfactory explanations. Finally, when Kozelichki told Bauldwin that they had found Bauldwin's jeans at Prince's house soon after she was killed, Bauldwin replied "They couldn'ta been. If that was the case, I'da been in jail."

It is true these statements were incriminating. But other evidence at trial showed that Bauldwin's relationship with Prince was rocky. Testimony showed that Bauldwin and Prince had repeatedly broken up, and their relationship was described as "on again, off again" at several points. And when the other incriminating statements in the interrogation are considered in the context of the overwhelming guilt, it is clear that the jury's verdict was surely unattributable to the court's erroneous admission of Bauldwin's statement.

The State presented strong evidence of Bauldwin's motive and opportunity for the murder. Prince was found strangled in the basement of her home. There was no sign of forced entry, showing that the person who killed Prince had access to her home. Bauldwin lived with Prince. Bauldwin's whereabouts were unknown during a critical 3- to 4-hour period on Saturday night into Sunday morning, which fit the timeframe for Prince's death.

The evidence also showed that Bauldwin was overly possessive of Prince. For example, the record showed that Bauldwin made 19 telephone calls in 1 hour to Prince's cellular telephone that Saturday morning. And when Scott, Prince's friend, escorted Prince home after a house party, Bauldwin was aggressive and territorial. Further, the evidence showed that Prince was seeing other men while in a relationship with Bauldwin.

The physical evidence also supported Bauldwin's guilt. The police photographed Bauldwin that Sunday evening, and those photographs show that Bauldwin had numerous injuries on his body. Bauldwin's explanation for those injuries—that they resulted from fixing the garage door—was inconsistent with his neighbor's testimony, who explained that fixing the

door took less than a minute and that he saw no injuries to Bauldwin while helping him do so. A pathologist testified that the numerous injuries on Prince's body were possibly defensive in nature.

Finally, the DNA evidence provided crushing evidence of guilt. Bauldwin was not excluded as a contributor to apparent bloodstains on the shirt worn by Prince at the time of her death. And even more condemning, a pair of Bauldwin's jeans, found at Prince's house, had apparent blood on them, from which Prince was not excluded as a contributor. The odds of someone other than Bauldwin or Prince contributing to these respective DNA samples were infinitesimal.

We again emphasize that the erroneously admitted statement was not a confession. Portions of the statement are incriminating, but when viewed relative to the properly admitted, overwhelming evidence of Bauldwin's guilt, there is no reasonable probability that the jury's verdict was attributable to the court's erroneous admission of Bauldwin's statement. Its admission was harmless error.

### 2. Bauldwin's 2006 Statement to Police

On February 26, 2006, the day Prince's body was found, Bauldwin went to the police station, where the police interviewed him. The police audio-recorded his statement that day. Bauldwin asserts that the court erred in admitting this statement into evidence because Bauldwin repeatedly invoked his right to counsel, which the police failed to honor. The State argues that *Miranda* protections did not apply, because at no time was Bauldwin subject to custodial interrogation. We agree with the State. We review the court's admission of the 2006 statement under the same two-part standard that we applied to review the admission of the 2009 statement.

[13-15] *Miranda* protections apply only when a person is both in custody and subject to interrogation.[54] Whether an individual is in custody requires an examination of all the circumstances surrounding the interrogation.[55] In making

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[54] See *Rogers, supra* note 6.

[55] *Id.*

that determination, the test is whether a reasonable person in the defendant's situation would have felt free to leave, and if not, then a defendant is considered to be in custody.[56] Circumstances that are relevant to this inquiry include, for example, the location of the interrogation, whether the individual initiated contact with the police, and whether the police told the defendant he was free to terminate the interview and leave at any time.[57] "Interrogation" under *Miranda* refers not only to express questioning, "but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[58] If a person is in custody and subject to interrogation, *Miranda* applies.

Bauldwin was not initially in custody. The district court made findings of fact—which, after our review of the record, we conclude are not clearly erroneous. Bauldwin went to the police station of his own accord; he was not arrested or in any way forced to come down to the station. Upon arriving there, the police placed Bauldwin in an interview room, but they did not shackle, handcuff, or restrict his freedom of movement in any way. The police told Bauldwin that he was not under arrest and that it was a matter of routine procedure for the police to speak with a victim's significant other. The police did not use any strong-arm tactics or deceptive strategies during the interview, and the atmosphere of the questioning was not police dominated. These facts show that, initially, Bauldwin was not in custody during the 2006 statement.

But when the police explicitly told Bauldwin that he could not leave until they had obtained a buccal swab and photographed his body, the police had effectively taken Bauldwin into custody. Regardless of the circumstances that brought Bauldwin to the police station, the key inquiry is whether a reasonable person would have felt free to leave. And, obviously, if the police explicitly refuse to let the person go, a reasonable person would not feel free to leave.

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[56] *Id.*

[57] See *id.*

[58] *Id.* at 54, 760 N.W.2d at 28-29.

Even so, *Miranda* applies only if the individual is subjected to custodial *interrogation*. "Interrogation" refers to words or actions of the police intended to elicit an incriminating response from the suspect.[59] Our review of the audio recording indicates that once Bauldwin was in custody, he was not interrogated. The interaction between Bauldwin and the police, from that point, was limited to allowing Bauldwin to contact an attorney; obtaining a few pieces of basic, biographical information; instructing Bauldwin about the investigation process; and taking photographs and a buccal swab. Following those procedures, the police allowed Bauldwin to leave and did not arrest him. The police never subjected Bauldwin to custodial interrogation during his 2006 statement. So *Miranda* did not apply, and the district court did not err in denying Bauldwin's motion to suppress the 2006 statement.

### 3. Challenge to DNA Evidence

Before trial, Bauldwin moved to preclude the State from offering its DNA evidence. Bauldwin claims that the State failed to prove that its methodology for analyzing mixed DNA samples was scientifically valid. Our review of the record, however, shows that the scientific community has generally accepted the methodology used in this case, it has been subject to peer review and publication, and the methodology is reliable. We conclude that the district court did not abuse its discretion in admitting the State's DNA evidence at trial.

#### (a) Standard of Review

[16] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[60]

#### (b) Analysis

The DNA analysis in this case used a methodology known as PCR-STR analysis. The forensic analysts used this methodology to analyze the mixed DNA samples found on certain pieces of evidence. A mixed DNA sample, as its name implies, contains DNA from two or more contributors. The results of

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[59] See *id.*

[60] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

this analysis linked Bauldwin to Prince's murder. Bauldwin asserts that the DNA results could only mislead the jury, and so the State's expert testimony in that regard should have been excluded.

[17] A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact.[61] This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology may properly be applied to the facts in issue.[62]

[18] In evaluating the admissibility of expert scientific testimony, a trial judge considers a number of factors. These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in a particular technique, there exists a high known or potential rate of error; whether standards exist for controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community. These factors are, however, neither exclusive nor binding. Different factors may prove more significant in different cases, and additional factors may prove relevant under particular circumstances.[63]

Here, the expert testimony at trial indicated that with a mixed DNA sample, an analyst attempts to determine the "major" and "minor" contributors to the sample. If the analyst can determine the distinct DNA profiles for each contributor, then the analyst compares each profile to that of the individual in question. If an individual's profile matches the profile of a contributor to the DNA sample, then the analyst calculates the probability that someone other than the individual could have contributed DNA to the sample.

Bauldwin argues that the probabilities which accompany the DNA analysis serve only to mislead the jury. For example,

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[61] See *Schafersman, supra* note 2.

[62] See *id.*

[63] See *State v. Daly*, 278 Neb. 903, 775 N.W.2d 47 (2009). See, also, *Daubert, supra* note 1; *Schafersman, supra* note 2.

Bauldwin claims that a jury would treat a probability of 1 in 500,000 the same as 1 in 1 septillion ($10^{24}$). In essence, Bauldwin claims that a jury is unable to assign the appropriate weight to DNA evidence, because the probabilities which accompany it are oftentimes so small as to be indistinguishable.

[19] This is essentially a claim that a jury is not smart enough to understand and give weight to the statistical analysis that accompanies DNA evidence. Bauldwin offers no authority for this argument, and we reject it out of hand—juries are asked to analyze complex topics and evidence in many cases, and that is what the jury was asked to do here. Furthermore, DNA evidence without the accompanying probability assessment would be inadmissible because it would not aid the trier of fact.[64] We have specifically held that DNA evidence is inadmissible without the probability assessment for that very reason.[65] We are not persuaded to reconsider that position today.

Bauldwin also argues that because the PCR-STR analysis cannot definitively determine the cell source of the DNA (e.g., whether the DNA came from blood, skin, hair, or semen), it is impossible for an analyst to say that the DNA from both contributors to a mixed sample came from blood. While a presumptive test exists to indicate the presence of blood, Bauldwin asserts that such a test "will mislead the jury into believing that both contributors to the mixture contributed blood."[66] As such, Bauldwin claims that the court erroneously admitted the State's expert testimony into evidence.

Here, the court determined that the PCR-STR methodology was scientifically valid and reliable. The court found that the forensic analyst followed the proper protocols and that the analyst properly applied the methodology to the DNA samples. The court emphasized the State's expert testimony, which outlined the protocols used, the scientific community's stance on the PCR-STR analysis, the certification of the laboratory, and

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[64] See, *Daubert, supra* note 1; *Schafersman, supra* note 2; *State v. Carter*, 246 Neb. 953, 524 N.W.2d 763 (1994), *overruled on other grounds, State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997).

[65] See *Carter, supra* note 64.

[66] Brief for appellant at 38.

specific literature on analyzing mixed DNA samples. The court found that the DNA evidence was admissible.

At issue here is the reliability of the PCR-STR methodology as applied to mixed samples. The State's expert witnesses testified that the scientific community has generally accepted the PCR-STR methodology as a means to identify contributors to mixed samples of DNA. The accreditation of each individual laboratory rests, in part, on the analysts' ability to pass proficiency testing regarding mixed DNA samples. The DNA laboratory was accredited. Testimony also showed that scientific literature had been published about the PCR-STR methodology regarding mixed samples. Furthermore, we have repeatedly found that the PCR-STR analysis itself produces sufficiently reliable information to be admitted at trial.[67] The Legislature has also recognized the reliability of the PCR-STR methodology.[68]

The inability of PCR-STR analysis to definitely label the cell source of each DNA contributor in a mixed sample does not affect the underlying validity of the methodology, or its admissibility under the *Daubert*/*Schafersman*[69] framework. In essence, Bauldwin claims that the PCR-STR methodology is not scientifically valid because it is not able to do *more*—it cannot definitively identify the cell source for each contributor to a mixed DNA sample. Bauldwin's assertions, however, go to the weight of the evidence, rather than to its admissibility. We cannot say the district court abused its discretion in admitting this testimony.

### 4. Exhibit 154's Admissibility

Bauldwin argues that the court erred in admitting into evidence exhibit 154—a photograph of Prince's tongue, throat, and larynx, excised during the autopsy. Specifically, Bauldwin claims that exhibit 154 was not relevant to any controverted

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[67] See, *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004); *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004); *State v. Jackson*, 255 Neb. 68, 582 N.W.2d 317 (1998).

[68] See Neb. Rev. Stat. § 29-4118(3) (Reissue 2008).

[69] See, *Daubert, supra* note 1; *Schafersman, supra* note 2.

issue and that the danger of unfair prejudice outweighed any probative value it might have had. But the court found that the photograph demonstrated the nature and extent of Prince's injuries and that no other evidence demonstrated the internal injuries that she sustained.

(a) Standard of Review

[20,21] In proceedings where the Nebraska Evidence Rules apply, the rules control admissibility of the evidence; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. When 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.[70] A trial court exercises its discretion in determining whether evidence is relevant and whether its probative value is outweighed by its prejudicial effect.[71]

(b) Analysis

[22] Bauldwin first argues that exhibit 154 was not relevant to prove any element of the State's case. But at trial, Bauldwin objected only because the danger of unfair prejudice outweighed any probative value. And on appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered at trial.[72] Furthermore, not only did Bauldwin fail to object to exhibit 154 on relevancy grounds, but he conceded that exhibit 154 was, in fact, relevant. When Bauldwin's attorney objected at trial, he explained, "Certainly 154 would be relevant to the judge — or to [the pathologist's] testimony and demonstrating his opinions, however, I feel that 154 is prejudicial, its prejudicial facts would outweigh its probative value . . . ." We therefore do not consider Bauldwin's relevance objection and instead focus on his claim that exhibit 154's danger of unfair prejudice outweighed its probative value.

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

[71] See *Jackson, supra* note 67.

[72] See *State v. Shipps*, 265 Neb. 342, 656 N.W.2d 622 (2003).

[23] Under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Bauldwin asserts that exhibit 154 lacked probative value because it only depicted injuries to Prince's neck region and there was no dispute that the cause of death was strangulation. And Bauldwin claims that the gruesome nature of the photograph would be "so emotionally overwhelming as to override the jury's objectivity."[73]

[24,25] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[74] In a homicide prosecution, a court may receive photographs of a victim into evidence for the purpose of identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[75]

Although Bauldwin may not have actively disputed the cause of Prince's death, the State must still *prove* all of the elements of the crime beyond a reasonable doubt. The State charged Bauldwin with first degree murder, which required showing that the killing was done "purposely and with deliberate and premeditated malice."[76] How Prince died was certainly relevant as to whether Bauldwin intended to kill her. Thus, because exhibit 154 provided foundation for the pathologist's cause-of-death determination, exhibit 154 had substantial probative value. Furthermore, the State also offered exhibit 154 to demonstrate the nature and extent of Prince's injuries. And, although many photographs showed Prince's external injuries, this was the only photograph offered that depicted Prince's internal injuries. We cannot say that the trial court abused its discretion in admitting exhibit 154 into evidence.

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[73] Brief for appellant at 40.

[74] *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).

[75] See, e.g., *id.*

[76] See Neb. Rev. Stat. § 28-303(1) (Reissue 2008).

### 5. Sufficiency of the Evidence

Bauldwin asserts that there was insufficient evidence to support his conviction. Specifically, Bauldwin claims that the evidence revealed a "shoddy" police investigation,[77] that police never definitely ruled out or investigated numerous other suspects, and that the DNA evidence was unconvincing.

#### (a) Standard of Review

[26] 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.[78] And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact.[79]

#### (b) Analysis

A jury convicted Bauldwin of second degree murder. A person commits second degree murder "if he causes the death of a person intentionally, but without premeditation."[80] Bauldwin is asking us to reweigh the evidence. This we will not do. Having already concluded that the record contains overwhelming evidence of Bauldwin's guilt, we will not repeat that evidence here. Our only inquiry is whether sufficient evidence exists to allow a rational trier of fact to find the essential elements of the crime to exist beyond a reasonable doubt. As previously discussed, there is.

A rational jury could find that Bauldwin killed Prince. And because the cause of death was strangulation, a jury could conclude that Bauldwin intentionally killed Prince without premeditation. This assignment of error has no merit.

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[77] Brief for appellant at 40.

[78] *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009).

[79] See *id.*

[80] Neb. Rev. Stat. § 28-304 (Reissue 2008).

### 6. Challenge to Sentence as Excessive

Bauldwin contends that the district court imposed an excessive sentence, because the court did not seriously consider all of the mitigating factors weighing in favor of a lesser sentence. Of course, the State views it differently. The State asserts that the district court properly considered all appropriate factors in imposing Bauldwin's sentence and, based on the violent nature of the crime, did not abuse its discretion in imposing a life sentence.

#### (a) Standard of Review

[27] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[81]

#### (b) Analysis

[28] The sentencing judge sentenced Bauldwin to a term of life to life in prison. Although this is the maximum sentence a court may impose for second degree murder, it falls within the statutory sentencing limits for second degree murder.[82] As such, we review the district court's decision for an abuse of discretion.[83] 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.[84]

[29,30] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.[85] In imposing a sentence, the sentencing

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[81] *State v. Davis*, 276 Neb. 755, 757 N.W.2d 367 (2008).

[82] See, *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009); *Davis, supra* note 81; *State v. Marrs*, 272 Neb. 573, 723 N.W.2d 499 (2006).

[83] See *Davis, supra* note 81.

[84] *Id.*

[85] *State v. Albers*, 276 Neb. 942, 758 N.W.2d 411 (2008).

court is not limited to any mathematically applied set of factors.[86] 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.[87]

Bauldwin claims that the district court did not seriously consider all of the circumstances surrounding his life. Bauldwin's brief details personal aspects of his life, as had been previously set forth in a letter submitted to the court. While Bauldwin asserts that this letter was made a part of the presentence report, we are unable to find it in our review of the record. Regardless, we conclude that the district court did not abuse its discretion in imposing the sentence in this case.

The record indicates that the court reviewed letters from members of both Bauldwin's family and Prince's family, written presentations from both sides' attorneys, and the evidence in the case before coming to its decision. And, based on the assertions made in Bauldwin's brief, all of the mitigating factors that weigh in favor of a lesser sentence were conveyed to the district court.

But the record also reveals that the trial court emphasized the violent nature of Bauldwin's crime:

> To cause a death by strangulation is different than a shot from a gun or a — or a stabbing. Those intentions are — or the act supporting those intentions to kill are nearly instantaneous, but a strangulation, . . . Bauldwin, as you know in this case, has to be prolonged. It has to be a use of extreme force and violence. The duration is a minute, the doctor testified, before someone would even pass out, and longer than that to cause their [sic] death. Those minutes where your hands had to be around her neck or the use of an instrument for the same purpose, she had to be deprived of breath for over that period of time, this person that you state that you loved and cared about, and as you caused to pass out and die and left in the basement in those early morning hours.

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[86] *Id.*

[87] *Id.*

The trial court's obvious focus on the viciousness of this attack is understandable, as is the sentence the court imposed. We cannot say that the trial court abused its discretion.

## IV. CONCLUSION

During Bauldwin's 2009 statement, he clearly invoked his right to remain silent, which the police failed to scrupulously honor. The trial court's admission of Bauldwin's 2009 statement was error, but it was harmless. We find no merit to Bauldwin's other assigned errors, and so we affirm his conviction and sentence.

AFFIRMED.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
BRANDON D. REINHART, APPELLANT.

811 N.W.2d 258

Filed April 20, 2012. No. S-11-464.

1. **Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection.
3. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact.
4. **Effectiveness of Counsel: Appeal and Error.** 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.
5. **Constitutional Law: Appeal and Error.** A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal.
6. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
7. **Hearsay.** A statement is not hearsay if it is offered against a party and is his own statement, in either his individual or a representative capacity.

8. **Trial: Evidence: Juries: Appeal and Error.** Evidentiary error is harmless when improper admission of evidence did not materially influence the jury to reach a verdict adverse to substantial rights of the defendant.
9. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
10. **Trial: Evidence: Appeal and Error.** Given the strength of other evidence presented by the State, erroneously admitted evidence can be harmless.
11. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
12. ____: ____. To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
13. **Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Boone County: MICHAEL J. OWENS, Judge. Affirmed.

Jerrod P. Jaeger, of Jaeger Law Office, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, Carrie A. Thober, and James D. Smith for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Brandon D. Reinhart was charged with using a minor to distribute a controlled substance and conspiracy to use a minor to distribute a controlled substance, specifically marijuana. A jury convicted him on both counts, and he was sentenced to 3 to 5 years' imprisonment on each conviction, with the sentences to run concurrently. Reinhart appeals.

## SCOPE OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for

an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012). And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact. *Id.*

[2] 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. See *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[3,4] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Dunkin, ante* p. 30, 807 N.W.2d 744 (2012). Whether counsel was deficient and whether the defendant was prejudiced are questions of law that we review independently of the lower court's decision. See, *id.*; *State v. Gonzalez, ante* p. 1, 807 N.W.2d 759 (2012).

## FACTS

In July 2008, State Patrol Trooper Timothy Stopak received a call from Micah Jennings and met Jennings at a cemetery near Albion, Nebraska, to arrange a controlled purchase of marijuana from Reinhart. At the cemetery, Sheriff Dave Spiegel searched Jennings' vehicle and Stopak searched Jennings' person for money and contraband. After Jennings was searched, Stopak placed two recording devices on Jennings and gave him $120 in "recorded buy money."

Jennings told Stopak that he had called B.L., his girlfriend, who was at Reinhart's house and that B.L. had arranged for Jennings to buy marijuana from Reinhart at his house. B.L. was 15 years old at the time. Stopak and Spiegel kept constant visual contact with Jennings' vehicle as they followed him to Reinhart's house. Jennings was in the house for 5 to 10 minutes. He came out the same door through which he had entered, got into his vehicle, and drove past Stopak and Spiegel. While

he was driving, Jennings called B.L. and spoke to Reinhart on B.L.'s telephone.

Reinhart obtained an ounce of marijuana from his bedroom and told B.L. that Jennings would be waiting at a local bike shop. Jennings drove to the far north end of the bike shop parking lot, and Stopak and Spiegel took up a surveillance position. B.L. arrived by car, met Jennings, and gave him the marijuana. Jennings gave B.L. two $50 bills and one $20 bill. Stopak saw B.L. complete the drug deal with Jennings and leave. When B.L. delivered the marijuana to Jennings, she did not know that Jennings was working with Stopak.

Stopak and Spiegel then followed Jennings back to the cemetery, where Jennings gave Stopak the package delivered by B.L. Stopak and Spiegel again searched Jennings and his vehicle for contraband and money, and Stopak recovered the recording devices. Laboratory analysis confirmed the substance in the package was marijuana. Reinhart was charged with using a minor to distribute a controlled substance and conspiracy to use a minor to distribute a controlled substance.

At trial, Reinhart took the stand, and although he admitted to having smoked marijuana, he denied ever selling marijuana or using B.L. to deliver marijuana. He also denied speaking with Jennings on B.L.'s telephone and making an agreement to personally deliver marijuana to Jennings or to deliver marijuana to Jennings through a third person.

The jury convicted Reinhart of both counts. The trial court sentenced Reinhart to 3 to 5 years' imprisonment on each count, with the sentences to run concurrently and credit for 1 day served.

## ASSIGNMENTS OF ERROR

On appeal, Reinhart assigns four errors: (1) His convictions and sentences for both use of a minor to distribute a controlled substance and conspiracy to use a minor to distribute a controlled substance violate the double jeopardy provisions of the federal and state Constitutions, (2) there was insufficient evidence to convict him of the charges, (3) the trial court erred in overruling one of Reinhart's hearsay objections, and (4) trial

counsel was ineffective for failing to make appropriate hearsay objections.

## ANALYSIS

### Double Jeopardy

Reinhart argues that his convictions and sentences for both use of a minor to distribute a controlled substance and conspiracy to commit that offense violate his right to be free from double jeopardy. However, he did not raise this claim in the trial court.

[5] A constitutional issue not presented to or passed upon by the trial court is not appropriate for consideration on appeal. *State v. Ford*, 279 Neb. 453, 778 N.W.2d 473 (2010). Because Reinhart failed to raise this issue in the trial court, he has waived his double jeopardy claim and we do not address it.

### Sufficiency of Evidence

Reinhart alleges the evidence was insufficient to convict him of the charges. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012). And in our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact. *Id.*

Reinhart was charged by information with one count of use of a minor to distribute a controlled substance under Neb. Rev. Stat. § 28-416(5)(a) (Reissue 2008) and one count of conspiracy under Neb. Rev. Stat. § 28-202 (Reissue 2008). Section 28-416(5)(a) states:

> Except as authorized by the Uniform Controlled Substances Act, it shall be unlawful for any person eighteen years of age or older to knowingly and intentionally employ, hire, use, cause, persuade, coax, induce, entice, seduce, or coerce any person under the age of eighteen years to manufacture, transport, distribute, carry, deliver, dispense,

> prepare for delivery, offer for delivery, or possess with intent to do the same a controlled substance or a counterfeit controlled substance.

This language requires the State to prove that the defendant is someone (1) who is 18 years of age or older and (2) who knowingly and intentionally (a) used a person under 18 years of age in one of the ways listed (b) to perform one of the listed acts related to drug distribution.

The evidence presented at trial provided a basis for the jury to determine beyond a reasonable doubt that Reinhart was guilty. Stopak testified that Reinhart was 19 years old when the alleged drug transaction involving B.L. and Jennings occurred. B.L. testified that she was 15 years old at the time. Jennings, B.L., and Holly Kelley (who was also at Reinhart's house that day) all testified that B.L. delivered marijuana to Jennings. The testimony of each of these witnesses indicated that B.L. made the delivery at Reinhart's direction. B.L. testified that "[Reinhart] handed me the marijuana and he told me to go to the bike shop because [Jennings] was going to be waiting." There was sufficient evidence for the jury to conclude beyond a reasonable doubt that Reinhart was guilty of violating § 28-416(5)(a).

Secton 28-202(1) states:

> A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:
>
> (a) He agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and
>
> (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

The trial court instructed the jury that to find Reinhart guilty on this count, it had to find (1) that on or about July 25, 2008, Reinhart agreed to sell marijuana to Jennings at Reinhart's house; or (2) that on July 25, Reinhart gave marijuana to a minor, B.L., which she delivered to Jennings; or (3) that on July 25, Jennings gave B.L. money in exchange for marijuana.

The testimony of both B.L. and Kelley established that Reinhart gave B.L. marijuana to deliver to Jennings. The testimony of Jennings and B.L. showed that Jennings gave B.L. money in exchange for marijuana. Thus, the evidence was sufficient to allow the jury to find that one of the acts necessary for a criminal conspiracy had occurred.

The evidence also showed the existence of a felony, as required by statute. The elements of using a minor to distribute a controlled substance were satisfied, and when the controlled substance is marijuana, as it was here, that crime is a felony. See Neb. Rev. Stat. § 28-405(c)(10) [Schedule I] (Reissue 2008) and § 28-416(2) and (5)(c).

Yet for Reinhart to be convicted of conspiracy, the evidence had to show that he conspired with someone, which requires an agreement. See § 28-202(1). The testimony of Jennings, B.L., and Kelley was consistent with B.L.'s willing agreement to deliver marijuana. B.L. testified that she asked Jennings "if he was going to snitch on us," which she stated "he better not do . . . because . . . that would be messed up." This testimony indicated that B.L. willingly participated with Reinhart in the drug deal. Viewing these facts in the light most favorable to the prosecution, which this court does when determining whether the evidence is sufficient to sustain the conviction, see *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011), there was sufficient evidence to convict Reinhart of use of a minor to deliver a controlled substance as well as conspiracy to commit that crime.

We note that at trial, defense counsel argued that witnesses for the State "show[ed] a tremendous amount of bias." He claimed that Jennings was a drug dealer "attempting to work off charges," B.L. was engaged to Jennings at the time of trial, and Kelley, a friend of B.L., had not spoken to Reinhart for over a year. In our review, we do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Those matters are for the finder of fact. *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012). The jury chose to believe Jennings, B.L., and Kelley, and those witnesses provided sufficient evidence to convict Reinhart. This assignment of error has no merit.

## Admission of Hearsay Evidence

Reinhart alleges that the trial court erred in admitting a portion of Stopak's testimony over a hearsay objection. Stopak testified:

> [Jennings] advised me that he had placed a phone call to [B.L.], and that he then spoke with . . . Reinhart, and that a deal was set up where he would be met downtown, either by . . . Reinhart or by one of the two females located at the residence to complete the drug transaction.

Reinhart alleges that this statement was inadmissible hearsay. His hearsay objection to this statement at trial was overruled.

[6,7] "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." Neb. Rev. Stat. § 27-801(3) (Reissue 2008). Reinhart made a statement to Jennings. Jennings told Stopak about the statement, and then Stopak testified about that statement. "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." Neb. Rev. Stat. § 27-805 (Reissue 2008). A statement is not hearsay if it is offered against a party and is his own statement, in either his individual or a representative capacity. See § 27-801(4)(b). Reinhart was the defendant, and his statements would not be hearsay. Thus, Reinhart's statement to Jennings was not hearsay.

[8-10] However, Jennings' statement to Stopak about what Reinhart told Jennings was hearsay, and the trial court erred in admitting this evidence. 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. *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010). Given the

strength of other evidence presented by the State, we conclude the erroneously admitted evidence was harmless. See *State v. Ellis, supra*.

Stopak testified Jennings told him that "a deal was set up where he would be met downtown, either by . . . Reinhart or by one of the two females located at the residence to complete the drug transaction." Other witnesses testified to these facts. Jennings testified:

> [State's counsel]. At some point when you called [B.L.] after you left the house, did you talk to [Reinhart]?
>
> [Jennings]. Yeah, briefly on the phone.
>
> Q. What was that conversation?
>
> A. Just asking him if I could get that so I could get going back to work.
>
> Q. And what'd he say to you?
>
> A. Yeah, he'd send one of the girls down.

B.L. testified:

> [Jennings] called me and asked me if we would go meet them downtown. And I talked to [Reinhart] about it and then handed the phone to [Reinhart] and they talked about it. And after the conversation was done, [Reinhart] handed me the marijuana and he told me to go to the bike shop because [Jennings] was going to be waiting.

Kelley testified that "[Jennings] was coming to buy from [Reinhart]. [Jennings] said he was coming from work. [Reinhart] wouldn't sell to him, he was paranoid. [Jennings] ended up leaving. And about 30 minutes later, [Reinhart] sent [B.L.] to go deliver it for him."

Stopak testified that a deal was arranged where someone, either Reinhart or "one of the girls," would meet Jennings downtown and complete the drug deal. The testimony of the other witnesses showed that Reinhart was not willing to sell to Jennings at the house, that a conversation subsequently occurred between Reinhart and Jennings on the telephone, and that following the conversation, Reinhart gave B.L. marijuana to deliver to Jennings. Thus, the inadmissible hearsay statement by Stopak did not materially influence the jury to reach a verdict adverse to Reinhart's substantial rights. Its admission was harmless error. This assignment of error has no merit.

## Ineffective Assistance of Counsel

[11-13] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Gonzalez, ante* p. 1, 807 N.W.2d 759 (2012). 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. See *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* Deficient performance and prejudice can be addressed in either order. See *id.*

Reinhart argues his trial counsel should have objected to Stopak's statements that (1) Jennings told Stopak that Jennings had a conversation on the telephone with B.L., and a plan was made to buy drugs from Reinhart before Jennings went to the house; (2) Jennings talked with Reinhart on the telephone, and Reinhart agreed to the deal; and (3) there was another person at Reinhart's home who could substantiate that the deal took place.

Trial counsel's failure to object to these statements did not prejudice Reinhart. With respect to the first challenged statement, Stopak testified:

> [State's counsel]. All right. Then what was the next thing that took place?
>
> [Stopak]. Um, prior to leaving, I then conversed again with [Jennings] just to make sure that we were all on the same page with regard to what was to transpire. He indicated that he had made a phone call to B.L. who was located at [Reinhart's] residence, and that [B.L.] had arranged for [Jennings] to arrive at [Reinhart's] residence to purchase the marijuana from [Reinhart]. Once that was clarified, we then departed from the cemetery, and [Jennings] traveled to [Reinhart's] residence in Albion.

Reinhart's trial counsel was not ineffective for failing to object to this statement, because this statement was admissible.

A statement is hearsay only if it is offered to prove the truth of the matter asserted. § 27-801(3). Here, Stopak's statement explained why he, Spiegel, and Jennings went to Reinhart's house. The statement would have been admissible for a non-hearsay purpose even if Reinhart's trial counsel had objected. Reinhart's counsel was not ineffective for failing to object to the admission of admissible evidence. See *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992) (counsel not ineffective for failing to raise constitutional objections to evidence when there was no constitutional violation).

With regard to the second challenged statement, that Jennings spoke with Reinhart on the telephone and agreed to the drug deal, both Jennings and B.L. provided evidence indicating that Jennings spoke with Reinhart on the telephone and that Reinhart agreed to the deal. The third statement by Stopak was that a third person was at Reinhart's house who could substantiate that the deal took place. Jennings, B.L., and Kelley all said that Kelley was at Reinhart's house when Jennings was there, and Kelley's testimony substantiated that a deal took place. Even assuming that the last two statements by Stopak were hearsay, they were repetitive of other testimony. They did not materially influence the jury to reach a verdict adverse to Reinhart's substantial rights, and their admission was, at most, harmless error. If admitting the statements was harmless error, Reinhart was not prejudiced by counsel's failure to object. See *id*.

Because the statements challenged by Reinhart were either admissible or their admission was, at most, harmless error, Reinhart has not shown that he was prejudiced by trial counsel's failure to object to these statements. Reinhart's final assignment of error has no merit.

## CONCLUSION

Reinhart did not allege that his convictions and sentences violated his constitutional protection against double jeopardy before the trial court, and that claim is waived on appeal. The evidence was sufficient to support his convictions on both counts. The trial court erred in admitting hearsay testimony by Stopak about what Stopak was told by Jennings that Jennings

heard from Reinhart, but the admission of Stopak's statement was harmless error. Reinhart claims trial counsel should have objected to several other statements, but those statements were either admissible as nonhearsay or their admission was, at most, harmless error, and therefore, the failure to object did not prejudice Reinhart. None of Reinhart's assignments of error have merit. The judgment of the district court is affirmed.

AFFIRMED.

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## REPUBLIC BANK, INC., APPELLANT, V. LINCOLN COUNTY BOARD OF EQUALIZATION, APPELLEE.

811 N.W.2d 682

Filed April 20, 2012. No. S-11-533.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
5. **Taxation: Appeal and Error.** Appeals may be taken from a county board of equalization to the Tax Equalization and Review Commission in accordance with the Tax Equalization and Review Commission Act.
6. **Jurisdiction: Time: Appeal and Error.** To acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal.
7. **Statutes: Appeal and Error.** The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible.
8. **Taxation: Statutes.** Neb. Rev. Stat. § 77-1502 (Reissue 2009) describes a process by which a taxpayer files a return and can initiate a protest to challenge an assessed value of real or personal property.
9. **Statutes: Jurisdiction.** Jurisdictional statutes are to be strictly construed.

10. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Tim W. Thompson and Angela R. Shute, of Kelley, Scritsmier & Byrne, P.C., for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

This is an appeal from a May 25, 2011, decision and order of the Nebraska Tax Equalization and Review Commission (TERC) with respect to 2010 tangible personal property taxes. TERC dismissed the appeal filed by Republic Bank, Inc. (Republic), after concluding that it did not have subject matter jurisdiction because Republic's appeal was not timely filed. Republic appeals. Because we agree with TERC that the appeal was controlled exclusively by and not timely filed under Neb. Rev. Stat. § 77-1233.06(4) (Reissue 2009), we affirm.

## STATEMENT OF FACTS

On September 19, 2007, Midwest Renewable Energy, LLC, and Marquette Equipment Finance, LLC (Marquette), executed a "Master Lease Agreement" regarding two boilers, "Nebraska Boiler Model NB-500D-70," with related components and one Barr-Rosin, Inc., feed-type ring drying system with related components. These three items involving ethanol manufacturing equipment are the tangible personal property at issue in this case. On September 24, Marquette assigned certain rights in this property to Republic by a "Sales and Assignment Agreement." Marquette filed the 2010 personal property tax returns related to this property.

Chapter 77 of the Nebraska Revised Statutes pertains to "Revenue and Taxation." As a general matter, under chapter 77,

every person having taxable tangible personal property with a situs in Nebraska must make a complete list of that property annually. Neb. Rev. Stat. § 77-1201 (Reissue 2009). Under Neb. Rev. Stat. § 77-1229 (Reissue 2009), a return containing this complete list and value must be filed with the county assessor. A taxpayer can also file a protest regarding the return filed under § 77-1229 suggesting a valuation different from that listed on the return. See Neb. Rev. Stat. § 77-1502 (Reissue 2009).

On April 30, 2010, Marquette filed a Nebraska personal property return for 2010. The return filed in Marquette's name reported a value of zero dollars for the property. After receiving additional information from Marquette, the assessor determined that the taxable value of the listed property should have been $4,170,149 rather than zero dollars. The assessor's comments explaining the change state, "Whether or not the taxpayer actually takes [the] federal depreciation for property which is depreciable has no bearing on its taxability for personal property taxation — if it's depreciable tangible personal property, it is subject to personal property taxation." The assessor's comments reflect Marquette's position that the property was not taxable as to it and thus had a zero taxable value as to Marquette.

The assessor notified Marquette in a letter dated May 6, 2010, of her action changing the value. The assessor listed the amended value of the personal property on a form entitled "Notice of Change in Personal Property Assessment." On the form, the assessor listed the amended value of the two boilers as $1,389,754, the amended value of the Barr-Rosin feed-type ring drying system as $2,003,563, and the amended value of certain distillation columns as $776,832. However, it is undisputed that Republic's interest howsoever described is limited to the boilers and the Barr-Rosin feed-type ring drying system and that another entity is said to have an interest in the distillation columns. Therefore, the personal property in which Republic has an interest has a taxable value according to the assessor of $3,393,317 for 2010.

On June 4, 2010, Marquette filed a form with the Lincoln County clerk. By doing so, Marquette appealed the action of

the assessor changing the taxable value of the property and asked the Lincoln County Board of Equalization (Board) to review the assessor's action.

A hearing was held before the Board on July 12, 2010. On July 19, the Board upheld the assessor's action.

The decision of the Board was mailed to Marquette on July 21, 2010. However, Republic did not receive a copy of the Board's decision from Marquette until August 20, when Marquette e-mailed a copy of the Board's decision to Republic's legal counsel.

On August 20, 2010, counsel for Republic mailed an appeal from the Board's decision to TERC, along with a check in the amount of $25 for the filing fee. TERC received the appeal on August 23.

TERC ordered Republic and the Board to appear at a hearing "in order to determine whether [TERC had] jurisdiction." After conducting an evidentiary hearing, TERC filed a decision and order on May 25, 2011. TERC found that Republic's appeal was filed more than 30 days after the Board's decision. TERC concluded that Republic's appeal was untimely because it did not meet the requirements of § 77-1233.06(4), which states that an "[a]ppeal may be taken within thirty days after the decision of the county board of equalization to [TERC.]" TERC rejected as inapplicable Republic's argument that the appeal was timely under § 77-1502 and Neb. Rev. Stat. § 77-1510 (Reissue 2009), pertaining to actions commenced as protests to assessed valuations which may be appealed on or before August 24. TERC concluded that it lacked subject matter jurisdiction and dismissed the appeal.

Republic appeals.

## ASSIGNMENTS OF ERROR

Republic claims that TERC erred when it dismissed its appeal for lack of subject matter jurisdiction and failed to reach the merits of its appeal from the decision of the Board.

## STANDARDS OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record. *Darnall Ranch v. Banner*

*Cty. Bd. of Equal.*, 280 Neb. 655, 789 N.W.2d 26 (2010). 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. *Id*. Questions of law arising during appellate review of TERC decision are reviewed de novo on the record. *Id*.

[4] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011).

## ANALYSIS

TERC found that Republic had failed to file its appeal from the Board within 30 days and concluded that the appeal was untimely filed under § 77-1233.06(4). TERC dismissed Republic's appeal for lack of subject matter jurisdiction. Republic claims for a variety of reasons that TERC erred in dismissing its appeal. We conclude that TERC did not err when it relied on § 77-1233.06(4) and dismissed Republic's appeal. In view of our disposition of the jurisdictional issue, we do not reach the merits of Republic's additional assignment of error to the effect that TERC should have considered the substance of the appeal from the Board's decision.

[5,6] Appeals may be taken from a county board of equalization to TERC in accordance with the Tax Equalization and Review Commission Act. Neb. Rev. Stat. § 77-5001 et seq. (Reissue 2009 & Cum. Supp. 2010). We have previously considered compliance with time requirements in connection with appeals to TERC and stated that for TERC "[t]o acquire jurisdiction over the subject matter of the action, there must be strict compliance with the time requirements of the statute granting the appeal." *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 295-96, 631 N.W.2d 492, 496 (2001).

In the instant case, the statute granting the appeal to TERC is determined by the manner in which Marquette's initial filing led to the assessor's action with which Marquette disagreed and which eventually led Republic to seek TERC review. The event which gives rise to the case did not commence by Marquette's

filing a valuation protest. Instead, viewing the property as not taxable as to it, Marquette filed a return listing the value of the property as zero, and as such, Marquette failed to value the property in conformity with the net book value of the property as reported to the assessor. Such failure required a corrective action by the assessor, who changed the reported valuation to conform to the net book value. Marquette challenged this action of the assessor before the Board. As TERC correctly identified in its order, under this scenario, after the Board's decision, the only statutes granting an appeal from the Board to TERC are found in chapter 77, article 12, of the Nebraska Revised Statutes (Article 12).

Neb. Rev. Stat. § 77-1233.04 (Reissue 2009) and § 77-1233.06, which we read together, control Republic's appeal from the Board to TERC. These statutes provide as follows:

Section 77-1233.04, entitled "Taxable tangible personal property tax returns; change in value; omitted property; procedure; penalty; county assessor; duties," provides in part:

> (1) The county assessor shall list and value at net book value any item of taxable tangible personal property omitted from a personal property return of any taxpayer. The county assessor shall change the reported valuation of any item of taxable tangible personal property listed on the return to conform the valuation to net book value.

Section 77-1233.06, entitled "Taxable tangible personal property tax valuation or penalty; appeal; procedure; collection procedures," provides:

> For purposes of section 77-1233.04:
>
> (1) The county assessor shall notify the taxpayer, on a form prescribed by the Tax Commissioner, of the action taken, the penalty, and the rate of interest. The notice shall also state the taxpayer's appeal rights and the appeal procedures. Such notice shall be given by first-class mail addressed to such taxpayer's last-known address. The entire penalty and interest shall be waived if the omission or failure to report any item of taxable tangible personal property was for the reason that the property was timely reported in the wrong tax district;

> (2) The taxpayer may appeal the action of the county assessor, either as to the valuation or the penalties imposed, to the county board of equalization within thirty days after the date of notice. . . .
>
> . . . .
>
> (4) Upon ten days' notice to the taxpayer, the county board of equalization shall set a date for hearing the appeal of the taxpayer. The county board of equalization shall make its determination on the appeal within thirty days after the date of hearing. The county clerk shall, within seven days after the determination of the county board, send notice to the taxpayer and the county assessor, on forms prescribed by the Tax Commissioner, of the action of the county board. Appeal may be taken within thirty days after the decision of the county board of equalization to [TERC.]

As noted, Marquette filed the 2010 Nebraska personal property return and listed the valuation of the property as zero but, as discussed below, did not file a protest of a valuation as reported to the assessor under §§ 77-1502 and 77-1510. See § 77-1229. Marquette's initial action lead the assessor to "change the reported valuation of [the] taxable tangible personal property listed on the return to conform the valuation to net book value" under the authority of § 77-1233.04(1) and to notify the taxpayer under § 77-1233.06(1). Thus, the filing by Marquette invited the action of the assessor and placed the taxpayer on the appellate path provided in Article 12.

The letter notice from the assessor addressed to Marquette's representative stated that the zero valuation would not be accepted and that the assessor changed the value from zero to $4,170,149, later clarified to $3,393,317. This letter further stated that "Statute # 77-1233.06" explained the procedures to appeal. A form entitled "Notice of Change in Personal Property Assessment" was also sent to Marquette notifying it that the "total taxable value has been changed from the previously reported value" of zero to $4,170,149. The form itself states that it is "[a]uthorized by Section 77-1233.06." These references to Article 12 alert the taxpayer to the applicable appellate procedure under Article 12.

Marquette timely appealed to the Board using a "Form 422." Notice of its unsuccessful appeal of the action of the assessor to the Board was endorsed on form 422 and mailed to Marquette on July 21, 2010. Form 422 notifying Marquette of the Board's decision contains "Instructions" regarding "Appeals." Although the instructions state that an appeal of a decision of the Board to TERC regarding personal property for which a valuation protest had been filed is due on or before August 24, elsewhere, form 422 clearly provides that "[a]ll other decisions of the county board of equalization" may be appealed within 30 days of the final decision to TERC. This 30-day provision is consistent with the Article 12 procedure, § 77-1233.06(4), which provides that an "[a]ppeal may be taken within thirty days after the decision of the county board of equalization to [TERC.]"

[7] We summarize the record and foregoing law relative to Republic's attempted appeal to TERC as follows: Marquette, viewing the tangible personal property as not taxable as to it, filed a return with the value of zero dollars for the property, and the assessor changed the reported valuation to conform to the net book value under § 77-1233.04(1); Marquette appealed this action of the assessor to the Board under § 77-1233.06(2); the Board affirmed the assessor's action; and Republic attempted to appeal that decision of the Board to TERC but failed to do so within 30 days of the decision, as required under § 77-1233.06(4). Read together, the foregoing statutes under Article 12 are a sensible and harmonious appellate procedure, as TERC correctly concluded. See *AT&T Communications v. Nebraska Public Serv. Comm., ante* p. 204, 211, 811 N.W.2d 666, 672 (2012) (stating "the rules of statutory interpretation require this court to give effect to the entire language of a statute, and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible"). These statutes control the outcome of this case.

The appeal to TERC had to be filed on or before August 18, 2010. Republic mailed its appeal on August 20, and it was received by TERC on August 23. TERC correctly determined that Republic's appeal was filed greater than 30 days after the

decision of the Board, that the appeal was untimely, and that it lacked subject matter jurisdiction. See § 77-1233.06(4).

Republic acknowledges its appeal to TERC was untimely under § 77-1233.06(4) found in Article 12, but urges us to read provisions in chapter 77, article 15, of the Nebraska Revised Statutes (Article 15), as providing an additional alternative timeframe which would permit its appeal from the Board to TERC to be filed until August 24, 2010. Republic relies on §§ 77-1502 and 77-1510. We conclude the provisions of § 77-1510 permitting an appeal from the Board to TERC until August 24 do not apply to this case and reject Republic's argument to the contrary.

Section 77-1502(1) provides:

> The county board of equalization shall meet for the purpose of reviewing and deciding written protests filed pursuant to this section beginning on or after June 1 and ending on or before July 25 of each year. . . . Protests regarding taxable tangible personal property returns filed pursuant to section 77-1229 from January 1 through May 1 shall be signed and filed on or before June 30.

Section 77-1502(2) provides in part:

> Each protest shall be signed and filed with the county clerk of the county where the property is assessed. The protest shall contain or have attached a statement of the reasons or reasons why the requested change should be made and a description of the property to which the protest applies.

Section 77-1502(4) provides that the county clerk or county assessor must prepare a separate report on each protest, including a description of the property and a recommendation of the county assessor. After the Board considers a protest, the protestor must be informed of the date the board heard the protest, the decision of the board, and the date of the decision. Section 77-1502(4) provided that notice of the board's decision must be mailed to the protestor on or before August 2. See, currently, § 77-1502(6) (Supp. 2011). Section 77-1510 provides: "Any action of the county board of equalization pursuant to section 77-1502 may be appealed

to [TERC] in accordance with section 77-5013 on or before August 24 . . . ."

[8] Section 77-1502 describes a process by which a taxpayer files a return and can initiate a protest to challenge an assessed value of real or personal property. The duties of the clerk or assessor and the actions of the Board are described. The outcome before the Board of the protest process under § 77-1502 can be appealed to TERC on or before August 24, 2010.

Republic asserts that its case involves a "[protest] regarding taxable tangible personal property returns filed pursuant to section 77-1229," as that phrase is found in § 77-1502(1), and that its case can be characterized as a "protest" case under Article 15 as well as a "change" case under Article 12, § 77-1233.04(1), which we have discussed above. In the instant case, Article 15 would permit an appeal to TERC until August 24, 2010, see § 77-1510, whereas Article 12 would only permit an appeal to TERC until 30 days after July 19, see § 77-1233.06(4). TERC examined the statutes and concluded that Republic's appeal from the Board to TERC was not from a protest made under Article 15. We agree with TERC's analysis.

The rules of statutory interpretation require this court to give effect to the entire language of a statute, and to reconcile different provisions of the statutes so they are consistent, harmonious, and sensible. See *AT&T Communications v. Nebraska Public Serv. Comm., ante* p. 204, 811 N.W.2d 666 (2012). Although Republic suggests it had a choice of deadlines by which to appeal, Republic proffers no reason why a sensible statutory scheme would provide two deadlines for the taking of the same act. Further, the language of § 77-1502(1) upon which Republic relies does not support the meaning it urges.

Republic's analysis focuses on events commencing at the Board level where the action of the assessor was upheld. Republic characterizes the proceedings as a "protest" and contends that such protest was "regarding" the return filed by Marquette on April 30, 2010, as "regarding" is used in

§ 77-1502(1), thus bringing the case within that statute. TERC rejected this argument. As TERC correctly determined, even if the hearing before the Board was a "protest" as the term is used in a casual manner, it "did not relate to the filing made [by Marquette] pursuant to section 77-1229 on April 30," but instead was a hearing challenging the actions made by the assessor. Republic had no quarrel with the zero valuation on the return as filed. Instead, the appeal before the Board was regarding "the action of the county assessor" under § 77-1233.06(2) and thus a case under Article 12. The decision of the Board was controlled by the 30-day provision in § 77-1233.06(4) and not subject to a protest-related appeal deadline of August 24 in § 77-1510.

Republic makes some additional arguments concerning unclear language in forms which may have caused confusion and suggests that it would be equitable for this court to deem its appeal as having been timely filed. Notwithstanding general instructions, the forms, for the most part, refer the taxpayer to the statutes for the definitive schedules. We note that a pamphlet in the record recites the appeal deadline as August 24; however, this pamphlet pertains to real property tax protests and is inapplicable. Further, we have previously rejected an argument addressed to an incorrect date on a form and concluded that the statute controlled. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

[9,10] In sum, Republic asks this court to grant relief from the effect of the 30-day deadline of § 77-1233.06(4) which we have concluded applies to this case. The controlling statute states that appeals must be filed within a certain time period. Jurisdictional statutes are to be strictly construed. *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006). It is not within the province of the courts to read a meaning into a statute that is not there. See *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). Having identified the applicable statute, we are unable to extend the time period which has been specified therein by the Legislature.

## CONCLUSION

TERC determined that Republic's appeal from the Board was not timely filed under § 77-1233.06(4) and correctly concluded that it lacked subject matter jurisdiction. We affirm.

AFFIRMED.

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PRIME ALLIANCE BANK, INC., APPELLANT,
V. LINCOLN COUNTY BOARD OF
EQUALIZATION, APPELLEE.

811 N.W.2d 690

Filed April 20, 2012. No. S-11-526.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
4. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Nicholas K. Niemann and Matthew R. Ottemann, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellant.

Rebecca Harling, Lincoln County Attorney, and Joe W. Wright for appellee.

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

STEPHAN, J.

This is an appeal from a decision and order of the Nebraska Tax Equalization and Review Commission (TERC) dismissing an appeal filed by Prime Alliance Bank, Inc. (Prime

Alliance), after determining that the appeal was not timely filed. We affirm.

## FACTS

On September 19, 2007, Midwest Renewable Energy, LLC, and Marquette Equipment Finance, LLC (Marquette), executed a master lease agreement for certain ethanol manufacturing equipment, including two distillation columns. In November, Marquette assigned its interest in the lease to Prime Alliance and agreed to file personal property tax returns on the equipment as an agent for Prime Alliance.

On April 30, 2010, Marquette filed a 2010 Nebraska personal property return with the Lincoln County assessor.[1] The return showed the 2010 taxable value of the two distillation columns as $0. After reviewing the return, the assessor determined that the taxable value of the columns should have been $776,832 and notified Marquette in a letter dated May 6, 2010, that the assessor had changed the value on the property tax return accordingly.[2]

On June 4, 2010, Prime Alliance filed a form entitled "Property Valuation Protest" with the Lincoln County clerk. Prime Alliance challenged the assessor's change to the taxable value of the columns and asked the Lincoln County Board of Equalization (Board) to review the assessor's decision.[3] On July 19, the Board upheld the assessor's change and ruled that the 2010 taxable value of the distillation columns was $776,832.

On August 23, 2010, Prime Alliance filed an appeal from this order to TERC. Subsequently, TERC ordered Prime Alliance and the Board to appear at a hearing convened for the purpose of determining whether TERC had jurisdiction to hear the appeal. After conducting an evidentiary hearing, TERC found that Prime Alliance's appeal was untimely because it was filed more than 30 days after the Board's decision and thus did not

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[1] See Neb. Rev. Stat. § 77-1229 (Reissue 2009).

[2] See Neb. Rev. Stat. §§ 77-1233.02, 77-1233.04, and 77-1233.06 (Reissue 2009).

[3] See § 77-1233.06.

meet the requirements of § 77-1233.06. TERC rejected Prime Alliance's argument that the appeal was timely filed pursuant to Neb. Rev. Stat. §§ 77-1502 and 77-1510 (Reissue 2009). Prime Alliance then perfected this timely appeal.

## ASSIGNMENTS OF ERROR

Prime Alliance assigns, restated and consolidated, that TERC erred in finding that the appeal was not timely filed pursuant to §§ 77-1502 and 77-1510, and further erred in failing to reverse the decision of the Board on the merits.

## STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[4] 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.[5] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record.[6]

[4] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[7]

## ANALYSIS

The assessor was authorized by § 77-1233.04(1) to "change the reported valuation of any item of taxable tangible personal property listed on the [personal property] return to conform the valuation to net book value." Section 77-1233.06 provides a procedure whereby a taxpayer may appeal from such action. Under this statute, the appeal is first considered by the county board of equalization and a dissatisfied taxpayer may

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[4] *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 280 Neb. 655, 789 N.W.2d 26 (2010).

[5] *Id.*

[6] *Id.*

[7] *American Amusements Co. v. Nebraska Dept. of Rev.*, 282 Neb. 908, 807 N.W.2d 492 (2011); *State v. State Code Agencies Teachers Assn.*, 280 Neb. 459, 788 N.W.2d 238 (2010).

further appeal to TERC within 30 days after the decision of that board.[8]

Prime Alliance acknowledges that its appeal was not timely under § 77-1233.06, but argues that it had an alternative avenue of appeal under §§ 77-1502 and 77-1510. Those statutes pertain to the processing of written protests filed by taxpayers, which are first considered by county boards of equalization. A taxpayer dissatisfied with an action taken by a board of equalization may appeal to TERC "on or before August 24 or on or before September 10 if the county has adopted a resolution to extend the deadline for hearing protests."[9] Prime Alliance argues that its appeal to TERC filed on August 23, 2010, was timely and therefore conferred jurisdiction upon TERC to consider and resolve its appeal.

The same argument was made in *Republic Bank v. Lincoln Cty. Bd. of Equal*.[10] That appeal, like this one, was triggered by a county assessor's change of the taxpayer's reported valuation to conform to book value. There, as here, the taxpayer listed the valuation of its tangible personal property as zero and did not file a protest of its reported valuation pursuant to § 77-1502. We concluded in *Republic Bank* that §§ 77-1233.04 and 77-1233.06 controlled the taxpayer's appeal from the Board to TERC, noting that the initial filing of the return reporting zero valuation "invited the action of the assessor and placed the taxpayer on the appellate path provided in [chapter 77, article 12, of the Nebraska Revised Statutes]."[11] We specifically rejected the taxpayer's argument that §§ 77-1502 and 77-1510 afforded an alternative method of appeal. We noted that the taxpayer "proffers no reason why a sensible statutory scheme would provide two deadlines for the taking of the same act," and we further concluded the language of § 77-1502(1) did not support the taxpayer's argument because the taxpayer was not protesting its reported valuation, but, rather,

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[8] See § 77-1233.06(2) to (4).

[9] § 77-1510.

[10] *Republic Bank v. Lincoln Cty. Bd. of Equal., ante* p. 721, 811 N.W.2d 682 (2012).

[11] *Id.* at 727, 811 N.W.2d at 687.

was appealing from action taken by the county assessor.[12] We agreed with TERC's reasoning that the taxpayer's appeal from the Board to TERC was not from a protest made under chapter 77, article 15, of the Nebraska Revised Statutes.

Our reasoning and holding in *Republic Bank* control the identical jurisdictional issue presented in this appeal.

## CONCLUSION

For the reasons more fully set forth in *Republic Bank*, we conclude that TERC did not err in dismissing Prime Alliance's appeal for lack of subject matter jurisdiction, due to the fact that the appeal was not timely filed under § 77-1233.06(4). Accordingly, we affirm.

AFFIRMED.

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[12] *Id.* at 730, 811 N.W.2d at 689.

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## STATE OF NEBRASKA EX REL. COMMISSION ON UNAUTHORIZED PRACTICE OF LAW, RELATOR, V. BILLY ROY TYLER, RESPONDENT.

811 N.W.2d 678

Filed April 20, 2012. No. S-11-713.

1. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.
2. ____: ____. The inherent power of the Nebraska Supreme Court to define and regulate the practice of law includes the power to prevent persons who are not attorneys admitted to practice in this state from engaging in the practice of law.
3. **Attorney and Client: Actions.** A legal proceeding in which a party is represented by a person not admitted to practice law is considered a nullity and is subject to dismissal.
4. **Rules of the Supreme Court: Attorneys at Law.** Pursuant to its inherent authority to define and regulate the practice of law in Nebraska, the Nebraska Supreme Court has adopted rules specifically addressed to the unauthorized practice of law.

Original action. Injunction issued.

Sean J. Brennan, Special Prosecutor, for relator.

Billy Roy Tyler, pro se.

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

PER CURIAM.

This is an original action to enjoin the unauthorized practice of law. We conclude that an injunction should issue.

## BACKGROUND

On June 2, 2011, pursuant to Neb. Ct. R. § 3-1014(E) (rev. 2008), the Nebraska Supreme Court Commission on Unauthorized Practice of Law (Commission) notified Billy Roy Tyler (Respondent) by certified mail that it had received complaints that he was engaged in activities in Douglas County, Nebraska, which, if true, would constitute the unauthorized practice of law. Specifically, the Commission alleged that Respondent engaged in unauthorized practice by (1) preparing pleadings for other individuals and either filing the documents or preparing them for others to file pro se and (2) representing other individuals in the district court for Douglas County.

The letter informed Respondent that he had 20 days to respond to the allegations and directed him to cease and desist from his actions. The letter also notified Respondent that the Commission was beginning a formal investigation of the allegations. A copy of the Supreme Court Rules on the Unauthorized Practice of Law, Neb. Ct. R. §§ 3-1001 to 3-1021 (rev. 2008), was enclosed with the letter.

The certified mailing was returned to the Commission unclaimed, but the same letter sent by regular U.S. mail was not returned. Respondent left a voice message with counsel for the Commission which confirmed he had received the letter. In the message, Respondent stated that the letter contained "lies and inaccuracies," that it was "slanderous and libelous," and that he intended to sue counsel for the Commission due to its contents.

On June 17, 2011, counsel for the Commission acknowledged by letter Respondent's voice message, noted Respondent's denial of the allegations, and informed Respondent that the

Commission was prepared to proceed with civil injunction proceedings. Respondent was again offered an opportunity to submit information regarding his alleged unauthorized practice to counsel for the Commission. The June 17 certified mailing was returned to the Commission unclaimed, but the same letter sent by regular U.S. mail was not returned.

On August 8, 2011, the Commission filed a "Petition for Injunctive Relief" in this court pursuant to § 3-1015. The petition stated the Commission had made findings that Respondent had engaged in the unauthorized practice of law. Specifically, the Commission alleged that from October 15, 2009, to the present,

> (A) The Respondent has been and is giving advice or counsel, direct or indirect, to other persons as to the legal rights of those persons, where a relationship of trust or reliance exists between the Respondent and the persons to which such advice or counsel is given;
>
> (B) The Respondent has engaged in selecting, drafting, completing, and/or filing, for other persons, legal documents which affect the legal rights of those persons;
>
> (C) The Respondent has appeared in court on behalf of parties to legal matters;
>
> (D) The Respondent is not licensed to practice law in the state of Nebraska and thus, is unauthorized to engage in the conduct referred to herein.

An alias summons was personally served on Respondent by the Douglas County sheriff's office on October 19, 2011, after both a prior attempt at personal service and an attempt at service by certified mail failed. Pursuant to § 3-1015(C), Respondent's answer to the petition was due 30 days after service, which was November 18, 2011. On October 25, Respondent filed a document entitled "Motion to appoint Counsel & for inspection & discovery." Respondent did not file an answer to the petition.

Based on Respondent's failure to file an answer, the Commission filed a "Motion for Summary Judgment and Civil Injunction" on December 2, 2011. The motion alleged that Respondent was in default by his failure to answer the petition. The Commission sought an order of this court enjoining

Respondent from engaging in the unauthorized practice of law. No response to this motion was filed by Respondent.

On February 29, 2012, this court entered an order requiring Respondent to show cause within 20 days as to why the court should not dispose of the matter pursuant to § 3-1015(D) and grant the petition for injunctive relief based on Respondent's failure to file a written answer. On the same date, the court denied Respondent's "Motion to appoint Counsel & for inspection & discovery."

In response to this court's order of February 29, 2012, Respondent filed a document captioned "Traverse to 2-29-12 order" in which he stated, "No Evidence Counsel Hearing No due Process am suing!" To that pleading, Respondent attached what appears to be a 42 U.S.C. § 1983 (2006) petition to be filed in the U.S. District Court for the District of Nebraska and an in forma pauperis request in that court.

## DISPOSITION

[1-3] This court has the inherent power to define and regulate the practice of law and is vested with exclusive power to determine the qualifications of persons who may be permitted to practice law.[1] This includes the power to prevent persons who are not attorneys admitted to practice in this state from engaging in the practice of law.[2] A legal proceeding in which a party is represented by a person not admitted to practice law is considered a nullity and is subject to dismissal.[3] This is not for the benefit of lawyers admitted to practice in this state, but "'"for the protection of citizens and litigants in the administration of justice, against the mistakes of the ignorant on the one

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[1] *State ex rel. Comm. on Unauth. Prac. of Law v. Yah*, 281 Neb. 383, 796 N.W.2d 189 (2011); *State ex rel. Hunter v. Kirk*, 133 Neb. 625, 276 N.W. 380 (1937); *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937); *State ex rel. Wright v. Barlow*, 131 Neb. 294, 268 N.W. 95 (1936).

[2] *Yah, supra* note 1.

[3] *Id.* See, also, *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996); *Back Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989); *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957).

hand, and the machinations of unscrupulous persons on the other . . . .'"'"[4]

[4] Pursuant to our inherent authority to define and regulate the practice of law in Nebraska, this court has adopted rules specifically addressed to the unauthorized practice of law.[5] At the core of these rules is a general prohibition: "No nonlawyer shall engage in the practice of law in Nebraska or in any manner represent that such nonlawyer is authorized or qualified to practice law in Nebraska except as may be authorized by published opinion or court rule."[6] "Nonlawyer" is defined by the rules as "any person not duly licensed or otherwise authorized to practice law in the State of Nebraska," including "any entity or organization not authorized to practice law by specific rule of the Supreme Court whether or not it employs persons who are licensed to practice law."[7] The term "practice of law" is defined as

> the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge, judgment, and skill of a person trained as a lawyer. This includes, but is not limited to, the following:
>
> (A) Giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between the party giving such advice or counsel and the party to whom it is given.
>
> (B) Selection, drafting, or completion, for another entity or person, of legal documents which affect the legal rights of the entity or person.
>
> (C) Representation of another entity or person in a court . . . .[8]

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[4] *Yah, supra* note 1, 281 Neb. at 391, 796 N.W.2d at 196, quoting *Niklaus, supra* note 3.

[5] See §§ 3-1001 to 3-1021.

[6] § 3-1003.

[7] § 3-1002(A).

[8] § 3-1001.

Our unauthorized practice rules include civil enforcement procedures under which the Commission may institute civil injunction proceedings in this court,[9] as it has done in this case. The rules provide that within 30 days after service of a petition alleging unauthorized practice of law, the "respondent shall file . . . a written answer admitting or denying the matter stated in the petition."[10] The rules further provide that if no written answer is filed, as is the case here, this court "upon its motion or upon the motion of the Commission or its counsel, shall decide the case, granting such relief and issuing such other orders as may be appropriate."[11] That is the posture in which this case comes before us now.

Accordingly, we find the following facts as alleged in the petition and not denied by Respondent to be true:

> (A) The Respondent has been and is giving advice or counsel, direct or indirect, to other persons as to the legal rights of those persons, where a relationship of trust or reliance exists between the Respondent and the persons to [whom] such advice or counsel is given;
>
> (B) The Respondent has engaged in selecting, drafting, completing, and/or filing, for other persons, legal documents which affect the legal rights of those persons;
>
> (C) The Respondent has appeared in court on behalf of parties to legal matters;
>
> (D) The Respondent is not licensed to practice law in the state of Nebraska[.]

Based upon these facts, we conclude that Respondent is a nonlawyer who has repeatedly engaged in the practice of law as defined by § 3-1001(A), (B), and (C) and that there is a very real risk of harm to the public if his conduct is not enjoined.

Accordingly, by separate order entered on April 19, 2012, Respondent is enjoined from engaging in the unauthorized practice of law in any manner, including but not limited to the

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[9] §§ 3-1015 to 3-1018.

[10] § 3-1015(C).

[11] § 3-1015(D).

following: (1) giving advice or counsel to another entity or person as to the legal rights of that entity or person or the legal rights of others for compensation, direct or indirect, where a relationship of trust or reliance exists between Respondent and the party to whom it is given; (2) selecting, drafting, or completing, for another entity or person, legal documents which affect the legal rights of the entity or person; and (3) representing another entity or person in a court, in a formal administrative adjudicative proceeding or other formal dispute resolution process, or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review. Noncompliance with this order of injunction shall constitute contempt punishable under this court's inherent power and § 3-1019.

INJUNCTION ISSUED.

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STATE OF NEBRASKA, APPELLEE, V.
MICHAEL L. ROSS, APPELLANT.

811 N.W.2d 298

Filed April 26, 2012. No. S-11-093.

1. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.
3. **Circumstantial Evidence: Proof.** Circumstantial evidence is not inherently less probative than direct evidence, and a fact proved by circumstantial evidence is nonetheless a proven fact.
4. **Convictions: Juries: Circumstantial Evidence.** In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.
5. **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.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and SIEVERS and MOORE, Judges, on appeal thereto from the District Court for Douglas County, PATRICIA A. LAMBERTY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Thomas C. Riley, Douglas County Public Defender, Timothy P. Burns, and Brenda J. Leuck for appellant.

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

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

STEPHAN, J.

Michael L. Ross was convicted by a jury of discharge of a firearm at a person, building, or occupied motor vehicle while in the proximity of a motor vehicle he had just exited, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. On direct appeal, the Nebraska Court of Appeals determined the evidence was insufficient to support Ross' convictions. We granted the State's petition for further review and now reverse the judgment of the Court of Appeals, because we conclude that the evidence, when considered under the deferential standard of appellate review, was sufficient to support the convictions.

## BACKGROUND

The following evidence was adduced at Ross' trial and pertains to the events of February 10, 2010. On that date, a shooting occurred in Omaha, Nebraska, on the block of North 33d Avenue, which is intersected by Erskine Street on the north and Grant Street on the south.

Lumonth Coleman and his girlfriend spent the morning moving out of a house located on North 33d Avenue. This is the first house south of Erskine Street on the east side of North 33d Avenue. Terrell Smith arrived at that location with his girlfriend, Tiffany Ross (Tiffany), around 9 a.m. Smith was driving a white Mercury Grand Marquis, which he parked

facing north on the east side of North 33d Avenue, directly in front of Coleman's house. Tiffany remained in the front passenger seat of the Grand Marquis while Smith began to help Coleman move items from the house to a van parked across the street.

At one point during the move, Coleman stepped onto the front porch of his house and saw a northbound two-door silver vehicle slowly swerve around the parked Grand Marquis. A passenger in the silver vehicle was facing backward, toward the south, holding a weapon that Coleman described as a silver .38- or .44-caliber revolver. Coleman first heard shots when the rear end of the silver vehicle was square with the front of the Grand Marquis. He heard approximately five or six shots, a very short pause, and then about nine additional shots. Coleman described the second set of shots as faster than the first and sounding like the shots were being fired from a different gun. The silver vehicle left the scene by continuing north.

Coleman ran outside and saw a red northbound vehicle farther south on North 33d Avenue. Coleman heard the driver yell, "I'm going to get you," followed by a string of expletives. The driver then backed up his vehicle down North 33d Avenue onto Grant Street. Coleman saw the driver stop and say something to a woman before leaving the scene.

Coleman walked south down North 33d Avenue and picked up two 9-millimeter shell casings, which he testified that he then threw and stomped on. He retrieved two more 9-millimeter casings and put them in his pocket. The casings were found near where Coleman had first seen the red vehicle on North 33d Avenue.

Smith was inside the house when the shots were fired. He heard four or five shots, a pause, and then seven to eight more shots. Smith testified that the seven or eight shots were fired back-to-back and were slightly louder than the first set. He went outside and saw that Tiffany had been shot. Tiffany sustained gunshot wounds to the front of her head and her arm. Smith drove her to a hospital, where she died about a month later.

Coleman's girlfriend was near the parked van in which items from Coleman's house were being loaded when the shots were

fired. She heard two shots and then eight or nine shots that were louder and came more rapidly. Following the second set of shots, she heard a voice say, "I'm going to get you," followed by several expletives.

Jasmine Pierce was at a residence located on the west side of North 33d Avenue, just south of Grant Street. After hearing what sounded like four or five shots, she stepped onto the porch. She saw a young man standing outside the driver's-side door of a vehicle that was facing north on North 33d Avenue. He was holding a gun and shooting north at what Pierce described as "her" vehicle. Pierce testified that a vehicle parked outside of a house that people were moving from separated the shooter's vehicle and another northbound vehicle located farther north on North 33d Avenue.

Pierce saw the shooter leave the scene by backing up his vehicle. He stopped in front of a house located on Grant Street, which is to the west of and adjacent to the house where Pierce was visiting. Pierce heard the shooter yell to a woman there to call "so and so" because people from "29th Street" were shooting at him. Pierce did not hear the shooter ask for the police to be called. The shooter then drove away on Grant Street. Pierce thought the shooting was gang related, because "29th Street" was a gang in Omaha. When asked about the color of the shooter's vehicle, Pierce testified that she could not remember and thought it could have been either red or white.

Lowell Berry, who lived about a block south of Pierce's location on North 33d Street, also heard the shots. From his kitchen window, Berry saw a woman running and a red vehicle near Grant Street with a man quickly moving toward it. The man was wearing a coat and came from the front of the vehicle. Berry observed the man enter the north-facing vehicle, back up on North 33d Avenue, and then drive away on Grant Street. Berry did not see who had fired the shots. Police took Berry to the area of North 14th Avenue and Pinkney Street later that morning, and Berry identified a vehicle at that location as the vehicle he had seen on North 33d Avenue. The vehicle was later identified as a maroon Chevrolet Impala.

At approximately 3:30 p.m., on February 10, 2012, Ross gave a statement to police. He said that he went to pick up his

girlfriend in the area of North 33d Avenue and Erskine Street earlier that day and that he was driving a maroon Impala. He parked in front of a blue house, and his girlfriend came to the car. He saw people moving items into a van up the street and said there was a vehicle parked in front of him, and then a white vehicle. A silver vehicle pulled up to the white vehicle, and someone in the silver vehicle started shooting. Ross heard the first shot after a man leaned out of the passenger-side window and turned around toward the white vehicle. Ross heard two different guns being fired and thought there were two people shooting.

Ross saw that the back window of the white vehicle was shattered and that a woman in the white vehicle was hurt. After reversing his vehicle, Ross yelled to a person in a nearby pink house that people from "29th Street" were shooting and to call the police because someone just got hurt. He left the scene by backing up his vehicle and going up Grant Street.

Ross said that he then drove to his grandfather's house near 25th Avenue and Pinkney Street. He briefly went inside, along with his girlfriend. While leaving his grandfather's house, Ross saw the vehicle from which the shots had been fired on North 33d Avenue. He identified the vehicle as a silver "G-six." Ross said people in the vehicle began to shoot at him, so he drove off toward North 14th Avenue and Pinkney Street.

Several people called the 911 emergency dispatch service to report someone in a silver vehicle chasing and shooting at a red vehicle. One caller saw shots fired from the silver vehicle, and another caller reported a vehicle "dumped" at a location on North 14th Avenue. The latter reported that two males had exited the "dumped" vehicle and were hiding behind a garage. This call was made from the area of North 14th Avenue and Pinkney Street, and the vehicle was later identified as a maroon Impala.

Ross said that the driver of the silver car ran him off the road and that its occupants started to chase him, so he ran behind a house. He said he approached a man who was standing outside and reported that people were trying to hurt him and his girlfriend and that he needed to call the police. Ross said the man went inside his house, so Ross went to a second

house and asked to call a tow truck. When he came outside, the police were there and Ross was arrested.

Ross denied ever having a gun or returning fire. Inspection of the Impala revealed a bullet hole in the driver's-side headlight and another in the trunk. At trial, the parties stipulated that Ross had a prior felony conviction.

Anthony Rivera lived on North 14th Avenue, near Pinkney Street. As he was returning to his home on the morning of February 10, 2010, he saw a vehicle in his yard. There were no passengers in the vehicle. Rivera called the police and then saw Ross and a woman come out from behind his garage, which was near a steep, wooded ravine that contained debris. Both persons were wearing big coats, and Ross was holding a shiny object which "looked exactly like a handgun clip." It appeared to Rivera that Ross was trying to conceal the object. Ross said his vehicle was stuck in Rivera's yard and asked for help in pulling it out. Rivera testified that Ross never asked him to call the police or mentioned that people were shooting at him. The vehicle in Rivera's yard was a maroon Impala.

When a police officer arrived at North 14th Avenue and Pinkney Street, he noticed Ross behind a house. Ross peeked around the corner and saw the officer, but then retreated behind the house.

Miguel Barajas lived nearby on North 14th Avenue. On the morning of February 10, 2010, Ross came to his door and asked to use a telephone to call a tow truck, explaining his vehicle had slid into someone's yard. When Ross was on the telephone, Barajas did not hear him mention anything about calling the police or needing help. Barajas observed a police officer come up his driveway and take Ross into custody.

Ross' hands were tested for gunshot residue, but the analyst could not give a definite opinion as to whether Ross had fired a weapon. The analyst explained that particles consistent with gunshot residue were found on Ross' hands but that none contained all three components necessary to definitively identify a particle as gunshot residue.

Several shell casings were found in the area of North 33d Avenue and Erskine Street, including several to the south of the house from which Coleman and his girlfriend were

moving. Two were identified as FC 9-millimeter Luger casings, and the rest were identified as WIN 9-millimeter Luger casings. "WIN" and "FC" are designations for Winchester and Federal Cartridge, which are popular ammunition brands. An ammunition holder and unfired FC 9-millimeter Luger rounds were found in the snow near where the Impala stopped in Rivera's yard. Rivera testified that no one in his household owned a 9-millimeter weapon and that there was no reason for 9-millimeter ammunition to be in his yard.

Three bullet holes were found in the Grand Marquis: one in the driver's-side door, one in the rear driver's-side "wing window," and one in the shattered rear windshield. An examiner determined that the holes in the wing window and rear windshield were made by rounds fired from outside the vehicle. These holes were consistent with someone's shooting from near the spot where the spent shell casings were found on North 33d Avenue, south of where the Grand Marquis was parked.

Several bullet fragments were also recovered from inside the Grand Marquis. A ballistics expert opined that the bullets recovered from the Grand Marquis were fired from at least two different weapons. Upon examination of the bullet fragments found in the Grand Marquis as well as bullet fragments found in Tiffany's body, a 9-millimeter weapon could not be ruled out as one of the weapons.

The jury convicted Ross on all counts. The court sentenced him to 5 to 20 years' imprisonment for discharge of a firearm at a person, building, or occupied motor vehicle; 5 to 20 years' imprisonment for use of a deadly weapon to commit a felony; and 3 to 10 years' imprisonment for possession of a deadly weapon by a felon. The sentences were to run consecutively, with credit for 329 days of time served on the discharge of a firearm conviction.

Ross appealed to the Nebraska Court of Appeals. In a memorandum opinion filed on September 27, 2011, the court concluded that viewing the evidence in a light most favorable to the State, the evidence was insufficient to support the jury's verdicts. The court reasoned:

> The evidence indicates that a witness saw a young man in a white or red vehicle shooting a gun at the Grand

> Marquis; that Ross was holding something shiny in his hand which "kind of looked like a handgun clip"; and that live ammunition was found outside of the red Impala. Other witnesses observed a man shooting from a silver car and ensuing in a chase with a red car, while still other witnesses saw nothing at all, but only heard two rounds of gunshots. Not one witness was able to identify that the shooter was actually in the red vehicle and no one identified Ross, at any time, as holding a gun, shooting a gun, or having possessed a gun during the events that unfolded on February 10, 2010.

The court further noted:

> [T]he testimony from the forensic experts was inconclusive. A gun was never located either at the scene of the shooting or during any subsequent search. The gunshot residue test of Ross' hands indicated that Ross may or may not have discharged a gun on February 10, 2010. No latent fingerprints were found and the testimony regarding the possible trajectories of the bullets, bullet casings, and the number of guns involved were also inconclusive and involved significant speculation as to what location the bullet fragments came from and what type of gun was used.

In conclusion, the court opined that the only evidence proved beyond a reasonable doubt was Ross' 2003 felony conviction. The court reversed Ross' convictions for discharge of a firearm at a motor vehicle, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a felon. The State timely filed a petition for further review, which we granted.

## ASSIGNMENT OF ERROR

On further review, the State assigns error to the Court of Appeals' conclusion that the evidence was insufficient to support Ross' convictions.

## STANDARD OF REVIEW

[1] 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.[1] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2]

## ANALYSIS

Ross was convicted of violating Neb. Rev. Stat. § 28-1212.04 (Supp. 2009), which at the time the shooting occurred provided:

> Any person, within the territorial boundaries of any city, incorporated village, or county containing a city of the metropolitan class or primary class, who unlawfully, knowingly, and intentionally or recklessly discharges a firearm, while in or in the proximity of any motor vehicle that such person has just exited, at or in the general direction of any person, dwelling, building, structure, [or] occupied motor vehicle . . . is guilty of a Class IC felony.

In accordance with this statute, the jury was instructed that the State had to prove beyond a reasonable doubt that (1) on or about February 10, 2010, Ross "discharged a firearm, while in the proximity of any motor vehicle that [Ross had] just exited, at or in the general direction of any person, dwelling, building, structure, or occupied motor vehicle"; (2) that Ross "did so in Omaha, Douglas County, Nebraska"; and (3) that Ross "did so intentionally or recklessly."

The State offered some direct evidence to prove its case against Ross. This included Ross' admissions to police that he was driving a maroon Impala on North 33d Avenue at the time the shots were fired into the white vehicle, that he was aware that the white vehicle was occupied by a woman, and that he was aware she had been injured by gunfire. This evidence placed Ross at the scene where shots were fired at an

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[1] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011); *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011).

[2] *Id.*

occupied motor vehicle. From the testimony of witnesses who heard two sets of shots and the ballistics evidence summarized above, the jury could have concluded that at least two persons fired shots in the general direction of the white Grand Marquis. The critical question in this appeal is whether there is evidence upon which the jury could have concluded beyond a reasonable doubt that Ross was one of the shooters.

[2-5] As the Court of Appeals noted, no witness identified Ross by name as a shooter. The evidence on this point was primarily circumstantial. Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.[3] Circumstantial evidence is not inherently less probative than direct evidence,[4] and a fact proved by circumstantial evidence is nonetheless a proven fact.[5] In finding a defendant guilty beyond a reasonable doubt, a jury may rely upon circumstantial evidence and the inferences that may be drawn therefrom.[6] And as noted above, our standard of review for sufficiency of the evidence to support a conviction does not differentiate between direct and circumstantial evidence; we are required to view the evidence in the light most favorable to the prosecution and to refrain from reassessing the credibility of witnesses and reweighing the evidence.[7] 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.[8]

The record reflects that only two vehicles were in motion on North 33d Avenue at the scene of the shooting during the

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[3] *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140 (1994); *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993).

[4] *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009); *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[5] *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

[6] *Leibhart, supra* note 4; *State v. Miner*, 265 Neb. 778, 659 N.W.2d 331 (2003).

[7] *McCave, supra* note 1.

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

moments immediately before and after it occurred. One was the silver vehicle occupied by unidentified persons, and the other was the maroon Impala operated by Ross, who was the only male associated with that vehicle. The evidence supports an inference that at the time of the shooting, the Grand Marquis was situated generally between the silver vehicle to the north and the Impala to the south, with all three vehicles facing north. There is evidence that shots fired from outside the Grand Marquis entered its rear wing window on the driver's side and rear windshield. This is consistent with shots fired from the rear, or south, of the Grand Marquis.

Ross was 26 years old at the time of the shooting. Pierce testified that she observed a "young man" standing outside the driver's side of a vehicle "shooting towards her car." Although she did not recall the color of the shooter's vehicle, Pierce testified that the driver left the scene by backing up onto Grant Street and then driving away. Other witnesses testified that they observed someone backing up a red vehicle down North 33d Avenue and then onto Grant Street and driving away. Ross told police that he left the scene of the shooting by backing up his vehicle and driving away. There is no evidence of anyone backing up any other vehicle down North 33d Avenue immediately after the shooting. Pierce testified that the young man she had seen firing shots made a reference to "29th Street" as he left the scene. Ross told police that after backing up his vehicle down North 33d Avenue, he stopped near a pink house and shouted that people from "29th Street" were shooting at him. This evidence supports a reasonable inference that Ross was the young man Pierce observed firing shots in the general direction of the occupied Grand Marquis.

The subsequent events at North 14th Avenue and Pinkney Street further reinforce and strengthen this inference. Berry identified the Impala in Rivera's yard as the vehicle he had observed backing up on North 33d Avenue a short time earlier. Rivera observed Ross emerge from behind his garage, holding and attempting to conceal what appeared to be a handgun clip. Although Ross denied having a weapon, an ammunition holder and several unfired 9-millimeter Luger rounds were found in the snow near where the Impala came to rest in Rivera's yard.

Some of the spent shell casings recovered from the scene of the shooting were marked 9-millimeter Luger casings and were consistent with the live rounds found near the Impala. Rivera's testimony negated an inference that the ammunition holder and live rounds belonged to him.

In his statement to police, Ross said that he told persons at the North 14th Avenue and Pinkney Street location that he needed help because people were trying to harm him. But the testimony of Rivera and Barajas indicates that Ross asked only for assistance in removing the Impala from Rivera's yard and that he did not mention a shooting or request any police assistance. When Ross observed a police officer arriving at the scene, he retreated behind a house.

Viewing this direct and circumstantial evidence in a light most favorable to the prosecution, as our standard of review requires, we conclude that a rational trier of fact could have found that upon exiting the Impala, Ross unlawfully, knowingly, and intentionally or recklessly discharged a firearm in the general direction of the Grand Marquis in which Tiffany was seated and that these events occurred in Omaha, Douglas County, Nebraska. Accordingly, the evidence was sufficient to support Ross' conviction for unlawful discharge of a firearm in violation of § 28-1212.04 and his conviction for use of a deadly weapon to commit a felony in violation of Neb. Rev. Stat. § 28-1205(1) (Cum. Supp. 2010). The same evidence, together with the evidence of Ross' prior felony conviction, is sufficient to support his conviction for possession of a deadly weapon by a felon in violation of Neb. Rev. Stat. § 28-1206(1) (Supp. 2009). Accordingly, the Court of Appeals erred in reversing these convictions.

## CONCLUSION

For the reasons discussed above, the evidence was sufficient to support each of the three felony convictions challenged in this appeal. We reverse the judgment of the Court of Appeals and remand the cause to that court with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

# State of Nebraska, appellant and cross-appellee, v. William E. Parminter, appellee and cross-appellant.

811 N.W.2d 694

Filed April 26, 2012. Nos. S-11-765, S-11-766.

1. **Sentences: Appeal and Error.** When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court reviews for an abuse of discretion.
2. **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.
3. **Sentences.** A sentencing court is not limited in its discretion to any mathematically applied set of factors.
4. ____. 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.
5. ____. A sentencing court must have some reasonable factual basis for imposing a particular sentence.
6. **Sentences: Appeal and Error.** In determining whether a sentence is excessively lenient, an appellate court considers the following factors: (1) the nature and circumstances of the offense; (2) the history and characteristics of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent.
7. ____: ____. If an appellate court determines that a sentence is excessively lenient, it may set aside the sentence and do one of the following: (1) remand the cause for imposition of a greater sentence; (2) remand the cause for further sentencing proceedings; or (3) impose a greater sentence.

Appeals from the District Court for Lancaster County: Robert R. Otte, Judge. Reversed and remanded with directions.

Joe Kelly, Lancaster County Attorney, Patrick F. Condon, Daniel D. Packard, and James J. Krauer, Senior Certified Law Student, for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Shawn D. Elliott for appellee.

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

CONNOLLY, J.

The State, through the Lancaster County Attorney, appeals from a district court order sentencing William E. Parminter for aggravated driving under the influence (DUI), third offense, and DUI, fourth offense. The State argues that the sentences were excessively lenient.[1] Because we conclude that the sentences imposed by the district court fail to adequately protect the public from Parminter, the district court's sentences were excessively lenient. We reverse, and remand with directions to impose consecutive sentences of 5 to 5 years in prison.

## BACKGROUND

Shortly before noon on May 14, 2010, Lincoln police stopped Parminter's vehicle. Police had received a report that Parminter was driving on a suspended license.

During the stop, the officer observed beer cans in Parminter's vehicle, many of which were open. In addition to seeing open beer cans, the officer also smelled alcohol on Parminter. Parminter had bloodshot, watery eyes, and the officer noticed that his speech was slurred. Parminter admitted to the arresting officer that he had been drinking. After failing field sobriety tests and a preliminary breath test, police arrested him. A test revealed a breath alcohol content of .13 of a gram of alcohol per 210 liters of breath. The State eventually filed an information charging Parminter with DUI, fourth offense[2]; driving under suspension before reinstatement[3]; and no proof of insurance.[4]

On January 20, 2011, Parminter appeared in court on the charges relating to his May 14, 2010, arrest. An arresting officer from his prior DUI was scheduled to testify against

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[1] See Neb. Rev. Stat. § 29-2320 (Cum. Supp. 2010).

[2] See, Neb. Rev. Stat. § 60-6,196 (Reissue 2010); Neb. Rev. Stat. § 60-6,197.03(7) (Supp. 2009).

[3] See Neb. Rev. Stat. § 60-4,108 (Reissue 2004).

[4] See Neb. Rev. Stat. § 60-3,167 (Reissue 2010).

Parminter. Before testifying, the officer became aware that Parminter's vehicle was parked on the street in front of the courthouse. The officer ran a check on Parminter's license and learned that it had been "suspended and revoked." After the hearing, about 11:45 a.m., the officer watched Parminter exit the courtroom by himself. He followed Parminter and saw him get into the driver's seat of his vehicle and drive away. The officer followed Parminter, turned on his vehicle's emergency lights, and stopped Parminter. During the stop, the officer detected a "strong odor of alcohol." After placing Parminter under arrest, the officer observed a cold, half-empty can of beer in the cupholder of Parminter's vehicle. The officer also saw several empty cans of beer in the car and several full, unopened cans of beer. A test showed Parminter's breath alcohol content to be .238 of a gram of alcohol per 210 liters of breath.

Based on this second incident, the State filed an information charging Parminter with aggravated DUI, third offense[5]; driving during revocation[6]; and no proof of insurance.[7]

Parminter eventually pleaded no contest to both DUI charges in exchange for the State's dropping the other charges. And the State proved his prior DUI's for enhancement. The court sentenced Parminter to 12 to 18 months in prison on the DUI, fourth offense. The court gave him credit for 212 days served. On the aggravated DUI, third offense, the court sentenced him to 12 to 24 months in prison. The court gave him credit for 13 days served. The court ordered that he serve the sentences concurrently.

## ASSIGNMENTS OF ERROR

In both cases, the State contends that the district court erred in imposing an excessively lenient sentence on Parminter.

## STANDARD OF REVIEW

[1,2] When reviewing a sentence within the statutory limits, whether for leniency or excessiveness, an appellate court

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[5] See, § 60-6,196; § 60-6,197.03(6) (Reissue 2010).

[6] See § 60-4,108 (Reissue 2010).

[7] See § 60-3,167.

reviews for an abuse of discretion.[8] 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.[9]

## ANALYSIS

Both of the offenses to which Parminter pleaded no contest—DUI, fourth offense, and aggravated DUI, third offense—are Class IIIA felonies. Class IIIA felonies generally do not have a minimum sentence.[10] But the specific DUI statutes under which the court sentenced Parminter require that Parminter serve at least 180 days in jail.[11] The maximum sentence for a Class IIIA felony is 5 years in prison, a $10,000 fine, or both.[12] Parminter's sentences of 12 to 18 months and 12 to 24 months are within these statutory limits. So we review them for an abuse of discretion.[13]

[3-5] A sentencing court is not limited in its discretion 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] But the court must have some reasonable factual basis for imposing a particular sentence.[16]

[6] In determining whether the sentence is excessively lenient, we consider the following factors: (1) the nature and circumstances of the offense; (2) the history and characteristics

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[8] See *State v. Moore*, 274 Neb. 790, 743 N.W.2d 375 (2008).

[9] *Id.*

[10] Neb. Rev. Stat. § 28-105 (Reissue 2008).

[11] See § 60-6,197.03(6).

[12] § 28-105.

[13] See *Moore, supra* note 8.

[14] *State v. Fields*, 268 Neb. 850, 688 N.W.2d 878 (2004).

[15] *Id.*

[16] See *id.*

of the defendant; (3) the need for the sentence imposed to afford deterrence; (4) the need for the sentence to protect the public from further crimes of the defendant; (5) the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (6) the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (7) any other matters appearing in the record that the appellate court deems pertinent.[17]

The presentence investigation reveals that Parminter has fought a long battle with alcoholism. Parminter, who was 55 at the time of sentencing, reported that he began drinking in his mid- to late teens. Over the years, his dependence on alcohol worsened. He reported that beginning in his thirties, he would drink a 12-pack of beer and some whiskey every day. He reported that even after his May 14, 2010, arrest, he was drinking to the point of intoxication daily, even though he was out on bond under an order that specifically forbade him from consuming alcohol. Further, he reported that he was still craving alcohol as late as April 2011.

Parminter's affliction with the drink has led to multiple DUI charges. In fact, it appears that the current charges are his eighth and ninth charges for DUI. In a substance abuse evaluation completed in 2006, Parminter estimated that he had driven under the influence "'maybe' 100 or more times." Equally unsettling, in 2004, police arrested Parminter twice for DUI—in April and again in May. The presentence report shows that both charges were resolved in February 2006. So, the current case represents the *second* instance in which Parminter has been arrested for DUI while currently on trial for another DUI.

Commendably, Parminter has tried several times to conquer his addiction—unfortunately, his successes have been short lived. Although he may achieve some measure of temporary success, he has always relapsed and fallen into his old (and

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[17] See, Neb. Rev. Stat. § 29-2322 (Reissue 2008); *State v. Rice*, 269 Neb. 717, 695 N.W.2d 418 (2005).

dangerous) habits. As Parminter himself said, "'[i]t seems every four years I get a DUI. I'll be sober for four years, and then something happens.'"

Parminter does seem to have a desire to get treatment. In the proceedings before the trial court, he unsuccessfully moved for a pretrial release so that he could go into inpatient treatment. The record also reflects other attempts at treatment, including several stays at inpatient facilities.

Applying several of the factors in § 29-2322, we believe the trial court's sentences were excessively lenient. In both cases, Parminter was driving drunk without a valid license around noon. In the second case, an officer arrested him leaving a hearing for a prior charge of DUI without a valid license. In that case, his breath alcohol content was nearly three times the legal limit. Moreover, these are Parminter's eighth and ninth charges for DUI. By providence or dumb luck, Parminter has escaped maiming or killing an innocent person. Prior punishments have fallen on deaf ears. Parminter's repeated serious offenses demand a stiff punishment. Further, Parminter is a risk to the public's safety. And "protection of the public requires certainty, not chance, and the only certainty we can perceive is that [Parminter] cannot drink and drive while incarcerated."[18]

[7] If we determine that a sentence is excessively lenient, we may set aside the sentence and do one of the following: (1) remand the cause for imposition of a greater sentence; (2) remand the cause for further sentencing proceedings; or (3) impose a greater sentence.[19] We choose to impose consecutive sentences of 5 to 5 years.

We note that Parminter also cross-appealed, claiming that the district court erred in calculating his credit for time served. But because Parminter's cross-appeal assigned error as to how credit was calculated on *concurrent* sentences and we are now imposing *consecutive* sentences, it is not necessary for us to address his cross-appeal.

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[18] *Rice, supra* note 17, 269 Neb. at 724, 695 N.W.2d at 424.

[19] Neb. Rev. Stat. § 29-2323 (Reissue 2008).

## CONCLUSION

We conclude that the district court abused its discretion in imposing an excessively lenient sentences on Parminter. We reverse, and remand with directions to resentence Parminter to consecutive terms of 5 to 5 years. The district court must also revoke Parminter's license according to the applicable statutes.[20] Finally, the court must give Parminter credit for the time he has already served.[21] We leave it to the district court to determine the credit to Parminter for the time served.

REVERSED AND REMANDED WITH DIRECTIONS.

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[20] See § 60-6,197.03(6) and (7).

[21] See Neb. Rev. Stat. § 83-1,106 (Reissue 2008). See, also, Neb. Rev. Stat. § 29-2324 (Reissue 2008).

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WILLIAM SELLERS, APPELLANT, V.
REEFER SYSTEMS, INC., APPELLEE.

811 N.W.2d 293

Filed April 26, 2012. No. S-11-909.

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. **Workers' Compensation: Stipulations.** Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.

Appeal from the Workers' Compensation Court. Affirmed.

Joel D. Nelson, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellant.

Sonya K. Koperski, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.

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

STEPHAN, J.

Appellant, William Sellers, injured his left knee in the course of his employment with Reefer Systems, Inc., and sought workers' compensation benefits. The Nebraska Workers' Compensation Court determined that Sellers was entitled to future medical care for the knee injury. A review panel of that court affirmed the award, but modified it "to exclude knee replacement surgery at present as the evidence as of the date of trial does not support such finding." The issue presented in this appeal is whether the modification limited Sellers' ability to claim workers' compensation benefits relating to any future knee replacement surgery. We conclude that it did not and affirm the judgment of the compensation court.

## BACKGROUND

On December 8, 2007, Sellers injured his left knee within the course and scope of his employment with Reefer Systems. An MRI showed both structural and degenerative damage. Dr. John Hannah operated on Sellers' knee in February 2008, and Sellers thereafter participated in physical therapy. Sellers also was fitted for a brace and had periodic injections for pain. On June 26, Hannah found Sellers had reached maximum medical improvement. And on June 18, 2009, Hannah opined "it is probable . . . Sellers will need left knee treatment in the future as a result of the aggravated degenerative changes including but not limited to doctor visits, imaging studies, injections, and possibly eventually knee replacement."

On February 23, 2011, the Workers' Compensation Court awarded Sellers temporary and permanent benefits for the knee injury. Citing to Hannah's June 18, 2009, opinion, it also found that Sellers was "entitled to future medical care for treatment of the left knee injury."

Reefer Systems appealed to the review panel, arguing the award of future medical care was improper. Specifically, it argued there was no evidence in the record of sufficient specificity to support the award of future medical treatment. The

panel rejected this argument, noting that Hannah's June 18, 2009, statement that future knee treatment was "probable" met the standard that future care was needed to a reasonable degree of medical probability. The panel reasoned, however, that because Hannah had used the word "possibly" with respect to future knee replacement surgery, "there is not sufficient evidence . . . to support an award of left knee replacement at the present time." It therefore modified the trial court's award of future medical care "to exclude knee replacement surgery at present as the evidence as of the date of trial does not support such finding." Sellers filed this timely appeal.

## ASSIGNMENT OF ERROR

Sellers assigns that the "review panel erred in modifying the award of future medical care so as to exclude the possibility" of Reefer Systems' "ever being required to pay" for knee replacement surgery.

## 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.[1]

## ANALYSIS

It is undisputed that Sellers sustained the knee injury in the course and scope of his employment with Reefer Systems. The Nebraska Workers' Compensation Act[2] provides that an "employer is liable for all reasonable . . . services . . . and medicines *as and when needed*, which are required by the nature of the injury and which will relieve pain or promote and

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[1] *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997).

[2] See Neb. Rev. Stat. § 48-101 et seq. (Reissue 2010 & Supp. 2011).

hasten the employee's restoration to health and employment."[3] The "obvious purpose" of § 48-120 is to authorize the compensation court "to order, as part of a final award, an employer to pay the costs of the medicines and medical treatment reasonably necessary to relieve the worker from the effects of the injury."[4] The provision exists because "[i]t is an obvious fact of industrial life . . . that an injured worker can reach maximum medical improvement from an injury and yet require periodic medical care to prevent further deterioration in his or her physical condition."[5]

Sellers does not contend that he is presently entitled to benefits for knee replacement surgery. But he argues that by modifying the award concerning future medical care, the review panel improperly and prejudicially limited the award's scope to include only that care which "is certainly or probably necessary at the time of trial,"[6] thereby foreclosing compensability of knee replacement surgery even if it is recommended by his physicians in the future. We do not interpret the modification as having that effect.

[2] Before an order for future medical benefits may be entered, there should be a stipulation of the parties or evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work-related injury or occupational disease.[7] That requirement was met in this case by the opinion of Sellers' physician that he will probably require future medical care, including future doctor visits and imaging studies, as a result of the injury to his left knee. Our case law establishes that once it has been determined that the need for future care is probable, the employer is liable for any future

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[3] § 48-120(1)(a) (emphasis supplied).

[4] *Foote v. O'Neill Packing*, 262 Neb. 467, 473, 632 N.W.2d 313, 319-20 (2001).

[5] *Id*. at 474, 632 N.W.2d at 320.

[6] Brief for appellant at 10.

[7] *Foote, supra* note 4; *Adams v. Cargill Meat Solutions*, 17 Neb. App. 708, 774 N.W.2d 761 (2009).

medical care shown to be reasonably necessary under § 48-120, even if the necessity for a specific procedure or treatment did not exist at the time of the award.[8]

In *Foote v. O'Neill Packing*,[9] we considered the scope of an award which included "'all reasonable and necessary medical expenses resulting from [the compensable] injuries'" but did not specify what future treatment would be compensable. The employee sought compensation for medical care he received more than 2 years after the last workers' compensation payment had been made pursuant to the award. The compensation court rejected the claim, finding it was barred by the statute of limitations.[10] We reversed, concluding that because future medical benefits were included in the language of the original award, the statute of limitations did not apply. Instead, "[t]he only limitation on medical benefits set forth in § 48-120 is that the treatment be reasonable and that the compensation court has the authority to determine the necessity, character, and sufficiency of the treatment furnished."[11] We noted that the employer "may contest any future claims for medical treatment on the basis that such treatment is unrelated to the original work-related injury or occupational disease, or that the treatment is unnecessary or inapplicable."[12]

That is essentially what occurred in *Rodriguez v. Hirschbach Motor Lines*.[13] The employee sought benefits for gastric bypass surgery, which he contended was medically necessary because his weight precluded him from undergoing the surgery which was necessary to treat his work-related injuries. The compensation court upheld the employer's objection to liability for this treatment, noting that while future medical benefits had been

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[8] See, *Pearson v. Archer-Daniels-Midland Milling Co.*, 282 Neb. 400, 803 N.W.2d 489 (2011); *Rodriguez v. Hirschbach Motor Lines*, 270 Neb. 757, 707 N.W.2d 232 (2005); *Foote, supra* note 4.

[9] *Foote, supra* note 4, 262 Neb. at 469, 632 N.W.2d at 317.

[10] See § 48-137.

[11] *Foote, supra* note 4, 262 Neb. at 474, 632 N.W.2d at 320.

[12] *Id.* at 476, 632 N.W.2d at 321. See, also, § 48-120(6).

[13] *Rodriguez, supra* note 8.

awarded, the record "'at this point'" did not establish that the gastric bypass surgery was necessary to treat the work-related injuries.[14] We concluded that the denial was not clearly erroneous. Implicit in our holding is that if necessity had been established, the gastric bypass surgery would have been compensable notwithstanding the fact that it was not specifically included in the award of future medical expenses.

Our recent decision in *Pearson v. Archer-Daniels-Midland Milling Co.*[15] reinforces the principle that a broadly worded award of future medical treatment may include treatment which becomes reasonably necessary only after entry of the award. The employee sustained a work-related knee injury. Based upon medical evidence that he would require periodic injections of medication to alleviate pain, oral anti-inflammatory medications, and a brace, the compensation court entered an award in 2008 which required the employer to pay for "'future medical care and treatment as may be reasonably necessary as a result of the accident and injuries . . . .'"[16] The employee subsequently underwent knee replacement surgery, for which he sought compensation. The compensation court denied the request, reasoning that the possibility of the surgery was known at the time of trial and that because compensation for the surgery was not explicitly awarded, it was therefore implicitly denied. Based upon this conclusion, the compensation court did not permit the employee to present evidence that the knee replacement surgery was necessitated by the compensable injury.

We reversed, and remanded for a factual determination of whether the knee replacement surgery fell under the provisions of § 48-120. We viewed the evidence at trial as establishing a possibility that the surgery would be necessary in the future, but insufficient to establish at the time of the award that the surgery would meet the test for compensability established by § 48-120(1)(a). But we concluded that this

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[14] *Id.* at 766, 707 N.W.2d at 240.

[15] *Pearson, supra* note 8.

[16] *Id.* at 403, 803 N.W.2d at 492.

fact did not foreclose a showing of compensability in the future, reasoning:

> 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 [the employee'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—[the employee] was awarded "[a]ny future medical treatment received . . . which falls under the provisions of § 48-120, and which otherwise satisfies all necessary foundational elements thereto . . . ."[17]

Here, the award recited the evidence regarding what future medical treatment would "probably" be necessary, i.e., doctor visits, imaging studies, and injections. It also recited the evidence that knee replacement surgery would "possibly" be required. It then ordered the employer "to pay plaintiff's future medical care as set forth above." To the extent that the award can be read to require payment for knee replacement surgery, it is erroneous, because the necessity for that surgery had not been established. The review panel addressed this narrow point by modifying the award "to exclude knee replacement surgery *at present* as the evidence *as of the date of trial* does not support such finding." (Emphasis supplied.) The modification is entirely consistent with our opinions in *Foote*, *Rodriguez*, and *Pearson*. It does not foreclose Sellers from establishing at a later date that knee replacement surgery is reasonably necessary to treat his compensable injury and is therefore encompassed under the terms of the award. Nor does it foreclose Reefer Systems from challenging any such future claim. Section 48-120(6) provides both parties with a mechanism for resolving any contested issue on this point, which the compensation court would resolve by exercising its continuing jurisdiction over medical benefits to enforce its award.[18]

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[17] *Id.* at 408, 803 N.W.2d at 495.

[18] See, *Foote, supra* note 4; § 48-120(1).

## CONCLUSION

For the reasons discussed, we find no error in the judgment of the compensation court review panel in affirming the award as modified. The judgment is therefore affirmed.

AFFIRMED.

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# STATE OF NEBRASKA, APPELLEE, V. DAVID W. KOFOED, APPELLANT.

817 N.W.2d 225

Filed May 4, 2012. No. S-10-613.

1. **Rules of Evidence: Proof.** Under Neb. Evid. R. 404(3), Neb. Rev. Stat. § 27-404(3) (Reissue 2008), before a court can admit evidence of an extrinsic crime or bad act, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic crime or bad act.
2. **Evidence: Words and Phrases.** Clear and convincing evidence is that amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
3. **Criminal Law: Judgments: Appeal and Error.** An appellate court will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime.
4. **Evidence.** In determining whether gaps in the chain of custody or alterations in the evidence compromise the integrity of the State's evidence as a whole, a court decides the issue on a case-by-case basis, considering the following factors: the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.
5. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is a factor only when the rules make discretion a factor in determining admissibility.
6. **Rules of Evidence: Appeal and Error.** It is within a trial court's discretion to determine the relevance of evidence under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and a trial court's decisions regarding relevance will not be reversed absent an abuse of discretion.
7. **Evidence: Appeal and Error.** When an appellate court reviews the sufficiency of the evidence to support a conviction, it reviews the evidence in the light most favorable to the prosecution. It determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. 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.

8. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.
9. **Convictions: Circumstantial Evidence.** Circumstantial evidence is not inherently less probative than direct 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.
10. **Circumstantial Evidence: Proof.** The State is not required to disprove every hypothesis of nonguilt that is consistent with the circumstantial evidence.
11. **Judges: Recusal: Appeal and Error.** A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.
12. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge is actually biased against a party or if the judge's impartiality could reasonably be questioned.
13. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge because of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. Absent a showing of actual bias or prejudice, a litigant must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness.
14. **Motions for New Trial.** A new trial can be granted on grounds materially affecting the substantial rights of the defendant.
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.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Steve Lefler, of Lefler & Kuehl Law, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

CONNOLLY, J.

## I. SUMMARY

The special prosecutor for Cass County charged the appellant, David W. Kofoed, with tampering with evidence, a

Class IV felony. Kofoed was the supervisor of the Crime Scene Investigation Division for the Douglas County sheriff's office (CSI Division). The State charged that Kofoed falsified DNA evidence during the investigation of Matthew Livers and Nicholas Sampson as suspects in the April 2006 murders of Wayne and Sharmon Stock. The State later dismissed the charges against Livers and Sampson and convicted different suspects for the Stocks' murders.

After a rule 404[1] hearing, the court admitted evidence of an uncharged extrinsic crime. The uncharged extrinsic crime was Kofoed's alleged tampering of DNA evidence during the 2003 investigation of a child's murder. The court found that the State had proved the 2003 act by clear and convincing evidence and had established independent relevance for offering the evidence at Kofoed's trial. It received the uncharged extrinsic crime evidence as relevant to rebutting Kofoed's claim that an accident or mistake accounted for his purported finding of a victim's DNA in a suspect's vehicle during the Stock murder investigation. The court also received the evidence as relevant to whether Kofoed acted with knowledge and intent.

Following a bench trial, the court found Kofoed guilty of evidence tampering during the Stock murder investigation. In summarizing its findings, the court emphasized that the 2003 and 2006 investigations had significant similarities. The court found that in each case, Kofoed had access to the victim's DNA specimens that investigators had previously collected from the crime scene and—under unlikely circumstances and despite other investigators' failure to find such evidence—had found the victim's DNA evidence in a place that corroborated the suspect's statements implicating himself in the crime. The court overruled Kofoed's motion for a new trial. It sentenced Kofoed to a term of incarceration of 20 months to 4 years.

## II. ASSIGNMENTS OF ERROR

Regarding the rule 404 hearing, Kofoed assigns that the court erred as follows:

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

(1) in sustaining the State's motion to admit evidence of his alleged act of evidence tampering in 2003;

(2) in concluding that the State had shown a sufficient chain of custody for the evidence presented to prove Kofoed's tampering of evidence during the 2003 investigation; and

(3) in excluding Kofoed's testimony and his expert's testimony about DNA evidence that was found in different cases under harsh conditions.

Regarding the trial, Kofoed assigns that the court erred in (1) overruling his motion for a directed verdict and (2) finding him guilty.

Regarding his motion for a new trial, Kofoed assigns that the trial judge erred as follows:

(1) in failing to recuse himself from the proceeding; and

(2) in overruling his motion despite his claims that (a) newly discovered evidence existed and (b) an investigator had failed to turn over important notes to the special prosecutor so that the information would be provided to Kofoed's defense counsel.

## III. ANALYSIS

### 1. Sufficiency of the Evidence to Prove Kofoed Falsified Evidence During the Gonzalez Murder Investigation

#### (a) Standard of Review

We have often stated that it is within the trial court's discretion to determine the relevancy and admissibility of evidence of extrinsic crimes or bad acts under rules 403[2] and 404(2). And we will not reverse the trial court's decision in the absence of an abuse of discretion.[3] But the issue in appeals challenging the admission of extrinsic crimes or bad acts is usually whether the trial court correctly determined that the evidence was admissible for a proper purpose or that it was independently relevant for that purpose. But here, the challenge is whether the State proved that Kofoed committed the uncharged extrinsic crime of falsifying evidence.

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

[3] See *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011).

[1,2] Under rule 404(3), before a court can admit evidence of an extrinsic crime or bad act, the State must prove by clear and convincing evidence, outside the presence of the jury, that the defendant committed the extrinsic crime or bad act. Clear and convincing evidence is that amount of evidence that produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[4]

Our standard of review for insufficient evidence claims under rule 404(3) is unsettled.[5] When reviewing the sufficiency of the evidence to support a conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6] 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.[7]

[3] We conclude that the standard for reviewing a sufficiency of the evidence claim regarding a conviction applies equally to whether, under rule 404, the State proved a defendant committed an uncharged extrinsic crime or bad act.[8] But in applying that standard, we consider the State's different burden of proof under rule 404.[9] Thus, we will affirm a trial court's ruling that the defendant committed an uncharged extrinsic crime or bad act if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found with a firm conviction the essential elements of the uncharged crime.

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[4] *State v. Floyd*, 277 Neb. 502, 763 N.W.2d 91 (2009).

[5] Compare *id.*, with *State v. Sanchez*, 257 Neb. 291, 597 N.W.2d 361 (1999).

[6] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[7] *State v. Howard*, 282 Neb. 352, 803 N.W.2d 450 (2011).

[8] Compare *State v. One 1985 Mercedes 190D Automobile*, 247 Neb. 335, 526 N.W.2d 657 (1995).

[9] See § 27-404(3).

Having determined our standard of review, we set out the facts supporting the court's rule 404 ruling on the uncharged extrinsic crime.

(b) Facts Relevant to Uncharged Extrinsic Crime of Falsifying Evidence During the Gonzalez Murder Investigation

In February 2010, the special prosecutor gave notice that he intended to offer evidence of an uncharged extrinsic crime to prove Kofoed's bias, intent, and lack of mistake or accident. Summarized, the notice stated that the evidence would show that in June 2003, Kofoed falsified DNA evidence to corroborate Ivan Henk's confession. In June 2003, Henk confessed that in January 2003, he killed his 4-year-old son, Brendan Gonzalez, and put his body in an apartment building's trash container (dumpster). At a pretrial hearing, the court heard extensive rule 404 evidence regarding these allegations.

The investigation of Brendan's death began on January 6, 2003, when Brendan's mother reported that he was missing. Officers found blood on the garage floor and on a bicycle and recliner in the garage. Kofoed and another CSI Division employee, Clelland Retelsdorf, collected blood specimens from the garage. The CSI Division stored the specimens in its biohazard room until it released the evidence to the Plattsmouth Police Department in June. DNA testing later showed that the blood in several of these samples was virtually certain to have been Brendan's blood.

Despite an extensive search, law enforcement officers did not find Brendan's body. But on June 2, 2003, Henk confessed to investigators that he had killed Brendan. He told them that he had put a comforter over a chair before decapitating Brendan with a knife. He stated that he then wrapped Brendan's body in the comforter and took it to an apartment building's dumpster. After Henk led the investigators to the dumpster, they seized it and took it to a storage building belonging to the Plattsmouth Police Department.

On the same day, June 2, 2003, Kofoed and Retelsdorf processed the dumpster for potential DNA evidence. The evidence showed that a hauling service had emptied it twice a week,

including the previous 6 months. Each time workers emptied it, the contents would roll over the front angled portion of the dumpster. It had flip lids that were often left open, and there was no shelter over it. So the contents were frequently exposed to rain and snow. When the police seized it, the dumpster had fluid in the bottom.

Kofoed and Retelsdorf removed the garbage and water and then sprayed a chemical in the dumpster that produces a color reaction to the presence of blood. They saw several reactions in the bottom of it, particularly where the front side and bottom met at an angle. Kofoed collected wet debris from this area. Retelsdorf described some of the debris that Kofoed collected as caked debris—a thick, dark substance that had built up on the bottom. In the same area, Retelsdorf swabbed the dumpster itself with cotton-tipped sticks.

Kofoed took the collected debris back to the CSI Division's crime laboratory for examination. From the total collection of debris, he separated out two items: a piece of glass and a piece of cardboard about the size of a credit card with dirt and hair on it. He put the rest of the debris in a brown paper bag.

On June 5, 2003, Kofoed filled out and signed a property report, listing six items that he and Retelsdorf had collected from the dumpster. Kofoed labeled the items "S507-33" to "S507-38," or items 33 to 38 for ease of discussion. The report contained the following items:

- Item 33: brown paper bag with the collection of debris from the dumpster;
- Item 34: packaged cotton-tipped sticks that Retelsdorf used to swab the bottom of the dumpster;
- Item 35: packaged piece of glass;
- Item 36: packaged piece of cardboard;
- Item 37: packaged round filter paper, stained pink; and
- Item 38: two packaged round filter papers.

Like the cotton-tipped sticks, investigators use the round filter papers listed in this report to swab evidence for forensic samples. Significantly, Kofoed stated in the property report that he used the filter papers in items 37 and 38 to swab item 33, which was the debris in a paper bag. In addition, he stated that he had tested the filter paper in item 37 with

phenolphthalein, which is a chemical that tests for the presumptive presence of blood. The filter paper showed a pink reaction. The record shows that when phenolphthalein reacts to iron in hemoglobin or other substances, it will produce a pink or purple color.

Retelsdorf testified that he was not present when Kofoed used the filter papers to swab the debris in item 33. But he recalled Kofoed telling him during a telephone conversation that he had swabbed the debris in item 33 with a filter paper. Retelsdorf further stated that sometime before June 5, 2003, Kofoed told him that he had obtained a positive reaction to phenolphthalein for the presence of blood on a filter paper that he had used to swab the debris in item 33.

Also on June 5, 2003, Retelsdorf took items 34 to 38 to a laboratory at the University of Nebraska Medical Center (UNMC) for testing. But he did not take item 33. Kofoed testified that he put item 33 back into the biohazard room and did not send it for testing because of the testing costs. Instead, he sent only the glass and cardboard, as the debris most likely to have DNA evidence. Retelsdorf believed that item 33 would have been stored in the biohazard room from June 2 (when the debris was collected) to June 26, when the CSI Division transferred custody of item 33 to the Plattsmouth Police Department.

Kelly Duffy, an analyst at UNMC's laboratory, tested the items that Retelsdorf brought in on June 5, 2003. She stated that if she had been given item 33 (the bag of debris), she would have separated the debris, swabbed it, and tested the filter papers for the presence of blood. Duffy stated that items 35 and 36 did not test positive for blood, so she did not further test them for DNA material.

Duffy also attempted to extract and amplify DNA material from the cotton-tipped sticks that Retelsdorf used to swab the bottom of the dumpster, but she obtained only a partial DNA profile. She reported finding alleles—variations of the DNA sequencing found at specific genetic markers[10]—for only 2

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[10] See David H. Kaye & George F. Sensabaugh, Jr., *Reference Guide on DNA Identification Evidence*, in Reference Manual on Scientific Evidence 129, 139-47, 199 (Federal Judicial Center 3d ed. 2011).

out of the 16 sites on the DNA molecule that the laboratory analyzes for individual variations. The two alleles that Duffy detected matched Brendan's alleles for those genetic markers, but Duffy stated that the alleles were not uncommon.

In contrast, from the filter papers that Kofoed had documented in the property report as swabs of item 33, Duffy obtained a full DNA profile that matched Brendan's profile at all 16 genetic markers. The probability of an unrelated Caucasian or American Hispanic matching Brendan's profile was infinitesimally small.

In April 2009, the Plattsmouth Police Department transferred custody of the evidence that Kofoed and Retelsdorf had collected during the Gonzalez murder investigation to an agent with the Federal Bureau of Investigation (FBI). The FBI first sent the evidence to its own DNA laboratory. Using phenolphthalein to test for reactions indicating blood, the FBI analyst did not detect blood in any of the debris contained in item 33. In November, the FBI sent the evidence to the Serological Research Institute (SERI), a private laboratory in California for forensic evaluation and DNA analysis.

Two forensic serologists from SERI, Kristi Spittle and Brian Wraxall, testified for the State. Wraxall stated that by using a chemical with slightly higher sensitivity to blood, he and Spittle obtained presumptive positive test results for blood when they tested some of the debris in item 33. But they were unable to find any DNA material in this debris. Nonetheless, because the UNMC laboratory had obtained a DNA profile from Kofoed's filter paper swabs, the SERI analysts attempted to amplify any DNA material that might be in the debris. They used a process called MiniFiler for degraded DNA samples. The MiniFiler process also failed to produce identifiable DNA.

The SERI analysts also failed to detect the presence of human blood on the piece of glass (item 35) or the piece of cardboard (item 36). These items initially tested positive for the presumptive presence of blood. But after the analysts extracted the material, it tested negative for the presence of human blood. So the analysts did not further test them.

In sum, the SERI analysts found only trace amounts of DNA material, from which Wraxall could not obtain even a partial profile or draw conclusions. Wraxall believed that after 6 months in a dumpster exposed to moisture, dirt, and temperatures over 70 degrees, any DNA from Brendan would have been degraded. Wraxall also testified that DNA can degrade if it is exposed to heat or moisture and sometimes when exposed to bacteria or enzymes. But it will remain stable for many years if it is kept dry at a cool temperature. So he opined that if item 33 had been stored in cool, dry conditions after Kofoed purportedly obtained DNA from swabbing it, he could have replicated UNMC's testing results, i.e., obtain a full DNA profile matching Brendan's profile, or at least he could have found some of the same alleles.

In addition to Spittle and Wraxall, the State also submitted a deposition of the chief of the FBI's nuclear DNA unit in Quantico, Virginia. All of these experts testified that it was highly unlikely that investigators would have found nondegraded DNA in the dumpster after 6 months of exposure to the elements and trash.

(c) Kofoed's Contentions

Kofoed makes a twofold claim that the State failed to prove by clear and convincing evidence that he falsified evidence during the 2003 investigation of the Gonzalez murder. First, he argues that the State's forensic evidence failed to show that he falsified evidence. Second, Kofoed contends that the integrity of the State's forensic evidence was compromised because items that were present when Duffy tested the forensic samples in 2003 were missing when they were tested in 2009. As part of this claim, he asserts that gaps in the chain of custody show that an opportunity existed for someone to have tampered with the evidence to convict him of evidence tampering.

(d) Forensic Evidence Was Sufficient to Prove the Uncharged Extrinsic Crime

In determining whether Kofoed had falsified evidence during the 2003 investigation, the court had to resolve two issues: (1) Whether Kofoed took Brendan's blood from the

blood specimens that Kofoed had previously collected from Brendan's house and placed Brendan's blood on the filter paper swab that Kofoed submitted for DNA testing; and (2) whether he falsely claimed to have obtained the blood on that filter paper from swabbing debris taken from the dumpster. Resolving these issues depended upon one factual question: Was it possible for Kofoed to have found Brendan's nondegraded DNA from blood in an open dumpster 6 months after Henk allegedly placed Brendan's body there?

Kofoed argues that the FBI and SERI, the private laboratory employed by the State, tested his collected samples only for the presence of blood, rather than searching for any type of DNA. He argues that the analysts mistakenly concluded that because there was no blood in the samples, there could be no DNA. Alternatively, he argues that the DNA in the samples could have degraded over time.

But Kofoed is mistaken in claiming that the analysts failed to look for any type of DNA material. The record shows that the SERI analysts searched for any DNA material in the debris that tested presumptively positive for blood. It was not necessary for them to analyze the entire contents of item 33 for trace amounts of DNA. Kofoed claimed to have found DNA in debris on or near the bottom of the dumpster that tested presumptively positive for the presence of blood. The evidence showed that the chemical Kofoed used for testing the debris reacts to red blood cells. Although the chemical can also react to other materials, the analysts' focus on determining whether Kofoed could have found DNA on material testing presumptively positive for blood was obviously relevant to whether Kofoed had lied about his collection of evidence.

Additionally, the evidence showed that item 33 was stored in a cool, dry place from the time that Kofoed collected the evidence in 2003 until the SERI analysts tested it in 2009. According to the DNA experts, under those conditions, any DNA in item 33 would have remained stable for a long period. So they should have been able to replicate Kofoed's purported finding of DNA on material that tested presumptively positive for blood. And the record shows that their examination of the evidence was thorough. But they found nothing.

Furthermore, the evidence refuted Kofoed's alternative explanation for the discrepancy between the testing results of his filter paper swabs and the analysts' testing results of the actual debris. Kofoed sent only his filter paper swabs (items 37 and 38) of the debris from the dumpster to the UNMC laboratory for testing. He did not send the debris in item 33 to the laboratory. But at the rule 404 hearing, Kofoed testified that he had actually swabbed the pieces of glass and cardboard (items 35 and 36) with the filter papers that he sent to UNMC for testing (items 37 and 38). And he stated that before sending the evidence to UNMC, he had obtained a presumptive positive test for blood by testing the filter paper in item 37 with phenolphthalein.

But this change in his story did not help Kofoed. Contrary to Kofoed's testimony, Duffy stated that she swabbed items 35 and 36 but that the filter paper did not test presumptively positive for blood. So she did not further test these items for DNA material. The SERI analysts also failed to find human blood on these items.

Furthermore, by the time of trial, testing of item 33 had revealed that the debris from the dumpster did not contain identifiable DNA material. This evidence conflicted with what Kofoed had stated in the property report—that he had obtained a presumptive positive test for blood after swabbing item 33. So the trial court could have concluded that Kofoed contradicted his statement in the property report in an attempt to explain why in June 2003, he did not submit item 33 to the UNMC laboratory for DNA testing. Obviously, if Kofoed had actually obtained a positive test for blood after swabbing the debris from the dumpster, he would have wanted to have item 33 further tested for DNA material.

Kofoed testified that to save money, he did not have the debris in item 33 tested. But this contention was simply not believable. The evidence showed that analysts routinely look for chemical reactions indicating the presence of blood before performing a full DNA analysis of a forensic sample. And Kofoed knew their procedures. Moreover, given the critical role that the DNA evidence played in corroborating Henk's confession, Kofoed's purported concerns about testing costs

were not credible. And the special prosecutor bit into Kofoed's credibility. On cross-examination, he showed that Kofoed had lied to bolster his credibility in other cases. Kofoed admitted that he had falsely stated under oath three times that he had a bachelor's degree in mathematics instead of a general studies degree in political science. The court clearly rejected Kofoed's explanations for not sending item 33 to the UNMC laboratory, and we find no error in that conclusion.

Moreover, three of the State's DNA experts testified that given the conditions of the dumpster, they would not expect nondegraded DNA to be present after 6 months. Even Kofoed's expert conceded on cross-examination that if every time the dumpster was emptied, most of the contents rolled directly over the tested area, an examiner was unlikely to find a full DNA profile from that area. Viewing the evidence in the light most favorable to the State, we conclude it supports a firm conviction that Kofoed could not have obtained from the dumpster a nondegraded DNA sample, fully matching Brendan's genetic profile.

(e) Evidence Was Not Compromised

During closing arguments, Kofoed moved to strike all the testimony regarding items 33 to 38 because the State had failed to established a chain of custody for this evidence. The court overruled that motion. But Kofoed's motion did not focus on the admissibility of any physical evidence. Instead, his claim at trial and on appeal is another sufficiency of the evidence claim. Kofoed argues that the State did not meet its burden in the rule 404 hearing to prove that he tampered with evidence because the evidence that the State relied on was compromised.

[4] In determining whether the State has established a sufficient chain of custody, a court decides the issue on a case-by-case basis, considering the following factors: the nature of the evidence, the circumstances surrounding its preservation and custody, and the likelihood of intermeddlers tampering with the object.[11] Although Kofoed did not challenge the admissibility of physical evidence, we believe that this same standard

[11] See *Glazebrook, supra* note 3.

applies when the issue is whether gaps in the chain of custody or alterations in the evidence compromise the integrity of the State's evidence as a whole.

The most crucial piece of forensic evidence was item 33—the bag of debris from the dumpster. The State established a complete chain of custody for that evidence. It was not tested at the UNMC laboratory but transferred from the CSI Division to the Plattsmouth Police Department's evidence custodian in June 2003 and sent to the FBI in 2009. Plattsmouth's evidence custodian from 2002 to 2007 specifically remembered item 33 and testified that no one had opened the bag or tampered with it.

Kofoed points to conflicting evidence on whether item 33 was completely sealed for 4 days when it was in the FBI agent's possession. But even if the bag was not completely sealed in the agent's possession, Kofoed did not contend that the debris in item 33 was not the evidence that he collected or that the debris was in a substantially different form than when he collected it. He did not present evidence explaining how someone could have removed DNA from the debris he collected. Nor did he show evidence suggesting that someone had tampered with the debris. And we will not presume that official misconduct could have occurred without any evidence or argument showing that misconduct accounted for the testing results.

The lack of custodial documentation for the tested items from the dumpster similarly fails to show that the evidence was compromised. Although the evidence failed to show when the CSI Division transferred custody of the tested items to the Plattsmouth Police Department's evidence custodian, the evidence was in the custodian's possession. The custodian testified that the evidence room was kept locked and that anyone wishing to check out evidence would have signed a property report. Both the evidence custodian and her successor testified that the evidence would not have come in contact with moisture or liquids.

Kofoed also contends that when SERI received his collected samples, the evidence was missing hair from item 36 and tubes containing the tested pieces of his filter paper swabs.

We assume without deciding for this analysis that the FBI did not possess the "microtainers" because it would have sent the tested portions of the filter papers to SERI for additional testing if it had possessed this evidence. But we do not agree that the missing microtainers or the missing hair from item 36 compromised the integrity of the State's other evidence.

It is true that the hair from item 36 was missing when SERI received the evidence. But whether the tested items contained DNA from human hair was not the focus of the investigation. Instead, the analysts were trying to determine whether Kofoed had falsely claimed to have found DNA in debris testing presumptively positive for blood. Because item 36 was taken from the debris in the paper bag (item 33), whether item 36 contained DNA from blood would have been relevant to whether Kofoed could have obtained DNA from material testing positive for blood in item 33. Because the investigation was focused on DNA from blood, the loss of the hair did not compromise the reliability of the testing showing that neither item 36 nor item 33 contained identifiable DNA from blood.

Moreover, in preserving the hair and the microtainers, Kofoed was the primary custodian for the tested items after UNMC's laboratory had performed its testing. Who more than Kofoed would have the incentive to undermine or sabotage the chain of custody after the DNA testing to give himself cover if questions or accusations arose later? Simply stated, Kofoed, as the primary custodian, was the fox guarding the chicken coop. We conclude that the trial court did not err in concluding that the State's evidence was sufficient to prove that in 2003, Kofoed falsified evidence during the Gonzalez murder investigation despite the alleged missing microtainers and the alteration in item 36.

### 2. Court Correctly Excluded Kofoed's Expert Testimony in the Rule 404 Hearing

Kofoed contends that the court erred in excluding part of his testimony and his DNA expert's testimony regarding DNA testing in unrelated cases. Kofoed's offers of proof showed that he and his expert would have testified about cases in which analysts found identifiable DNA in evidence despite the

unfavorable environments in which investigators had found the evidence.

Kofoed's expert was another analyst who worked at UNMC's laboratory. She would have testified about finding DNA evidence on a murder victim's clothing after the passage of 3 months, despite exposure to moisture and dirt. The special prosecutor objected to the evidence as relying on hearsay, irrelevant, and lacking foundation; the court sustained the objections. The court stated that the facts of the other case would not help it decide the merits of the allegations against Kofoed.

Similarly, Kofoed would have testified that he knew from DNA studies that analysts could identify the remains of some individuals who died when the World Trade Center's twin towers collapsed in New York City, despite long-term fires and a massive amount of debris. The court sustained the special prosecutor's foundation and relevance objections to this evidence.

Kofoed argues that these testimonies would have shown that under similar, or more severe, environmental conditions, analysts have found DNA evidence. He contends that his evidence would have refuted expert testimony that he could not have found Brendan's nondegraded DNA in the dumpster.

[5,6] In proceedings where the Nebraska Evidence Rules apply, the rules control the admissibility of evidence; judicial discretion is a factor only when the rules make discretion a factor in determining admissibility.[12] It is within a trial court's discretion to determine the relevance of evidence under rule 403, and a trial court's decisions regarding relevance will not be reversed absent an abuse of discretion.[13]

We agree with the trial court that the circumstances presented in Kofoed's offers of proof were not sufficiently similar to be probative of whether Kofoed could have found Brendan's nondegraded DNA on or near the bottom of a trash dumpster. Again, the State's analysts attempted to determine whether Kofoed could have found nondegraded DNA from blood cells allegedly deposited on debris in a trash

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[12] See *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012).

[13] See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

dumpster—not DNA deposited on a victim's clothing or DNA from a human body.

The water, dirt, and trash in a dumpster presented a different fact pattern. Even if water in the dumpster did not wash out any alleged blood in it when the dumpster was tipped, Wraxall testified that the combination of dirt and water in the dumpster would have caused any DNA to degrade. He further stated that blood cells rupture and break up in the presence of water. Finally, even Kofoed's expert conceded that if every time the dumpster was emptied, most of contents rolled directly over the tested area, an examiner was unlikely to find a full DNA profile from that area. Kofoed's offers of proof did not show that DNA could survive in a nondegraded form under similar circumstances. His assignment of error is without merit.

### 3. Sufficiency of the Evidence to Prove That Kofoed Falsified Evidence During the Investigation of the Stocks' Murders

Kofoed argues that the court erred in overruling his motion for a directed verdict and finding him guilty of tampering with evidence. The charge stemmed from Kofoed's claim that he found Wayne Stock's blood in the vehicle that investigators suspected Matthew Livers and Nicholas Sampson had driven to the Stocks' residence on the night that they were murdered. The State had to prove that on or about April 27 or sometime on or before May 8, 2006, Kofoed falsified the DNA evidence during the investigation of Livers and Sampson for their suspected role in the Stocks' murders.

#### (a) Standard of Review

[7] When an appellate court reviews the sufficiency of the evidence to support a conviction, it reviews the evidence in the light most favorable to the prosecution. It determines whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.[14] And whether the evidence is direct, circumstantial, or a

[14] See *McCave, supra* note 6.

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.[15]

(b) Additional Facts

In 2006, on April 16 or in the early morning of April 17, the Stocks were murdered in their home. Their bodies were discovered on April 17. They had both been shot in the head. With Kofoed in charge, investigators from the CSI Division processed evidence in the house for 3 days. Investigators collected blood specimens and stored them in the CSI Division's evidence room or biohazard room.

Investigators initially focused on Livers and Sampson as suspects. Sharmon Stock's family members told investigators that they suspected Livers was involved. Livers is Wayne Stock's nephew, and Sampson is Livers' cousin. Witnesses had reported seeing a car near the Stocks' residence in the early morning of April 17, 2006. Their description of the car matched the general description of a car owned by William Sampson (William). William is Sampson's brother.

Investigators believed that because the crime scene was covered in blood, the perpetrators would have transferred blood to their vehicle after committing the crime. On April 19, 2006, State Patrol officers seized William's car, a Ford Contour. That same day, the State Patrol towed it to the CSI Division's garage. Investigators wanted to see if the car had either of the Stocks' blood in it.

On April 19 and 20, 2006, Christine Gabig, a forensic scientist with the CSI Division, thoroughly processed William's car for DNA evidence. Many parts of the car reacted to a chemical test to locate blood. But Kofoed told another investigator that because William worked in heavy construction, the chemical was probably reacting to iron in dirt instead of iron in blood. UNMC's laboratory later found no blood in the samples and swabs that Gabig collected from William's car. William testified that he had never loaned his car to Livers or Sampson. Gabig also found no blood in Sampson's vehicle.

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[15] See *Howard, supra* note 7.

Investigators had also sent in items from the Stocks' residence for DNA testing, including a gold ring with an inscription, which they had found on the kitchen floor. The gold ring was the pebble that started a landslide. This lead ultimately led investigators to Gregory Fester and Jessica Reid, who later pleaded guilty to murdering the Stocks.[16] Through inscription records, investigators eventually traced the ring to the man whose pickup Fester and Reid had stolen; they learned that the man had put his ring in the pickup's glove box.

UNMC's laboratory also tested a marijuana pipe found in the Stocks' driveway. On April 25, 2006, the CSI investigators learned that the pipe contained DNA from two people. The laboratory's June 29 written report tied the DNA on the ring and the pipe to Fester and Reid and excluded Livers, Sampson, and William as contributors. Nothing in the record shows that in late April or early May 2006—when Kofoed was accused of falsifying the blood evidence that he claimed to have found in William's car—investigators knew about Fester and Reid. Nor did they know of items found at the Stocks' residence that contained DNA evidence that pointed to other perpetrators and excluded Livers and Sampson as contributors.

On April 25, 2006, Livers volunteered to be interviewed by law enforcement officers and to take a polygraph test. During the interrogation, he confessed that he and Sampson had killed the Stocks and that one of them had thrown in the back seat of the car the shotgun they had used. The testimony of several witnesses suggests that Livers also stated he and Sampson had used William's car. Livers recanted his statements the next day.

Investigators were frustrated. They had a confession that involved William's car but the CSI Division investigators had not found any blood evidence that linked Livers and Sampson to the crime. The investigators were pressuring the CSI Division to retest items for blood evidence.

On April 27, 2006, William Lambert, a criminal investigator with the Nebraska State Patrol, asked Kofoed to recheck

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[16] See, *State v. Fester*, 274 Neb. 786, 743 N.W.2d 380 (2008); *State v. Reid*, 274 Neb. 780, 743 N.W.2d 370 (2008).

the back seat of William's car for gunshot residue to verify Livers' statements. Kofoed completed a request form to have Retelsdorf take photographs of the back seat. Retelsdorf drove the CSI Division's van to the impound lot, where he met Kofoed. A 10-foot barbed wire fence and locked gate enclosed the impound lot.

Kofoed's reexamination of William's car is the pivotal event for the charged crime. Much of the evidence focused on Kofoed's inconsistent statements about his activities; these statements were in his reports and made at different times during the investigation. Kofoed's statements also conflicted with Retelsdorf's statements about the events of April 27, 2006.

Kofoed told investigators that he decided to swab areas of the car that Gabig might have missed and that he had previously reviewed Gabig's work to learn what areas she had already swabbed. He claimed to have set up a clean processing area on the floor of the CSI Division's van by the side door. He reported that he used a high intensity light to examine the driver's compartment before swabbing it. He stated that after obtaining about five negative swabs, he swabbed under the dashboard with a filter paper. This swab produced a presumptively positive test for blood. He laid the positive filter paper on an envelope and asked Retelsdorf to test the same area.

In contrast, Retelsdorf said that he parked the van 20 to 30 feet away from William's car. Nor did he bring any equipment to process the car for blood evidence because he knew that Gabig had already done this and he believed that he and Kofoed were going to recheck the back seat for signs of a gun. While Retelsdorf was examining the back seat, he could see Kofoed by the driver's-side open door. Retelsdorf did not see Kofoed using a light as Kofoed later claimed. Nor did he see any items that would indicate that Kofoed was processing the car for DNA evidence.

After Retelsdorf put his camera back in the van, he asked Kofoed to look at an area of the back seat, which Kofoed did. Almost immediately after returning to the driver's-side open door, Kofoed told Retelsdorf that he had just obtained a presumptively positive test for blood. Retelsdorf did not see

Kofoed swab the car. But Kofoed showed Retelsdorf a filter paper with a pink positive reaction and pointed to where he had swabbed the car under the dashboard. Contrary to Kofoed's statements, Retelsdorf still saw no items for processing evidence, and he did not see a stain on the car's interior. But he swabbed the area that Kofoed had indicated and obtained a negative result. Kofoed opined that he had probably consumed the entire sample.

After examining the car, Kofoed told Retelsdorf that they would each write their own reports. Retelsdorf completed the report of his photograph activities on the same day, April 27, 2006. Retelsdorf also reported in the CSI Division's event log that he took photographs of the car on April 27. Unlike Retelsdorf, Kofoed dated his report May 8, 2006. And he made statements about his processing of William's car that directly conflicted with Retelsdorf's report and other evidence as follows:

> *On 08 May 2006 at 1800 hours*, CSI Division Commander KOFOED processed the driver's side dash board of a Ford Contour . . . utilizing filter paper and distilled water. The vehicle was secured in the [Douglas County Sheriff's office] impound lot . . . .
>
> . . . .
>
> KOFOED initially examined the driver's side compartment utilizing high intensity oblique lighting. Upon completion of the initial examination KOFOED swabbed the bottom edge of the driver's compartment dashboard below the steering wheel utilizing filter paper and distilled water. A presumptive test for blood was conducted on a section of the filter paper by employing phenolphthalein. The presumptive test indicated positive.
>
> . . . .
>
> [The filter paper] will be secured in the CSI Division . . . until forwarded to [UNMC's laboratory].

(Emphasis supplied.)

Kofoed's date of his activities was obviously false. And in contrast to his statement in his report that the filter paper would be secured, the evidence logs showed that Kofoed never put the filter paper that he collected in the CSI Division's evidence

rooms. Also, in contrast to Retelsdorf's report, Kofoed did not state in his report that Retelsdorf had been with him. He reported going to the car alone for evidence collection.

Kofoed's property report showed that he sent the positive filter paper swab to UNMC's laboratory on May 9, 2006. The laboratory's June 29 report included its analysis of the filter paper. It generated a DNA profile that completely matched Wayne Stock's DNA profile at all the loci obtained. Kofoed later admitted that besides his one filter paper swab—from under the dashboard of William's car—none of the approximately 450 pieces of evidence that the investigators had processed contained DNA evidence that tied Livers or Sampson to the crime.

In January 2007, under plea agreements, Fester and Reid both pleaded guilty to two counts of second degree murder. In May 2008, the FBI began investigating Kofoed. In September 2008, an FBI agent went to the Cass County Property and Evidence Division and viewed a paper bag containing a shirt stained with Wayne Stock's blood. The CSI Division had transferred this evidence to Cass County in June 2006. The sealed bag had been opened and resealed with tape. It had Kofoed's initials and identification code written on the tape used to reseal the bag but no date. The CSI investigator who originally marked and sealed the bag testified that Kofoed's initials were not on the bag when he placed it in the CSI Division's biohazard room.

(c) Analysis

Kofoed argues that the State's circumstantial evidence did not convincingly support an inference that he falsified DNA evidence. He contends that because the circumstantial evidence was weak, the more logical explanation for his finding of Wayne Stock's blood in William's car was accidental contamination from the crime scene.

[8,9] Circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact exists.[17] But circumstantial

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[17] *State v. Blackman*, 254 Neb. 941, 580 N.W.2d 546 (1998).

evidence is not inherently less probative than direct evidence.[18] 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.[19]

Kofoed contends that it did not make sense for him to have planted DNA evidence on April 27, 2006, when there were hundreds of pieces of evidence yet to be tested. We disagree. The evidence shows that law enforcement officers were focused on Livers and Sampson as suspects and were pressuring the CSI Division to find corroborating evidence to verify Livers' recanted confession. As the court found, there was no evidence that the CSI investigators knew before May 8 that the DNA on items from the Stocks' residence pointed to other perpetrators and excluded Livers and Sampson as contributors. So Kofoed did not know that the DNA evidence he falsified would be inconsistent with the DNA testing results that were issued on June 29. And even if he had learned that unknown persons were involved in the crime, that evidence would not necessarily have precluded Livers' or Sampson's guilt.

Moreover, Kofoed's deceit was amply demonstrated by the false statements that he made in his reports and the inconsistent statements that he made to investigators. First, Kofoed originally told FBI agents that before he obtained the positive filter paper swab from under the dashboard of William's car, he first took about four filter paper swabs that tested negative for blood. But he later told a grand jury that he obtained the negative tests results from using cotton-tipped sticks instead of filter paper swabs. As the special prosecutor argued, Kofoed had to change his original story that he had used only filter papers to swab William's car because it was inconsistent with his claim that the filter papers in the presumptive blood testing kit must have been contaminated with Wayne Stock's DNA from the crime scene. Under his original story, Kofoed could not explain why only the fifth filter paper in the testing kit

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

[19] *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

was contaminated but the first four were not. But the more significant inconsistencies were those between the statements in Kofoed's reports and Retelsdorf's report.

As noted, contrary to the statement in Kofoed's report, he never logged his positive swab into the evidence room. And contrary to Retelsdorf's report, Kofoed falsely stated that he had obtained the presumptively positive swab on May 8, 2006, not April 27. Kofoed argued only that he must have made a mistake on his report.

But the log omission and the false May 8, 2006, date for his evidence collection were not mistakes. He put the same false date on the property report, the evidence envelope with the filter paper, and the event log. Instead, the false date he used, the omission of Retelsdorf's presence from his report, and the log omission showed that Kofoed did not want his collection of the blood specimen linked to his examination of William's car with Retelsdorf. He had to avoid this connection because Retelsdorf knew that Kofoed had not tested swabs for blood on April 27.

The false statements strongly supported an inference that Kofoed lied to conceal that he was sitting on evidence that might be needed to tie Livers and Sampson to the crime. Kofoed did not know when or if he would need that evidence. And it was only after UNMC's laboratory reported on May 4, 2006, that several items from the Stocks' residence had tested negative for blood that Kofoed claimed to have found a blood specimen in William's car.

The inferences that the trial court could reasonably draw from Kofoed's false statements were also consistent with other circumstantial evidence of his guilt. Kofoed not only had access to Wayne Stock's blood specimens, but the evidence supported a finding that he had actually accessed a sealed bag containing a shirt stained with Wayne Stock's blood and resealed it with his initials. Additionally, Kofoed's review of Gabig's work on William's car before reprocessing it for DNA evidence supported an inference that he was ensuring that he did not find DNA evidence in an area that she had already tested. Finally, the most damning evidence of Kofoed's guilt was William's testimony that he had never

loaned his car to Livers or Sampson. No evidence contradicted that testimony.

We reject Kofoed's claim that the circumstantial evidence showing that he falsified evidence was weak. We also reject Kofoed's three alternative theories: (1) Livers and Sampson were actually involved in the crime and used William's car; (2) someone besides Kofoed planted the evidence; or (3) the filter paper that Kofoed used to swab the car was contaminated with Wayne Stock's blood from the Stocks' residence. Kofoed's theories bring to mind the old saw that theories are free; facts are precious.

[10] A trier of fact must weigh the State's evidence of guilt in the light of the defendant's presumption of innocence: "Whether evidence is circumstantial or direct, 'a [fact finder] is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference.' . . . 'If the [fact finder] is convinced beyond a reasonable doubt, we can require no more.'"[20] The State is not required to disprove every hypothesis of nonguilt that is consistent with the circumstantial evidence.[21] Here, however, the court correctly determined that the evidence refuted Kofoed's alternative theories.

First, the court rejected Kofoed's theory that Livers and Sampson were involved in the murders despite the State's dismissal of the charges against them and Fester's and Reid's convictions for the crime. The court found that when deposed by Kofoed in 2010, Reid clearly stated that only she and Fester killed the Stocks. The court also found credible William's testimony, which his wife corroborated. The court specifically noted William's testimony that he was not particularly close to Sampson or to Livers and that he had never loaned either of them his car. Finally, the court noted that even Kofoed had

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[20] *State v. Pierce*, 248 Neb. 536, 547, 537 N.W.2d 323, 330 (1995), quoting *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 (1954). See, also, *State v. Shambley*, 281 Neb. 317, 795 N.W.2d 884 (2011), citing *Mantell v. Jones*, 150 Neb. 785, 36 N.W.2d 115 (1949).

[21] See, *State v. Jacob*, 253 Neb. 950, 574 N.W.2d 117 (1998), *abrogated on other grounds, Nolan, supra* note 12; *Pierce, supra* note 20.

stated that the only possible explanation for his finding of the blood evidence was cross-contamination of the filter paper. The court concluded that even if a viable alternative explanation for Kofoed's finding of the blood evidence were not available, it would reject the argument that Livers and Sampson were involved in the murders.

Second, the court rejected Kofoed's theory that someone besides him could have planted the evidence. The court stated that investigators had seized and secured the car, with limited access to anyone. More important, it found that after Gabig extensively processed William's car on April 19 and 20, 2006, no one requested further processing of the car to search for DNA evidence. So the court concluded that no one would have planted blood evidence in an obscure location of the car thinking that it would be discovered when the car was reprocessed for DNA evidence.

The court also rejected the possibility of another officer's contaminating William's car. It found that the special prosecutor meticulously established (1) who was in the car and how it was processed and (2) the officers processing the car had followed correct procedures to avoid contaminating it. The court found that the officers had not contaminated William's car with DNA from the Stocks' residence.

Finally, the court rejected Kofoed's theory that the presumptive blood testing kit was contaminated from the crime scene. But Kofoed contends that the court was wrong. Relying on the testimony of his coworker, Gabig, Kofoed argues that the risk of cross-contamination from a crime scene can never be eliminated even if investigators properly handled their equipment. Followed to its logical conclusion, Gabig's opinion would mean that DNA evidence is unreliable in any criminal case. We reject that argument.

The evidence showed that CSI investigators are trained in techniques to avoid cross-contamination of DNA evidence at a crime scene, both in their collection of evidence and their use of equipment. They are also trained to properly dispose of protective gloves and booties and to clean their equipment, including presumptive blood testing kits, to avoid contaminating evidence at a different location after leaving the crime scene.

Gabig testified about the correct way to use these kits without contaminating them. And she did not cite instances in which the filter papers in testing kits had been cross-contaminated from a crime scene despite investigators' proper handling of the kits. Finally, the special prosecutor impeached Gabig with her deposition testimony that the risk of contamination was miniscule or nonexistent if investigators properly used disposable gloves when handling these testing kits.

More important, the court specifically found no CSI investigators had used these testing kits at the Stocks' residence to test stains for blood. That finding is supported by the evidence. We also note Kofoed never expressed his cross-contamination theory until the summer of 2006, only after it became apparent that someone else had committed the crime and that Wayne Stock's blood could not have been in William's car. And even after Kofoed expressed his cross-contamination theory to coworkers, he never initiated an investigation to determine whether the testing kits were contaminated or whether investigators had used the kits at the Stocks' residence.

Most important, we agree with the court that Kofoed's claim of a mistake in using the testing kits was not plausible in the light of the evidence proving that he falsified DNA evidence in 2003. The court emphasized the significant similarities between Kofoed's 2003 finding of Brendan's DNA and his 2006 finding of Wayne Stock's DNA:

- In each case, law enforcement officers had identified the person who they believed was responsible for the crime and the suspect had made statements to officers implicating himself;
- In each case, officers were having difficulty finding evidence to corroborate the suspect's statements;
- In each case, under "unusual or unlikely circumstances," Kofoed obtained a victim's DNA specimen that was not recovered by other investigators processing evidence and that corroborated the suspect's statements;
- In each case, Kofoed had access to the victim's blood because the CSI Division had performed the initial crime scene investigation and stored items stained with the victim's blood in its evidence room.

We conclude that the court did not err in determining that cross-contamination did not account for Kofoed's finding of Wayne Stock's blood in William's car. The evidence strongly supported an inference that Kofoed's alternative theories arose in hindsight from his need to explain how he had found this evidence despite later evidence pointing to Fester and Reid as the perpetrators. In short, he was tangled in his own web of deceit. We conclude that cross-contamination was not a reasonable possibility under these facts. Viewed in the light most favorable to the State, the circumstantial evidence fully supports the court's conclusion that the State had proved beyond a reasonable doubt that Kofoed falsified evidence to corroborate Livers' recanted confession.

## IV. MOTIONS FOR NEW TRIAL AND TO RECUSE JUDGE

In April 2010, after the court found Kofoed guilty, he moved for a new trial. He claimed that the court should grant him a new trial because of newly discovered evidence. Kofoed's allegations that are relevant to his new trial claims on appeal included the following:

(1) Lambert, the State Patrol investigator in the Stocks' murder case, did not turn over to the special prosecutor his notes about a conversation that Lambert had with Darnel Kush, an investigator at the CSI Division who worked under Kofoed. Kofoed alleged that after Kush contacted Lambert, Lambert contacted the FBI about Kofoed. Kofoed alleged that Lambert's notes about his conversation with Kush constituted material that under *Brady v. Maryland*,[22] he was entitled to receive from the special prosecutor.

(2) Douglas County Deputy Sheriff Charles Rehmeier was the trial judge's cousin, and Rehmeier was a supporter of Kush. If the trial judge had disclosed his relationship to Rehmeier, Kofoed "would have determined whether to ask the Court to recuse itself."

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[22] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

(3) Cass County Deputy Sheriff Earl Schenck, Jr., who was assigned to the Gonzalez and Stock cases, had told an individual that "'blood would be found'" in the dumpster and under the Ford Contour's dashboard, "leading to the clear impression" that Schenck knew about the evidence before it was discovered.

Kofoed also moved to recuse the trial judge from further proceedings because of the judge's undisclosed relationship to Rehmeier. The court heard evidence on these motions in April 2010.

### 1. Evidence on Kofoed's Motions for New Trial and Recusal

Kush had worked in the CSI Division since 1995 and worked under Kofoed beginning in 2000 or 2001. The evidence showed that Kush believed Kofoed would lie to promote himself and that she had filed complaints against him. She also felt Kofoed was harassing her, and she had asked for a transfer to "get away" from him. Because of her past complaints, she was afraid to report her concerns about the Stock case. She believed Kofoed would say that she was trying to create problems for him. In October 2007, she contacted Lambert because she had formerly worked with him. In December, Lambert and Kush contacted an FBI agent about Kofoed. Kofoed claimed that the special prosecutor had to give him Lambert's notes about his conversations with Kush.

Regarding the motion to recuse, Rehmeier testified that he was the trial judge's second cousin. He said that he had last seen the judge 25 years earlier. Rehmeier's father had introduced him to the judge at a funeral. Rehmeier testified that he had not directly or indirectly discussed Kofoed's case with the judge. Kofoed presented evidence to show that after Kofoed was put on leave, Rehmeier told Kush that she had done the right thing and to "hang in there."

Finally, Kofoed questioned Schenck about conversations he allegedly had during the Gonzalez and Stock murder investigations. Schenck was asked whether he had told a woman he knew that blood would be found in the dumpster. The woman was one of Schenck's estranged wife's beauty salon customers.

Schenck denied having that conversation with the woman. He also denied having a conversation with his wife in the woman's presence in which he stated that he knew blood would be found under the dashboard of William's car. The woman did not appear to testify.

### 2. Trial Court's Findings and Rulings

The court stated its findings from the bench. Regarding the motion to recuse, the court first noted that a trial judge is not a competent witness to speak to an issue raised about the judge's contacts with someone involved in the case.[23] But from the evidence presented, the court made the following findings: (1) Neither Rehmeier nor Kush had been a witness in the case, (2) no one had mentioned Rehmeier's name in the hearings or at trial, (3) no evidence showed that Rehmeier had participated in the investigation or talked to the FBI, and (4) none of the court's findings at the close of trial involved Kush or Rehmeier.

The court further stated that although Rehmeier shared the judge's last name, the evidence showed that Rehmeier was the judge's distant relative and that Rehmeier had not had any contact with the judge in 25 years. The court concluded that no reasonable person who knew the circumstances of the case would question the judge's impartiality. It overruled the motion to recuse and the motion for a new trial to the extent it was premised on his relationship to Rehmeier. Additionally, the court concluded that the other issues Kofoed had raised involving Lambert, Schenck, and Kush were issues of credibility that would not have substantively changed how the case was decided. It overruled Kofoed's motion for a new trial.

### 3. Motion to Recuse

Kofoed argues that the court erred in overruling his motion to recuse because the trial judge had a duty to disclose his family relationship to Rehmeier. Kofoed argues that if the court had disclosed this information, he would not have waived a jury trial and potentially would have asked the judge to recuse himself from presiding over the trial.

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[23] See Neb. Evid. R. 605, Neb. Rev. Stat. § 27-605 (Reissue 2008).

(a) Standard of Review

[11] A motion to recuse for bias or partiality is initially entrusted to the discretion of the trial court, and the trial court's ruling will be affirmed absent an abuse of that discretion.[24]

(b) Analysis

[12,13] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge is actually biased against a party or if the judge's impartiality could reasonably be questioned.[25] A defendant seeking to disqualify a judge because of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[26] Absent a showing of actual bias or prejudice, a litigant must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness.[27]

Kofoed does not claim that the judge's statements or conduct showed actual bias. Instead, he claims that a reasonable person would have questioned the judge's impartiality. Section 5-302.11(A) of the judicial code sets out specified circumstances when a judge's impartiality could be reasonably questioned. Some of those circumstances include a judge's personal relationship to a person connected with the litigation. Section 5-302.11(A)(2) disqualifies a judge or requires disclosure of the disqualifying relationship in the following circumstances:

> The judge knows that the judge, the judge's spouse or domestic partner, or a person *within the fourth degree of relationship* to either of them, or the spouse or domestic partner of such a person is:
>
> (a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

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[24] *Huber v. Rohrig*, 280 Neb. 868, 791 N.W.2d 590 (2010).

[25] Neb. Rev. Code of Judicial Conduct § 5-302.11 (previously found at Neb. Code of Judicial Conduct § 5-203(E)); *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

[26] See *Nolan, supra* note 12.

[27] E.g., *id*.

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

The court specifically found that Rehmeier and Kush were not witnesses and that Rehmeier's name was never mentioned during the trial. The record supports that finding and thus fails to show that the trial judge could have known that Rehmeier was even a potential witness. More important, the "fourth degree of relationship" is a term defined under the code to include the following family relationships: "great-great-grandparent, great-uncle or great-aunt, brother, sister, great-great-grandchild, grandnephew or grandniece, or first cousin." The code does not disqualify judges for their relationship to a second cousin who has some connection to the litigation, even if that connection had been shown. So Rehmeier was not a person whose relationship to the judge, or whose interests or connection to the litigation, could have triggered this provision.

Even apart from the lack of any showing that the circumstances set out in the code applied, no reasonable person would have questioned the trial judge's impartiality based on his distant relationship to Rehmeier. Rehmeier's contact with the judge was limited to a long-ago introduction. And Kofoed introduced no evidence to suggest that Rehmeier had communicated with the judge about the case or anything else. This assignment of error has no merit.

### 4. Motion for a New Trial

[14,15] A new trial can be granted on grounds materially affecting the substantial rights of the defendant.[28] 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.[29]

Kofoed's claim that he would not have waived a jury trial if he had known about the judge's relationship to Rehmeier fails

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[28] *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

[29] *Id.*

for the same reason that his recusal claim fails. Because a reasonable person would not have questioned the judge's impartiality, Kofoed cannot show that demanding a jury trial would have produced a substantially different result.

In addition to his claim regarding Rehmeier, Kofoed makes the following claims about Lambert: Kofoed contends that Lambert's notes should have been disclosed under *Brady*.[30] He argues that if Lambert had disclosed his notes about Kush, he would have called Kush to testify. His strategy would have changed to "whether or not it was reasonable to think that either Lambert or Kush, amongst others, could have planted evidence to fulfill their wish of destroying [Kofoed]."[31] His argument about Schenck's alleged statements to his estranged wife's customer is apparently the same—he would have used this evidence to bolster his claim that someone else planted the DNA evidence in William's car. Kofoed grasps at twigs thinking they are redwoods.

First, Kofoed did not prove that Schenck stated to anyone that he knew DNA evidence would be found during the Gonzalez and Stock murder investigations before it was found. Schenck denied making these statements, and Kofoed's witness did not appear to testify.

Second, even if Lambert's notes were material evidence that Kofoed was entitled to know about—a question we need not decide—under *Brady*, he must also show a reasonable probability that if the evidence had been disclosed to the defense, the result of the proceeding would have been different.[32] A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.[33] Kofoed cannot satisfy that standard.

Kofoed's claim of prejudice from not knowing about either Lambert's notes or Schenck's alleged statements is that he was not given the opportunity to prove that someone else

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[30] See *Brady, supra* note 22.

[31] Brief for appellant at 46.

[32] *McGee, supra* note 19.

[33] *Id.*

could have planted the DNA evidence in William's car. This theory is the same "mystery person" theory that he presented at trial.

But this theory was soundly rejected by the trial court, and we agree with the court that this "new" evidence would not have changed the results. Nor does it undermine confidence in the outcome. It is inconsequential whether Kofoed claims that the mystery person's motive for planting the evidence was to frame Livers and Sampson, or to frame Kofoed. The fundamental problem with his theory exists in either circumstance: How could someone else have known Kofoed would search for DNA evidence in an obscure part of William's car when no officer had requested the car to be reprocessed for DNA evidence? Who, besides Kofoed, would have known that he would take it upon himself to do so?

Throughout this prosecution, Kofoed's defense strategy has been an attempt to deflect evidence of his guilt by floating theories of a mystery perpetrator or careless investigators. At the rule 404 hearing, at trial, and on appeal, he has claimed that someone else could have tampered with the evidence to frame him. The irony of his defense is rich, and his theories plentiful. But "[t]here is nothing more horrible than the murder of a beautiful theory by a brutal gang of facts."[34] The court did not err in overruling Kofoed's motion for a new trial.

## V. CONCLUSION

Regarding the extrinsic crime at the rule 404 hearing, we conclude that the evidence was sufficient to prove that in 2003, Kofoed falsified DNA evidence during the Gonzalez murder investigation. Gaps in the chain-of-custody documentation did not undermine the integrity of the forensic evidence when the record shows that this evidence was in the evidence custodian's possession and stored under proper conditions during the relevant time period. Similarly, alterations in the forensic evidence after it was tested did not compromise the evidence. The alterations were not relevant to the testing results, and Kofoed was

[34] Frequently ascribed to 17th-century French writer, François Duc de La Rochefoucauld.

a primary custodian in the chain of custody. The court did not err in excluding expert testimony about circumstances in which investigators and analysts were able to find DNA evidence in a harsh environment. Those circumstances were not sufficiently similar to the facts at hand to be probative of whether Kofoed could have found nondegraded DNA in a dumpster after 6 months' exposure to the elements and trash.

For the charged crime of tampering with evidence in the Stock murder investigation, we conclude that the inferences reasonably drawn from the circumstantial evidence were sufficient to prove that in 2006, Kofoed falsified DNA evidence during the Stock murder investigation to corroborate a suspect's recanted confession. The evidence did not support his theory that cross-contamination from DNA at the Stocks' residence could have contaminated the testing kit that Kofoed later used to find a victim's DNA in a vehicle that investigators believed the suspects had used.

The trial judge properly declined to recuse himself from hearing Kofoed's motion for a new trial. No reasonable person would have questioned the trial judge's impartiality under these circumstances. The court correctly denied Kofoed's motion for a new trial based on evidence that Kofoed argued would have bolstered his claim that someone else planted the DNA evidence in William's car. The car had already been thoroughly and unsuccessfully examined for DNA evidence, and no officer had requested further testing. So no one but Kofoed would have known that Kofoed would nonetheless search for, and find, a DNA sample in an obscure location of the car.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

GERRARD, J., not participating in the decision.

# Randy and Helen Strode, appellants, v. Saunders County Board of Equalization, appellee.

815 N.W.2d 856

Filed May 4, 2012. Nos. S-11-352 through S-11-355.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
3. **Actions: Statutes: Time.** The application of Neb. Rev. Stat. § 25-2221 (Reissue 2008) is not limited to proceedings in a court, and § 25-2221 applies to matters of practice which are not necessarily enunciated in statutes.
4. **Administrative Law: Actions: Time.** In the absence of a specific imperative to the contrary, Neb. Rev. Stat. § 25-2221 (Reissue 2008) applies to administrative rules and regulations.
5. **Administrative Law: Taxation: Time.** A motion for rehearing filed pursuant to 442 Neb. Admin. Code, ch. 5, § 023.01 (2009), is a "motion" under 442 Neb. Admin. Code, ch. 5, § 014.03C (2009), and therefore may be filed by facsimile if the original is mailed or delivered within 24 hours.

Petitions for further review from the Court of Appeals, Inbody, Chief Judge, and Sievers and Moore, Judges, on appeal thereto from the Tax Equalization and Review Commission. Judgments of Court of Appeals reversed, and causes remanded with directions.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellants.

Scott Tingelhoff, Saunders County Attorney, for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

In these consolidated appeals, we granted the petitions for further review filed by the appellants, Randy and Helen Strode. The underlying cases involve the Strodes' unsuccessful challenge to the valuation of certain property located in Saunders County. The Nebraska Court of Appeals concluded that the Strodes' appeals were not timely filed in the Court

of Appeals and dismissed their appeals for lack of jurisdiction. The jurisdictional issue hinges on whether the Strodes' motions for rehearing filed before the Tax Equalization and Review Commission (TERC) were timely filed and therefore tolled the time during which the Strodes could thereafter petition the Court of Appeals to judicially review the TERC's decisions.

We conclude that the motions were timely filed before the TERC and that therefore the time to petition to the Court of Appeals was tolled and the Court of Appeals had jurisdiction over the appeals. The Court of Appeals erred when it dismissed the appeals as untimely. We further conclude that because the motions for rehearing were timely filed before the TERC, the TERC erred when it denied the motions as untimely. We therefore reverse the ruling of the Court of Appeals and direct the Court of Appeals to remand the cause to the TERC with directions for the TERC to consider the merits of the Strodes' motions for rehearing.

## STATEMENT OF FACTS

The dates and filings that are relevant on further review are the same in each of these consolidated appeals. Because the same set of facts recited below pertains to each of the appeals, for ease and clarity the appeals are discussed for the most part in this statement of facts and in our analysis as if they were a single appeal.

The Strodes appealed the Saunders County Board of Equalization's valuation for certain real property to the TERC. On March 16, 2011, a panel of the TERC filed a decision affirming the valuation. On March 28, the Strodes filed by facsimile a motion for rehearing seeking consideration by the full TERC. The Strodes followed the facsimile filing with the original motion, which was file stamped as being received by the TERC on March 29.

On March 30, 2011, the TERC concluded that the Strodes failed to timely file the motion for rehearing, and for that reason, the motion was denied. The TERC noted in its order that under its rule 442 Neb. Admin. Code, ch. 5, § 023.01 (2009), any party to a proceeding heard by a panel of the TERC may

file a motion for rehearing before the full TERC and such motion must be filed "within ten (10) calendar days of the date that the [d]ecision . . . was filed." The TERC noted in its order that "[o]n March 28, 2011, the Appellant filed a Motion for Rehearing via facsimile." Without further analysis, the TERC ordered the motion for rehearing denied as untimely.

On May 2, 2011, the Strodes filed a petition for review in the Court of Appeals. In their petition for review, they stated that the final decisions at issue were the March 16 order, which affirmed the valuation, and the March 30 order, which denied the motion for rehearing as untimely filed. With respect to the TERC's March 30 order, the Strodes asserted in the petition for review that the TERC erred when it determined that the "Motion for Rehearing dated and fax-filed on March 28 . . . was filed out of time."

The Court of Appeals determined that the appeal to it was untimely and dismissed the appeal for lack of jurisdiction. In its initial order dismissing the appeal, the Court of Appeals stated that the motion for rehearing "filed March 29, 2011" before the TERC was out of time and did not toll the filing of a petition for review by the Court of Appeals pursuant to Neb. Rev. Stat. § 77-5005(4) (Reissue 2009), which provides in part, "The thirty-day filing period for appeals under subsection (2) of section 77-5019 [which provides for judicial review by the Court of Appeals of a final decision of the TERC] shall be tolled while a motion for rehearing [before the TERC] is pending." In the view of the Court of Appeals, the motion for rehearing filed before the TERC was a nullity, and it therefore examined timeliness to it based on the March 16, 2011, order. The Court of Appeals determined that because the Strodes' petition for review to the Court of Appeals was filed on May 2, which was more than 30 days after the March 16 order, and the motion for rehearing filed before the TERC was untimely and did not toll the time to appeal to the court, the appeal was not timely and should be dismissed.

The Strodes filed a motion for rehearing in the Court of Appeals in an effort to persuade the Court of Appeals that their motion for rehearing filed before the TERC was timely and tolled the time to file for judicial review by the Court of

Appeals. The Strodes noted that the 10th and 11th calendar days following the March 16, 2011, decision were a Saturday and a Sunday. They asserted that Neb. Rev. Stat. § 25-2221 (Reissue 2008), which provides generally for the manner by which days shall be computed, applied to the calculation of time to file a motion for rehearing with the TERC. The Strodes contend that under § 25-2221, the motion for rehearing in this case was due before the TERC by the first business day following the 10th calendar day, and that therefore their filing of the motion by facsimile on Monday, March 28, was timely.

The Court of Appeals adhered to its view that the appeal to it was untimely and denied the motion for rehearing. In the order denying the motion, the Court of Appeals stated that the "[m]otion for rehearing [in the TERC] was file-stamped on March 29, 2011, which was untimely as such motion needed to be filed by March 28." With regard to the facsimile filing of the motion on March 28, the Court of Appeals stated that the "TERC is not a 'court' within the meaning of Neb. Ct. R. 6-601 authorizing filing by fax in 'courts.' See also, 442 Neb[.] Admin. Code, ch. 5, § 001.07C (TERC does not accept appeals by fax)." The Strodes' appeal to the Court of Appeals was thus dismissed as untimely.

We granted the Strodes' petition for further review.

## ASSIGNMENT OF ERROR

The Strodes assert that the Court of Appeals erred when it concluded they did not timely file their petition for review to the Court of Appeals and dismissed their appeal for lack of jurisdiction.

## STANDARDS OF REVIEW

[1,2] A jurisdictional issue that does not involve a factual dispute presents a question of law. *Big John's Billiards v. State, ante* p. 496, 811 N.W.2d 205 (2012). We independently review questions of law decided by a lower court. *Id.*

## ANALYSIS

The question whether the Strodes timely filed their petition for review with the Court of Appeals depends on whether their

motion for rehearing filed before the TERC was timely and therefore tolled the time to petition the Court of Appeals for judicial review. Under Neb. Rev. Stat. § 77-5019 (Cum. Supp. 2010), a party aggrieved by a final decision in a case appealed to the TERC is entitled to judicial review in the Court of Appeals and a petition for judicial review must be filed within 30 days after the date a final, appealable order is entered by the TERC. Under § 77-5005(4), the 30-day filing period is tolled while a motion for rehearing is pending.

The question whether the time was tolled depends on whether the motion for rehearing of the March 16, 2011, decision was timely filed before the TERC. In the present case, the Strodes' motion filed by facsimile on March 28 was timely if (1) § 25-2221 is applicable to the calculation of time to file a motion for rehearing with the TERC and (2) a motion for rehearing filed before the TERC may be filed by facsimile. The TERC and the Court of Appeals both concluded that the motion for rehearing filed before the TERC was not timely, albeit for different reasons. The TERC determined that although facsimile filing was proper, § 25-2221 did not apply and the March 28 filing was untimely; the Court of Appeals determined that § 25-2221 applied but that facsimile filing was not proper and the March 29 filing was untimely. Because we conclude that § 25-2221 applies and that facsimile filing of a motion for rehearing is proper, we conclude that both lower tribunals erred. As explained below, we specifically conclude that the Strodes timely filed their motion for rehearing before the TERC by facsimile on March 28 and that because they were entitled to tolling, their petition for judicial review with the Court of Appeals was timely.

We must first determine the date by which the Strodes were required to file the motion for rehearing before the full TERC. Under the TERC's rule § 023.01, any party to a proceeding heard by a panel of the TERC may file a motion for rehearing before the full TERC and such motion must be filed "within ten (10) calendar days of the date that the [d]ecision . . . was filed." The decision at issue in this case was filed on March 16, 2011, and the 10th calendar day following the

decision was March 26. Because March 26 was a Saturday, if § 25-2221 applies, then the Strodes had until the next business day, Monday, March 28, to file a motion for rehearing.

Section 25-2221 provides in part:

> Except as may be otherwise more specifically provided, the period of time within which an act is to be done in any action or proceeding shall be computed by excluding the day of the act, event, or default after which the designated period of time begins to run. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a day during which the offices of courts of record may be legally closed as provided in this section, in which event the period shall run until the end of the next day on which the office will be open.

[3,4] In *Geddes v. York County*, 273 Neb. 271, 276, 729 N.W.2d 661, 666 (2007), we stated that § 25-2221 "establishes a uniform rule applicable alike to the construction of statutes and to matters of practice. We have regularly applied § 25-2221 and its predecessors in computing time periods specified in other statutes." In *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 811, 523 N.W.2d 518, 522 (1994), we concluded that the application of § 25-2221 was not limited to court proceedings, stating that "[a]lthough the term 'action or proceeding' generally refers to business before a court or judicial officer, the term is not restricted in application to those actions which occur within the walls of a courtroom." We further stated:

> "A statutory rule for the computation of time is usually construed as a general provision relating to all acts required and permitted by law, unless an intention to the contrary affirmatively appears or a different construction seems imperative, and it may be applied in matters of practice as well as in the construction of statutes . . . ."

246 Neb. at 812, 523 N.W.2d at 523 (quoting 86 C.J.S. *Time* § 8 (1954)). The application of § 25-2221 is not limited to proceedings in a court, and § 25-2221 applies to matters of practice which are not necessarily enunciated in statutes. We therefore conclude that in the absence of a specific imperative

to the contrary, § 25-2221 applies to administrative rules and regulations, such as the TERC's rule § 023.01 regarding the time to file a motion for rehearing.

We find nothing in the statutes or rules and regulations governing the TERC that makes specific provision for computing time when the last day for filing a motion for rehearing falls on a Saturday, Sunday, or holiday. Because nothing is otherwise specifically provided with regard to the calculation of time for filing a motion for rehearing with the TERC, we conclude that § 25-2221 applies to such calculation and that therefore the last day to file the motion for rehearing of the TERC panel's March 16, 2011, decision was Monday, March 28, which was the first business day following the 10th calendar day after the decision.

In related areas, we note for completeness that the TERC's rule 442 Neb. Admin. Code, ch. 5, § 001.08E (2009), provides that with regard to the filing of an appeal to the TERC, "[i]f a filing deadline is on a weekend or state or federally recognized holiday, the next business day becomes the filing deadline." See, also, Neb. Rev. Stat. § 49-1203 (Reissue 2010) ("[i]f the date for filing any . . . tax valuation, equalization, or exemption protest, . . . petition, [or] appeal . . . falls upon a Saturday, Sunday, nonjudicial day, or legal holiday, such filing . . . shall be considered timely if performed in person or postmarked on the next business day"). These provisions are compatible with our determination that the method for computing time in § 25-2221 should be applied in this case.

Based on the foregoing, the TERC erred when it determined that the Strodes' motion that was filed on March 28, 2011, was not timely. And although the Court of Appeals correctly determined that § 25-2221 applied and that the motion for rehearing had to be filed by March 28, it erred when it did not recognize that the motion for rehearing could be filed with the TERC by facsimile and that the March 28 motion for rehearing, filed by facsimile on March 28, was in fact timely.

A review of the Court of Appeals' orders shows the Court of Appeals reasoned that the Strodes' filing by facsimile on March 28, 2011, was not filed by a proper method and that

therefore the motion was not filed until March 29, when the TERC received the original motion. In concluding that filing the motion for rehearing by facsimile was not proper, the Court of Appeals cited 442 Neb. Admin. Code, ch. 5, § 001.07C (2009), which provides, "Facsimile copies of an *appeal/petition* will not be accepted for filing by the [TERC]." (Emphasis supplied.) However, we note that elsewhere, 442 Neb. Admin. Code, ch. 5, § 014.03C (2009), provides that "[a]ny motion or objection to a motion may be filed with the [TERC] by facsimile if the original is mailed or delivered to the [TERC] within twenty-four (24) hours of the facsimile transmission."

[5] Under the TERC's rules, although an appeal or petition to the TERC may not be filed by facsimile, a motion may be filed by facsimile if the original is mailed or delivered with 24 hours. There is no suggestion in this case that this facsimile rule exceeded the TERC's statutory authorization. Compare *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000) (stating that Neb. Rev. Stat. § 77-1510 (Cum. Supp. 2000) as it was then written did not authorize TERC to promulgate "mailbox rule"). We decide the jurisdictional issue in this case as a matter of law. See *Big John's Billiards v. State, ante* p. 496, 811 N.W.2d 205 (2012). We conclude that a motion for rehearing filed pursuant to the TERC's rule § 023.01 is a "motion" under its rule § 014.03C and therefore may be filed by facsimile if the original is mailed or delivered within 24 hours. Therefore, where the Strodes filed their motion for rehearing by facsimile on March 28, 2011, and the original was stamped as being filed with the TERC on March 29, the Strodes timely filed their motion for rehearing before the TERC.

In sum, the TERC correctly concluded that the filing by facsimile on March 28, 2011, was proper, but the TERC erred when it failed to apply the manner by which to compute days under § 25-2221 and concluded that the motion was not timely filed. By contrast, the Court of Appeals correctly applied § 25-2221 and concluded that the Strodes had until March 28 to file the motion, but the Court of Appeals erred when it concluded that filing a motion for rehearing by

facsimile was not allowed and that the motion was untimely because the original was not filed until March 29. As noted above, we conclude that § 25-2221 applied and that filing the motion for rehearing by the full TERC by facsimile was allowed; therefore, the Strodes timely filed their motion for rehearing on March 28.

Because the motion for rehearing was timely filed before the TERC on March 28, 2011, pursuant to § 77-5005(4), the motion tolled the time for the Strodes to petition for judicial review in the Court of Appeals. In this case, the time was tolled until the TERC ruled on the motion for rehearing on March 30. The 30th day following the TERC's March 30 order denying the motion was Friday, April 29, 2011, which was a court holiday in Nebraska—Arbor Day. The next 2 days were a Saturday and a Sunday, and therefore, the next business day following April 29 was Monday, May 2. Because § 25-2221 applies to the time to file a petition for review with the Court of Appeals, the Strodes' petition for review was timely filed on May 2. Therefore, the Court of Appeals had jurisdiction of the appeal and erred when it determined that the appeal to that court was untimely and dismissed the appeal for lack of jurisdiction.

As noted above, the Strodes asserted in their petition for judicial review by the Court of Appeals that the TERC erred when it determined in its March 30, 2011, order that the "Motion for Rehearing dated and fax-filed on March 28 . . . was filed out of time." As discussed above, we agree with the Strodes that the TERC erred in such determination. Rather than denying the motion as being filed out of time, the TERC should have considered the merits of the Strodes' motion for rehearing before the full TERC. The proper resolution of this appeal on further review is to make provision in our order that the TERC consider the Strodes' motion for rehearing. We therefore reverse the order of the Court of Appeals which dismissed the Strodes' appeal as untimely and direct the Court of Appeals to reverse the March 30, 2011, TERC order denying the motion for rehearing as untimely and to remand the cause to the TERC to consider the Strodes' timely filed motion for rehearing on its merits.

## CONCLUSION

In these consolidated appeals, we conclude that the Strodes' motions for rehearing before the full TERC were timely filed by facsimile on March 28, 2011, thus tolling the time for filing petitions for review with the Court of Appeals until the TERC ruled on the motions, which ruling occurred on March 30. The Strodes timely filed their petitions for judicial review with the Court of Appeals on May 2, and the Court of Appeals erred when it dismissed these appeals for lack of jurisdiction as untimely filed. The TERC erred when it determined that the motions for rehearing were filed out of time, and instead of denying the motions as untimely, the TERC should have considered the motions for rehearing on their merits. On further review, we reverse the Court of Appeals' dismissal of these appeals and remand these appeals to the Court of Appeals with directions to reverse the TERC's denial of the motions for rehearing as untimely and to remand the causes to the TERC with directions to the TERC to consider the merits of the motions for rehearing.

Reversed and remanded with directions.

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Christy Spitz, as surviving spouse of Roger McCannon and as next friend of Danielle E. Spitz-McCannon, appellant, v. T.O. Haas Tire Co., and its insurer, Cincinnati Casualty Co., appellees.

815 N.W.2d 524

Filed May 4, 2012. No. S-11-620.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
2. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
3. **Marriage: Proof.** In Nebraska, a couple cannot create a common-law marriage by agreement or cohabitation and reputation.

Appeal from the Workers' Compensation Court. Affirmed.

William J. Erickson and Lori A. Zeilinger for appellant.

John W. Iliff, of Gross & Welch, P.C., L.L.O., for appellees.

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

CONNOLLY, J.

## SUMMARY

We are asked to decide whether, under Colorado law, the appellant, Christy Spitz, was the common-law wife of Roger McCannon. McCannon died in an accident while working for the appellee T.O. Haas Tire Company (T.O. Haas). Spitz sought workers' compensation death benefits. The trial judge applied Colorado law and found that Spitz was not McCannon's common-law spouse. The review panel affirmed. Finding no error of fact or law, we also affirm.

## BACKGROUND

The parties stipulated that on July 15, 2006, McCannon died in an accident arising out of and in the course of his employment with T.O. Haas. On July 28, Spitz sent a demand letter to T.O. Haas' insurer for indemnity payments to herself and Danielle E. Spitz-McCannon (Danielle). Danielle is the daughter of Spitz and McCannon. T.O. Haas' insurer made indemnity payments to Danielle.

In November 2006, the county court for Perkins County entered an order of intestacy, determining that McCannon's heirs were Danielle and "Christy Spitz(surviving spouse)." The assets of McCannon's estate included only the $40,000 in proceeds from his life insurance policy, which was payable to his estate, and his vehicle, which was worth $5,000. The inventory did not list any joint property.

### EVIDENCE OF SPITZ' RELATIONSHIP WITH MCCANNON

McCannon moved into Spitz' home in 1990 or 1991 while they were attending a junior college in Colorado. Spitz stated that because they had each been through a bad divorce, they did not feel that "it was relevant to have a piece of paper saying

that [they] were married." After her divorce, Spitz began using her maiden name. Neither Spitz nor McCannon ever used the other's surname.

Danielle was born in 1991. Spitz also had two older daughters. In 1993, Spitz and McCannon lived apart for 7 to 8 months. Spitz also stated that they were separated for a period in the last half of 1996. But an affidavit in the record suggests that she meant that they were separated in the last half of 1995. In 1998, McCannon gave Spitz a ring; the court found that this was a wedding ring. In 1999, they moved to Nebraska.

Spitz and McCannon never used the same name in any contracts or other writings. Spitz filed her income tax returns as the head of a household, and from 1995 to 2005, Spitz listed McCannon as a dependent on her returns. She and McCannon never filed a joint return. An accountant testified that persons claiming "head of household" status must maintain their home for a dependent child for more than half the year and that they then receive a more favorable tax treatment than persons claiming a single status. But he said that a person cannot claim "head of household" status if the person's spouse was a member of his or her household for the last 6 months of the year.

Spitz also represented that she was a single person on deeds of trust in Nebraska. She said that McCannon had bad credit and that a real estate agent had advised them not to include McCannon's name. Spitz and McCannon never jointly purchased real estate. They both owned vehicles while living in Colorado that they separately titled in their own names.

Spitz never talked to McCannon about providing any type of health insurance or life insurance benefits for her, nor did they discuss how she would manage financially after his death. Neither Spitz nor McCannon had wills. Spitz believed that she was validly married in Colorado. She said that she did not hold herself out as married after they moved to Nebraska because she thought Nebraska did not recognize common-law marriages.

One of Spitz' older daughters testified that she lived with Spitz and McCannon from the time she was 11 (in 1990) until she was 15. She believed that Spitz and McCannon were

common-law spouses because they had lived together for more than 6 months. She stated that they acted like a married couple and that her children had called McCannon "grandfather." But she could not recall that Spitz or McCannon ever addressed themselves as husband and wife.

Danielle testified that Spitz and McCannon appeared to love each other, acted together in rearing her, and regularly attended school functions together. But she stated that she had no information that would lead her to believe that Spitz and McCannon were "in fact" married. A friend who had known Spitz and McCannon from 1991 to 1999 also testified that they acted like a married couple and made decisions together, including parenting decisions and where to live.

### Trial Judge's Order

The trial judge ruled that Danielle was entitled to benefits and assessed attorney fees and a penalty for late payments made to Danielle. But the judge dismissed Spitz' claim that she was McCannon's surviving spouse. He concluded that he was not bound by the county court's intestacy order finding that Spitz was McCannon's surviving spouse. He found that Spitz failed to meet her burden to prove that the marriage existed by "'clear, consistent, and convincing'" evidence. Citing a Colorado case, *People v. Lucero*,[1] the judge stated that under Colorado law, this phrase means that "it is [Spitz'] burden to present more than vague claims unsupported by competent evidence." The judge stated that living together and acting like a married couple around friends was not enough and cited objective facts showing that Spitz and McCannon had held themselves out as single persons, not married persons.

### Review Panel's Order

The review panel concluded that the trial judge had correctly interpreted Colorado case law regarding Spitz' burden of proof. It rejected Spitz' argument that Colorado law requires a trial court to follow a burden-shifting scheme. It concluded that "[e]ven if a shift in the burden of proof existed, the trier of fact

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[1] *People v. Lucero*, 747 P.2d 660 (Colo. 1987).

obviously credited, in large measure, the evidence generated by the defendants."

## ASSIGNMENTS OF ERROR

Spitz assigns that the trial judge erred in (1) finding that she was not McCannon's surviving spouse, (2) requiring her to prove the alleged marriage by clear and convincing evidence, (3) finding that she had failed to present a prima facie claim of marriage, (4) failing to find that a presumption or inference of a valid marriage existed, and (5) failing to rule that T.O. Haas had the burden to disprove the existence of a marriage.

## STANDARD OF REVIEW

[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 trial judge's findings of fact, which will not be disturbed unless clearly wrong.[2] We independently review questions of law decided by a lower court.[3]

## ANALYSIS

[3] In Nebraska, a couple cannot create a common-law marriage by agreement or cohabitation and reputation.[4] So to claim workers' compensation benefits as a surviving spouse in Nebraska, Spitz must show that she and McCannon had a valid common-law marriage under Colorado law before 1999, when they moved to Nebraska.[5]

We sum up Spitz' assignments of error as follows: The trial judge and review panel incorrectly interpreted and applied Colorado law to these facts. She argues that the trial judge misinterpreted the Colorado Supreme Court's 1987 decision in *Lucero*[6] as requiring the proponent of a common-law marriage

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[2] See *Lovelace v. City of Lincoln, ante* p. 12, 809 N.W.2d 505 (2012).

[3] See *id.*

[4] See, Neb. Rev. Stat. § 42-104 (Reissue 2008); *Randall v. Randall*, 216 Neb. 541, 345 N.W.2d 319 (1984).

[5] See, Neb. Rev. Stat. § 42-117 (Reissue 2008); *Randall, supra* note 4.

[6] *Lucero, supra* note 1.

to establish the marital relationship by clear and convincing evidence. In addition, she argues that under Colorado law, a presumption exists in favor of a finding of marriage. We disagree with both contentions.

*Lucero* was a criminal case in which the defendant objected to testimony from his alleged common-law wife under the state's marital testimonial privilege. The trial court found that no marriage existed and admitted her testimony. The putative wife testified that she had lived with the defendant for 5 years and that they had a child together. She also testified that (1) she considered herself married to the defendant, (2) the defendant agreed that they were married, and (3) she and the defendant had held themselves out to friends as being married. The Colorado Court of Appeals reversed, finding that the court should not have admitted the testimony. Based on the putative wife's testimony, the court found the existence of a common-law marriage as a matter of law.

The Colorado Supreme Court reversed that conclusion. It remanded for the trial court to provide further findings and explanation under the standards that it set forth in the opinion:

> In the present case, the trial court was offered evidence that, if believed, would have established the existence of a common law marriage. . . . We disagree with the court of appeals that the evidence established a common law marriage as a matter of law. A determination of whether a common law marriage exists turns on issues of fact and credibility, which are properly within the trial court's discretion. . . . However, in ruling that no such marriage existed, the trial court gave no indication of its reasoning, and it did not make any finding that the testimony of [the putative wife] was lacking in credibility. Since it is not clear by what criteria the trial court evaluated the existence of the common law marriage, we now return this case . . . for further findings in light of the standards we have clarified today.[7]

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[7] *Id.* at 665.

The court explained that "[a] common law marriage is established by mutual consent or agreement of the parties to be husband and wife, followed by a mutual and open assumption of a marital relationship."[8] The court further stated that although some of its cases could be read otherwise,

> we have almost uniformly required that such consent or agreement be manifested by conduct that gives evidence of the mutual understanding of the parties. . . . We affirm today that such conduct in a form of mutual public acknowledgment of the marital relationship is not only important evidence of the existence of mutual agreement but is essential to the establishment of a common law marriage.[9]

The court provided the following examples of the type of evidence that could establish a mutual understanding of the parties that they had a marital relationship:

> The two factors that most clearly show an intention to be married are cohabitation and a general understanding or reputation among persons in the community in which the couple lives that the parties hold themselves out as husband and wife. Specific behavior that may be considered includes maintenance of joint banking and credit accounts; purchase and joint ownership of property; the use of the man's surname by the woman; the use of the man's surname by children born to the parties; and the filing of joint tax returns. . . . However, there is no single form that such evidence must take. Rather, *any form of evidence that openly manifests the intention of the parties that their relationship is that of husband and wife* will provide the requisite proof from which the existence of their mutual understanding can be inferred.[10]

In addition, the Colorado Supreme Court specifically rejected a presumption in favor of a common-law marriage:

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[8] *Id.* at 663.

[9] *Id.* at 663-64.

[10] *Id.* at 665 (emphasis supplied).

> The cases in this jurisdiction have used language suggesting that an agreement "may be proven by, and *presumed* from, evidence of cohabitation as husband and wife, and general repute," . . . interchangeably with language stating that "mutual consent may be *inferred* from cohabitation and repute" . . . . In applying these standards to particular facts, we have generally not treated evidence of cohabitation and repute as creating a presumption of a common law marriage. . . . Instead, sufficient evidence of cohabitation and reputation may give rise to a permissible inference of common law marriage.[11]

Spitz acknowledges this last statement from *Lucero*, but she nonetheless relies on cases preceding *Lucero* or cases from states other than Colorado to argue that a presumption applies or that upon a prima facie showing of marriage, the burden of proof shifts to the opponent.

This argument is without merit. The *Lucero* court intended to resolve any inconsistencies in its earlier cases. So we decline to consider any contrary decision preceding *Lucero* as authority for a presumption of a common-law marriage. In addition, the court clarified that a trial court is free to reject a claimant's testimony as not credible even if it is uncontested. So a presumption of a common-law marriage does not exist under Colorado law.

Similarly, we reject Spitz' argument that the trial judge improperly enhanced her burden of proof. In a footnote, the *Lucero* court stated that it did not intend its "'clear, consistent and convincing'" standard of proof "to establish a higher burden of proof for those attempting to prove a common law marriage, but instead merely stresses that the parties must present more than vague claims unsupported by competent evidence."[12] The trial judge specifically cited this language. We read the order as discussing the type of evidence that the claimant must present, rather than the claimant's burden of proof. Having eliminated these preliminary issues, we turn to Spitz' claim that

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[11] *Id.* at 664 n.5 (emphasis in original).

[12] *Id.* at 664 n.6.

the court erred in finding the evidence insufficient to show the parties' intent.

The evidence established that Spitz and McCannon cohabitated for many years before his death. So Spitz' appeal is really about whether the other evidence showed their intent to have a marital relationship. It is true that Spitz and McCannon had a committed relationship and made decisions together for Danielle. Affidavits and testimony showed that at least some of their family members and friends believed that they had a common-law marriage under Colorado law because they had lived together for an extended period. But one of Spitz' older daughters could not recall that Spitz or McCannon had ever addressed themselves as husband and wife. And no one, including Danielle, testified or stated in an affidavit that Spitz or McCannon had ever said that they were married.

The trial judge correctly determined that evidence showing that a friend or family member had assumed that Spitz and McCannon had a common-law marriage or believed that they behaved like a married couple was insufficient to create a common-law marriage under *Lucero*. The *Lucero* court was concerned with evidence that manifests the parties' *intent* to have a marital relationship. If their intent could be shown by other persons' assumptions based solely on their cohabitation or committed relationship, then a court could find that a cohabitating couple was legally married even if the couple did not intend to create a marital relationship. Similarly, evidence that McCannon gave Spitz a wedding ring in 1998 cannot alone show he intended to create a marriage. This evidence could equally show that Spitz and McCannon were devoted to each other but did not want the complications or obligations of a marital relationship.

In contrast, the trial court found that the following facts showed Spitz and McCannon did not intend to create a marital relationship:

- Spitz never held herself out to be Christy "McCannon."
- In 2006, McCannon represented that he was single on his W-4 form and his life insurance forms with his employer.
- Spitz and McCannon never filed joint tax returns.
- The parties titled their vehicles in their individual names.

- Spitz presented no documents that showed she and McCannon had signed them as husband and wife.
- In July 2003, Spitz and McCannon filed a "Subordinate Deed of Trust," in which they represented that they were single persons.
- In October 2003, Spitz executed a "Deed of Reconveyance" as a single person.
- From 2003 to 2005, Spitz represented in deed documents that she was single, and the documents described the property as Spitz' sole property.
- Spitz' tax returns for 1995 through 2005 show that she did not represent herself as married: "In fact, by stating she was the head of the household, the filing of [Spitz'] tax returns actually shows that [she] held herself out to be unmarried."
- McCannon's obituary identified Spitz as a "longtime companion."

We conclude that the court was not clearly wrong in finding that the vast majority of objective evidence showed that Spitz and McCannon did not intend to create a common-law marriage and did not conduct their affairs as though a common-law marriage existed. Under Colorado law, we review the trial judge's conclusion for abuse of discretion. We find none here.

AFFIRMED.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V. GLEN E. RIENSCHE, APPELLEE, AND H.M., ALLEGED VICTIM, APPELLANT.

812 N.W.2d 293

Filed May 11, 2012. No. S-11-280.

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 determination made by the court below.
2. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
3. **Final Orders: Appeal and Error.** An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment,

(2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.

4. **Witnesses: Contempt: Final Orders: Appeal and Error.** A civil contempt order against a nonparty witness is a final and appealable order.
5. **Criminal Law: Witnesses: Testimony: Case Disapproved.** Insofar as it recognizes a public ignominy privilege, Neb. Rev. Stat. § 25-1210 (Reissue 2008) does not apply to a criminal case. To the extent that *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981), and *State v. Bittner*, 188 Neb. 298, 196 N.W.2d 186 (1972), can be read to suggest otherwise, they are disapproved.

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

Randall Wertz, John F. Recknor, and Susan L. Kirchmann, of Recknor, Wertz & Associates, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee State of Nebraska.

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

STEPHAN, J.

The issue in this appeal is whether an alleged victim of child sexual abuse may claim a privilege against testifying in the criminal prosecution of the alleged perpetrator pursuant to Neb. Rev. Stat. § 25-1210 (Reissue 2008), which provides, "When the matter sought to be elicited would tend to render the witness criminally liable or to expose him or her to public ignominy, the witness is not compelled to answer . . . ." The district court for Lancaster County found the privilege against exposure to public ignominy did not apply to the victim because her testimony was highly material to the crimes charged. The victim appeals. Although our reasoning differs from that of the district court, we affirm.

## BACKGROUND

Sometime prior to August 2010, law enforcement authorities learned that Glen E. Riensche may have sexually assaulted H.M., his stepdaughter, when she was approximately 7 years old. H.M. was born in August 1986 and currently resides in another state. When questioned by law enforcement in 2010,

H.M. discussed the allegations and participated in a recorded telephone call with Riensche. In November 2010, the State charged Riensche with first degree sexual assault and sexual assault of a child.

Pursuant to a subpoena, H.M. appeared with counsel in Nebraska on March 7, 2011, the day Riensche's trial was scheduled to begin. H.M. participated in a deposition in which Riensche's counsel attempted to question her about the charges filed against Riensche. Before H.M. answered, her counsel stated, "My client's going to refuse to testify." He explained the testimony "would render her infamous, would disgrace her to the public and [would] expose her to public ignominy pursuant to Nebraska statutes and [the] Nebraska constitution." Counsel stipulated that H.M. had previously spoken to law enforcement officers, but stated that H.M. did not want "to get into the specifics of the allegation" because she was the mother of three young children and did not want them or her "to be exposed to any criminal proceeding." After confirming that H.M. would refuse to testify about the criminal charges, Riensche's counsel discontinued questioning. When the prosecutor sought to clarify the basis for H.M.'s refusal by asking if her testimony would subject her to potential prosecution, her counsel replied, "Not that we know of" and confirmed that H.M. was refusing to testify only because she believed her testimony would expose her to public ignominy. On cross-examination by the prosecutor, H.M., through her counsel, again asserted the privilege against exposure to public ignominy and refused to answer substantive questions about the criminal case.

The deposition was then concluded, and the parties appeared before the district court. The prosecutor made an oral motion to compel H.M.'s testimony, and the court scheduled a subsequent hearing on that issue. Riensche's trial did not take place as scheduled.

At the subsequent hearing, H.M.'s counsel confirmed H.M. was asserting the privilege codified in § 25-1210. Counsel explained that H.M. had started a "new life" in another state and did not "want to testify about an alleged incestuous assault that happened many, many years ago." The prosecutor

argued that the privilege against exposure to public ignominy did not apply if the testimony was material to a criminal prosecution.

In an order dated March 14, 2011, the district court opined that a witness could "be compelled to testify, notwithstanding the privilege created by § 25-1210," if "the witness' testimony is material to the issue to which the testimony is addressed." In finding H.M.'s testimony could be compelled, the court reasoned H.M. was "the alleged victim of the allegations against the defendant" and noted it was "difficult to imagine a more material witness under the circumstances." The district court ordered H.M. to appear at Riensche's trial on April 4.

H.M. moved to stay the order compelling her to testify pending her appeal. At a March 31, 2011, hearing, H.M. testified that despite the court's order, she would refuse to testify if she were called as a witness at trial. The prosecutor asked the court to hold H.M. in contempt and to impose an appropriate sanction. After finding by clear and convincing evidence that H.M.'s conduct was "willful and contumacious," the court found H.M. "to be in willful contempt of court." The court committed H.M. to the county jail "for a period of 90 days or until such time as she testifies as ordered, whichever occurs first." The court granted H.M.'s motion to stay execution of the sentence pending her appeal. H.M. perfected this appeal on April 1, and we moved it to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

H.M. assigns that the district court erred in interpreting § 25-1210, (1) to preclude her from asserting a privilege against testifying and (2) in a manner that violates public policy.

## STANDARD OF REVIEW

[1] In this appeal, we are asked to determine the scope of the public ignominy privilege set forth in § 25-1210. Statutory interpretation presents a question of law, for which

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

an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.[2]

## ANALYSIS

### Jurisdiction

[2,3] Because it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it,[3] we note the reasons for our agreement with the parties that we have jurisdiction over this appeal. Generally, for an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.[4] An order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.[5]

We apply these principles of finality to an order affecting a party to a case. But here, H.M. is a nonparty witness charged with civil contempt for refusing to testify in a criminal case based upon the assertion of an evidentiary privilege. The contempt order requiring her to either testify or spend up to 90 days in county jail does not fit neatly within our standard analytical framework for finality, although we have no doubt that it seems very final to H.M.

As we have recently noted, federal courts permit nonparties to appeal from interlocutory, civil contempt orders.[6] This policy is based upon recognition that while such orders may be interlocutory with respect to the parties to an action, they are

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[2] *State v. Jimenez, ante* p. 95, 808 N.W.2d 352 (2012); *State v. Parks*, 282 Neb. 454, 803 N.W.2d 761 (2011).

[3] *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[4] *StoreVisions v. Omaha Tribe of Neb.*, 281 Neb. 238, 795 N.W.2d 271 (2011), *modified on denial of rehearing* 281 Neb. 978, 802 N.W.2d 420.

[5] *Id.*; *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011).

[6] *Schropp Indus., supra* note 5; *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, ante* p. 369, 808 N.W.2d 867 (2012).

final from the perspective of the nonparty witness found to be in contempt.[7] In an early recognition of this principle, the U.S. Supreme Court concluded that in "cases in which the [contempt] proceedings are against one not a party to the suit, and cannot be regarded as interlocutory[,] we are of opinion that there is a right of review."[8] In another early case, the Court distinguished between an interlocutory order requiring a nonparty witness to produce certain evidence and an order holding the witness in contempt for failure to do so, noting that the "power to punish being exercised[,] the matter becomes personal to the witness and a judgment as to him."[9] More recently, the Court has stated, "The right of a nonparty to appeal an adjudication of contempt cannot be questioned. The order finding a nonparty witness in contempt is appealable notwithstanding the absence of a final judgment in the underlying action."[10] Another federal court has noted that "[t]he contempt order effectively transforms the 'interlocutory' into the 'final' by giving the [nonparty] witness a distinct and severable interest in the underlying action."[11]

[4] We conclude that this approach is sensible and fair. The rule that only final orders are appealable is designed to prevent piecemeal review, chaos in trial procedure, and a succession of appeals granted in the same case to secure advisory opinions to govern further actions of the trial court.[12] That purpose is not advanced by requiring a nonparty witness who has been held in contempt to await the eventual resolution of the underlying case by the parties before obtaining appellate review. By that

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[7] See, *Catholic Conf. v. Abortion Rights Mobilization*, 487 U.S. 72, 108 S. Ct. 2268, 101 L. Ed. 2d 69 (1988); *Alexander v. United States*, 201 U.S. 117, 26 S. Ct. 356, 50 L. Ed. 686 (1906); *Bessette v. W. B. Conkey Co.*, 194 U.S. 324, 24 S. Ct. 665, 48 L. Ed. 997 (1904).

[8] *Bessette, supra* note 7, 194 U.S. at 338.

[9] *Alexander, supra* note 7, 201 U.S. at 122.

[10] *Catholic Conf., supra* note 7, 487 U.S. at 76.

[11] *U.S. v. Sciarra*, 851 F.2d 621, 628 (3d Cir. 1988).

[12] See, *Smith v. Lincoln Meadows Homeowners Assn.*, 267 Neb. 849, 678 N.W.2d 726 (2004); *State v. Meese*, 257 Neb. 486, 599 N.W.2d 192 (1999).

time, such review may be meaningless if the nonparty witness has completed the term of imprisonment imposed as a sanction for contempt. Accordingly, we adopt the principle set forth in federal cases and hold that a civil contempt order against a nonparty witness is a final and appealable order.

### Scope of Public Ignominy Privilege

The Nebraska rules of evidence[13] apply generally to all civil and criminal proceedings[14] and include provisions relating to privileges,[15] which provisions "apply at all stages of all actions, cases, and proceedings."[16] Rule 501 provides:

> Except as otherwise required by the Constitution of the United States or the State of Nebraska or provided by Act of Congress, or the Legislature of the State of Nebraska, by these rules or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters, no person has the privilege to:
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> (1) Refuse to be a witness; or
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> (2) Refuse to disclose any matter; or
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> (3) Refuse to produce any object or writing; or
>
> (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

The privileges set forth in article 5 of the rules of evidence[17] do not include a public ignominy privilege. Thus, we must look to other state or federal statutes, or the state or federal Constitution, for the source of the privilege claimed by H.M.

The parties agree that the sole source of the public ignominy privilege is § 25-1210, which actually identifies two distinct privileges. Under § 25-1210 and subject to an exception not applicable here, a witness may not be compelled to testify "[w]hen the matter sought to be elicited would tend to render

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[13] Neb. Evid. R. 101 to 1301, Neb. Rev. Stat. §§ 27-101 to 27-1301 (Reissue 2008 & Cum. Supp. 2010).

[14] Neb. Evid. R. 1101(2).

[15] Neb. Evid. R. 501 to 513.

[16] Neb. Evid. R. 1101(3).

[17] Neb. Evid. R. 503 to 510.

the witness criminally liable" or tend "to expose him or her to public ignominy." The word "ignominy" is generally defined to mean "[p]ublic disgrace or dishonor."[18] Long ago, the Iowa Supreme Court concluded that the term "was not intended to apply to all acts which might justify public censure or disapproval, but those of a more serious nature, which would tend to expose the perpetrator to public hatred or detestation or dishonor."[19] Although we acknowledge a Georgia appellate opinion to the contrary,[20] and with due respect to H.M.'s reasons for asserting the privilege, we question whether a victim's truthful testimony about a crime perpetrated upon him or her would subject that person to "public ignominy."[21] But the State did not challenge the assertion of the privilege on that basis, the district court did not address the issue, and we need not do so in order to resolve this appeal.[22]

As noted, § 25-1210 refers to two separate and distinct privileges: a privilege against self-incrimination and a privilege against exposure to public ignominy. The latter is not a part of the former. In *Brown v. Walker*,[23] the U.S. Supreme Court held that the Fifth Amendment privilege against self-incrimination was not intended to shield a witness from giving testimony which would expose the witness to disgrace or disrepute. The Court noted that the "extent to which the witness is compelled to answer such questions as do not fix upon him a criminal culpability is within the control of the legislature."[24]

The Nebraska Legislature has exercised such control by its enactment of § 25-1210. Although this is an appeal from a civil contempt order, it originates from the assertion of a

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[18] Black's Law Dictionary 814 (9th ed. 2009).

[19] *Mahanke v. Cleland*, 76 Iowa 401, 405, 41 N.W. 53, 55 (1888).

[20] *Wynne v. State*, 139 Ga. App. 355, 228 S.E.2d 378 (1976).

[21] See § 25-1210.

[22] See, *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Sommer*, 273 Neb. 587, 731 N.W.2d 566 (2007).

[23] *Brown v. Walker*, 161 U.S. 591, 16 S. Ct. 644, 40 L. Ed. 819 (1896).

[24] *Id.*, 161 U.S. at 598.

privilege by a witness testifying in a criminal case. Section 25-1210 is included in chapter 25 of the Nebraska Revised Statutes, entitled "Courts; Civil Procedure." Chapter 29, entitled "Criminal Procedure," includes no similar privilege. Chapter 25 and chapter 29 do not include general scope provisions.

Some statutes found within chapter 29 specifically incorporate statutory procedures from chapter 25. For example, Neb. Rev. Stat. § 29-1905 (Reissue 2008), pertaining to depositions in criminal cases, provides that "[t]he proceedings in taking the examination of such witness and returning it to court shall be governed in all respects as the taking of depositions in all civil cases." And Neb. Rev. Stat. § 29-1206 (Reissue 2008) provides that applications for continuances in criminal cases "shall be made in accordance with section 25-1148," subject to certain modifications. The parties have directed us to no provision in chapter 29 which incorporates the public ignominy privilege found in § 25-1210, and we have found none.

On several occasions, this court has specifically declined to apply a civil procedure statute in a criminal case. We held long ago in *Hubbard v. State*[25] that a defendant could not rely upon a statute governing motions for new trials in civil cases in order to file a motion which was time barred under the corresponding criminal procedure statute. We noted that "the provisions of the code [of civil procedure], as indicated by its title, refer only to new trials in civil actions."[26] In *Huckins v. State*,[27] we held that a witness subpoenaed to testify in a criminal case could not insist on advance payment of his fees as a condition precedent to his appearance pursuant to a civil procedure statute. Noting the absence of any provision of law imposing a prepayment requirement in criminal cases, the court concluded that "[i]t would require a very plain provision of law to justify the belief that the legislative branch of

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[25] *Hubbard v. State*, 72 Neb. 62, 100 N.W. 153 (1904).

[26] *Id.* at 67, 100 N.W. at 154.

[27] *Huckins v. State*, 61 Neb. 871, 86 N.W. 485 (1901).

the government intended to interpose such obstacles to the prosecution of crime."[28] More recently, in *State v. Merrill*,[29] we held that the State could not rely upon civil procedure statutes as legal authority for an appeal in a criminal case. We noted that the statutes upon which the State relied were "statutes of general application found in chapter 25 of the Nebraska Revised Statutes relating to civil procedure"[30] and did not provide authorization for the State's attempted appeal in a criminal case.

In other cases, however, the line of demarcation between the scope of civil and criminal procedural statutes is less distinct. In *State v. Micek*[31] and *State v. Mills*,[32] both criminal appeals, we held that copies of prior judgments used to prove that the defendants were habitual criminals were properly authenticated pursuant to Neb. Rev. Stat. §§ 25-1285 (Reissue 1995) and 25-1286 (Reissue 1979). And in *State v. Bittner*[33] and *State v. Ellis*,[34] we referenced § 25-1210 without specifically addressing its applicability to a criminal case. In *Bittner*, a prosecution witness refused to answer certain questions on cross-examination on the ground that the answers would incriminate her. We noted that the privilege against self-incrimination was based upon the Fifth Amendment to the U.S. Constitution and on § 25-1210. While the opinion includes a survey of cases dealing with whether "impeachment on moral grounds is permissible,"[35] that discussion is largely dicta because the witness asserted only the privilege against self-incrimination. The dispositive issue was whether assertion of the privilege deprived the defendant of his right to confrontation. We concluded that it did not, because the restricted

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[28] *Id.* at 872, 86 N.W. at 485.

[29] *State v. Merrill*, 273 Neb. 583, 731 N.W.2d 570 (2007).

[30] *Id.* at 586, 731 N.W.2d at 573.

[31] *State v. Micek*, 193 Neb. 379, 227 N.W.2d 409 (1975).

[32] *State v. Mills*, 199 Neb. 295, 258 N.W.2d 628 (1977).

[33] *State v. Bittner*, 188 Neb. 298, 196 N.W.2d 186 (1972).

[34] *State v. Ellis*, 208 Neb. 379, 303 N.W.2d 741 (1981).

[35] *Bittner, supra* note 33, 188 Neb. at 300, 196 N.W.2d at 188.

questioning dealt only with a collateral matter unrelated to the guilt or innocence of the defendant.

In *Ellis*, we addressed a defendant's contention that his cross-examination of a prosecution witness was unduly restricted by her assertion of the privileges against self-incrimination and public ignominy in response to questions about prior sexual conduct. We concluded without further analysis that the ruling sustaining the witness' right to assert the privilege was "fully in accord with . . . § 25-1210."[36] Again, we did not explain the basis for applying that civil procedure statute in a criminal case.

Recognizing a right of a recalcitrant witness to assert a public ignominy privilege in a criminal case would pose an obstacle to the prosecution of crime. As the U.S. Supreme Court observed more than 100 years ago, the danger of recognizing this privilege in a criminal case

> is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which [the witness] would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind [the witness'] privilege.[37]

We conclude here, as we did in *Huckins*, that "[i]t would require a very plain provision of law to justify the belief that the legislative branch of the government intended to interpose such obstacles to the prosecution of crime."[38]

[5] We find no such provision. Had the Legislature intended to permit a witness in a criminal case to assert a public ignominy privilege, it could have included the privilege in article 5 of the Nebraska rules of evidence, enacted a criminal procedure statute specifically recognizing the privilege, or

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[36] *Ellis, supra* note 34, 208 Neb. at 395, 303 N.W.2d at 751.

[37] *Brown, supra* note 23, 161 U.S. at 600.

[38] *Huckins, supra* note 27, 61 Neb. at 872, 86 N.W. at 485.

enacted a criminal procedure statute incorporating § 25-1210 by reference. It did none of those things. While we acknowledge that some of our prior cases imply that § 25-1210 is applicable to a criminal case, we specifically reject that implication with respect to the public ignominy privilege. We further note that the privilege against self-incrimination recognized in § 25-1210 has an independent constitutional basis, whereas the public ignominy privilege does not. We therefore hold that insofar as it recognizes a public ignominy privilege, § 25-1210 does not apply to a criminal case. To the extent that *Bittner*[39] and *Ellis*[40] can be read to suggest otherwise, they are disapproved.

We do not hold or suggest that a provision of chapter 25 of the Nebraska Revised Statutes must be specifically incorporated by a provision of chapter 29 to apply to a criminal case. We acknowledge that some procedural and evidentiary statutes found in chapter 25 may harmoniously apply to a criminal case. And we acknowledge that "[t]itle heads, chapter heads, section and subsection heads or titles . . . in the statutes of Nebraska, supplied in compilation, do not constitute any part of the law."[41] But because the public ignominy privilege would impose an obstacle to the prosecution of crime, it is not available to a witness in a criminal case absent a clear indication that the Legislature intended that it should. And as we have noted, we find no such indication of legislative intent.

The district court concluded that H.M. could be compelled to testify because the public ignominy privilege did not apply to testimony concerning a material issue in a criminal case. We disagree with this reasoning because § 25-1210 does not include a materiality exception. But because we conclude that the public ignominy privilege cannot be asserted by a witness in a criminal case, regardless of the materiality of the testimony, we affirm the district court's ruling.[42]

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[39] *Bittner, supra* note 33.

[40] *Ellis, supra* note 34.

[41] Neb. Rev. Stat. § 49-802(8) (Reissue 2010).

[42] See, *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012); *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011).

## CONCLUSION

For the reasons discussed, we conclude that the district court did not err in ordering H.M. to testify and in exercising its contempt power to enforce its order. We observe that the fact that the State *may* compel H.M. to testify does not necessarily mean that it *should*. But that question must be left to the judgment and discretion of the prosecutor.

AFFIRMED.

WRIGHT, J., not participating.

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BRIAN SHIPLEY, APPELLANT, V. DEPARTMENT OF ROADS, AN AGENCY OF THE STATE OF NEBRASKA, AND CASS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

KENNETH E. STODDARD AND SONDRA K. STODDARD, GUARDIANS OF JAMIN L. STODDARD, AN INCAPACITATED PERSON, APPELLANTS, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AN AGENCY OF THE STATE OF NEBRASKA, APPELLEE, V. DEPARTMENT OF ROADS, AN AGENCY OF THE STATE OF NEBRASKA, AND CASS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

813 N.W.2d 455

Filed May 11, 2012. Nos. S-11-293, S-11-294.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Administrative Law: Judgments.** Interpretation of the Manual on Uniform Traffic Control Devices presents a question of law.
4. **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.

5. **Political Subdivisions Tort Claims Act: Tort Claims Act: Immunity: Waiver.** Both the Political Subdivisions Tort Claims Act and the State Tort Claims Act provide limited waivers of sovereign immunity, which are subject to statutory exceptions.
6. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The discretionary function exception is expressed in nearly identical language in the State Tort Claims Act, see Neb. Rev. Stat. § 81-8,219(1) (Supp. 2007), and the Political Subdivisions Tort Claims Act; thus, cases construing the state exception apply as well to the exception granted to political subdivisions by Neb. Rev. Stat. § 13-910(2) (Supp. 2007).
7. ____: ____. The purpose of the discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
8. ____: ____. The discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.
9. ____: ____. A court engages in a two-step analysis to determine whether the discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting employee. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.
10. **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.

Appeals from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and Douglas L. Kluender for appellee State.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellee Cass County.

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

STEPHAN, J.

On June 5, 2005, Jamin L. Stoddard and Brian Shipley were injured in a collision with a train owned by the Burlington Northern Santa Fe Railway Company (BNSF) at a grade crossing in Cass County, Nebraska. Stoddard's guardians and Shipley brought actions against the Nebraska Department of Roads (NDOR) and Cass County (County) under the State Tort Claims Act (STCA)[1] and the Political Subdivisions Tort Claims Act (PSTCA),[2] alleging that the governmental entities negligently designed the grade crossing and negligently failed to install various warning devices. The district court for Cass County entered summary judgment in favor of the State and the County. Stoddard's guardians and Shipley appeal from that judgment. The principal issue is whether the negligence claims fall within the discretionary function exceptions to the limited waiver of sovereign immunity under the PSTCA and the STCA.

## I. BACKGROUND

### 1. ACCIDENT

The accident occurred at a grade crossing on Beach Road, which is located in Cass County, Nebraska, approximately 2 miles north and one-half mile west of the city of Plattsmouth. Beach Road is a two-lane road that runs in a north-south direction. Two BNSF railroad tracks running generally in an east-west direction intersect with Beach Road at the grade crossing. On the date of the accident, the County owned and controlled the right-of-way included within Beach Road and BNSF owned, controlled, and maintained the crossing.

In 2004, Shipley moved to a house north of Plattsmouth on Colt Drive. Colt Drive runs in an east-west direction parallel to the railroad tracks. Shipley's home was just north and approximately one block west of the crossing. In order to travel from Shipley's home to Plattsmouth, one would proceed east on Colt Drive to Beach Road, then south through the grade crossing to U.S. Highway 75.

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[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003 & Supp. 2007).

[2] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007).

Stoddard, who is Shipley's uncle, resided in Plattsmouth for most of his life, including at the time of the accident. Stoddard and Shipley were close and spent time together every day before June 5, 2005. When they went places together, it was normal practice for Stoddard to drive and to use Beach Road to access Shipley's home. According to Shipley, when Stoddard's vehicle would approach the crossing, Stoddard typically stopped about 5 feet from the tracks, looked both ways, and then proceeded through the crossing. If a train was approaching, Stoddard would usually stop and wait for the train to clear the crossing.

On June 5, 2005, Stoddard, Shipley, and another passenger were returning to Shipley's home after attending church in Bellevue, Nebraska. As the vehicle operated by Stoddard proceeded north on Beach Road, a westbound train was approaching the crossing. Shipley, who was in the rear seat on the passenger side of the vehicle, does not recall seeing the train involved in the collision.

As it approached the crossing, the train was traveling at a speed of 40 miles per hour and sounding its whistle. An eyewitness observed Stoddard's vehicle proceed at a constant speed toward the crossing. But the train's engineer and conductor both testified that Stoddard first applied the brakes and then accelerated in an attempt to "beat the train."

Stoddard's vehicle and the train collided on the north set of tracks. At the time of the accident, the sky was clear and sunny, and the road was dry. Stoddard and Shipley were severely injured in the collision, and the other passenger was killed.

### 2. Truck Wash Facility

In September 2003, the County issued a permit for the construction of a truck wash facility in the southeast quadrant of the Beach Road crossing. When completed, the north edge of the facility was approximately 56 feet south of the south rail of the crossing.

In the opinion of several experts, the truck wash facility caused the crossing to be severely sight restricted for motorists proceeding north on Beach Road. Experts opined that the crossing did not comply with the minimum sight distances set

out by title 415 of the Nebraska Administrative Code. Title 415 required all new highway-rail grade crossings to meet certain sight distance requirements.

Experts also found that the crossing did not comply with the American Association of Highway and Transportation Officials' "A Policy on Geometric Design of Highways and Streets" (AASHTO Green Book) sight distance table. Experts acknowledged that the AASHTO Green Book contained industry standards and did not constitute a mandatory legal authority. Title 428 of the Nebraska Administrative Code, which the County highway superintendent regarded as a mandatory standard, includes minimum design standards for certain rural state highways and notes that the AASHTO Green Book "should be used for other design criteria."[3]

### 3. Paving Beach Road

In March 2004, the manager of the truck wash facility asked the County to pave a portion of Beach Road that included the segment just south of the crossing. The facility offered to pay 50 percent of the cost. The project was proposed to and accepted by the County's board of commissioners on May 4, 2004. Although the former County highway superintendent was unsure about precisely when the paving project was completed, the current highway superintendent stated that it was completed before the facility paid its 50-percent share with a check dated May 14, 2004.

### 4. Warning Signals Present at Crossing

At the time of the accident, there were no automatic traffic control devices in place at the Beach Road crossing. There was an advance warning sign, installed and maintained by the County, approximately 400 feet south of the crossing. There was also a crossbuck warning sign installed and maintained by BNSF on the east side of Beach Road, approximately 15 feet south of the south rail of the crossing. There was no placard on the crossbuck indicating the presence of two sets of tracks, and

[3] 428 Neb. Admin. Code, ch. 2, § 001.04 (2002).

there was no crossbuck on the west side of Beach Road south of the crossing. Also, there was no pavement marking on Beach Road south of the crossing to warn northbound traffic that the crossing was ahead.

### 5. Claims Against State and County

As relevant to this appeal, Stoddard's guardians and Shipley allege that the County and the State caused the accident and their injuries by (1) failing to install pavement markings on Beach Road to warn of the approaching crossing, (2) failing to improve the sight restriction caused by the truck wash facility, and (3) failing to warn northbound traffic of that sight restriction. The pavement marking claim is based upon an alleged violation of the 2000 version of the Manual on Uniform Traffic Control Devices (Manual). The sight restriction claim is based upon alleged violations of titles 415 and 428 of the Nebraska Administrative Code, as adopted by NDOR, and design standards set forth in the AASHTO Green Book.

### 6. Order Granting Summary Judgment

The County and the State each filed a motion for summary judgment, arguing sovereign immunity barred the claims against them. In its order granting the motions, the district court determined that all claims relevant to this appeal were barred by the discretionary function exception because the alleged failures were discretionary by nature. The court specifically found that neither title 415 nor title 428 applied to the issues of the case and held that the Manual was the controlling legal standard.

The court found summary judgment was also proper on the pavement markings claim because the absence of pavement markings did not cause the accident. And the court found that the failure to improve sight restrictions claim was barred as a failure to inspect claim under § 13-910(3) and as a claim based upon the issuance of a permit under § 13-910(4). The court reasoned that had the County not issued the permit, the facility would not have been constructed. The court

denied motions to alter or amend the summary judgment order filed by Stoddard's guardians and Shipley, and they perfected timely, separate appeals, which we consolidated for argument and disposition.

## II. ASSIGNMENTS OF ERROR

Stoddard's guardians and Shipley assign, restated and summarized, that the district court erred in granting summary judgment on their claims regarding (1) the failure to install pavement markings to warn of the existence of the crossing, (2) the failure to improve sight restrictions, and (3) the failure to warn motorists that the Beach Road crossing was a blind crossing. Stoddard's guardians and Shipley also challenge the district court's finding that neither title 415 nor title 428 applied to this case.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5]

[3,4] Interpretation of the Manual presents a question of law.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

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[4] *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007); *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

[5] *Id.*

[6] See, *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005); *Kirkwood v. State*, 16 Neb. App. 459, 748 N.W.2d 83 (2008).

[7] *Thomas & Thomas Court Reporters v. Switzer, ante* p. 19, 810 N.W.2d 677 (2012); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

## IV. ANALYSIS

### 1. Legal Framework

[5,6] Both the PSTCA and the STCA provide limited waivers of sovereign immunity,[8] which are subject to statutory exceptions.[9] If a statutory exception applies, the claim is barred by sovereign immunity.[10] Here, we are concerned with what is commonly known as the discretionary function exception. The STCA provides that it shall not apply to

> [a]ny claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused[.][11]

The PSTCA includes a similar provision,[12] and we have held that because of the similarity, cases construing the STCA exception are equally applicable to the discretionary function exception in the PSTCA.[13]

[7-9] The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.[14] The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities

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[8] See, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Geddes, supra* note 4; *Bojanski v. Foley*, 18 Neb. App. 929, 798 N.W.2d 134 (2011).

[9] *Id*. See §§ 13-910 and 81-8,219.

[10] See, *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007); § 81-8,219. See, also, § 13-910.

[11] § 81-8,219(1).

[12] § 13-910(2).

[13] *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

[14] *Doe v. Omaha Pub. Sch. Dist., supra* note 10; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.[15] A court engages in a two-step analysis to determine whether the discretionary function exception of the PSTCA or the STCA applies.[16] First, the court must consider whether the action is a matter of choice for the acting employee.[17] If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.[18] With these principles in mind, we turn to the specific issues presented for review.

### 2. Pavement Marking Claim

In support of their first assignment of error, Stoddard's guardians and Shipley argue that the Manual required the County to place pavement markings on Beach Road to warn northbound motorists of the crossing ahead. They contend that the Manual imposed a legal requirement which eliminated any element of discretion on the part of County officials. NDOR is authorized by statute to adopt and promulgate rules and regulations adopting and implementing the Manual.[19] The 2000 edition of the Manual was in force and effect on June 5, 2005.

Two statutes refer to the use of the Manual by state and local authorities. Neb. Rev. Stat. § 60-6,120(1) (Reissue 2010) provides that "[NDOR] shall place and maintain, or provide for such placing and maintaining, such traffic control devices, conforming to the [M]anual, upon all state highways as it deems necessary to indicate and to carry out the Nebraska Rules of the Road or to regulate, warn, or guide traffic." Neb. Rev. Stat. § 60-6,121 (Reissue 2010) similarly provides that local authorities "shall place and maintain such traffic control

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[15] *Id.*

[16] *Doe v. Omaha Pub. Sch. Dist., supra* note 10; *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[17] *Id.*

[18] *Id.*

[19] Neb. Rev. Stat. § 60-6,118 (Reissue 2010).

devices upon highways under their jurisdictions as they deem necessary to indicate and to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn or guide traffic." Section 60-6,121 further provides that "[a]ll such traffic control devices erected pursuant to the rules shall conform with the [M]anual."

In *McCormick v. City of Norfolk*,[20] we read the phrase "as they deem necessary" in § 60-6,121 as the Legislature's grant of discretion to political subdivisions in the installation of traffic control devices. We noted that the installation of such devices "involves balancing the competing needs of pedestrian safety, engineering concerns, commerce, and traffic flow—which in itself involves safety issues—with limited financial resources. These decisions are normally the type of economic, political, and social policy judgments that the discretionary function exception was designed to shield."[21]

But here, Stoddard's guardians and Shipley contend that the Manual specifically requires pavement markings on roadways approaching a railroad crossing and that therefore, County officials had no discretion in whether to place the markings on Beach Road. They rely on a "Standard" in the Manual, found at paragraph 8B.16, which states in part: "Identical markings shall be placed in each approach lane on all paved approaches to highway-rail grade crossings where signals or automatic gates are located, and at all other highway-rail grade crossings where the posted or statutory highway speed is 60 km/h (40 mph) or greater." But this argument ignores another standard in the Manual, found at paragraph 1A.09, which states: "This Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation." Immediately following this standard is a "Guidance" which states that "[t]he decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of engineering judgment" and, further, that while the Manual "provides

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[20] *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002).

[21] *Id.* at 698, 641 N.W.2d at 642.

Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment." An expert hired by Stoddard's guardians and Shipley acknowledged that the Manual contemplates the exercise of engineering judgment in determining whether to use a particular traffic control device at a particular location.

Our decision in *Tadros v. City of Omaha*[22] articulates how the Manual factors into the discretionary function exception. In that case, we reaffirmed the principle that "placement of traffic control devices is a discretionary function," but we stated that once a decision to utilize a particular device had been made, the device was "required to conform with the [M]anual."[23] Here, if the County had decided to place pavement markings on Beach Road to warn of the crossing, it would have been required to do so in the manner prescribed by the Manual. But the decision of *whether* to utilize the pavement markings at that location required the exercise of judgment and was therefore a discretionary function for which sovereign immunity was not waived. Accordingly, the district court did not err in entering summary judgment with respect to the pavement marking claim.

### 3. Sight Restriction Claim

Stoddard's guardians and Shipley alleged that the State and County were negligent in failing to improve sight restrictions at the crossing. Several experts opined that the truck wash facility caused the crossing to be severely sight restricted. This opinion was based upon a table in title 415 of the Nebraska Administrative Code defining the proper sight distance at a railroad crossing, as well as a similar table from the AASHTO Green Book. Stoddard's guardians and Shipley contend that these sight distance standards constitute mandatory requirements which preclude application of the discretionary function exception.

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[22] *Tadros v. City of Omaha, supra* note 6.

[23] *Id*. at 540, 694 N.W.2d at 190.

(a) Title 415

The sight restrictions in title 415 apply to "*new* public highway-rail grade crossings."[24] Title 415 became effective on December 14, 2004. The parties agree that the grade crossing existed prior to that date and is not "new." But title 415 defines "new" to include "[t]he construction of a new roadway across an existing railroad line."[25] Thus, the applicability of the title 415 sight restrictions to this case depends upon whether the Beach Road paving project was completed before or after December 14, 2004. The district court determined that the project was completed prior to May 25, 2004, and that thus, title 415 did not apply. Stoddard's guardians and Shipley argue there is a genuine issue of material fact with respect to the completion date.

In support of their motions for summary judgment, the County and the State offered the affidavit of the County's current highway superintendent, who served as the assistant superintendent from 2004 to 2007 and was familiar with the Beach Road paving project. He stated that the truck wash facility paid its share of the cost with a check dated May 14, 2004, and that based upon his recollection and review of the records, the pavement project was completed prior to the payment. Stoddard's guardians and Shipley offered the deposition of the former highway superintendent, who testified that he could not recall when the project was completed and could not make a "good guess" without seeing additional records.

[10] Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[26] In *Mefferd v. Sieler & Co.*,[27] the existence of liability insurance coverage turned on the issue of whether the insured had given timely notice of a lawsuit filed against it. In support of its motion for summary

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[24] 415 Neb. Admin. Code, ch. 6, § 002.01G (2004) (emphasis supplied).

[25] *Id.*, ch. 4, § 001.18A.

[26] *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011).

[27] *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004).

judgment, the insurance carrier offered the testimony of its employee stating that he had not been informed of the lawsuit until after a default judgment had been entered. In opposition to the motion, the president of the insured testified that she could not recall whether she informed the carrier of the suit before or after the default judgment. We concluded that this "equivocal testimony" did not create a genuine issue of material fact, noting that "because of its uncertainty," it did not stand contrary to the carrier's showing that it did not receive timely notice.[28]

Similarly, we conclude in this case that the former superintendent's testimony that he did not know when the Beach Road paving project was completed does not controvert the current superintendent's testimony that it was completed in May 2004, which was months prior to the effective date of title 415. Accordingly, the district court did not err in concluding that the sight restriction standards set forth in title 415 did not apply to this case.

(b) Title 428 and AASHTO Green Book

Title 428 of the Nebraska Administrative Code includes minimum design standards for public roadways. It does not include specific sight distance requirements for railroad crossings, but it includes a note stating that the AASHTO Green Book "should be used for other design criteria."[29] The AASHTO Green Book includes a sight distance table. Based upon this table, an expert for Stoddard's guardians and Shipley opined that the Beach Road crossing was sight restricted. But we do not read title 428 or the AASHTO Green Book to impose mandatory sight distance requirements for grade crossings in Nebraska. We agree with the characterization by one of the experts hired by Stoddard's guardians and Shipley that the AASHTO Green Book sets forth guidelines which are not legal standards.

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[28] *Id.* at 537, 676 N.W.2d at 27.

[29] 428 Neb. Admin. Code, *supra* note 3.

(c) Disposition

The record does not support a claim that either the State or the County had a mandatory legal duty to improve any sight restriction at the crossing created by the truck wash facility. Any decision of whether or how to do so would necessarily involve balancing the competing needs of public safety, engineering concerns, and expenditure of public funds. We conclude that the district court did not err in finding that this claim falls within the discretionary function exceptions of the PSTCA and the STCA.

4. Failure-To-Warn Claim

Stoddard's guardians and Shipley alleged that the State and the County were negligent in failing to warn northbound vehicular traffic on Beach Road that the presence of the truck wash facility made the crossing a "blind crossing" to "any oncoming westbound locomotives and vice versa." Relying upon *Lemke v. Metropolitan Utilities Dist.*,[30] they argue the County and the State had a nondelegable duty to warn, which does not come within the discretionary function exception.

*Lemke* involved a claim against a public utility for damages caused by a natural gas explosion in a residence served by the utility. The explosion was caused by a leak in a flexible connector used by the utility to connect its natural gas line to a range in the home. There was evidence that the utility had received a specific warning from its trade association regarding dangers associated with the connector, but did not take any specific steps to warn its customers of the hazard posed by the connector. One question presented was whether the claim that the utility failed to warn its customer fell within the discretionary function exception of the PSTCA. After reviewing cases from other jurisdictions, this court held that

> when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the

[30] *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

> dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.[31]

In this circumstance, we held that the discretionary function exception did not apply. Similarly, in *Parker v. Lancaster Cty. Sch. Dist. No. 001*,[32] we held that a school district had a nondiscretionary duty to warn of an unguarded ramp or floor riser in a school building which caused the plaintiff to fall and injure herself.

But the facts of this case do not support the existence of the nondiscretionary duty to warn recognized in *Lemke* and *Parker*. The truck wash facility alleged to constitute the sight restriction "hazard" was built by a private party on private property and was thus not "caused by or under the control of" the State or the County. Moreover, prior accidents at the crossing did not place the State or the County on actual or constructive notice of any hazard posed by the truck wash facility, as Stoddard's guardians and Shipley claim. The prior accidents occurred between March 1983 and January 1995, and permits were not issued for the construction of the facility until 2003. And further, any sight restriction hazard posed by the truck wash facility was readily apparent to a northbound motorist approaching the crossing. Thus, any duty to warn on the part of the State or the County was discretionary.

## V. CONCLUSION

The issue presented by these appeals is not whether the State or the County was negligent, but whether any claimed negligence occurred in the performance of discretionary functions for which the Legislature has granted immunity. As we have previously noted, because immunity necessarily implies that a

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[31] *Id*. at 647, 502 N.W.2d at 89.

[32] *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999).

"wrong" has occurred, some tort claims against governmental agencies will inevitably go unremedied.[33] Each grade crossing, like each street or highway crossing, has some inherent danger,[34] but the placement of traffic control devices is a discretionary function of a governmental entity.[35] For the reasons discussed, the district court did not err in concluding that all of the claims which are the subject of these appeals fell within the discretionary function exceptions of the PSTCA and the STCA, and we therefore affirm the judgment in each case.

AFFIRMED.

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[33] *McCormick v. City of Norfolk, supra* note 20.

[34] See *id.*

[35] See *id.* See, also, *Dresser v. Thayer County*, 18 Neb. App. 99, 774 N.W.2d 640 (2009).

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FIELD CLUB HOME OWNERS LEAGUE, A NEBRASKA CORPORATION, AND THORNBURG PLACE NEIGHBORHOOD ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLANTS, v. ZONING BOARD OF APPEALS OF OMAHA ET AL., APPELLEES.

814 N.W.2d 102

Filed May 11, 2012. No. S-11-432.

1. **Jurisdiction: Appeal and Error.** An appellate court reviews de novo jurisdictional determinations that do not involve a factual dispute.
2. **Zoning.** A zoning board is an administrative body performing quasi-judicial functions.
3. **Zoning: Standing.** To apply for a variance from a zoning regulation, the applicant must have standing.
4. **Standing: Jurisdiction: Parties.** Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.
5. ____: ____: ____. Standing is a component of jurisdiction; only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.
6. **Claims: Parties.** Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

7. **Corporations: States: Standing.** A foreign corporation has the right to enter court and defend itself.
8. **Zoning: Standing.** A property owner has standing to seek a variance from a zoning ordinance that, if strictly enforced, would adversely affect the owner's property rights or interests.
9. **Zoning: Standing: Vendor and Vendee: Contracts.** A prospective purchaser under a purchase agreement subject to the grant of a variance or rezoning of the property has standing to seek the change.
10. **Zoning: Standing: Vendor and Vendee: Options to Buy or Sell.** The holder of an option to purchase property has standing to apply for a variance when the holder is bound to purchase the property if the variance is obtained or when the property owner anticipated that the option holder would seek the variance to complete the sale.
11. **Standing: Jurisdiction: Proof.** A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.
12. **Standing.** The stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Reversed and vacated, and cause remanded for further proceedings.

David J. Lanphier, of Broom, Clarkson, Lanphier & Yamamoto, for appellants.

Rosemarie R. Horvath, Assistant Omaha City Attorney, for appellees Zoning Board of Appeals of Omaha and City of Omaha.

Donald J. Kleine, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee Volunteers of America, Dakotas.

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

PER CURIAM.

## SUMMARY

Volunteers of America, Dakotas (VOA), proposed to build an apartment-style building for veterans in Omaha. To construct the building as planned, VOA applied for variances from area and use restrictions under the Omaha Municipal Code (Code). VOA applied to the zoning board of appeals of Omaha (the Board) for the variances. The appellants, Field Club Home Owners League and Thornburg Place Neighborhood

Association (collectively Field Club), opposed the application. The Board granted the variances, concluding that the 1987 Code created an unnecessary hardship because it did not contemplate a project like VOA's.[1] The district court affirmed the Board's decision.

We conclude that the record fails to show that VOA had standing to seek the variances. We therefore reverse and vacate the court's judgment. However, because Field Club raised standing for the first time on appeal to this court, we conclude that the district court must conduct an evidentiary hearing on the issue. We remand the cause with instructions for the court to conduct this further proceeding.

## BACKGROUND

VOA requested a number of variances related to setbacks, landscaping, buffer yards, offstreet parking, and population density. At the hearing before the Board, numerous individuals expressed their opinion that because the 1987 Code did not anticipate the type of project envisioned by VOA, its strict application constituted a hardship that justified the Board's granting of these variances.[2] After discussion amongst the various parties and members of the Board, the Board granted the requested variances, subject to specified conditions.

Field Club petitioned the district court to review the Board's decision, arguing that the Board's decision was contrary to law. While the petition was pending, Field Club moved the court to allow additional discovery. Field Club did not, however, specifically challenge VOA's standing to seek the variances or judicial review of the Board's order. The court overruled Field Club's discovery motion and admitted only the bill of exceptions and certain sections of the Code into evidence. In its order, the court explained that it could reverse the Board's decision only if it was illegal or not supported by the evidence, and thus arbitrary, unreasonable, or clearly wrong. After reviewing the evidence, the court concluded that Field Club

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[1] See Neb. Rev. Stat. § 14-411 (Reissue 2007).

[2] See *id.*

had not met that standard. The court affirmed the Board's decision. Field Club appeals.

## ASSIGNMENTS OF ERROR

Field Club assigned, renumbered and restated, that the district court erred in

(1) finding that VOA had standing to request variances from the Board;

(2) failing to permit Field Club to conduct discovery or adduce additional evidence; and

(3) affirming the Board's granting of the variances.

## STANDARD OF REVIEW

[1] We review de novo jurisdictional determinations that do not involve a factual dispute.[3]

## ANALYSIS

Field Club argues that VOA lacked standing to request variances from the Board because (1) it had not obtained a "certificate of authority" pursuant to Neb. Rev. Stat. § 21-20,169 (Reissue 2007) and (2) it did not have a legally cognizable interest in the property.

[2-6] A zoning board is an administrative body performing quasi-judicial functions.[4] To apply for a variance from a zoning regulation, the applicant must have standing.[5] Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.[6] Standing is a

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[3] See, *Trumble v. Sarpy County Board, ante* p. 486, 810 N.W.2d 732 (2012); *Project Extra Mile v. Nebraska Liquor Control Comm., ante* p. 379, 810 N.W.2d 149 (2012).

[4] See, *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001); *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996).

[5] See, generally, Annot., 89 A.L.R.2d 663 (1963). Compare, *Smith v. City of Papillion*, 270 Neb. 607, 705 N.W.2d 584 (2005); *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

[6] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

component of jurisdiction; only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.[7] Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.[8]

Relying on § 21-20,169(1), Field Club first argues that VOA lacked standing to request variances from the Board because VOA had not obtained a certificate of authority. That section provides that "[a] foreign corporation transacting business in this state without a certificate of authority may not maintain a proceeding in any court in this state until it obtains a certificate of authority."

[7] But § 21-20,169(1) does not apply here. Although VOA is a foreign corporation, it is not "maintaining" a court proceeding. It is Field Club that petitioned the district court and named VOA as a defendant. And a foreign corporation certainly has the right to enter court and defend itself.[9]

Field Club also contends that VOA lacked standing because it had no legally cognizable interest in the property. Field Club argues that the owner of the property was Kiewit Construction Company, not VOA.

[8-10] A property owner obviously has standing to seek a variance from a zoning ordinance that, if strictly enforced, would adversely affect the owner's property rights or interests.[10] And the majority of courts that have considered the issue also hold that a prospective purchaser under a purchase agreement subject to the grant of a variance or rezoning of the

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

[8] *Central Neb. Pub. Power Dist., supra* note 7.

[9] See § 21-20,169(5).

[10] See, 8 Eugene McQuillin, The Law of Municipal Corporations § 25:179.33 (rev. 3d ed. 2010); 8A Eugene McQuillin, The Law of Municipal Corporations § 25:321 (rev. 3d ed. 2012); 89 A.L.R.2d, *supra* note 5, § 3 (citing cases); 101A C.J.S. *Zoning and Land Planning* § 319 (2005).

property has standing to seek the change.[11] Similarly, courts have held that the holder of an option to purchase property has standing to apply for a variance when the holder is bound to purchase the property if the variance is obtained or when the property owner anticipated that the option holder would seek the variance to complete the sale.[12] We agree with these holdings. We note that in appeals from administrative decisions, the issue of standing is often raised with the party's right to seek review of the decision in court.[13] But the standing question is the same. If a party has standing to seek judicial review, then it also had standing to request relief from the administrative board.

Here, it is true that the record fails to show that VOA has standing to seek the variances. There was evidence of a lease agreement between VOA and the Department of Veterans Affairs, to take effect once the building was fully constructed. This evidence suggests that VOA has an ownership interest in the property. And VOA also told the Board that it would own the property. But VOA did not show the existence of a purchase agreement that was subject to its ability to obtain variances, an option contract subject to the same conditions, or Kiewit Construction Company's authorization for VOA to seek variances on the company's behalf. On the other hand, Field Club did not specifically challenge VOA's standing until after VOA prevailed with the Board and the district court.

[11,12] A party invoking a court's or tribunal's jurisdiction bears the burden of establishing the elements of standing.[14]

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[11] See, *Robinson v. City of Huntsville*, 622 So. 2d 1309 (Ala. Civ. App. 1993); *Lenette Realty v. City of Chesterfield*, 35 S.W.3d 399 (Mo. App. 2000); *Silverco, Inc. v. Zoning Bd. of Adjustment*, 379 Pa. 497, 109 A.2d 147 (1954). See, also, *Webb v. Fox*, 105 N.M. 723, 737 P.2d 82 (N.M. App. 1987); 8A McQuillin, *supra* note 10, § 25:280; 89 A.L.R.2d, *supra* note 5, § 4[b].

[12] See, *Babitzke v. Village of Harvester*, 32 Ill. App. 2d 289, 177 N.E.2d 644 (1961); *Hatch v. Fiscal Court of Fayette County*, 242 S.W.2d 1018 (Ky. 1951).

[13] See, e.g., *Central Neb. Pub. Power Dist., supra* note 7.

[14] See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

But we have previously explained that the stage of the litigation in which a party claims that its opponent lacks standing affects how a court should dispose of the claim. In *Citizens Opposing Indus. Livestock v. Jefferson Cty.*,[15] a citizens group and a village petitioned the district court to review a board of adjustment's order which granted a special use permit. After the court conducted a trial on the petition, the board moved to dismiss the litigation because the village and citizens group lacked standing. We explained that because the litigation had moved past the pleading stage, the board had raised a factual challenge to the plaintiffs' standing. We held that the court erred in failing to conduct an evidentiary hearing on standing before dismissing the litigation.

We conclude that the same reasoning applies here. At the pleading stage, the standard for determining the sufficiency of a complaint or petition to allege standing is fairly liberal. And we have not previously held what specific factual allegations a plaintiff must allege to show standing to seek variances. So Field Club's standing challenge raised a factual issue on appeal that VOA did not anticipate. In this circumstance, we will not order the trial court to dismiss the litigation based merely on allegations in a complaint or petition. Because this litigation is well past the pleading stage, VOA is entitled to an opportunity to demonstrate standing in an evidentiary hearing.

We therefore reverse and vacate the judgment and remand the cause with directions to the district court to receive additional evidence and determine whether VOA has sufficient interest in the property to seek the variances. We leave to the district court's discretion whether to permit additional discovery on the issue. Given our disposition of the standing issue, we do not reach the merits of Field Club's assigned error that the court improperly granted the variances.

REVERSED AND VACATED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

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[15] *Citizens Opposing Indus. Livestock v. Jefferson Cty.*, 274 Neb. 386, 740 N.W.2d 362 (2007).

# State of Nebraska, appellee, v. Thunder Collins, appellant.

812 N.W.2d 285

Filed May 11, 2012. No. S-11-891.

1. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
2. **Criminal Law: Pretrial Procedure: Appeal and Error.** Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.
3. **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.
4. **Judges: Recusal.** In order to demonstrate that a trial judge should have recused himself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
5. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
6. **Depositions: Proof.** Under Neb. Rev. Stat. § 29-1917 (Reissue 2008), for a defendant to obtain a deposition, the defendant must make a factual showing that the deponent's testimony either (1) may be material or relevant to an issue in the trial or (2) may assist the parties preparing for trial in their respective cases.
7. **Depositions: Statutes: Words and Phrases.** The plain language of Neb. Rev. Stat. § 29-1917 (Reissue 2008), by using the term "may," indicates that the granting of a deposition is within the trial court's discretion. As such, a defendant is not entitled, as a matter of right, to a deposition pursuant to § 29-1917.

Appeal from the District Court for Douglas County: Gary B. Randall, Judge. Affirmed.

Steve Lefler and Kyle C. Hassett, of Lefler & Kuehl Law, for appellant.

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

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ., and Pirtle, Judge.

McCormack, J.

## NATURE OF CASE

Thunder Collins was tried and convicted for numerous crimes, including first degree murder. On Collins' first appeal, we remanded the cause for a hearing to determine whether Collins was prejudiced by the jury's weekend separation during its deliberations. At that hearing, Collins moved for the judge's recusal and to conduct discovery. Both motions were denied. Following the hearing, the district court determined that Collins suffered no prejudice from the jury's separation and overruled his motion for new trial. Collins appealed each of those rulings. We conclude that the district court did not abuse its discretion, and we affirm Collins' convictions and sentences.

## BACKGROUND

The circumstances surrounding this case are set out in detail in *State v. Collins*[1] and need not be repeated here. Suffice it to say, the record showed that Collins worked with two California-based drug dealers to supply crack cocaine in Omaha, Nebraska. Rather than continue to split the profits, Collins tried to eliminate his partners. While they were all at an Omaha house to prepare the drugs for distribution, Collins shot them both—one survived, and one did not. Collins was apprehended and charged with and convicted of first degree murder, attempted second degree murder, first degree assault, and two counts of use of a weapon to commit a felony. He was sentenced to life in prison plus at least 90 years' imprisonment.[2]

On Collins' first appeal, we concluded that the district court erred in allowing the jury to separate during deliberations without Collins' express consent. We determined that this error resulted in a presumption of prejudice in Collins' favor, but that the State would be given an opportunity to rebut that presumption. We then remanded the cause for an evidentiary hearing on that issue.[3]

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[1] *State v. Collins*, 281 Neb. 927, 799 N.W.2d 693 (2011).

[2] See *id.*

[3] See *id.*

At the hearing, Collins argued several motions. First, Collins moved the presiding judge to recuse himself from the proceeding. Essentially, Collins argued that it would be difficult for the judge to admit his mistake and follow this court's direction on remand and that therefore, the judge should recuse himself. Collins noted that a judge should avoid even the appearance of impropriety and that a reasonable person, when presented with these circumstances, might question the judge's impartiality. Collins also claimed that the judge's scheduling of the remand hearing on the same day as the hearing on Collins' preliminary motions indicated that the judge had already decided to deny Collins' motions, before ever hearing argument, which demonstrated bias. The judge denied the motion for recusal, explaining that Collins had not offered any evidence of bias or prejudice and that, considering the issue on remand, the judge was in the best position to determine if Collins had been prejudiced by the jury's separation during deliberations.

Second, Collins moved the court to allow Collins to depose each of the jurors who had been subpoenaed to testify at the hearing. Collins argued that each juror's testimony was crucial to the issue the court was asked to decide on remand: whether the separation of the jury during deliberations had prejudiced Collins. And weighing the penalty to be imposed on Collins—life in prison—with the small burden of going through a deposition, Collins argued that he should be able to depose each juror. Collins also explained that while many of the jurors had willingly talked to him before the hearing, several had refused, stating that they preferred to speak in the courtroom. Moreover, Collins requested leave to subpoena each juror's telephone and computer usage records for the relevant time period, to ensure that the jurors had followed their instructions during their separation. The district court denied Collins' motion, noting that the State had shared all of the information from its investigation and interviews with the jurors and that Collins already had the opportunity to interview the jurors.

The State then proceeded to call each juror to testify. All 12 jurors testified that they had followed their instructions

and they had not accessed any media sources regarding the case. One alternate juror also took the stand and testified that he and the other alternate juror never participated in deliberations and that they had followed the judge's instructions. Each juror was subjected to direct and cross-examination. Both the State and Collins then gave closing argument.

Four days later, the district court entered a written order. The order memorialized the district court's initial rulings regarding Collins' previous motions, overruling both, and explained that the State had proved, "beyond a reasonable doubt," that Collins suffered no injury from the jury's separation during its deliberations. Collins appealed.

## ASSIGNMENTS OF ERROR

Collins assigns, restated, that the district court erred in (1) denying Collins' motion for recusal; (2) denying Collins' motion to depose each juror to assess whether he or she had accessed prohibited information during deliberations; and (3) overruling Collins' motion for new trial, because the State failed to prove that Collins suffered no prejudice from the court's failure to sequester the jury.

## STANDARD OF REVIEW

[1] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[4]

[2] Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.[5]

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[4] *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012).

[5] *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010); *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991).

[3] 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.[6]

## ANALYSIS

### Motion for Recusal

Collins argues that the judge's order shows an inability to properly address the issue presented on remand. He also argues that the judge had predetermined the outcomes for both the motion for recusal and the motion to take depositions before hearing argument. Collins claims that under these circumstances, a reasonable person would question the judge's impartiality. Our review of the record, however, does not indicate any bias or prejudice on the part of the judge, and no reasonable person under the circumstances would question the judge's impartiality in this case. As such, the judge did not abuse his discretion in denying Collins' motion for recusal.

[4,5] We have explained that in order to demonstrate that a trial judge should have recused himself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[7] In addition, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[8]

Collins first argues that a reasonable person reading the judge's order on remand would question the judge's impartiality. According to Collins, this is because the judge, in his order, "spent more time protecting himself, explaining why [this court] was wrong, than he did addressing the reason for the remand."[9]

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[6] *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

[7] *State v. Nolan, supra* note 4.

[8] *Id.*

[9] Brief for appellant at 17.

Our review of the judge's order reveals no bias or prejudice, nor is such bias or prejudice reasonably implied. The judge accurately stated both our holding in *State v. Collins*[10] and the issue on remand. It is true that the judge's order included information which was not relevant to the inquiry on remand; namely, his recounting Collins' failure to object to the jury instruction regarding the possible weekend separation of the jury. Such information was irrelevant because the sole issue on remand was whether the State could rebut the presumption of prejudice. Still, the judge understood the task before him:

> The Supreme Court found error in the Court's failure to obtain "express agreement or consent" for the jury's separation after submission of the case. [Collins] is entitled to a presumption that he was prejudiced by this separation and the State has a right to rebut that presumption on remand by showing that no injury resulted from the jury's separation.

This accurately framed the issue on remand. The judge then proceeded to analyze the evidence adduced at the hearing, and he concluded that the State had rebutted the presumption of prejudice. While the judge may have included an excess of information, the language of the order does not reveal any bias or prejudice, and a reasonable person under the circumstances would not question the judge's impartiality in this case.

Collins also argues that exhibit 374 shows that, before hearing argument, the judge had already made up his mind concerning both the motion for recusal and the motion for discovery. As a result, Collins claims the judge should have recused himself. Exhibit 374 is a letter from Collins' counsel to the judge. In that letter, counsel took issue with the court's scheduling of the evidentiary hearing on the same day as the hearings scheduled for Collins' preliminary motions. Collins' counsel explained that it did not make sense for the judge to have the State subpoena the jurors for the evidentiary hearing if the judge had not already decided to hold the hearing. And if that were the case, the judge had already decided to deny

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[10] *State v. Collins, supra* note 1.

Collins' other motions without ever hearing argument, demonstrating bias against Collins.

The judge's scheduling of hearings does not, by itself, require finding that the judge should have recused himself. In *State v. Thomas*,[11] we explained:

> Absent extraordinary circumstances, in order to disqualify a judge based upon the appearance of impropriety, the bias and prejudice *must stem from a nonjudicial source* and not from what the judge learned from his or her prior involvement in the defendant's case or cases that concerned parties or witnesses in the defendant's case.

Even assuming that the judge had preliminarily decided the outcome of these motions, Collins has made no showing that the judge based his decision on anything other than the law and facts of the case. In other words, any alleged bias or prejudice did not "stem from a nonjudicial source." Additionally, the court gave both sides an opportunity to argue their positions at the hearing, and then the court issued its rulings. The rulings themselves do not show any bias or prejudice against Collins.

While we found no similar case in our law, the Supreme Court of Ohio has addressed an analogous situation. In *In re Disqualification of Aubry*,[12] the trial judge scheduled a resentencing hearing for the defendant immediately after a hearing on the defendant's motion to withdraw his guilty plea. The defendant claimed that this showed the judge had already decided to deny the motion to withdraw and demonstrated that the judge was prejudiced against the defendant.[13]

The court first noted that a trial court had discretion to manage its own docket and that no express language existed in the scheduling order indicating bias. The court then explained that it would not be unusual for a judge, after reviewing

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[11] *State v. Thomas*, 268 Neb. 570, 581, 685 N.W.2d 69, 80 (2004) (emphasis supplied).

[12] *In re Disqualification of Aubry*, 117 Ohio St. 3d 1245, 884 N.E.2d 1095 (2006).

[13] See *id.*

the parties' legal memorandums and conducting research, to have reached some preliminary conclusions about the merits of the defendant's motion to withdraw his guilty plea. And that did not create a disqualifying bias or prejudice.[14] The court concluded:

> Judges are not required to wait until the eleventh hour to begin forming preconceptions about the proper resolution of the legal questions presented to them. In the absence of any evidence that the judge is likely to resolve the motion on grounds other than the relevant facts and the relevant law, her decision to schedule a sentencing hearing right after the motion hearing does not demonstrate that she lacks the requisite impartiality to decide fairly the issues presented to her at both of those hearings.[15]

We agree with this reasoning, and likewise conclude that there is no evidence that the judge in this case was required to recuse himself. A reasonable person, knowing the circumstances of this case, would not question the judge's impartiality under an objective standard of reasonableness. This assignment of error has no merit.

### Motion to Depose Jurors

Collins asserts that the district court erroneously denied his motion to depose each juror and also obtain telephone and computer usage records. Collins argues that such information was material to the issue on remand and would have been helpful in impeaching the jurors' testimony during cross-examination. We agree that such evidence would be relevant to the issue on remand. But because that evidence was unlikely to be helpful in any significant respect, and Collins' provided no factual basis to support a different determination, we conclude that the district court did not abuse its discretion in denying Collins' motion.

Much of Collins' brief is appropriately dedicated to analyzing Neb. Rev. Stat. § 29-1917 (Reissue 2008), which deals with depositions in a criminal proceeding. But Collins also

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[14] See *id.*

[15] *Id.* at 1246, 884 N.E.2d at 1096.

claims that the court's refusal to allow Collins to depose each juror under § 29-1917 resulted in a due process violation. We note at the outset that this is not a constitutional issue. As we explained in *State v. Tuttle*,[16] a defendant in a criminal proceeding has no general due process right to discovery.

[6,7] Instead, resolution of this assigned error is controlled by statute, and specifically by § 29-1917. That statute states, in relevant part:

> The court may order the taking of the deposition [of a witness] when it finds the testimony of the witness:
>
> (a) May be material or relevant to the issue to be determined at the trial of the offense; or
>
> (b) May be of assistance to the parties in the preparation of their respective cases.

Thus, for a defendant to obtain a deposition, the defendant must make a factual showing that the deponent's testimony either (1) may be material or relevant to an issue in the trial or (2) may assist the parties preparing for trial in their respective cases.[17] But the plain language of the statute, by using the term "may," also indicates that the granting of a deposition is within the trial court's discretion.[18] As such, we have concluded that a defendant is not entitled, as a matter of right, to a deposition pursuant to § 29-1917.[19]

In *Tuttle*, the defendant wished to depose seven witnesses listed on the information.[20] When asked why the depositions were needed, the defendant's counsel explained that all the witnesses' testimony would be material to the defendant's case, and he explained that they had already given written statements or were somehow implicated in the offense. As such, he concluded that the individuals were "'extremely material

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[16] *State v. Tuttle, supra* note 5 (citing *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)).

[17] See *State v. Vela, supra* note 5.

[18] See, e.g., *State v. County of Lancaster*, 272 Neb. 376, 721 N.W.2d 644 (2006).

[19] See *State v. Vela, supra* note 5.

[20] *State v. Tuttle, supra* note 5.

and relevant.'"[21] He also explained that he was unable to find one of the witnesses, and had not attempted to interview the others, but that it was important to "'question them under oath prior to the trial in order to get . . . their version of the statements before trial.'"[22] The State argued that the defendant was required to make some showing that the depositions would provide useful information before they should be granted. The district court overruled the defendant's motion, explaining that it would not allow "'wholesale depositions,'" but that the defendant could request depositions in the future if he showed a special need.[23]

We explained that a party seeking a deposition in a criminal proceeding must make a factual showing to the court that the deponent's testimony satisfies one of the two statutory conditions in § 29-1917. We also noted that there was no indication that "some assistance . . . might be gained in preparing [the defendant's] defense" from the proposed depositions.[24] Thus, we concluded that the district court did not abuse its discretion in refusing to order depositions.[25]

Collins' counsel has provided similar justifications here. Defense counsel claims that the jurors' testimony was material and relevant to the issue on remand and that he needed to depose the jurors for impeachment purposes. He also claims that he needed telephone and computer usage records to verify that the jurors had each followed the jury instructions. While we agree that the jurors' deposition testimony and records would have been relevant to the issue on remand, there was no reason to think that deposing the jurors, or subpoenaing their records, would provide any useful information beyond what could be obtained through their live testimony.

Defense counsel had an opportunity to interview many of the jurors prior to the hearing. And while a few jurors refused

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[21] *Id.* at 831, 472 N.W.2d at 715.

[22] *Id.* at 831, 472 N.W.2d at 716.

[23] *Id.*

[24] *Id.* at 837, 472 N.W.2d at 719.

[25] *State v. Tuttle, supra* note 5.

to speak with defense counsel, explaining that they would prefer to speak in court, defense counsel was aware of the substance of their testimony. Additionally, the State had conducted an investigation and interviewed each of the jurors, and that information was turned over to Collins in its entirety. Neither the State's investigation nor defense counsel's interviews with the jurors gave any indication that the jury had violated their instructions, or provided any reason to believe depositions or subpoenaed records were necessary. Thus, as in *Tuttle*, there was no indication that the depositions or records would materially assist Collins in preparing for the hearing. Under these circumstances, we cannot say the district court abused its discretion in overruling Collins' motion to take depositions and subpoena records.

### Motion for New Trial

Collins claims that the district court erred in overruling his motion for new trial. Collins argues that the State failed to rebut the presumption of prejudice and that therefore, the court's failure to sequester the jury requires a new trial. Our review of the record, however, shows that the State rebutted any presumed prejudice from the jury's separation. This assigned error has no merit.

Collins' brief focuses on the failure of the district court to sequester the jury and the possibility that the jurors accessed improper information. We agree that the separation of the jury during deliberations was error—that is why we remanded this cause on Collins' first appeal. And we also agree that the jurors could have accessed improper information—that is why a rebuttable presumption of prejudice exists in Collins' favor. But the issue is whether the State effectively rebutted that presumption by showing that the jurors followed their instructions and properly arrived at their verdict. The State did so.

As noted by the district court, each juror testified that he or she had followed all the jury instructions from start to finish, including while the jury was separated. The jurors did not read news about the case, watch or hear broadcasts about the case, or conduct their own independent research into issues in the case. The district court found their testimony

to be completely credible. The district court also found that their testimony effectively rebutted any presumed prejudice. There is nothing in the record to support drawing a different conclusion. The district court did not abuse its discretion in overruling Collins' motion for new trial. This assignment of error has no merit.

## CONCLUSION

For each of the foregoing reasons, we affirm the district court's judgment.

AFFIRMED.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, v. JOSEPH M. DORSEY, RESPONDENT.

812 N.W.2d 302

Filed May 11, 2012. No. S-12-223.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by respondent, Joseph M. Dorsey, on March 22, 2012. The court accepts respondent's voluntary 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 June 25, 1973. Respondent was also licensed to practice law in the District of Columbia, but the District of Columbia Court of Appeals disbarred him from the practice of law on December 14, 1983, for obtaining money fraudulently and dishonestly and thereby engaging in conduct involving moral turpitude. See *In re Dorsey*, 469 A.2d 1246 (D.C. 1983).

On March 15, 2012, the Committee on Inquiry of the First Disciplinary District filed a motion for reciprocal discipline and an application for temporary suspension of respondent's license. An order to show cause with respect to this motion and this application was entered on March 21. On March 22, respondent filed a voluntary surrender in which he admitted that on December 14, 1983, he had been disbarred by the District of Columbia Court of Appeals. Respondent further stated that he did not inform the Nebraska Supreme Court or the Nebraska State Bar Association of this disciplinary action taken against him. Respondent further stated that he does not challenge or contest the truth of the allegations being made against him. He further stated that he freely and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely,

knowingly, and voluntarily admits that he does not contest the allegations being made against him. 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. In view of the acceptance of respondent's voluntary surrender, the motion for reciprocal discipline and the application for temporary suspension are denied as moot. 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.

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IN RE INTEREST OF DAVID M. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. HERENDIRA H., APPELLEE, MADISON COUNTY, NEBRASKA, INTERVENOR-APPELLANT, AND KATE M. JORGENSEN, INTERVENOR-APPELLEE.

814 N.W.2d 371

Filed May 18, 2012. No. S-10-968.

Petition for further review from the Court of Appeals, IRWIN, CASSEL, and PIRTLE, Judges, on appeal thereto from the County Court for Madison County, DONNA F. TAYLOR, Judge. Judgment of Court of Appeals affirmed.

Joseph M. Smith, Madison County Attorney, and Gail E. Collins for intervenor-appellant.

Harry A. Moore for intervenor-appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK and MILLER-LERMAN, JJ.

PER CURIAM.

Having reviewed the briefs and record and having heard oral argument, we conclude on further review that the decision of the Nebraska Court of Appeals in *In re Interest of David M. et al.*, 19 Neb. App. 399, 808 N.W.2d 357 (2012), is correct, and accordingly, we affirm the decision of the Nebraska Court of Appeals that reversed and remanded the ruling of the county court.

AFFIRMED.

HEAVICAN, C.J., not participating.

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ANTHONY, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS, V. CITY OF OMAHA, A NEBRASKA MUNICIPAL CORPORATION, APPELLEE.

813 N.W.2d 467

Filed May 18, 2012. No. S-11-421.

1. **Constitutional Law: Ordinances: Appeal and Error.** The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Administrative Law: Statutes: Appeal and Error.** The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Municipal Corporations: Taxation: Statutes.** Municipal corporations have no power to impose taxes except such as is expressly conferred by or necessarily implied from statute.
4. **Taxation: Words and Phrases.** An occupation tax is a tax upon the privilege of doing business in a particular jurisdiction or upon the act of exercising, undertaking, or operating a given occupation, trade, or profession.
5. ____: ____. A sales tax is a tax upon the sale, lease, rental, use, storage, distribution, or other consumption of all tangible personal property in the chain of commerce.
6. **Taxation: Proof.** The legal incidence test requires a determination of who the law declares has the ultimate burden of the tax.
7. **Taxation.** The legal incidence of a sales tax falls upon the purchaser, because it is a tax upon the privilege of buying tangible personal property.
8. ____. The legal incidence of an occupation tax falls upon the retailer, because it is a tax upon the act or privilege of engaging in business activities.

9. ____. Both occupation taxes and sales taxes can be calculated upon gross receipts.
10. ____. It is not objectionable for there to be two or more occupation taxes imposed upon the same retailer.
11. ____. The same person or entity may engage in several different businesses or activities and be taxed on each.
12. **Statutes: Legislature: Intent.** In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.
13. ____: ____: ____. When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which a court sees plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then the court may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.
14. **Taxation: Liquor Licenses.** The monetary limit for an occupation tax on the business of any person, firm, or corporation licensed under the Nebraska Liquor Control Act is a specific limitation on an occupation tax on the type of business or activity licensed under the act.
15. **Administrative Law: Taxation: Legislature.** A state legislature, in fixing a license tax on a certain subject, may limit taxes against the same subject by other branches of government.
16. **Constitutional Law: Ordinances: Presumptions: Proof: Appeal and Error.** When passing on the constitutionality of an ordinance, an appellate court begins with a presumption of validity. Therefore, the burden of demonstrating the constitutional defect rests with the challenger.
17. **Constitutional Law: Statutes: Special Legislation.** When a law confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, then the law in question has resulted in the kind of improper "special favors" prohibited by the special legislation clause.
18. **Special Legislation.** A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.
19. **Municipal Corporations: Taxation: Ordinances.** To be valid, a municipal ordinance classifying an occupation for the purpose of levying a tax thereon must not be arbitrary in its classification.
20. **Taxation: Public Policy.** A classification for tax purposes must rest on some reason of public policy or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.
21. **Municipal Corporations: Taxation: Ordinances.** Municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with by the courts, unless it manifestly appears that it is unreasonable and arbitrary.

Appeal from the District Court for Douglas County: MARLON A. POLK, Judge. Affirmed.

D.C. Bradford, Ryan J. Dougherty, and Justin D. Eichmann, of Bradford & Coenen, L.L.C., for appellants.

Thomas Mumgaard, Deputy Omaha City Attorney, for appellee City of Omaha.

Rodney M. Confer, Lincoln City Attorney, and Jocelyn W. Golden for amicus curiae City of Lincoln.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and MOORE, Judges.

MCCORMACK, J.

## NATURE OF CASE

Anthony, Inc.; Anthony J. Fucinaro, Jr.; La Casa Pizzaria Inc.; and members of the Omaha Restaurant Association (collectively the Restaurants) operate restaurants in the City of Omaha (the City) subject to a municipal ordinance which became effective on October 1, 2010. The ordinance declares itself to be an "occupation tax" on restaurants and drinking places in the City in the amount of 2½ percent of gross receipts. The Restaurants argue that the tax is actually a "sales tax" which exceeds the sales tax limits authorized by law. Alternatively, the Restaurants argue that if the ordinance imposes an occupation tax, it violates limitations in the Nebraska Liquor Control Act (Liquor Control Act)[1] on the amount of occupation tax for liquor licensees. Finally, the Restaurants argue that the ordinance is unconstitutional special legislation. We find no merit to the Restaurants' challenges to the ordinance.

## BACKGROUND

### THE RESTAURANT ORDINANCE

In response to budget shortfalls, the Omaha City Council passed ordinance No. 38791 (the Restaurant Ordinance),[2]

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[1] Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010).

[2] Omaha Mun. Code, ch. 19, art. XVI, §§ 19-800 through 19-813 (2010).

which imposes "an occupation tax on persons operating restaurants and drinking places within the City" (the Restaurant Tax). A restaurant is defined by the ordinance as "any place that is kept, used, maintained, advertised, or held out to the public as a place where food is prepared and sold for immediate consumption either on the premises or elsewhere."[3] A "drinking place" is defined as "any establishment or business offering the public on-premises consumption of alcoholic and/or non-alcoholic beverages."[4]

The amount of the Restaurant Ordinance is 2½ percent "of all gross receipts for each calendar month derived from the sale of food or beverages subject to this tax."[5] The Restaurant Ordinance provides that a taxable restaurant or drinking place "may itemize the tax levied on a bill, receipt, or other invoice provided to the purchaser but each person engaged in the restaurant or drinking place business shall remain liable for the tax imposed by this section."[6] The tax "is for revenue purposes to support the government of the city" and is "in addition to all other fees, taxes, excises, and licenses levied and imposed under any contract or any other provisions of this code or ordinances of the city and in addition to any fee, tax, excise, or license imposed by the state."[7]

The stated intent and purposes of the Restaurant Ordinance are as follows:

> (a) The city council determines that persons engaging in restaurant and drinking place businesses are benefited from tourism and recreational activity that places unique demands on the city's resources but which is activity that should be promoted and encouraged. Further, residents and non-residents who patronize these businesses are enjoying a discretionary activity that is dependent upon, and generating revenue from, the business's location

[3] *Id.*, § 19-800(h).

[4] *Id.*, § 19-800(c).

[5] *Id.*, § 19-802(a).

[6] *Id.*, § 19-802(b).

[7] *Id.*, § 19-803(a).

> within the city and the business's access to the services provided by the city. Subjecting the business's revenue to taxation for general city purposes is fair, reasonable, and just.
>
> (b) Pursuant to the authority of Neb. Rev. Stat. § 14-109, the city council finds, determines, and declares that restaurant and drinking place businesses form a discrete class of occupation engaged in within the city and it is appropriate that a tax be imposed on this class of businesses for the purpose of raising revenue to support and further general city activities and services. This determination is made with due recognition of the inherent value of business conducted within the city and the relation business has to the municipal welfare and the expenditures required of the city, and with consideration of the just, proper and equitable distribution of tax burdens within the city.[8]

The Restaurant Ordinance contains a severability clause stating that if any provision "or the application thereof to any person or circumstances" is held invalid, then "that invalidity shall not affect the other provisions of this article which can be given effect without the invalid provision or application."[9]

The City's finance department sent letters to restaurants, drinking places, and caterers identified as subject to the Restaurant Ordinance. Those letters informed the businesses as to various matters concerning the Restaurant Tax, including how it related to the calculation of state and city sales and use taxes.

The letter stated that the state and local sales and use taxes are "*calculated on the gross receipts* ***plus*** *the restaurant tax*." In the event restaurants chose to itemize the Restaurant Tax on their customers' bills, the City sent the following example as to how the sales tax would be calculated and listed:

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[8] *Id.*, § 19-801.

[9] *Id.*, § 19-813.

| | | |
|---|---|---|
| *Example:* | *Meal and beverage cost:* | *$100.00* |
| | *2.5% restaurant tax* | *2.50(a)* |
| | *Total cost of the meal* | *$102.50* |
| | *Total cost of the meal* | *$102.50* |
| | *7% sales tax* | *7.18(b)* |
| | ***Total cost to the customer*** | *$109.68* |
| ***Amount remitted to the State of Nebraska*** | | ***$7.18(b)*** |
| ***Calculation of amount sent to the City*** | | |
| | *2.5% food and beverage tax* | *$2.50(a)* |
| | *Less: collection fee of 2%* | *.05* |
| ***Amount remitted to the City of Omaha*** | | ***$2.45*** |

This method of calculation followed the recommended method by the Nebraska Department of Revenue, based on its interpretation of sales tax regulation 316 Neb. Admin. Code, ch. 1, § 007.01 (2010), and Neb. Rev. Stat. § 77-2701.35(3)(c) (Reissue 2009). The department considers occupation taxes as simply another cost of doing business, no different than income, property, or other business or license taxes and fees. As such, occupation taxes are considered part of the gross receipts upon which the sales tax is calculated.

## Proceedings Below

The Restaurants filed an action for declaratory judgment and injunctive relief against the City. The Restaurants alleged that the Restaurant Ordinance is invalid because it imposes an unauthorized sales tax, violates the provisions of § 53-132(4), and constitutes special legislation affording special or exclusive immunity to persons operating businesses other than restaurants and drinking places.

The Restaurants asked that the district court declare the Restaurant Ordinance unconstitutional, invalid, illegal, and unenforceable and that it enjoin the City from imposing and collecting the Restaurant Tax imposed by the ordinance. The Restaurants did not seek declaratory judgment or injunctive relief concerning the state or local sales tax calculations. In particular, they did not challenge regulation § 007.01 or § 77-2701.35(3)(c) and the recommended method of computing the total sales tax when the Restaurant Tax is itemized on the customers' bills.

At a hearing on cross-motions for summary judgment, Anthony, Inc., presented evidence that it had elected to itemize the Restaurant Tax on its customers' bills. La Casa Pizzaria, in contrast, apparently did not specifically itemize the Restaurant Tax, but charged a combined total of 9 percent tax to its customers' bills. La Casa Pizzaria paid the additional 0.68 percent of its Restaurant Tax obligation from its general revenue. Anthony, Inc., presented evidence that it paid $26,707.89 to the City under the Restaurant Ordinance in 2010. La Casa Pizzaria paid a total of $12,053.29 in 2010.

The district court denied the Restaurants' motion for summary judgment and granted summary judgment in favor of the City. The Restaurants appeal.

## ASSIGNMENTS OF ERROR

The Restaurants assign that the district court erred in granting summary judgment upon the determination that the Restaurant Ordinance (1) does not constitute an illegal sales tax, (2) does not constitute an illegal occupation tax, and (3) does not constitute unconstitutional special legislation.

## STANDARD OF REVIEW

[1] The constitutionality of an ordinance presents a question of law, in which an appellate court is obligated to reach a conclusion independent of the decision reached by the trial court.[10]

[2] The interpretation of statutes and regulations presents questions of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[11]

## ANALYSIS

[3] Municipal corporations have no power to impose taxes except such as is expressly conferred by or necessarily implied from statute.[12] Pursuant to Neb. Rev. Stat. § 14-109 (Reissue

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[10] *Waste Connections of Neb. v. City of Lincoln*, 269 Neb. 855, 697 N.W.2d 256 (2005).

[11] *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009).

[12] See *Caldwell v. City of Lincoln*, 19 Neb. 569, 27 N.W. 647 (1886).

2007), city councils of cities of the metropolitan class have the power to "raise revenue by levying and collecting a tax on any occupation or business within the limits of the city," so long as they are "uniform in respect to the class upon which they are imposed." There are no statutory limits on the amount of such occupation taxes.

The Restaurants' principal argument is that the Restaurant Ordinance really imposes a sales tax instead of an occupation tax. The Restaurants argue that the Restaurant Ordinance is therefore invalid because it exceeds statutory limits on the amount of sales and use taxes that may be imposed. Alternatively, the Restaurants argue that if the Restaurant Ordinance imposes an occupation tax, it violates the Liquor Control Act.[13] Finally, the Restaurants argue that the Restaurant Tax is unconstitutional special legislation. We address each of these arguments in turn.

### The Restaurant Ordinance Does Not Impose Illegal Sales Tax

While there is no statutory limit on the amount of municipal occupation taxes, there are limits on the amount of municipal sales and use taxes. Neb. Rev. Stat. § 77-27,142 (Reissue 2009) authorizes any municipality to impose a sales and use tax, but currently imposes a limit of 1½ percent for such taxes. A municipal ordinance already imposes a sales tax of 1½ percent for City residents.[14] Thus, if the Restaurant Ordinance were a sales tax and not an occupation tax, it would violate § 77-27,142.

The Nebraska statutes do not define the terms "sales tax" or "occupation tax." Municipal occupation taxes are not described by statute other than the requirements of uniformity as stated in § 14-109.

The state sales tax is described in more detail. Neb. Rev. Stat. § 77-2701.02(4) (Reissue 2009) sets the current state sales tax rate at 5½ percent. Under Neb. Rev. Stat. § 77-2703(1) (Reissue 2009), the sales and use tax is imposed "upon the

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[13] §§ 53-101 to 53-1,122.

[14] Omaha Mun. Code, ch. 35, art. II, § 35-21 (1995).

gross receipts from all sales of tangible personal property sold at retail in this state."

Section 77-2703(1) states further as follows:

> (a) The tax imposed by this section shall be collected by the retailer from the consumer. It shall constitute a part of the purchase price and until collected shall be a debt from the consumer to the retailer and shall be recoverable at law in the same manner as other debts. The tax required to be collected by the retailer from the consumer constitutes a debt owed by the retailer to this state.
>
> (b) It is unlawful for any retailer to advertise, hold out, or state to the public or to any customer, directly or indirectly, that the tax or part thereof will be assumed or absorbed by the retailer, that it will not be added to the selling, renting, or leasing price of the property sold, rented, or leased, or that, if added, it or any part thereof will be refunded. The provisions of this subdivision shall not apply to a public utility.
>
> (c) The tax required to be collected by the retailer from the purchaser, unless otherwise provided by statute or by rule and regulation of the Tax Commissioner, shall be displayed separately from the list price, the price advertised in the premises, the marked price, or other price on the sales check or other proof of sales, rentals, or leases.

The Restaurants believe that because the Restaurant Tax shares some of the attributes of the sales tax, as described by § 77-2703(1), it is also a sales tax. We disagree.

Both occupation taxes and sales taxes are "excise taxes" for the purpose of raising revenue.[15] An excise tax is a tax imposed on the manufacture, sale, or use of goods or on an occupation

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[15] See *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011). See, also, *Town of Eagle v. Scheibe*, 10 P.3d 648 (Colo. 2000); *Callaway v. City of Overland Park*, 211 Kan. 646, 508 P.2d 902 (1973); *Reed v. City of New Orleans*, 593 So. 2d 368 (La. 1992); *Eugene Theatre et al. v. Eugene et al.*, 194 Or. 603, 243 P.2d 1060 (1952); *Ford Motor Co. v. City of Seattle*, 160 Wash. 2d 32, 156 P.3d 185 (2007).

or activity,[16] and is measured by the extent to which a privilege is exercised by the taxpayer, without regard to the nature or value of the taxpayer's assets.[17] An excise tax is imposed upon the performance of an act.[18]

[4,5] But sales taxes and occupation taxes tax different kinds of acts.[19] An occupation tax is a tax upon the privilege of doing business in a particular jurisdiction[20] or upon the act of exercising, undertaking, or operating a given occupation, trade, or profession.[21] A sales tax, on the other hand, is a tax upon the sale, lease, rental, use, storage, distribution, or other consumption of all tangible personal property in the chain of commerce.[22]

[6-8] The most fundamental distinction between a sales tax and an occupation tax is the "legal incidence" of the tax. The legal incidence test requires a determination of who the law declares has the ultimate burden of the tax.[23] The legal incidence of a sales tax falls upon the purchaser, because it is a tax upon the privilege of buying tangible personal property.[24] The legal incidence of an occupation tax falls upon the

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[16] *Waste Connections of Neb. v. City of Lincoln, supra* note 10.

[17] 71 Am. Jur. 2d *State and Local Taxation* § 22 (2001).

[18] See *Kiplinger v. Nebraska Dept. of Nat. Resources, supra* note 15.

[19] *Ford Motor Co. v. City of Seattle, supra* note 15. See, also, *Archer Daniels Midland Co. v. Chicago*, 294 Ill. App. 3d 186, 689 N.E.2d 392, 228 Ill. Dec. 520 (1997).

[20] See *Ford Motor Co. v. City of Seattle, supra* note 15.

[21] See *Wellington v. City of Chicago*, 144 Ill. App. 3d 774, 494 N.E.2d 603, 98 Ill. Dec. 481 (1986).

[22] *Intralot, Inc. v. Nebraska Dept. of Rev.*, 276 Neb. 708, 757 N.W.2d 182 (2008).

[23] See, *American Beverage Ass'n v. City of Chicago*, 404 Ill. App. 3d 682, 937 N.E.2d 261, 344 Ill. Dec. 555 (2010); *Marcum v. City of Louisville Municipal Housing Com'n*, 374 S.W.2d 865 (Ky. 1963); *Keystone Auto Leasing, Inc. v. Norberg*, 486 A.2d 613 (R.I. 1985); *South Cent. Bell Telephone Co. v. Olsen*, 669 S.W.2d 649 (Tenn. 1984).

[24] See *id.* See, also, *P & S Grain, LLC v. County of Williamson*, 399 Ill. App. 3d 836, 926 N.E.2d 466, 339 Ill. Dec. 234 (2010); *Ford Motor Co. v. City of Seattle, supra* note 15.

retailer, because it is a tax upon the act or privilege of engaging in business activities.[25] While sales taxes and occupation taxes often have "a similar appearance and effect," they are "substantively distinct," because of the distinct identities of the taxpayers upon whom the tax is levied.[26]

[9] Both occupation taxes and sales taxes can be "gross receipts taxes."[27] A "gross receipts tax" is any tax law that provides for calculation or computation of the amount of taxes due with reference to total revenues arising out of the subject matter taxed.[28] The method of computation of a tax is generally considered to be "of no significance in determining the nature of the exaction imposed in any particular tax legislation."[29]

Several other jurisdictions have accordingly rejected arguments that a tax must be a sales tax rather than an occupation tax because it is calculated on gross receipts. In *Short Bros. v. Arlington County*,[30] for instance, the court rejected the plaintiff's argument that an occupation tax calculated based on revenue generated by the sale or lease of property was thereby transformed into a tax *on* the sale or lease of property. The court explained that "revenue is merely an element in the formula used to determine the taxpayer's liability for the tax at issue, just as it also may serve to determine the taxpayer's

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[25] See, *American Beverage Ass'n v. City of Chicago, supra* note 23; *Ford Motor Co. v. City of Seattle, supra* note 15. See, also, e.g., *Governors of Ak-Sar-Ben v. Department of Rev.*, 217 Neb. 518, 349 N.W.2d 385 (1984).

[26] See *Southern Pacific Transp. Co. v. State*, 202 Ariz. 326, 333, 44 P.3d 1006, 1013 (Ariz. App. 2002). See, also, *Ryder Truck Rental, Inc. v. Bryant*, 170 So. 2d 822 (Fla. 1964).

[27] 16 Eugene McQuillin, The Law of Municipal Corporations § 44.192 (rev. 3d ed. 2003).

[28] *Id.*

[29] *Town of Fenwick Island v. Sussex Sands, Inc.*, No. Civ. A. 89C-MY14, 1990 WL 161177 at *3 (Del. Super. Sept. 18, 1990) (unpublished opinion). See, also, *American Beverage Ass'n v. City of Chicago, supra* note 23; *Eugene Theatre et al. v. Eugene et al., supra* note 15. But see *Town of Eagle v. Scheibe, supra* note 15.

[30] *Short Bros. v. Arlington County*, 244 Va. 520, 423 S.E.2d 172 (1992).

liability for income taxes, sales taxes, use taxes, or value-added taxes."[31]

The court explained that although gross receipts may form the same basis of calculation for all these kinds of taxes, "the taxes are different taxes, based upon different underlying philosophies, different taxing jurisdictions, and different taxpayers."[32] Similarly, in *Eugene Theatre et al. v. Eugene et al.*,[33] the court said that a true occupation tax "is no less an occupation tax because the amount thereof is measured by the gross receipts from sales or services."

Nebraska has a history of occupation taxes calculated on gross receipts. In *Lincoln Traction Co. v. City of Lincoln*,[34] for example, we recognized the authority and right of the city to impose an occupation tax for the use and occupation of its streets by street railway companies and the authority and right to measure the amount of such occupation tax by the gross earnings of the corporation enjoying and making use of that privilege. And, in *Nebraska Telephone Co. v. City of Lincoln*,[35] we said, "A business tax measured by gross earnings is a tax upon the business which is actually performed, and is not a tax upon property in any sense . . . ."

Currently, several statutes expressly contemplate occupation taxes calculated upon gross receipts. Neb. Rev. Stat. § 15-202 (Reissue 2007) provides that a city of the primary class may impose an occupation tax on public service property

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[31] *Id.* at 523, 423 S.E.2d at 174.

[32] *Id.*

[33] *Eugene Theatre et al. v. Eugene et al., supra* note 15, 194 Or. at 630, 243 P.2d at 1072. See, *Acme Brick & Supply v. Dep't of Revenue*, 133 Ill. App. 3d 757, 478 N.E.2d 1380, 88 Ill. Dec. 654 (1985); *Ford Motor Co. v. City of Seattle, supra* note 15. See, also, *McPheeter v. City of Auburn*, 288 Ala. 286, 259 So. 2d 833 (1972). But see, *Bd. of Trustees v. Foster Lumber*, 190 Colo. 479, 548 P.2d 1276 (1976); *Svithiod Singing Club v. McKibbin*, 381 Ill. 194, 44 N.E.2d 904 (1942).

[34] *Lincoln Traction Co. v. City of Lincoln*, 84 Neb. 327, 121 N.W. 435 (1909).

[35] *Nebraska Telephone Co. v. City of Lincoln*, 82 Neb. 59, 63, 117 N.W. 284, 286 (1908).

or corporations "based upon a certain percentage of the gross receipts . . . or upon such other basis as may be determined upon by the mayor and council." Neb. Rev. Stat. § 86-704 (Reissue 2009) allows municipalities to impose an occupation tax on telecommunications businesses based on a percentage of customer sales receipts. Neb. Rev. Stat. § 77-27,223 (Reissue 2009) allows counties to impose an occupation tax on businesses engaged in the sale of admissions to recreational, cultural, entertainment, or concert events and states that such tax "shall be based upon a certain percentage of gross receipts from sales." We are not persuaded by the Restaurants' arguments that the Restaurant Tax must be a sales tax because it is calculated upon gross receipts.

The option to itemize the tax on the bill only reinforces its nature as an occupation tax.[36] It is significant that instead of listing the tax on a customer's bill, a restaurant or "drinking place" may choose to absorb the cost of the Restaurant Tax. Alternatively, the restaurant or drinking places may indirectly pass the tax on to the consumer through an increase in prices. This is notably distinguishable from sales taxes under § 77-2703. Section 77-2703(1)(c) mandates the sales tax "shall be displayed separately from the list price." And § 77-2703(1)(b) expressly prohibits that the retailer "advertise, hold out, or state to the public or to any customer, directly or indirectly, that the tax or part thereof will be assumed or absorbed by the retailer." The Restaurants, by taking advantage of a discretionary act created for the sole purpose of making the tax less onerous for them, have not thereby invalidated the Restaurant Tax.

Occupation taxes such as the Restaurant Tax are not unprecedented. It might be "contrary to common sense and practical business procedure" not to consider passing on the expense of

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[36] See, *Watkins Cigarette Serv., Inc. v. Arizona St. Tax Com'n*, 111 Ariz. 169, 526 P.2d 708 (1974); *Southern Pacific Transp. Co. v. State, supra* note 26; *Pac. Coast Eng. Co. v. State of California*, 111 Cal. App. 2d 31, 244 P.2d 21 (1952); *Waukegan School Dist. v. City of Waukegan*, 95 Ill. 2d 244, 447 N.E.2d 345, 69 Ill. Dec. 128 (1983); *Town of Fenwick Island v. Sussex Sands, Inc., supra* note 29.

an occupation tax to the customers.[37] But that does not make the tax a sales tax. Ordinances that give businesses the option of listing the tax on the customers' bills simply give businesses an "out" to explain to the customer precisely why the cost has increased.[38]

Ultimately, the legal incidence of the Restaurant Tax is upon the restaurants and drinking places, and not upon the customers. In *Governors of Ak-Sar-Ben v. Department of Rev.*,[39] we were called upon to determine upon whom the legal incidence of the state sales tax really fell. The statute mandates that the business owner collect and remit the tax to the Tax Commissioner. Nevertheless, we observed that the statute[40] "clearly states that *the purchaser must pay the tax* on the cost of his purchase to the retailer."[41] Thus, we concluded that "the purchaser . . . is the taxpayer," not the business.[42] The business is simply the tax collector[43] under the state sales tax statute.

Conversely, here, the Restaurant Tax is "imposed . . . upon each and every person conducting business as a restaurant or drinking place."[44] The Restaurant Ordinance specifically states that no matter whether the business chooses to itemize the tax levied on a bill receipt, or other invoice provided to the purchaser, the "business shall remain liable for the tax."[45] Pursuant to the provisions of the Restaurant Ordinance, if the tax is not remitted to the City, it is the business that can incur penalties, not the purchaser.[46] If the customer refuses to pay the

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[37] *Town of Fenwick Island v. Sussex Sands, Inc., supra* note 29, 1990 WL 161177 at *3.

[38] See *id.*

[39] *Governors of Ak-Sar-Ben v. Department of Rev., supra* note 25.

[40] See § 77-2703 (Reissue 1981).

[41] *Governors of Ak-Sar-Ben v. Department of Rev., supra* note 25, 217 Neb. at 520, 349 N.W.2d at 386 (emphasis supplied).

[42] *Id.* at 520, 349 N.W.2d at 387.

[43] See *Wiseman v. Phillips*, 191 Ark. 63, 84 S.W.2d 91 (1935).

[44] Omaha Mun. Code, ch. 19, art. XVI, § 19-802(a).

[45] *Id.*, § 19-802(b).

[46] See *id.*, § 19-812.

occupation tax when itemized on his or her bill, action by the City will be taken against the restaurant, not against the consumer. Because the legal incidence of the tax falls on the business and not the customer, the Restaurant Tax is an occupation tax, not a sales tax.

The Restaurants briefly refer in their arguments to the manner in which they have been directed, in the City's letter, to calculate the state and city sales and use taxes when the Restaurant Tax is listed on a customer's bill. The Restaurants claim that when restaurants choose to itemize the Restaurant Tax on the customer's bill and the restaurant then calculates that tax on the bill as directed, the combined state and local sales tax rate upon the consumer is illegally increased from 7 percent to 7.18 percent. They appear to argue that this supports their theory that the Restaurant Tax is really a sales tax. We fail to see how the directed method of calculating sales taxes, which are imposed by an entirely different local sales tax ordinance and by state laws concerning the state sales tax, is pertinent to whether the Restaurant Tax is a sales tax versus an occupation tax.

Nor can the threatened application of the sales and use taxes upon the Restaurant Tax render the Restaurant Tax inapplicable to the Restaurants in any other way. The method of calculating sales and use taxes when the Restaurant Tax is itemized in the bill is not a matter expressly provided for in the Restaurant Ordinance. Even if it were, such provision would be severable from the Restaurant Ordinance, under both the severability clause of the ordinance and principles of common law.[47] An abuse in application or enforcement of an ordinance does not render the ordinance itself invalid.[48]

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[47] See *County of Sarpy v. City of Papillion*, 277 Neb. 829, 765 N.W.2d 456 (2009).

[48] See, *Batt v. City and County of San Francisco*, 184 Cal. App. 4th 163, 109 Cal. Rptr. 3d 129 (2010); *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000); *Kew Gardens Assoc v Tyburski*, 70 N.Y.2d 325, 514 N.E.2d 1114, 520 N.Y.S.2d 544 (1987); *Tempo Holding Co. v. Oxford City Council*, 78 Ohio App. 3d 1, 603 N.E.2d 414 (1992).

In their petition below, the Restaurants did not challenge the method of calculating the customer's state or local sales and use taxes. The Restaurants did not challenge the Department of Revenue regulation concerning sales tax calculations.[49] The Restaurants did not challenge the statutes upon which the sales tax regulation is based.[50] In sum, the Restaurants did not express concern over the 0.18-percent increase in their obligation as sales tax collectors when they chose to pass the Restaurant Tax onto their customers' bills. And they did not purport to have standing to challenge the alleged sales tax increase on behalf of their customers.

The purpose of the Restaurants' action was to invalidate the Restaurant Tax and thereby avoid the 2½-percent tax obligation imposed upon the Restaurants. Because the method of computing the sales and use taxes on a customer's bill does not affect the validity of the Restaurant Ordinance, we do not address that issue in this appeal.

### The Restaurant Ordinance Does Not Violate Liquor Control Act or Omaha Mun. Code § 19-62

The Restaurants next argue that insofar as the Restaurant Ordinance applies to restaurants and "drinking places" which have liquor licenses, it violates § 53-132(4) of the Liquor Control Act[51] and Omaha Mun. Code, ch. 19, art. II, § 19-62 (2005). They argue that those laws prohibit the City from imposing any occupation taxes upon liquor licensees which exceed two times the liquor license fee. For the Restaurants, two times the liquor license fee would be $600 per year. We disagree with the Restaurants' reading of § 53-132(4) and Omaha Mun. Code § 19-62, and find that the limit to two times the license fee pertains only to taxes on the occupation of selling alcohol. The limit has no bearing on occupation taxes designed to target activities other than selling alcoholic beverages.

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[49] 316 Neb. Admin. Code, ch. 1, § 007.

[50] See Neb. Rev. Stat. § 77-2701.16 (Reissue 2009) and § 77-2701.35.

[51] §§ 53-101 to 53-1,122.

[10,11] It is not objectionable for there to be two or more occupation taxes imposed upon the same retailer.[52] The same person or entity may engage in several different businesses or activities and be taxed on each.[53] There is no "double taxation" unless both taxes are of the same kind and have been imposed by the same taxing entity, for the same taxing period, for the same taxing purpose, and upon the same property or the same activity, incident, or subject matter.[54] Furthermore, unless it is unreasonable, confiscatory, or discriminatory, double taxation is not unconstitutional or prohibited, although it is our policy to guard against it.[55]

Nevertheless, the Restaurants argue that § 53-132(4) of the Liquor Control Act and Omaha Mun. Code § 19-62 place special limits on all occupation taxes for entities licensed under the Liquor Control Act. Section 53-132(4) principally concerns delivery of a liquor license to the licensee and the prerequisites to such delivery. It states that a liquor license shall not be delivered unless the licensee demonstrates it has paid the "occupation taxes, if any, imposed by such city, village, or county." Section 53-132(4) then sets forth the language upon which the Restaurants rely:

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[52] See 14A William Meade Fletcher, Fletcher Cyclopedia of the Law of Corporations § 6952 (perm. ed., rev. vol. 2008).

[53] See, *Bullock v. Pioneer Corp.*, 774 S.W.2d 302 (Tex. App. 1989); *VEPCO v. Haden*, 157 W. Va. 298, 200 S.E.2d 848 (1973).

[54] See, *Fox etc. Corp. v. City of Bakersfield*, 36 Cal. 2d 136, 222 P.2d 879 (1950); 71 Am. Jur. 2d, *supra* note 17, § 26. See, also, e.g., *Lake Havasu City v. Mohave County*, 138 Ariz. 552, 675 P.2d 1371 (Ariz. App. 1983); *Hirschfeld Press v. Denver*, 806 P.2d 917 (Colo. 1991); *Cedar Valley Leasing v. Iowa Dept. of Revenue*, 274 N.W.2d 357 (Iowa 1979); *Cooksey Bros. Disp. Co. v. Boyd County*, 973 S.W.2d 64 (Ky. App. 1997); *Bullock v. Pioneer Corp., supra* note 53.

[55] See, *Abernathy v. City of Omaha*, 183 Neb. 660, 163 N.W.2d 579 (1968); *Stephenson School Supply Co. v. County of Lancaster*, 172 Neb. 453, 110 N.W.2d 41 (1961). See, also, *Scott & Scott, Inc. v. City of Mount. Brook*, 844 So. 2d 577 (Ala. 2002); *Waste Connections of Neb. v. City of Lincoln, supra* note 10; *Village of Utica v. Rumelin*, 134 Neb. 232, 278 N.W. 372 (1938); *Speier's Laundry Co. v. City of Wilber*, 131 Neb. 606, 269 N.W. 119 (1936); 84 C.J.S. *Taxation* § 59 (2010).

> Notwithstanding any ordinance or charter power to the contrary, no city, village, or county shall impose an occupation tax on the business of any person, firm, or corporation licensed under the [Liquor Control A]ct and doing business within the corporate limits of such city or village or within the boundaries of such county in any sum which exceeds two times the amount of the license fee required to be paid under the act to obtain such license.

Omaha Mun. Code § 19-62 establishes the occupation tax within the limits imposed by the above-quoted "[n]otwithstanding" provision. Section § 19-62 states that "the occupation tax for any person who engages in the manufacture, distribution, . . . or selling at retail of alcoholic liquors within the city shall be two times the amount of the license fee required to be paid under the . . . Liquor Control Act," as stated in a schedule to be maintained by the city clerk (Liquor Occupation Tax). The current liquor license fee is $300 annually for the type of liquor licenses maintained by the Restaurants in this case.[56] Thus, as stated, the current Liquor Occupation Tax under § 19-62 is $600 per year.

According to the Restaurants, § 53-132(4) does not just limit the City's Liquor Occupation Tax to two times the liquor license fee. The Restaurants argue that any occupation tax imposed by the City on an entity "licensed under the [Liquor Control A]ct," must be limited to two times the liquor license fee. The Restaurants claim that Omaha Mun. Code § 19-62 sets a similar limit to any occupation tax that is applied to entities "who engage[] in the manufacture, distribution, . . . or selling at retail of alcoholic liquors."

First, we find no merit to the Restaurants' reading of Omaha Mun. Code § 19-62 as establishing any broadly based proscription as to the amount of all municipal occupation taxes when imposed upon "any person who engages in the manufacture, distribution, . . . or selling at retail of alcoholic liquors." Section 19-62 was designed only to impose an occupation tax on the occupation of selling liquor. And it was passed to

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[56] See § 53-124.01(8).

impose such an occupation tax in an amount corresponding to the limitations of the Liquor Control Act.

We reach a similar conclusion as to the "[n]otwithstanding" provision of § 53-132(4). The "[n]otwithstanding" provision was first codified in 1935 as part of the predecessor to § 53-160.[57] That statute imposed a state tax upon the privilege of engaging in the business of manufacturing or distributing alcohol.[58] It principally detailed the rate of the tax, which depended on the type of alcoholic beverage. The predecessor to § 53-160 then stated:

> The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the state of Nebraska or by any municipal corporation or political subdivision thereof: Provided, notwithstanding any ordinance or charter power to the contrary, no city or village shall impose an occupation tax on the business of any person, firm or corporation licensed under [the Liquor Control] Act and doing business within the boundaries of such city or village, in any sum which exceeds the amount of the license fee required to be paid under [the Liquor Control] Act to obtain said license.[59]

In 1947, § 53-160 was amended to provide for the current limit of "double the amount of the license fee."[60]

The Legislature reenacted the Liquor Control Act in 1993, subsequent to a decision in which we struck down an unrelated provision of the Liquor Control Act as unconstitutional.[61] At that time, the "[n]otwithstanding" provision was extracted from § 53-160 and moved to its current location within § 53-132(4). The legislative history does not explain why this was done.

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[57] See Comp. Stat. § 53-350 (Supp. 1935).

[58] See 1935 Neb. Laws, ch. 116, § 50, p. 405.

[59] *Id.*, p. 406.

[60] 1947 Neb. Laws, ch. 189, § 1, p. 625. See, also, § 53-160 (Cum. Supp. 1949).

[61] See, General Affairs Committee Hearing, L.B. 183, 93d Leg., 1st Sess. 67-70 (Jan. 25, 1993); *Bosselman, Inc. v. State*, 230 Neb. 471, 432 N.W.2d 226 (1988).

Section 53-132 sets forth a multitude of requirements and considerations pertaining to the determination by the Nebraska Liquor Control Commission of whether it should issue a liquor retail license, craft brewery license, or microdistillery license to an applicant. As already described, § 53-132(4) states that once a license is issued or renewed by the commission, it shall be mailed to the clerk of the city, village, or county. The clerk shall subsequently deliver the license to the licensee upon proof of payment of (1) the license fee, if by the terms of § 53-124(6), the fee is payable to the treasurer of such city, village, or county; (2) any fee for publication of notice of hearing before the local governing body upon the application for the license; (3) the fee for publication of notice of renewal as provided in § 53-135.01; and (4) the "occupation taxes, if any, imposed by such city, village, or county."[62] It is only after referring to the proof that the "occupation taxes, if any," have been paid that the "[n]otwithstanding" provision appears.

A statutory provision focused on prerequisites to the procurement of a liquor license is an unlikely place for an overarching limit in the amount of occupation taxes imposed upon entities which happen to hold liquor licenses. The Restaurants' reading of the provision is also inconsistent with the statutory reference to only one "occupation tax" so limited in amount, while at the same time referring to multiple "occupation taxes" without such a limitation. But perhaps most fundamentally, the Restaurants' reading of the provision is manifestly contrary to the scope and purposes of the Liquor Control Act.

[12,13] In the exposition of statutes, the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity.[63] When words of a particular clause, taken literally, would plainly contradict other clauses of the same statute, or lead to some manifest absurdity or to some consequences which we see plainly

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[62] § 53-132(4).

[63] *Hoiengs v. County of Adams*, 254 Neb. 64, 574 N.W.2d 498 (1998). See, also, *Boss v. Fillmore Cty. Sch. Dist. No. 19*, 251 Neb. 669, 559 N.W.2d 448 (1997).

could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then we may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.[64]

The Liquor Control Act concerns the regulation and control of the manufacture, distribution, and sale of alcoholic liquor.[65] It is also designed to generate revenue by imposing an excise tax upon alcoholic liquor.[66] The stated policy of the Liquor Control Act is to "encourage temperance in the consumption of alcoholic liquor."[67] Section 53-101.05 specifically states that the Liquor Control Act "shall be liberally construed to the end that . . . *temperance* in the consumption of alcoholic liquor is fostered and promoted by sound and careful control and regulation of the manufacture, sale, and distribution of alcoholic liquor." (Emphasis supplied.)

A construction which imposes a special monetary limitation on all occupation taxes as applied to any "business . . . licensed under the [Liquor Control A]ct" would have the manifestly absurd result of creating a special tax immunity for any business with a liquor license. Pursuant to the Restaurants' reasoning, any number of occupation taxes in Omaha and other cities would, as applied to businesses with a liquor license, violate § 53-132(4). Liquor licensees would thus be granted the privilege of avoiding those occupation taxes, while businesses that do not sell alcohol would have to pay them. It would reward businesses for selling alcoholic beverages and encourage more businesses to do so. The Restaurants' reading of § 53-132(4) is therefore contrary to the stated policy of § 53-101.01 of "encourag[ing] temperance in the consumption of alcoholic liquor" and contrary to the mandate of § 53-101.05 that the Liquor Control Act be construed to "foster[] and promote[]" temperance.

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[64] *Morton v. Green*, 2 Neb. 441 (1872) (Oliver, C.J., dissenting).

[65] See § 53-101.01.

[66] *Id.*

[67] *Id.*

Furthermore, we observe that while the "occupation tax" which must be limited to twice the license fee is referred to by the statute in the singular, the "occupation taxes" which the licensee must prove paid before obtaining the license is plural. In other words, the limit of two times the liquor license fee pertains only to *one* occupation tax. Other "occupation taxes," are plainly contemplated, but are not similarly limited to two times the license fee. And we observe that this has always been the case. At the time of the inception of the "[n]otwithstanding" provision, the language preceding it stated that the liquor license tax "shall be in addition to all other occupation or privilege *taxes* imposed . . . by any municipal corporation."[68]

[14] Accordingly, given the language of the statute and the purposes of the Liquor Control Act, the only sensible reading of § 53-132(4) is that municipalities are prohibited from imposing a tax on the occupation of selling liquor which exceeds two times the liquor license fee. Municipalities are not limited, however, in the amount of occupation taxes upon other activities—regardless of whether the business taxed also engages in the activity of selling liquor. The monetary limit for "an occupation tax" "on the business of any person, firm or corporation licensed under [the Liquor Control] Act" is a specific limitation on an occupation tax on the type of business or activity licensed under the Liquor Control Act.

[15] A state legislature, in fixing a license tax on a certain subject, may limit taxes against the same subject by other branches of government.[69] The Liquor Control Act so limits the amount municipalities may tax for the occupation of having a liquor license and selling alcohol pursuant to such license. But the Liquor Occupation Tax and the Restaurant Tax are directed toward different objects. The Restaurant Tax is on the occupation of serving food and beverages—be they with or without alcohol. Reading § 53-132(4) as prohibiting any type of municipal occupation tax over $600 per year for

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[68] § 53-160 (Cum. Supp. 1949) (emphasis supplied).

[69] 9 Eugene McQuillin, The Law of Municipal Corporations § 26:41 (rev. 3d ed. 2005).

any business that happens to hold a liquor license would have the absurd result that a liquor license would provide a special exemption from all occupation taxes otherwise applicable. We reject the Restaurants' reading of the statute. Therefore, the Restaurant Tax, when applied to the Restaurants, does not violate § 53-132(4).

### Special Legislation

[16] Finally, the Restaurants assert that the Restaurant Ordinance is special legislation. They argue it creates an arbitrary and unreasonable distinction between restaurants and "drinking places," and "all other businesses who sell goods and services to the public within the City."[70] When passing on the constitutionality of an ordinance, this court begins with a presumption of validity.[71] Therefore, the burden of demonstrating the constitutional defect rests with the challenger.[72]

[17] The enactment of special legislation is prohibited by Neb. Const. art. III, § 18, which prohibits the Legislature from passing local or special laws for any of a number of enumerated cases, including the "[g]ranting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever[.]" It also states that "where a general law can be made applicable, no special law shall be enacted." When a law confers privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, then the law in question has resulted in the kind of improper "special favors" prohibited by the special legislation clause.[73]

[18] 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.[74] The Restaurants argue that the Restaurant Ordinance creates an arbitrary and

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[70] Brief for appellants at 22.

[71] *Maxon v. City of Grand Island*, 273 Neb. 647, 731 N.W.2d 882 (2007).

[72] *Id.*

[73] See *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

[74] *Id.*

unreasonable method of classification. The City points out that occupation taxes will always, by their nature, separate out a particular class. At the same time, the revenue from a tax on a particular occupation usually inures to the municipality's general fund.

[19,20] We have never addressed the validity of a municipal occupation tax under the special legislation clause. We have, however, addressed the validity of occupation taxes under the same principles as those applied in a special legislation analysis. We have said that, to be valid, a municipal ordinance classifying an occupation for the purpose of levying a tax thereon must not be arbitrary in its classification.[75] The classification must instead rest on some reason of public policy or some substantial difference of situation or circumstances that would naturally suggest the justice or expediency of diverse legislation with respect to the objects or individuals classified.[76]

[21] Under these principles, "[t]his court has repeatedly held that a classification separating out commercial businesses or occupations as distinct from the use by the general public is a reasonable classification."[77] "Classifications have been upheld imposing different amounts of revenue charges on both widely diverse and closely related commercial enterprises."[78] We have said that "'municipal authorities may by ordinance classify the different occupations for taxation, and impose different taxation in different amounts upon the different classes; and a classification made by such authorities will not be interfered with

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[75] *Speier's Laundry Co. v. City of Wilber, supra* note 55. See, also, *Hug v. City of Omaha, supra* note 73.

[76] *Id.*; *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991).

[77] *City of Ord v. Biemond*, 175 Neb. 333, 337, 122 N.W.2d 6, 10 (1963) (citing *Gooch Food Products Co. v. Rothman*, 131 Neb. 523, 268 N.W. 468 (1936). See, also, *Petersen Baking Co. v. City of Fremont*, 119 Neb. 212, 228 N.W. 256 (1929); *Norris v. City of Lincoln*, 93 Neb. 658, 142 N.W. 114 (1913); *Western Union Telegraph Co. v. City of Fremont*, 39 Neb. 692, 58 N.W. 415 (1894).

[78] *City of Ord v. Biemond, supra* note 77, 175 Neb. at 338, 122 N.W.2d at 10.

by the courts, unless it manifestly appears that it is unreasonable and arbitrary.'"[79]

The only special legislation principle we have never expressly applied to municipal occupation taxes is that the distinction in the classification should bear some reasonable relation to the legitimate objectives and purposes of the legislation.[80] This is understandable since the objective of municipal occupation taxes is simply to increase revenue—albeit to do so in a way that is fair and justified by some reason of public policy. The type of connection between an occupation tax's purpose and the occupation taxed is thus different from the connections looked for in special legislation challenges to laws involving tax revenue earmarked for special purposes, exemptions from regulations, or legislation expressly granting a special privilege to a certain class.[81] The connection for an occupation tax is the connection to the public policy behind singling out a certain occupation for the burden of taxation.

Thus, the connection need not necessarily be that the occupation taxed is especially responsible for the drains on the city's economy or that it especially benefits from the revenue generation. Nevertheless, in this case, the Restaurant Ordinance explains that restaurants and "drinking places" are subject to the occupation tax because they derive a special benefit from public expenditures. The Restaurant Ordinance states that "persons engaging in restaurant and drinking place businesses are benefited from tourism and recreational activity."[82] Such tourism and recreational activity "places unique

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[79] *Gooch Food Products Co. v. Rothman, supra* note 77, 131 Neb. at 528, 268 N.W. at 471 (quoting *Norris v. City of Lincoln, supra* note 77).

[80] See, *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000); *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[81] See, e.g., *Hug v. City of Omaha, supra* note 73; *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000); *Big John's Billiards v. Balka, supra* note 80; *Pfizer v. Lancaster Cty. Bd. of Equal., supra* note 80; *City of Ralston v. Balka*, 247 Neb. 773, 530 N.W.2d 594 (1995); *State v. Galyen*, 221 Neb. 497, 378 N.W.2d 182 (1985).

[82] Omaha Mun. Code, ch. 19, art. XVI, § 19-801(a).

demands on the city's resources, but . . . should be promoted and encouraged."[83]

Thus, the classification bears a reasonable relation to the purposes of the Restaurant Tax. The purposes of the Restaurant Tax are to increase revenue so the City may expend money on special attractions that draw visitors to the City and bring its citizens out to enjoy recreational activities. Restaurants and "drinking places" tend to be located near these attractions and are especially benefited from people's recreational activities, because those activities tend to also involve eating and drinking out.

The classification also soundly rests upon the city council's public policy determination that it is preferable to target discretionary spending in restaurants and "drinking places" instead of in the much broader, and not always discretionary, category of "all other businesses who sell goods and services." The Restaurant Ordinance states that the "residents and non-residents who patronize these businesses are enjoying a discretionary activity that is dependent upon, and generating revenue from, the business's location within the city and the business's access to the services provided by the city."[84] Thus, "[s]ubjecting the business's revenue to taxation for general city purposes is fair, reasonable, and just."[85]

Finally, the classification rests upon a substantial difference that would naturally suggest the justice or expediency of diverse legislation. The Restaurant Ordinance states:

> [T]he city council finds, determines, and declares that restaurant and drinking place businesses form a discrete class of occupation engaged in within the city and it is appropriate that a tax be imposed on this class of businesses for the purpose of raising revenue to support and further general city activities and services.[86]

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*, § 19-801(b).

While other retail businesses might also benefit from tourism, and some of those businesses might also principally sell discretionary goods, restaurants and drinking places are easily identifiable as a distinct class. They are easily identifiable as a certain discretionary form of entertainment. "[A]ll other businesses who sell goods and services to the public within the City"[87] are not. It would be difficult for the City to come up with a different, broader retail category which similarly focused on discretionary spending and the entity's benefit from tourism. The classification of restaurants and drinking places, as distinguished from other retail establishments, is not unreasonable or arbitrary.

The Restaurants have failed to meet their burden of demonstrating a constitutional defect in the Restaurant Ordinance. By focusing on restaurants and drinking places, the Restaurant Ordinance does not create an arbitrary and unreasonable method of classification. Its classification of restaurants and drinking places from other retail businesses in the City soundly rests on reasons of public policy, justice, and expediency. And the classification bears a reasonable relation to the legitimate objective and purposes of the legislation. Having already found no merit to the Restaurants' other challenges to the Restaurant Ordinance, we affirm the judgment of the district court.

## CONCLUSION

For the foregoing reasons, we find no merit to the Restaurants' arguments that the Restaurant Ordinance is invalid. The Restaurant Ordinance is not an illegal sales tax, does not violate § 53-132(4) as applied to liquor licensees, and does not violate the prohibition against special legislation. Accordingly, we affirm the judgment of the district court which granted summary judgment in favor of the City and denied summary judgment in favor of the Restaurants.

AFFIRMED.

WRIGHT, J., not participating.

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[87] Brief for appellants at 22.

# Ronald D. Sherman, appellant, v. Beverly Neth, director, Nebraska Department of Motor Vehicles, appellee.

813 N.W.2d 501

Filed May 25, 2012. No. S-10-945.

1. **Actions: Parties: Death: Abatement, Survival, and Revival: Statutes.** Despite the language of Neb. Rev. Stat. §§ 25-1401 and 25-1402 (Reissue 2008), which suggests that all pending actions other than those specifically listed in the statutes survive the death of a party, Nebraska case law has limited the list of those actions which survive to exclude those which involve purely personal rights.
2. **Actions: Parties: Death: Abatement, Survival, and Revival: Moot Question: Appeal and Error.** An appeal will abate where, by reason of the death of a party, the record presents a mere abstract or moot question, the determination of which will be of no practical benefit.

Petition for further review from the Court of Appeals, Irwin, Moore, and Cassel, Judges, on appeal thereto from the District Court for Cheyenne County, Derek C. Weimer, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and Gregory J. Walklin for appellee.

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

Miller-Lerman, J.

## NATURE OF CASE

This case involves a civil administrative operator's license revocation for refusal to submit to a chemical test. The Nebraska Department of Motor Vehicles revoked the operator's license of Ronald D. Sherman for 1 year, and the district court for Cheyenne County affirmed the revocation. The Nebraska Court of Appeals determined that the sworn report in this case failed to confer jurisdiction on the Department of Motor Vehicles because it did not sufficiently establish that Sherman was on a public road or private property open to public access

at the time of his arrest, and it reversed the district court's order. *Sherman v. Neth*, 19 Neb. App. 435, 808 N.W.2d 365 (2011). On February 15, 2012, we granted the petition for further review filed by Beverly Neth, director of the Department of Motor Vehicles (the Department). On further review, the Department argues there is no requirement that the sworn report establish that the driver was on a public road or private property open to public access.

Prior to oral argument before this court, on March 30, 2012, Sherman's attorney notified this court that Sherman died on March 14. We conclude that because this license revocation proceeding involved a right that was purely personal to Sherman, the action abated on Sherman's death, and that there is no longer a party with an interest in the resolution of this appeal. We therefore must reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to vacate its decision and to reverse the district court's order and, in addition, to remand the cause to the district court with instructions for the district court to vacate its order and dismiss Sherman's appeal from the Department's revocation order.

## STATEMENT OF FACTS

A proper sworn report confers jurisdiction on the Department in an administrative license revocation matter. Neb. Rev. Stat. § 60-6,197(2) (Reissue 2010). According to the sworn report, Sherman was "asleep behind [the] wheel with keys in ignition & vehicle off, with open beer between legs. Subject pulled parrallel [sic] with east elm street." Sherman contended that he had not been driving. Sherman refused to take a preliminary breath test and refused to take a chemical test at the Sidney Police Department. The officer completed and provided to Sherman a copy of a "Notice/Sworn Report/Temporary License" form quoted above.

Sherman filed a petition for a hearing pursuant to Neb. Rev. Stat. § 60-498.01 (Reissue 2010). Following the hearing, the Department entered an administrative order revoking Sherman's operator's license for 1 year. Sherman appealed the revocation to the district court pursuant to Neb. Rev.

Stat. § 60-498.04 (Reissue 2010). After rejecting Sherman's argument that the Department lacked jurisdiction because the sworn report was insufficient to establish a prima facie case, the court affirmed the revocation. The basis of Sherman's challenge was that the sworn report failed to sufficiently allege that he was on a public road or private property open to the public, which allegations are a necessary element of the intoxicated driver enforcement scheme. See Neb. Rev. Stat. § 60-6,108 (Reissue 2010).

Sherman appealed the district court's affirmance to the Court of Appeals. He claimed that the district court erred when it found that the sworn report was sufficient to confer jurisdiction for the revocation. Although the Court of Appeals acknowledged the absence of case law so holding, it held that "the sworn report must contain sufficient assertions to allow an inference that the motorist was on a public road or private property open to public access." *Sherman v. Neth*, 19 Neb. App. 435, 440, 808 N.W.2d 365, 370 (2011). The Court of Appeals agreed with Sherman's argument that the assertions in the sworn report in his case failed to sufficiently establish that he was on a public road or private property open to public access at the time of his arrest and that therefore, the sworn report was insufficient to confer jurisdiction on the Department. The Court of Appeals reversed the district court's order and remanded the cause with directions to reverse the revocation. *Id.*

We granted the Department's petition for further review. As noted above and discussed further below, after we granted further review but before oral argument, we were notified of Sherman's death.

## ASSIGNMENT OF ERROR

For its sole assignment of error on further review, the Department asserts that the Court of Appeals erred when it concluded that the sworn report lacked the necessary recitations and was insufficient to vest the Department with jurisdiction to revoke Sherman's license. However, because of Sherman's death while this case was pending before this court on further review, we do not address this issue.

## ANALYSIS

On March 30, 2012, prior to oral argument before this court on further review, Sherman's attorney filed a "Motion to Dismiss Petition for Further Review for Mootness," informing this court that Sherman had died on March 14. The motion included a copy of Sherman's death certificate. We treat the motion as a suggestion of death.

We note that neither Sherman's attorney nor any other person has filed a motion to revive the action herein or to continue the appeal. As a general matter, when a party to appellate proceedings dies and the party's interest in the litigation passes to his or her heirs, the heirs are necessary parties to the proceedings. *Urlau v. Ruhe*, 63 Neb. 883, 89 N.W. 427 (1902). However, because of the personal nature of the rights associated with a license revocation, neither Sherman's heirs nor any other person has a continuing interest in the disposition of this appeal, and therefore this action appealing the revocation of Sherman's operator's license abated on his death and we must issue orders accordingly.

Nebraska statutes provide that certain types of actions survive the death of a party. Neb. Rev. Stat. § 25-322 (Reissue 2008) provides in relevant part: "An action does not abate by the death . . . of a party . . . if the cause of action survives or continues. In the case of the death . . . of a party, the court may allow the action to continue by or against his or her representative or successor in interest." Neb. Rev. Stat. § 25-1401 (Reissue 2008) provides:

> In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same.

Further, Neb. Rev. Stat. § 25-1402 (Reissue 2008) provides: "No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, or for a nuisance, which shall abate by the death of the defendant."

[1] In *Bullock v. J.B.*, 272 Neb. 738, 741, 725 N.W.2d 401, 404 (2006), we stated that despite the language of §§ 25-1401 and 25-1402, which suggests that all pending actions other than those specifically listed in the statutes survive the death of a party, "Nebraska case law has limited the list of those actions which survive to exclude those which involve purely personal rights." In *Bullock*, we noted cases in which this court concluded that specific types of actions did not survive the death of a party. We cited *Holmberg v. Holmberg*, 106 Neb. 717, 184 N.W. 134 (1921), and *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945), in which this court concluded that a divorce action did not survive the death of a party to the marriage because of the personal nature of a divorce action and because further proceedings after a party's death would be useless when the death itself dissolved the marriage. We also cited *Fitzgerald v. Clarke*, 9 Neb. App. 898, 621 N.W.2d 844 (2001), in which the Nebraska Court of Appeals concluded that a suit seeking to enjoin regulations limiting an inmate's ownership of personal property was personal to the inmate and did not survive the inmate's death.

With regard to the specific action at issue in *Bullock*, we concluded that a paternity action was personal and did not survive the death of the putative father. We reasoned that the primary purposes of a paternity action were to establish a parental relationship and to impose a support obligation and that such relationship was undoubtedly personal to the putative father, because the personal representative of his estate could not be made the child's father nor could a support obligation be imposed on the personal representative of his estate. *Id.*

We note that courts in other jurisdictions have reached similar conclusions regarding proceedings that involve purely personal rights of parties who died during an appeal. In *Olson v. Com'n for Lawyer Discipline*, 901 S.W.2d 520 (Tex. App. 1995), the Texas Court of Appeals concluded that the appeal of a discipline action in which an attorney's license was suspended became moot upon the attorney's death, because the case was limited to personal rights and no property rights were involved. Similarly, in *Gee v. Bess*, 132 S.W.2d 242, 243 (Mo.

App. 1939), the Missouri Court of Appeals determined that an action to determine the competency of a person to manage his affairs abated when the person died during a pending appeal, because the action involved "only his personal rights or status and [did] not involve any property rights." In *State ex rel. Turner v. Buechele*, 236 N.W.2d 322, 324 (Iowa 1975), which involved the death of a county supervisor during his appeal of a proceeding to remove him from office, the Iowa Supreme Court concluded that "where the subject matter of the controversy is personal to the decedent the action does abate" and that the "right to hold office is generally considered personal so that the death of the office holder on appeal in a removal action abates the proceeding."

We rely on our previous reasoning and that of other courts such as those noted above and conclude that the present action, in which Sherman challenged the Department's revocation of his operator's license, involved rights that were purely personal to Sherman and that therefore, the action did not survive his death. The purpose of this court action was to determine whether or not the Department properly ordered a revocation of Sherman's license. Sherman's right to his license was clearly personal to him; neither the personal representative of Sherman's estate, Sherman's heirs, nor any other person would have a right to his operator's license after his death. Further proceedings after Sherman's death would be useless, and we therefore conclude that this action challenging the Department's revocation order abated on Sherman's death.

[2] Because the action abated on Sherman's death, there is no present case or controversy upon which this court may opine on appeal. It has been stated that "[a]n appeal will abate where, by reason of the death of a party, the record presents a mere abstract or moot question, the determination of which will be of no practical benefit." 4 C.J.S. *Appeal and Error* § 343 at 334-35 (2007). The Department argues that even though this case is moot, we should consider the appeal under the public interest exception to mootness. However, as the Court of Appeals previously noted, and we agree, there exists "no authority in Nebraska where a cause was continued upon the death of a party pursuant to the public interest exception,"

and it would not be appropriate to apply the public interest exception to mootness "to a situation where the only plaintiff . . . died after the appeal was perfected." *Fitzgerald v. Clarke*, 9 Neb. App. 898, 901-02, 621 N.W.2d 844, 847 (2001). Where the sole party with an interest in a proceeding involving purely personal rights dies, not only are the issues in that proceeding moot but there is no longer a party to continue the litigation and there is no one with a justiciable interest who may take that party's place. We therefore conclude that the public interest exception to mootness does not apply when an appeal abates because of the death of the sole party with an interest in a proceeding that involves purely personal rights of the deceased party.

Because Sherman's death abates this appeal, it is clear that this court ought not consider the merits on further review or opine on the issues raised. But because the Court of Appeals issued an opinion, we must also determine the effect of Sherman's death on the court proceedings to date in this appeal, including the Court of Appeals' decision.

In criminal cases, we have stated that "the death of the decedent pending appeal abates not merely the appeal, but also the proceedings had below in the prosecution from its inception and therefore the correct procedure is to vacate the conviction, and reverse and remand with directions to dismiss the indictment or information." *State v. Campbell*, 187 Neb. 719, 720, 193 N.W.2d 571, 572 (1972). See, generally, *Bevel v. Comm.*, 282 Va. 468, 477, 717 S.E.2d 789, 794 (2011) (reviewing current status of abatement in criminal cases in federal and state courts when defendant dies during pending appeal and concluding that "most courts and commentators agree that abatement in some form is the majority position in the federal and state courts" but recognizing minority view "to limit or modify the application of the doctrine, or dispense with it entirely").

Although there is little authority, we find some authority for a similar result in civil cases such that the death abates not merely the appeal but also requires that outcomes in proceedings below be vacated. In dissolution actions, this court has stated that "'where the cause of action does not survive, the

action abates as if the death had occurred before the verdict or interlocutory judgment or decision, unless saved by a statute.'" *Williams v. Williams*, 146 Neb. 383, 387, 19 N.W.2d 630, 632 (1945) (quoting *Holmberg v. Holmberg*, 106 Neb. 717, 184 N.W. 134 (1921)). We find no statute that saves the instant action, and therefore the action abates as if Sherman's death had occurred before the district court's judgment. As noted above, in *Olson v. Com'n for Lawyer Discipline*, 901 S.W.2d 520 (Tex. App. 1995), the Texas Court of Appeals determined that the appeal of an attorney discipline proceeding became moot when the attorney died during the pendency of the appeal. The court further concluded that not only was it required to dismiss the appeal but that it was also "required to set aside the judgment of the trial court and dismiss the underlying cause of action." 901 S.W.2d at 525. In *Gee v. Bess*, 132 S.W.2d 242 (Mo. App. 1939), the trier of fact had found the appellant to be of unsound mind, and the appellate court stated that the "appeal duly filed acted as a supersedeas and brought the cause to this court for final determination." The appellate court determined that the appeal abated on the death of the subject of the proceeding and that the judgment of the lower court should be reversed. The appellate court remanded the cause with orders accordingly.

We conclude that because this appeal abated on Sherman's death, the decision of the Court of Appeals, for which we granted further review, as well as that of the district court, should be vacated and that the district court should dismiss the action.

## CONCLUSION

We treat Sherman's "Motion to Dismiss Petition for Further Review for Mootness" as a suggestion of death and, in light of this opinion, overrule such motion. Because of Sherman's death, we conclude that this appeal on further review and Sherman's action challenging the Department's revocation of his operator's license have abated, because the proceedings involve rights purely personal to Sherman and the action did not survive his death. We therefore reverse the decision of the Court of Appeals. We remand the cause to the Court of Appeals

with directions to vacate its decision. We also direct the Court of Appeals to reverse the decision of the district court which affirmed the revocation order and to remand the cause to the district court with instructions to the district court to vacate its order and dismiss Sherman's action in district court.

REVERSED AND REMANDED WITH DIRECTIONS.

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BUTLER COUNTY SCHOOL DISTRICT 12-0502, ALSO KNOWN AS EAST BUTLER PUBLIC SCHOOL DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT, AND BRENDA COUFAL, AN INDIVIDUAL RESIDENT TAXPAYER OF BUTLER COUNTY SCHOOL DISTRICT 12-0502, ALSO KNOWN AS EAST BUTLER PUBLIC SCHOOL DISTRICT, APPELLEE, V. FREEHOLDER PETITIONERS 1 THROUGH 10: FERN JANSA ET AL., APPELLEES.

814 N.W.2d 724

Filed May 25, 2012. No. S-11-562.

1. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case.
2. **Jurisdiction: Appeal and Error.** An appellate court reviews de novo jurisdictional determinations that do not involve a factual dispute.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.
4. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes that are appropriately resolved through the judicial process.
5. ____: ____. Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf.
6. **Standing: Claims: Parties: Proof.** To have standing, a litigant must assert its own rights and interests and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense. The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.
7. **Standing.** To have standing, a party must have some legal or equitable right, title, or interest in the subject of the controversy.
8. **Actions: Standing: Proof.** Standing requires that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.

9. **Statutes: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning.
10. **Statutes: Legislature: Intent: Appeal and Error.** In discerning the meaning of a statute, an appellate court gives effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.
11. ____: ____: ____: ____. When possible, an appellate court determines the legislative intent from the language of the statute itself.
12. **Statutes: Appeal and Error.** 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.
13. ____: ____. An appellate court will not read into a statute a meaning that is not there.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded for further proceedings.

Rex R. Schultze, Derek A. Aldridge, and Dyana Wolkenhauer, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Maureen Freeman-Caddy, of Bromm, Lindahl, Freeman-Caddy & Lausterer, for appellees Fern Jansa et al.

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

CONNOLLY, J.

SUMMARY

Butler County School District 12-0502, also known as East Butler Public School District (East Butler), appeals from the district court's order dismissing its appeal from an order of the Saunders County freeholder board (the Board). The Board's order granted the appellee property owners' petitions to move their property from Prague Public School District (Prague District) to Wahoo Public School District (Wahoo District). The appellees had petitioned for the move while a dissolution and merger petition involving the same territory was pending before the State Committee for the Reorganization of School Districts (Reorganization Committee). At the Reorganization Committee, the school boards of East Butler and the Prague District petitioned to dissolve their separate districts and merge

them into a single school district. The appellees' property would be a part of this newly merged district.

After the Reorganization Committee approved the merger but before it became effective, the Board granted the appellees' petitions to move their property to the Wahoo District. East Butler appealed that decision to the district court. It argued that the Board lacked jurisdiction to consider the appellees' petitions while East Butler's merger petition was pending. But the court concluded that under Neb. Rev. Stat. § 79-458(5) (Reissue 2008), the appeal was untimely. It also determined that East Butler lacked standing to challenge the Board's order.

We reverse. We conclude that because East Butler had a valid merger petition that involved the same property pending at the time of the appellees' freeholder petitions, it had sufficient interest in the matter to invoke the court's jurisdiction. In addition, we conclude that its appeal was timely. We therefore remand the cause for further proceedings.

## BACKGROUND

The district court summarized the facts as follows:

- On April 13, 2010, East Butler and the Prague District filed a petition and plan for dissolution and merger with the Reorganization Committee.
- On April 20, 2010, the appellees filed freeholder petitions with the Board seeking to remove property owned by them from the Prague District and move it to the Wahoo District.
- On May 14, 2010, the Reorganization Committee approved the dissolution and merger and entered an order merging East Butler and the Prague District. This order did not become effective immediately.
- On May 17, 2010, the Board granted the appellees' petitions to move their property into the Wahoo District.
- On June 10, 2010, the merger of East Butler and the Prague District became effective.
- On July 1, 2010, East Butler appealed to the district court. In the appeal, East Butler sought vacation or reversal of the Board's order. It alleged that the Board lacked jurisdiction because the Reorganization Committee had exclusive

jurisdiction over the matter or that the Reorganization Committee had prior jurisdiction to act under the prior jurisdiction rule.

The district court dismissed the appeal for lack of jurisdiction. It found that East Butler had not complied with § 79-458(5) when that section was read in pari materia with Neb. Rev. Stat. § 23-136 (Reissue 2007). Section 79-458(5) permits a party to appeal from an action of a freeholder board in the same manner that a party can appeal from a county board's allowance or disallowance of a claim. The court read § 79-458(5) to require a party to comply with the time limit to appeal under § 23-136, which governs appeals from a county board's allowance of a claim. Because East Butler did not appeal within the 10 days specified for appeals under § 23-136, the court determined that it did not acquire jurisdiction over the appeal. In addition, citing case law holding that a school district cannot maintain an action to challenge its boundaries,[1] the court found that East Butler lacked standing.

## ASSIGNMENTS OF ERROR

East Butler assigns that the district court erred in concluding that (1) it lacked standing and (2) its appeal was untimely.

## STANDARD OF REVIEW

[1-3] Standing is a jurisdictional component of a party's case.[2] We review de novo jurisdictional determinations that do not involve a factual dispute.[3] And statutory interpretation presents a question of law that we independently review.[4]

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[1] See, *In re Plummer Freeholder Petition*, 229 Neb. 520, 428 N.W.2d 163 (1988); *School Dist. No. 46 v. City of Bellevue*, 224 Neb. 543, 400 N.W.2d 229 (1987); *In re Hilbers Property Freehold Transfer*, 211 Neb. 268, 318 N.W.2d 265 (1982); *Board of Education v. Winne*, 177 Neb. 431, 129 N.W.2d 255 (1964).

[2] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[3] *Field Club v. Zoning Bd. of Appeals of Omaha, ante* p. 847, 814 N.W.2d 102 (2012).

[4] See *Project Extra Mile v. Nebraska Liquor Control Comm., ante* p. 379, 810 N.W.2d 149 (2012).

## ANALYSIS

### East Butler Does Have Standing

East Butler asserts that the district court erred in concluding that it did not have standing. Relying on several of our cases holding that a school district cannot maintain an action to challenge its boundaries,[5] the district court held that East Butler lacked standing. We conclude that East Butler does have standing because the facts of this case—the authorized petition that was pending before the Reorganization Committee—distinguish it.

[4-8] Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes that are appropriately resolved through the judicial process.[6] Standing requires that a litigant have a personal stake in the outcome of a controversy that warrants invocation of a court's jurisdiction and justifies exercise of the court's remedial powers on the litigant's behalf.[7] To have standing, a litigant must assert its own rights and interests[8] and demonstrate an injury in fact, which is concrete in both a qualitative and temporal sense.[9] The alleged injury in fact must be distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. A party must have some legal or equitable right, title, or interest in the subject of the controversy.[10] Finally, standing requires that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.[11]

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[5] See, *In re Plummer Freeholder Petition, supra* note 1; *School Dist. No. 46, supra* note 1; *In re Hilbers Property Freehold Transfer, supra* note 1; *Winne, supra* note 1.

[6] *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

[7] *Id.*

[8] *Id.*

[9] See *Frenchman-Cambridge Irr. Dist. v. Dept. of Nat. Res.*, 281 Neb. 992, 801 N.W.2d 253 (2011).

[10] See *Brook Valley Ltd. Part., supra* note 2.

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

In addressing standing, the district court correctly noted that we have long held that school districts may not bring an action to challenge their boundaries.[12] We have often reasoned, at least in part, that the governing statutes did not authorize such actions. Yet in other cases, we have reasoned that school districts, as political subdivisions of the state, have no interest in their territorial integrity[13]; changes to their borders do not constitute "injuries" sufficient to confer standing.

But this case presents facts that are different from our prior cases, and we believe that these differences dictate a different result. Here, the school districts had already presented a plan for merger to the Reorganization Committee before the appellees petitioned the Board to move their property to a different district. Neb. Rev. Stat. § 79-415 (Reissue 2008) permits the school districts to do this. Given this statutory authorization, our prior cases' rationales no longer apply. The statutes *do* allow East Butler to initiate changes to its boundaries. And it cannot be seriously contended that East Butler does not have an interest that could be harmed in its plan before the Reorganization Committee.

To not allow a school district the opportunity to challenge actions that could threaten its plan before the Reorganization Committee would negate the power given to the school district by the Legislature. The plan that the school district expended time and money in developing could be destroyed by a gradual chipping away of freeholder petitions. If a school district may initiate changes in its boundaries, there is no reason its hands should be tied in fending off a postpetition dismantling of its plan.

Simply stated, if the Legislature saw fit to allow a school district to initiate changes in its boundaries, surely it intended that this be done in an orderly fashion. To not allow the school

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[12] See, e.g., *In re Plummer Freeholder Petition, supra* note 1; *Cowles v. School Dist.*, 23 Neb. 655, 37 N.W. 493 (1888). See, also, *School Dist. v. School Dist.*, 55 Neb. 716, 76 N.W. 420 (1898).

[13] See, e.g., *In re Hilbers Property Freehold Transfer, supra* note 1; *Winne, supra* note 1; *Halstead v. Rozmiarek*, 167 Neb. 652, 94 N.W.2d 37 (1959).

districts to challenge subsequent freeholder petitions would invite chaos. The Reorganization Committee should not have to base its decision on whether to grant a merger petition on a factual basis that is constantly changing, as would be the case if subsequent freeholder petitions could remove property from the area under consideration. We conclude that East Butler has an interest in a proposed plan before the Reorganization Committee sufficient to afford it standing.

### The Appeal Was Timely

The Board rendered its decision on May 17, 2010, and East Butler appealed to the district court on July 1. As mentioned previously, the district court concluded that East Butler had not complied with § 79-458(5), which governs appeals from a freeholder board.

The relevant portions of § 79-458(5) read as follows:

> Appeals may be taken from the action of such board or, when such board fails to act on the petition, on or before August 1 following the filing of the petition, to the district court of the county in which the land is located on or before August 10 following the filing of the petition, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims against the county.

The court determined that the relevant time limits for appeals under § 79-458(5) were those that applied to appeals from a county board's allowance or disallowance of a claim. Under Neb. Rev. Stat. § 23-135(4) (Reissue 2007), if a county board disallows a claim, a party has 20 days to appeal. Under § 23-136, if the county board allows a claim, a party has 10 days to appeal. The court concluded that the August 10 date under § 79-458(5) was not intended to alter the time limits imposed under § 23-135(4) or § 23-136.

Applying the district court's rationale to the facts, the district court reasoned that because the Board had allowed the petitions, appeals had to be brought within 10 days of the decision, which was rendered on May 17, 2010. East Butler did not appeal until July 1, which was clearly outside the 10 days the district court concluded was the time for appeals.

We have not previously decided the proper timeframe within which to appeal a decision from a freeholder board. East Butler argues that if the appeal is from a freeholder board's decision or its failure to act on or before August 1, the party has until August 10 to appeal. Of course, the appellees view it differently. They argue that the court correctly determined that a party has only 10 or 20 days to appeal, depending on whether the freeholder board granted or denied the petition. According to the appellees, August 10 is the "drop-dead deadline,"[14] although how a "drop-dead deadline" relates to the 10- or 20-day deadline is left unexplained. But from our reading of the statute, we conclude that East Butler's appeal was timely.

[9-13] We begin with familiar canons of statutory construction. We give statutory language its plain and ordinary meaning.[15] And in discerning the meaning of a statute, we give effect to the purpose and intent of the Legislature as ascertained from the entire language of a statute considered in its plain, ordinary, and popular sense.[16] When possible, we determine the legislative intent from the language of the statute itself.[17] 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.[18] Likewise, we will not read into a statute a meaning that is not there.[19]

In a case involving somewhat similar statutory language, we held that the time limit under the disputed statute was not altered by the time limits under §§ 23-135 and 23-136.[20]

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[14] Brief for appellees at 15.

[15] *Village of Hallam v. L.G. Barcus & Sons*, 281 Neb. 516, 798 N.W.2d 109 (2011).

[16] *Id.*

[17] *Id.*

[18] *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

[19] *Cargill Meat Solutions v. Colfax Cty. Bd. of Equal.*, 281 Neb. 93, 798 N.W.2d 823 (2011).

[20] *Knoefler Honey Farms v. County of Sherman*, 193 Neb. 95, 225 N.W.2d 855 (1975), *overruled in part on other grounds, United Way of the Midlands v. Douglas County Board of Equalization*, 199 Neb. 323, 259 N.W.2d 270 (1977).

At that time, the statute for appeals from a county board of equalization provided that "'[a]ppeals may be taken . . . to the district court within forty-five days after adjournment of the board, in the same manner as appeals are now taken from the action of the county board in the allowance or disallowance of claims . . . .'"[21] Then, as now, claims against the county had to be appealed within 10 or 20 days, depending on whether the county allowed or disallowed the claim. In *Knoefler Honey Farms v. County of Sherman*,[22] we concluded that the statutes relating to appeals from a county—§§ 23-135 and 23-136—did not alter the necessary time limit for appeals from a county board of equalization. The timeframe was controlled by the text of the statute, which provided for a period of 45 days after the adjournment of the board. Applying this reasoning to § 79-458(5), we conclude that appeals must be filed by August 10, not within 10 or 20 days of the Board's decision.

The appellees, however, correctly point out that 2 years after *Knoefler Honey Farms* was decided, we overruled it in part in *United Way of the Midlands v. Douglas County Board of Equalization.*[23] But the appellees fail to realize that we limited our disapproval of *Knoefler Honey Farms* to an issue irrelevant to this appeal. In *Knoefler Honey Farms*, our language had indicated that a party had to file everything necessary to perfect the appeal within the statutory time limit of 45 days, including the notice of appeal, the appeal bond, and the transcript from the proceedings. Our decision in *United Way of the Midlands* made clear that the party was not required to file the transcript within the time limit for perfecting an appeal. We overruled *Knoefler Honey Farms* only to the extent that it was inconsistent with that holding. The reasoning of *Knoefler Honey Farms* that the 10- or 20-day periods under § 23-135 or § 23-136 did not alter the 45-day period was not affected by *United Way of the Midlands*.

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[21] See *Knoefler Honey Farms, supra* note 20, 193 Neb. at 97-98, 225 N.W.2d at 857.

[22] *Knoefler Honey Farms, supra* note 20.

[23] *United Way of the Midlands, supra* note 20.

Furthermore, the district court's reading of § 79-458(5) would in large part negate the language "on or before August 10." If a party had to appeal within 10 or 20 days, it is by no means clear what, if anything, the August 10 date would mean. The appellees' contention that a party must appeal within 10 or 20 days but that August 10 is a "drop-dead deadline" would confuse litigants as to when to appeal; there would be two deadlines—a deadline of 10 or 20 days and then a separate "drop-dead deadline." In contrast, reading the statute to require a party to appeal by August 10 any decision establishes an easily administrable rule. We adopt that reading.

Finally, to the extent that the statute can be considered ambiguous, the legislative history supports our reading of the statute. The committee statement for an introduced bill that was later made a part of the 2008 amendment to § 79-458 states, "*Appeals would need to be filed on or before August 10, instead of within 20 days of the action of the board* or of November 1 if the board fails to take action."[24] The legislative history confirms that our reading of the statutory text is correct.

The Board rendered its decision on May 17, 2010. East Butler filed its appeal on July 1. This was before the August 10 deadline. The appeal was timely.

## CONCLUSION

We conclude that the district court erred in concluding that East Butler lacked standing. We also conclude that East Butler's appeal was timely filed. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[24] Statement of Purpose, L.B. 977, Committee on Education, 100th Leg., 2d Sess. (Feb. 4, 2008) (emphasis supplied).

# David Pittman, appellant, v. Western Engineering Company, Inc., and Evert Falkena, appellees.

813 N.W.2d 487

Filed May 25, 2012. No. S-11-584.

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. **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. **Statutes: Appeal and Error.** In examining the language of a statute, its 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.
6. ____: ____. The rules of statutory interpretation require an appellate court to give effect to the entire language of a statute, and to reconcile different provisions of the statute so that they are consistent, harmonious, and sensible.
7. **Statutes: Legislature: Intent: Appeal and Error.** In construing a statute, an appellate court's objective is to determine and give effect to the legislative intent of the enactment.
8. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
9. **Statutes: Legislature: Presumptions: Judicial Construction.** In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.

Appeal from the District Court for Lincoln County: Donald E. Rowlands, Judge. Affirmed.

Robert O. Hippe, of Robert Pahlke Law Group, P.C., L.L.O., for appellant.

Dean J. Sitzmann and Krista M. Carlson, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

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

MILLER-LERMAN, J.

## NATURE OF CASE

David Pittman, the appellant, brought a negligence action against Western Engineering Company, Inc. (Western), and Evert Falkena (collectively, the appellees) in the district court for Lincoln County. The case stems from the death of David's wife, Robin Pittman, who died in a work-related accident while working for Western on a road construction crew. David's sole theory of liability is bystander negligent infliction of emotional distress. In considering the appellees' motion for summary judgment, the district court determined, inter alia, that David's action was barred by the exclusivity provisions of the Nebraska Workers' Compensation Act and dismissed David's complaint with prejudice. David appeals.

We conclude that David's negligence action is barred by the exclusivity provisions of the Nebraska Workers' Compensation Act. David accepted payment, thereby releasing Western, and his action against Western is barred by operation of Neb. Rev. Stat. § 48-148 (Reissue 2010); this employer immunity extends to Falkena, a fellow employee of Robin, under Neb. Rev. Stat. § 48-111 (Reissue 2010). We affirm the district court's order which granted summary judgment in favor of the appellees and dismissed the action.

## STATEMENT OF FACTS

On September 8, 2009, Robin was working as an employee of Western doing road construction on a project resurfacing Interstate 80 near Chappell, Nebraska. One of Western's semi-trailer trucks was hauling material for work on the project, when the left dual wheels of the sixth axle on the trailer broke loose from the left back axle of the trailer. The dual wheels rolled down the center median of the Interstate, where they struck and killed Robin. Falkena worked for Western and is alleged to have negligently maintained the semi-trailer truck. The parties agree that at the time of her death, Robin was acting in the scope of her employment, and that Robin's

death arose out of, and in the course of, her employment with Western.

David was located less than a mile away when he was notified to go to the scene of the accident. David also worked for Western. David arrived at the scene shortly after the accident and saw that Robin was dead. In his complaint, David alleges that the fatal injuries to Robin caused immediate and extreme mental anguish and shock to David and caused emotional distress to David so severe that no reasonable person should be expected to endure it.

David accepted workers' compensation payments as Robin's surviving spouse and dependent. Western and its insurance carrier paid David, as Robin's dependent, weekly death benefits of $602.32. Western also paid $6,000 in burial expenses. After David had received death benefits for approximately 38 weeks, Western, Western's insurer, and David filed in the Workers' Compensation Court an "Application for an Order Approving Lump Sum Settlement and Release." The application stated that Western and its insurer would pay a lump sum of $400,000 to David and that David would no longer receive workers' compensation death benefits by reason of the death of Robin. The application further stated that David could decline the settlement and proceed to trial. The application stated that upon payment of the $400,000, the parties agreed Western and its insurer would be "fully discharged from all further liability under the Nebraska Workers' Compensation laws, as amended[,] on account of the fatal accident of 9/8/2009 to Robin . . . , and shall be entitled to a duly executed release."

In its June 28, 2010, order, the Nebraska Workers' Compensation Court approved the parties' application, finding that the application was in conformity with the Nebraska Workers' Compensation Act. The court stated that Western and its insurer were to pay David $400,000, as described in the application, and that Western and its insurer were ordered "discharged from all further liability on account of the accident and injuries of 9/8/2009."

David subsequently brought this negligence case against the appellees in district court. He alleged bystander negligent

infliction of emotional distress against Western, based upon his shock upon arrival at the scene of the accident, where he saw Robin's body. See *Catron v. Lewis*, 271 Neb. 416, 712 N.W.2d 245 (2006) (describing bystander negligent infliction of emotional distress). David sought damages for emotional injuries from Western; he also alleged that Falkena was negligent in relation to the accident and sought damages therefor. David did not allege that he suffered any physical injury. David asks for no damages for loss of financial support, services, comfort, or companionship due to the death of Robin. The sole basis for his claim is common-law negligence.

The appellees filed a motion for summary judgment, and a hearing was held on June 6, 2011. In its "Journal Entry and Order" filed June 13, from which this appeal is taken, the district court determined that the cause of action set forth in the complaint was barred by the exclusivity provisions in the Nebraska Workers' Compensation Act. Accordingly, the district court dismissed David's complaint with prejudice.

The district court also stated that the lump-sum settlement which David entered into with Western and its insurer constituted a full and final release of all claims or causes of action which David sustained by reason of the death of Robin. Therefore, the court additionally determined that the "Settlement and Release" barred David's claim. The court again determined to dismiss David's complaint with prejudice.

The district court also commented on whether David's claim was derivative of Robin's injuries and indicated that

> [i]f [the] Court is incorrect in its analysis of the exclusivity rule under the Nebraska Workers' Compensation Act, or the release and lump sum settlement filed by [David] in the Workers' Compensation Court, then there is still the issue of whether the fellow servant rule bars the cause of action alleged by [David and] there are genuine issues of material fact [regarding the source of duty owed David].

Given these comments, the court stated that if it was incorrect in its conclusion that David's action was barred by the exclusivity provisions of the Nebraska Workers' Compensation Act, speaking hypothetically, it would not be able to enter

summary judgment in favor of the appellees and against David. Nevertheless, the action was dismissed.

David appeals.

## ASSIGNMENTS OF ERROR

David generally claims, restated and summarized, that the district court erred when it sustained the appellees' motion for summary judgment and dismissed the complaint with prejudice. David claims in particular that the district court erred when it concluded that the exclusivity provisions of the Nebraska Workers' Compensation Act bar David's negligence claim filed in district court and when it additionally determined that David released the appellees from his negligence claim of bystander negligent infliction of emotional distress when he accepted the lump-sum settlement representing the dependent's benefits from the death of Robin under the Nebraska Workers' Compensation Act. David also assigns error to the district court's further comments in which it considered whether bystander negligent infliction of emotional distress is derivative of the claim of the person seriously injured or killed and whether David's claim against Falkena is barred by the fellow-servant rule.

Because there is no merit to David's initial and controlling assignment of error and we conclude that the district court correctly concluded that David's claim was barred by the exclusivity provisions of the Nebraska Workers' Compensation Act, we do not address David's additional assignments of error regarding the district court's comments regarding the derivative or nonderivative nature of his claim and issues related to the fellow-servant rule. See *In re Trust Created by Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (stating that appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it, and thus need not address issue that is not material to disposition of appeal).

## 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. *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012). 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. *Id.*

[3,4] Statutory interpretation presents a question of law. *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012). An appellate court resolves questions of law independently of the trial court. *Id.*

## ANALYSIS

*Nebraska Workers' Compensation Act and Claims of the Parties.*

The district court concluded in its order filed June 13, 2011, that the exclusivity provisions of the Nebraska Workers' Compensation Act barred David's claim and dismissed the case with prejudice. Although unnecessary to the disposition of the case, it further commented that if the case was not barred and its dismissal was in error, then there were questions of fact regarding the details of various matters which could preclude summary judgment. Because we conclude that the exclusivity provisions of the Nebraska Workers' Compensation Act bar David's claims, the district court correctly dismissed the action and we affirm.

The initial issue before the district court was whether David's claims were barred. David contends for a variety of reasons that his claims against the appellees in district court are not barred and that therefore the dismissal by the district court was error. He points out that with the exception of first responders such as firefighters, Neb. Rev. Stat. § 48-101.01 (Reissue 2010), purely psychological damages are not recoverable under the definition of "injury" in the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-151(4) (Reissue 2010). See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007) (determining that work-related injury caused by mental stimulus was not compensable under Nebraska Workers' Compensation Act, because injury caused by mental stimulus

does not meet statutory requirement that compensable injury involve violence to physical structure of body). David asserts that his claim in district court is limited to emotional injuries, which are not covered by the Nebraska Workers' Compensation Act, and asserts that "[s]ince emotional distress is not covered, the . . . exclusivity provisions do not bar an employee's tort suit against his/her employer for bystander negligent infliction of emotional distress." Brief for appellant at 7. This argument suggests that David is suing Western as an employee. David further contends that the injuries he claims did not arise from the injuries suffered by Robin, but instead arose separately and resulted solely from his shock of encountering the scene of Robin's death. He asserts that his negligence claim for bystander negligent infliction of emotional distress is not derivative of Robin's injuries. He contends that he has a freestanding claim which he can bring in district court regardless of whether he received a workers' compensation recovery based on Robin's employment. He acknowledges that the payment in the workers' compensation case was made without regard to negligence and that he would have to establish, inter alia, a breach of a duty owed by the appellees to him to establish negligence, were his bystander case to proceed.

The appellees claim that because David accepted payments under the Nebraska Workers' Compensation Act, the district court correctly concluded that David's case was barred by operation of the statutory exclusivity provisions of the act. See §§ 48-111 and 48-148. They also note that David signed a release in connection with his acceptance of the lump-sum settlement and assert that subsequent lawsuits arising from Robin's accident are prohibited. The appellees contend that David's claims in district court are derivative of Robin's and barred by the exclusivity rule. The appellees sometimes emphasize that David is an "employee" of Western and contend that because he recovered money from his employer not based in negligence, he cannot also seek a second recovery from his employer in another forum based on negligence.

In their arguments, both parties sometimes refer to David's status as an "employee" of Western. Contrary to various arguments asserted by both David and the appellees, we make clear

at this point in our analysis that David's status as an employee of Western is not relevant to the disposition of the exclusivity issue before us.

We have previously determined that an individual can be an employee of an entity but nevertheless sue that entity in district court where the particular facts show that the suit in district court is not covered under or barred by the Nebraska Workers' Compensation Act. See *Skinner v. Ogallala Pub. Sch. Dist. No. 1*, 262 Neb. 387, 631 N.W.2d 510 (2001) (noting that event in question did not arise in course of employment). Here, however, Robin's death arose out of and in the course of her employment, and David accepted payment under the Nebraska Workers' Compensation Act as her dependent. As explained more fully below, it is David's status as "surviving spouse" and "dependent" who has accepted compensation and payment under the act that bars him from pursuing the instant case in the district court. His status as an "employee" of Western has no bearing on the outcome of this case.

Our analysis is guided by the Nebraska Workers' Compensation Act and jurisprudence thereunder. Neb. Rev. Stat. § 48-110 (Reissue 2010) provides:

> When employer and employee shall by agreement, express or implied, or otherwise as provided in section 48-112 accept the provisions of the Nebraska Workers' Compensation Act, compensation shall be made for personal injuries to or for the death of such employee by accident arising out of and in the course of his or her employment, without regard to the negligence of the employer, according to the schedule provided in such act, in all cases except when the injury or death is caused by willful negligence on the part of the employee. The burden of proof of such fact shall be upon the employer.

Neb. Rev. Stat. § 48-112 (Reissue 2010) provides that "all contracts of employment shall be presumed to have been made with reference and subject to the Nebraska Workers' Compensation Act. Every such employer and every employee is presumed to accept and come under such sections."

In the present case, the outcome is controlled by §§ 48-111 and 48-148. These statutes are referred to as the "exclusivity"

provisions of the Nebraska Workers' Compensation Act. See *Bennett v. Saint Elizabeth Health Sys.*, 273 Neb. 300, 729 N.W.2d 80 (2007).

Section 48-111 provides:

> Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in the Nebraska Workers' Compensation Act, and an acceptance of all the provisions of such act, and shall bind the employee himself or herself, and for compensation for his or her death shall bind his or her legal representatives, his or her surviving spouse and next of kin, as well as the employer, and the legal representatives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency. For the purpose of this section, if the employer carries a policy of workers' compensation insurance, the term employer shall also include the insurer. The exemption from liability given an employer and insurer by this section shall also extend to all employees, officers, or directors of such employer or insurer, but such exemption given an employee, officer, or director of an employer or insurer shall not apply in any case when the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director.

Section 48-148 provides:

> If any employee, or his or her dependents in case of death, of any employer subject to the Nebraska Workers' Compensation Act files any claim with, or accepts any payment from such employer, or from any insurance company carrying such risk, on account of personal injury, or makes any agreement, or submits any question to the Nebraska Workers' Compensation Court under such act, such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury.

We have previously explained that workers' compensation laws reflect a compromise between employers and employees.

*Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011). 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. *Id*. The employer receives immunity from common-law suit. See *id*.

Quoting a treatise on workers' compensation law, we have noted:

> "'The reason for the employer's immunity is the *quid pro quo* by which the employer gives up his normal defenses and assumes automatic liability, while the employee gives up his right to commonlaw verdicts. This reasoning can be extended to the tortfeasor co-employee; he, too, is involved in a compromise of rights. . . . [O]ne of the things he is entitled to expect in return for what he has given up is the freedom [from] the commonlaw suits based on industrial accidents in which he is at fault.' . . ."

*Peterson v. Cisper*, 231 Neb. 450, 455-56, 436 N.W.2d 533, 536 (1989). See 6 Arthur Larson & Lex K. Larson, Workers' Compensation Law § 111.03[2] (2011). It is within this statutory and jurisprudential framework that we examine the application of the exclusivity provisions of the Nebraska Workers' Compensation Act to the present case.

*David's Claim Against Western Is Barred.*

Upon accepting payment as a dependent, by operation of § 48-148 of the Nebraska Workers' Compensation Act, David released Robin's employer, Western, from further claims arising from Robin's injury. David signed a "Settlement and Release" to the same effect. David's action against Western in district court is barred by employer immunity found in § 48-148.

Section 48-148 quoted earlier in this opinion refers to "dependents" who accept payment from the employer. Dependent is defined in Neb. Rev. Stat. § 48-124 (Reissue 2010), which states, "The following persons shall be conclusively presumed to be dependent for support upon a deceased employee: . . . a husband upon a wife with whom he is living or upon whom

he is actually dependent at the time of her injury or death . . . .” Section 48-124 further provides, “When used as a noun, the word dependent shall mean any person entitled to death benefits.”

In this case, David is Robin’s only dependent under § 48-124. As a dependent, David received weekly death benefits for approximately 38 weeks from Western and its insurer. David also entered into a “Lump Sum Settlement and Release” with Western and its insurer. In the “Application for an Order Approving Lump Sum Settlement and Release,” David states that he understands that upon payment of the lump sum, “the employer and its insurer . . . are fully discharged from all further liability under the Nebraska Worker’s Compensation laws, as amended[,] on account of the fatal accident on 9/8/2009 to Robin.” The Nebraska Workers’ Compensation Court’s order of approval directed Western and its insurer to pay $400,000 to David. The order further stated that Western and its insurer were discharged from all further liability on account of the accident and injuries of September 8, 2009. Given the statute and his agreement, David is subject to the terms of the Nebraska Workers’ Compensation Act.

We have previously discussed the release afforded the employer in § 48-148 of the Nebraska Workers’ Compensation Act in *Edelman v. Ralph Printing & Lithographing, Inc.*, 189 Neb. 763, 205 N.W.2d 340 (1973). In *Edelman*, the plaintiff employee sustained personal injuries in the course of his employment and received compensation benefits. Considering a similar predecessor version of § 48-148, we noted that § 48-148 “is effective whether the Workmen’s Compensation Act is voluntary, semi-voluntary, or compulsory.” 189 Neb. at 765, 205 N.W.2d at 341. In considering the “release” language in § 48-148, we stated, “The payment of benefits and medical expenses by statute released [the employer] from the present claim [filed in district court].” 189 Neb. at 765, 205 N.W.2d at 341. As determined in *Edelman*, under § 48-148, the payment and acceptance of benefits form a release.

In the present case, by virtue of the provisions of § 48-148 and the jurisprudence thereunder, as well as the settlement and release, David “released” Western from the present claim.

David elected to accept benefits under the Nebraska Workers' Compensation Act. David signed a settlement and release which incorporated Nebraska's workers' compensation laws. Even viewing the evidence in a light most favorable to David, see *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012), David has released Western.

Our conclusion that David has "released" Western and is precluded from bringing the instant case under § 48-148 is consistent with other authorities decided under similar statutes. For example, in *Phillips v. Unijax, Inc.*, 462 F. Supp. 942 (S.D. Ala. 1978), *reversed on other grounds* 625 F.2d 54 (5th Cir. 1980), a widow brought a wrongful death action against her deceased husband's employer as a result of her husband's work-related death. Following her husband's death, the widow applied for and accepted workers' compensation benefits. *Id.* The court recognized that there was a factual issue of whether the death of the employee arose out of and in the course of his employment and that thus, the widow arguably had a choice of remedies. *Id*. Whether the wrongful death claim was derivative was not discussed. However, the court determined that because the widow chose to accept and retain benefits under Alabama's workers' compensation act, she was bound by the election and the act's exclusivity provision precluded the widow's separate cause of action for wrongful death against the employer. *Id*.

The terms found in § 48-148 are important for our analysis. Section 48-148 applies to "any employee, or his or her dependents in case of death, of any employer subject to the Nebraska Workers' Compensation Act." In this case, § 48-148 applies to David because Robin was an employee who died in the course of her employment, David is Robin's "dependent," and Western is an "employer" under Neb. Rev. Stat. § 48-106 (Reissue 2010). Section 48-148 goes on to provide that if the dependent "accepts any payment from such employer" or "makes any agreement," then "such action shall constitute a release to such employer of all claims or demands at law, if any, arising from such injury." David, as a dependent, accepted "payment" from Western and its insurer. David's tort action for bystander negligent infliction of emotional distress is a "claim

or demand at law." David fits the preceding terms of a § 48-148 release. However, in an effort to avoid the employer immunity effects of § 48-148, David contends that his present case did not "arise" from Robin's injuries as "arise" is used in § 48-148. We disagree.

[5,6] We examine whether David's claim for bystander negligent infliction of emotional distress "aris[es] from such injury" as that phrase is used in § 48-148, i.e., whether David's claim arose from Robin's injury and is therefore barred by statute. In examining the language of a statute, its 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. *AT&T Communications v. Nebraska Public Serv. Comm., ante* p. 204, 811 N.W.2d 666 (2012). The rules of statutory interpretation require this court to give effect to the entire language of a statute, and to reconcile different provisions of the statute so that they are consistent, harmonious, and sensible. *Id.* We conclude that David's claim arises from Robin's injury and is barred by the plain language of § 48-148.

Other courts construing similar statutes have concluded that emotional distress claims brought by an injured employee's family member "arose" from the employee's injury and are therefore barred. In *McLaughlin v. Stackpole Fibers Co.*, 403 Mass. 360, 530 N.E.2d 157 (1988), a widow brought a claim for negligent infliction of emotional distress against her deceased husband's employer after her husband had died in the course of his employment. After her husband's death, the widow applied for and began to receive weekly compensation benefits under the provisions of Massachusetts' workers' compensation act. *Id.* The applicable Massachusetts statute, which is similar to § 48-148, provided:

> "If an employee files any claim for, or accepts payment of, compensation on account of personal injury under this chapter, or makes any agreement, or submits to a hearing before a member of the division under section eight, such action shall constitute a release to the insured [employer] or self-insurer of all claims or demands at law, if any, arising from the injury."

403 Mass. at 361-62 n.3, 530 N.E.2d at 158-59 n.3. Another Massachusetts statute provided, "'Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.'" *Id.* at 362 n.4, 530 N.E.2d at 159 n.4.

In *McLaughlin*, the Supreme Judicial Court of Massachusetts determined that it was clear that once the widow filed a claim and received compensation under the act, "she was barred from recovering in any actions against the employer for common law claims arising from her husband's injury." 403 Mass. at 362, 530 N.E.2d at 159. In determining that the lower court correctly dismissed the widow's claim under the statute, the court specifically stated that the widow's common-law negligence "allegations of emotional distress *arose* from [her husband's] injury and ultimate death, and are therefore barred." *Id.* (emphasis supplied).

In *Maney v. Louisiana Pacific Corp.*, 303 Mont. 398, 15 P.3d 962 (2000), the Montana Supreme Court considered the connection between the employee's injury and the close relative's claim for negligent infliction of emotional distress. In *Maney*, the mother of a deceased employee brought, inter alia, claims for negligent infliction of emotional distress against her son's employer. The applicable Montana statute containing an exclusive remedy provision stated:

> "*For all employments covered under the . . . Act . . .* the provisions of this chapter are exclusive. Except as provided in part 5 of this chapter for uninsured employers and except as otherwise provided in the . . . Act, an *employer is not subject to any liability whatever for the death of or personal injury to an employee* covered by the . . . Act or for any claims for contribution or indemnity asserted by a third person from whom damages are sought *on account of such injuries or death.* The . . . Act binds the employee himself, and in case of death binds his personal representative and all persons having any right or claim to compensation for his injury or death, as well as the employer and the servants and employees of

> such employer and those conducting his business during liquidation, bankruptcy, or insolvency."

303 Mont. at 402, 15 P.3d at 965 (emphasis supplied).

The Montana Supreme Court was asked to consider the scope of the employer immunity from claims "'on account of such injuries or death [of the employee],'" under the just-quoted statute. *Id*. The Montana Supreme Court stated that the inquiry to be made in analyzing whether a third-party claim for emotional distress was barred by the exclusivity provision of Montana's workers' compensation act was whether it was a claim for compensation "'as a result of'" or "'concerning'" the employee's death as those concepts are understood under the immunity statute. 303 Mont. at 406, 15 P.3d at 968. Thus, the court asked whether there was some "rational nexus" between the mother's claim and the injury to or death of the employee son. *Id*.

In determining that there was a rational nexus between the mother's claim and her son's death, the Montana Supreme Court observed that whether the mother's claim was independent or derivative of her son's injury was "not pertinent" to a determination of whether her action was barred by the statutory exclusive remedy provision. 303 Mont. at 405, 15 P.3d at 967. The Montana Supreme Court stated that the mother's claim for negligent infliction of emotional distress was

> logically related to the underlying injury to, and death of, [the employee]. In other words, had [the employee's] injury and death not occurred, [the mother's] emotional distress claims would not have *arisen*. Thus, *her claims arose as a result of—and directly concern—*[*the employee's*] *compensable injury and death*. . . . There is a clear nexus between the injury to, and death of, [the employee] and [the mother's] emotional distress claim.

303 Mont. at 406, 15 P.2d at 968 (emphasis supplied). Accordingly, the Montana Supreme Court found that the mother's claims were barred by the exclusive remedy provision of Montana's workers' compensation act, and therefore affirmed the district court's decision which granted summary judgment in favor of the employer. *Maney, supra*.

These cases are instructive as we consider § 48-148 and analyze the present case. Similar to the analysis in *Edelman v. Ralph Printing & Lithographing, Inc.*, 189 Neb. 763, 205 N.W.2d 340 (1973), after Robin's death, David accepted compensation benefits from Western and its insurer, thereby releasing Western. As in *McLaughlin v. Stackpole Fibers Co.*, 403 Mass. 360, 530 N.E.2d 157 (1982), and *Maney v. Louisiana Pacific Corp.*, 303 Mont. 398, 15 P.3d 962 (2000), David's claim for bystander negligent infliction of emotional distress logically arises from Robin's death because, as articulated by the Montana Supreme Court in *Maney*, had Robin's injury and death not occurred, David's emotional distress claims would not have arisen. There is a clear, rational nexus between Robin's death and David's claim, and thus David's claims "aris[e] from such injury" under § 48-148. Based on the foregoing, under § 48-148, David's claim against Western is barred because he accepted compensation as Robin's dependent, he settled and released Western, and his claim arises from Robin's injury and death. The district court correctly concluded David's claim for bystander negligent infliction of emotional distress against Western was barred by the employer immunity provisions of the Nebraska Workers' Compensation Act.

*David's Claim Against Falkena Is Barred.*

Having concluded that employer immunity bars David's action against Western, we next consider whether Falkena, the coemployee of Robin, is also immune from David's suit. We conclude that the district court correctly concluded that David's claim against Falkena was barred, and we reject David's assignment of error to the contrary.

In determining whether David's suit against Falkena is barred, we look primarily to the language of § 48-111. Section 48-111 provides:

> Such agreement or the election provided for in section 48-112 shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or determination thereof than as provided in the Nebraska Workers' Compensation Act, and an acceptance of all the provisions of such act, and shall

> bind the employee himself or herself, and for compensation for his or her death shall bind his or her legal representatives, his or her surviving spouse and next of kin, as well as the employer, and the legal representatives of a deceased employer, and those conducting the business of the employer during bankruptcy or insolvency. For the purpose of this section, if the employer carries a policy of workers' compensation insurance, the term employer shall also include the insurer. The exemption from liability given an employer and insurer by this section shall also extend to all employees, officers, or directors of such employer or insurer, but such exemption given an employee, officer, or director of an employer or insurer shall not apply in any case when the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director.

[7,8] In construing a statute, our objective is to determine and give effect to the legislative intent of the enactment. *State v. Hernandez, ante* p. 423, 809 N.W.2d 279 (2012). Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. *Id*.

We have previously considered § 48-111. See *Pettigrew v. Home Ins. Co.*, 191 Neb. 312, 214 N.W.2d 920 (1974). In *Pettigrew*, we noted that in 1965, the Nebraska Legislature amended § 48-111 to include the sentence, "'For the purpose of this section, if the employer carries a policy of workmen's compensation insurance, the term employer shall also include the insurer' . . . ." 191 Neb. at 315, 214 N.W.2d at 922-23. We stated that with this amendment, the Legislature intended to extend the immunity provided to the employer to the employer's workers' compensation insurer. We observed that the amendment "place[d] the insurer in the same situation as the employer." 191 Neb. at 315, 214 N.W.2d at 923.

In *Pettigrew*, an injured employee who had already received workers' compensation for injuries suffered in the course of

his employment brought an additional action in district court against his employer's workers' compensation insurance carrier to recover for the same injuries. Looking to the legislative history of § 48-111, we noted that the principal backer of the 1965 amendment testified before the legislative committee considering the bill, and stated that the bill was intended to eliminate the possibility of the injured employee's receiving an award in a case under the Nebraska Workers' Compensation Act and again from the insurance carrier in a separate action. Once the employee had elected to receive workers' compensation benefits, the insurance carrier, like the employer, was immune from liability to the employee for the same injuries. Therefore, based on the language of § 48-111 and its legislative history, this court determined in *Pettigrew* that the employee had no cause of action in district court against the insurer and affirmed the dismissal of the action.

[9] After *Pettigrew* was decided, § 48-111 was again amended, and the following sentence was added:

> The exemption from liability given an employer and insurer by this section shall also extend to all employees, officers, or directors of such employer or insurer, but such exemption given an employee, officer, or director of an employer or insurer shall not apply in any case when the injury or death is proximately caused by the willful and unprovoked physical aggression of such employee, officer, or director.

See 1975 Neb. Laws, L.B. 227. In determining the meaning of a statute, the applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation. *River City Life Ctr. v. Douglas Cty. Bd. of Equal.*, 265 Neb. 723, 658 N.W.2d 717 (2003). Just as in *Pettigrew, supra*, where this court construed the legislative intent of the 1965 amendment to extend the immunity provided to the employer to the insurer, we determine that after *Pettigrew* was decided, § 48-111 was amended to extend employer immunity to fellow employees in the absence of willful conduct by the employee.

The Introducer's Statement of Purpose for L.B. 227 states that where workers' compensation benefits had been sought, *Pettigrew* had "upheld [the] legislative intent" to place the insurer "in the same situation as the employer" and further states that the purpose of the current bill was to extend such immunity to fellow employees. Committee on Labor, 84th Leg., 1st Sess. (Feb. 4, 1975). The Committee Statement observes that "[i]t seems inconsistent . . . to permit an employee to sue people working for the employer when he could not sue the employer . . . ." Committee Statement, L.B. 227, Committee on Labor, 84th Leg., 1st Sess. (Feb. 5, 1975).

Section 48-111 provides that "[t]he exemption from liability given an employer . . . shall also extend to all employees . . . ." The extension of employer immunity to employees under § 48-111 means that where the employer is immune from suit, in the absence of willful conduct, the employee is similarly immune.

As Robin's dependent, David accepted compensation benefits from Robin's employer and, as explained above, the provisions of the Nebraska Workers' Compensation Act apply to David. Because David accepted these benefits, Robin's employer, Western, enjoys employer immunity from third-party tort actions under § 48-148 and David's suit against Western is barred. Under § 48-111, this employer immunity provided to Western extends to Robin's fellow employee, Falkena. Accordingly, David's action against Falkena is barred. The district court did not err when it determined that David's claim against Falkena was barred by the exclusivity provisions of the Nebraska Workers' Compensation Act.

## CONCLUSION

The district court correctly determined that David's claims against the appellees were barred by the exclusivity provisions of the Nebraska Workers' Compensation Act, §§ 48-111 and 48-148. The district court sustained the appellees' motion for summary judgment and dismissed the complaint. The district court did not err in so ruling. Accordingly, we affirm.

AFFIRMED.

# State of Nebraska, appellee, v. Chad N. Sorensen, appellant.

814 N.W.2d 371

Filed May 25, 2012. No. S-11-597.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.
2. ____: ____: ____. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.
3. **Constitutional Law: Trial: Hearsay.** Where testimonial statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination.
4. **Testimony: Words and Phrases.** Testimony is defined as a solemn declaration or affirmation made for the purpose of establishing or proving some fact.
5. **Constitutional Law: Hearsay.** Nontestimonial statements are not subject to Confrontation Clause protection or analysis.
6. **Constitutional Law: Trial: Appeal and Error.** Error of a constitutional magnitude need not automatically require reversal if that error was a trial error and not a structural one.
7. **Trial: Evidence: Appeal and Error.** The improper admission of evidence is a trial error and subject to harmless error review.
8. **Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
9. **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.

Appeal from the District Court for Box Butte County, Leo Dobrovolny, Judge, on appeal thereto from the County Court for Box Butte County, Charles Plantz, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

Bell Island, of Island, Huff & Nichols, P.C., L.L.O., for appellant.

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

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

HEAVICAN, C.J.

## INTRODUCTION

Chad N. Sorensen was convicted of driving under the influence of alcohol (DUI), second offense, with a blood alcohol content over .15. Sorensen was sentenced to probation, and his license was revoked for 1 year. He appeals.

At issue on appeal is whether Sorensen's confrontation rights were violated when the county court admitted into evidence the affidavit of the nurse who performed Sorensen's blood draw without also requiring that nurse to testify at trial. We find that the county court erred in admitting the affidavit and that this error was not harmless.

## BACKGROUND

Sorensen was arrested on December 13, 2008, for DUI. He was transported to a hospital, where a sample of his blood was drawn for blood alcohol testing.

Following the collection of blood, the nurse who collected the sample completed a "Certificate of Blood Specimen Taken in a Medically Acceptable Manner" (Certificate). This Certificate indicated the name of the person who drew the blood; that the sample was taken at the request of law enforcement; the date, time, and name of the subject; that the sample was done in a medically acceptable manner; that the person drawing the sample was qualified under Nebraska law to do so; that the antiseptic solution was nonalcoholic; that the sample was collected in a clean container which contained an anticoagulant-preservative substance; that the container was labeled appropriately and otherwise initialed by the person collecting the sample; and that the container was sealed after collection.

Following this blood draw, the sample collected from Sorensen was tested and found to have a blood alcohol content

of .198. Sorensen was charged with DUI, as well as a violation of Nebraska's open container law.

At trial, the State offered into evidence the Certificate. Sorensen objected on the basis of confrontation and hearsay. These objections were overruled, and the Certificate was admitted into evidence. The nurse did not appear as a witness at trial. The arresting officer did testify, as did the analyst who performed the blood alcohol testing. In addition to objecting to the introduction of the Certificate, Sorensen objected to the admission of the testing results on the basis of confrontation, hearsay, and foundation. Those objections were also overruled, and the results were admitted into evidence.

Sorensen was convicted by jury of DUI with a blood alcohol content over .15 and of having an open container of alcohol in his vehicle. The county court later found the DUI to be a second offense. Sorensen was sentenced to 24 months' probation. His license was also revoked for 1 year, concurrent with any administrative license revocation, and he was fined $50 for the open container violation. Sorensen appealed to the district court, which affirmed.

## ASSIGNMENT OF ERROR

Sorensen assigns that the county court's admission of the nurse's affidavit regarding the blood draw violated his confrontation rights under the Sixth Amendment.

## STANDARD OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and reviews the underlying factual determinations for clear error.[1]

## ANALYSIS

*Confrontation.*

On appeal, Sorensen assigns that his Sixth Amendment right to confrontation was violated when the court admitted the Certificate but did not require the nurse who

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[1] See *State v. Britt, ante* p. 600, 813 N.W.2d 434 (2012).

performed the blood draw to testify or otherwise be subject to cross-examination.

[2] The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her, and the main and essential purpose of confrontation is to secure the opportunity for cross-examination.[2] The U.S. Supreme Court, in *Crawford v. Washington*,[3] set forth a new standard for analyzing confrontation issues; we have recognized and applied *Crawford* on several occasions.[4]

[3-5] In *Crawford*, the court explained that where "testimonial" statements are at issue, the Confrontation Clause demands that such out-of-court hearsay statements be admitted at trial only if the declarant is unavailable and there has been a prior opportunity for cross-examination.[5] Under *Crawford*, testimony is typically a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[6] As to testimonial statements covered by the Confrontation Clause, the Court in *Crawford* stated:

> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," . . . "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," . . . "statements that were made under circumstances which would lead an objective witness reasonably to believe

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[2] See, e.g., *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

[3] *Id.*

[4] *State v. Britt, supra* note 1; *State v. Fischer*, 272 Neb. 963, 726 N.W.2d 176 (2007); *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005); *State v. Vaught*, 268 Neb. 316, 682 N.W.2d 284 (2004).

[5] *Crawford, supra* note 2.

[6] *Id.*, 541 U.S. at 51.

> that the statement would be available for use at a later trial . . . ."[7]

Conversely, nontestimonial statements are not subject to Confrontation Clause protection or analysis.[8]

The Court subsequently clarified the meaning of "testimonial" in *Melendez-Diaz v. Massachusetts*[9] and *Bullcoming v. New Mexico*.[10] *Melendez-Diaz* involved the admission of a certificate stating that the tested substances were cocaine. The analyst who performed the analysis did not testify. The Court found that the admission of the certificate without subjecting the analyst to cross-examination was a violation of the defendant's confrontation rights. The Court first found that there was "little doubt" that the certificate at issue fell within the "'core class of testimonial statements'" described in *Crawford*.[11] The Court further held that the certificates were "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'"[12] and that the circumstances surrounding the creation of the certificate, as well as the express purpose for the certificates as stated by law, left no doubt that the certificates were testimonial.[13]

The Court further expanded its confrontation jurisprudence in *Bullcoming*. In that case, the lower court admitted a blood alcohol content report despite the fact that the analyst who prepared the report had been placed on unpaid leave and did not testify. Though the certifying analyst did not testify, the State did present the testimony of another analyst who was familiar with the laboratory's testing procedures.

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[7] *Id.*, 541 U.S. at 51-52 (citations omitted).

[8] See *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006).

[9] *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

[10] *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011).

[11] *Melendez-Diaz, supra* note 9, 129 S. Ct. at 2532.

[12] *Id.*

[13] *Melendez-Dias, supra* note 9.

The Court in *Bullcoming* first concluded that as in *Melendez-Diaz*, the report in question was clearly testimonial. The Court then turned to the question of whether the testimony of the second analyst was sufficient to protect the defendant's confrontation rights and concluded that it was not. The Court reasoned that the "surrogate testimony . . . could not convey what [the certifying analyst] knew or observed about the events his certification concerned . . . . Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part."[14]

This court has also recently opined on the issue of testimonial versus nontestimonial evidence. In *State v. Britt*,[15] we recognized the validity of our pre-*Melendez-Diaz* holding[16] that a certificate signed by the licensed supplier of a solution used in the maintenance and checking of breath testing devices was not testimonial. In *Britt*, we noted that the same type of certificate

> was not created in preparation for a trial and did not pertain to any particular pending matter. Instead, it related to the maintenance process and accuracy of the testing device to ensure that the solution used to calibrate and test the breath testing device was of the proper concentration, and the certificate would have been prepared regardless of whether or not it would later be used in a criminal proceeding. The preparation of the certificate was too attenuated from the prosecution of charges against [the defendant] to be considered testimonial.[17]

Unlike the certificate in *Britt*, the nurse's Certificate in this case was clearly testimonial. To begin, it is, at its essence, an affidavit. It was admitted to prove the facts in it, namely that the blood draw was performed in a medically acceptable manner, including the averments as set forth above. In the words of the U.S. Supreme Court: this affidavit was "functionally

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[14] *Bullcoming*, *supra* note 10, 131 S. Ct. at 2715.

[15] *Britt, supra* note 1.

[16] See *Fischer, supra* note 4.

[17] *Britt, supra* note 1, *ante* at 606-07, 813 N.W.2d at 439.

identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"[18]

Moreover, this situation is easily distinguishable from *Britt*. Here, the Certificate was the statement of the nurse who actually performed Sorensen's blood draw. This blood was then tested, and those results were used against Sorensen to convict him of DUI. The Certificate itself was filled out at the request of law enforcement under authority of Neb. Rev. Stat. § 60-6,202 (Reissue 2010), which expressly provides that either law enforcement or the defendant may request such a certificate when a blood draw is performed in connection with an arrest under Neb. Rev. Stat. § 60-6,197 (Reissue 2010)—one of the charged violations in this case. Section 60-6,202(2) further provides that the certificate "shall be admissible in any proceeding as evidence of the statements contained in the certificate." Given this, unlike *Britt*,[19] it cannot be said that this Certificate and its statements were too attenuated to be testimonial.

We therefore conclude that the nurse's Certificate was testimonial and that Sorensen's right to confrontation was violated when the State was not required to call the nurse as a witness at trial.

*Harmless Error and Double Jeopardy.*

[6,7] Our review does not end with our conclusion that the county court erred. Error of a constitutional magnitude need not automatically require reversal if that error was a "trial" error and not a "structural" one.[20] We have held that the improper admission of evidence is a "trial" error and subject to harmless error review.[21]

[8] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict surely would have been rendered, but, rather, whether the

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[18] *Melendez-Diaz, supra* note 9, 129 S. Ct. at 2532.

[19] See *Britt, supra* note 1.

[20] See *State v. Bauldwin, ante* p. 678, 811 N.W.2d 267 (2012).

[21] See *id.*

actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[22]

We cannot find in this case that the jury's guilty verdicts were surely unattributable to the error in admitting the nurse's affidavit. The affidavit in this case opined that Sorensen's blood draw was performed in a medically acceptable manner and detailed the procedures followed by the nurse in collecting that sample. But the averments in the affidavit were the only evidence in the record as to the procedures required to be followed when collecting a blood specimen. Without this affidavit, the evidence in this case was insufficient to establish foundation for the blood draw.

[9] Having concluded that reversible error has occurred, we must also determine whether the totality of the evidence admitted by the district court was sufficient to sustain Sorensen's convictions. If it was not, then the principles of double jeopardy will not allow a remand for a new trial.[23] But 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.[24]

And we conclude that when the affidavit is considered together with the other evidence against Sorensen, there was sufficient evidence to sustain Sorensen's guilty verdicts. We therefore reverse the convictions and remand the cause for a new trial.

## CONCLUSION

The decision of the district court affirming Sorensen's convictions is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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[22] *State v. Reinhart, ante* p. 710, 811 N.W.2d 258 (2012); *Bauldwin, supra* note 20; *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009); *State v. Gutierrez*, 272 Neb. 995, 726 N.W.2d 542 (2007), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[23] See *State v. Taylor*, 282 Neb. 297, 803 N.W.2d 746 (2011).

[24] *Id.*

# JEFFREY B., APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE, V. AMY L., APPELLANT AND CROSS-APPELLEE, AND TODD W., INTERVENOR-APPELLEE, CROSS-APPELLANT, AND CROSS-APPELLEE.

814 N.W.2d 737

Filed June 1, 2012. No. S-11-561.

1. **Paternity: Appeal and Error.** In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.
2. **Interventions.** Whether a party has the right to intervene in a proceeding is a question of law.
3. **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.
4. **Interventions.** Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule.
5. **Interventions: Appeal and Error.** An order permitting equitable intervention is reviewed for an abuse of discretion.
6. **Judgments: Interventions: Trial: Time.** A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit.
7. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.

Appeal from the District Court for Sarpy County: MAX KELCH, Judge. Reversed and remanded with directions.

Anthony W. Liakos, of Govier & Milone, L.L.P., for appellant.

Phillip G. Wright for intervenor-appellee Todd W.

C.G. (Dooley) Jolly and Tyler J. Volkmer, of Jolly Law, P.C., L.L.O., for appellee Jeffrey B.

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

PER CURIAM.

## NATURE OF CASE

Amy L. is the biological mother of Fianna L. In 2001, the Sarpy County District Court entered a paternity decree finding

Jeffrey B. to be Fianna's father. Several years later, Amy began to suspect that Todd W. was Fianna's father.

In 2009, Amy filed an application to modify the paternity decree. Todd sought to intervene in the action, claiming that he was Fianna's father. The trial court allowed Todd to intervene, and it later set aside the paternity decree. Later still, the court entered an order finding that Todd was Fianna's father and awarding custody of Fianna to Todd. Genetic tests confirmed that Todd was the biological father. Because it was error for the trial court to permit Todd to intervene, we reverse the judgment and remand the cause with directions.

## FACTS

Todd was in Omaha, Nebraska, between January and July 1999, working for a company that did wireless construction. Between March and June 1999, Todd and Amy were involved in a sexual relationship. Though Todd testified that he used contraception during his sexual encounters with Amy, he also admitted to being intoxicated during at least one of these encounters, which made it possible that he did not always take such measures. Around that same time, Amy was also in a sexual relationship with Jeffrey. When Todd left Omaha in July 1999, he did not know that Amy was pregnant. He ultimately returned to St. Louis, Missouri.

Amy learned she was pregnant in June 1999. Shortly thereafter, she went to St. Louis to find Todd and "see if there was anything more between [them]." She did not meet with Todd because he was out of town; however, she did locate two of his coworkers, but she did not ask them for Todd's telephone number or tell them she was pregnant.

Later, Todd learned that Amy had met with his coworkers. Todd testified one of them told him that he thought Amy might be pregnant, but that he also thought she was seeing someone other than Todd. Though Todd knew that Amy could be pregnant and did not know that she had another boyfriend during their sexual relationship, Todd testified that he never considered the possibility that he could be the father of Amy's baby.

When Fianna was born in December 1999, both Amy and Jeffrey thought Jeffrey was her biological father. After Fianna was born, Jeffrey lived with Amy and Fianna, and attempted to form a family, an attempt that lasted 6 to 8 months. Jeffrey and Amy were never married.

By 2001, Jeffrey had filed a petition to establish paternity. On October 26, 2001, the Sarpy County District Court entered a paternity decree making a legal finding that Jeffrey was Fianna's father. Under the decree, Amy had custody of Fianna, Jeffrey had visitation rights, and Jeffrey paid child support. At this point, Amy still believed Jeffrey was Fianna's biological father. In July 2002, the paternity decree was modified to adjust Jeffrey's child support payments.

In 2005, Fianna was removed from Amy's home and placed in the temporary custody of the Department of Health and Human Services. The paternity decree was modified again in 2006, and custody was transferred from Amy to Jeffrey, subject to Amy's visitation. When Amy signed the stipulation transferring custody, she still thought Jeffrey was Fianna's biological father. Fianna lived with Jeffrey for approximately 7 years prior to trial.

Amy first realized that Todd could be Fianna's biological father when Fianna was about 6 years old. Fianna had certain physical traits resembling Todd. Amy sought modification of the paternity decree on August 10, 2009, but did not raise her concerns about paternity with the court. At that time, Fianna was in Jeffrey's custody.

After Todd left Omaha in July 1999, he had no contact with Amy for approximately 10 years. On October 12, 2009, Amy sent Todd an e-mail telling him that he could be Fianna's biological father. Amy testified that in an e-mail response to her, Todd mentioned hearing from his coworker that Amy was pregnant but that "he didn't think anything more of it."

When Todd saw a picture of Fianna, he thought she resembled him, and he agreed to a genetic test. The test was performed on DNA samples from Fianna, Amy, and Todd and showed a 99.997-percent probability that Todd could not be excluded as Fianna's biological father. A later genetic test

excluded Jeffrey as Fianna's biological father. Todd first met Fianna in May 2010.

On May 17, 2010, Todd moved to intervene in the pending proceedings to modify the paternity decree, alleging that he was Fianna's biological father. Todd's initial motion to intervene was denied because he had failed to challenge the existing paternity decree, which the trial court determined was res judicata as long as it stood. Within a month of that decision, Todd filed another motion. This motion asked the court to allow him to intervene and to set aside the paternity decree. On August 10, the court entered an order allowing Todd to intervene. He filed a complaint on August 16 asking the court to set aside the paternity decree.

On May 9, 2011, the trial court set aside the paternity decree. It relied on Neb. Rev. Stat. § 25-2001(2) and (4) (Reissue 2008). The court found that Todd had met his burden of showing that he did not have sufficient information or knowledge to participate in the paternity action which resulted in the October 26, 2001, decree. The court determined that the 2-year statute of limitations in Neb. Rev. Stat. § 25-2008 (Reissue 2008) ran from the time Todd discovered he might be Fianna's father and that from this point forward, Todd had 2 years to attempt to set aside a decree under § 25-2001(4). It found that Todd did not know of Amy's pregnancy, despite her visit to St. Louis in 1999. Therefore, the court concluded that Todd met the statute of limitations by instituting legal proceedings within 2 years after he knew of the situation.

At the trial of Todd's petition to set aside the paternity decree, the court found that Todd had shown irregularity in obtaining the decree because a necessary party was not included in the proceedings, newly discovered material evidence that could not have been discovered before the 2001 paternity decree was entered, and unavoidable casualty or misfortune kept Todd from participating in the 2001 paternity action. It determined that Todd had met the requirements of § 25-2001(4)(a), (4)(c), and (4)(f) and that the October 26, 2001, paternity decree and subsequent modifications should be set aside.

The trial court also found that Todd had made the necessary showing for the court to exercise its equity power pursuant to § 25-2001(2). The court concluded that Amy had not told Todd's coworkers she was pregnant, Amy and Todd took measures to prevent pregnancy, and absent speculation from a coworker, Todd had no information to support a belief that he was the father of a child with Amy. As a result, the court concluded that Todd had met his burden to show that the paternity decree and its later modifications should be set aside pursuant to § 25-2001(2).

Given the evidence, including the statistical probability of Todd's paternity, the trial court found that Todd was Fianna's biological father and was a fit parent. Though the court was concerned about Amy's parenting ability, it did not find her to be an unfit parent. It concluded that Jeffrey could not be awarded custody because the rights of Amy and Todd were greater than any rights Jeffrey had under the doctrine of in loco parentis. The court found it would be in Fianna's best interests for Todd to have custody. It granted Jeffrey and Amy visitation and set out a visitation schedule. The court later stayed the change of custody until after the appeal was decided but denied other postjudgment relief requested by the parties.

## ASSIGNMENTS OF ERROR

Amy assigns that the trial court erred in (1) granting Todd's amended motion to intervene, (2) determining § 25-2001 governed the complaint the court allowed Todd to file, (3) setting aside the paternity decree and the modifications made to the decree in 2002 and 2006, (4) determining Todd's complaint was timely filed under § 25-2008, (5) awarding custody to Todd, (6) failing to sufficiently consider Fianna's trial testimony, and (7) changing Fianna's surname.

On cross-appeal, Jeffrey assigns that the trial court erred in (1) disestablishing Jeffrey's paternity, (2) granting Todd's amended motion to intervene, (3) failing to appoint a guardian ad litem for Fianna, (4) awarding custody to Todd, (5) failing to give appropriate consideration to Fianna's best interests, (6) failing to sustain Jeffrey's motion for new trial, and (7) failing to grant any of Jeffrey's requested postjudgment relief.

Todd also cross-appeals, claiming that the trial court erred in awarding Jeffrey visitation and arguing that if Jeffrey is to have visitation, he should pay child support.

## STANDARD OF REVIEW

[1] In a filiation proceeding, questions concerning child custody determinations are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion.[1]

[2,3] Whether a party has the right to intervene in a proceeding is a question of law.[2] 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]

## ANALYSIS

In a paternity decree entered on October 26, 2001, the Sarpy County District Court legally determined that Jeffrey was Fianna's father. Both Amy and Jeffrey claim that the trial court erred in allowing Todd to intervene and in setting aside the paternity decree. Whether a party has the right to intervene in a proceeding is a question of law.[4]

We first examine whether Todd had a right to intervene. Under Neb. Rev. Stat. § 25-328 (Reissue 2008),

> Any person who has or claims an interest in the matter in litigation . . . in any action pending or to be brought in any of the courts of the State of Nebraska, may become a party to an action . . . by joining the plaintiff . . . by uniting with the defendants . . . or by demanding anything adversely to both the plaintiff and defendant, either before or after issue has been joined in the action, and *before the trial commences*.

(Emphasis supplied.) The plain language of § 25-328 makes clear that intervention as a matter of right is allowed only

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[1] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[2] *Merz v. Seeba*, 271 Neb. 117, 710 N.W.2d 91 (2006).

[3] *Id.*

[4] *Id.*

before trial begins. Intervention after judgment cannot be obtained as a matter of right under § 25-328.[5] Todd did not attempt to intervene until 2010, nearly a decade after the paternity decree was entered. He could not intervene as a matter of right.

[4] Leave to intervene after the entry of a final decree is not allowable as a matter of right and should seldom be granted, but equity sometimes requires a departure from the general rule.[6] In such a case, the burden of persuasion is a heavy one. One court wrote that "absent extraordinary and unusual circumstances, intervention, by a party who did not participate in the litigation giving rise to the judgment sought to be vacated, should not be permitted."[7] The Washington Supreme Court has stated that "[w]here a person seeks to intervene after judgment, the court should allow intervention only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay."[8]

We conclude that the trial court erred in allowing Todd to intervene; in setting aside the October 26, 2001, paternity decree; and in relying upon § 25-2001(2), (4)(a), (4)(c), and (4)(f), which state:

> (2) The power of a district court under its equity jurisdiction to set aside a judgment or an order as an equitable remedy is not limited by this section.

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[5] See, *Meister v. Meister*, 274 Neb. 705, 742 N.W.2d 746 (2007); *Lincoln Bonding & Ins. Co. v. Barrett*, 179 Neb. 367, 138 N.W.2d 462 (1965); *Department of Banking v. Stenger*, 132 Neb. 576, 272 N.W. 403 (1937); *Kitchen Bros. Hotel Co. v. Omaha Safe Deposit Co.*, 126 Neb. 744, 254 N.W. 507 (1934); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993).

[6] *Meister, supra* note 5; *Lincoln Bonding & Ins. Co., supra* note 5; *Kitchen Bros. Hotel Co., supra* note 5; *Engdahl v. Laverty*, 110 Neb. 672, 194 N.W. 862 (1923).

[7] *Bank of Quitman v. Phillips*, 270 Ark. 53, 56, 603 S.W.2d 450, 452 (Ark. App. 1980), citing 7A Charles Alan Wright et al., Federal Practice and Procedure: Civil § 1916 (1972).

[8] *Kreidler v. Eikenberry*, 111 Wash. 2d 828, 832-33, 766 P.2d 438, 441 (1989).

> . . . .
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> (4) A district court may vacate or modify its own judgments or orders after the term at which such judgments or orders were made (a) for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order . . . (c) for newly discovered material evidence which could neither have been discovered with reasonable diligence before trial nor have been discovered with reasonable diligence in time to move for a new trial . . . (f) for unavoidable casualty or misfortune, preventing the party from prosecuting or defending . . . .

Todd cannot invoke § 25-2001(4) because § 25-328 does not permit intervention after the paternity decree was entered in 2001. Todd has not shown that the 2001 paternity decree was obtained by mistake, neglect, or irregularity. Amy's pregnancy could have been discovered by reasonable diligence before trial or in time to move for a new trial, but Todd did not exercise reasonable diligence to discover that Amy was pregnant with his child. Todd has not shown there was unavoidable casualty or misfortune that prevented him from intervening before the 2001 decree. Thus, it was error to allow Todd to intervene and for the trial court to rely upon § 25-2001(4) as a basis for Todd to intervene and set aside the 2001 decree.

[5] We next examine whether, consistent with § 25-2001(2), the trial court could apply equity jurisdiction and allow Todd to intervene and set aside the 2001 paternity decree. An order permitting equitable intervention is reviewed for an abuse of discretion.[9]

[6] A key factor in the analysis is the length of delay, which in this case is the time between entry of the paternity decree and Todd's attempt to intervene. "A right to intervene should be asserted within a reasonable time. The applicant must be diligent and not guilty of unreasonable delay after knowledge of the suit."[10]

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[9] *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002).

[10] *Lincoln Bonding & Ins. Co., supra* note 5, 179 Neb. at 371, 138 N.W.2d at 465. See *Merz, supra* note 2.

Several cases demonstrate this principle. In *Engdahl v. Laverty*,[11] we held that a trial court did not err in permitting a landowner to intervene in a mortgage foreclosure action 17 days after the decree of foreclosure had been entered, but before its execution. In *Meister v. Meister*,[12] we held under principles of equity that an attorney should have been permitted to intervene 8 days after his attorney's lien was found to be unenforceable, because he was given notice only 5 business days before the hearing on the validity of the lien. But in *Lincoln Bonding & Ins. Co. v. Barrett*,[13] we held that a party was properly denied leave to intervene several months after a decree dissolving a corporation and ordering its liquidation had been entered. We noted the party was aware of the action prior to trial, but did not seek leave to intervene until after the judgment had been entered, a receiver had been appointed, and the corporation had been partially liquidated.

We have held that laches, or unreasonable delay, is a proper reason to deny intervention even prior to trial or judgment. In *Merz v. Seeba*,[14] an action by a shareholder for an accounting and divestment of stock had been dismissed for lack of prosecution, but no formal order of dismissal was entered. Nearly 10 years later, after the original plaintiff had died, another shareholder sought but was denied leave to intervene. We noted that laches depends on the circumstances of the case and does not result from the mere passage of time, but results when, "during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another."[15] We reasoned that such circumstances existed because the original defendant could have justifiably believed that the action had been finally concluded and the statute of limitations for the filing of a new action had run.

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[11] *Engdahl, supra* note 6.

[12] *Meister, supra* note 5.

[13] *Lincoln Bonding & Ins. Co., supra* note 5.

[14] *Merz, supra* note 2.

[15] *Id.* at 121, 710 N.W.2d at 95.

To be entitled to vacate a judgment after term by an action in equity, the litigant must show that, without fault or laches on his part, he was prevented from proceeding under § 25-2001.[16] Todd has not shown that he was without fault or was prevented from proceeding in a timely manner. His actions show that he is not entitled to equitable relief. Todd did not exercise reasonable diligence to determine if he was Fianna's father. Todd was told in 1999 that Amy could be pregnant. At that point, he could have taken steps to confirm the pregnancy and establish or rule out his own paternity, but he did not do so until after being contacted by Amy in 2009. Instead, "he didn't think anything more of it" or consider whether he could be the father if Amy was pregnant. He took no action for 10 years despite knowing that he had sexual relations with Amy in 1999. He admitted he was intoxicated during at least one of those sexual encounters, so it was possible he had not always used contraception.

While Todd slept on his rights, Jeffrey fulfilled the obligations of a father in justifiable reliance on the 2001 paternity decree. Jeffrey was judicially determined to be Fianna's father, and he developed a parental relationship with her. He exercised his visitation rights when Fianna was in Amy's custody, paid child support, and later took custody of Fianna after she was removed from Amy's care. Todd's failure to exercise any attempt to discover whether he was the biological father of Fianna prevents him from obtaining equitable relief.

Another reason that Todd cannot intervene as a matter of equity is that "equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or statute."[17] This maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law.[18] Also, equitable remedies are

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[16] See, *State ex rel. Birdine v. Fuller*, 216 Neb. 86, 341 N.W.2d 613 (1983); *Lindstrom v. Nilsson*, 133 Neb. 184, 274 N.W. 485 (1937).

[17] *Guy Dean's Lake Shore Marina v. Ramey*, 246 Neb. 258, 264, 518 N.W.2d 129, 133 (1994).

[18] *Id.*; *In re Petition of Ritchie*, 155 Neb. 824, 53 N.W.2d 753 (1952).

generally not available where there exists an adequate remedy at law.[19]

Todd sought to set aside the paternity decree on the basis of his own unadjudicated claim that he was Fianna's biological father. Nebraska law provides specific statutory remedies to be utilized in establishing paternity and setting aside a paternity decree. Neb. Rev. Stat. § 43-1411(1) (Reissue 2008) authorizes the mother or "alleged father" of a child to bring a civil action to determine paternity "either during pregnancy or within four years after the child's birth," except in circumstances not applicable here. Neb. Rev. Stat. § 43-1412.01 (Reissue 2008) provides a remedy whereby "an individual" may ask a court to set aside a legal determination of paternity based upon the results of a scientifically reliable genetic test performed in accordance with certain statutes. Even where such testing demonstrates that a presumed or adjudicated father is not the biological father, a court has discretion in determining whether to grant disestablishment of paternity, based upon its consideration of the interests of the child and the adjudicated father.[20] Section 43-1412.01 specifically provides that a "court shall not grant relief from determination of paternity" under certain circumstances, including where "the individual named as father . . . completed a notarized acknowledgment of paternity pursuant to section 43-1408.01."

In his amended motion to intervene, Todd asserted that the paternity decree should be set aside pursuant to § 43-1412.01. But in response to a specific question from the court during the hearing on this motion, Todd's counsel argued that § 25-2001(2) and (4) provided the statutory authority for setting aside the decree. The district court's subsequent order granted Todd leave to intervene and to "file a Complaint . . . requesting that the Decree of Paternity be set aside pursuant to Neb.Rev.Stat. § 25-2001(4)." In his complaint, Todd alleged that it had been determined by genetic testing that he "is the

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[19] *Central States Found. v. Balka*, 256 Neb. 369, 590 N.W.2d 832 (1999); *Vaccaro v. City of Omaha*, 254 Neb. 800, 579 N.W.2d 535 (1998).

[20] See *Alisha C. v. Jeremy C., ante* p. 340, 808 N.W.2d 875 (2012).

true biological father" and that the paternity decree should be set aside pursuant to § 25-2001(2) and (4).

[7] To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.[21] Under this well-established rule, the question of whether the paternity decree should be set aside must be determined under § 43-1412.01, applicable to setting aside a judgment of paternity, and not under the provisions of § 25-2001, applicable to vacating judgments in general. And to have standing in the form of a legal or equitable right, title, or interest in the subject matter of the controversy,[22] it was necessary for Todd to establish his own paternity under the procedure set forth in § 43-1411. By permitting Todd to intervene for the purpose of setting aside the 2001 decree pursuant to § 25-2001, the district court effectively negated the specific procedures and limitations which the Legislature imposed in §§ 43-1411 and 43-1412.01. A court's equitable power does not include the power to circumvent statutory requirements and procedures.

Fianna has resided with Jeffrey since 2004, and we can find no reason that would allow Todd to intervene and substitute himself as Fianna's father. An applicant must be diligent and not guilty of unreasonable delay in bringing such claim.[23] Todd made no attempt to assert his claim of paternity for 10 years. Therefore, the trial court abused its discretion in applying its equity jurisdiction to set aside the October 26, 2001, paternity decree.

Because the trial court erred in allowing Todd to intervene and in setting aside the 2001 paternity decree, it also erred in finding that Todd was Fianna's father. Under these circumstances, a genetic test establishing that Todd was Fianna's biological father does not compel a legal determination that Todd should be allowed to intervene or that the 2001 paternity

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[21] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009); *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819.

[22] See *Ferer v. Aaron Ferer & Sons*, 278 Neb. 282, 770 N.W.2d 608 (2009).

[23] See *Lincoln Bonding & Ins. Co., supra* note 5.

decree should be set aside. Todd, who did nothing to investigate whether Amy was pregnant with his child, cannot now seek equitable relief to intervene and set aside the paternity decree in this action, especially when doing so negates the effect of statutes duly enacted by the Legislature.

## CONCLUSION

Todd attempted to intervene in the pending action to modify the 2001 paternity decree. The trial court erred in relying upon § 25-2001 in order to permit Todd to intervene and set aside the 2001 decree of paternity that Jeffrey is Fianna's father. For the foregoing reasons, we conclude the trial court abused its discretion in allowing Todd to intervene and in setting aside the paternity decree of 2001.

The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Todd from the action and to proceed on Amy's request to modify the paternity decree.

REVERSED AND REMANDED WITH DIRECTIONS.

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# MUTUAL OF OMAHA BANK, APPELLEE, V. PATRICK J. KASSEBAUM AND APRIL M. KASSEBAUM, APPELLANTS, AND TIMOTHY R. ENGLER, APPELLEE.

814 N.W.2d 731

Filed June 1, 2012. No. S-11-749.

1. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Judgments: Moot Question: Appeal and Error.** When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.
3. ____: ____: ____. Where the payment of a judgment compelled by law is not voluntary, payment will not render an appeal moot.
4. **Torts: Claims: Assignments: Death: Abatement, Survival, and Revival.** The common-law rule regarding the assignability of tort claims is that such a right of action is not assignable where the tort causes a strictly personal injury and does not survive the death of the person injured.
5. ____: ____: ____: ____: ____. The prohibition against the assignability of a tort claim is grounded on two principles: (1) that prior to more recent statutory

amendments, personal claims did not survive the death of the victim, and (2) that prohibiting the assignment of tort claims prevents champerty and maintenance.

6. **Assignments: Words and Phrases.** Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.
7. **Actions: Words and Phrases.** Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.
8. **Claims: Assignments.** Where only the proceeds of the litigation, and not control of the litigation, have been assigned, there is little or no concern of intermeddling as a reason for declining to allow the assignment of the claim.

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

Katie Martens, of Ritnour & Associates, P.C., L.L.O., and, on brief, Matthew S. Torres for appellants.

William F. Austin, of Erickson & Sederstrom, P.C., and, on brief, William C. Nelson for appellee Mutual of Omaha Bank.

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

HEAVICAN, C.J.

## INTRODUCTION

Mutual of Omaha Bank (Bank) filed a petition seeking declaratory judgment against Patrick J. Kassebaum and April M. Kassebaum. In particular, the Bank sought to have the district court declare the rights of the parties with respect to an assignment executed by the Kassebaums. The Kassebaums filed a motion to dismiss or, in the alternative, a motion for summary judgment, alleging that the assignment was ineffective. The district court denied the motion, and the matter proceeded to trial. A jury entered a verdict in favor of the Bank in the amount of $126,376.42. The Kassebaums appeal. We affirm.

## FACTUAL BACKGROUND

The Kassebaums are the owners of residential real estate located in Seward County, Nebraska. Financing for this

property was obtained through a series of promissory notes and deeds of trust, first with Security Federal Savings, and then with its successor, the Bank. Two promissory notes and deeds of trust were executed on July 1, 1999, one in the amount of $240,000 and the other in the amount of $156,000. On July 26, 2002, a third note and deed of trust were executed in the amount of $31,692.56.

The Kassebaums had difficulty paying the amounts due on the notes. Various efforts were made to help the Kassebaums become current. Ultimately, on May 25, 2007, the Kassebaums refinanced the notes and executed two more notes and deeds of trust in the amounts of $336,000 and $98,350.

On that same date, the Kassebaums also executed an assignment of settlement proceeds or monetary judgment in favor of the Bank. At the time they executed the assignment, the Kassebaums had pending in federal court a lawsuit against Bausch and Lomb, Inc. The basis of this suit was a claim for damages suffered by Patrick when a defective Bausch and Lomb product caused him to suffer severe injuries to his left eye. Patrick eventually settled the suit, and the proceeds were deposited to the trust account of Timothy R. Engler, Patrick's counsel in the litigation. Engler is a nominal defendant in this case.

The Bank filed a declaratory judgment action on January 19, 2010, seeking that the balance of the funds held by Engler be distributed to the Bank as required by the assignment. Specifically, the Bank sought judgment in the amount of $365,601.55 plus interest.

The Kassebaums filed a motion to dismiss and/or a motion for summary judgment on March 15, 2010, alleging that the assignment was unenforceable. Specifically, the Kassebaums contended that the assignment occurred before the "claims were liquidated by settlement or judgment" and that the assignment was "against the public policy . . . and void as a matter of law." The district court denied this motion, concluding that the assignment of a claim might be unenforceable, but that in this case, it was only the proceeds that were assigned. As such, the district court ruled that the assignment was not invalid for the reasons raised by the motion.

The matter then proceeded to trial. In their answer, the Kassebaums raised a number of affirmative defenses, none of which are at issue on appeal. Following a jury trial, on August 11, 2011, the court accepted the verdict and entered a judgment against the Kassebaums and in favor of the Bank for $126,376.42, as well as judgment interest and costs. This amount was stipulated to by the parties. Engler subsequently paid and distributed to the Bank the funds held under his control.

This case raises the issue of whether an assignment of unliquidated proceeds from a personal injury claim is valid and enforceable under Nebraska law.

## ASSIGNMENTS OF ERROR

On appeal, the Kassebaums argue that the district court erred in (1) denying their motion to dismiss/motion for summary judgment and (2) enforcing the assignment.

## STANDARD OF REVIEW

[1] An appellate court reviews questions of law independently of the lower court's conclusion.[1]

## ARGUMENT

*Mootness.*

The Bank first asserts that because the Kassebaums have paid the judgment entered against them, this appeal is moot.

[2,3] When a party voluntarily complies with the mandate of the trial court, satisfying the judgment, the appeal no longer presents an actual controversy, but an abstract question.[2] But where the payment of the judgment compelled by law is not voluntary, payment will not render an appeal moot.[3] Thus, the question presented here is whether the Kassebaums' payment in this case was voluntary.

We addressed the voluntariness of the payment of a judgment in *Green v. Hall*.[4] There, we concluded that the payment

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[1] *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011).

[2] *Hormandl v. Lecher Constr. Co.*, 231 Neb. 355, 436 N.W.2d 188 (1989).

[3] *Green v. Hall*, 43 Neb. 275, 61 N.W. 605 (1895).

[4] *Id.*

was involuntary because it was made to avoid a forced sale, which could not be undone by legal process.[5] Conversely, in *Hormandl v. Lecher Constr. Co.*,[6] we concluded that the payment was voluntary where the defendant's insurer, also a third-party defendant, paid the judgment.

In addition, this issue was addressed in *Ray v. Sullivan*.[7] In that case, the Nebraska Court of Appeals found that an appeal was moot where the record did not show that the defendants were aware that execution of the judgment had been ordered by the district court. The Court of Appeals reasoned that in the absence of this showing, it could not be determined whether the motivation in paying the judgment was the execution of judgment or if the payment was made voluntarily. The Court of Appeals concluded that it was the burden of the appealing party to show why any payment was not voluntary.

The record shows that the settlement proceeds from the Bausch and Lomb litigation were held in Engler's trust account. Following the jury's finding in this case, Engler was served with the judgment entered by the district court. That judgment specifically ordered Engler to pay the funds over to the Bank. Engler averred to all these facts in an affidavit contained in the record.

Engler was presented with a judgment of the district court ordering him to perform a legal duty. Engler performed that duty. On these facts, any payment by Engler is not considered voluntary on the part of the Kassebaums. We therefore reject the Bank's argument that this appeal is moot.

*Assignment.*

The primary issue presented by this appeal is whether an assignment of proceeds made at a time when the amount to be assigned was unliquidated is valid and enforceable under Nebraska law. This is an issue of first impression in Nebraska.

[4,5] The common-law rule regarding the assignability of tort *claims* is that such a right of action is not assignable where

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[5] *Id.* See, also, *Burke v. Dendinger*, 120 Neb. 594, 234 N.W. 405 (1931).

[6] *Hormandl, supra* note 2.

[7] *Ray v. Sullivan*, 5 Neb. App. 942, 568 N.W.2d 267 (1997).

the tort causes a strictly personal injury and does not survive the death of the person injured.[8] This prohibition is grounded on two principles: (1) that prior to more recent statutory amendments, personal claims did not survive the death of the victim, and (2) that prohibiting the assignment of tort claims prevents champerty and maintenance.[9]

[6,7] "'Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his or her own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation.'"[10] "'Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it.'"[11]

There is a split of authority regarding whether an assignment of the *proceeds* of litigation violates this common-law prohibition[12]:

> It has been held that, although a personal injury claim is not assignable before judgment, an assignment of the proceeds of whatever recovery is had in such an action is enforceable, at least where the plaintiff retains control of the lawsuit without any interference from the assignee. However, it has also been held that even the proceeds of such a claim are not assignable, since an assignment of the proceeds is, in effect, an assignment of the claim.[13]

Those courts that hold proceeds are assignable generally conclude that the reasons behind the prohibition against assigning a claim do not apply in the case of the proceeds.

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[8] 6 Am. Jur. 2d *Assignments* § 55 (2008). Cf. *Milbank Ins. Co. v. Henry*, 232 Neb. 418, 441 N.W.2d 143 (1989).

[9] See, e.g., *A. Unruh Chiropractic v. De Smet Ins. Co.*, 782 N.W.2d 367 (S.D. 2010).

[10] *Andersen v. Ganz*, 6 Neb. App. 224, 230, 572 N.W.2d 414, 418 (1997) (quoting 14 C.J.S. *Champerty and Maintenance* § 2 a. (1991)).

[11] *Id.* at 230, 572 N.W.2d at 418-19 (quoting 14 C.J.S., *supra* note 10, § 2 b.).

[12] Annot., 33 A.L.R.4th 82 (1984).

[13] 6 Am. Jur. 2d, *supra* note 8, § 58 at 188.

First, statutes now exist which allow certain personal causes of action to nevertheless survive the death of the victim.[14]

And more and more courts are finding that the second reason is also inapplicable to an assignment of proceeds, at least in cases where the assignee has no control over the litigation: Where the assignee has no control, champerty and maintenance are not as great a concern.[15] As was noted by the North Carolina Supreme Court:

> There is a distinction between the assignment of a claim for personal injury and the assignment of the proceeds of such a claim. The assignment of a claim gives the assignee control of the claim and promotes champerty. . . . The assignment of the proceeds of a claim does not give the assignee control of the case and there is no reason it should not be valid.[16]

However, other courts have declined to enforce the assignment of proceeds. Usually those courts base their decision on a rejection of the conclusion that the fears of champerty and maintenance are lessened when the assignment is one of proceeds,[17] further reasoning that the distinction between the claim and the proceeds is a "fiction,"[18] or one without a "'difference.'"[19]

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[14] See, e.g., *Hernandez v. Suburban Hosp.*, 319 Md. 226, 572 A.2d 144 (1990). Cf. Neb. Rev. Stat. § 25-1401 (Reissue 2008).

[15] See, e.g., *Hernandez, supra* note 14; *Achrem v. Expressway Plaza Ltd.*, 112 Nev. 737, 917 P.2d 447 (1996); *Charlotte-Mecklenburg Hospital Auth. v. First of Ga. Ins. Co.*, 340 N.C. 88, 455 S.E.2d 655 (1995); *In re Musser*, 24 B.R. 913 (D.C. Va. 1982) (concluding assignment would be enforceable under Virginia law).

[16] *Charlotte-Mecklenburg Hospital Auth., supra* note 15, 340 N.C. at 91, 455 S.E.2d at 657.

[17] *Karp v. Speizer*, 132 Ariz. 599, 647 P.2d 1197 (Ariz. App. 1982); *Town & Country Bk v. Country Mu. In. Co.*, 121 Ill. App. 3d 216, 459 N.E.2d 639, 76 Ill. Dec. 724 (1984); *Quality Chiropractic v. Farmers Ins. Co.*, 132 N.M. 518, 51 P.3d 1172 (N.M. App. 2002); *A. Unruh Chiropractic, supra* note 9.

[18] *Town & Country Bk, supra* note 17, 121 Ill. App. 3d at 218, 459 N.E.2d at 640, 76 Ill. Dec. at 725.

[19] *A. Unruh Chiropractic, supra* note 9, 782 N.W.2d at 371 (quoting *Karp, supra* note 17).

Neb. Rev. Stat. § 25-1563.02 (Reissue 2008) is also instructive. This section provides that lump-sum or periodic payment settlements made as compensation for personal injury or death shall be exempt from attachment, garnishment, or other legal or equitable process and from all claims of creditors. Notably, however, this section protects these proceeds "unless a written assignment to the contrary has been obtained."[20]

[8] We find the cases holding that an assignment of proceeds is enforceable to be the better reasoned position. Where only the proceeds of the litigation, and not control of the litigation, have been assigned, there is little or no concern of intermeddling as a reason for declining to allow the assignment of the claim. Section 25-1563.02, though concerned with liquidated amounts, lends further support to this conclusion. While the Legislature enacted § 25-1563.02 to provide some protection to certain types of personal injury "proceeds" similar to the ones at issue in this case, it did not see fit to prohibit written assignment of those proceeds. We therefore conclude that the Kassebaums' assignment is valid and enforceable under Nebraska law.

## CONCLUSION

We conclude that this appeal is not rendered moot by Engler's payment of the judgment. We also conclude that the unliquidated proceeds of personal injury litigation are assignable. As such, the decision of the district court is affirmed.

AFFIRMED.

STEPHAN, J., not participating.

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[20] § 25-1563.02(1).

# Westin Hills West Three Townhome Owners Association, appellant, v. Federal National Mortgage Association, doing business as Fannie Mae, appellee.

814 N.W.2d 378

Filed June 1, 2012. No. S-11-817.

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. ____: ____. 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. **Deeds.** Neb. Rev. Stat. § 76-238 (Reissue 2009) was designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his or her title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property.
4. **Deeds: Liens: Time.** Because Neb. Rev. Stat. § 76-238(1) (Reissue 2009) reflects "first in time" jurisprudential concepts, it is critical to determine when each of the competing liens became choate. A lien becomes choate when there is nothing more to be done when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.
5. **Liens.** A lien cannot exist in the absence of the debt, the payment of which it secures.

Appeal from the District Court for Douglas County: Thomas A. Otepka, Judge. Affirmed.

Ben Thompson, of Thompson Law Office, P.C., L.L.O., for appellant.

Donald J. Pavelka, Jr., and Patricia D. Schneider, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellee.

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

Per Curiam.

## NATURE OF CASE

Westin Hills West Three Townhome Owners Association (the Association) appeals the order of the district court for

Douglas County which entered summary judgment in favor of the owner of the property, Federal National Mortgage Association, doing business as Fannie Mae (FNMA). In this foreclosure of lien case, the Association claims that the recording of its declaration of covenants before the deed of trust (the Deed of Trust) gave the assessment lien recorded after the Deed of Trust first priority. The district court rejected this claim, as do we. We affirm the district court's order.

## STATEMENT OF FACTS

The Association was formed pursuant to a declaration of covenants, conditions, and restrictions (the Declaration) for a townhome community in the Westin Hills West subdivision in Douglas County, Nebraska. The Declaration imposed duties on the Association to provide maintenance service to townhome owners and included a covenant for assessments to fund the costs of the Association. The Declaration was recorded with the Douglas County register of deeds on March 29, 2002, and the Association made its first assessment on April 10.

Mary K. Pichler bought a property in the townhome community subject to the Declaration. In order to secure certain indebtedness, Pichler executed and delivered a Deed of Trust encumbering the property. The Deed of Trust was recorded with the register of deeds on May 6, 2003. The original creditor later assigned the Deed of Trust to U.S. Bank, and the assignment was recorded on January 14, 2009.

Pichler failed to pay the Association's assessment of September 1, 2008. On January 28, 2009, the Association recorded with the register of deeds a notice of assessment lien naming Pichler as the person against whom the interest was claimed.

Pichler also became delinquent on her indebtedness to U.S. Bank, and the trustee of the Deed of Trust filed a notice of default with the register of deeds on November 4, 2009. U.S. Bank elected to proceed with a nonjudicial foreclosure of the Deed of Trust pursuant to the Nebraska Trust Deeds Act. The trustee held a trustee's sale on May 6, 2010. U.S. Bank submitted the winning bid and later assigned its bid to FNMA.

The trustee's deed to FNMA was recorded on June 14. On August 23, the Association recorded with the register of deeds a notice of assessment lien naming FNMA as the entity against which the interest was claimed.

On February 11, 2011, the Association filed a second amended complaint in this case. The second amended complaint named FNMA as the sole defendant and alleged that FNMA had failed to pay assessments when due since June 2010 and that the previous owner had failed to pay assessments since November 2008. At oral argument on appeal, the parties agreed that subsequent to the district court's judgment but prior to oral argument, FNMA paid all assessments which had come due during the period of FNMA's ownership, and that therefore, the only assessments at issue on this appeal are those that Pichler failed to pay between November 2008 and the trustee sale in May 2010. Essentially, the priority to be accorded the lien filed January 28, 2009, attributable to Pichler's delinquency is at issue before us. In its controlling complaint, the Association sought an order establishing and confirming its assessment lien "as a paramount lien upon the real estate . . . senior and superior to the rights, title, interests, liens or claims of" FNMA.

The parties filed competing motions for summary judgment. In an order filed August 31, 2011, the district court denied the Association's motion and granted FNMA's motion. The court concluded that the Association's lien recorded on January 28, 2009, was subsequent and inferior to the Deed of Trust that was recorded on May 6, 2003. The court rejected the Association's argument that its recording of the Declaration on March 29, 2002, gave the Association's lien attributable to Pichler's delinquency priority over the Deed of Trust. The court reasoned that the Declaration only gave notice of potential future assessments and that no lien arose until the owner became delinquent on payments, which did not occur until after September 1, 2008. In addition to concluding that the Association's assessment lien recorded on January 28, 2009, was subsequent and inferior to the Deed of Trust that was recorded on May 6, 2003, the court further concluded that the trustee's sale of the real estate in May 2010 effectively

extinguished and terminated all junior liens and encumbrances. In its order on summary judgment, the court ordered (1) that the Deed of Trust recorded on May 6, 2003, was senior as against the Association's Declaration recorded on March 29, 2002; (2) that the Deed of Trust recorded on May 6, 2003, was senior as against the Association's assessment lien recorded on January 28, 2009; and (3) that FNMA was entitled to a first lien position as against the Association and its assessment lien attributable to Pichler's delinquent Association dues. In reaching its conclusions, the court referred to both Neb. Rev. Stat. § 76-238 (Reissue 2009) and Neb. Rev. Stat. § 52-2001 (Reissue 2010).

The Association appeals the district court's order.

## ASSIGNMENTS OF ERROR

The Association assigned four errors generally claiming that the district court erred when it denied the Association's motion for summary judgment and granted FNMA's motion for summary judgment. One of the assignments of error pertained to priorities of liens during the period of FNMA's ownership, which issue is no longer before us on appeal and about which we make no comment.

Summarized and restated, the Association's three remaining assignments of error each claim for a variety of reasons that the district court erred when it concluded that the Deed of Trust recorded May 6, 2003, was superior to the assessment lien mentioned in the Declaration filed March 29, 2002, and the lien created by Pichler's delinquency.

## STANDARDS OF REVIEW

[1] 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. *Howsden v. Roper's Real Estate Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011).

[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. *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012).

## ANALYSIS

In this foreclosure of lien case, the district court concluded, inter alia, that the Deed of Trust filed May 6, 2003, was "senior" to the right to a lien described in the Declaration of the Association recorded March 29, 2002, and entered summary judgment accordingly. The Association claims this ruling was error. The Association proffers numerous arguments, including that the assessment lien was entitled to priority under the Nebraska Trust Deeds Act, specifically, Neb. Rev. Stat. § 76-1002 (Reissue 2009); that the Deed of Trust should be subordinated pursuant to the terms of the Declaration; and that the actual assessment it charged and which became delinquent after the filing of the Deed of Trust should enjoy a priority date through relation back to the date the Declaration was filed. We find no merit to these arguments. Although our reasoning differs in part from that of the district court, we find no error in the court's summary judgment ruling.

As an initial matter, we observe that at the time the underlying facts occurred, Nebraska had no statute governing homeowners' association assessments. Subsequent to these events, the Legislature passed 2010 Neb. Laws, L.B. 736, effective March 4, 2010, and codified at § 52-2001, which deals with homeowners' association liens and their priority in relation to other encumbrances. Both parties contend that § 52-2001 does not apply to this case, and we agree. We, therefore, do not refer to that statute as a rationale for our resolution of this appeal.

The Association contends on appeal that the Nebraska Trust Deeds Act—specifically § 76-1002(1), (2), and (3)(a)—controls the priority issue in this foreclosure of lien case. The provisions upon which the Association relies concern the priority accorded future advances necessary to protect that secured property and debts and obligations created simultaneously with the Deed of Trust. These items are not at issue in this

case, and we conclude that the Nebraska Trust Deeds Act is not applicable.

In the absence of a specific statutory framework applicable to this case, we look to the general recording statutes to determine the priority of the liens involved.

Section 76-238(1) provides:

> All deeds, mortgages, and other instruments of writing which are required to be or which under the laws of this state may be recorded, shall take effect and be in force from and after the time of delivering such instruments to the register of deeds for recording, and not before, as to all creditors and subsequent purchasers in good faith without notice. All such instruments are void as to all creditors and subsequent purchasers without notice whose deeds, mortgages, or other instruments are recorded prior to such instruments. However, such instruments are valid between the parties to the instrument.

[3] Section 76-238(1) is a "race-notice recording statute." See *Pederson v. U.S. ex rel. Farm Services Agency*, 78 F. Supp. 2d 1017, 1020 (D. Neb. 1999). "First in time" concepts inform our application of § 76-238(1). Fundamental to the law of registry is the principle of establishing priority of title. Section 76-238 was designed to protect a subsequent purchaser even though there was a prior conveyance or transaction concerning the property, provided the subsequent purchaser recorded his or her title first, and provided further that the subsequent purchaser was a bona fide purchaser without notice of any other claims to the property. *Miller v. McMillen*, 214 Neb. 244, 333 N.W.2d 887 (1983).

The issue before us as framed by the assignments of error is whether the Deed of Trust or the Association's assessment lien initially described in the Declaration has priority. The Association contends that its lien has priority because the Declaration of the Association was recorded before the Deed of Trust. The Declaration was recorded March 29, 2002. The Deed of Trust was recorded May 6, 2003. If the lien mentioned in the Declaration was enforceable against third parties when the Declaration was recorded, it would be superior to the Deed of Trust. If the lien in the Declaration was not enforceable as

against third parties until the assessment became delinquent and a notice of the delinquency was recorded, the Deed of Trust is superior.

[4] Because § 76-238(1) reflects "first in time" jurisprudential concepts, "it is critical to determine when each of the competing liens became *choate*." *Reed v. Civiello*, 297 F. Supp. 2d 1008, 1012 (N.D. Ohio 2003). A lien becomes choate when "there is nothing more to be done . . . when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *United States v. New Britain*, 347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520 (1954). See, also, 51 Am. Jur. 2d *Liens* § 8 (2011); 53 C.J.S. *Liens* § 43 (2005).

In its order, the district court stated that there must be a clearly established debt to which the lien can attach, and there was no debt owed by the property owner until the Association imposed an assessment, the property owner failed to pay it, and the assessment became delinquent. Somewhat similarly, in *Allied Mut. Ins. Co. v. Midplains Waste Mgmt.*, 259 Neb. 808, 612 N.W.2d 488 (2000), we indicated that as a general matter, a lien is in existence when the lienor has been identified, the property is subject to a lien, and the amount of the lien has been established.

[5] Other courts have observed that a lien does not exist until a debt is owed. A lien on real estate for payment of a debt is a right to have the debt satisfied out of the land, if not otherwise paid. Thus, a lien cannot exist in the absence of the debt, the payment of which it secures. *Dean Realty Co. v. City of Kansas City*, 85 S.W.3d 83 (Mo. App. 2002). Because a lien is a right to encumber property until a debt is paid, it presupposes the existence of a debt. *Dorr v. Sacred Heart Hospital*, 228 Wis. 2d 425, 597 N.W.2d 462 (Wis. App. 1999). Compare *First Federal Savings & Loan v. Bailey*, 316 S.C. 350, 450 S.E.2d 77 (S.C. App. 1994) (holding that it is failure of owners to pay assessment when due that actuates association's lien identified in covenants).

With respect to assessment liens mentioned in declarations of covenants, other courts have held that a homeowners' association's assessment lien is junior to a deed of trust or

mortgage. In *F.N. Realty v. Or. Shores Recreational Club*, 133 Or. App. 339, 891 P.2d 671 (1995), the association's declaration was recorded on February 13, 1978. Lots were sold and secured by deeds of trust, which were recorded. The lender foreclosed on the deeds of trust when the purchasers defaulted. The plaintiff escrow agent acting on behalf of the lender sought declaratory judgment to determine whether it was liable for delinquent assessments on the foreclosed lots. The declaration provided that a lien would exist when an annual assessment was unpaid 90 days after its due date. The court stated that no lien existed when the declaration was recorded, because no power of assessment had been exercised. The court added that under the terms of the declaration, a lien existed when an annual assessment remained unpaid 90 days after its due date. The court stated that the recorded declarations merely "provide notice of the authority to impose a lien." *Id.* at 344, 891 P.2d at 674. See, similarly, *Builders Floor Serv., Inc. v. Westchester Homes of VA, Inc.*, No. 13724, 1992 WL 884540, *1 (Va. Cir. Feb. 26, 1992) (unpublished opinion) (stating that "[t]he [a]ssociation does not have a lien merely by saying it does in the [d]eclaration").

In *First Twinstate Bank v. Hart*, 160 Vt. 613, 648 A.2d 820 (1993), the Supreme Court of Vermont considered when a lien becomes choate in the context of deciding priority between a declaration of covenants and a purchase-money mortgage. In *First Twinstate Bank*, a declaration of covenants was recorded on March 25, 1970. A mortgage deed was recorded on April 21, 1986, and the bank sought to foreclose on February 25, 1991. Relying on the "first in time" rule, the court concluded that prior to the recording of the mortgage, there was no evidence of unpaid dues. The association's claim of a first priority lien based on the date of filing the declaration of covenants did not establish the amount of any lien. Thus, the bank's mortgage had priority.

In *First Twinstate Bank*, the court also considered the language of the declaration of covenants in deciding the priority issue. The court noted that the declaration lacked an express provision as to which type of encumbrances the association considered its liens to be superior. The absence of express

subordination provisions defeated the association's claim of priority based on the declarations.

Notwithstanding the foregoing jurisprudence, the Association contends that the language of the Declaration implies that the Deed of Trust should be subordinated to the assessment lien initially identified in the Declaration. We do not agree.

The Association relies on article IV, sections 1, 10, and 11, of the Declaration in support of its argument. These sections read as follows:

> Section 1. Creation of the Lien and Personal Obligation of Assessments. The Declarant, for each Lot owned within the Properties, hereby covenants, and each Owner of any Lot by acceptance of a deed therefor, whether or not it shall be so expressed in such deed, is deemed to covenant and agree to pay to the Association (1) annual assessments or charges, and (2) special assessments for capital improvements, such assessments to be established and collected as hereinafter provided. The annual and special assessments, together with interest, costs, and reasonable attorney's fees, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made. Each such assessment, together with interest, costs, and reasonable attorney's fees, shall also be the personal obligation of the person who was the Owner of such property at the time when the assessment fell due. The personal obligation for delinquent assessments shall not pass to his successors in title unless expressly assumed by them.
>
> . . . .
>
> Section 10. Effect of Nonpayment of Assessments: Remedies of the Association. Any assessment not paid within thirty (30) days after the due date shall be deemed delinquent and shall bear the maximum rate of interest allowable by law. Should any assessment remain unpaid more than sixty (60) days after the due date, the Association may declare the entire unpaid portion of said assessment for said year to be immediately due and payable and thereafter delinquent. The Association may bring an action at law against the Owner personally obligated

> to pay the same, or may foreclose the lien of such assessment against the property through proceedings in any court having jurisdiction of actions for the enforcement of such liens. No Owner may waive or otherwise escape liability for the assessments provided herein by abandonment of title or transfer of such Owner's Lot.
>
> Section 11. Subordination of Assessments. The lien on the assessments provided for herein shall be subordinate to the lien of any first mortgage, and the holder of any first mortgage, on any Lot may rely on this provision without the necessity of the execution of any further subordination agreement by the Association. Sale or transfer of any Lot shall not affect the status or priority of the lien for assessments made as provided herein. The Association, if authorized by its Board of Directors, may release the lien of any delinquent assessments on any Lot as to which the first mortgage thereon is in default, if such Board of Directors determines that such lien has no value to the Association. No mortgagee shall be required to collect any assessments due. The Association shall have sole responsibility to collect all assessments due.

The Association refers us to *American Holidays v. Foxtail Owners*, 821 P.2d 577 (Wyo. 1991), in which an association's lien for a specific delinquency recorded after a mortgage was found to have priority over the mortgage based on the language of the declaration of covenants which was filed before the mortgage. In *American Holidays*, the declaration provided that "'[a]ny mortgage or other encumbrance . . . shall be subject [to] and subordinate to each and all of the provisions of this [d]eclaration . . . .'" 821 P.2d at 580. This language was relied on by the court in making its decision. No such sweeping subordination clause or comparable terms exist in the Declaration under consideration, and we decline to read in such terms. See *First Twinstate Bank v. Hart*, 160 Vt. 613, 648 A.2d 820 (1993) (declining to give priority based on declaration which failed to contain express language creating priority lien and failed to give adequate notice of agreement to subordinate subsequent liens).

In a related argument, the Association claims that the actual assessment it charged and which became delinquent after the filing of the Deed of Trust should enjoy the priority date of the Declaration by relation back to the date of the filing of the Declaration. The Association relies on cases such as *Ass'n of Poinciana v. Avatar Properties*, 724 So. 2d 585 (Fla. App. 1998), in which the court stated that given the language in the declaration, a later recorded assessment lien had priority based on relation back. The cases on which the Association relies were decided based on specific language which served as notice of relation back. No such language is found in the Declaration under consideration, and, to the contrary, article IV, section 10, suggests that it is not until an assessment remains unpaid more than 60 days that such obligation becomes a lien.

In *Holly Lake Ass'n v. Federal Nat. Mortg.*, 660 So. 2d 266, 267 (Fla. 1995), the following question was certified to the Florida Supreme Court:

> "WHETHER A CLAIM OF LIEN RECORDED PURSUANT TO A DECLARATION OF COVENANTS BY A HOMEOWNERS' ASSOCIATION HAS PRIORITY OVER AN INTERVENING RECORDED MORTGAGE WHERE THE DECLARATION AUTHORIZES THE ASSOCIATION TO IMPOSE A LIEN FOR ASSESSMENTS BUT DOES NOT OTHERWISE INDICATE THAT THE LIEN RELATES BACK OR TAKES PRIORITY OVER AN INTERVENING MORTGAGE."

After considering the language of the declaration and the lack of notice as to the extent or amount of the claimed assessment lien, the Florida Supreme Court held as follows:

> We hold that in order for a claim of lien recorded pursuant to a declaration of covenants to have priority over an intervening recorded mortgage, the declaration must contain specific language indicating that the lien relates back to the date of the filing of the declaration or that it otherwise take priority over intervening mortgages.

*Id*. at 269. See, similarly, *St. Paul Federal Bank v. Wesby*, 149 Ill. App. 3d 1059, 1073, 501 N.E.2d 707, 716, 103 Ill. Dec. 390, 399 (1986) (stating that "we find no language in [the] declaration that would cause any lien for unpaid common

expenses to 'relate back' to the date that the declaration was filed"). We agree with the analysis of the Florida Supreme Court in *Holly Lake Ass'n* and, given the language of the Declaration, reject the Association's argument that assessment liens in this case relate back to the date that the Declaration was filed.

In the present case, the undisputed facts show that at the time the Declaration was recorded on March 29, 2002, there existed no actual lien upon the property because no assessment had been charged, much less stood unpaid or delinquent. The Deed of Trust was recorded on May 6, 2003. The assessment lien contemplated by the Declaration could not have come into existence and become enforceable against third parties until a debt was owed and became delinquent in September 2008. The terms of the Declaration do not contain an express priority provision subordinating a deed of trust, nor is there a relation-back clause.

This case is presented to us as an appeal from the granting of summary judgment. 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. *Howsden v. Roper's Real Estate Co.*, 282 Neb. 666, 805 N.W.2d 640 (2011). 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. *Doe v. Board of Regents, ante* p. 303, 809 N.W.2d 263 (2012). Giving all inferences in favor of the Association and finding no material fact in dispute, we agree with the district court that FNMA was entitled to summary judgment.

## CONCLUSION

There are no genuine issues of material fact. We note that this case is decided without reference to § 52-2001. As explained above, the Deed of Trust was superior to any assessment lien mentioned in the Declaration of the Association, as

the district court so determined. The district court was correct when it denied the Association's motion for summary judgment and granted FNMA's motion for summary judgment. The decision of the district court is affirmed.

AFFIRMED.

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MICHAEL P. FELONEY, APPELLANT, V.
ROBERT W. BAYE, APPELLEE.

815 N.W.2d 160

Filed June 1, 2012. No. S-11-879.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant 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 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 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. **Easements: Words and Phrases.** An easement is an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose.
4. **Easements.** A claimant may acquire an easement through prescription.
5. **Easements: Adverse Possession.** The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate, but there are some differences between the two doctrines.
6. **Easements.** The law treats a claim of prescriptive right with disfavor.
7. **Easements: Proof: Time.** A party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.
8. **Easements: Presumptions: Proof: Time.** Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed. At that point, the landowner must present evidence showing that the use was permissive.
9. **Easements: Presumptions.** When an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a use thereof by a neighboring landowner and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances to the contrary.

10. ____: ____. The presumption of permissiveness that arises from unenclosed lands applies when the land in question is wilderness.
11. **Judgments: Appeal and Error.** An appellate court will affirm a lower court's ruling that reaches the correct result, although based on different reasoning.
12. **Easements: Presumptions.** When a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

W. Eric Wood, of Downing, Alexander & Wood, and Russell S. Daub for appellant.

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

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MCCORMACK, JJ., and PIRTLE, Judge.

CONNOLLY, J.

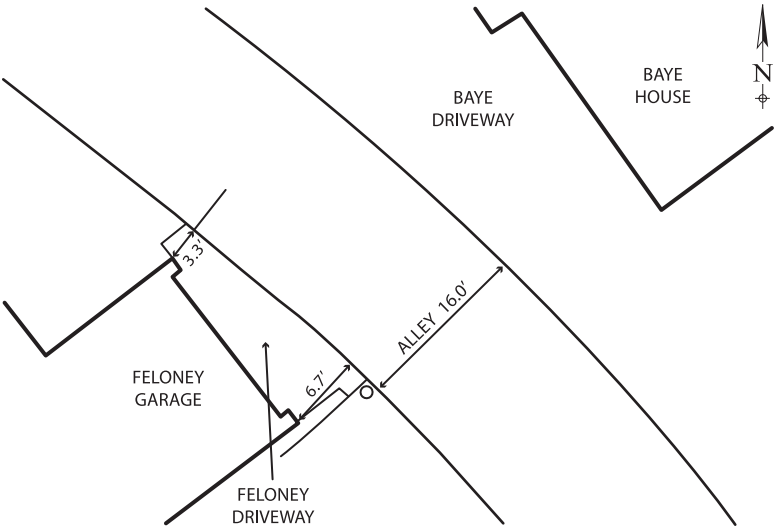
For several years, Michael P. Feloney used his neighbor's driveway to turn his vehicle to enter his garage. This was apparently necessary because the narrow alley that separated Feloney's property from his neighbor's did not leave adequate room for Feloney to make the sharp turn into his garage. Eventually, the neighbor, Robert W. Baye, decided to build a retaining wall on his driveway. This construction prevented Feloney from using Baye's driveway to get in and out of his garage.

Feloney sued Baye in the district court for Douglas County. Feloney requested the court to impose a prescriptive easement on Baye's driveway for ingress and egress. Feloney also requested the court to require Baye to remove at least part of his retaining wall. Baye moved for summary judgment. The district court granted it, concluding that Feloney's use of the driveway was permissive and thus Feloney could not prove the elements required for a prescriptive easement. Although our rationale differs from that of the district court, we affirm.

## BACKGROUND

Feloney lives at 714 North 58th Street in Omaha, Nebraska. Baye lives at 720 North 58th Street. An alley that runs generally

in a northwest-southeast direction separates the homes. Both properties, at least at one time, had driveways. These driveways were directly across from one another on opposite sides of the alley. Baye's driveway did not have any fence or gate surrounding it. A diagram showing the locations of the driveways is included below.




Feloney's driveway is very short. At its longest, it is 6.7 feet in length, and at its shortest, it is only 3.3 feet long. The alley separating the two driveways is only 16 feet wide. Because of the narrow alley, Feloney would use Baye's driveway to help him make the turn into his garage. Baye, however, apparently used his own driveway rarely, if ever, instead choosing to park his car on the street. But Baye's roommate did use the driveway to access Baye's garage. The record does not show that Feloney's use of the driveway ever interfered with Baye's or his roommate's use.

Feloney moved into the house in the summer of 2006. The prior occupants lived in the house for 8 years. They stated that in exiting their garage, they would "occasionally" back into Baye's driveway. They never did any maintenance on

Baye's driveway. Feloney, however, did shovel snow from Baye's driveway.

Before Baye built the retaining wall, he and Feloney had a good relationship. They would talk frequently, visit each other's home, and attend neighborhood gatherings together. They were friendly neighbors.

The friendly neighbors became less friendly when Baye later decided to build a retaining wall over his driveway to combat a drainage problem. This construction prevented Feloney from using Baye's driveway.

After Baye built the retaining wall, Feloney sued in the district court for Douglas County. He sought an order imposing a prescriptive easement over a portion of the area that was once Baye's driveway and an order requiring Baye to remove a portion of his retaining wall. Baye counterclaimed to quiet title.

Baye moved for summary judgment and the district court sustained the motion. The court noted that courts should generally presume adverseness if the claimant can prove uninterrupted and open use over the prescriptive period, which is 10 years. But the court concluded that an exception to this rule applied. The court reasoned that the presumption of adverseness does not apply when the use is over unenclosed land, and Baye's driveway was unenclosed. On such facts, the use is presumed to be permissive. And the court ruled that Feloney had not presented any evidence that would rebut such a presumption. Because Feloney could not show that his use was adverse, the court granted Baye summary judgment.

## ASSIGNMENTS OF ERROR

Feloney assigns that the court erred in applying the presumption that Feloney's use of the land was permissive and in granting Baye summary judgment.

## STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant 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 the ultimate inferences that may be drawn

from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[2]

## ANALYSIS

We begin with some general propositions of prescriptive easements. The law of prescriptive easements has been called "a tangled mass of weeds."[3] Nevertheless, the core principles of the doctrine are well established in Nebraska.

[3-5] An easement is "[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose."[4] Our cases recognize that a claimant may acquire an easement through prescription.[5] The use and enjoyment that will establish an easement through prescription are substantially the same in quality and characteristics as the adverse possession that will give title to real estate,[6] but there are some differences between the two doctrines.[7]

[6] We have previously noted "the law treats a claim of prescriptive right with disfavor."[8] The reasons are obvious—"'[t]o allow a person to acquire prescriptive rights over the lands of another is a harsh result for the burdened landowner.'"[9] And further, a prescriptive easement "essentially

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[1] See *Golden v. Union Pacific RR. Co.*, 282 Neb. 486, 804 N.W.2d 31 (2011).

[2] *Id.*

[3] *O'Dell v. Stegall*, 226 W. Va. 590, 599, 703 S.E.2d 561, 570 (2010).

[4] Black's Law Dictionary 585-86 (9th ed. 2009).

[5] See, e.g., *Werner v. Schardt*, 222 Neb. 186, 382 N.W.2d 357 (1986).

[6] See *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[7] See *Plettner v. Sullivan*, 214 Neb. 636, 335 N.W.2d 534 (1983).

[8] *Sjuts v. Granville Cemetery Assn.*, 272 Neb. 103, 109, 719 N.W.2d 236, 241 (2006).

[9] *Waters v. Ellzey*, 290 Ga. App. 693, 697, 660 S.E.2d 392, 396 (2008).

rewards a trespasser, and grants the trespasser the right to use another's land without compensation."[10]

[7] In our prescriptive easement cases, we have held that a party claiming a prescriptive easement must show that its use was exclusive, adverse, under a claim of right, continuous and uninterrupted, and open and notorious for the full 10-year prescriptive period.[11] Here, the point in contention is whether Feloney's use was adverse, that is, was it under a claim of right?

Feloney points to two acts that would establish adverse use: (1) his and the prior occupants' use of the driveway to turn around and (2) his shoveling snow off the driveway. But the shoveling of the driveway would have begun in 2006, at the earliest, when Feloney moved into his home. Assuming that shoveling snow off Baye's driveway would establish the adverseness element, it has not been occurring for the 10 years required to establish a prescriptive easement. Thus, the only act that is relevant is the use of the driveway to turn around.

[8] Generally, once a claimant has shown open and notorious use over the 10-year prescriptive period, adverseness is presumed.[12] At that point, the landowner must present evidence showing that the use was permissive.[13] But this rule "is not without exceptions."[14] In certain factual situations, we have applied a presumption of permissiveness. One of these exceptions is when a claimant seeks an easement over land that is unenclosed. Here, the district court found that the land was unenclosed and thus that the use was presumptively permissive.

[9] In its decision, the district court relied on *Scoville v. Fisher*.[15] In *Scoville*, the plaintiff sought to establish a

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[10] *O'Dell, supra* note 3, 226 W. Va. at 599, 703 S.E.2d at 570.

[11] *Sjuts, supra* note 8.

[12] See, e.g., *Teadtke, supra* note 6.

[13] See *id.*

[14] *Gerberding v. Schnakenberg*, 216 Neb. 200, 204, 343 N.W.2d 62, 65 (1984).

[15] *Scoville v. Fisher*, 181 Neb. 496, 149 N.W.2d 339 (1967).

prescriptive easement over an unenclosed lot in the business district of a small town. The lot was graveled and belonged to a neighboring business. The plaintiff had used the lot for parking and unloading trucks. And the evidence showed that others used the lots for parking. We cited a rule providing that a presumption of permissiveness arises when the land is unenclosed. We held that

> when an owner permits his unenclosed and unimproved land to be used by the public, or by his neighbors generally, a use[] thereof by a neighboring landowner and others, however frequent, will be presumed to be permissive and not adverse in the absence of any attendant circumstances to the contrary.[16]

Applying this rule, we concluded that the use was permissive, despite that the land was graveled (i.e., improved) and in a business district.

Feloney argues that the district court erred in applying the "unenclosed land" rule to Baye's driveway and, implicitly, that *Scoville* was incorrectly decided. Feloney argues that the presumption of permissive use should apply only when the land is unenclosed and undeveloped. We agree.

[10] The rule providing for a presumption of permissiveness in the case of unenclosed land has traditionally been applied to land such as wilderness. The Idaho Supreme Court has said that the presumption of permissiveness applies to "wild and unenclosed lands."[17] A Missouri appeals court has said that "[t]he 'wild lands' exception to prescriptive easements is inapplicable where [the] defendant's land is located in a well settled county and forms no part of an extensive, unimproved, uninhabited area."[18] Washington courts apply the presumption "[w]here the land is vacant, open, unenclosed,

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[16] *Id.* at 502, 149 N.W.2d at 343.

[17] See *Hodgins v. Sales*, 139 Idaho 225, 232, 76 P.3d 969, 976 (2003). See, also, *Rancour v. Golden Reward Mining Co., L.P.*, 694 N.W.2d 51 (S.D. 2005).

[18] *Behen v. Elliott*, 791 S.W.2d 475, 476 (Mo. App. 1990).

and unimproved."[19] Maryland courts have stated that the exception applies "'[w]hen unenclosed and unimproved wildlands or woodlands are involved.'"[20] Arkansas courts have said that "[i]t is well established that where there is passage over property that is unenclosed, uninhabited, and unimproved, there is a presumption that such use is permissive."[21] The lesson of these cases is clear: The presumption of permissiveness arises when the land is unenclosed wilderness; the presumption is not properly applied to an unenclosed parking lot in a downtown shopping center; nor is it applicable to a driveway in a suburban neighborhood.

In fact, a treatise author has lamented applications of this rule like ours in *Scoville*. The treatise reads:

> The term "unenclosed" is the most frequently used, but it is misleading, and has occasionally led a court to confuse the subject *by invoking the principle in the case of vacant lots or blocks in an urban district, though cleared and cared for*. Obviously it cannot apply to a residential lawn, though unenclosed. The more appropriate terms [sic] is "unimproved."[22]

This statement lends strong support to Feloney's interpretation of the rule.

Courts have advanced several rationales for the rule. One, a landowner who owns hundreds or thousands of acres of wilderness may not notice a person crossing his land and thus would have no opportunity to protect his or her rights.[23] Two, even if he or she did discover the use, there would likely be no incentive to stop it—a landowner might not want to upset

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[19] *Granite Beach v. Natural Resources*, 103 Wash. App. 186, 200, 11 P.3d 847, 855 (2000). See, also, *Drake v. Smersh*, 122 Wash. App. 147, 89 P.3d 726 (2004).

[20] *Turner v. Bouchard*, 202 Md. App. 428, 447, 32 A.3d 527, 537 (2011), quoting *Forrester v. Kiler*, 98 Md. App. 481, 633 A.2d 913 (1993).

[21] *Cook v. Ratliff*, 104 Ark. App. 335, 346, 292 S.W.3d 839, 847 (2009).

[22] Annot., 170 A.L.R. 776, 820 (1947).

[23] See *Rancour, supra* note 17. See, also, *Friend v. Holcombe*, 196 Okla. 111, 162 P.2d 1008 (1945).

neighborly relations when the use of his land causes him no injury.[24] Three, it is also possible that the "rule springs from the modern tendency to restrict the right of prescriptive use to prevent mere neighborly acts from resulting in deprivation of property."[25]

Whatever its theoretical underpinnings, we agree that the rule should not apply to cases like the one before us. The land at issue is not wilderness; it is a residential driveway in the middle of the largest city in Nebraska. The presumption of permissiveness arising from unenclosed, vacant, and unimproved land does not apply here. And it should not have applied in *Scoville* either.

[11] But an appellate court will affirm a lower court's ruling that reaches the correct result, although based on different reasoning.[26] And we find that on these facts, a different presumption of permissiveness arises.

In *Dan v. BSJ Realty, LLC*,[27] a Florida appeals court considered an alleged prescriptive easement over a 25-foot strip of land. The land was a private roadway on a piece of commercial real estate that was used by two adjacent businesses, those of the plaintiffs and the defendants. The roadway, however, was entirely on the defendants' property. And the defendants eventually built a fence that prevented the plaintiffs from using the property. The plaintiffs sued, claiming a prescriptive easement.

The appellate court affirmed the district court's decision that the plaintiffs had not established an easement. The court noted that the defendants' predecessors had allowed the plaintiffs and their predecessors free use of the roadway and that the defendants had also used the roadway. The court cited a rule that "use in common with the owner is presumed to be in subordination of the owner's title and with his or her

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[24] See *Rancour, supra* note 17.

[25] *Granite Beach, supra* note 19, 103 Wash. App. at 200, 11 P.3d at 855.

[26] *Doe v. Bd. of Regents, ante* p. 303, 809 N.W.2d 263 (2012).

[27] *Dan v. BSJ Realty, LLC*, 953 So. 2d 640 (Fla. App. 2007).

permission."[28] Applying this rule, the court found the plaintiffs' use to be permissive.

Thus, when the owner of a property has opened or maintained a right of way for his own use and the claimant's use appears to be in common with that use, the presumption arises that the use is permissive.[29] The foundation for the presumption is the likelihood that the owner is acting neighborly as opposed to acquiescing in a tortious trespass over his land.[30] Several other courts have applied similar presumptions.[31] And we have stated a similar rule, although in dicta. In *Gerberding v. Schnakenberg*,[32] we stated that a presumption of permissiveness arises when the use is "over a way opened by the landowner for his own purposes."

[12] We believe a similar rule should apply here. We hold that when a claimant uses a neighbor's driveway or roadway without interfering with the owner's use or the driveway itself, the use is to be presumed permissive. As noted, the law disfavors prescriptive easements.[33] And using a neighbor's driveway to turn around in is a common act. Landowners who permit such acts out of neighborly accommodation would likely stop doing so if their continued accommodation meant that they would one day lose the power to control the development of their land. "'Such [a] rule would [lead to] a prohibition of all neighborhood accommodations in the way of travel.'"[34]

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[28] *Id.* at 642-43.

[29] See *Guerard v. Roper*, 385 So. 2d 718 (Fla. App. 1980).

[30] See *id.*

[31] See, e.g., *Dewey Beach Lions Club, Inc. v. Longanecker*, 905 A.2d 128 (Del. Ch. 2006); *Chen v. Conway*, 121 Idaho 1000, 829 P.2d 1349 (1992); *Bulatovich v. Easton*, 435 N.E.2d 997 (Ind. App. 1982); *Wilfon v. Hampel 1985 Trust*, 105 Nev. 607, 781 P.2d 769 (1989); *Kawulok v. Legerski*, 165 P.3d 112 (Wy. 2007).

[32] *Gerberding, supra* note 14, 216 Neb. at 205, 343 N.W.2d at 66.

[33] See, e.g., *Sjuts, supra* note 8.

[34] *Connot v. Bowden*, 189 Neb. 97, 101, 200 N.W.2d 126, 129 (1972), quoting *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263 (1918).

Of course, this rule merely creates a presumption. And a claimant can rebut the presumption by showing the claimant is making the claim as of right.[35] But here, Feloney adduced evidence showing that he only cleared Baye's driveway of snow. Even if we assume that this act would have put Baye on notice of Feloney's hostile claim, Feloney's clearing of the driveway did not span the full 10-year prescriptive period. Feloney's use was presumed permissive until he clearly put Baye on notice that he was claiming under right.[36] Ten years have not passed since that time. The district court properly granted summary judgment.

## CONCLUSION

We conclude that Feloney's use of Baye's driveway is presumptively permissive. And Feloney did not present any evidence that would create a question of fact as to that question. Accordingly, we affirm.

AFFIRMED.

MILLER-LERMAN, J., not participating.

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[35] See *Kimco Addition v. Lower Platte South N.R.D.*, 232 Neb. 289, 440 N.W.2d 456 (1989).

[36] See, e.g., *Connot, supra* note 34.

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STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. MICHAEL JAMES MURPHY, RESPONDENT.

814 N.W.2d 107

Filed June 1, 2012. No. S-12-278.

Original action. Judgment of public reprimand.

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

PER CURIAM.

## INTRODUCTION

The Counsel for Discipline of the Nebraska Supreme Court, relator, has filed a motion for reciprocal discipline

against Michael James Murphy, respondent. We grant the motion for reciprocal discipline and enter a judgment of public reprimand.

## FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 22, 1980. Respondent was also admitted to the practice of law in the State of Iowa. On April 3, 2008, respondent received a public reprimand from the Supreme Court of Iowa. Respondent never reported the public reprimand by the Supreme Court of Iowa to the Counsel for Discipline as required by Neb. Ct. R. § 3-321 of the disciplinary rules.

On April 5, 2012, the Counsel for Discipline filed a motion for reciprocal discipline pursuant to § 3-321. On April 11, we entered an order directing the parties to show cause as to why this court should or should not enter an order imposing the identical discipline, or greater or lesser discipline, as the court deemed appropriate. On April 26, respondent responded by filing a "Resistance to Application for Order to Show Cause," offering an explanation regarding the 2008 public reprimand from the Supreme Court of Iowa and requesting a private reprimand. On May 14, relator filed a statement in response to this court's order recommending that respondent receive a public reprimand, stating that this discipline is the same sanction imposed by the Supreme Court of Iowa and would fully protect the public. Relator also states that respondent has indicated that he wishes to resign from the Nebraska bar upon resolution of this matter.

## ANALYSIS

The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances. *State ex rel. Counsel for Dis. v. Seyler, ante* p. 401, 809 N.W.2d 766 (2012). In a reciprocal discipline proceeding, a judicial determination of attorney misconduct in one jurisdiction is generally conclusive proof of guilt and is not subject to relitigation in the second jurisdiction. *State ex rel. Counsel for Dis. v. Loftus*, 278 Neb. 1015, 775 N.W.2d 426 (2009) (citing *State*

*ex rel. Counsel for Dis. v. Boose*, 277 Neb. 1, 759 N.W.2d 110 (2009)). Neb. Ct. R. § 3-304 of the disciplinary rules provides that the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
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> (1) Disbarment by the Court; or
>
> (2) Suspension by the Court; or
>
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
>
> (4) Censure and reprimand by the Court; or
>
> (5) Temporary suspension by the Court; or
>
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
>
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

Section 3-321 of the disciplinary rules provides in part:

> (A) Upon being disciplined in another jurisdiction, a member shall promptly inform the Counsel for Discipline of the discipline imposed. Upon receipt by the Court of appropriate notice that a member has been disciplined in another jurisdiction, the Court may enter an order imposing the identical discipline, or greater or lesser discipline as the Court deems appropriate, or, in its discretion, suspend the member pending the imposition of final discipline in such other jurisdiction.

In imposing attorney discipline, we evaluate each case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Walocha, ante* p. 474, 811 N.W.2d 174 (2012). Respondent has requested for us to enter a judgment of private reprimand; however, pursuant to § 3-304, we cannot enter a judgment of private reprimand. Accordingly, we grant the motion for reciprocal discipline and enter a judgment of public reprimand.

## CONCLUSION

The motion for reciprocal discipline is granted. It is the judgment of this court that respondent should be and 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) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF PUBLIC REPRIMAND.

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DAVE ENGLER ET AL., APPELLANTS, V. STATE OF NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLEE.

814 N.W.2d 387

Filed June 8, 2012. No. S-11-182.

1. **Jurisdiction: Judgments: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.
4. **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.
5. **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.
6. **Jurisdiction: Immunity.** Sovereign immunity deprives a trial court of subject matter jurisdiction unless the State consents to suit.
7. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.

Petition for further review from the Court of Appeals, IRWIN, MOORE, and CASSEL, Judges, on appeal thereto from the District Court for Lancaster County, ROBERT R. OTTE, Judge. Judgment of Court of Appeals affirmed.

Edward F. Fogarty, of Fogarty, Lund & Gross, for appellants.

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

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

MILLER-LERMAN, J.

## NATURE OF THE CASE

The State of Nebraska Accountability and Disclosure Commission (Commission) issued an advisory opinion (Advisory Opinion No. 199), answering the question of whether Omaha firefighters can engage in a campaign to raise funds for the Muscular Dystrophy Association (MDA) during on-duty time paid for with taxpayer funds or using city-owned uniforms and equipment. The Commission answered "no," stating that such activities constitute a violation of Neb. Rev. Stat. § 49-14,101.01(2) (Reissue 2010) of the Nebraska Political Accountability and Disclosure Act (NPADA).

Nebraska Professional Firefighters Association; its president, Dave Engler, and the MDA (collectively the appellants) filed an action against the Commission, asking the district court for Lancaster County to declare that Advisory Opinion No. 199 was invalid and to order it withdrawn from publication. The district court determined that it lacked subject matter jurisdiction to review a Commission advisory opinion and granted the Commission's motion to dismiss.

On appeal, the Nebraska Court of Appeals agreed with the district court's analysis, summarily dismissed the appellants' appeal for lack of jurisdiction, and denied the appellants' subsequent motion for rehearing. We granted the appellants' petition for further review. Because we determine that the district court correctly concluded that it lacked subject matter jurisdiction, we conclude that the Court of Appeals correctly dismissed the appeal. We affirm.

## STATEMENT OF FACTS

In March 2010, the city of Omaha requested that the Commission consider whether it was a violation of the NPADA for Omaha firefighters to engage in fundraising for the MDA

while on city time using city-owned uniforms and equipment. See Neb. Rev. Stat. §§ 49-14,100 and 49-14,123(10) (Reissue 2010). The issue arose out of the firefighters' participation in the MDA's "Fill the Boot" campaign as part of the Jerry Lewis Labor Day telethon. On March 12, the Commission issued Advisory Opinion No. 199, in which the Commission determined that such activities constitute a violation of § 49-14,101.01(2). Advisory Opinion No. 199 stated that "Omaha Firefighters may not, under the terms of Section 49[-14],101.01(2), use on duty time, paid for with taxpayer funds, to engage in a campaign to raise funds for the [MDA], which is a private, charitable corporation."

On August 19, 2010, the appellants filed an amended petition captioned "Amended Petition for Declaratory Judgment (84-911)" in which they requested that the district court review the validity of Advisory Opinion No. 199. The petition alleged that the advisory opinion was invalid and asked the court to order it withdrawn from publication.

On September 1, 2010, the Commission filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1), for lack of subject matter jurisdiction, and § 6-1112(b)(6), for failure to state a claim for relief. In an order, filed February 2, 2011, the district court dismissed the action for lack of subject matter jurisdiction. In its order, the court stated that the appellants had alleged that the court had jurisdiction over the matter pursuant to Neb. Rev. Stat. § 49-14,131 (Reissue 2010) of the NPADA and Neb. Rev. Stat. §§ 84-911 and 84-917 (Reissue 2008) of the Administrative Procedure Act (APA). However, we note that the controlling petition did not allege § 84-917 as a jurisdictional basis and that the appellants did not claim on appeal that jurisdiction is based on § 84-917, which pertains to contested cases. Further, because we determine below that the appellants' action did not meet the threshold requirements of § 49-14,131, we make no comment on the propriety of specifically invoking § 84-911 as the APA jurisdictional basis had they done so.

In its order, the district court referenced § 49-14,131 of the NPADA, which provides that "[a]ny final decision by the

[C]ommission in a contested case or a declaratory ruling made pursuant to the [NPADA] may be appealed. The appeal shall be in accordance with the [APA].”

Section 84-911(1) of the APA provides in part that

> [t]he validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner.

The district court rejected the appellants’ argument that Advisory Opinion No. 199 constituted a rule or regulation that could be reviewed pursuant to § 84-911 of the APA. The district court relied on cases such as *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997), *overruled on other grounds, Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999), and *Logan v. Department of Corr. Servs.*, 254 Neb. 646, 578 N.W.2d 44 (1998). Thus, the court determined that § 84-911 did not provide jurisdiction for the court to review Advisory Opinion No. 199.

Because the district court found there was no subject matter jurisdiction, it declined to address the Commission’s argument that the appellants’ petition failed to state a claim upon which relief can be granted, pursuant to § 6-1112(b)(6) of the Nebraska Court Rules of Pleading in Civil Cases, thus following the procedure outlined in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010), in which we held that consideration should first be given to subject matter jurisdiction before considering possible dismissal based on a failure to state a claim for relief. The court granted the Commission’s motion to dismiss.

The appellants appealed the district court’s order. On April 11, 2011, the Nebraska Court of Appeals summarily dismissed the appeal with the following docket entry:

> Appeal dismissed pursuant to Neb. Ct. R. App. P. § 2-107(A)(2). When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court

> also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. Kaplan v. McClurg, 271 Neb. 101, 710 N.W.2d 96 (2006).

On April 21, 2011, the appellants filed a motion for rehearing. The motion was denied.

We granted the appellants' petition for further review.

## ASSIGNMENT OF ERROR

The appellants claim, summarized and restated, that the Court of Appeals erred when it concluded that both the district court and the appellate court lacked jurisdiction to review the Commission's Advisory Opinion No. 199. Because there is no merit to this assignment of error, we need not consider other assigned errors addressed to the correctness of the content of Advisory Opinion No. 199. See *In re Interest of Hansen*, 281 Neb. 693, 798 N.W.2d 398 (2011) (stating that appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

## STANDARDS OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court. *City of Waverly v. Hedrick, ante* p. 464, 810 N.W.2d 706 (2012).

[2] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *Republic Bank v. Lincoln Cty. Bd. of Equal., ante* p. 721, 811 N.W.2d 682 (2012).

## ANALYSIS

The appellants claim on further review that because the district court had erred when it determined that it lacked subject matter jurisdiction over their petition, the Court of Appeals also erred when it dismissed their appeal for lack of jurisdiction. There are no disputed issues of fact in this case, and thus the jurisdictional issue before us is a matter of law which we review independently of the lower courts. See *City of Waverly v. Hedrick, supra*. We find no merit to the appellants' claim of error.

The appellants sought relief in district court from an unfavorable advisory opinion issued by the Commission. The appellants refer us to §§ 49-14,131 and 84-911 as the jurisdictional bases for seeking relief in district court. Section 49-14,131 provides: "Any final decision by the [C]ommission in a contested case or a declaratory ruling made pursuant to the [NPADA] may be appealed. The appeal shall be in accordance with the [APA]." The appellants specifically relied on § 84-911 of the APA which concerns appeals involving the validity of rules or regulations as the alleged APA basis of jurisdiction.

The language of § 49-14,131 is clear that a petitioner can file an appeal to the district court from outcomes in two identified types of matters before the Commission: (1) a contested case or (2) a declaratory ruling. Where there is a decision in one of these two identified matters, the appeal shall follow the procedure set forth in the APA. Reading §§ 49-14,131 and 84-911 together, it is also clear that the threshold requirements of § 49-14,131 must be met before taking an appeal in accordance with the APA. In sum, § 49-14,131 identifies a "contested case" and a "declaratory ruling" as the matters suitable for APA appeal.

The parties agree that this matter does not involve a "contested case" under § 49-14,131, and therefore, the issue is whether an "advisory opinion" should be treated as a "declaratory ruling" for the purposes of appealability under § 49-14,131. The appellants contend that an advisory opinion equates to a declaratory ruling and is thus appealable pursuant to § 49-14,131. We do not agree.

Statutory interpretation is a question of law. *Republic Bank, supra*. The plain language of § 49-14,131 does not support the appellants' interpretation. Section 49-14,131 authorizes appeals seeking relief against the Commission for the actions specified, and such appeals shall be in accordance with the APA. In this case, § 84-911 of the APA is alleged to be the basis for jurisdiction over the Commission. A suit against an agency of the state is the same as a suit against the state, and therefore the doctrine of sovereign immunity is implicated. See, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb.

152, 505 N.W.2d 654 (1993). We have stated that § 84-911 provides a limited statutory waiver of sovereign immunity. See, *Gaylen v. Balka*, 253 Neb. 270, 570 N.W.2d 519 (1997); *Perryman v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 66, 568 N.W.2d 241 (1997).

[3-5] Neb. Const. art. V, § 22, provides that "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This provision of the Constitution is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity. *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009). 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. *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011). 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. *Id*. As we consider § 49-14,131, which provides the rationale for invoking § 84-911, we will not expand the meaning of "declaratory ruling" in § 49-14,131 to include "advisory opinion" and thereby effectively expand § 84-911—unless the express language of § 49-14,131 or the text of the statute and the Commission's rules and regulations provide an overwhelming implication to do so. Neither the text nor the rules and regulations so imply.

The express language of § 49-14,131 allows appeals under the APA only for contested cases and declaratory rulings: The express language of the statute does not include appeals for advisory opinions. Notwithstanding the statutory language, the appellants urge us to imply that advisory opinions are encompassed by § 49-14,131. An examination of the rules and regulations of the Commission convinces us that it would not be prudent for us to imply that an advisory opinion is the equivalent of a declaratory ruling for purposes of § 49-14,131.

The Commission is authorized to "[p]rescribe and publish . . . rules and regulations . . . pursuant to the [APA]." § 49-14,123(1). We have stated that we may take judicial notice of state agencies' rules and regulations. See, *JCB*

*Enters. v. Nebraska Liq. Cont. Comm.*, 275 Neb. 797, 749 N.W.2d 873 (2008); *Gase v. Gase*, 266 Neb. 975, 671 N.W.2d 223 (2003); Neb. Rev. Stat. § 84-906.05 (Reissue 2008). The Commission's rules and regulations make clear that advisory opinions, contested cases, and declaratory rulings are three different and distinct categories of matters that come before the Commission. The Commission's rules and regulations provide three separate rules, identified as "1-(5) Advisory Opinions," "1-(6) Contested Cases," and "1-(4) Declaratory Rulings." 4 Neb. Admin. Code, ch. 1 (1990). Each rule has subparts not repeated here regarding detailed procedures for pursuing each avenue. Where advisory opinions, contested cases, and declaratory rulings are so clearly distinct from one another, the Commission's rules and regulations do not permit us to imply that advisory opinions are the equivalent of either of the appealable matters identified in § 49-14,131, to wit, contested cases and declaratory rulings.

For completeness, we note that the Commission's rules and regulations further provide that an advisory opinion can be challenged by seeking a declaratory ruling regarding the same subject. The Commission's rules provide: "GRIEVANCE WITH ADVISORY OPINION: Any person or governing body aggrieved by an official advisory opinion issued by the Commission may file a petition for declaratory ruling pursuant to the provisions of 1-(4)." 4 Neb. Admin. Code, ch. 1, § 1-(5)(b). If a grievance with an advisory opinion is pursued and results in an unfavorable declaratory ruling, such declaratory ruling can then be appealed pursuant to § 49-14,131 in accordance with the APA.

There is no allegation or suggestion that a grievance regarding Advisory Opinion No. 199 was filed seeking a declaratory ruling. The appellants did not exhaust or allege that they exhausted the available administrative remedies which, if unsuccessful, could have recast the advisory opinion into an appealable declaratory ruling. See 73 C.J.S. *Public Administrative Law and Procedure* § 79 at 272 (2004) (stating that "[w]here an administrative remedy is provided, particularly where it is provided by statute or rules or regulations having the force of law, relief ordinarily must be sought initially from the

appropriate administrative agency and the administrative remedy usually must be exhausted before a litigant may resort to the courts"). Compare § 84-911(1) (not requiring exhaustion with respect to rules and regulations). Under the Commission's rules and regulations, there was an opportunity for the appellants whose standing has not been challenged to turn Advisory Opinion No. 199 into a declaratory ruling which is the kind of matter appealable under § 49-14,131 in accordance with the APA.

[6,7] In sum, the appellants rely on § 49-14,131 as the rationale for jurisdiction under the APA, but they do not have a decision that fits under § 49-14,131. Sovereign immunity deprives a trial court of subject matter jurisdiction unless the State consents to suit. See *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009). Section 84-911, upon which appellants rely and upon which the case was considered in the lower courts, is a limited waiver of sovereign immunity, and the advisory opinion which the appellants seek to have reviewed in their case against the Commission is not a matter for which waiver has been granted. Accordingly, the district court correctly determined that it lacked subject matter jurisdiction to review Advisory Opinion No. 199. When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W.2d 96 (2006). Thus, the Court of Appeals did not err when it dismissed the appellants' appeal.

## CONCLUSION

The Court of Appeals correctly determined that the district court lacked subject matter jurisdiction over the appellants' petition for review of the Commission's Advisory Opinion No. 199. The Court of Appeals summarily dismissed the appellants' appeal. On further review, we conclude the Court of Appeals did not err and we affirm.

AFFIRMED.

# Matthew John Bock, appellee, v. Jennifer Lynn Dalbey, appellant.

815 N.W.2d 530

Filed June 15, 2012. No. S-10-973.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Divorce: Property Division: Taxes.** Ordinarily, a trial court in Nebraska should not consider the speculative tax consequences of its distribution orders unless it has ordered the immediate liquidation or sale of an asset or a party must sell an asset to satisfy a monetary judgment.
3. **Injunction: Equity.** A mandatory injunction is an equitable remedy that commands the subject of the order to perform an affirmative act to undo a wrongful act or injury. It is considered an extreme or harsh remedy that should be exercised sparingly and cautiously.
4. **Injunction: Damages.** An injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury; a court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
5. **Statutes: Equity: Jurisdiction.** When a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity.
6. **Divorce: Property Division: Equity.** Neb. Rev. Stat. § 42-365 (Reissue 2008) authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable under the circumstances.
7. **Divorce: Property Division: Equity: Taxes.** Under Neb. Rev. Stat. § 42-365 (Reissue 2008), if a party seeking an equitable adjustment presents the court with the tax disadvantages of filing separate returns, a trial court may consider a party's unreasonable refusal to file a joint return. Evidence of a tax disadvantage would normally include the parties' calculated joint and separate returns for comparison.
8. **Divorce: Taxes.** A trial court does not have discretion to compel parties seeking marital dissolution to file a joint income tax return.

Petition for further review from the Court of Appeals, Irwin, Cassel, and Pirtle, Judges, on appeal thereto from the District Court for Douglas County, John D. Hartigan, Jr., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellant.

Brent M. Kuhn, of Harris Kuhn Law Firm, L.L.P., for appellee.

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

CONNOLLY, J.

## SUMMARY

The district court dissolved the marriage of Jennifer Lynn Dalbey, the appellant, and Matthew John Bock. We granted Dalbey's petition for further review on one question: Does a trial court in a marital dissolution action have the discretion to order the parties to file a joint income tax return? We conclude it does not. The Nebraska Court of Appeals affirmed the trial court's order requiring the parties to file a joint tax return.[1] It cited cases showing that courts have conflicting views and agreed with those courts holding that trial courts do have this discretion. Because a trial court can equitably adjust its division of the marital estate to account for a spouse's unreasonable refusal to file a joint return, we reverse, and remand the cause to the Court of Appeals with directions for further disposition.

## BACKGROUND

The parties married in 2006. The district court entered its dissolution decree in August 2010. Many of the facts of this case deal with the district court's division of the marital assets. But the issue here is the court's order requiring that the parties file a joint tax return for 2008 and 2009. The parties filed a joint return for the 2007 tax year. But they had not filed any tax return for 2008 or 2009. The district court, without citing authority, ordered the parties to file a joint return. It allocated the unspecified refunds or assessments to be shared by the parties in a ratio that equaled each party's contribution of adjusted gross income to their total adjusted gross income. The record does not show what their individual income contributions were for the 2008 and 2009 tax years, but it does show that Bock earned substantially more income than Dalbey.

In affirming, the Court of Appeals framed the issue as whether the Supremacy Clause of the U.S. Constitution barred the district court from ordering the parties to file a joint

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[1] *Bock v. Dalbey*, 19 Neb. App. 210, 809 N.W.2d 785 (2011).

return. The federal tax code allows married individuals to elect whether to file joint or separate returns. But the Court of Appeals determined that this election did not conflict with a state court's order to file jointly. It stated that domestic relations law is generally a state law matter outside of federal jurisdiction.

## ASSIGNMENT OF ERROR

In her petition for further review, Dalbey assigns that the Court of Appeals erred in affirming the district court's order that the parties file a joint income tax return.

## STANDARD OF REVIEW

[1] We independently review questions of law decided by a lower court.[2]

## ANALYSIS

[2] Ordinarily, a trial court in Nebraska should not consider the speculative tax consequences of its distribution orders unless it has ordered the immediate liquidation or sale of an asset or a party must sell an asset to satisfy a monetary judgment.[3] But the questions here are (1) whether a district court can consider the tax consequences of one party's refusal to file a joint return in dividing the marital estate and (2) whether it has discretion to order the parties to file a joint return to preserve assets for the marital estate or to equalize its division of the estate.

Married individuals can elect whether to file a joint or separate return.[4] For joint returns, the federal government taxes the income of a married couple in the aggregate.[5] Filing jointly generally, but not always, produces substantial tax savings.[6]

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[2] *Spitz v. T.O. Haas Tire Co., ante* p. 811, 815 N.W.2d 524 (2012).

[3] See *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003). But see *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988). See, also, 2 Brett R. Turner, Equitable Distribution of Property § 8:28 (3d ed. 2005).

[4] I.R.C. § 6013 (2006).

[5] See I.R.C. § 6013(d)(3).

[6] See Leon Gabinet, Tax Aspects of Marital Dissolution § 3:3 (rev. 2d ed. 2005).

But a "[h]usband and wife filing a joint return are jointly and severally liable for all tax for the taxable year (not merely the amount shown on the return), including interest, additions for negligence, and fraud penalties if applicable."[7] The right of election under the federal tax code and the possible exposure to liability have prompted several courts to hold that a trial court cannot order a party to file a joint return.

Few courts, however, have decided this question. This may partially be because marital tax experts advise divorcing couples to privately negotiate an agreement to file a joint return.[8] Generally, if the parties have agreed to file a joint return, the trial court can incorporate or rely on the agreement in equitably dividing the marital estate and enforce the agreement if necessary.[9] But other appellate courts have disagreed on whether a trial court, outside of a party's agreement, can compel a party to a divorce proceeding to file a joint return.

Of the courts that have held that a trial court cannot compel a party to file a joint return, *Leftwich v. Leftwich*[10] is the most cited case. There, unless the wife agreed to file joint tax returns for 2 years of the marriage, the husband would owe about $40,000 in additional taxes. So the trial court conditioned the wife's receipt of her share of marital property upon her filing the joint returns, with the understanding that the husband would pay any additional taxes. The District of

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[7] Boris I. Bittker & Lawrence Lokken, Federal Taxation of Income, Estates and Gifts § 111.3A.1 at 1 (2012) (emphasis omitted). See I.R.C. § 6013(d)(3).

[8] See, e.g., Gabinet, *supra* note 6.

[9] See, *Cox v. Cox*, 17 Ark. App. 93, 704 S.W.2d 171 (1986); *Kane v. Parry*, 24 Conn. App. 307, 588 A.2d 227 (1991); *Johansen v. Johansen*, 365 N.W.2d 859 (S.D. 1985); *Ahmad v. Ahmad*, No. 23740, 2010 WL 4703072 (Ohio App. Nov. 19, 2010) (unpublished opinion).

[10] *Leftwich v. Leftwich*, 442 A.2d 139 (D.C. 1982). Accord, *Kane, supra* note 9; *Sweeney v. Sweeney*, 583 So. 2d 398 (Fla. App. 1991); *In re Marriage of Butler*, 346 N.W.2d 45 (Iowa App. 1984), *overruled on other grounds, In re Marriage of Wertz*, 492 N.W.2d 711 (Iowa App. 1992); *Teich v. Teich*, 240 A.D.2d 258, 658 N.Y.S.2d 599 (1997); *Matlock v. Matlock*, 750 P.2d 1145 (Okla. App. 1988); *Lewis and Lewis*, 81 Or. App. 22, 723 P.2d 1079 (1986).

Columbia appellate court, concerned with the wife's liability exposure, reversed:

> The propriety of considering tax matters in divorce proceedings, however, does not serve as a license for the trial court to compel a party to execute a joint return. The trial court is not at liberty to alter basic precepts of federal or of state tax law. . . .
>
> . . . A married individual possesses complete discretion to file a separate return, or, with the concurrence of his or her spouse, a joint return. . . .
>
> To sanction the trial court's effectively ordering a spouse to cooperate in filing a joint return would nullify the right of election conferred upon married taxpayers by the Internal Revenue Code. Such a right is not inconsequential; its exercise affects potential criminal and/or civil liabilities of taxpayers. . . . Married individuals filing a joint return expose themselves to joint and several liability for any fraudulent or erroneous aspect of the return.[11]

The wife's exposure to liability was the critical factor in the court's holding:

> Given the wife's substantial interest in the choice of a filing status, with its concomitant consequences, we find that it was error for the trial court to impose a coercive construction of [I.R.C.] § 6013 [the federal statute permitting a husband and wife to elect to file jointly or separately] on appellant.[12]

Furthermore, the *Leftwich* court reasoned that even if the trial court could override the wife's election to file a separate return, under equity principles, it should not have resorted to a coercive remedy when a less intrusive one existed: "[T]he trial court well could have remedied any perceived tax disadvantage to the husband by altering the disposition of the marital property."[13] Other courts that hold a trial court cannot compel

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[11] *Leftwich, supra* note 10, 442 A.2d at 144-45.

[12] *Id.* at 145.

[13] *Id.* at 146.

the filing of a joint return have also held the trial court may nonetheless consider the tax disadvantages of filing separate returns in its equitable division of the marital estate.[14]

But other appellate courts have held that a trial court can compel a party to file a joint tax return.[15] Of these cases, *Bursztyn v. Bursztyn*[16] is a recent, prominent decision on which the Nebraska Court of Appeals relied. The *Bursztyn* court conceded that good arguments exist on both sides of the issue. It noted, however, that in New Jersey, a trial court is statutorily required to consider the tax consequences of its alimony and equitable distribution rulings. The *Bursztyn* court considered an abridgment of an individual's choice whether to file joint or separate tax returns to be a minor intrusion of the parties' individual rights. Finally, the court concluded that because a trial court has discretion to allocate federal tax exemptions for dependent children, it could, when appropriate, compel the parties to file joint tax returns to preserve the marital estate.

Yet the *Bursztyn* court was nonetheless persuaded by the *Leftwich* court's reasoning that altering the equitable distribution of marital property was a less intrusive option to remedy a tax disadvantage that a spouse incurs because of the other spouse's election to file a separate return. So the *Bursztyn* court tempered its decision that a trial court has discretion to order joint tax returns as follows: "In general, we believe trial courts should avoid compelling parties to execute joint tax returns because of the potential liability to which the parties would be exposed, and because there generally exists a means by which to compensate the parties for the adverse

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[14] See, *Sweeney, supra* note 10; *In re Marriage of Butler, supra* note 10; *Teich, supra* note 10; *Matlock, supra* note 10. Compare *Hardebeck v. Hardebeck*, 917 N.E.2d 694 (Ind. App. 2009).

[15] See, *In re Marriage of Zummo*, 167 Ill. App. 3d 566, 521 N.E.2d 621, 118 Ill. Dec. 339 (1988); *Theroux v. Boehmler*, 410 N.W.2d 354 (Minn. App. 1987); *Bursztyn v. Bursztyn*, 379 N.J. Super. 385, 879 A.2d 129 (2005); *Fraase v. Fraase*, 315 N.W.2d 271 (N.D. 1982); *Ahmad, supra* note 9. See, also, *In re Marriage of LaFaye*, 89 P.3d 455 (Colo. App. 2003).

[16] *Bursztyn, supra* note 15.

tax consequences of filing separately."[17] In short, the *Bursztyn* court required a trial court to consider the equitable adjustment remedy before resorting to a coercive order to file a joint return.

But in other appellate decisions—including the Nebraska Court of Appeals' decision in this appeal—courts holding that trial courts have discretion to compel the parties to file joint tax returns have not required a coercive order to be the remedy of last resort. That is, they have not considered whether adjusting the equitable distribution of marital property is a less intrusive way to remedy a spouse's unprincipled refusal to file a joint tax return. But we believe that it is the preferable remedy for four reasons.

First, the U.S. Tax Court is not bound by orders compelling the parties to sign a joint return. It will look to the husband and wife's intent, and if one of them signed only because a state court ordered him or her to do so, the return may or may not be treated as a joint return.[18] This means that a trial court cannot know with certainty whether its equitable division of the marital estate based on consideration of a joint tax return will be given effect by federal authorities or courts.

[3-5] Second, an order compelling the parties to file joint tax returns is a mandatory injunction. A mandatory injunction is an equitable remedy that commands the subject of the order to perform an affirmative act to undo a wrongful act or injury.[19] It is considered an extreme or harsh remedy that should be exercised sparingly and cautiously.[20] Further, an injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury. And a court should not grant an injunction unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure

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[17] *Id.* at 398, 879 A.2d at 137.

[18] Compare *Price v. Commissioner*, 86 T.C.M. (CCH) 203 (2003), with *Anderson v. Commissioner*, 47 T.C.M. (CCH) 1123 (1984).

[19] See, *Barthel v. Liermann*, 2 Neb. App. 347, 509 N.W.2d 660 (1993); 42 Am. Jur. 2d *Injunctions* § 6 (2010).

[20] *Barthel, supra* note 19.

of justice.[21] Finally, when a statute provides an adequate remedy at law, equity will not entertain jurisdiction, and a party must exhaust the statutory remedy before it may resort to equity.[22]

[6] Here, the statutory remedy is found in Neb. Rev. Stat. § 42-365 (Reissue 2008). This statute authorizes a trial court to equitably distribute the marital estate according to what is fair and reasonable under the circumstances.[23] Because § 42-365 is broad in its scope, we agree with the decisions of courts that hold a trial court may adjust its equitable division of the marital estate to account for the tax consequences of filing separate returns.

[7] Therefore, under § 42-365, we hold that if a party seeking an equitable adjustment presents the court with the tax disadvantages of filing separate returns, a trial court may consider a party's unreasonable refusal to file a joint return. Evidence of a tax disadvantage would normally include the parties' calculated joint and separate returns for comparison.[24] But because we conclude that § 42-365 permits a court to adjust its division of the marital estate to fit the equities of the case, we agree with the *Leftwich* court that equity principles weigh against permitting a trial court to resort to the coercive remedy of compelling a party to file a joint tax return.

Third, a resisting spouse's exposure to liability under the federal tax code is too difficult to predict if compelled to file a joint return. We agree with the Court of Appeals that trial courts in marital dissolution proceedings can order the parties to take actions with tax consequences, such as allocating the dependency exemptions.[25] But allocating dependency exemptions is not analogous to compelling a spouse to file a joint

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[21] See *Hogelin v. City of Columbus*, 274 Neb. 453, 741 N.W.2d 617 (2007).

[22] *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[23] See, *Claborn v. Claborn*, 267 Neb. 201, 673 N.W.2d 533 (2004); *Shuck v. Shuck*, 18 Neb. App. 867, 806 N.W.2d 580 (2011).

[24] See, Gabinet, *supra* note 6; 2 Turner, *supra* note 3, § 8:30.

[25] See *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991), citing *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990).

tax return because of the potential liability. And we doubt that a trial court could be certain that the spouse resisting a joint return would not be exposed to joint and several liability for the tax consequences of the return.

In its decision, the Court of Appeals noted that the tax code provides relief from joint and several liability for an "innocent spouse."[26] Obtaining relief under the innocent spouse statute, however, is far from certain. The regulations are complicated,[27] and predicting liability would frequently require considerable tax expertise.

A divorcing spouse compelled to sign a joint return faces potential liability on two fronts. First of all, I.R.C. § 6015(b) and (c) can provide relief from an under*statement* of tax or a divorced spouse's portion of an assessed deficiency, but these provisions do not provide relief from an under*payment* of reported tax. Because subsections (b) and (c) do not apply to underpayments of tax, a claimant can seek equitable relief from an underpayment of tax only under § 6015(f).[28] Among the multiple factors that federal tax regulators will consider are whether the claimant had reason to know that the tax would not be paid and whether the claimant significantly benefited from the unpaid liability.[29] Summed up, for a divorcing spouse with little or no taxable income for the tax year, signing a joint tax return may pose considerable liability risk with no appreciable benefit.

Next, to seek relief from understatements of tax or assessed deficiencies under I.R.C. § 6015(b) and (c), an innocent spouse must *not* have had knowledge of the other spouse's "item" on the joint tax return that resulted in the understatement or deficiency assessment.[30] "A spouse knowing of the facts giving rise to a deficiency has actual knowledge, even if he or she does not understand the tax consequences of the

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[26] See I.R.C. § 6015(b) and (c) (2006).

[27] See Bittker & Lokken, *supra* note 7, §§ 111.3A.2 and 111.3A.3.

[28] See *Washington v. Commissioner*, 120 T.C. 137 (2003).

[29] See *id.*

[30] See I.R.C. § 6015(b)(1)(B) and (c)(3)(C).

facts or the error in the return's treatment of the item."[31] The knowledge component applies to both omissions of income and erroneous deductions, although the test can differ depending on whether omitted income or an erroneous deduction is at issue.[32] In general, however, federal courts review these issues for whether a reasonably prudent person, under the circumstances, would have known that the return contained a substantial understatement of tax or that further investigation was required.[33] If so, and the claimant did not take reasonable steps to investigate, relief will be denied.[34]

These rules show that a coerced filing of a joint tax return can be fraught with unanticipated liability. Because the risks frequently outweigh the benefits, in private negotiations a spouse will often not agree to a joint return without the other spouse's agreement to share in the tax savings and to promise indemnity.[35] We believe that these decisions are best left to the parties to negotiate after considering the risks and benefits of a joint return. If a spouse unreasonably refuses to file a joint return, the other spouse can take the matter up with the court.

Fourth, the rules related to filing deadlines under the federal tax code create practical hurdles to allowing a trial court to compel the parties to file joint returns. Under § 6013(b) of the tax code, a husband and wife can only elect to file a joint return for up to 3 years after they filed separate returns. But the opposite is not true. If the husband and wife filed a joint return, they cannot revoke that decision after the filing time limits for the taxable year have expired.[36]

So if a trial court orders a party to file a joint return, he or she will usually have to comply quickly or risk being held

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[31] See Bittker & Lokken, *supra* note 7, § 111.3A.3 at 4 (citing regulations and case examples).

[32] See, e.g., *Cheshire v. C.I.R.*, 282 F.3d 326 (5th Cir. 2002); *Resser v. C.I.R.*, 74 F.3d 1528, 1536 n.9 (7th Cir. 1996).

[33] See *id.*

[34] See *id.*

[35] See Gabinet, *supra* note 6.

[36] See I.R.C. § 6013(f)(4); 26 C.F.R. § 1.6013-1(a)(1) (2011).

in contempt.[37] Yet even if the party appeals the order, the party cannot revoke the joint return. The party's only avenue for relief from federal tax liability is the tax code's innocent spouse statute. As discussed, that option is a precarious road at best. Thus, the tax code's time limitations also weigh against permitting trial courts to order the parties to file a joint return.

[8] For all of these reasons, we hold that a trial court does not have discretion to compel parties seeking marital dissolution to file a joint income tax return.

## CONCLUSION

We conclude that the Court of Appeals erred in holding that a district court has discretion to compel the parties to a marital dissolution proceeding to file a joint income tax return. Because a trial court can equitably adjust its division of the marital estate to account for a spouse's unreasonable refusal to file a joint return, resort to a coercive remedy that carries potential liability is unnecessary. We therefore reverse that portion of the Court of Appeals' decision affirming the district court's order requiring the parties to file a joint tax return. We remand the cause to the Court of Appeals with directions to remand the cause to the district court with directions to vacate that portion of its order that we have reversed.

REVERSED AND REMANDED WITH DIRECTIONS.

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[37] See *Ahmad, supra* note 9.

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CARLOS H., APPELLANT, V.
LINDSAY M., APPELLEE.

815 N.W.2d 168

Filed June 15, 2012. No. S-11-548.

1. **Adoption: Appeal and Error.** Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law,

is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
4. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.
5. **Courts: Parties: Justiciable Issues: Words and Phrases.** The capacity to sue is the right to come into court. A party has capacity when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy.
6. **Minors: Mental Competency: Guardians and Conservators: Guardians Ad Litem.** Minors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities; such persons are required to appear in court through a legal guardian, a next friend, or a guardian ad litem.
7. **Rules of the Supreme Court: Jurisdiction: Parties.** Under the Nebraska Court Rules of Pleading in Civil Cases, the capacity of a party to sue or be sued need not be averred except to show the jurisdiction of the court.
8. **Actions: Minors: Guardians and Conservators.** Nebraska law provides that the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted.
9. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
10. ____: ____. When an appellate court is without jurisdiction to act, the appeal must be dismissed.

Appeal from the County Court for Sarpy County: Robert C. Wester, Judge. Appeal dismissed.

Hugh I. Abrahamson, of Abrahamson Law Office, for appellant.

Kelly N. Tollefsen, of DeMars, Gordon, Olson, Zalewski, Wynner & Tollefsen, for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ., and Pirtle, Judge.

Heavican, C.J.

## NATURE OF CASE

On August 11, 2010, Lindsay M. gave birth to Alexander M., whose biological father is Carlos H. Lindsay and Carlos,

who were both 15 years of age at the time of Alexander's birth, were never married. Lindsay planned to place the child for adoption, but Carlos objected and sought custody. The county court found that Carlos did not timely file his objection to the adoption and that Carlos was not a proper party to bring an action, because he is a minor.

We find that because Carlos is a minor, he lacked capacity to bring this action, and that therefore, the county court lacked jurisdiction. It follows that this court lacks jurisdiction, and the appeal must be dismissed.

## FACTS

*Notice Prior to Alexander's Birth.*

Lindsay alleges that prior to Alexander's birth, she sent Carlos the notice required by Neb. Rev. Stat. § 43-104.08 (Reissue 2008). Section 43-104.08 provides that when a biological mother to a child born out of wedlock contacts an adoption agency to relinquish her rights to a child, the adoption agency shall attempt to establish the identity of the father and attempt to inform the father of his right to execute a relinquishment and consent to adoption or a denial of paternity and waiver of rights. The record reflects that Carlos received the notice on or about June 2, 2010.

*Notice of Objection to Adoption.*

Carlos alleges that he filed a "Notice of Objection to Adoption and Intent to Obtain Custody" (Notice), which acknowledged that he is the baby's father. Although Carlos does not contest any facts, we note that the record includes a copy of the Notice indicating that it was signed on August 12, 2010, and witnessed by Christian H. The record before the court does not identify Christian. At oral argument, he was identified as Carlos' brother.

The Notice shows that it was filed and received by the Department of Health and Human Services (DHHS) on August 16, 2010. Christian stated in an affidavit that on August 12, he personally tried to deliver the Notice to the DHHS office in Papillion, Nebraska, in compliance with the instructions on the DHHS Web site. The Web site states that the Notice may

be filed at any DHHS office and that "[t]he date of the filing is the date of actual receipt or the postmark when the notice is mailed." Christian stated that two workers in the office refused to accept the Notice. Christian then sent the form via certified mail to the DHHS office in Lincoln, Nebraska. After several telephone conversations with counsel, Christian returned to the Papillion DHHS office on August 12 and delivered the Notice, which he asserted was accepted on that date.

*Petition to Adjudicate.*

On September 17, 2010, Carlos filed a petition for adjudication of the Notice. The petition alleged that Alexander was born within 5 days of the filing of the Notice. Carlos asked the court to adjudicate the Notice and determine whether Carlos' consent to the proposed adoption was required.

Lindsay filed an answer and counterclaim, in which she alleged that Carlos had reasonable notice of the pregnancy and that he filed the petition to adjudicate on September 23, 2010, which was more than 30 days after the Notice was filed with DHHS on August 16. She alleged that Alexander was currently residing in "cradle care" with the prospective adoptive family, who had cared for him since he left the hospital on August 13. Lindsay stated that she intended to sign a valid relinquishment and consent within 60 days of her receipt of the Notice, pending the determination of Carlos' rights under Neb. Rev. Stat. § 43-104.05(2) (Reissue 2008). She asked the court to find that Carlos failed to timely file a petition for adjudication of the Notice and to determine whether his consent to the adoption is necessary.

*Hearing.*

At a hearing on October 12, 2010, Carlos' counsel stated that there was no question that the petition was filed more than 30 days after the filing of the Notice. However, he argued that § 43-104.05 was not applicable, because even though Carlos did not file the Notice within 30 days, Lindsay did not file her consent to adoption within 60 days of the filing of the Notice. We note that the record includes a copy of the consent to relinquishment signed by Lindsay on October 14, which

was within 60 days of the filing of the Notice with DHHS on August 16.

*County Court Order.*

The county court entered an order on October 21, 2010, finding that the petition for adjudication of the Notice was not filed within 30 days of the filing of the Notice. The court also found that because Carlos was 15 years old, he was not a proper party, because the action must be maintained by a guardian or next friend pursuant to Neb. Rev. Stat. § 25-307 (Reissue 2008). Accordingly, a trial date was not set.

*First Appeal.*

Carlos appealed, and in case No. A-10-1141, the Nebraska Court of Appeals dismissed the appeal in a decision without opinion on March 29, 2011, finding that the county court's order was not a final order.

*Summary Judgment Motion and Order.*

In an apparent attempt to obtain a final, appealable order, Carlos filed a motion for summary judgment on March 29, 2011. On June 1, the county court entered an order reiterating its ruling of October 21, 2010, finding that Carlos is a minor and incapable of bringing this action in his own name and that the action was filed more than 30 days after the Notice was filed. The motion for summary judgment was denied, and the action dismissed. Carlos again appeals. We moved the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Carlos argues, restated and summarized, that the trial court abused its discretion (1) in failing to find that § 43-104.05 is against public policy (and a violation of equal protection) because it treats the mother and father differently in adoption cases, giving the father 30 days to object, while the mother has

[1] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008). See, also, *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

60 days to sign her relinquishment; (2) in refusing to determine that Lindsay filed her relinquishment out of time; (3) by overruling Carlos' motion for summary judgment; (4) in making the minority of the father an issue while not considering the minority of the mother, in violation of equal protection; (5) in failing to find that the statute is tolled until Carlos reaches majority; and (6) in determining that because Carlos is a minor, his parental rights are diminished.

## STANDARD OF REVIEW

[1,2] Appeals in adoption proceedings are reviewed by an appellate court for error appearing on the record.[2] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[3]

## ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[4] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[5]

Carlos was 15 years old at the time this action was filed. The county court determined that because Carlos was a minor, he was incapable of bringing the action in his own name. Lindsay was also 15 years old. We must therefore decide whether either party had the capacity to sue or be sued.

A Nebraska statute addresses the incapacity of a minor:

> Except as provided by the Nebraska Probate Code, *the action of an infant shall be commenced, maintained, and prosecuted by his or her guardian or next friend.* Such

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[2] *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[3] *In re Estate of Craven*, 281 Neb. 122, 794 N.W.2d 406 (2011).

[4] *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007).

[5] See *id.*

> actions may be dismissed with or without prejudice by the guardian or next friend only with approval of the court. When the action is commenced by his or her next friend, the court has power to dismiss it, if it is not for the benefit of the infant, or to substitute the guardian of the infant, or any person, as the next friend. Any action taken pursuant to this section shall be binding upon the infant.[6]

This court has held:

> In this state an action of an infant must be brought by his guardian or next friend and when such an action is brought by a guardian of the infant, the court has power, for cause, to substitute the next friend in place of the guardian. . . . The district court has authority to and it should appoint a guardian ad litem or permit their next friend to appear for unrepresented, interested infants.[7]

In *Macku v. Drackett Products Co.*,[8] we noted:

> [A]t common law an infant could sue only by a guardian, because an infant was not sui juris—a person with legal capacity to act for oneself. . . . Absent prosecution by a guardian or next friend, an infant's action was subject to a demurrer as a result of the plaintiff's lack of capacity to sue.

We then noted that § 25-307 recognizes the common law regarding an infant's lack of legal capacity to sue.[9]

[5] The capacity to sue is the right to come into court.[10] "'"[A] party has *capacity* when it has the legal authority to act, regardless of whether it has a justiciable interest in the controversy."'"[11]

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[6] § 25-307 (emphasis supplied).

[7] *Workman v. Workman*, 167 Neb. 857, 869, 95 N.W.2d 186, 194 (1959).

[8] *Macku v. Drackett Products Co.*, 216 Neb. 176, 180, 343 N.W.2d 58, 61 (1984) (citations omitted).

[9] *Id.*

[10] 67A C.J.S. *Parties* § 11 (2002).

[11] *Intracare Hosp. North v. Campbell*, 222 S.W.3d 790, 795 (Tex. App. 2007).

[6] "[M]inors and incompetents are considered to be under a legal disability and are therefore unable to sue or be sued in their individual capacities; such persons are required to appear in court through a legal guardian, a 'next friend,' or a guardian ad litem."[12]

Although a minor or incompetent may have suffered an injury and thus have a justiciable interest in the controversy, these parties lack the legal authority to sue; the law therefore grants another party the capacity to sue on their behalf.[13]

[7] We must consider how the issue of capacity is raised before a court and whether a party's capacity raises a jurisdictional question. We note again that it is our duty to determine whether this court has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.[14] Under the Nebraska Court Rules of Pleading in Civil Cases, the capacity of a party to sue or be sued need not be averred except to show the jurisdiction of the court. The rule states:

> When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued . . . the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.[15]

The corresponding federal rule provides:

> (a) Capacity or Authority to Sue; Legal Existence.
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> (1) *In General*. Except when required to show that the court has jurisdiction, a pleading need not allege:
>
> (A) a party's capacity to sue or be sued;
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> (B) a party's authority to sue or be sued in a representative capacity; or
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> (C) the legal existence of an organized association of persons that is made a party.
>
> (2) *Raising Those Issues*. To raise any of those issues, a party must do so by a specific denial, which must

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[12] *Austin Nursing Center, Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005).

[13] *Id*.

[14] *In re Estate of Potthoff, supra* note 4.

[15] Neb. Ct. R. Pldg. § 6-1109(a) (rev. 2008).

> state any supporting facts that are peculiarly within the party's knowledge.[16]

[8] Thus, under the pleading rules, a party wishing to raise the issue of whether another party has the necessary capacity must specifically deny that the opposing party has capacity. However, in this case, Lindsay was also 15 years old at the time the action was brought. Nebraska law also provides that "the defense of an infant must be by a guardian for the suit, who may be appointed by the court in which the action is prosecuted."[17] Therefore, as the named defendant, Lindsay also should have been represented by a guardian, because she was a minor.[18] But because she lacked capacity to defend herself under § 25-309, she cannot be found to have waived any claim that Carlos lacked capacity by failing to raise it in her answer.

We note that several states have specific statutes governing whether the consent requirements for adoption are different if the relinquishing parent is a minor. In Colorado, South Carolina, and Wyoming, statutes provide that the validity of a relinquishment for adoption is not affected by the minority of the relinquishing parent or parents.[19] And Oklahoma state law provides specific requirements for consent to adoption if the relinquishing parent is under 16 years of age.[20]

Nebraska's adoption statutes do not address the age of the parties except to provide that if the mother is under the age of 19, the affidavit of identification, which is required to be attached as an exhibit to any petition to finalize the adoption, "may be executed by the agency or attorney representing the biological mother."[21] The statutes also provide that a guardian ad litem "may" be appointed to represent the interests of

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[16] Fed. R. Civ. P. 9(a).

[17] Neb. Rev. Stat. § 25-309 (Reissue 2008).

[18] See *Peterson v. Skiles*, 173 Neb. 470, 113 N.W.2d 628 (1962).

[19] Colo. Rev. Stat. Ann. § 19-5-104(9) (West Cum. Supp. 2011); S.C. Code Ann. § 63-9-310(E) (2010); Wyo. Stat. Ann. § 1-22-109(d) (2011).

[20] Okla. Stat. Ann. tit. 10, § 7503-2.1B(2) (West 2007).

[21] Neb. Rev. Stat. § 43-104.09 (Reissue 2008).

the biological father if the adoption petition does not establish compliance with notice requirements.[22] The statutory scheme for adoptions does not require that any of the minor parties be represented by guardians, but § 25-307 imposes the requirement that minors must be represented by guardians or next friends.

To the extent that *In re Adoption of Baby Girl H.*[23] implicitly holds that an unemancipated minor may file a petition such as the one in this case, it is disapproved. In that case, we determined that the putative father was not deprived of any benefit intended by the notice requirements of the adoption statutes and that the statutes did not require that notice be served on the parents of a minor. We did not address whether the father had the capacity to file the action, since he was a minor.

[9,10] Under § 25-307, Carlos lacked the capacity to bring this action, because he was a minor. Likewise, under § 25-309, Lindsay lacked the capacity to defend herself. Both parties lacked capacity to act in their own names without a guardian or next friend. The county court determined that Carlos was not a proper party, but it exercised its jurisdiction and also determined that the petition was not timely filed. We find that the court had no jurisdiction to determine the merits of Carlos' claim. We have often held that if the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[24] And when an appellate court is without jurisdiction to act, the appeal must be dismissed.[25]

## CONCLUSION

The county court lacked jurisdiction over the action which was brought solely in the name of a minor. Therefore, this court also lacks jurisdiction. The appeal is dismissed.

APPEAL DISMISSED.

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[22] Neb. Rev. Stat. § 43-104.18 (Reissue 2008).

[23] *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001).

[24] *Big John's Billiards v. State, ante* p. 496, 811 N.W.2d 205 (2012).

[25] *Wright v. Omaha Pub. Sch. Dist.*, 280 Neb. 941, 791 N.W.2d 760 (2010).

# In re Interest of Kendra M. et al., children under 18 years of age.
# State of Nebraska, appellee, v. Lisa G., appellant.

814 N.W.2d 747

Filed June 15, 2012. No. S-11-695.

1. **Judges: Recusal: Appeal and Error.** A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court. An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
2. **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. When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **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.
4. **Judges: Recusal.** Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.
5. **Judges: Recusal: Proof.** In order to demonstrate that a trial judge should have recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.
6. **Judges: Recusal: Presumptions.** A party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.
7. **Parental Rights: Proof.** In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) exists and that termination is in the child's best interests.
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. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court gives statutory language its plain and ordinary meaning.
10. **Parental Rights: Proof.** The fact that a child has been placed outside the home for 15 or more months of the most recent 22 months does not demonstrate parental unfitness.
11. ____: ____. Only one statutory ground for termination need be proved in order for parental rights to be terminated.
12. **Constitutional Law: Parental Rights: Proof.** A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.

13. **Parental Rights: Presumptions: Proof.** There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.
14. **Child Custody: 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 and which has caused, or probably will result in, detriment to a child's well-being.
15. **Parental Rights.** The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.

Appeal from the County Court for Merrick County: LINDA S. CASTER SENFF, Judge. Affirmed.

Rachel A. Daugherty, of Myers & Daugherty, P.C., L.L.O., for appellant.

Lynelle Homolka, Merrick County Attorney, for appellee State of Nebraska.

Matthew C. Boyle, of Lauritsen, Brownell, Brostrom & Stehlik, guardian ad litem for appellant.

Jerom E. Janulewicz, of Mayer, Burns, Koenig & Janulewicz, guardian ad litem.

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

STEPHAN, J.

Lisa G., the biological mother of Kendra M., Matthew G., and Katrina G., appeals from an order of the county court for Merrick County, sitting as a juvenile court, terminating her parental rights to the three minor children. Paternal rights are not at issue in this case. We affirm.

## BACKGROUND

The facts relevant to the issues in this appeal span a period of several years. Because resolution of the appeal is highly dependent upon these facts, we recount them in some detail.

### Family Members and Relationships

Lisa has given birth to eight children, including two sets of twins. Her first children, twin girls, were born in July 1994. Kendra was born in March 1996, Matthew in June 1998, and Katrina in September 1999.

In October 2008, Lisa gave birth to another set of twin girls, Dakota S. and Destiny S., and her son Johnathan F. was born in October 2010. Mark F. is Johnathan's father and Lisa's current boyfriend. Dakota, Destiny, and Johnathan reside with Mark and Lisa, and Lisa's parental rights with respect to those three children are not at issue in this case.

Lisa's mother is Paula B. At all relevant times, Robert L. was Paula's boyfriend. Teresa R. and Gregory R. (Greg) are the court-appointed guardians of Kendra, Matthew, and Katrina.

### Lisa's History With Nebraska Department of Health and Human Services

The twin girls born in 1994 were twice hospitalized in the months following their births. Lisa's visits to the hospital were minimal, and she showed little interest in the twins. Petitions to adjudicate each twin based on Lisa's neglect were filed in Red Willow County, Nebraska, in November 1994. Lisa failed to make progress on her case plan, and her parental rights to the twins were terminated in August 1998. The order terminating Lisa's parental rights was appealed and affirmed by this court.[1]

In November 1998, when Matthew was nearly 5 months old and Kendra was 2 years old, the Nebraska Department of Health and Human Services (DHHS) received a report regarding the condition of Lisa's home. An investigation revealed that the home contained dog excrement and was filled with junk. The home's source of heat was an unguarded stove that presented a burn hazard to the children. Lisa cleaned the home, but the stove remained unguarded. Lisa thereafter refused to let DHHS officials into her home.

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[1] *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

Due to ongoing concerns with the condition of the home, Lisa's lack of cooperation with DHHS, and Kendra's slow development, a juvenile petition with respect to Kendra and Matthew was filed in Clay County, Nebraska, in January 1999. The children were adjudicated in March and placed in the legal custody of DHHS but remained in Lisa's care.

In June 1999, Lisa reported suspicions that Kendra, then 3 years old, had been sexually molested. Lisa reported that in mid-January, Kendra began stripping herself and acting out sexually following a night she spent with Paula and Robert. Kendra apparently said, "'Bob did it.'" Robert was charged with sexual assault, but the case was later dismissed. Robert was a registered sex offender, and Lisa had been warned by several parties prior to this time not to leave the children alone with him. The juvenile case filed in January 1999 was dismissed on May 16, 2000. At the time, Lisa was seeing to the children's needs and was employed.

In October 2004, a DHHS employee visited Lisa's home after receiving a report of a red mark under Kendra's eye. Despite Kendra's claim that Paula caused the bruise by intentionally hitting her, the report was closed as unfounded. During the visit, Lisa told the DHHS employee that she and the children were living with Paula and Robert. The employee told Lisa that Robert was a convicted sex offender and that the conviction stemmed from sexually assaulting young boys similar in age to Kendra and Matthew. Lisa allegedly responded by stating that she had no concerns about Robert and felt that Robert was falsely convicted of the crimes. Lisa denied ever saying that Robert was falsely accused, but admitted she knew as of October 2004 that Robert had a sexual assault conviction. Lisa also testified that Robert was not living with her in October 2004 and that although Paula moved in with her at a later date, she did not allow Robert to also live with her and the children.

### Adjudication of Kendra, Matthew, and Katrina

On February 15, 2005, Lisa went to a community agency seeking relocation assistance and reported that Robert had

sexually assaulted the children. Lisa reported that a few days earlier, she had heard Robert hit Matthew and then take him into the bathroom. She heard Matthew screaming "'stop'" and "'no.'" At the same time, Paula was physically assaulting Kendra and Lisa was trying to stop that assault. Lisa reported that when Matthew came out of the bathroom, he was pulling up his pants. Lisa further reported that she left the children alone with Paula and Robert following this incident, but she later denied doing so.

Following Lisa's report, the children were interviewed. Kendra and Matthew disclosed physical and sexual abuse, and Katrina disclosed physical abuse. Paula and Robert were each charged with sexual assault of a child and felony child abuse. Robert entered a plea of no contest to the felony child abuse charge, for which he was sentenced to 4 to 5 years' imprisonment. Paula pled no contest to misdemeanor child abuse and was sentenced to 75 days' imprisonment.

The three children were removed from Lisa's care on February 16, 2005. The petition which commenced this proceeding was filed on February 23 and alleged that Kendra, Matthew, and Katrina were juveniles as defined by Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004), because they lacked proper parental care. The children have not resided with Lisa since February 16.

### Case Plans and Lisa's Progress Prior to Guardianship Placement

Following the children's February 2005 adjudication and removal, several case plans with a permanency objective of reunification were adopted. The case plans required Lisa to schedule and complete a psychological evaluation, to seek out medical or psychiatric help to determine if she needed antidepressant medication, and to participate in individual counseling. The case plans further required Lisa to maintain regular contact with the case manager, to complete a multiweek parenting class, to participate in supervised visits with the children, to demonstrate age-appropriate parenting and activities, to not associate with any person with a current criminal record or a past record of violent or sexual crimes, and to schedule and

complete a parenting assessment. Lisa was also required to maintain gainful employment and an appropriate residence, to not reside with other adults, and to make and maintain a budget. As of March 3, 2006, Lisa was substantially complying with all of these requirements.

But by September 25, 2006, Lisa's progress had declined. Sometime between March 3 and September 25, Lisa stole $750 from a neighbor, while the children were watching, during an unsupervised visit. During this time, Lisa also sent the children to neighbors' homes to ask for money and cigarettes during unsupervised visits. These incidents caused Lisa to lose her weekly, unsupervised visits. She was also convicted of theft and sentenced to 2 years' probation for stealing the $750, and lost her job as a result of her arrest. By May, Lisa was unable to pay rent, and she moved into a shelter. She left in August, against the advice of professionals, and moved in with a man who had twice been convicted of domestic assault and had protection orders against him from two different women. During this time period, Lisa was having difficulty following budget advice and had taken on obligations she could not afford.

Lisa found employment on November 20, 2006, but was unable to work regularly due to an arm injury, and her employment was terminated on January 21, 2007. Lisa was employed again for a 1-week period in May, but as of July 16, she had not found other employment.

In September 2006, Lisa moved into a motel with a man who was on probation for driving under the influence, third offense. She lived with him until January 2007, when he was jailed for a probation violation. Lisa then moved into a shelter, where she resided until she moved into an apartment in June. She received assistance for June and July rent from DHHS and other agencies.

In a court report dated July 16, 2007, DHHS recommended termination of Lisa's parental rights, based upon the extensive services it had provided, Lisa's lack of progress, and the children's 29-month out-of-home placement. The report explained that Lisa was given every possible service in and out of her community and that she was no closer

to providing a safe, stable home for her family than when the case was opened. Those services included assistance in obtaining employment, visitation services, gas vouchers, motel vouchers, referrals to community agencies, counseling, and psychological evaluations. In July 2007, the court found that Lisa had not followed the case plan, but did not order any specific disposition.

In October 2007, Lisa began "helping out a neighbor . . . with rides," but stopped when she learned that he was on "'furlough.'" The neighbor had an extensive criminal history which included drug offenses, burglary, assault, receiving stolen property, and possession of a deadly weapon by a felon. Lisa had begun another job in late July 2007, but was dismissed in December for not being available to work, not showing up for scheduled shifts, and demanding too much time off. Lisa moved to a mobile home in Chapman, Nebraska, in October 2007, but by January 2008, she was behind on rent and utility bills, and she was evicted.

In January 2008, the children's therapist wrote a letter to the court addressing the potential termination of parental rights. The therapist opined that if Lisa's rights were terminated, the children would be devastated and their progress would be disrupted. The therapist noted the children had a strong bond with Lisa and opined that termination was not in their best interests.

The court did not terminate Lisa's parental rights in 2008, but did change the permanency objective from reunification to guardianship. Teresa and Greg were proposed as guardians, and in February 2008, the children began transitioning from foster care into Teresa and Greg's home. Lisa was advised to "step back" to allow the children to bond with Teresa and Greg. But visits between Lisa and the children were scheduled during the transitional period, including three in February 2008 that Lisa failed to attend. Visits were then put on hold until Lisa contacted DHHS in June, and two or three visits occurred between June and July.

A new case plan and a progress report were prepared in July 2008, requiring Lisa to regularly participate in scheduled, supervised visits. Lisa contacted the caseworker in August to

inform her she was on bed rest due to her pregnancy. She gave birth to Dakota and Destiny in late October 2008. Kendra, Matthew, and Katrina came to the hospital to visit Lisa and the babies.

At the time of the birth, Lisa was living at a motel with Dakota and Destiny's father. Around this time, Lisa was accused of theft of services for overreporting her hours while housekeeping at the motel. The allegation was dropped when Lisa paid $150 in restitution. Lisa, Dakota and Destiny's father, and Dakota and Destiny moved to another residence in January 2009.

### Guardianship Placement and Lisa's Progress Thereafter

On January 21, 2009, Teresa filed a petition requesting that she and Greg be appointed as the children's guardians. Lisa consented to the appointment, and Teresa and Greg were appointed guardians on March 4. The caseworker noted that since being placed in Teresa and Greg's home in February 2008, the children had improved, had good grades, and were happy.

The caseworker's involvement ended when the guardians were appointed, and DHHS stopped providing services to Lisa at that time. Lisa testified she had not been subject to a case plan since the guardianship went into effect. At about this time, Lisa began working part time, 15 to 20 hours per week, earning $6 per hour plus tips. She worked for that employer through February 2011, when she sought and obtained full-time employment.

Lisa left the father of Dakota and Destiny and began residing with Mark and his son in July 2009. After Mark's son left the residence in August, Mark disclosed to Lisa that his son had been convicted of molesting his younger siblings. Mark's son occasionally visited the residence after that, but Dakota and Destiny were never left alone with him.

Johnathan was born in October 2010. In February 2011, Lisa, Mark, Dakota, Destiny, and Johnathan moved into a four-bedroom house, which could be converted to have five bedrooms. Lisa and Mark share the $900 monthly rent.

Since January 2011, Mark has been employed as a maintenance worker, earning $15 per hour. At her new full-time job, Lisa earns $4 per hour as a server and $10 per hour as a supervisor.

Despite progress in other areas of her life, Lisa's visits with the children became sporadic after the guardians were appointed. In April 2009, Lisa and Teresa scheduled a visit with the children at a therapist's office, but Lisa canceled the visit. Lisa then did not contact Teresa to arrange visitation for almost 1 year. On April 1, 2010, Teresa, Kendra, Matthew, Katrina, Lisa, Dakota, and Destiny attended a family therapy session. Judy Melius, the children's new therapist, conducted the session. One purpose was to further Lisa's relationship with the children to allow for more visits. The children had requested overnight visits with Lisa, and Melius wanted to ensure that the children were ready and that Lisa was in agreement. Early in the session, Lisa and the children were reminiscing and laughing. But Lisa later became angry. Lisa explained she was upset with Teresa and DHHS and started raising her voice. Melius observed that Matthew was becoming visibly upset, and Melius ended the session.

Melius then cautioned Teresa that further visits between Lisa and the children would not be in the children's best interests. But the children told Teresa that they wanted a relationship with Lisa, Dakota, and Destiny, and Lisa was again permitted to see her children on April 7 and 8, 2010.

### Events Leading to Lisa's Request to Terminate Guardianship

On April 8, 2010, Teresa took the children to visit Lisa in Hastings, Nebraska. During the visit, Katrina told Teresa that Greg had touched her with his hand under her shirt while tickling her. Teresa responded, "'I don't believe you. If that [were] true, I would be the first one to report it.'" Lisa heard this exchange. Teresa allowed Lisa to leave with the children, but told her not to take them outside of the Hastings city limits. Lisa testified that the children continued to insist that the incident described by Katrina had occurred. Lisa took them to Grand Island, Nebraska, where they spoke with

police. After interviewing the children, Greg, and Teresa, officials determined that the allegations of abuse were unsubstantiated and that the children were safe in the care of their guardians.

After this episode, the guardians did not allow further contact between Lisa and the children. On October 28, 2010, Lisa filed a motion requesting that the guardianship be terminated and on January 12, 2011, moved to establish visitation with the children.

### Hearing on Lisa's Motion to Establish Visitation

The court held a hearing on the motion to establish visitation on February 24, 2011. In deposition testimony received at the hearing, Melius discussed the effects of visits between Lisa and the children. She explained the visits caused Kendra to speak with the tone of a small child and to withdraw in therapy sessions, resulted in increased anger for Matthew, and led to nightmares, anger outbursts, and uncontrollable crying for Katrina. Melius also testified that when asked, the children said they were not interested in further visits with Lisa. Melius opined that based on the children's statements and the effects of visits described above, further visitation was not in the best interests of Kendra, Matthew, or Katrina. Melius had been the children's therapist for approximately 2½ years at the time of this testimony. Following the hearing, the court denied visitation, finding it would not serve the best interests of the children.

### Motion to Terminate Parental Rights and Lisa's Psychological Evaluation

On March 28, 2011, the guardian ad litem for the children filed a motion to terminate parental rights. The motion set out five separate statutory grounds supporting termination and averred that termination of Lisa's parental rights was in the children's best interests. One of the statutory grounds challenged Lisa's mental health.

On March 29, 2011, Lisa underwent a psychological evaluation performed by John Meidlinger, Ph.D., a clinical

psychologist. Meidlinger had previously evaluated Lisa in 2005 and 2007. His 2011 evaluation suggested a mild or moderate level of defensiveness, which he "frequently found in persons taking [the evaluation] test for forensic purposes." The evaluation also suggested an attempt by Lisa to describe herself in a "somewhat unrealistically positive light." Meidlinger opined that Lisa's behavior could lapse due to some very painful early life experiences. His diagnoses included adjustment disorder with depressed mood, which was based on Lisa's sadness about her situation; uncomplicated bereavement due to missing her children; possible bipolar disorder; and a personality disorder. The personality disorder was an "Axis II" diagnosis, whereas the others were "Axis I" diagnoses. Axis I diagnoses are reflective of a person's current functioning and are often treatable; Axis II diagnoses reflect more stable difficulties, such as difficulties in relationships, personal functioning, self-esteem, and mood regulation, and are of long duration.

Meidlinger based the personality disorder diagnosis on Lisa's instability of self-concept and mood; unpredictability; difficulty in maintaining long-term, positive functioning; tendency to fall into dependent relationships with destructive males; difficulty controlling impulses; gaps in moral development; and difficulty putting the needs of her children ahead of her own. He had reached the same diagnosis in 2005 and 2007, and at those times, the diagnosis was also based in part on Lisa's narcissistic tendencies and unstable relationships with men. Meidlinger testified that the nature and severity of a personality disorder dictate whether the disorder impairs an individual's ability to parent.

Based on his evaluation, Meidlinger recommended exercising "great caution" in returning the children to Lisa. He opined that while she was stable at the time of their meeting, that was likely "to be changeable over time." He testified that the odds were high that she would be unable to maintain a stable relationship and that her past behavior was the best predictor of how her life would change in terms of stability if she were not in a relationship.

### Hearing on Motions to Terminate Guardianship and to Terminate Parental Rights

On June 23 and 24, 2011, the court held a hearing on Lisa's motion to terminate the guardianship and the motion of the children's guardian ad litem to terminate parental rights. Before testimony was adduced, Lisa made an oral motion for recusal of the judge, which was based on the fact that in August 1993, while employed as a deputy county attorney, the judge had signed an amended information charging Robert with sexual assault of a child. The judge overruled the motion, stating on the record that she had no independent recollection of the case and that she may have only been signing paperwork on her supervisor's behalf.

Testimony was then adduced. Teresa testified the children had adjusted well to living in the guardians' home. As of June 23, 2011, Kendra was 15 years old and had just completed the eighth grade. She had been diagnosed as "moderately mentally handicapped" and was seeing Melius on an ongoing basis. She requires close monitoring because of issues with understanding personal boundaries and interacting with other children. Kendra has an individualized educational plan and receives special help in all subjects.

Matthew was 13 years old at the time of the hearing. Teresa described him as "very bright" and "family focused." Katrina was 11 years old, and while an individualized educational plan was still in place for her, it had been minimized because she had been doing very well. Teresa testified that other than the pending proceeding, she did not foresee anything that would cause the children to no longer be able to live with her. Teresa opined that termination of Lisa's parental rights was in the children's best interests. She explained that her home provided stability and security for the children.

Melius' deposition testimony from the prior hearing was reoffered and received. Melius opined that it would not be in the best interests of any of the three children to have contact with Lisa, because they did not wish to have such contact and because the children's prior anger and behavioral issues would be likely to return. She testified unequivocally that

termination of Lisa's parental rights would be in the best interests of Matthew and Katrina because of Matthew's need for permanency and Katrina's fear of renewed contact with persons who had harmed her in the past. With respect to Kendra, Melius testified that it "would be in her best interest to have stability," which would allow her to continue to mature and to not have "periods of time where . . . she is regressing, struggling at school, withdrawing."

Lisa testified at the hearing that she was in the most stable period of her life. She had three children at home, a good job and residence, and a support group. She said that she had no difficulty taking care of herself or her young children in the 3 years preceding the hearing and that her mental health had been stable. She had not been on medication, nor did she need therapy during this time period. She admitted to having pain, but said it did not prevent her from parenting her young children. She said she no longer needed her mother or her family and felt it was in the children's best interests to be placed with her and their younger siblings.

Lisa testified that she had no difficulty meeting her financial obligations. She pays $50 per month in child support for each of the three adjudicated children. As of June 2011, she was $150 in arrears. She explained this arrearage occurred when she took time off from work to have Johnathan.

Evidence of Mark's history was also adduced at the hearing. While he had not consumed alcohol in the past few years, his license had been previously suspended due to a driving under the influence conviction, and he had been involved in two bar fights. He was arrested for an alleged sexual assault, but the charges were later dropped. He was also charged with possession of drug paraphernalia, which he explained to Lisa was because he had taken the blame for his son. During his years with Lisa, Mark has had no issues with the law.

Tonya Taylor, a former agency-level foster care provider, testified on Lisa's behalf. As of June 2011, Taylor had known Lisa and Mark for about 3 years, and she typically saw Lisa three to four times per week. She testified that based on her specialized training in foster care, she had no concerns about Lisa's interactions with her three young children. She testified

that the children were well fed and had age-appropriate toys and that the house was clean. She had never seen Lisa place the children in danger and testified that Lisa was careful about the people to whom she entrusted her children. She also said that Mark appeared to be an appropriate parent. She had not observed anything indicating that Lisa or Mark had a drug or alcohol problem. She stated that she had known Lisa to always be employed and that while Mark had been laid off twice in recent years, he had always soon found new employment.

### Order Terminating Parental Rights

On July 22, 2011, the court denied Lisa's motion to terminate the guardianship and terminated her parental rights. In summarizing the facts, the court noted that it did not find parts of Lisa's testimony to be credible. The court found by clear and convincing evidence that four separate grounds listed in Neb. Rev. Stat. § 43-292 (Cum. Supp. 2010) supported terminating Lisa's parental rights.

First, the court concluded that Lisa had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection. The court found that even though services were provided to Lisa, she was unable to maintain stable employment or housing for several years following the removal of the children. The court also found that Lisa had missed scheduled visits with the children in February 2008 and April 2009 and that while Lisa requested visits in June 2008, she had stopped those visits by the end of the month.

The court next found that following the children's adjudication under § 43-247(3)(a), reasonable efforts to preserve and reunify the family under the direction of the court were made, and that Lisa failed to correct the conditions leading to the adjudication. The court noted that although Lisa had been provided with extensive services, she was still not in a position to care for her children 2½ years after removal; that Lisa had failed to maintain a job or housing and continued to associate with men who had criminal histories or habits not conducive to living with children; and that the permanency

goal was changed because Lisa was unable to provide "even minimal care."

The court further determined that because the children had been out of Lisa's home since February 2005, they had been in an out-of-home placement for 15 or more months of the most recent 22 months.

Finally, the court found Lisa was unable to discharge her parental duties due to a mental illness or deficiency for which there were reasonable grounds to believe would continue for a prolonged and indeterminate period. The court gave weight to the adjustment mood disorder, bipolar disorder, and personality disorder diagnoses, and to Meidlinger's opinion that great caution should be exercised in returning the children to Lisa. The court also distinguished Lisa's recent stability, stating it was "not really that stable" and noting Mark's criminal history.

The court found by clear and convincing evidence that termination of Lisa's parental rights was in the children's best interests. The court noted that the children were doing well in their current placement, which gave them love, consistency, and stability; that the children told their therapist they did not want contact with Lisa; and that Lisa's "recent limited stability" did not overcome the years of neglect and instability. Lisa timely appealed from this order.

## ASSIGNMENTS OF ERROR

Lisa assigns, summarized and renumbered, that the county court erred in (1) finding, by clear and convincing evidence, that (a) Lisa had substantially and continuously or repeatedly neglected and refused to give parental care and protection to her children; (b) following the children's adjudication under § 43-247(3)(a), reasonable efforts to preserve and reunify the family failed to correct the conditions leading to the determination; (c) the children had been in an out-of-home placement for 15 or more months of the most recent 22 months; (d) Lisa was unable to discharge her parental responsibilities because of a mental illness or mental deficiency for which there were reasonable grounds to believe would continue for a prolonged and indeterminate period; and (e) termination of

Lisa's parental rights was in the best interests of the children; (2) denying Lisa's motion to terminate the guardianship; and (3) failing to grant Lisa's motion for recusal.

## STANDARD OF REVIEW

[1] A motion to disqualify a trial judge on account of prejudice is addressed to the sound discretion of the trial court.[2] An order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.[3]

[2] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[4] When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[5]

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[6]

## ANALYSIS

### Motion for Recusal

[4-6] Under the Nebraska Revised Code of Judicial Conduct, a judge must recuse himself or herself from a case if the judge's impartiality might reasonably be questioned.[7] Here, Lisa argues that the judge's impartiality could reasonably be questioned and that the judge was biased because she signed a document in 1993 relating to a criminal case against Robert. In order to demonstrate that a trial judge should have

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[2] *State v. Nolan, ante* p. 50, 807 N.W.2d 520 (2012).

[3] *Id.*

[4] *In re Interest of Ryder J., ante* p. 318, 809 N.W.2d 255 (2012); *In re Interest of Lakota Z. & Jacob H.*, 282 Neb. 584, 804 N.W.2d 174 (2011).

[5] *In re Interest of Ryder J.*, *supra* note 4.

[6] *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[7] Neb. Rev. Code of Judicial Conduct § 5-302.11(A). See *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011).

recused himself or herself, the moving party must demonstrate that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice was shown.[8] In addition, a party seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.[9]

There is nothing in the record indicating that the trial judge had any involvement in Robert's criminal prosecution other than signing the amended information, and no evidence contradicted her statements that she did not remember the case. It was likely that the judge would not have remembered the case, considering the amended information was filed more than 17 years prior to the June 2011 hearing. No reasonable person would have questioned the judge's impartiality under these circumstances. Accordingly, we conclude that the judge did not abuse her discretion in denying Lisa's motion for recusal.

### Statutory Grounds for Termination

[7] In order to terminate an individual's parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests.[10] As noted, the trial court found by clear and convincing evidence that four of the statutory grounds existed, including the circumstance described in § 43-292(7)—that "[t]he juvenile has been in an out-of-home placement for fifteen or more months of the most recent twenty-two months." It is undisputed that the three children have not resided with Lisa since they were removed from her custody in 2005. But Lisa and her guardian ad litem argue that for the 22 months preceding the termination hearing, the

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[8] See *Nolan, supra* note 2.

[9] See, *id.*; *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

[10] See *In re Interest of Sir Messiah T. et al.*, 279 Neb. 900, 782 N.W.2d 320 (2010).

children were in a guardianship placement, which should not be considered an "out-of-home placement" under § 43-292(7) in that it was a temporary placement to which Lisa specifically agreed. They argue it would be bad policy to characterize a guardianship placement as an "out-of-home placement" which, if of sufficient duration, could constitute grounds for terminating parental rights.

[8,9] As we have often noted, it is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[11] Here, the Legislature has used the phrase "out-of-home placement" in defining a statutory ground for termination of parental rights. That phrase is not specifically defined in the Nebraska Juvenile Code, but absent anything to the contrary, we give statutory language its plain and ordinary meaning.[12]

When a child is adjudicated pursuant to § 43-247(3)(a), as is the case here,

> the court may permit such juvenile to remain in his or her own home subject to supervision or may make an order committing the juvenile to (1) the care of some suitable institution, (2) inpatient or outpatient treatment at a mental health facility or mental health program, (3) the care of some reputable citizen of good moral character, (4) the care of some association willing to receive the juvenile embracing in its objects the purpose of caring for or obtaining homes for such juveniles . . . (5) the care of a suitable family, or (6) the care and custody of [DHHS].[13]

Further,

> [w]hen the court awards a juvenile to the care of [DHHS], an association, or an individual in accordance with the

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[11] *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011); *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

[12] *In re Interest of Spencer O.*, 277 Neb. 776, 765 N.W.2d 443 (2009); *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[13] Neb. Rev. Stat. § 43-284 (Reissue 2008).

> Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed.[14]

These children have been placed out of the parental home since 2005, first in DHHS' custody and then in the custody of Teresa and Greg. There is no principled basis for concluding that the first was an "out-of-home placement," but the second was not. Lisa's agreement to the appointment of Teresa and Greg as guardians did not change the nature of the placement, which was outside of her home.

[10] We are also not persuaded by the argument that characterizing the guardianship as an "out-of-home placement" would somehow undermine the "temporary" nature of a guardianship for a child adjudicated pursuant to § 43-247(3)(a). In many such cases, any form of out-of-home placement is originally intended as a temporary step toward reunification of the family. But when reunification has not occurred after the passage of time determined by the Legislature, the child's need for permanency may necessitate other measures, up to and including termination of parental rights. And parental rights cannot be terminated solely based on the duration of the out-of-home placement, because it must also be shown that the parent is unfit and that termination is in the best interests of the child.[15] The placement of a child outside the home for 15 or more months of the most recent 22 months under § 43-292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.[16] The fact that a child has been placed outside the home for 15 or more months of the most recent 22 months does not demonstrate parental unfitness.[17]

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[14] Neb. Rev. Stat. § 43-285(1) (Cum. Supp. 2010).

[15] See, § 43-292; *In re Interest of Ryder J., supra* note 4.

[16] *In re Interest of Angelica L. & Daniel L.*, 277 Neb. 984, 767 N.W.2d 74 (2009); *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[17] *Id.*

[11] Only one statutory ground for termination need be proved in order for parental rights to be terminated.[18] Because we conclude that there is clear and convincing evidence that all three juveniles have been in an out-of-home placement for 15 or more months of the most recent 22 months, we need not discuss the other statutory grounds which the court found to exist in this context, and we proceed to the issues of best interests and fitness.[19]

### Best Interests of Children and Parental Fitness

[12-15] In addition to proving a statutory ground, the State must show that termination is in the best interests of the child.[20] A parent's right to raise his or her child is constitutionally protected; so before a court may terminate parental rights, the State must also show that the parent is unfit.[21] There is a rebuttable presumption that the best interests of a child are served by having a relationship with his or her parent. Based on the idea that fit parents act in the best interests of their children, this presumption is overcome only when the State has proved that the parent is unfit.[22] The term "unfitness" is not expressly used in § 43-292, but the concept is generally encompassed by the fault and neglect subsections of that statute, and also through a determination of the child's best interests.[23] In discussing the constitutionally protected relationship between a parent and a child, we have stated, "'Parental unfitness means a personal deficiency or incapacity which has prevented, or will probably prevent, performance

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[18] *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000); *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

[19] See *In re Interest of Michael B. et al., supra* note 18.

[20] See, *In re Interest of Ryder J., supra* note 4; *In re Interest of Sir Messiah T. et al., supra* note 10.

[21] *In re Interest of Ryder J., supra* note 4.

[22] *Id.* See, also, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *In re Interest of Xavier H., supra* note 16.

[23] *In re Interest of Hope L. et al.*, 278 Neb. 869, 775 N.W.2d 384 (2009).

of a reasonable parental obligation in child rearing and which has caused, or probably will result in, detriment to a child's well-being.'"[24] The best interests analysis and the parental fitness analysis are fact-intensive inquiries. And while both are separate inquiries, each examines essentially the same underlying facts as the other.[25]

Based upon her own testimony and that of Taylor, Lisa argues that her life has stabilized to the point where she is now able to care for the children who are the subject of this case, in addition to her other three young children. But this court is not prohibited from considering prior events when determining whether to terminate parental rights,[26] and despite evidence of Lisa's current stability, we cannot ignore what has transpired during the parental relationship. While Lisa had these children in her care, she exposed them to health hazards and permitted them to live with a convicted sex offender who abused more than one of them. And before the children were placed in the guardianship, Lisa stole from a neighbor in their presence and lived with men who had criminal backgrounds. In the years DHHS was working with her, Lisa was also unable to provide a stable home for the children, despite receiving services designed to assist her in doing so.

While in recent years Lisa has been able to maintain a suitable residence and employment, this corresponds with the time period in which she has been living with Mark. Meidlinger's expert opinion is particularly relevant in this regard. Based upon the personality disorder diagnosis, he opined that Lisa was unstable in terms of self-concept and mood, was unpredictable, and had difficulty in maintaining long-term, positive functioning. He opined that the odds were high that Lisa would be unable to maintain a stable relationship with an adult partner, and when asked what would occur if Lisa were not in such a relationship, he stated that the "best predictor . . . would be her past behavior," which included an instability with work

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[24] *Uhing v. Uhing*, 241 Neb. 368, 375, 488 N.W.2d 366, 372 (1992) (quoting *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990)).

[25] *In re Interest of Ryder J., supra* note 4.

[26] See *In re Interest of Hope L. et al., supra* note 23.

and relationships and an inability to focus on the needs of her children. Meidlinger further opined that Lisa's most recent period of stability was not predictive of her future stability and that based upon a broader view of her life history, she was "likely to have less stability in relationships; less stability in her own emotional functioning and more difficulty [in] making . . . good long-term decisions for herself. She is also impaired from dealing with problems by her own desire to see everything as being okay." No expert testimony was offered to rebut Meidlinger's opinion.

We also place considerable weight on the testimony of Melius, the children's therapist, who stressed the children's need for stability. Melius testified that the children became anxious at the thought of a change in their current placement and that Katrina feared that reunification would put her in contact with those who had abused her in the past. Melius opined, explicitly with respect to Matthew and Katrina and implicitly with respect to Kendra, that termination of parental rights would be in their best interests.

Based upon our de novo review of the record, we find clear and convincing evidence that Lisa's personal deficiencies have prevented her from performing her reasonable parental obligations to Kendra, Matthew, and Katrina in the past, and would likely prevent her from doing so in the future. Accordingly, the presumption of fitness has been rebutted. We also find that it was shown by clear and convincing evidence that termination of Lisa's parental rights would be in the children's best interests. Because we conclude that the lower court did not err in terminating Lisa's parental rights to Kendra, Matthew, and Katrina, we need not address Lisa's contention that the court erred in denying her motion to terminate the guardianship.

## CONCLUSION

For the reasons discussed, we affirm the judgment of the county court, sitting as a juvenile court.

AFFIRMED.

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