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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

MAY 2, 2014 and SEPTEMBER 11, 2014

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCLXXXVIII

PEGGY POLACEK
OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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DURING THE PERIOD OF THESE REPORTS

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

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

EVERETT O. INBODY, Chief Judge
JOHN F. IRWIN, Associate Judge
FRANKIE J. MOORE, Associate Judge
MICHAEL W. PIRTLE, Associate Judge
FRANCIE C. RIEDMANN, Associate Judge
RIKO E. BISHOP, Associate Judge

PEGGY POLACEK . . . . . Reporter
LANET ASMUSSEN . . . . . Clerk[1]
TERESA A. BROWN . . . . . Acting Clerk[2]
TERESA A. BROWN . . . . . Clerk[3]
JANICE WALKER . . . . . State Court Administrator[4]
COREY STEEL . . . . . State Court Administrator[5]

[1]Until July 11, 2014
[2]As of July 12, 2014
[3]As of August 27, 2014
[4]Until May 2, 2014
[5]As of May 19, 2014

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	William B. Zastera	Papillion
		David K. Arterburn	Papillion
		Max Kelch	Papillion
		Jeffrey J. Funke	Plattsmouth
Third	Lancaster	Paul D. Merritt, Jr.	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
		Jodi Nelson	Lincoln
		Robert R. Otte	Lincoln
		Andrew R. Jacobsen	Lincoln
		Stephanie F. Stacy	Lincoln
		Lori A. Maret	Lincoln
Fourth	Douglas	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
		Shelly R. Stratman	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
		Mary C. Gilbride	Wahoo
		James C. Stecker	Seward
		Rachel A. Daugherty	Aurora
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	James G. Kube	Madison
		Mark A. Johnson	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
		Stefanie A. Martinez	Papillion
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Laurie Yardley	Lincoln
		Susan I. Strong	Lincoln
		Timothy C. Phillips	Lincoln
		Thomas W. Fox	Lincoln
		Matthew L. Acton	Lincoln
Fourth	Douglas	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
		Derek R. Vaughn	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Frank J. Skorupa	Columbus
		Patrick R. McDermott	David City
		Linda S. Caster Senff	Aurora
		C. Jo Petersen	Seward
		Stephen R.W. Twiss	Central City

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	Donna F. Taylor	Madison
		Ross A. Stoffer	Pierce
		Michael L. Long	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	Alan L. Brodbeck	O'Neill
		James J. Orr	Valentine
		Tami K. Schendt	Broken Bow
Ninth	Buffalo and Hall	Philip M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen, Jr.	Kearney
		Arthur S. Wetzel	Grand Island
		John P. Rademacher	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Michael Offner	Hastings
		Michael P. Burns	Hastings
		Timothy E. Hoeft	Holdrege
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
		Edward D. Steenburg	Ogallala
		Anne Paine	McCook
		Michael E. Piccolo	North Platte
		Jeffrey M. Wightman	Lexington
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
		Paul G. Wess	Alliance

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
J. Michael Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha

ATTORNEYS
Admitted Since the Publication of Volume 287

JOHN PHILIP BEAUVAIS
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DAVID CHRISTEN BRIESE
JASON D. BRING
MATTHEW D. BURNS
LYNDSEY AZAR CANNING
LORETTA DENISE COLLINS
BRITT HEDSTROM DUDZINSKI
GEORGE CLINTON DUNGAN III
GARY ALLEN FICEK
JASON BRIAN GANN
MOSAH FERNANDEZ GOODMAN
EMILY CHRISTINE HAAS
ADAM DEAN HOFFMAN
THOMAS L. LANGE
LUCAS ALEXANDER LAROSE
ANGELA BARRON LODER
JAMES MICHAEL LUCE II
KYLE JAMISON MANLEY
WILLIAM KOLBE MATTAR
JOANN MARIE MAURER
EVA NAOMI KERR MERZ
JACQUELYN RENEE MORRISON
KENNETH AGHADI NNAKA
CATHERINE CHRISTINA O'BRIEN-CRUM
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TIMOTHY JAMES VAN VLIET
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ZACHARY MICHAEL WINTER
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JENNIFER EILEEN YEATS

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No. S-12-877: **McCord & Burns Law Firm v. Piuze**. Affirmed. Heavican, C.J. Wright, J., not participating in decision. Stephan, J., not participating.

No. S-13-290: **Schanuth v. Schanuth**. Affirmed. Per Curiam.

No. S-13-396: **In re Interest of Dalon T**. Appeal dismissed. Connolly, J.

No. S-13-677: **State v. Hoelting**. Affirmed. Miller-Lerman, J.

No. S-13-814: **State v. Lockett**. Affirmed. Heavican, C.J.

No. S-13-921: **Grove v. City of Ralston**. Affirmed. Miller-Lerman, J.

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No. S-09-593: **State ex rel. Counsel for Dis. v. Nich**. Application for reinstatement of license to practice law in the State of Nebraska granted, effective immediately.

No. S-12-1165: **State ex rel. Counsel for Dis. v. Pivovar**. Probation agreement approved and application for reinstatement granted.

No. S-13-918: **American Red Cross v. Dantzler**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. S-13-985: **Berger v. Madsen**. Appeal dismissed. See, § 2-107(A)(2); Neb. Rev. Stat. § 25-1315(1) (Reissue 2008); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005); *Elkhorn Ridge Golf Partnership v. Mic-Car, Inc.*, 17 Neb. App. 578, 767 N.W.2d 518 (2009).

No. S-13-1138: **Sadowsky v. Neth**. Affirmed. See, § 2-107(A)(1); *Hoppens v. Nebraska Dept. of Motor Vehicles*, 288 Neb. 857, 852 N.W.2d 331 (2014); *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007); *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

No. S-14-044: **State v. Grafe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-14-105: **State v. Palomino-Duque**. Motion of appellee for summary affirmance sustained; judgment affirmed. See, § 2-107(B)(2); *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014); *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

No. S-14-213: **State v. Myers**. Appeal dismissed. See § 2-107(A)(2).

No. S-14-238: **State v. Stanko**. Appeal dismissed. See § 2-107(A)(2).

No. S-14-443: **Estevez v. Arana**. Appeal dismissed. See § 2-107(A)(2).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

Nos. A-11-806, A-11-974: **In re Guardianship & Conservatorship of Giventer**. Petitions of appellant for further review denied on July 22, 2014.

No. A-12-745: **Barthel v. Liermann**, 21 Neb. App. 730 (2014). Petition of appellant for further review denied on June 4, 2014.

No. A-12-802: **Pflueger-James v. Pope Paul VI Institute Physicians**, 21 Neb. App. 635 (2014). Petition of appellee for further review denied on May 7, 2014.

No. A-12-804: **Harris v. Frazier**. Petition of appellant for further review denied on May 2, 2014, as premature.

No. S-12-843: **O'Brien v. Bellevue Public Schools**. Petition of appellant for further review sustained on July 2, 2014.

No. A-12-853: **Jones v. Houston**. Petition of appellant for further review denied on August 27, 2014.

No. A-12-903: **Hayes v. County of Thayer**, 21 Neb. App. 836 (2014). Petition of appellant for further review denied on June 25, 2014.

No. A-12-909: **State v. Gardner**. Petition of appellant for further review denied on June 25, 2014.

No. A-12-933: **Austin v. Timperley**. Petition of appellant for further review denied on June 17, 2014.

No. A-12-962: **In re Guardianship & Conservatorship of Herrick**, 21 Neb. App. 971 (2014). Petition of appellant for further review denied on June 25, 2014.

No. S-12-1052: **State v. Matthews**, 21 Neb. App. 869 (2014). Petition of appellee for further review sustained on May 22, 2014.

Nos. A-12-1067 through A-12-1070: **In re Interest of Jordana H. et al.**, 22 Neb. App. 19 (2014). Petitions of appellant for further review denied on July 18, 2014.

Nos. S-12-1083 through S-12-1092: **City of Beatrice v. Meints**, 21 Neb. App. 805 (2014). Petitions of appellant for further review sustained on July 29, 2014.

No. A-13-018: **Cole v. Sabatka-Rine**. Petition of appellant for further review denied on May 6, 2014, for failure to file brief in compliance with § 2-102(F)(1).

No. A-13-074: **Bruna v. Bradford & Coenen**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-093: **Henderson v. Smallcomb**, 22 Neb. App. 90 (2014). Petition of appellant for further review denied on August 21, 2014.

No. A-13-159: **Nebraska Equal Opp. Comm. v. Widtfeldt**. Petition of appellant for further review denied on August 20, 2014.

No. A-13-196: **Loveless v. Loveless**. Petition of appellant for further review denied on July 15, 2014.

No. A-13-205: **State on behalf of Oliver M. v. Kirk B**. Petition of appellant for further review denied on April 23, 2014.

No. A-13-206: **Fellers v. Fellers**. Petition of appellant for further review dismissed without prejudice on July 18, 2014, as premature.

No. A-13-206: **Fellers v. Fellers**. Petition of appellant for further review denied on August 27, 2014.

No. A-13-246: **State v. Dubray**, 21 Neb. App. 782 (2014). Petition of appellant for further review denied on April 23, 2014.

No. A-13-278: **Burnett v. Tyson Fresh Meats**, 21 Neb. App. 910 (2014). Petition of appellant for further review denied on July 2, 2014.

No. A-13-281: **Melville v. Hansen Truck Salvage**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-302: **Bartunek v. Bellevue University**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-313: **In re Trust of Morris**. Petition of appellant for further review denied on July 29, 2014.

No. A-13-376: **Highway Signing v. Coleman Constr**. Petition of appellant for further review denied on June 11, 2014.

No. A-13-384: **Brittain v. H & H Chevrolet**, 21 Neb. App. 986 (2014). Petition of appellant for further review denied on June 25, 2014.

No. A-13-417: **State v. Alvarado**. Petition of appellant for further review denied on June 4, 2014.

No. A-13-426: **State v. Nyman**. Petition of appellant for further review denied on May 7, 2014.

No. A-13-447: **SWJKM v. General Cas. Ins. Co**. Petition of appellant for further review denied on July 29, 2014.

No. A-13-462: **Castonguay v. Tecumseh Institution Mailroom Staff**. Petition of appellant for further review denied on June 11, 2014.

No. A-13-476: **City of Hastings v. Hughes**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-501: **Colwell v. Garvey**. Petition of appellant for further review denied on August 14, 2014, as untimely. See § 2-102(F)(1).

No. A-13-510: **Johnson v. DHS Drilling Co**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-514: **State v. Stevens**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-567: **In re Interest of Quintel C. et al**. Petition of appellant for further review denied on May 9, 2014, as untimely filed.

No. S-13-643: **In re Interest of Shayla H. et al.**, 22 Neb. App. 1 (2014). Petition of appellee for further review sustained on July 18, 2014.

No. S-13-653: **State v. Hansen**. Petition of appellee for further review sustained on June 17, 2014.

No. A-13-687: **State v. Hernandez**, 22 Neb. App. 62 (2014). Petition of appellant for further review denied on July 17, 2014.

No. A-13-695: **State v. Jensen**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-701: **Kaufman v. Reganis Auto Group**. Petition of appellant for further review denied on June 17, 2014.

No. A-13-715: **State v. Saenz**. Petition of appellant for further review denied on May 14, 2014.

No. S-13-725: **Brothers v. Kimball County**. Petition of appellant for further review sustained on August 27, 2014.

No. A-13-747: **State v. Foltz**. Petition of appellant for further review denied on May 22, 2014.

No. A-13-750: **State v. Kinser**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-767: **Tucker v. Adams Industries**. Petition of appellant for further review denied on May 14, 2014.

No. A-13-773: **O'Flannagan v. Ochsner**. Petition of appellant for further review denied on July 15, 2014.

No. A-13-783: **State v. Mumin**. Petition of appellant for further review and amended petition of appellant for further review denied on May 19, 2014, as premature.

No. A-13-783: **State v. Mumin**. Petition of appellant for further review denied on August 1, 2014.

No. A-13-783: **State v. Mumin**. Petition of appellant pro se for further review denied on August 1, 2014.

No. A-13-786: **Costello v. Costello**. Petition of appellant for further review denied on May 7, 2014.

No. A-13-790: **In re Interest of Elijah G. & Ezra G**. Petition of appellant for further review denied on July 2, 2014.

No. A-13-796: **Jones v. Department of Corr. Servs**. Petition of appellant for further review denied on August 29, 2014, for lack of jurisdiction.

No. A-13-843: **In re Interest of Avery S. & Izabel S**. Petition of appellee for further review denied on May 28, 2014, as untimely filed.

No. A-13-864: **In re Interest of Trentity D. & Surenity D**. Petition of appellant for further review denied on June 4, 2014.

No. A-13-877: **State v. Tuttle**. Petition of appellant for further review denied on May 7, 2014.

No. S-13-900: **In re Interest of Gabriella H.**, 22 Neb. App. 70 (2014). Petition of appellee for further review sustained on July 29, 2014.

No. A-13-955: **State v. Scott**. Petition of appellant for further review denied on July 15, 2014.

No. A-13-958: **State v. Ernstmeyer**. Petition of appellant for further review denied on August 29, 2014, as untimely.

No. A-13-996: **State v. Bewley**. Petition of appellant for further review denied on July 18, 2014.

No. S-13-1009: **State v. Contreras**. Petition of appellant for further review sustained on July 2, 2014.

No. S-13-1024: **Kappas Enters. v. Department of Roads**. Petition of appellant for further review sustained on May 7, 2014.

No. A-13-1081: **State v. Brown**. Petition of appellant for further review denied on June 25, 2014.

No. A-13-1098: **State v. McPherson**. Petition of appellant for further review denied on July 24, 2014.

No. A-13-1107: **State v. Rosa**. Petition of appellant for further review denied on August 27, 2014.

No. A-13-1109: **State v. Harms**. Petition of appellant for further review denied on May 14, 2014.

No. A-13-1121: **In re Interest of Joseph A. et al**. Petition of appellant for further review denied on July 29, 2014.

No. A-13-1122: **State on behalf of Jeslynn C. v. Jeremiah E**. Petition of appellant for further review denied on April 23, 2014.

No. A-14-025: **King v. Houston**. Petition of appellant for further review denied on August 25, 2014.

No. A-14-046: **State v. Baker**. Petition of appellant for further review denied on July 10, 2014.

No. A-14-068: **State v. Johnson**. Petition of appellant for further review denied on July 2, 2014.

No. A-14-075: **State v. Potter**. Petition of appellant for further review denied on July 2, 2014.

No. A-14-095: **State v. Fotopulos**. Petition of appellant for further review denied on August 20, 2014.

No. A-14-184: **State v. Hochstein**. Petition of appellant for further review denied on July 17, 2014.

No. A-14-273: **Wells v. Houston**. Petition of appellant for further review denied on July 15, 2014.

No. A-14-278: **State v. Domach**. Petition of appellant for further review denied on August 27, 2014.

No. A-14-504: **State v. Foster**. Petition of appellant for further review denied on August 27, 2014.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

AMANDA LATZEL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS LATZEL, DECEASED, AND HERSELF, INDIVIDUALLY, APPELLANT, V. RONALD BARTEK ET AL., APPELLEES.

846 N.W.2d 153

Filed May 2, 2014. No. S-13-053.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
4. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
5. **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.
6. **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.
7. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
8. **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.
9. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.

10. ____. It is for the fact finder in a negligence case to determine, on the facts of each individual case, whether or not the evidence establishes a breach of that duty.
11. **Negligence: Proximate Cause: Proof.** To establish proximate cause, the plaintiff must meet three basic requirements. First, without the negligent action, the injury would not have occurred, commonly known as the "but for" rule. Second, the injury was a natural and probable result of the negligence. Third, there was no efficient intervening cause.
12. **Negligence: Proximate Cause: Words and Phrases.** An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff.
13. **Negligence: Proximate Cause: Tort-feasors: Liability.** The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. But if a third party's negligence is reasonably foreseeable, then the third party's negligence is not an efficient intervening cause as a matter of law.

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

Eric B. Brown, of Atwood, Holsten, Brown & Deaver Law Firm, P.C., L.L.O., for appellant.

Gary J. Nedved and Joel Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee Ronald Bartek.

Robert W. Shively, Jr., and Emily R. Cameron, of Shively & Lannin, P.C., L.L.O., for appellee Doug Bartek.

Brian S. Kruse, of Rembolt Ludtke, L.L.P., for amicus curiae Nebraska Agricultural Legal Foundation.

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

MILLER-LERMAN, J.

NATURE OF CASE

Thomas Latzel died as a result of catastrophic injuries he sustained in an automobile accident between drivers Daniel J. Vanekelenburg and Patrick L. Gaughen that occurred on

October 6, 2007, at the unmarked intersection of County Road 17 and County Road T in Saunders County, Nebraska. Thomas was a passenger in Vanekelenburg's vehicle at the time of the accident. Landowners and brothers, Ronald Bartek and Doug Bartek, owned the land to the southwest of the corner of the intersection, and they had planted corn on that land up to the ditch alongside the road. At the time of the accident, the corn had grown in excess of 7 feet high and obstructed the view of the intersection to some extent.

While Thomas was still alive, his wife, Amanda Latzel, brought this negligence action on behalf of herself and on behalf of Thomas against the drivers and the landowners. The district court for Lancaster County determined that the negligence of the drivers constituted an intervening cause as a matter of law and that therefore, Ronald and Doug were not liable. The district court granted the joint motion for summary judgment filed by the landowners, Ronald and Doug. After the remainder of the claims in the case were disposed of, Amanda appealed from the district court's order granting summary judgment in favor of Ronald and Doug. We determine that because reasonable minds could not differ, the actions of the drivers, Vanekelenburg and Gaughen, constituted an efficient intervening cause, which severed the causal connection between the landowners' conduct and Thomas' injuries. Thus, the district court did not err when it granted summary judgment in favor of the landowners, and we therefore affirm.

STATEMENT OF FACTS

This case arises out of an automobile accident that occurred on October 6, 2007, at the unmarked intersection of County Road 17 and County Road T in Saunders County. Both County Road 17 and County Road T are gravel roads.

On the day of the accident, Thomas and two other people were passengers in a pickup truck driven and owned by Vanekelenburg. Vanekelenburg was driving his pickup truck eastbound on County Road T when it collided with another pickup truck driven and owned by Gaughen, who was traveling northbound on County Road 17. The intersection of County Road 17 and County Road T was unmarked.

The land to the southwest of the intersection was owned by brothers Ronald and Doug. Ronald and Doug had planted corn to the southwest of the corner of the intersection up to the ditch that runs alongside the road. The record indicates that at the time of the collision, the corn to the southwest of the corner of the intersection had not been harvested and had grown in excess of 7 feet tall.

Thomas was catastrophically injured as a result of the accident. He suffered permanent traumatic injuries, which ultimately led to his death 3 years later. Thomas' wife, Amanda, was appointed by the district court as the guardian and conservator for Thomas, who was incapacitated due to his injuries resulting from the collision.

On September 4, 2009, while Thomas was still living, Amanda filed this negligence action on behalf of herself and Thomas against Ronald, Doug, Vanekelenburg, and Gaughen. With respect to the claim on behalf of Thomas against the landowners, the complaint alleged that Ronald and Doug were negligent by planting the corn too close to the roadside, choosing to plant corn near the southwest corner of the intersection of County Road 17 and County Road T rather than other crops less likely to obstruct motorists' vision, and failing to use reasonable and proper care in the maintenance of their land. The complaint further alleged that Ronald and Doug were negligent pursuant to Neb. Rev. Stat. § 39-308 (Reissue 2008). Section 39-308 provides:

> It shall be the duty of the owner of real property to remove from such property any tree, plant, shrub, or other obstruction, or part thereof, which, by obstructing the view of any driver, constitutes a traffic hazard. When the Department of Roads or any local authority determines upon the basis of engineering and traffic investigation that such a traffic hazard exists, it shall notify the owner and order that the hazard be removed within ten days. Failure of the owner to remove such traffic hazard within ten days shall constitute a Class V misdemeanor, and every day such owner fails to remove it shall be a separate offense.

With respect to Amanda's individual claim, the complaint alleges that as a result of the negligence of the landowners and drivers, Amanda had incurred compensable damages, including loss of consortium, loss of services, and loss of past wages.

On June 30, 2010, by order of the district court, Amanda's case was consolidated with another case that had been brought against the drivers, Vanekelenburg and Gaughen, by the estate of another passenger in Vanekelenburg's pickup truck at the time of the accident.

On August 5, 2010, Ronald and Doug filed a joint motion for summary judgment. A hearing was held on the joint motion on October 12. At the hearing, Ronald and Doug jointly offered and the court received 14 exhibits, which were primarily photographs of the accident and depositions, including their own and those of the drivers. Amanda offered and the court received two exhibits, which were affidavits.

In their depositions, both Vanekelenburg and Gaughen stated that they were experienced rural drivers. Vanekelenburg testified that he had driven through unmarked intersections over the years and that when approaching such an intersection, he would slow down and look both ways before proceeding through the intersection. Vanekelenburg further testified that he understood it was the responsibility of a driver to yield to a driver approaching on the right. In this case, Vanekelenburg was eastbound on County Road T and Gaughen was northbound on County Road 17, thus approaching on Vanekelenburg's right. Like Vanekelenburg, Gaughen testified that he was familiar with the rule of the road that the driver on the left approaching an unmarked intersection is required to yield to the driver on the right.

With respect to the accident, Vanekelenburg testified that when he was approximately one-half mile away from the intersection, he was driving 15 to 20 miles per hour. He further stated that as he approached the intersection, he was "distracted," because he was uncertain which direction he was supposed to go. When asked whether he came to a full stop before the intersection, Vanekelenburg stated, "I'm pretty sure I did. But I can't swear to it." He further testified that due to

the accident, he does not have any memories of what happened once he entered the intersection. Vanekelenburg also stated that if the corn to the southwest of the corner of the intersection had been planted farther back from the intersection or if soybeans or alfalfa had been planted instead of corn, he would have had a better chance of seeing whether other vehicles were approaching the intersection.

With respect to the accident, Gaughen testified that he was traveling northbound on County Road 17, at approximately 46 to 47 miles per hour. In Gaughen's answers to Amanda's interrogatories, which were attached as an exhibit to his deposition, Gaughen stated that he was traveling 49 to 50 miles per hour. In his deposition, Gaughen stated that once he saw Vanekelenburg's vehicle as he approached the intersection, Gaughen thought that Vanekelenburg was going to stop, but then Gaughen "noticed nobody [in Vanekelenburg's vehicle] was even looking [his] way," so Gaughen applied his brakes and turned his vehicle to the right in an attempt to avoid the collision. Gaughen testified that if the corn to the southwest of the corner of the intersection had been planted farther back from the intersection or if a crop that did not grow as high as the corn had been planted on the land, he would have had a better chance of seeing the Vanekelenburg vehicle as it approached the intersection.

In their depositions, Ronald and Doug each testified that they owned the land at the southwest corner of County Road 17 and County Road T. Ronald stated that he had been a farmer for 35 years, and Doug stated that he had been a farmer for 20 to 25 years. Ronald and Doug each testified that they rotate the type of crop they plant on an annual basis, generally between corn and soybeans, in order to avoid toxicities that would build up in the soil if the same type of crop were planted each year. They each testified that they grow their crop up to the ditch that runs alongside the road.

Ronald testified in his deposition that he could anticipate that people would sometimes speed on gravel roads, and he agreed that "not everybody drives like grandpa and grandma." Doug also testified that people may speed on roads that go by his property. Neither Ronald nor Doug testified that

they anticipated drivers would proceed through the intersection when they could not see other traffic. When Ronald was asked whether he believed that his corn "obstructed the views of any drivers," Ronald responded that "[i]t would obstruct, yes."

At the hearing on the motion for summary judgment, Amanda offered and the court received the affidavit of the traffic crash reconstructionist who analyzed the accident at issue in this case. The traffic crash reconstructionist stated in his affidavit that the average height of the unharvested corn to the southwest side of the intersection was 7.1 feet and that the unharvested corn "was a contributing factor in this crash and influenced the crash as a view obstruction." He further stated that Vanekelenburg's eastbound vehicle was traveling at approximately 15 miles per hour at the time of impact and that Gaughen's northbound vehicle was traveling at approximately 44 miles per hour at the time of impact.

The traffic crash reconstructionist stated in his affidavit that once Vanekelenburg's vehicle was approximately 47 feet from the area of impact, it reached its point of no return, or imminent impact, and that at that moment, "the Gaughen vehicle would have just started to enter Vanekelenburg's available field of view, obstructed partially by the cornfield." He further stated that once the Gaughen vehicle was approximately 206 feet from the area of impact, it reached its point of no return, or imminent impact, and at that moment, "the Vanekelenburg vehicle would have been out of view, completely obstructed by the cornfield."

At the hearing, Amanda also offered the affidavit of a witness to the accident. In his affidavit, the witness stated that the eastbound pickup truck on County Road T, Vanekelenburg's vehicle, stopped at the intersection of County Road 17 and County Road T "for quite awhile." He also stated that the northbound pickup truck on County Road 17, Gaughen's vehicle, "was driving over 65 miles per hour as he approached the intersection from the south" and that it "was definitely substantially exceeding the speed limit." The speed limit was 50 miles per hour. Amanda did not offer evidence that the landowners should reasonably have anticipated that drivers

would proceed through the intersection when they could not see other traffic.

After the hearing, on January 18, 2011, the district court filed an order granting summary judgment in favor of the landowners, Ronald and Doug. This is the order at issue in this appeal. In the order, the district court noted that in *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010), this court adopted portions of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010). Citing *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 786 N.W.2d 902, (2010), the district court noted that in order to prove negligence, a plaintiff must show: "1) that there is a legal duty on the part of the defendant to protect the plaintiff from injury, 2) a failure to discharge that duty, 3) damage to the plaintiff, and 4) that the damage was proximately caused by the failure to discharge the duty."

The district court stated that "the [landowners] Barteks do not argue the absence of duty though its existence in this case is far from certain." The court then noted that in Amanda's complaint, she alleged that a legal duty could be found in § 39-308. The district court stated that an argument could be made that under § 39-308, a landowner's duty does not arise until the landowner has been notified that a traffic hazard exists. Citing *A.W.*, the district court stated that "[a]bsent the existence of a specific duty or a policy exemption, a landowner would owe only the 'duty that an actor ordinarily has to exercise reasonable care when the actor's conduct creates a risk of physical harm.'" The district court then stated, "For the purposes of this order, the court has assumed the existence of a duty and does not address the issue of duty further."

The district court then stated that "[p]roximate cause is the next consideration." Notably, the district court did not explicitly discuss whether or not Ronald and Doug breached their duty. Such discussion ordinarily follows consideration of the existence of duty. Because the district court proceeded to consider causation, we assume for purposes of analysis that the district court found that Ronald and Doug had breached the applicable standard of care.

Regarding proximate cause, the district court stated that for Ronald's and Doug's actions to be considered the proximate cause, there must be no intervening cause. The district court order described an intervening cause by stating:

> An intervening cause is a new and independent force that severs the causal connection between the defendant's actions and the plaintiff's injuries. The causal connection is severed when: 1) "the negligent actions of a third party intervene, 2) the third party had full control of the situation, 3) the third party's negligence could not have been anticipated by the defendant, and 4) the third party's negligence directly resulted in injury to the plaintiff." . . . Importantly, the doctrine of intervening cause comes "into play only when the intervening cause is not foreseeable."

(Citations omitted.)

The district court then discussed the "[c]hanging [c]ontext of [f]orseeability." Paraphrasing this court's opinion in *A.W.*, the district court stated that "while the rules of duty serve as broadly applicable guidelines to be applied to corresponding categories of cases, foreseeability determinations are fact specific and incapable of serving as useful behavioral guides."

The district court next cited Nebraska cases involving blind intersections and intervening cause. Although certain of the cases had been resolved upon summary judgment and others after trial, the district court stated its understanding that it had been determined in these cases that "a driver's actions are unforeseeable as a matter of law where he or she has disregarded the obvious danger of the intersection." See, e.g., *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006); *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987); *Gerlach v. State*, 9 Neb. App. 806, 623 N.W.2d 1 (2000).

Thus, based on its understanding of our prior cases, the district court reasoned that for intervening cause purposes, "the negligence of a driver who disregards the obvious dangers of an obscured intersection is not foreseeable" as a matter of law. The district court also stated that it was undisputed

that the drivers traversed the intersection "'when [they] could not see what [they] needed to see,'" quoting *Delaware v. Valls, supra*, thus creating an intervening cause as a matter of law. Therefore, the court determined that an efficient intervening cause existed due to the negligence of the drivers, Vanekelenburg and Gaughen. Having determined that an efficient intervening cause existed as a matter of law, the landowners' conduct was not the proximate cause of the accident and Ronald and Doug were not liable. Accordingly, the district court granted the landowners' joint motion for summary judgment.

After the district court filed its order granting summary judgment in favor of Ronald and Doug, Amanda filed a motion to alter or amend or, in the alternative, for pronouncement and certification under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) of final judgment regarding the claims against Ronald and Doug. After a hearing, the district court overruled this motion on January 31, 2011.

Amanda later settled with Gaughen, and Gaughen was dismissed by stipulation of the parties on November 9, 2011. Following Gaughen's dismissal, Amanda filed an amended complaint on January 26, 2012, which added an additional defendant, the State of Nebraska, Department of Health and Human Services (DHHS). With respect to DHHS, Amanda sought an order determining DHHS' interest in the proceeds of the settlement with Gaughen. On December 5, the district court filed an order resolving the dispute between DHHS and Amanda over the proceeds of the settlement. Thus, as of December 5, the only outstanding claim was Amanda's claim against Vanekelenburg, which was later dismissed with prejudice on January 14, 2013. With the dismissal of the claim against Vanekelenburg, all claims at issue in this case were resolved.

Amanda appeals from the order granting summary judgment in favor of the landowners, Ronald and Doug.

ASSIGNMENTS OF ERROR

Amanda claims on appeal that the district court erred when it granted summary judgment in favor of Ronald and Doug.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Harris v. O'Connor*, 287 Neb. 182, 842 N.W.2d 50 (2014). 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

In this case, the district court determined that it was undisputed both drivers disregarded the obvious dangers of the obscured intersection by proceeding to traverse the intersection when they could not see what they needed to see and that such conduct was not foreseen by the landowners. Because the actions of the drivers, Vanekelenburg and Gaughen, could not have been anticipated by the landowners, the actions of the drivers constituted an intervening cause of the accident as a matter of law. The district court determined that because the drivers' negligence was an intervening cause, the causal connection between Ronald's and Doug's actions and Thomas' injuries was severed, and accordingly, the district court granted Ronald and Doug's joint motion for summary judgment. On appeal, Amanda argues that a genuine issue of material fact exists as to whether the negligence of the drivers was foreseeable, and thus contends that summary judgment was improper. Even giving Amanda favorable inferences from the record, we find no merit to Amanda's argument, and we therefore affirm.

[3,4] 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. *Harris v. O'Connor, supra*. Summary judgment proceedings do not

resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Peterson v. Homesite Indemnity Co.*, 287 Neb. 48, 840 N.W.2d 885 (2013). If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.*

[5-7] 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. *Id.* After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Id.*

[8] The case before us is a negligence action. 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. *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[9,10] The district court and the parties devote considerable attention to the relevance of our negligence analysis in *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010), and subsequent cases applying the framework described in *A.W.* See, e.g., *Martensen v. Rejda Bros., supra*; *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012); *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011); *Deviney v. Union Pacific RR. Co.*, 280 Neb. 450, 786 N.W.2d 902 (2010). In *A.W.*, we abandoned the risk-utility test and adopted the duty analysis set forth in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (hereinafter Restatement (Third)). Under the Restatement (Third), 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, supra*. We stated in *A.W.* that

> [t]he question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. But it is for the fact finder to determine, on the facts of each individual case, whether or not the evidence establishes a breach of that duty.

280 Neb. at 210-11, 784 N.W.2d at 913. We made clear in *A.W.* that foreseeability is not a factor to be considered by the courts when making determinations of duty and that "foreseeability" determinations in the context of breach are determinations of fact. We comment further on the Restatement (Third) later in this opinion.

For the landowners, Ronald and Doug, to be successful on their motion for summary judgment, the record must show as a matter of law that they owed no duty to Thomas, that any duty owed was not breached, or that any breach was not the proximate cause of the accident.

In its analysis of negligence, the district court stated that for the purposes of its order, it assumed the existence of a duty owed by the landowners, Ronald and Doug, to Thomas. We have noted, however, that after the district court stated that it assumed the existence of duty, the court was silent on the question of breach. Instead, after stating that it assumed the existence of a duty, the district court stated that "[p]roximate cause is the next consideration." No party has assigned error to the district court's failure to address breach in general or in what manner the landowners' conduct undisputedly failed to adhere to a standard of reasonable care in particular. It would have been informative if the district court had commented on breach of duty and articulated its analysis, and in another case, findings regarding breach could be pivotal. However, given the manner in which the parties have framed the issues in this appeal, the absence of such analysis does not prevent our resolution of this case. For purposes of our analysis, we understand the district court's order to have implicitly assumed that the landowners breached their duty.

The district court considered proximate cause and determined that the negligent conduct of the drivers, Vanekelenburg and Gaughen, of disregarding the dangers of an obstructed intersection and proceeding through it when they could not

see what they needed to see, was an efficient intervening cause of the accident as a matter of law. The district court determined that because the drivers' negligence was an intervening cause, the causal connection between the landowners' actions and Thomas' injuries was severed, and therefore, the court granted Ronald and Doug's joint motion for summary judgment.

For the purposes of this opinion, we assume without deciding that the landowners owed a duty to Thomas and, as noted above, that the landowners breached their duty. For purposes of this opinion, when we refer to "negligent drivers," we are merely saying they "owed some duty of care to another yet failed to abide by that duty." See *Hersh v. E-T Enterprises, Ltd. Partnership*, 232 W. Va. 305, 310, 752 S.E.2d 336, 341 (2013). Accordingly, we turn our focus to the element of causation.

[11] To establish proximate cause, the plaintiff must meet three basic requirements. *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009). First, without the negligent action, the injury would not have occurred, commonly known as the "but for" rule. *Id.* Second, the injury was a natural and probable result of the negligence. *Id.* Third, there was no efficient intervening cause. *Id.*

[12,13] An efficient intervening cause is new and independent conduct of a third person, which itself is a proximate cause of the injury in question and breaks the causal connection between the original conduct and the injury. *Id.* The causal connection is severed when (1) the negligent actions of a third party intervene, (2) the third party had full control of the situation, (3) the third party's negligence could not have been anticipated by the defendant, and (4) the third party's negligence directly resulted in injury to the plaintiff. *Id.* We have stated that "[t]he doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. But if a third party's negligence is reasonably foreseeable, then the third party's negligence is not an efficient intervening cause as a matter of law." *Id.* at 816-17, 774 N.W.2d at 383.

As an example of the application of the doctrine of efficient intervening cause, we considered whether such intervening cause existed in *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988), which was an appeal after trial. In *Zeller*, a passenger in a truck was injured after the truck was struck by another vehicle while driving at a low rate of speed through an unprotected and obstructed intersection. The passenger sued Howard County, Nebraska, for failing to replace a stop sign at the intersection. We observed that the truckdriver failed to take appropriate measures to avoid the collision and unreasonably disregarded the obvious danger of the intersection. We determined that the truckdriver's conduct was an efficient intervening cause of the collision, because his behavior was unforeseen to the county. We stated that

> [the truckdriver] had complete control over the situation because he could have avoided the collision by exercising reasonable care while driving the pickup toward and into the intersection. Howard County, even if negligent regarding the absent stop sign in question, was not bound to anticipate, and could not have contemplated, that [the truckdriver] would totally and unreasonably disregard the obvious danger inherent in vehicular travel into a visually obstructed intersection of public roads and fail to take appropriate measures to avoid the collision.

Id. at 675, 419 N.W.2d at 659.

We further illustrate the application of the efficient intervening cause doctrine in the following examples of intersection accidents from our case law and note that in each of these cases the matter was properly disposed of on summary judgment essentially because the third party's negligence could not have been anticipated.

In *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006), a negligence action was brought against Lancaster County, Nebraska, to recover for injuries sustained following a two-vehicle collision. The driver of one of the vehicles involved in the collision ran a stop sign and struck Todd Willet's vehicle at an intersection where a private landowner had constructed a berm. Willet argued that the berm obstructed

the drivers' views at the intersection and that the county breached its duty by ignoring the risk created by the berm. The trial court granted summary judgment in favor of the county, and we affirmed.

In *Willet*, we determined that even if the county breached its duty owed to Willet, the other driver's negligent conduct constituted an efficient intervening cause. We stated that the negligent driver could have avoided the collision by exercising reasonable care in obeying the stop sign or reducing his speed so that he could react appropriately. We determined that if the negligent driver had stopped at the stop sign and proceeded cautiously, he would have seen Willet's vehicle approaching the intersection. We stated that

> [t]he County was not bound to anticipate—and could not have contemplated—that [the negligent driver] would disregard the obvious danger inherent in disobeying a stop sign and entering an obstructed intersection at high speed. Thus, [the negligent driver's] negligent behavior was unforeseeable to the County and constituted an efficient intervening cause of the collision.

Id. at 578, 713 N.W.2d at 489.

In *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987), a collision occurred between a dirt bike and an automobile at an intersection that was visually obstructed. A passenger on the dirt bike filed suit against the private landowner who was responsible for the obstruction. We ruled that the landowners

> were not bound to anticipate and cannot be said to have contemplated that [the dirt bike driver] would negligently attempt to traverse the intersection when he could not see what he needed to see in order to do so safely or that [the automobile driver] would . . . fail to see [the dirt bike] in time to avoid the collision. Thus, [the dirt bike driver's] negligence and that alleged on the part of [the automobile driver] are efficient intervening causes.

Id. at 145, 409 N.W.2d at 624. We affirmed the summary judgment in favor of the landowners.

Notwithstanding case law represented by the foregoing examples, Amanda suggests that after *A.W. v. Lancaster Cty.*

Sch. Dist. 0001, 280 Neb. 205, 784 N.W.2d 907 (2010), the issue of whether the negligence of the drivers, Vanekelenburg and Gaughen, was foreseeable and could have been anticipated is a determination for the finder of fact and should not be decided as a matter of law on summary judgment. Amanda reads *A.W.* too broadly. As noted in *A.W.*, although foreseeability is a question of fact, there remain cases where foreseeability can be determined as a matter of law, such as by summary judgment. In *A.W.*, we discussed foreseeability in the context of breach and stated that

> [u]nder the Restatement (Third), foreseeable risk is an element in the determination of negligence, not legal duty. In order to determine whether appropriate care was exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence. The extent of foreseeable risk depends on the specific facts of the case and cannot be usefully assessed for a category of cases; small changes in the facts may make a dramatic change in how much risk is foreseeable. Thus, courts should leave such determinations to the trier of fact unless no reasonable person could differ on the matter. And if the court takes the question of negligence away from the trier of fact because reasonable minds could not differ about whether an actor exercised reasonable care (for example, because the injury was not reasonably foreseeable), then the court's decision merely reflects the one-sidedness of the facts bearing on negligence and should not be misrepresented or misunderstood as involving exemption from the ordinary duty of reasonable care.

280 Neb. at 216, 784 N.W.2d at 917. Thus, under the Restatement (Third) and after *A.W.*, foreseeability determinations can properly be made as a matter of law where indicated. See, e.g., *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

Amanda's argument regarding the impact of *A.W.* on our efficient intervening cause case law leads to another topic touched on by the parties and the district court. Although the parties assert variously that we need not reevaluate intervening cause case law and *A.W.* does not change intervening cause

case law, there was, nevertheless, some consideration at the trial level regarding the wisdom of adopting the Restatement (Third) version of intervening cause and related principles. For several reasons, we need not settle this discussion in this case.

With respect to negligence or breach of care, the Restatement (Third), § 19 at 215, provides: "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." We referred to this section in *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

The Restatement (Third), § 34 at 569, provides: "When a force of nature or an independent act is also a factual cause of harm, an actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." And § 29 at 493 provides: "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." The preceding proposition is sometimes referred to as "scope-of-risk" analysis, *Hale v. Brown*, 38 Kan. App. 2d 495, 499, 167 P.3d 362, 365 (2007), *affirmed* 287 Kan. 320, 197 P.3d 438 (2008), or "'scope-of-liability'" analysis, *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 452 n.4 (Tex. 2006) (plurality opinion). In connection with scope of liability, one court has observed that the term "proximate cause" has been criticized and that the Restatement (Third) has therefore adopted a two-prong test for causation which "asks (1) whether the actor's conduct was a necessary condition of the harm (but-for or factual cause) and (2) whether the harm was the product of the risks that made the actor's conduct unlawful (scope of liability or proximate cause)." *U.S. v. Monzel*, 746 F. Supp. 2d 76, 85-86 (D.D.C. 2010).

Although the scope of risk approach has been explicitly adopted in certain jurisdictions, e.g., *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009), and *Hill v. Damm*, 804 N.W.2d 95 (Iowa App. 2011), other jurisdictions have declined to adopt it, e.g. *Hale, supra*, and *Dew, supra*, noting that adoption would require the courts to abandon decades of causation law and would increasingly preclude disposition without a trial. In a jurisdiction where the scope of liability approach

to causation has been adopted, it has been conceded that the provisions of the Restatement (Third) regarding the scope of liability analysis "seem as clear as mud." *Hill v. Damm*, 804 N.W.2d at 103. See, also, *U.S. v. Monzel*, 746 F. Supp. 2d at 86 n.16 (stating that "[d]espite the well-established reputation of the [American Law Institute], the [c]ourt has strong concerns about whether the second prong of its causation analysis, which addresses the scope of liability, is going to be any easier or clearer for judges, who must write appropriate instructions on causation, or for jurors, who must apply them"). Furthermore, recognizing the difficulty of implementing the Restatement (Third) approach, a comment to § 19 of the Restatement (Third) observes that "the issues of defendant negligence and scope of liability often tend to converge." § 19, comment *c*. at 216. The importation of foreseeability jurisprudence from our causation cases by the concurrence into its breach analysis illustrates this point.

Even if we were inclined to adopt the entire Restatement (Third) approach to negligence, causation, and intervening cause, it could not be applied in this case. Under the Restatement (Third) two-prong approach referred to above, we would have to examine, inter alia, the trial court's undisputed findings as to the risks that made the landowners' conduct unlawful. This we cannot do. Here, there is no discussion of breach by the district court or identification of the harms that resulted from the particular risks that made the landowners' conduct tortious in the first place. Therefore, we could not assess whether the conduct of the landowners, which according to the district court impliedly breached the standard of care, increased the likelihood of the harms that actually ensued. See *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). As we noted earlier, although we have treated the district court's order as having implicitly ruled that the landowners' conduct was a breach of duty, the district court made no ruling regarding breach and no party assigns error to this aspect of the district court's order. The order as written does not permit the review contemplated by the Restatement (Third). Thus, at this time and in this case, we do not rely on the Restatement (Third) approach to intervening

cause and, instead, continue to adhere to our existing efficient intervening cause jurisprudence, which the district court correctly described.

In the present case, the record shows that the landowners planted corn up to the ditches that ran alongside County Road 17 and County Road T, that the corn had grown to over 7 feet high, and that it partially obstructed the intersection. However, just as in *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988), the drivers, Vanekelenburg and Gaughen, had complete control over the situation, because either driver could have prevented the collision by exercising reasonable care while driving toward and into the obstructed intersection. The traffic crash reconstructionist stated in his report that "[h]ad either driver been operating their [sic] vehicle more cautiously, the crash could have been avoided." There was no evidence that the landowners could have reasonably foreseen the drivers' conduct.

We have viewed the evidence in the light most favorable to Amanda and given her the benefit of all reasonable inferences deducible from the evidence. Based upon the undisputed facts of this case, although the landowners anticipated speeding, they were not bound to anticipate that drivers would disregard the obvious danger of traversing a visually obstructed unmarked intersection without being able to see what they needed to see to do so safely. Reasonable minds cannot differ that the drivers' actions could not have been anticipated by the landowners and that as a matter of law, the drivers' negligence constituted an efficient intervening cause of the collision, thus severing the causal connection between the landowners' conduct and Thomas' injuries. Landowners, Ronald and Doug, were entitled to judgment, and Amanda did not show a material fact in dispute preventing judgment. The district court did not err when it granted the landowners' motion for summary judgment.

CONCLUSION

The district court correctly determined that the actions of the drivers, Vanekelenburg and Gaughen, constituted an efficient intervening cause of the collision, which severed the causal

connection between the conduct of the landowners, Ronald and Doug, and Thomas' injuries. Therefore, the district court did not err when it granted summary judgment in favor of the landowners. We affirm.

AFFIRMED.

STEPHAN, J., concurring.

I agree that the judgment of the district court should be affirmed. But in reaching that result, I see no need to "assume without deciding" that the landowners breached a duty of care. Instead, I conclude as a matter of law that there was no breach, and thus no negligence, on the part of the landowners who were simply making lawful use of their agricultural land to raise crops.

In *A.W. v. Lancaster Cty. Sch. Dist. 0001*,[1] this court adopted the principles of the Restatement (Third) of Torts[2] with respect to the first two elements of a negligence action: A legal duty owed by the defendant to the plaintiff and a breach of such duty. Under prior law, foreseeability of a particular injury was considered in the legal determination of whether a duty was owed.[3] Under the Restatement (Third), an actor has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.[4] But foreseeable risk is an element in the determination of breach, not legal duty.[5] In *A.W.*, we reframed the issue of foreseeability: The lack of foreseeable risk in a specific case may be a basis for a no-breach determination but not a no-duty determination.[6]

The majority cites and quotes *A.W.* for the principle that "[i]n order to determine whether appropriate care was

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

[2] Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010).

[3] See, e.g., *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000); *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

[4] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 1; Restatement, *supra* note 2, § 7(a).

[5] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 1.

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

exercised, the fact finder must assess the foreseeable risk at the time of the defendant's alleged negligence."[7] But we recognized in *A.W.* that while foreseeability is usually an issue of fact, a court may decide the issue as a matter of law "where reasonable people could not disagree about the unforeseeability of the injury."[8] We subsequently applied that principle in *Riggs v. Nickel*.[9]

It is axiomatic that if a defendant's conduct is not negligent, it does not matter whether it was the proximate cause of the plaintiff's injury. Therefore, rather than jumping to causation as the district court did, and the majority does, I would follow the *A.W.* protocol and examine the issue of foreseeability in the context of whether the landowners in this case were negligent.

Under the Restatement (Third) formulation which we adopted in *A.W.*:

> "A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether a person's conduct lacks reasonable care are the foreseeable likelihood that the persons conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."[10]

In this context, the "extent of foreseeable risk depends on the specific facts of the case" and "small changes in the facts may make a dramatic change in how much risk is foreseeable."[11]

The alleged negligence of the Bartek brothers consisted of planting and raising corn in their field up to the point where the road ditch begins, which is approximately 25 to 30 feet from the center of the road. Ronald Bartek testified that he

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[7] See *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 1, 280 Neb. at 216, 784 N.W.2d at 917.

[8] *Id.* at 218, 784 N.W.2d at 918.

[9] *Riggs v. Nickel*, 281 Neb. 249, 796 N.W.2d 181 (2011).

[10] *A.W. v. Lancaster Cty. Sch. Dist. 0001, supra* note 1, 280 Neb. at 218, 784 N.W.2d at 918, quoting Restatement, *supra* note 2, § 3.

[11] *Id.* at 216, 784 N.W.2d at 917.

and his brother had been raising corn in this manner for 35 years and that there was nothing unusual about the practice of planting corn "up to the ditch." Doug Bartek testified that he was unaware of any other motor vehicle accidents at rural intersections abutting the Barteks' farmland and that he was unaware of any such accidents at other Saunders County road intersections due to corn growing in an abutting field. Similarly, the drivers involved in the accident, Gaughen and Vanekelenburg, testified that there was nothing unusual about the rural intersection at that time of year. Gaughen, who farms in the same area, testified that there was nothing improper about the manner in which the Barteks planted their corn and that it was consistent with the manner in which he and other farmers in Saunders County plant corn.

Although violation of a statute may constitute evidence of negligence,[12] there is no merit in the appellant's argument that the Barteks violated Neb. Rev. Stat. § 39-308 (Reissue 2008). That statute provides in pertinent part:

> It shall be the duty of the owner of real property to remove from such property any tree, plant, shrub, or other obstruction, or part thereof, which, by obstructing the view of any driver, constitutes a traffic hazard. When the Department of Roads or any local authority determines upon the basis of engineering and traffic investigation that such a traffic hazard exists, it shall notify the owner and order that the hazard be removed within ten days.

The statute obligates a landowner to remove a visual obstruction that is a "traffic hazard," but it entrusts the determination of when a condition is a "traffic hazard" to state and local officials. There is no evidence that such officials ever notified the Barteks that their growing corn crop was a traffic hazard. To the contrary, Doug Bartek testified that no one from the Department of Roads or any local authority had ever contacted him with respect to the intersection and that no one else had ever questioned the proximity of the crop to the road. Similarly, Ronald Bartek testified that he had never heard of

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[12] See *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

anyone complaining of corn growing too close to a road or obstructing visibility.

The Barteks acknowledged that motorists sometimes speed on gravel roads and that their corn obstructed a motorist's view to some degree. But this general knowledge does not support an inference that a traffic accident was a reasonably foreseeable risk of the manner in which the Barteks grew their corn. The authors of the Restatement (Third) recognized that, in determining whether specific conduct constitutes negligence, "the law itself must take care to avoid requiring excessive precautions of actors relating to harms that are immediately due to the improper conduct of third parties, even when that improper conduct can be regarded as somewhat foreseeable."[13] As the majority notes, we have held as a matter of law that a motorist's negligence in proceeding through a visually obstructed intersection in disregard of obvious danger is not a reasonably foreseeable risk.[14] While we reached this conclusion in the context of efficient intervening cause, I think it is equally apposite to the assessment of foreseeability of risk in the context of negligence.

An appellate court will affirm a lower court's ruling that reaches the correct result, although based on different reasoning.[15] I would conclude as a matter of law that the Barteks were not negligent in planting their corn up to the edge of their field, and I would affirm the summary judgment in their favor on that basis.

HEAVICAN, C.J., and CONNOLLY, J., join in this concurrence.

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[13] Restatement, *supra* note 2, § 19, comment *g*. at 221.

[14] See, *Willet v. County of Lancaster*, 271 Neb. 570, 713 N.W.2d 483 (2006); *Delaware v. Valls*, 226 Neb. 140, 409 N.W.2d 621 (1987).

[15] *Feloney v. Baye*, 283 Neb. 972, 815 N.W.2d 160 (2012).

American Family Mutual Insurance Company, appellee, v. Regent Insurance Company, appellant.

846 N.W.2d 170

Filed May 2, 2014. No. S-13-297.

1. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
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 was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
4. ____: ____. 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.
5. **Contribution: Equity.** Contribution is an equitable remedy given to the party who pays a debt that is concurrently owed by another party. The existence of a "common obligation" makes the right to contribution possible.
6. **Insurance: Contribution.** Among insurers, the right to contribution arises in two basic circumstances: (1) An insurer of a joint tort-feasor has paid all, or greater than its share, of a loss, and (2) a single insured is covered by concurrent or "double" insurance, and one insurer paid all, or greater than its share, of a loss.
7. ____: ____. In the circumstance of concurrent insurers, contribution is proper only where the policies insure the same entities, the same interest in the same property, and the same risk.
8. **Insurance: Contracts: Contribution.** When considering whether insurance policies cover the "same risk," it is not necessary that the policies provide identical coverage in all respects. As long as the particular risk actually involved in the case is covered by both policies, the coverage is concurrent, and contribution will be allowed.
9. ____: ____: ____. In determining whether one insurer is entitled to contribution from another, courts consider the nature of the claim, the relation of the insured to the insurers, the particulars of each policy and any other equitable considerations.
10. **Insurance: Liability.** The insurer seeking indemnification against a concurrent insurer does so entirely in its own right.
11. **Insurance: Contribution: Words and Phrases.** Contribution in a concurrent insurer scenario is a right of the insurer flowing from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.

12. **Insurance: Contribution: Proof.** A contribution rule based on apportionment of fault would hamper settlements and require the defendant to prove its own fault before the defendant's insurer could seek equitable contribution.
13. **Contribution.** For coverage to be concurrent for purposes of contribution, it must be at the same level—primary to primary or excess to excess.
14. **Insurance: Liability.** The loss between the primary insurers should be apportioned before considering the excess insurers' exposure.
15. **Insurance: Contracts.** Among policies at the same level, absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy.
16. **Insurance: Contracts: Words and Phrases.** A true excess insurance policy is one providing coverage conditioned upon the existence of a primary policy, which coverage does not begin until a loss exceeds a stated level.
17. **Insurance: Contracts: Liability.** Umbrella policies, as the only true excess insurance policies, incur liability only after the exhaustion of all other policies, including primary policies containing excess insurance clauses.
18. ____: ____: ____. Where an excess clause and a pro rata clause appear in concurrently effective policies, the pro rata clause is usually disregarded and full effect is given to the excess clause, making the pro rata policy the primary insurance.
19. ____: ____: ____. Excess insurance clauses are mutually repugnant, and the liability should be shared by the insurers pro rata in the proportion that their respective policy limits bear to the entire loss.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Mark C. Laughlin and Patrick S. Cooper, of Fraser Stryker, P.C., L.L.O., and Brian D. Nolan and Michael D. Reisbig, of Nolan, Olson, & Stryker, P.C., L.L.O., for appellant.

Joel D. Nelson and Joel A. Bacon, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

This is an action for contribution against an insurer to pay a share of a settlement paid by another insurer to an injured guest of a party at an apartment complex. The underlying lawsuit was brought against both the ownership of the complex and its management under theories of joint and several liability. The insurer seeking contribution held liability policies

covering both the complex's ownership and management. The insurer being sued for contribution held liability policies covering the management company; the parties dispute whether the policies also covered the "same risk" for the ownership as an additional insured. The insurer seeking contribution argues that it does not matter whether both tort-feasors were coinsureds under all the policies at issue because, either way, the insurers shared a "common obligation."

II. BACKGROUND

This contribution action stems from a lawsuit to recover for injuries sustained when a guest at an apartment complex fell off a third-story apartment's balcony. Beacon Hill Investment Group (Beacon Hill) owned the apartment complex, and N.P. Dodge Management Company (NP Dodge) managed it.

1. Accident

When the decks of the apartment complex were built in 1968, there was no code specifying the minimum height for deck railings. The decks of the complex were remodeled in 1997. This improvement was apparently at the behest of NP Dodge.

According to a representative of Beacon Hill, it was NP Dodge's job to ensure that its properties met safety codes. A representative of NP Dodge generally agreed it was NP Dodge's responsibility to keep the property compliant with current safety codes.

The plans submitted for the permit specified that the old deck railing would be reused, but incorrectly indicated that those deck railings were 36 inches high. In fact, the railings were 30 inches high. The applicable 1994 Uniform Building Code required guardrails within private apartments to be a minimum of 36 inches high. The 1994 Uniform Building Code required most other exterior guardrails to be 42 inches high.

In 2003, NP Dodge's assistant property manager lived in a third-floor apartment at the complex. While off duty, she had a small gathering of her friends at her apartment. There

was underage drinking at the gathering, although the assistant property manager stated she did not provide any guests with alcohol.

A neighboring tenant and his friend, the guest, stopped by. The guest went out to the apartment's balcony to smoke. He was 20 years old and very intoxicated. He fell over the railing. Injuries from the fall rendered the guest a quadriplegic.

The guest sued both Beacon Hill and NP Dodge. The complaint alleged that Beacon Hill and NP Dodge were jointly and severally liable for his injuries under theories of premises liability and negligence relating to the dangerous condition of the low railing. The guest also alleged that NP Dodge's assistant property manager was negligent in allowing alcohol to be served to minors and in failing to warn the guest of the low railing height.

2. Management Agreement

NP Dodge has been managing the Beacon Hill property since 1986. The management agreement in force at the time of the accident provided that Beacon Hill was to obtain and keep in force adequate insurance "against liability for loss, damage, or injury to property or persons which might arise out of the occupancy, management, operation or maintenance of the Property." Beacon Hill was to cover NP Dodge "as an additional insured on all liability insurance maintained with respect to the Property." For its part, NP Dodge was required by the management agreement to, at all times, maintain "general liability, automobile liability, and worker's compensation insurance on [NP Dodge's] employees." And NP Dodge was to cover Beacon Hill as an "additional insured on [NP Dodge's] general liability policy."

A "Liability and Hold Harmless" provision contained in a 2001 amendment to the management agreement stated in relevant part:

> To the extent not covered by applicable policies of insurance, [Beacon Hill] shall hold harmless and reimburse [NP Dodge] for expenses incurred by [NP Dodge], including . . . claims for personal injury and property

> damage, reasonable costs and attorney fees, and any liability, fines or penalties, in connection with any claim, proceedings, or suit involving an alleged violation by [NP Dodge] or [Beacon Hill], or both, of any law or duty with respect to any alleged violations of local, federal or state laws occurring after the effective date of this Agreement . . . provided, however, that [Beacon Hill] shall not be responsible to [NP Dodge] for any such expenses in the event the liability . . . is the result of a willful violation by [NP Dodge], or its employees, of any local, federal, or State laws or regulations (unless [NP Dodge] was not the cause of the violation and has used its best efforts to remedy the violation), or is the result of the willful misconduct or the negligent act or omission of [NP Dodge] or the agents or employees of [NP Dodge] or for any acts of [NP Dodge] arising outside of the scope of this Agreement.

Likewise, NP Dodge agreed to hold harmless and reimburse Beacon Hill

> for any loss [Beacon Hill] incurs as a result of a willful violation by [NP Dodge], or its employees, of any local, federal, or State laws or regulations (unless [NP Dodge] was not the cause of the violation and has used its best efforts to remedy the violation), or is the result of the willful misconduct or the negligent act or omission of [NP Dodge] or the agents or employees of [NP Dodge] and for any acts of [NP Dodge] arising outside of the scope of this Agreement.

3. Insurance Policies

American Family Mutual Insurance Company (American Family) insured Beacon Hill as its named insured, and Regent Insurance Company (Regent) insured NP Dodge as its named insured. Pursuant to the management agreement, Beacon Hill was an additional insured under Regent's policies for NP Dodge and NP Dodge was an additional insured under American Family's policies for Beacon Hill.

(a) American Family
Primary Policy

American Family provided a primary "Businessowners Package Policy" for Beacon Hill as the named insured in the amount of $1 million per occurrence. The coverage included bodily injury liability. The annual premium was $37,006. The policy included as an "insured" "any organization, while acting as [Beacon Hill's] real estate manager."

The "**Other Insurance**" provision of the American Family primary policy provided that the insurance was primary except with respect to certain fire, watercraft, and other insurance coverage, which are not applicable here. The obligations under the American Family primary policy were "not affected [by other insurance] unless any of the other insurance is also primary." In the event there was coverage for the loss with another primary policy, then the other insurance clause provided:

> If all of the other insurance permits contribution by equal shares, **we** will follow this method also. Under this approach each insurer contributes equal amounts until each has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, **we** will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limit of insurance to the total applicable limits of insurance of all insurers.

(b) American Family
Umbrella Policy

American Family provided an umbrella policy in the amount of $5 million for Beacon Hill as the named insured. The annual premium for the umbrella coverage was $5,714.

NP Dodge was an additional insured under the umbrella policy pursuant to a provision that the policy would cover any person "(other than **your** employee) or any organization while acting as **your** real estate manager."

The "**Other Insurance**" clause of the umbrella policy stated:

> If other valid and collectible insurance is available to the **insured** for **ultimate net loss we** cover under this policy, [American Family's] obligations under this policy are limited as follows:
>
> a. As this insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis, except such insurance as is specifically purchased to apply in excess of this policy's Limit of Insurance, **we** will indemnify only **our** share of the amount of **ultimate net loss**, if any, that exceeds the sum of:
>
> (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance . . . .

(c) Regent Primary Policy

Regent provided a primary comprehensive insurance policy for NP Dodge as the named insured. The policy included general liability coverage in the amount of $1 million per occurrence. The premium for this policy was $144,403 annually.

A "Blanket Additional Insured Endorsement" for the Regent primary policy defined as an additional insured "[a]ny person or organization whom you are required to add as an additional insured on this policy under a written contract or agreement . . . ."

The endorsement provided that such "person or organization is only an insured with respect to liability arising out of premises you [NP Dodge] own, rent, lease or occupy; or 'your work' for that additional insured by or for you [NP Dodge]." The policy elsewhere defines "Your work":

> **a.** Means:
>
> **(1)** Work or operations performed by you [NP Dodge] or on your behalf; and
>
> **(2)** Materials, parts or equipment furnished in connection with such work or operations.
>
> **b.** Includes
>
> **(1)** Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

The blanket additional insured endorsement further stated that the insurance for such person or organization does not apply to:

> "bodily injury" . . . arising out of an architect's, engineer's or surveyor's rendering or failing to render any professional services including:
>
> **1.** The preparing, approving or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, design or specifications; or
>
> **2.** Supervisory, inspection or engineering services.

As to the named insured under the policy, the "**Other Insurance**" section of Regent's primary policy was similar in most respects to the other insurance provision of American Family's primary policy:

> **a. Primary Insurance**
>
> This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in **c.** below.
>
> **b. Excess Insurance**
>
> This insurance is excess over:
>
> **(1)** [Fire coverage, watercraft coverage, et cetera]
>
> . . . .
>
> **(2)** Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.
>
> . . . .
>
> **c. Method Of Sharing**
>
> If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.
>
> If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under

> this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

But as to an additional insured under the blanket additional insured endorsement, the other insurance provision of Regent's primary policy stated: "Any coverage provided hereunder shall be excess over any other valid and collectible insurance available to that person or organization whether primary, excess, contingent or on any other basis unless a contract specifically requires that this insurance be primary."

(d) Regent Umbrella Policy

Regent provided a commercial umbrella policy in the amount of $4 million for NP Dodge as the named insured. The premium for this policy was $22,522 annually.

The umbrella policy covered "[a]ny person or organization who is an additional insured in the 'underlying insurance,'" with the caveat that "[t]he coverage afforded under this insurance will be no broader than that of the 'underlying insurance.'"

Similarly to Beacon Hill's umbrella policy, the other insurance clause of Regent's umbrella policy stated, as to both its named and additional insureds, that it was "excess over any of the other insurance" and will pay only its "share" of the amount of the loss that exceeds the sum of the "total amount that all such other insurance would pay for the loss in the absence of this insurance" and the total of all deductible and self-insured amounts under all other insurance.

4. Claims Adjuster Communications

American Family hired an attorney to represent the interests of both Beacon Hill and NP Dodge in the guest's suit against them. American Family's litigation attorney filed an answer to the guest's complaint, generally denying liability on the part of Beacon Hill or NP Dodge and alleging contributory negligence to a degree sufficient to bar his recovery.

American Family's claims analyst wrote to Regent requesting that it share in the costs of the litigation attorney's

representation. The analyst explained that "it appears that both our policies have primary coverage." Therefore, "each insurer is to contribute in equal amounts until each has paid its applicable limit of insurance or none of the loss remains, which ever [sic] comes first."

In consideration of this letter, Regent suggested in its internal communications that "[d]ifferent court's [sic] might reach different results" but that NP Dodge could "make the argument" that "the fact of insurance coverage for [NP] Dodge is beside the point," because the claim did not "fall within those defined by the [liability and hold harmless] paragraph." Furthermore, the agreement required Beacon Hill to "have coverage for injury to property or persons arising out of the occupancy of the Property and is to name [NP Dodge] as an additional insured," but NP Dodge "has no similar requirement." Therefore, it could be argued that "[t]he fact that [NP] Dodge has coverage under a [Regent] Policy at a cost that it incurred for any lapse of other protection does not make such coverage applicable to this cause except as 'excess' for [NP] Dodge."

On October 30, 2006, Regent sent a letter to American Family advising that "at this time, we are unable to agree with your assessment regarding sharing in the defense of this matter and contributing one-half of the legal fees incurred by American Family." The October 30 letter "direct[ed] [American Family's] attention" to the hold harmless provisions of the management agreement and asserted that under this agreement, Beacon Hill must "defend and hold harmless [NP] Dodge." Regent asserted that "the fact that [NP] Dodge has insurance coverage is moot to the argument." Regent further stated:

> Paragraph 5 on page 3 [of the management agreement] clearly provides that the owner is to have coverage for injury to property or persons arising out of the occupancy of the property and is to name the agent as an additional insured. [NP] Dodge has no similar requirement. The fact that [NP] Dodge has coverage under a [Regent] policy at a cost that it incurred for any lapse of other protection does not make such coverage applicable to this loss except as "excess" coverage for [NP] Dodge.

American Family's claims analyst responded in a letter dated December 18, 2006:

> This letter is in response to your correspondence of October 30, 2006, in which you enclosed a copy of the Management Agreement between Beacon Hill . . . and [NP Dodge] and Amendment. I did not previously have that agreement. Based upon my review of that agreement and the policies, I do concur with your assessment regarding American Family's primary coverage of [NP Dodge].
>
> By copy of this correspondence to [other parties involved], I want to reiterate that at no time did American Family ever suggest that [NP Dodge] was not entitled to defense and indemnification under the American Family policy. Rather, I was simply investigating if there were other policies under which [NP Dodge] would also be owed primary coverage in this matter.

For a period of time, there were no further communications between American Family and Regent discussing the priority of coverage under their respective policies. Regent assumed that both its primary and umbrella policies would be excess to both the primary and umbrella coverage provided for in American Family's policies. Because Regent estimated the value of the underlying action to be less than the $6 million combined amount of coverage through American Family, it did not think it would ever be liable for a payout.

Regent hired its own litigation attorney to represent the interests of NP Dodge and to keep Regent informed of the underlying litigation. Regent instructed the attorney to "only monitor the litigation, and to not actively participate in the defense of my insured NP Dodge." According to Regent's claims analyst, had he known that American Family was not "providing a full defense and indemnification to my insured, NP Dodge," he would have instructed the litigation attorney to "take different action in the underlying litigation, including the filing of a cross-claim against Beacon Hill for indemnification pursuant to the property Management Agreement."

American Family's litigation attorney generally kept Regent's litigation attorney abreast of the matters pertaining to

the underlying lawsuit by the guest. At no point did American Family discourage Regent's more direct involvement. American Family's litigation attorney provided Regent's litigation attorney with hard copies of all the depositions taken during discovery. American Family's litigation attorney also provided Regent's litigation attorney with copies of motions filed and court orders in the case. Regent has no complaints regarding the performance of American Family's litigation attorney in the underlying action.

American Family's litigation attorney sought partial summary judgment on the issue of whether NP Dodge's assistant property manager was acting within the scope of her employment at the time of the fall. That motion was overruled on August 28, 2008. Another motion for summary judgment brought on behalf of both Beacon Hill and NP Dodge was overruled on April 2, 2009. In its April 2 order, the court directed the parties to submit to mediation on or before June 1. American Family's litigation attorney apprised Regent's litigation attorney of these matters in a letter dated April 3, 2009.

On April 21, 2009, Regent sent a letter to American Family noting an upcoming scheduled mediation for May 2, "as a courtesy to remind American Family of its duties to our insured, NP Dodge . . . , as an additional insured on the American Family Policy." The letter also took "this opportunity to remind you of the duties owed to [Regent] as the excess carrier in this matter." Finally, Regent stated:

> It is our understanding that American Family maintains a $1 million underlying policy with a $5 million umbrella, providing total available coverage of $6 million. It is our position that this case has a settlement value within those policy limits and that our insured and [Regent] should not be exposed to any excess exposure.

On May 1, 2009, American Family sent a fax in response to Regent's letter, which American Family said it had not received until April 28. American Family stated:

> While we agree with your assertion that we owe a duty to both Beacon Hill and NP Dodge to act in good faith in handling this claim we also assert that you owe the

> same duty to your insured. Based on your good faith obligation to your insured, we believe it is imperative that a representative of [Regent] appear at the mediation on May 2, 2009.

American Family further stated in the May 1, 2009, fax:

> As expressed in an earlier communication, American Family's coverage under the Business Owner Package Policy (BOPP) policy [sic] is the primary insurance for Beacon Hill and NP Dodge. Contrary to your statement in your letter dated April 21, 2009, the [Regent] commercial liability policy . . . is also a primary policy.

Setting forth various policy provisions, American Family explained it did "not agree with your assertion that American Family has $6 Million in coverage before the [Regent] policies." American Family stated its position that its $1 million primary policy was first, then Regent's primary policy, then both umbrella policies on a pro rata basis.

Regent did not participate in the mediation. During the mediation, American Family's litigation attorney reached a tentative settlement with the guest. The settlement was signed on June 10, 2009. It released all liability for Beacon Hill, NP Dodge, American Family, and Regent in exchange for an initial payment of $2 million and monthly payments of $4,375.20 for 25 years. American Family reserved any rights of contribution against Regent. American Family, pursuant to the settlement, paid the guest $3.5 million. Regent has not paid anything toward the settlement. Regent concedes that the settlement was fair and reasonable.

5. Current Suit for Contribution

American Family sued Regent for equitable contribution toward the payment it made to the guest under the settlement agreement. American Family's complaint alleged that "American Family's and Regent's liability and excess/umbrella coverages applied to at least one of the two defendants in the personal injury case (Beacon Hill and [NP] Dodge), applied to the same risk and loss, and applied to the same potential liability and exposure." The complaint further alleged that

American Family had borne more than its share of the "common obligation" from Regent. American Family asked for reimbursement of $1 million plus four-ninths of the cost of future monthly payments under the settlement.

In Regent's answer, it generally denied the allegations and affirmatively asserted the defense of estoppel, lack of privity, waiver, and unjust enrichment. American Family and Regent filed cross-motions for summary judgment.

American Family asserted in its motion for summary judgment that, as a matter of law, Regent's primary and umbrella coverages applied to the underlying injury claims and that no policy provision or other agreement negated Regent's obligation to pay damages under those coverages. At the hearings on the motions for summary judgment, American Family elaborated that both companies' insurance policies insured the same risk and the same loss.

Regent's motion for summary judgment generically asserted that there was no material issue of fact preventing summary judgment in its favor. At the hearing on the motions, Regent argued that American Family's claims analyst conceded in the December 18, 2006, letter that both American Family's primary policy and its umbrella policy were in "first position" before either of Regent's policies. Regent argued that the May 1, 2009, fax came too late to retract this concession and that American Family was equitably estopped from seeking contribution. In the event equitable estoppel did not apply, Regent argued:

> They settle it on their nickle [sic], and this is an attempt to try to essentially subrogate in a way that's not permitted under the Royal case we cite in our brief, to recover monies they chose to pay to settle the case where they are responsible for getting it resolved within their limits, if they can, on a primary basis, both of their policies; primary with respect to ours.

The district court granted summary judgment in favor of American Family. In its order, the court set forth Regent's defense as arguing that (1) a direct action against Regent is not allowed under Nebraska law and (2) equitable estoppel bars American Family's claim.

The court concluded that a direct action for contribution was proper. The court distinguished *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*,[1] in which we held that lack of privity barred one joint tort-feasor's insurer's contribution action against the other tort-feasor's insurer, but not the insurer's action against the tort-feasor. The district court explained that American Family presented a case where the insurers shared a joint insured and both provided coverage for the accident in question. The court explained that one insurer can seek contribution from another when both policies insured the same risk. The court explained that insuring the same risk does not require that each insurer provided coverage to all the same policyholders.

The court rejected any argument that the management agreement overrode the respective insurance policies regarding priority of payment.

The court also rejected Regent's estoppel argument. The court found that there was no evidence from which a fact finder could conclude that any American Family representative misrepresented a material fact, as opposed to expressing a mere opinion. The court said that any statements by American Family about paying for NP Dodge's defense were irrelevant, because American Family did not seek contribution on defense costs. In any event, there was no evidence that American Family's claims analyst had the authority to change the terms of the policies. Finally, the court found no evidence that Regent had changed its position or proposed course of action in reliance on any representations by American Family.

The court then concluded that American Family had paid more than its pro rata share of a joint obligation:

> Each insurer . . . had $ 1 million in primary liability coverage. Above that, American Family had $ 5 million in excess coverage and Regent $ 4 million in excess coverage. Whether viewed as concurrent obligations to pay under their primary liability coverages, or that American

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[1] *Royal Ind. Co. v. Aetna Cas. & Sur. Co.*, 193 Neb. 752, 229 N.W.2d 183 (1975).

> Family would pay under its primary liability coverage and then Regent under its, each insurer owed $ 1 million initially. That accounts for $ 2 million of the $ 3.5 million settlement amount. For the remaining $ 1.5 million, each insurer owed "our share" pursuant to the umbrella/excess coverage language of the policies. That means five-ninths of the obligation be borne by American Family and four-ninths by Regent.

Accordingly, the court entered judgment in favor of American Family in the amount of $1,666,666. The court overruled Regent's motion to reconsider, alter, or amend the order. Regent appeals.

III. ASSIGNMENTS OF ERROR

Regent assigns that the district court erred in granting summary judgment in favor of American Family and in denying summary judgment in favor of Regent.

IV. STANDARD OF REVIEW

[1] On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[2]

[2] The interpretation of an insurance policy presents a question of law that we decide independently of the trial court.[3]

[3] In reviewing a summary judgment, an appellate court views the evidence in a 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.[4]

[4] 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

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[2] *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013).

[3] *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

[4] *McKinney v. Okoye*, 287 Neb. 261, 842 N.W.2d 581 (2014).

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.[5]

V. ANALYSIS

[5,6] Contribution is an equitable remedy given to the party who pays a debt that is concurrently owed by another party.[6] The existence of a "common obligation" makes the right to contribution possible.[7] Among insurers, the right to contribution arises in two basic circumstances: (1) An insurer of a joint tort-feasor has paid all, or greater than its share, of a loss, and (2) a single insured is covered by concurrent or "double" insurance, and one insurer paid all, or greater than its share, of a loss.[8]

[7,8] In the second circumstance, that of concurrent insurers, it is said that contribution is proper only where the policies insure the same entities, the same interest in the same property, and the same risk.[9] When considering whether insurance policies cover the "same risk," it is not necessary that the policies provide identical coverage in all respects.[10] As long as the particular risk actually involved in the case is covered by both policies, the coverage is concurrent, and contribution will be allowed.[11]

These basic principles of contribution among insurers are not easily applied, however. Indeed, few areas in the field of insurance law give courts and parties more difficulty than that of duplicating or overlapping insurance.[12] Part of the

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[5] *Peterson v. Homesite Indemnity Co.*, 287 Neb. 48, 840 N.W.2d 885 (2013).

[6] 2 Warren Freedman, Freedman's Richards on the Law of Insurance § 12:3 (6th ed. 1990).

[7] *Id.* at 337.

[8] 15 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 217:4 (2005).

[9] *Id.*, § 218:3.

[10] See *id.*, § 218:6.

[11] See *id.*

[12] See 8A John Alan Appleman & Jean Appleman, Insurance Law and Practice § 4906 (1981).

difficulty stems from the reality that a perfect commonality of obligation does not exist in the real world:

> Unfortunately, there is no uniformity as to the rules of apportionment and contribution since true concurrency of policies never does exist. It is veritably impossible for the insurance policies to relate to the same subject matter, against the same risk, for the same insured or interest, and at the identical time.[13]

[9] Moreover, because contribution lies in equity, there is no definitive rule applicable in every case in light of varying equitable considerations which may arise and which affect the insured and the primary and excess carriers.[14] Thus, in determining whether one insurer is entitled to contribution from another, courts consider the nature of the claim, the relation of the insured to the insurers, the particulars of each policy, and any other equitable considerations.

1. Arguments

American Family and Regent compound the inherent difficulty with legions of changing arguments as to whether they share a common obligation toward the guest's settlement, how to determine each parties' share of the loss, and whether other principles apply to bar contribution in this case. The most plentiful arguments come from Regent.

Broadly, Regent believes it should have to pay nothing toward the settlement that released Regent and its named insured, NP Dodge—which indisputably had a primary policy and an umbrella policy with Regent providing commercial general liability and bodily injury coverage. In contrast, American Family argues that its primary policy was liable for the first $1 million of the settlement with the guest, but that the second $1 million of the settlement should have been Regent's share of the obligation under Regent's primary policy and that their respective umbrella policies should have shared the last $1.5 million in future payments pro rata.

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[13] 2 Freedman, *supra* note 6, § 12:2 at 326.

[14] *Fire Ins. Exchange v. American States Ins.*, 39 Cal. App. 4th 653, 46 Cal. Rptr. 2d 135 (1995).

(a) Claims Adjuster Correspondence

But we summarize with more particularity the evolution of the parties' theories, as each party accuses the other of raising issues for the first time on appeal, and Regent asserts estoppel based on early communications between the claims adjusters. We begin with the internal and external correspondence of the claims adjusters. We find this correspondence, for the most part, vague.

It appears, especially in later communications, that Regent relied on the management agreement to support its theory that it was not liable to contribute toward any loss. Alternatively, Regent thought it was an "excess carrier." By the time of its April 21, 2009, letter, Regent clearly explained to American Family its belief that it was not liable to contribute toward any loss until the total $6 million in coverage under both the primary and umbrella policies with American Family was exhausted.

American Family, in its early correspondence, seemed to accept that under the hold harmless provision of the management agreement, American Family would not be reimbursed for legal fees incurred by its counsel in representation of Beacon Hill and NP Dodge. Beyond that, it is unclear what American Family meant when it wrote on December 18, 2006, "I do concur with your assessment regarding American Family's primary coverage of [NP Dodge]." We disagree with Regent's assessment that, through this statement, American Family "expressly agreed with and stipulated to Regent's analysis, indicating that it would treat the American Family policies, which provided $6 million in coverage, as primary coverage."[15] By the time of the May 1, 2009, fax, which was responding to Regent's April 21 letter stating clearly for the first time its position that it was not liable until $6 million was exhausted, American Family more clearly stated its belief that its primary policy was liable first, Regent's primary policy was second, then the umbrella policies would share the remaining liability on a pro rata basis.

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[15] Brief for appellant at 23.

(b) Arguments Before District Court

American Family's contribution action before the district court sought this same distribution of the shared obligation on the settlement; i.e., American Family primary, Regent primary, and American Family and Regent pro rata. The complaint alleged that the American Family and Regent policies applied to "at least one of the two defendants in the personal injury case (Beacon Hill and [NP] Dodge), applied to the same risk and loss, and applied to the same potential liability and exposure." American Family alleged it had borne more than its share of the parties' common obligation.

At the hearing on the parties' cross-motions for summary judgment, Regent no longer pressed any argument based on the management agreement. Regent instead argued that American Family's December 18, 2006, response to Regent's management agreement theory estopped American Family from claiming contribution.

Regent alternatively argued that a lack of privity barred American Family's claim. And, alternative to that, Regent argued that both American Family policies were primary to both Regent policies. Regent's underlying theory as to why its primary policy was secondary to American Family's umbrella policy is not clear from the record.

American Family apparently took the stance that sharing either one or both the same entities jointly and severally liable to the guest rendered a common obligation under the settlement. And, as far as the record reflects, this underlying legal contention was not a point of dispute. Regent did not argue that as a matter of law, contribution is improper when only one insured is common to the two insurers. In granting summary judgment for American Family, the district court explicitly reasoned that sharing the requisite common obligation does not require that each insurer provided coverage to all the same policyholders.

Although all the relevant policies were before the district court, neither party asked the court to address whether Beacon Hill, like NP Dodge, was a coinsured under both the American Family and Regent policies for the "same risk" involved in

the guest's action. And the court's reasoning would have made such determination unnecessary. Regent has never denied that NP Dodge was a coinsured under both the American Family and Regent policies for the "same risk."

Neither Regent nor American Family asked the district court to apportion the underlying fault of Beacon Hill and NP Dodge for the guest's injuries. Only as part of its estoppel argument did Regent bemoan the fact that had it known American Family was not covering the first $6 million, it would have taken more action to differentiate NP Dodge's liability from Beacon Hill. The reason why Beacon Hill believed such apportionment of fault mattered for purposes of the contribution action was not fully clear.

The record reflects no argument by Regent that the district court should consider as the parties' common obligation only one-half of the settlement amount. And Regent did not raise before the district court any issues pertaining to Neb. Rev. Stat. § 25-21,185.10 (Reissue 2008).

(c) Arguments on Appeal

In this appeal, Regent continues to assert estoppel, but it no longer alleges lack of privity as a defense to American Family's contribution action. Regent instead now argues that there was no common obligation as a matter of law, because the insurers did not insure all the same insureds. Regent still does not dispute that it insured NP Dodge for the same risk as NP Dodge was insured for with American Family, but it now explicitly denies such concurrent coverage of Beacon Hill.

Regent argues that there can be no contribution based on the joint and several liability of separate insureds with separate insurers. Alternatively, if there could be contribution based on joint and several liability, Regent argues that under § 25-21,185.10, NP Dodge, and thus Regent, would be jointly and severally liable only for economic damages, but not noneconomic damages. Therefore, according to Regent, no apportionment could be proper without allocation of fault and allocation of economic versus noneconomic damages. Furthermore, Regent argues that there can be no joint and

several liability if there is no liability and that "such liability was never determined in the underlying litigation."[16]

Regent argues further that if American Family and Regent are concurrent insurers or otherwise liable in contribution because they insure a joint tort-feasor, then only that share of the total damages attributable to the fault of NP Dodge is the common obligation for which it would owe contribution. Since American Family failed to present evidence upon which the district court could have allocated the respective fault of Beacon Hill and NP Dodge, Regent argues the court should have granted summary judgment in Regent's favor. At the very least, Regent asks that we remand for an allocation of fault or that we apportion liability upon only one-half of the total settlement amount. Regent argues that the district court's order "forced Regent to pay part of Beacon Hill's share of the liability, even though Regent did not insure Beacon Hill."[17]

In response, American Family continues to assert that the commonality of one insured—especially in the case of joint and several liability with the other insured—satisfies the common obligation element of contribution. American Family alternatively asserts that Beacon Hill is, in fact, a coinsured under all the policies at issue. American Family argues that fault is normally not the appropriate measure of apportionment of the common obligation; rather, one looks primarily to the policies to evaluate the extent of the respective insurer's obligations. American Family gives numerous reasons why it believes there is no merit to Regent's estoppel argument.

Regent argues in its reply brief that we cannot consider whether Beacon Hill was concurrently insured by both American Family and Regent, because American Family did not argue that point before the district court. We ordered supplemental briefing on the issue of whether Beacon Hill was a coinsured under all policies. This spurred an astounding number of new arguments regarding Regent's coverage of Beacon Hill.

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[16] *Id.* at 16.

[17] Reply brief for appellant at 1.

To summarize these arguments, Regent asserts that Beacon Hill was not insured under its umbrella policy, because there was no "additional insured endorsement" in that policy. As to its primary policy, Regent argues that Beacon Hill is covered only for claims arising out of NP Dodge's work on premises NP Dodge owns, rents, leases, or occupies. Therefore, Beacon Hill was not covered for the "same risk" as its coverage with American Family. Furthermore, Regent points to the coverage limitations in the additional insured endorsement and argues that NP Dodge did not own, rent, lease, or occupy the Beacon Hill premises and that the accident did not arise out of NP Dodge's work. Regent further asserts that Beacon Hill was not covered under the Regent policy for the "same risk," because the additional insured endorsement stated that the primary policy's coverage of the additional insured was "excess." Finally, Regent argues that the professional services exclusion applies to bar all coverage of Beacon Hill for the guest's accident. American Family makes several arguments denying these claims and explaining why it believes that Beacon Hill is a coinsured for the same risk under both Regent's and American Family's primary and umbrella policies.

We find that the decisive issues in this case may be determined as a matter of law. Therefore, summary judgment was appropriate. For the reasons further described below, we affirm the district court's determination that contribution can be had between these two insurers who share a common insured. We find that the specific allocation of that shared obligation is a matter of equity, and in our de novo review of that determination, we agree with the district court's division based on the other insurance provisions of the respective policies. Viewing the record in a light most favorable to Regent, we find no dispute of fact that would change those conclusions.

2. Subrogation Issues for Joint Tort-Feasors Versus Joint Insureds

Regent is correct that some contribution cases under the first kind of contribution, on the basis of joint tort-feasor liability,

apply subrogation principles.[18] Sometimes called "reimbursement by subrogation" actions,[19] apportionment in such joint tort-feasor contribution actions may be dependent upon the tort-feasors' respective fault.[20] Other questions as well, such as the ability to directly sue the tort-feasor's insurer[21] or the applicability of a joint tort-feasor statute, may arise.[22]

Such joint tort-feasor contribution actions are rare. We note that in at least one case where contribution was based solely on the joint and several liability of separate insurers, the court apportioned the loss in the same manner as would be done between concurrent insurers, dispensing with any explicit apportionment of fault or other subrogation-type issues.[23]

[10] The right of equitable contribution under the second circumstance—between concurrent insurers—is not in any way based on principles of subrogation to the rights of the insured against the party legally responsible.[24] The insurer seeking indemnification against a concurrent insurer does so entirely in its own right.[25]

[11] The inquiry between concurrent insurers is simply whether, under its policy with the insured, the nonparticipating

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[18] *U. S. Fire Ins. v. State Farm Ins.*, 246 Ark. 1269, 441 S.W.2d 787 (1969); *Reliance v. General Star Indem. Co.*, 72 Cal. App. 4th 1063, 85 Cal. Rptr. 2d 627 (1999); 2 Allan D. Windt, Insurance Claims & Disputes: Representation of Insurance Companies and Insureds § 7:1 (6th ed. 2013).

[19] *Reliance v. General Star Indem. Co., supra* note 18.

[20] See, *Fire Ins. Exchange v. American States Ins., supra* note 14; *American States Ins. Co. v. Hartford Accident & Indemnity Co.*, 218 Kan. 563, 545 P.2d 399 (1976).

[21] See *Royal Ind. Co. v. Aetna Cas. & Sur. Co., supra* note 1.

[22] See, generally, 15 Russ & Segalla, *supra* note 8, §§ 218:33 and 218:37.

[23] See *Fire Ins. Exchange v. American States Ins., supra* note 14. But see, *U. S. Fire Ins. v. State Farm Ins., supra* note 18; *American States Ins. Co. v. Hartford Accident & Indemnity Co., supra* note 20.

[24] See *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 77 Cal. Rptr. 2d 296 (1998).

[25] 15 Russ & Segalla, *supra* note 8, § 217:5.

coinsurer had a legal obligation to provide a defense or indemnity coverage for the claim or action prior to the date of the settlement.[26] In this sense, equity provides no right for an insurer to seek contribution from another insurer who has no obligation to the insured.[27] Further, an insurer will normally be compelled to contribute no more than the limits fixed in its policy.[28] Nevertheless, contribution in a concurrent insurer scenario is a right of the insurer flowing from equitable principles designed to accomplish ultimate justice in the bearing of a specific burden.[29] It is a right independent of the rights of the insured.[30]

[12] There is therefore little question that liability for the loss among concurrent insurers should be allocated without regard to comparative fault or other subrogation-related questions such as lack of privity or the applicability of a contribution-among-joint tort-feasors statute.[31] Such questions are irrelevant to the underlying contractual obligations for a covered occurrence.[32] Moreover, a contribution rule based on apportionment of fault "would hamper settlements and require the defendant to prove its own fault before the defendant's insurer could seek equitable contribution."[33]

The only case in Nebraska concerning a concurrent insured is *State Farm Mut. Auto. Ins. Co. v. Union Ins. Co.*[34] The driver who was involved in an accident with a deer was covered under both his father's automobile insurance and

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[26] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wash. 2d 411, 191 P.3d 866 (2008).

[27] *Id.*

[28] 16 Mark S. Rhodes, Couch Cyclopedia of Insurance Law § 62:15 (1983).

[29] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co., supra* note 26.

[30] *Id.*

[31] See *Fireman's Fund Ins. Co. v. Maryland Cas. Co., supra* note 24.

[32] *Fire Ins. Exchange v. American States Ins., supra* note 14.

[33] *Id.* at 663, 46 Cal. Rptr. 2d at 140.

[34] *State Farm Mut. Auto. Ins. Co. v. Union Ins. Co.*, 181 Neb. 253, 147 N.W.2d 760 (1967).

the automobile insurance of the parties in possession of the vehicle, which had been loaned to them by a repair shop, and who gave the driver permission to use the vehicle. One insurer paid the damages resulting from the collision and sought to recover from the other insurer one-half of the sums paid. Both policies had excess insurance clauses. We held that the excess insurance clauses were mutually repugnant, explaining, "If literal effect were given to the clauses in both policies, the result would be that neither policy covered the loss, and thus produce an unintended absurdity."[35] We observed that the parties failed to present evidence as to the exact amount of coverage of each policy or of the premiums paid, upon which pro rata apportionment could have been made. "In any event," we concluded that "where both companies stand on an equal footing, equity requires an equal apportionment of the loss."[36]

3. Concurrent Insurer Analysis in Hybrid Scenario

The parties' apparent confusion in this case is perhaps understandable. For if we were to accept Regent's contention that Beacon Hill is not insured under the respective American Family and Regent policies for the "same risk," then this is a hybrid of the two kinds of contribution: (1) an insurer of a joint tort-feasor which has paid all, or greater than its share, of a loss and (2) a single insured which is covered by concurrent or "double" insurance, and one insurer paid all, or greater than its share, of a loss.

We have not addressed a situation where some, but possibly not all the insureds, are covered for the same risk. And legal authorities fail to explain whether insuring the "same entities" for purposes of a concurrent insurer analysis means ensuring all of the same entities, as Regent assumes.

But a handful of cases have considered this question. In the majority of those cases, at least where the insureds are also joint tort-feasors, courts have found the settlement determinative of

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[35] *Id.* at 258, 147 N.W.2d at 763.

[36] *Id.* at 259, 147 N.W.2d at 763.

the insureds' liability and have apportioned the contribution in accordance with set principles applicable to the policies' other insurance provisions.[37] In other words, these courts apply a concurrent insurer analysis to hybrid facts. The respective fault of the tort-feasors, contribution-among-joint tort-feasor statutes, questions of privity, and so on, are not considered relevant. These courts consider the entire loss caused by the joint tort-feasors to be the joint obligation under the policies in question.

Thus, in *Towne Realty, Inc. v. Safeco Ins. Co. of America*,[38] one insurer covered both the apartment owner and the apartment manager and two other insurers insured only the manager. As in a standard concurrent insurer analysis, the court looked simply to the policy language to determine liability under the settlement that released the owner and manager of their alleged joint and several liability. The court found that the limits of the primary policy must first be exhausted, then the primary policy with an escape clause, then the umbrella policy.

Graphic Arts Mut. Ins. Co. v. Essex Ins. Co.[39] similarly presented a contribution action between an insurer of the apartment owner and the insurer of both the owner and the manager. As in a standard concurrent insurer situation, the court apportioned the common obligation of the entire settlement amount in accordance with the other insurance provisions of the policies. The court specifically rejected the argument that doing

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[37] See, *Towne Realty, Inc. v. Safeco Ins. Co. of America*, 854 F.2d 1264 (11th Cir. 1988); *Graphic Arts Mut. Ins. Co. v. Essex Ins. Co.*, 465 F. Supp. 2d 1290 (N.D. Ga. 2006); *Ariz. Jt. Underwriting Plan v. Glacier, Etc.*, 129 Ariz. 351, 631 P.2d 133 (Ariz. App. 1981), *disapproved on other grounds, National Indemn. Co. v. St. Paul Ins. Companies*, 150 Ariz. 458, 724 P.2d 544 (1986). See, also, *Nationwide Mut. Ins. Co. v. Hall*, 643 So. 2d 551 (Ala. 1994); *Home Ins. Co. v. Cincinnati Ins. Co.*, 213 Ill. 2d 307, 821 N.E.2d 269, 290 Ill. Dec. 218 (2004); *American States Ins. Co. v. CFM Const. Co.*, 398 Ill. App. 3d 994, 923 N.E.2d 299, 337 Ill. Dec. 740 (2010);. But see *MIC Property and Cas. v. International Ins. Co.*, 990 F.2d 573 (10th Cir. 1993).

[38] *Towne Realty, Inc. v. Safeco Ins. Co. of America, supra* note 37.

[39] *Graphic Arts Mut. Ins. Co. v. Essex Ins. Co., supra* note 37.

so would require the owner's insurer to contribute toward the manager's indemnity and defense. The court refused to "speculate and assume what the allocation of liability would have been had the case not settled."[40]

In *Ariz. Jt. Underwriting Plan v. Glacier, Etc.*,[41] two insurers (one providing primary coverage and the other providing umbrella coverage) insured the physicians, their practice, and the nurse, who were all sued by the injured patient as joint tort-feasors. Those two policies paid a settlement with the patient. But the nurse, individually, also had a primary liability policy. The court affirmed that the nurse's insurer should pay its policy limits in contribution to the other two insurers. The court reasoned that the question of the nurse's underlying liability had been resolved by the settlement; the nurse's insurer knew of the litigation and chose not to participate. And contribution was proper because "[t]he interest, as well as the risk and subject matter of the policies, were identical as to [the nurse]."[42] "[W]here all three insurers were liable in some degree to pay the judgment and only two insurers satisfied it, the parties wrongfully compelled to pay the loss are entitled to contribution from the one who paid nothing."[43] It would be a "windfall" to the nurse's primary insurer to pay nothing "merely because a fellow primary insurer had additional excess coverage."[44]

We agree with this line of cases that a traditional concurrent insurer contribution analysis based on the policy language may be appropriate regardless of whether all insurers cover all the same entities. And we find that under the undisputed facts presented, the equities make such a policy-based, concurrent insurer apportionment appropriate here. NP Dodge's liability for the guest's injuries was conclusively determined by the

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[40] *Id.* at 1299.

[41] *Ariz. Jt. Underwriting Plan v. Glacier, Etc., supra* note 37.

[42] *Id.* at 352, 631 P.2d at 134.

[43] *Id.* at 353, 631 P.2d at 135.

[44] *Id.* at 354, 631 P.2d at 136.

settlement, and any disputed allocation of fault within that liability is irrelevant.

4. Beacon Hill as Coinsured

In reaching this conclusion, we need not fully wade through the quagmire of arguments concerning whether Beacon Hill was, in all respects, covered for the "same risk" under both Regent's and American Family's policies. Yet, we cannot ignore that the policies before us establish as a matter of law that Beacon Hill was in some capacity also a coinsured under all the policies in question. This is properly part of our equity analysis that considers the nature of the claim, the relation of the insured to the insurers, the particulars of each policy, and any other equitable considerations.

Given Regent's own shifting theories, we have little sympathy for Regent's argument that we should take no notice of Beacon Hill's coverage under any Regent policy because it was not argued below. In any case, this issue was broadly presented by American Family's complaint for contribution and through its presentation of the policies to the district court.

Regent does not deny that, pursuant to the management agreement, Beacon Hill fell under Regent's primary policy definition of an additional insured, being "[a]ny person or organization whom you are required to add as an additional insured on this policy under a written contract or agreement . . . ."

We find no merit to Regent's argument that Beacon Hill was not an additional insured under the umbrella policy because there was no "additional insured endorsement" in that policy. The umbrella policy stated that it covered "[a]ny person or organization who is an additional insured in the 'underlying insurance.'"

We also find no merit to Regent's argument that Beacon Hill cannot be considered a coinsured because it did not tender its defense to Regent. In none of the cases cited by Regent did the insurer seeking to deny contribution have actual notice of the underlying litigation and hire independent counsel to

monitor that litigation.[45] Moreover, the case law cited by Regent is based in the "'selective tender' rule,"[46] which seeks to honor the insured's right to knowingly forgo the insurer's assistance.[47] There is no evidence that Beacon Hill made such a selective tender here.

We reject any argument by Regent pertaining to its coverage of Beacon Hill that asks this court to relitigate the fault of the parties discharged in the settlement. And, as will be discussed further below, Regent's excess clause under the additional insured endorsement does not convert the primary coverage into umbrella coverage, and, therefore, into coverage for a different risk.

But, for purposes of this opinion, we need not analyze the arguments surrounding Regent's additional insured coverage limitation that the accident arise out of NP Dodge's work or on premises occupied by NP Dodge. And we do not decide whether the professional services exclusion applied. It is sufficient for our purposes here to note that absent a successful argument that such coverage limitation or professional services exclusion applied, Regent would have been liable under its coverage of Beacon Hill for the guest's entire loss, up to the policy limits, had Beacon Hill and NP Dodge selectively tendered their defense to Regent or had American Family gone defunct. These coverage limitations and exclusion, added by Regent to its rather complicated additional insured endorsement, are a particularly weak basis for Regent's arguments that as a matter of law there is no joint obligation, or that it is inequitably being asked to pay Beacon Hill's share of liability.

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[45] See, *Casualty Indem. Ins. v. Liberty Nat. Fire Ins. Co.*, 902 F. Supp. 1235 (D. Mont. 1995); *John Burns Const. Co. v. Indiana Ins. Co.*, 189 Ill. 2d 570, 727 N.E.2d 211, 244 Ill. Dec. 912 (2000); *Chicago Hosp. Risk Pooling Program v. ISMIE*, 397 Ill. App. 3d 512, 925 N.E.2d 1216, 339 Ill. Dec. 95 (2010); *Mutual of Enumclaw Ins. Co. v. USF Ins. Co., supra* note 26.

[46] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co., supra* note 26, 164 Wash. 2d at 417, 191 P.3d at 871.

[47] *John Burns Const. Co. v. Indiana Ins. Co., supra* note 45; *Mutual of Enumclaw Ins. Co. v. USF Ins. Co., supra* note 26.

Most important to our analysis, however, is that even without Beacon Hill as an insured under Regent's policy, Regent could have been liable for the entire amount of the guest's loss up to its policy limits by virtue of its coverage of NP Dodge. NP Dodge paid significant premiums to Regent in order to cover the kind of occurrence alleged by the guest and conclusively determined by the underlying settlement, which Regent closely monitored at every stage. Because NP Dodge was undisputedly a coinsured for the same risk under all the policies, and the only other entity, Beacon Hill, was jointly and severally liable with NP Dodge, and was additionally a coinsured under all the policies for at least some risks, there is certainly no inequity in apportioning liability under a concurrent insurer analysis.

5. No Estoppel

We find no merit to Regent's argument that American Family is estopped from claiming contribution. Six elements must be satisfied for the doctrine of equitable estoppel to apply: (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct will be acted upon by, or influence, the other party or other persons; (3) knowledge, actual or constructive, of the real facts; (4) lack of knowledge and the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel.[48]

Regent's estoppel claim is based entirely on the claims adjuster communications that are in the record. Even viewing this evidence in the light most favorable to Regent, we do not find any of these elements have been met. Most fundamentally, we find no clear representation by American

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[48] *Becton, Dickinson & Co. v. Nebraska Dept. of Rev.*, 276 Neb. 640, 756 N.W.2d 280 (2008).

Family's claims adjuster that American Family conceded Regent's policy would not be liable on the guest's claim until both the American Family primary and umbrella policies were exhausted. The communications between the claims adjusters seem focused on sharing the immediate defense costs, rather than the ultimate apportionment of any settlement. It was wishful thinking for Regent to interpret American Family's statement in the December 18, 2006, letter, "I do concur with your assessment regarding American Family's primary coverage of [NP Dodge]," as a concession that both American Family's primary policy and its umbrella policy would come first.

This is especially true in light of the almost incomprehensible letter by Regent, sent October 30, 2006, which the December 18 letter was responding to. And we note that the statements in Regent's October 30 letter, which induced American Family's alleged concession, were always internally viewed by Regent with skepticism and have since been abandoned.

6. Application of Concurrent Insurer Analysis in This Case

[13-15] We turn now to the policies in question to determine the proper apportionment of Regent's and American Family's common obligation as concurrent insurers. For coverage to be concurrent for purposes of contribution, it must be at the same level—primary to primary or excess to excess.[49] Furthermore, the loss between the primary insurers should be apportioned before considering the excess insurers' exposure.[50] Among policies at the same level, absent compelling equitable reasons, courts should not impose an obligation on an insurer that contravenes a provision in its insurance policy.[51] In particular, where two carriers have responsibility for a claim, the other insurance clause of each policy must be examined to determine

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[49] See, e.g., 2 Windt, *supra* note 18, § 7:4.

[50] See *id.*, § 7:5. See, also, *St. Paul Mercury Ins. Co. v. Lexington Ins. Co.*, 78 F. 3d 202 (5th Cir. 1996).

[51] *OneBeacon Amer. Ins. Co. v. Fireman's Fund Ins.*, 175 Cal. App. 4th 183, 95 Cal. Rptr. 3d 808 (2009).

whether there exists language which may govern the contribution each party should make.[52]

(a) Which Policies Are Primary and Which Are Umbrella

In arguing that both its policies come after the $6 million in coverage under American Family's policies, Regent is essentially arguing that the excess insurance clause of its primary policy transforms that policy into an umbrella policy. We find no merit to this argument.

[16] A true excess insurance policy is one providing coverage conditioned upon the existence of a primary policy, which coverage does not begin until a loss exceeds a stated level.[53] Furthermore, in general, umbrella policy premiums are relatively small in relation to the amount of risk.[54] In addition to the language of the policies themselves, the $144,403 premium compared to the $22,522 make it clear which Regent policy was the primary policy and which was the umbrella policy.

[17] We agree with the majority of jurisdictions that hold that umbrella policies, as the only true excess insurance policies, incur liability only after the exhaustion of all other policies, including primary policies containing excess insurance clauses.[55] In other words, there is a difference between

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[52] *Universal Underwriters v. CNA Ins.*, 308 N.J. Super. 415, 706 A.2d 217 (1998).

[53] 15 Russ & Segalla, *supra* note 8, § 219:24.

[54] *Id.*, § 220:32.

[55] Michael E. DeFao, *Topical Survey of Rhode Island,* ***Insurance****—Determining Payment Priority Among Multiple Insurers Claiming Only Excess Liability*—Liberty Mutual Insurance Co. v. Harbor Insurance Co., 603 A.2d 300 (R.I. 1992), 27 Suffolk U. L. Rev. 551 (1993). See, also, *Allstate Ins. Co. v. American Hardware Mut. Ins. Co.*, 865 F.2d 592 (4th Cir. 1989); *Towne Realty, Inc. v. Safeco Ins. Co. of America, supra* note 37; *Allstate Ins. Co. v. Employers Liability Assur. Corp.*, 445 F.2d 1278 (5th Cir. 1971); *Allstate Ins. Co. v. Executive Car and Truck*, 494 So. 2d 487 (Fla. 1986); *U.S. Fire Ins. v. Maryland Cas.*, 52 Md. App. 269, 447 A.2d 896 (1982); *Pru. Prop. Cas. Ins. Co. v. New Hamp. Ins. Co.*, 164 N.J. Super. 184, 395 A.2d 923 (1978); *NFU v. Farm and City Ins. Co.*, 689 N.W.2d 619 (S.D. 2004); 8A Appleman & Appleman, *supra* note 12, § 4909.85 (Cum. Supp. 2009); 15 Russ & Segalla, *supra* note 8, § 218:13.

a true excess policy providing coverage conditioned upon the existence of a primary policy, which coverage does not begin until a loss exceeds a stated level, and a primary policy with devices by which the primary insurer attempts to limit or eliminate its liability where another primary policy covers the risk.[56] We conclude that the American Family and Regent primary policies were at the same level for purposes of contribution. We thus look to the other insurance clauses of those policies to determine contribution between them.

(b) Primary Policies

As to NP Dodge, there are compatible pro rata other insurance clauses for the concurrent Regent primary policies. As to Beacon Hill, however, there is American Family's pro rata other insurance clause versus Regent's excess other insurance clause.

That is a unique circumstance. Since our concurrency analysis rests primarily with the concurrency of NP Dodge alone, it is perhaps most proper to apply the compatible pro rata other insurance clauses. On the other hand, American Family has always conceded that its primary policy came "first" before Regent's primary policy. This is essentially a concession to American Family's excess other insurance clause.

American Family is correct that this is purely an academic question. Regardless of which excess insurance clauses we apply, the result in this case would be the same.

[18] Where an excess clause and a pro rata clause appear in concurrently effective policies, the pro rata clause is usually disregarded and full effect is given to the excess clause, making the pro rata policy the primary insurance.[57] If we were to apply this principle here, then Regent's comprehensive policy would be excess to American Family's business owner's package policy. However, the guest's loss exceeded the limits of either primary policy and they each have the same limit of

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[56] 15 Russ & Segalla, *supra* note 8, §§ 219:24 and 220:33.

[57] *Id.*, § 219:51. See, also, e.g., *Schal Bovis, Inc. v. Casualty Ins. Co.*, 315 Ill. App. 3d 353, 732 N.E.2d 1179, 247 Ill. Dec. 847 (2000). But see, e.g., *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, *supra* note 24.

$1 million. Therefore, each must contribute $1 million even if Regent's primary policy is considered "excess" to American Family's primary policy.

If we were to instead apply the pro rata clauses, American Family and Regent would likewise each have to contribute $1 million. Each having the same policy limits, their pro rata shares of the total loss up to their combined policy limits would have been equal.

Thus, under either theory, we conclude that the district court's distribution of the common liability of the primary policies was correct.

(c) Umbrella Policies

[19] There were competing excess other insurance clauses in the two umbrella policies. The interaction of two or more policies containing excess insurance clauses creates circularity and could provide a windfall to whichever insurer's policy is read first.[58] Thus, the rule adopted by the majority of jurisdictions, and by this court in *State Farm Mut. Auto. Ins. Co. v. Union Ins. Co.*, is that the excess insurance clauses are mutually repugnant and that the liability should be shared by the insurers pro rata in the proportion that their respective policy limits bear to the entire loss.[59]

While in *State Farm Mut. Auto. Ins. Co. v. Union Ins. Co.*, we apportioned the loss equally between the two insurers without regard to policy limits, the policy limits were not in the record in that case. The district court in this case had the

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[58] See, e.g., *State Farm Mut. Auto. Ins. Co. v. Bogart*, 149 Ariz. 145, 717 P.2d 449 (1986) (superseded by statute as stated in *Consolidated Enterprises v. Schwindt*, 171 Ariz. 452, 831 P.2d 828 (1991)); *Planet Ins. Co. v. Ertz*, 920 S.W.2d 591 (Mo. App. 1996); 8A Appleman & Appleman, *supra* note 12, § 4909 (Cum. Supp. 2009); Steven Plitt, The Claim Adjuster's Automobile Liability Handbook § 3:2 (2012), available at Westlaw CAALH.

[59] See, *Polenz v. Farm Bureau Ins. Co.*, 227 Neb. 703, 419 N.W.2d 677 (1988); *State Farm Mut. Auto. Ins. Co. v. Union Ins. Co., supra* note 34. See, also, *State Farm Mut. Auto. Ins. Co. v. Bogart, supra* note 58; *Planet Ins. Co. v. Ertz, supra* note 58; 8A Appleman & Appleman, *supra* note 12, § 4909 (Cum. Supp. 2009); 15 Russ & Segalla, *supra* note 8, §§ 217:9, 217:11, and 219:47; Plitt, *supra* note 58. See, also, Annot., 12 A.L.R.4th 993 (1982).

policy limits before it and was therefore able to divide pro rata the loss that remained after exhaustion of the two primary policies. Thus, Regent, under its umbrella policy, was liable in contribution to American Family for four-ninths of the cost of payments made and to be made to the guest under American Family's umbrella policy. We find that apportionment was correct.

VI. CONCLUSION

For all the reasons stated above, we agree with the district court's apportionment of the common obligation toward the guest's settlement. We affirm the district court's order granting summary judgment in favor of American Family.

AFFIRMED.

LEO W. HIKE, JR., AND JOANNA K. HIKE, HUSBAND AND WIFE, APPELLANTS, V. STATE OF NEBRASKA DEPARTMENT OF ROADS, APPELLEE.

846 N.W.2d 205

Filed May 9, 2014. No. S-12-1080.

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. **Judges: Evidence: Appeal and Error.** The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.
3. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
4. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
5. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.

6. **Eminent Domain: Words and Phrases.** Eminent domain is the inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking.
7. **Eminent Domain: Damages.** In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits.
8. **Real Estate: Valuation.** The market value of property includes its value for any reasonable use to which it may be put. If, by reason of its surroundings, its natural advantages, its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation. The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted? The adaptability must be reasonably probable, not merely possible. And the adaptability must be reasonably expected in the immediate future.
9. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.
10. **Expert Witnesses.** Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess.
11. **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.
12. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.
13. **Motions for Mistrial.** A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.
14. **Motions for Mistrial: Juries.** Generally, a mistrial is only warranted where unfairness has been injected into a jury trial and so permeates the proceedings that no amount of admonition to the jury can remove the unfairness to a party.
15. ____: ____. A trial court has considerable discretion in determining when an event occurring during a trial can be rectified by a cautionary instruction or is so prejudicial as to warrant a mistrial.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Affirmed.

Jason M. Bruno and Robert S. Sherrets, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Jon Bruning, Attorney General, and Martel J. Bundy for appellee.

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

STEPHAN, J.

Through its power of eminent domain, the State of Nebraska Department of Roads (NDOR) took certain real property owned by Leo W. Hike, Jr., and Joanna K. Hike, husband and wife, because it was needed for a highway project. The parties were unable to agree on appropriate compensation for the taking, and a jury trial was held to determine damages. After a 5-day trial, the jury returned a verdict in favor of the Hikes for $53,209. The Hikes filed this timely appeal, contending the trial court made various evidentiary and instructional errors which entitle them to a new trial. We find no error and affirm the jury verdict.

I. FACTS

The Hikes owned 6.7 acres of land legally described as the northeast quarter of Section 22, Township 13 North, Range 13 East of the 6th P.M., in Sarpy County, Nebraska. The property is located on the west side of U.S. Highway 75, just south of Platteview Road, in Bellevue, Nebraska. The Hikes purchased most of the property in 2001 and added an additional tract in 2003. The total purchase price was $260,000. The Hikes' property included an easement over a neighbor's adjoining property to a 30-foot-wide graded driveway which directly accessed Highway 75 at a point south of the Hikes' property. Prior to the taking, this driveway was the only means of access from the Hikes' property to a public road.

In May 2008, NDOR acquired 1.05 acres of the land, including the easement to the driveway and the access to Highway 75. After the taking, NDOR provided the Hikes temporary access to Platteview Road via a concrete driveway, and NDOR is legally obligated to provide the Hikes direct paved access to a newly constructed Platteview Road after the highway project is completed. After the taking, the Hikes no longer had direct access to Highway 75.

The primary issue at trial was the property's highest and best use as of May 2, 2008, the date of the taking. The nature and possible uses of the Hikes' pretaking access to Highway 75 was a critical factor in the highest and best use analysis.

Leo Hike is a real estate broker and serves as a Sarpy County commissioner. He formerly served as a Bellevue planning commissioner. He testified that prior to 2008, he intended to develop the property commercially using the 30-foot graded access onto Highway 75. He acknowledged that it would have been necessary to have the property rezoned in order to develop it commercially and that the city of Bellevue had zoning jurisdiction over his property. He further acknowledged that in 2008, the Bellevue Planning Commission's street design standards for commercial zoning access required a 50-foot right-of-way. Leo Hike thought the standards could be read to require only 25 feet of actual roadway so that his existing access would be sufficient to support commercial development. Alternatively, he thought the Bellevue City Council was likely to waive the 50-foot requirement so he could zone his property commercial with the existing driveway. He also testified that he thought he could obtain additional access to Highway 75, if needed, by purchasing it from the State of Nebraska.

Two appraisers and a commercial real estate developer testified on behalf of the Hikes as to their opinions that the highest and best use of the property before the taking was speculative holding for future commercial development. One appraiser testified that it would be possible to develop the property commercially with the existing driveway. He admitted on cross-examination that before the taking, the 30-foot driveway was "probably not wide enough" for commercial access, but testified that it was "reasonable to assume" that there could have been a solution to this problem which would have permitted commercial development prior to the taking.

The Hikes' other appraiser generally testified that the existing driveway was sufficient to support commercial development of the property. The real estate developer also testified that the property could be developed commercially based on the existing 30-foot graded driveway. These witnesses

generally testified that because the highest and best use of the property before the taking was holding it for future commercial development, its value was between $3 and $4 per square foot, or $130,680 to $174,240 per acre. They further testified that because the taking removed the property's access to Highway 75, after the taking, the highest and best use of the property was for residential use, reducing its value to between $20,000 and approximately $80,000 per acre.

In contrast, NDOR presented testimony of two appraisers and an engineer/land developer to the effect that the existing driveway was not sufficient to support commercial development and that therefore, the highest and best use of the property both before and after the taking was residential. The engineer/developer testified that the 30-foot graded driveway would not have supported commercial development. He opined that 36 feet of paved road would be needed for commercial traffic, but admitted on cross-examination that the development could perhaps be done with two 11-foot paved lanes. One appraiser opined that the 30-foot graded driveway would support residential use only. And appraiser George Tesar, Jr., testified the 30-foot driveway was adequate access for residential use but would not have supported commercial development of the land. These witnesses testified that because the highest and best use of the property before the taking was residential use, its value was between $25,000 and $35,000 per acre. They testified that the highest and best use after the taking remained the same, as did the value. They opined that the value was the same before and after the taking, because the access before and after the taking was substantially the same, even though its physical location had changed from Highway 75 to Platteview Road.

NDOR also introduced evidence that since 1957, it had owned all access rights from the Hikes' property to Highway 75, other than the 30-foot graded driveway. In addition, it introduced evidence that as early as 1998, it had planned to make Highway 75 a freeway and close all access points to it, and that the public had been made aware of these plans in 1998 and in the following years via public hearings. NDOR contended that this evidence demonstrated that it would never have granted

the Hikes any access to Highway 75 beyond what they possessed via the easement to the 30-foot graded driveway.

Additional relevant facts are set forth in our analysis of the Hikes' specific assignments of error.

II. ASSIGNMENTS OF ERROR

The Hikes assign that the district court erred in (1) allowing NDOR to offer evidence that it intended to take the Hikes' property a decade prior to the time it filed the condemnation petition, (2) failing to instruct the jury that it could not consider NDOR's intent to acquire the Hikes' property in considering fair market value, (3) allowing evidence and argument intended to diminish the taking, (4) failing to instruct the jury that the elimination of the Hikes' easement and access was compensable, (5) refusing to strike the testimony of appraiser Tesar, (6) not allowing appraiser Joel Walker to testify, (7) refusing to allow the Hikes to offer evidence of structural damage that diminished the fair market value of their property, (8) failing to grant a mistrial based upon a statement made by counsel for NDOR in his closing argument, and (9) refusing to grant the Hikes' motion for new trial.

III. STANDARD OF REVIEW

[1,2] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[1] The exercise of judicial discretion is implicit in determining the relevance of evidence, and a trial court's decision regarding relevance will not be reversed absent an abuse of discretion.[2]

[3] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the

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[1] *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013); *Simon v. Drake*, 285 Neb. 784, 829 N.W.2d 686 (2013).

[2] *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010).

evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.[3]

[4,5] Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[4] An appellate court reviews a denial of a motion for new trial or, in the alternative, to alter or amend the judgment, for an abuse of discretion.[5]

IV. ANALYSIS

[6,7] This is a condemnation proceeding involving the exercise of eminent domain by a governmental entity. Eminent domain is "'[t]he inherent power of a governmental entity to take privately owned property, esp[ecially] land, and convert it to public use, subject to reasonable compensation for the taking.'"[6] Under the Nebraska Constitution, "The property of no person shall be taken or damaged for public use without just compensation therefor."[7] In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits.[8]

The principal disputed issue at trial was the fair market value of the Hikes' property immediately prior to the taking, which depended on whether the property's highest and best use at the time was residential or commercial. It was undisputed that the property was zoned for residential use. But the Hikes contended that it had potential for commercial development in the future and, thus, had a higher value. NDOR, on the other

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[3] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Sturzenegger v. Father Flanagan's Boys' Home*, 276 Neb. 327, 754 N.W.2d 406 (2008).

[4] *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 3.

[5] *InterCall, Inc. v. Egenera, Inc., supra* note 3.

[6] *Pinnacle Enters. v. City of Papillion,* 286 Neb. 322, 333, 836 N.W.2d 588, 596 (2013), quoting Black's Law Dictionary 601 (9th ed. 2009).

[7] Neb. Const. art. I, § 21.

[8] *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003); *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (superseded by statute on other grounds).

hand, took the position that the property was not suitable for commercial development prior to the taking and therefore must be valued as residential property. The amount of the jury's verdict suggests that it agreed with NDOR.

[8] In Nebraska, the market value of property includes its value for any reasonable use to which it may be put.[9] If, by reason of its surroundings, its natural advantages, its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating compensation.[10] The proper inquiry is, what is its fair market value in view of any reasonable use to which it may be applied and all the reasonable uses to which it is adapted?[11] The adaptability must be reasonably probable, not merely possible.[12] And the adaptability must be reasonably expected in the immediate future.[13]

With these general principles in mind, we turn to the specific issues presented in this appeal.

1. Evidentiary Issues

(a) NDOR's Intent to Take

The Hikes contend the district court erred in receiving evidence that showed NDOR planned to acquire their property as early as 1998. The Hikes contend this evidence was used to diminish the pretaking fair market value of the property and to confuse the jury about what NDOR was actually taking. The specific evidence identified by the Hikes as improperly admitted includes several exhibits documenting the fact that NDOR began planning to build a restricted-access freeway within the Highway 75 right-of-way as early as 1998. These

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[9] *Johnson v. Nebraska Public Power Dist.*, 187 Neb. 421, 191 N.W.2d 594 (1971). See *Leffelman v. City of Hartington*, 173 Neb. 259, 113 N.W.2d 107 (1962).

[10] *Johnson v. Nebraska Public Power Dist., supra* note 9.

[11] *Id.*

[12] *Id.*

[13] *Id.*

exhibits were admitted or referenced during the testimony of an NDOR engineer who was NDOR's assistant design engineer on the Highway 75 project. He testified that because NDOR had planned to make Highway 75 a freeway as early as 1998, on the date of the taking, it would have been impossible for the Hikes to obtain additional access to Highway 75 from the State.

The Hikes contend that this evidence was improper, because it "led the jury to believe that the Hikes' access had already been taken and [NDOR] did not need to fully compensate the Hikes for the taking or that the Hikes' Property could never have any commercial value."[14] They also argue that the admission of the evidence, or at least the reference to it in NDOR's closing argument, violated Neb. Rev. Stat. § 76-710.01 (Reissue 2009), which provides in relevant part:

> Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property.

The Hikes contend that based on this statute, the fact that NDOR planned to take their access point to Highway 75 in connection with construction of the freeway could not be considered in determining the fair market value of their property prior to the taking.

We conclude that the challenged evidence was relevant to the Hikes' contention that their property had the potential for future commercial development and was therefore more valuable than its pretaking residential use would otherwise warrant. Contrary to the Hikes' contention, NDOR did not take the position at trial that it was not required to compensate the Hikes for the loss of their easement access to Highway 75. But it did contend, in response to the Hikes' claim that the property which they purchased in 2001 and 2003 had added value

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[14] Brief for appellants at 9.

because of its potential for future commercial development, that the easement access would not have permitted such development. Leo Hike testified that he thought the existing access was sufficient for commercial development, but that if it was not, he could have obtained additional access from the State. NDOR was entitled to rebut the inference created by this testimony by showing that it would never have granted additional access. NDOR presented evidence that prior to the taking, it owned all access rights to Highway 75 *except* the 30-foot easement access and that if the Hikes had sought to purchase additional access, it would have refused to sell because of its longstanding intent to build a restricted-access freeway adjacent to the Hikes' property. This evidence was clearly relevant to the question whether, prior to the taking, it was reasonably probable that the property could be adapted to commercial use and thus should be valued accordingly.

The admissibility of this evidence was not affected by the provisions of § 76-710.01. NDOR's evidence was not that the fair market value of the property was increased or decreased by the plans to construct the freeway, but, rather, that there was no reasonable expectation of acquiring additional access. We do not read § 76-710.01 to provide that a party may purchase property adjacent to a planned public improvement and then, when a portion of the property is taken for the improvement, insist that the property be valued on the basis of some potential future use that could never have occurred because of the planned improvement.

(b) Testimony of Appraiser Tesar

(i) Access

The Hikes assign that "the district court erred by allowing evidence and argument intended to diminish the taking." They argue that NDOR attempted "to repeatedly diminish the taking and confuse and mislead the jury by claiming that the elimination of access and the Hikes' easement . . . was not a compensable property right."[15] The only evidence identified by the Hikes with respect to this broad assignment of error is certain

[15] Brief for appellants at 16.

testimony of Tesar, one of the licensed real estate appraisers retained by NDOR to appraise the Hikes' property. Tesar testified that the only access to Highway 75 from the Hikes' property was the easement across the adjoining property and that, in his opinion, this would not have been adequate for any land use other than residential. Tesar testified without objection that the highest and best use of the Hikes' property, both before and after the taking, was residential.

The testimony the Hikes now contend was erroneously received was actually elicited in their cross-examination of Tesar. Referring to the Hikes' pretaking easement access to Highway 75, counsel asked Tesar if it was necessary for the State to file a lawsuit "[i]n order to stop the Hikes from driving in and out of that little strip there off Highway 75 . . . ." Tesar responded: "I don't believe so. They — the right-of-way, or the access — the control of access was purchased . . . prior to this condemnation. I believe it was February of '07, it [was] purchased." The Hikes argue that this testimony, which they elicited and did not move to strike, misled the jury into the belief that NDOR was not required to compensate the Hikes for the loss of their easement access to Highway 75.

The record does not support this argument. When Tesar was cross-examined further on this point, he testified that he did consider the Hikes' loss of access to be compensable and was actually told by NDOR to ignore the fact that the access point had been taken in the prior action involving the owner of that property. He denied that he had been told by NDOR not to assign any value to the Hikes' loss of access. On redirect examination, Tesar testified that NDOR told him to assume that the Hikes "still had access to their property using the easement over the [adjoining] property," which consisted of the 30-foot graded drive, and that he made this assumption in arriving at his opinions with respect to value.

The Hikes also argue that "[o]n several occasions," they made motions for mistrial, "because NDOR repeatedly insinuated and expressly told the jury that it did not have to compensate the Hikes for the easement or the access,"[16] and that

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[16] *Id.* at 17.

the court erred in overruling these motions. They cite to a single instance in which the district court overruled their motion for mistrial on various grounds, including a claim that NDOR "has been allowed to insinuate to the jury that [NDOR has] own[ed] this access since approximately 1998." This motion was unrelated to Tesar's testimony and was made immediately before the Hikes rested their case in chief.

[9] We need not consider the district court's ruling on this motion for mistrial because it was not specifically assigned as error. Errors argued but not assigned will not be considered on appeal.[17] However, from our review of the record, we find no argument or suggestion by NDOR that the Hikes' loss of easement access to Highway 75 should not be considered in determining their damages. NDOR's consistent position was that the easement access was a part of the taking, but that the access would not have been sufficient to support commercial development and that NDOR would not have granted any additional access which would have permitted commercial development. As we have noted, NDOR was entitled to make this argument in response to the Hikes' claim that their property was adaptable to commercial use immediately prior to the taking.

(ii) Value

Based on his opinion that the highest and best use of the Hikes' property before and after the taking was residential, Tesar testified without objection that just compensation for the taking would be $26,250 for the 1.05 acre tract and $320 for the new access easement. During cross-examination, the Hikes moved to strike Tesar's testimony regarding value and the court overruled the motion. The Hikes argue that this was error, relying on the proposition that an expert's opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant.[18]

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[17] *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013); *Bacon v. DBI/SALA*, 284 Neb. 579, 822 N.W.2d 14 (2012).

[18] See *Sorensen v. Lower Niobrara Nat. Resources Dist., supra* note 8.

The Hikes' argument focuses on the following colloquy during Tesar's direct examination:

> [Counsel for NDOR:] So [Leo] Hike had no access to the highway along the entire stretch of his property?
>
> [Tesar:] No physical or legal?
>
> Q. No legal.
>
> A. No legal access.
>
> Q. Would that be fair to say?
>
> A. Correct.

The Hikes argue that this was a misstatement of law and fact because it was undisputed that their 30-foot easement access to Highway 75 was included in the taking. But we read the question and Tesar's answer as focusing on the narrower question whether, prior to the taking, the Hikes had access directly from their property to Highway 75. And the record is clear that they did not; their only access was by way of the easement over the adjoining property to the south. As noted, Tesar acknowledged the loss of this easement and factored it into his opinion regarding the compensation to which the Hikes were entitled.

The Hikes also contend that Tesar's opinion was inadmissible because he failed to place any value on the loss of the easement or the access to Highway 75. Tesar testified that he did not place any value on the loss of the easement access to Highway 75 because it was his opinion that the replacement access provided by NDOR was equal to the lost access, so that there was no compensable loss. While this opinion may be disputed factually, it is not based on an improper or incorrect legal interpretation.

The Hikes also contend that Tesar's opinion was inadmissible because he based his opinion of the value of the property before the taking on "the very improvements that caused the taking."[19] During his testimony, Tesar generally admitted that he used the city of Bellevue's future land use plan when formulating his opinion. This plan was based on the completion and existence of the highway project, and thus

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[19] Brief for appellants at 22.

the Hikes contend this evidence also violated the principle of § 76-710.01 by inflating the value of the property before the taking based on the very project the property was taken for. The Hikes moved to strike Tesar's testimony because he relied on this plan.

On direct examination, Tesar stated that he relied on the future land use plan primarily to determine the possible zoning designations of the Hikes' property, but on cross-examination, he conceded that he also considered it in formulating his opinion that the highest and best use of the property was residential. Although this was an improper factual basis for Tesar's opinion, we conclude that it did not render his entire opinion inadmissible.

[10,11] Expert testimony should not be received if it appears that the witness is not in possession of such facts as will enable the expert to express a reasonably accurate conclusion, and where the opinion is based on facts shown not to be true, the opinion lacks probative value. The opinion must have a sufficient factual basis so that the opinion is not mere conjecture or guess.[20] Here, Tesar relied on one improper fact in formulating his opinion. But it is clear from his testimony that he did not exclusively or even substantially rely on that fact. Instead, it was simply one of many factors that he considered in forming an opinion as to the highest and best use of the land. And he was cross-examined about his use of the information. We conclude that his improper reliance on the future plan goes to the weight of his testimony, not its admissibility. 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.[21] The district court did not abuse its discretion in overruling the Hikes' motion to strike Tesar's testimony.

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[20] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011). See, also, *Sorensen v. Lower Niobrara Nat. Resources Dist., supra* note 8.

[21] *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012); *Richardson v. Children's Hosp., supra* note 2.

(c) Testimony of Appraiser Walker

Joel Walker was a former NDOR staff appraiser who conducted the appraisal for acquisition of the Hikes' property in accordance with NDOR's statutory duty to negotiate in good faith.[22] In this context, he had various communications with Leo Hike in 2005 and 2006 in which they discussed comparable sales.

Walker was not called by NDOR as a witness at trial. But the Hikes called him and attempted to elicit testimony that he told Leo Hike the property had commercial value and that he thought a commercial sale at 18310 Highway 370 was a comparable sale. NDOR objected to this testimony as irrelevant, and the district court refused to allow it. In this appeal, the Hikes contend Walker's testimony should have been admitted because it enhanced Leo Hike's testimony and impeached NDOR's credibility.

We addressed a similar issue in *In re Application of SID No. 384*.[23] There, the property owners attempted to introduce into evidence the original notice of acquisition filed by the condemnor, claiming it was filed before negotiations began and was admissible as an offer of the value of the property taken. We held that the district court did not abuse its discretion in excluding this notice, because it was a part of the statutorily required settlement negotiation which preceded the condemnation action and was therefore inadmissible pursuant to the provision of Neb. Rev. Stat. § 27-408 (Reissue 2008) which states that evidence of conduct or statements made in compromise negotiations is not admissible.

The purported statements by Walker to Leo Hike were likewise inadmissible under § 27-408. And we are not persuaded by the Hikes' argument that NDOR waived the protection imposed by § 27-408 by cross-examining Leo Hike with respect to statements he made to Walker. We note that the Hikes did not object to this cross-examination by NDOR. The fact that the Hikes failed to assert § 27-408 during the cross-examination of Leo Hike does not prevent NDOR

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[22] See Neb. Rev. Stat. § 76-704.01(6) (Reissue 2009).

[23] *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000).

from asserting irrelevancy based on § 27-408 during the Hikes' direct examination of Walker. The district court did not abuse its discretion in sustaining NDOR's objection to this testimony.

(d) Evidence of Structural Damage

Prior to trial, the court entered an order in limine preventing the Hikes from offering any evidence of structural damage caused to their home by the construction of the highway project. The Hikes made two offers of proof during trial and now argue that the exclusion of this evidence was prejudicial error because it prevented them from obtaining full compensation for the taking.

The Hikes argue that Nebraska law requires that a property owner be compensated for all "'property that is damaged'" by a taking "'in the sense that the market value of the property has been diminished even if the property is not actually taken.'"[24] While this is an accurate statement of the law, it is applied out of context. Any structural damage caused to the Hikes' home was not the proximate result of the taking, but, rather, was caused by conduct that occurred after the taking with respect to the use of the property by the condemnor or its contractors. Although the Hikes may have a remedy with respect to such damage, it is not compensable in this condemnation proceeding.[25]

2. Jury Instructions

(a) Intent to Take

The Hikes argue that even if the evidence with respect to NDOR's longstanding intent to acquire all access points along Highway 75 was admissible, as we conclude it was, the district court should have instructed the jury to not consider this intent in determining the fair market value of their property. In this regard, the jury was instructed:

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[24] Brief for appellants at 27, quoting *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[25] See, *Moyer v. Nebraska City Airport Auth.*, *supra* note 8; *Hansen v. County of Cass*, 185 Neb. 565, 177 N.W.2d 568 (1970).

> The "fair market value" of a piece of property is the price that someone ready to sell, but not required to do so, would be willing to accept in payment for the property, and that someone ready to buy, but not required to do so, would be willing to pay for the property.
>
> In determining fair market value, you may consider the uses to which the property has been put and the uses to which it might reasonably be put in the immediate future.

The Hikes requested that the following additional language be added to this instruction: "In determining the amount of compensation to be paid, you must not consider any change in the fair market value of the property caused by the public improvement or by the knowledge that the improvement would be constructed or that the access would be taken." The district court refused to include this language in the instruction.

The instruction given was taken from NJI2d Civ. 13.02, and the additional language requested by the Hikes is an optional portion under the pattern instruction. The comment to NJI2d Civ. 13.02 states: "Use only those parts of this pattern instruction as are appropriate under the pleadings and the evidence." It further states that the provision requested by the Hikes is to be used

> when there is a danger that the jury will conclude that, as a result of either the public improvement for which the property was acquired or the likelihood that the property would be acquired for such improvement, the value of the property increased or decreased immediately before the date of the taking.

On appeal, the Hikes assert that the additional paragraph of the instruction should have been given so that the jury was not misled by the evidence that NDOR intended to take the access point as early as 1998. The Hikes contend in their brief that "NDOR argued repeatedly that the Property could never be commercial because NDOR previously intended to acquire the access and would deny any request for the return of that access by the Hikes ***because*** Highway 75 was 'already planned

to be a freeway.'"[26] They also contend that NDOR took the position that it "had acquired the critical access needed to develop the Property commercially before the taking was instituted. This happened to be the very same access that NDOR acquired through the filing of the condemnation petition on May 2, 2008."[27]

But what NDOR actually argued was that the property could never be adapted to commercial use as it existed with the 30-foot access without acquiring more access from NDOR and that it would have denied any request for additional access because it planned to make Highway 75 a freeway. Contrary to the Hikes' contention, NDOR did not argue that at all times, it owned all access to Highway 75.

As we have noted, the fact that NDOR owned all access to Highway 75 other than that involved in the taking, and would not have been willing to sell additional access to the Hikes, was relevant to the disputed issue of whether, prior to the taking, the Hikes' property was adaptable to commercial development. These facts are distinguishable from those in *Mobeco Indus. v. City of Omaha*,[28] a case relied upon by the Hikes, in which we determined that the failure of the trial court to give the portion of NJI2d Civ. 13.02 at issue here was reversible error. In *Mobeco Indus.*, the City of Omaha condemned seven urban lots. By the time of trial on the issue of damages caused by the taking, the lots had already been partially improved. The court allowed the jury to view the property without instructing it to disregard any value added by the improvements. On appeal, we found this was error, because without an instruction to the contrary, the jury could have taken the improvements into account in determining the value of the property.

Here, no actual improvements were seen by the jury. And the evidence about NDOR's intent to construct the project was related only to the reasonableness of future commercial

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[26] Brief for appellants at 15-16 (emphasis in original).

[27] *Id.* at 14-15.

[28] *Mobeco Indus. v. City of Omaha*, 257 Neb. 365, 598 N.W.2d 445 (1999).

development as of the date of the taking. We conclude that the district court did not err in refusing to include the optional portion of NJI2d Civ. 13.02 requested by the Hikes.

(b) Compensability and Damages

The Hikes contend that the district court erred by failing to instruct the jury that the elimination of their easement access to Highway 75 was compensable. The issues, burden of proof, and elements of the Hikes' compensation are set forth in instruction No. 3 given by the court, to which there was no objection. That instruction is patterned after NJI2d Civ. 13.01, and its use was in conformity with the general rule that whenever applicable, the Nebraska Jury Instructions are to be used.[29] The instruction described the property taken by reference to an attached legal description which specifically stated that there would be "no ingress or egress over" a described control access line. The instruction further stated that the Hikes were entitled to recover:

> 1. The fair market value of the property taken at [its] highest or best use, figuring that value as [of] May 2, 2008.
>
> 2. Any decrease in the fair market val[u]e of the remaining property, to the extent that the decrease was proximately caused by the taking.
>
> 3. Reasonable value for the use of [the Hikes'] property for a temporary easement.
>
> 4. Reasonable abstracting expenses.

This instruction was a correct statement of the law and afforded a basis on which the Hikes could and did argue that they should be compensated for the loss of access to Highway 75.

The Hikes contend on appeal that the court erred in not giving NJI2d Civ. 13.06 or NJI2d Civ. 13.07. But there is no indication in the record that the Hikes ever requested that these instructions be given. And in any event, they are inapposite to

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[29] See, *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).

this case because they involve the taking of a new permanent easement over a condemnee's property. In this case, the existing easement in question was extinguished.

[12] The Hikes did request four jury instructions which consisted of legal principles generally stating the nature of a permanent easement and its compensability in a condemnation action. The district court declined to give these instructions. In reviewing a claim of prejudice from instructions given or refused, an appellate court must read the instructions together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence, there is no prejudicial error.[30]

The requested instructions are correct statements of the law. But we conclude that the Hikes were not prejudiced by the district court's refusal to give them. The issue in this case was not the fair market value of the Highway 75 access easement standing alone, but, rather, the value of the entire condemned tract, which included the easement, and any decrease in the fair market value of the Hikes' remaining property to the extent that the decrease was proximately caused by the taking. That, in turn, depended upon whether the easement would have been sufficient to permit future commercial development of the Hikes' property had it not been taken, which was the subject of conflicting evidence at trial. The instructions given by the court adequately instructed the jury on the measure of damages.

3. NDOR's Closing Argument

During closing argument, counsel for NDOR discussed the parties' different interpretations regarding the highest and best use of the property prior to the taking. Counsel then stated that the Hikes had "totally and completely failed to carry [their] burden in [their] argument to you that this property was — is commercial at all, let alone, in the immediate future." Counsel continued, "I don't want to — rarely do I get worked up in a

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[30] *Borley Storage & Transfer Co. v. Whitted, supra* note 29; *Pribil v. Koinzan*, 266 Neb. 222, 665 N.W.2d 567 (2003).

condemnation case. But, I've got to tell you, a million dollars? We're the Nebraska Department of Roads; we're not the Nebraska State Lottery." The Hikes immediately objected and moved for a mistrial. The court ordered the statement stricken, implicitly denying the motion for mistrial.

On appeal, the Hikes argue the reference to the state lottery was so inflammatory that a mistrial was warranted. They argue that the statement caused the jury to think about not just what the damages should be, but who was going to pay them. They contend a mistrial was warranted because there was no way to "'unring a bell.'"[31]

[13-15] A mistrial is appropriate when an event occurs during the course of a trial which is of such a nature that its damaging effects would prevent a fair trial.[32] Generally, a mistrial is only warranted where unfairness has been injected into a jury trial and so permeates the proceedings that no amount of admonition to the jury can remove the unfairness to a party.[33] A trial court has considerable discretion in determining when an event occurring during a trial can be rectified by a cautionary instruction or is so prejudicial as to warrant a mistrial.[34] We agree with the Hikes and the district court that the hyperbolic statement was improper. But it was an isolated event which hardly permeated the proceedings so as to prevent a fair verdict. The district court did not abuse its discretion in instructing the jury to disregard the statement and overruling the motion for mistrial.

4. Motion for New Trial

All of the grounds for new trial asserted by the Hikes were included in this appeal. We have found them to be without merit, and it necessarily follows that the district court did not err in overruling the motion for new trial.

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[31] Brief for appellants at 30.

[32] *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 3. See *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984).

[33] *State v. Archbold, supra* note 32.

[34] See *Sturzenegger v. Father Flanagan's Boys' Home, supra* note 3.

V. CONCLUSION

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

AFFIRMED.

CONAGRA FOODS, INC., APPELLANT, V. RYAN J. ZIMMERMAN, APPELLEE.

846 N.W.2d 223

Filed May 9, 2014. No. S-13-375.

1. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.
2. **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.
3. **Evidence.** Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.
4. **Trial: Evidence: Appeal and Error.** An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence.
5. **Injunction: Equity.** An injunction lies in equity.
6. **Equity.** Equity is not a rigid concept, and its principles are not applied in a vacuum.
7. ____. Equity is determined on a case-by-case basis when justice and fairness so require.
8. **Injunction.** An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
9. **Injunction: Trespass.** An injunction against trespassing will be granted where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land.
10. **Injunction: Proof.** The party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief.
11. **Criminal Law.** As a general rule, the prosecution of criminal offenses is normally a complete and sufficient remedy at law.
12. **Criminal Law: Injunction: Equity.** Where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by

injunction to prevent their commission, as they will not exercise their power for the purpose of enforcing criminal laws.

13. ____: ____: ____. A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution.
14. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
15. **Evidence: Proof.** For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded with directions.

Heidi A. Guttau-Fox and Christopher R. Hedican, of Baird Holm, L.L.P., for appellant.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

ConAgra Foods, Inc. (ConAgra), appeals the district court's denial of injunctive relief. ConAgra argues that the violent nature of Ryan J. Zimmerman's alleged trespass warrants injunctive relief enjoining Zimmerman from having any contact with ConAgra and its employees and restraining him from ConAgra property.

BACKGROUND

At approximately 5 a.m. on November 10, 2012, a white male drove a vehicle onto ConAgra's main campus in downtown Omaha, Nebraska. The man fired a gun five times at two window washers working on ConAgra property and then drove away.

On November 13, 2012, police arrested Zimmerman for the incident. The two window washers reviewed the photographs from television news reports and the Omaha World-Herald newspaper and positively identified Zimmerman

as the shooter. Zimmerman's estranged wife is a manager at ConAgra.

On November 15, 2012, ConAgra filed its complaint seeking a temporary restraining order, a preliminary injunction, and a 1-year permanent injunction enjoining Zimmerman from having any contact with ConAgra. ConAgra also served a "bar and ban" letter upon Zimmerman.

The district court entered a temporary restraining order. Zimmerman answered the complaint, and a hearing was held on ConAgra's request for permanent injunction.

At the hearing, ConAgra offered 21 exhibits. Exhibits 1 through 6 consisted of three petitions/affidavits for protection orders filed by Zimmerman's estranged wife and the three protection orders granted by the district court. Exhibits 7 and 11 through 14 are printouts containing Zimmerman's criminal history which were obtained from "JUSTICE," Nebraska's online trial court case management system. The exhibits also show that Zimmerman had posted bond for the charges associated with the alleged shooting. The district court sustained Zimmerman's relevancy objections on all of these exhibits.

Exhibit 8 is the "bar and ban" letter sent to Zimmerman by ConAgra. Exhibits 17 and 18 are the affidavits of the window washers, identifying Zimmerman as the shooter. Exhibit 19 is the affidavit from ConAgra security, and exhibit 21 is the complaint filed in this action. Each of these exhibits was admitted.

On April 1, 2013, the district court dissolved the temporary injunction and denied ConAgra's request for a permanent injunction. The district court relied on *Cox v. Sheen*[1] for the proposition that a single trespass does not give rise to injunctive relief. ConAgra appealed, and we moved the case to our docket.[2]

ASSIGNMENTS OF ERROR

ConAgra assigns that the district court erred in (1) sustaining Zimmerman's relevancy objections to exhibits 1 through 6

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[1] *Cox v. Sheen*, 82 Neb. 472, 118 N.W. 125 (1908).

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

and 11 through 14, (2) holding that Zimmerman's trespass was insufficient for injunctive relief, and (3) denying the permanent injunction.

STANDARD OF REVIEW

[1] An action for injunction sounds in equity. On appeal from an equity action, an appellate court tries factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the conclusion reached by the trial court.[3]

[2-4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[4] Determining the relevancy of evidence is a matter entrusted to the discretion of the trial court.[5] An erroneous exclusion of evidence is reversible only if the complaining litigant was prejudiced by the exclusion of such evidence.[6]

ANALYSIS

The issue presented by this appeal is whether ConAgra met its burden in establishing that Zimmerman is likely to trespass again and that the existing remedies at law are inadequate to remedy such a trespass. After reviewing the record, the uncontroverted facts sufficiently demonstrate that Zimmerman will again trespass in flagrant violation of criminal law upon ConAgra's property. Therefore, justice requires a 1-year permanent junction.

[5-7] An injunction lies in equity.[7] Equity is not a rigid concept, and its principles are not applied in a vacuum.[8] Rather,

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[3] *State ex rel. City of Alma v. Furnas Cty. Farms*, 266 Neb. 558, 667 N.W.2d 512 (2003).

[4] *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014).

[5] *Id.*

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

[7] See *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006).

[8] *Id.*

equity is determined on a case-by-case basis when justice and fairness so require.[9]

[8-10] An injunction is an extraordinary remedy, and it ordinarily should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.[10] An injunction against trespassing will be granted where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land.[11] The party seeking an injunction must establish by a preponderance of the evidence every controverted fact necessary to entitle him or her to relief.[12]

[11-13] As a general rule, the prosecution of criminal offenses is normally a complete and sufficient remedy at law.[13] We have stated that where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction to prevent their commission, as they will not exercise their power for the purpose of enforcing criminal laws.[14] However, a court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution.[15] For instance, we have upheld injunctive relief against a husband and wife who operated a private homeschool in continuing and flagrant violation of the State Department of Education's rules and regulations and Nebraska statutes.[16]

In cases involving serious violence, other courts have granted an injunction if there is a risk that the serious violent

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[9] *Id.*

[10] See *id.*

[11] See *id.*

[12] *Riha v. FirsTier Bank*, 248 Neb. 785, 539 N.W.2d 632 (1995).

[13] See *City of New York v. Andrews*, 186 Misc. 2d 533, 719 N.Y.S.2d 442 (2000).

[14] See *State, ex rel. Spillman, v. Heldt*, 115 Neb. 435, 213 N.W. 578 (1927).

[15] *State ex rel. Douglas v. Wiener*, 220 Neb. 502, 370 N.W.2d 720 (1985).

[16] *Id.*

act will be repeated again. For example, in *Emma Goldman Clinic v. Holman*,[17] injunctive relief was granted against a protestor who had undertaken aggressive demonstrations for more than a year outside of a clinic that performed abortions and who made threatening comments in a local newspaper. The court held that the plaintiffs lacked an adequate remedy to prevent the protestor from harming the clinic and its staff. The court thus placed restrictions on the protestor's actions to help prevent such harm. And in *State ex rel. Dobbs v. Burche*,[18] injunctive relief was granted after a landlord had raped one female tenant and had repeatedly harassed others. These cases, along with our precedent, indicate that an injunction can be granted, even when the criminal law is implicated, if the trespass is likely to be repeated in flagrant violation of the criminal law.

[14,15] But before addressing whether Zimmerman is likely to trespass again, we must determine whether the district court abused its discretion in sustaining Zimmerman's relevancy objections to exhibits 1 through 6 and 11 through 14. Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[19] For evidence to be relevant, all that must be established is a rational, probative connection, however slight, between the offered evidence and a fact of consequence.[20]

We find the excluded exhibits to be relevant evidence. Exhibits 1 through 6 and exhibit 11 demonstrate that Zimmerman's wife has had protection orders against him. The evidence establishes that Zimmerman's estranged wife works at ConAgra and that Zimmerman has previously harassed her. Therefore, the exhibits provide the relevant evidence

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[17] *Emma Goldman Clinic v. Holman*, No. 05-2097, 2006 WL 3436221 (Iowa App. Nov. 30, 2006) (unpublished disposition listed in table of "Decisions Without Published Opinions" at 728 N.W.2d 60 (Iowa App. 2006)).

[18] *State ex rel. Dobbs v. Burche*, 729 N.W.2d 431 (Iowa 2007).

[19] *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[20] *Id.*

of why Zimmerman may trespass again. Exhibit 12 is a JUSTICE report which demonstrated that Zimmerman was out on bond at the time of the hearing. Its relevance is obvious—if Zimmerman was held in jail for the shooting, he could not possibly trespass while incarcerated. Exhibit 13, another JUSTICE report, shows the charges Zimmerman faced from this incident. And finally, exhibit 14 is a JUSTICE report which shows that Zimmerman had a pending stalking charge at the time of the hearing, for which he had pled not guilty. Exhibits 13 and 14 provide a relevant connection between the past actions of Zimmerman and the likelihood he will trespass again, while also demonstrating his flagrant disregard for the criminal law.

After reviewing all of the relevant exhibits, we find that ConAgra established by a preponderance of the evidence every controverted fact necessary to entitle it to injunctive relief. The preponderance of the evidence established that ConAgra has a clear right to exclude Zimmerman from its private property, and Zimmerman provided no evidence to the contrary. The record also established that the damage could be irreparable should another similar trespass occur. And finally, the preponderance of the evidence established that the current remedies at law are inadequate to prevent a failure of justice because, despite possible criminal sanctions, all of the admitted evidence indicates that it is more likely than not that the trespass will be repeated. It is uncontroverted that Zimmerman fired his gun on ConAgra property. It is uncontroverted that his estranged wife works at ConAgra and that she had previously requested and received protection orders against Zimmerman. The record demonstrates that Zimmerman flagrantly violated at least one of his estranged wife's protection orders when he entered onto her work premises at ConAgra on November 10, 2012. After being arrested for the shooting, Zimmerman was released on bail and was thus capable of trespassing again.

This evidence supported ConAgra's argument that Zimmerman will again trespass on ConAgra property to harass and possibly harm his estranged wife, which could result in irreparable damage to ConAgra property and its

employees. Through his deplorable actions, Zimmerman has demonstrated that he is willing to flagrantly violate the criminal laws of this state in order to trespass upon ConAgra property. Although Zimmerman's prior criminal actions raise real doubts on the efficacy of a permanent injunction preventing Zimmerman from again trespassing onto ConAgra property, we do not feel comfortable standing by idly when justice calls for action. Therefore, we reverse the district court's order and remand the cause with directions to grant a 1-year permanent injunction.

CONCLUSION

For the reasons discussed, we hold that the district court erred in denying injunctive relief to ConAgra. We remand with directions, consistent with this opinion, to enter a 1-year permanent injunction against Zimmerman.

REVERSED AND REMANDED WITH DIRECTIONS.

MILLER-LERMAN, J., not participating.

CASSEL, J., dissenting.

ConAgra's request for a 1-year injunction was prompted by a single event of trespass including criminal behavior. The majority now permits ConAgra to judicially obtain a special, extraordinary remedy denied to it by the Legislature. Further, equity has long denied injunctive relief for single instances of trespass or completed, past acts. And for over 100 years, this court has held that equity will not enjoin actions constituting criminal offenses. The majority departs from this long-established precedent without explaining a principled distinction between this case and the hundreds, if not thousands, of instances annually involving assaultive or violent behavior. I respectfully dissent.

The majority concludes that the uncontroverted facts sufficiently demonstrate that Zimmerman will again trespass upon ConAgra's property. This conclusion overstates the record. The record contains no evidence indicating that Zimmerman's trespass was anything more than a single incident of violence. There is no evidence that Zimmerman had ever undertaken similar acts in the past or threatened ConAgra with future harm. While the record establishes that Zimmerman's wife had made

allegations of harassment in the past and that Zimmerman had a pending stalking charge against him, such evidence provides no basis on which to conclude that Zimmerman posed a threat of future harm to ConAgra.

This court has consistently stated that when simple acts of trespass are involved, equity generally will not act.[1] Rather, an injunction will be granted where the nature and frequency of trespasses are such as to prevent or threaten the substantial enjoyment of the rights of possession and property in land.[2] In trespass cases, equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.[3] Thus, in *Whipps Land & Cattle Co. v. Level 3 Communications*,[4] this court affirmed the denial of injunctive relief, because the record provided no basis on which to conclude that future trespasses might occur. In *Whipps Land & Cattle Co.*, the plaintiff failed to articulate a reason why similar trespasses would occur in the future, but instead relied upon the absence of any reason to believe they would *not* occur. In other words, much like the instant case, the plaintiff was speculating on the prospect of future harm. This was not sufficient, according to the *Whipps Land & Cattle Co.* court, to warrant the extraordinary remedy of injunctive relief.[5]

ConAgra is requesting this court to speculate that future trespasses may occur merely because Zimmerman's estranged wife still works at ConAgra. But an injunction should be granted in only the clearest of cases.[6] Mere speculation that a future trespass may occur is insufficient to meet this standard.

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[1] See, e.g., *Lambert v. Holmberg*, 271 Neb. 443, 712 N.W.2d 268 (2006); *Whipps Land & Cattle Co. v. Level 3 Communications*, 265 Neb. 472, 658 N.W.2d 258 (2003); *Thomas v. Weller*, 204 Neb. 298, 281 N.W.2d 790 (1979).

[2] See *Lambert, supra* note 1.

[3] *Id.*

[4] *Whipps Land & Cattle Co., supra* note 1.

[5] *Id.*

[6] See *Lambert, supra* note 1.

Zimmerman's behavior, though thoroughly deplorable, comprised only a single event, and ConAgra failed to prove that the act will be repeated.

Additionally, this court has described the purpose of an injunction as the restraint of actions which have not yet been taken.[7] Remedy by injunction is generally preventative, prohibitory, or protective, and equity will not usually issue an injunction when the act complained of has been committed and the injury has been done.[8] The purpose of an injunction is not to afford a remedy for what is past but to prevent future mischief.[9] Rights already lost and wrongs already perpetrated cannot be corrected by an injunction.[10] Zimmerman's trespass, albeit violent, is a completed, past act. And the record contains no evidence to support the majority's conclusion that future trespasses are likely. Thus, the majority contravenes our well-established precedent that an injunction is an inappropriate remedy for a completed, past act.

Moreover, injunctive relief was not appropriate, because ConAgra was effectively seeking to enjoin Zimmerman from committing a future crime. The record shows that ConAgra sent Zimmerman a "bar and ban" letter after the shooting, informing him that he was no longer permitted to enter onto its property. Thus, any subsequent entry by Zimmerman would constitute a criminal trespass.[11] It is well settled that equity, as a general rule, has no criminal jurisdiction.[12] Where acts complained of are in violation of the criminal law, courts of equity will not, on that ground alone, interfere by injunction

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[7] See *Professional Firefighters Assn. v. City of Omaha*, 282 Neb. 200, 803 N.W.2d 17 (2011).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] See Neb. Rev. Stat. § 28-521 (Cum. Supp. 2012).

[12] See, *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237 (11th Cir. 1999); *U.S. v. Santee Sioux Tribe of Nebraska*, 135 F.3d 558 (8th Cir. 1998); *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205 N.W.2d 649 (1973); *State, ex rel. Spillman, v. Heldt*, 115 Neb. 435, 213 N.W. 578 (1927); *State v. Maltby*, 108 Neb. 578, 188 N.W. 175 (1922).

to prevent their commission, as they will not exercise their power for the purpose of enforcing criminal laws.[13] Since at least 1911, this court has recognized that equity will not interfere to punish crime.[14]

The majority circumvents these principles, claiming that ConAgra has no adequate remedy at law. But the prosecution of criminal offenses is normally a complete and sufficient remedy at law.[15] Thus, an injunction was not necessary to prevent a failure of justice, because any subsequent trespass would subject Zimmerman to criminal prosecution.

The majority fails to explain how this case differs from hundreds, if not thousands, of assaultive crimes perpetrated annually in Nebraska. I see no principled basis in the majority opinion to distinguish this case from other cases. Undoubtedly, this precedent will prompt employers of victims to routinely seek injunctive relief merely for the sake of appearing to do something. The majority's rationale for opening up the floodgates to such cases is that it does not "feel comfortable standing by idly when justice calls for action." Although aspirations of justice are noble, courts apply law and equity. The majority's discomfort strikes me as a poor basis for departing from the accumulated wisdom of over 100 years of precedent.

Ultimately, the majority permits ConAgra to obtain special treatment from the courts where the Legislature has declined to authorize it. I do not believe that ConAgra's status as a corporation or as a large and successful enterprise justifies the special treatment afforded by the majority's decision. Injunctive relief is an extraordinary remedy.[16] The Legislature has provided injunctive relief for victims of domestic abuse[17] or victims of harassment,[18] but ConAgra's status as a victim's

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[13] See *Heldt, supra* note 12.

[14] See *State v. Chicago, B. & Q. R. Co.*, 88 Neb. 669, 130 N.W. 295 (1911).

[15] See *City of New York v. Andrews*, 186 Misc. 2d 533, 719 N.Y.S.2d 442 (2000).

[16] See *Bock v. Dalbey*, 283 Neb. 994, 815 N.W.2d 530 (2012).

[17] See Neb. Rev. Stat. § 42-924 (Cum. Supp. 2012).

[18] See Neb. Rev. Stat. § 28-311.09 (Cum. Supp. 2012).

employer clearly falls outside of the protections afforded by these statutes. This court has repeatedly emphasized that it is the Legislature's function to declare the public policy of this state.[19] And the court long ago recognized that equity will not enjoin the commission of a crime merely because the penalty seems to be inadequate, since the relief in such case must come from the Legislature.[20] As the court said at that time, "If the punishment provided is not sufficient, recourse should be had to the [L]egislature, and not to the equity side of the courts."[21] It is the Legislature's prerogative to determine whether the extraordinary remedy of injunctive relief should be extended in the way that ConAgra seeks. Instead of deferring to the Legislature's proper functioning, the majority's decision preempts the Legislature's role.

I respectfully dissent.

STEPHAN, J., joins in this dissent.

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[19] See, e.g., *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013); *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012); *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); *Bamford v. Bamford, Inc.*, 279 Neb. 259, 777 N.W.2d 573 (2010); *R & D Properties v. Altech Constr. Co.*, 279 Neb. 74, 776 N.W.2d 493 (2009); *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

[20] See *Maltby, supra* note 12.

[21] *Id.* at 584, 188 N.W. at 178.

CHARLES RODGERS, APPELLANT, V. NEBRASKA STATE FAIR, APPELLEE.

846 N.W.2d 195

Filed May 9, 2014. No. S-13-651.

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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong.
3. ____: ____. Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
5. ____: ____. The language of a statute 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. ____: ____. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
7. ____: ____. When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. ____: ____. 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.
9. **Workers' Compensation.** The Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes.

Appeal from the Workers' Compensation Court: MICHAEL K. HIGH, Judge. Reversed and remanded.

David M. Handley, of Dyer Law, P.C., L.L.O., for appellant.

Brynne E. Holsten, of Engles, Ketcham, Olson & Keith, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Charles Rodgers, the appellant, suffered injuries to both of his knees in a work-related accident on September 7, 2009. In its award filed July 3, 2013, the Workers' Compensation Court concluded that in order to perform a loss of earning capacity calculation under the third paragraph of Neb. Rev. Stat. § 48-121(3) (Reissue 2010), there must be expert opinion of permanent physical restrictions as to each injured scheduled

member. Despite Rodgers' request, the court declined to consider a potential loss of earning capacity award in the absence of such proof as to the left knee and therefore limited its award to scheduled member benefits. Rodgers appeals. We conclude that the compensation court erred as a matter of law when it concluded that the absence of expert opinion of permanent physical restrictions as to the left knee precluded a loss of earning capacity calculation under the third paragraph of § 48-121(3). We reverse, and remand the cause for consideration consistent with our opinion.

STATEMENT OF FACTS

This case stems from a work-related accident that occurred on September 7, 2009, in which Rodgers suffered injuries to both of his knees. The parties stipulated to certain facts, described and adopted by the court as follows:

> 1. On September 7, 2009, plaintiff, . . . Rodgers, injured his knees arising out of and in the scope and course of his employment with the defendant, Nebraska State Fair.
>
> 2. Timely notice of the injury was given to the employer.
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> 3. Venue is proper in the Nebraska Workers' Compensation Court.
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> 4. At the time of [Rodgers'] injury, [Rodgers] was earning an average weekly wage of $480.36.
>
> 5. [Rodgers] has reached maximum medical improvement for his left knee on August 5, 2010, and was assigned a 2 percent impairment to his left lower extremity by Dr. Lawson.
>
> 6. [Rodgers] has reached maximum medical improvement for his right knee on October 25, 2011, as indicated by both Dr. Donovan and Dr. O'Neil and was assigned a 40 percent impairment to his right lower extremity by Dr. O'Neil.
>
> 7. The parties agree that all related medical and hospital expenses previously incurred by [Rodgers] have been or are in the process of being paid by the [Nebraska State Fair] pursuant to the Fee Schedule.
>
> 8. The parties agree that all future related medical [expenses] as defined by Neb. Rev. Stat. § 48-120 for

> [Rodgers'] right knee will be paid by the [Nebraska State Fair] pursuant to the Fee Schedule.
>
> 9. The parties agree that there are no penalties due.

Dr. John C. Yeakley initially treated Rodgers for his knee injuries. Dr. Yeakley performed surgery on the left knee on May 3, 2010. After Dr. Yeakley retired, Dr. Keith W. Lawson assumed Rodgers' care. In Dr. Lawson's report dated December 12, 2011, he stated that Rodgers reached maximum medical improvement for his left knee on August 5, 2010. Dr. Lawson opined that Rodgers had sustained a 2-percent permanent partial impairment to his left knee but assigned no permanent physical restrictions to the left knee.

Dr. Yeakley performed surgery on the right knee on February 1, 2010. Dr. Yeakley performed a second surgery on the right knee on November 29. Following the second surgery on the right knee, Rodgers was diagnosed with chronic regional pain syndrome in the right knee.

At the request of the Nebraska State Fair, Rodgers was examined by Dr. Michael T. O'Neil for an independent medical evaluation. According to Dr. O'Neil's September 19, 2012, report, Rodgers had reached maximum medical improvement for his right knee on October 25, 2011. Dr. O'Neil assigned a 40-percent permanent partial impairment rating for the right knee. As to permanent physical restrictions, Dr. O'Neil noted "no prolonged walking or standing as well as [no] climbing, squatting and kneeling."

On January 7, 2013, the vocational counselor agreed upon by the parties provided a loss of earning capacity analysis. In his report, the counselor stated that he had interviewed Rodgers and reviewed Rodgers' medical records regarding his knee injuries. The counselor stated: "I have been asked to determine . . . Rodgers' loss of earning capacity per the parties [sic] e-mail . . . that states 'the entitlement to [loss of earning capacity] will be a matter of fact determined by the trial judge.'" The vocational counselor determined that Rodgers' loss of earning capacity "would be approximately 65%."

Rodgers filed his petition, including a request for loss of earning compensation in the Workers' Compensation Court

on October 9, 2012. The Nebraska State Fair filed its answer on November 21. A hearing was held before the Workers' Compensation Court on June 25, 2013. Rodgers offered and the court received five exhibits, and the Nebraska State Fair offered and the court received six exhibits. The exhibits consisted primarily of Rodgers' medical expenses, records, and reports. Rodgers was the only witness.

On July 3, 2013, the Workers' Compensation Court filed an award in which it concluded that it was unable to perform a loss of earning power calculation under the third paragraph of § 48-121(3) in the absence of expert proof of permanent restrictions relating to the left knee and therefore limited its consideration of the evidence and made an award based on scheduled member benefits. Referring to the provisions in the third paragraph of § 48-121(3), the court stated that "the sole issue in this case is whether or not [the third paragraph] from Neb. Rev. Stat. § 48-121[(3)] applies so [Rodgers] is entitled to a loss of earning power rather than the payment schedule for scheduled member disability."

The statutory language to which the court referred and which is central to this appeal is found in the third paragraph of § 48-121(3). This paragraph was added in 2007, and provides in its entirety:

> If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case the employee shall not be entitled to compensation under this subdivision.

We have previously considered this amendatory language and noted that

> [o]ther than the amendment at issue, the portions of § 48-121(3) then and now provide for compensation based on designated amounts for scheduled member injuries, but no loss of earning capacity [except as may result from the second paragraph of § 48-121(3)]. The amendment provides for the loss of earning capacity at the court's discretion where there is a loss or loss of use of more than one member which results in at least a 30-percent loss of earning capacity.

Smith v. Mark Chrisman Trucking, 285 Neb. 826, 830, 829 N.W.2d 717, 720 (2013).

In its award, the Workers' Compensation Court endeavored to interpret the new language of § 48-121(3). The court focused on the introductory sentence of the new third paragraph, which provides that the option to consider an award of loss of earning capacity depends on the availability of compensation benefits payable "for a loss or loss of use of more than one member or parts of more than one member." The court concluded that "there must be at least a functional loss of use in the form of permanent physical restrictions for each scheduled member" in order to perform a loss of earning capacity calculation. The court stated that "'a loss' clearly relates to a physical removal of a part of the scheduled members, that is leg, arm, or finger, etc." The court continued that the portion of the phrase in the new third paragraph of § 48-121(3) that provides "loss of use of more than one member"

> means that there must [be] a permanent partial disability in the form of permanent restrictions relating to the use of the particular scheduled member before the rest of the calculations set forth in the above quoted paragraph [of § 48-121(3)] can possibly take place and result in payment for a loss of earning power.

The court found that Rodgers had sustained a permanent partial impairment to his right knee of 40 percent and a permanent partial impairment to his left knee of 2 percent. No party challenges these findings on appeal. Notwithstanding these findings of permanent impairment, the court nevertheless determined that because no permanent physical restrictions

were specifically assigned by an expert for Rodgers' left knee, the court could not calculate loss of earning capacity benefits authorized under § 48-121(3), and that Rodgers was thus limited to scheduled member compensation. The court found that the Nebraska State Fair had paid Rodgers all the benefits to which he was entitled, and ordered that the Nebraska State Fair pay for all reasonable and necessary future medical costs associated with Rodgers' right knee. Rodgers appeals.

ASSIGNMENT OF ERROR

Rodgers claims on appeal that the Workers' Compensation Court erred when it concluded that the third paragraph of § 48-121(3) requires that there must be specific expert evidence of permanent physical restrictions as to each scheduled member in order to calculate an award of a loss of earning capacity under this statute.

STANDARDS OF REVIEW

[1-3] 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. *Visoso v. Cargill Meat Solutions*, 287 Neb. 439, 843 N.W.2d 597 (2014). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, a higher appellate court reviews the trial judge's findings of fact, which will not be disturbed unless clearly wrong. *Rader v. Speer Auto*, 287 Neb. 116, 841 N.W.2d 383 (2013). Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions. *Id.*

[4] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014).

ANALYSIS

At issue in this case is the interpretation of the third paragraph of § 48-121(3), which was added to the statute by 2007 Neb. Laws, L.B. 588. As stated above, this paragraph provides:

> If, in the compensation court's discretion, compensation benefits payable for a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, resulting from the same accident or illness, do not adequately compensate the employee for such loss or loss of use and such loss or loss of use results in at least a thirty percent loss of earning capacity, the compensation court shall, upon request of the employee, determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section, and in such a case the employee shall not be entitled to compensation under this subdivision.

This third paragraph was first introduced as 2007 Neb. Laws, L.B. 77, which was later inserted into L.B. 588. In *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 829, 829 N.W.2d 717, 720 (2013), we stated that this amendment created a new remedy and set forth the Introducer's Statement of Intent for L.B. 77, which provided:

> "LB 77 relates to the Nebraska Workers' Compensation Act and would change disability compensation provisions. Under current law, if a worker sustains an injury to multiple members, he or she is limited to the compensation provided in the schedule contained in section 48-121 of the Nebraska Workers' Compensation Act. LB 77 would give to the Nebraska Workers' Compensation Court the discretion to award a loss of earning capacity in an appropriate case involving loss of use of multiple members."

In *Smith*, we commented that

> a worker can now receive compensation for the loss of earning capacity if, in the court's discretion, compensation as set forth in § 48-121(3) would not adequately compensate the worker and where there is a loss or loss of use of more than one member resulting from the same

> accident which results in at least a 30-percent loss of earning capacity.

285 Neb. at 834, 829 N.W.2d at 723.

In the instant case, we examine the new language more closely and conclude that the court erred as a matter of law when it limited the application of the new remedy to only those cases in which an expert opinion existed regarding the permanent physical restrictions as to each injured member, an element not found in the statutory language and not essential to the performance of a loss of earning capacity calculation. We thus find merit to Rodgers' assignment of error claiming the Workers' Compensation Court erred in its interpretation, and we reverse, and remand.

The introductory language of § 48-121 provides that this statute contains a "schedule of compensation" for injuries. Although the language of § 48-121 has changed over time, the following partial summary of § 48-121 from *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977), is still appropriate. In *Jeffers*, we stated:

> Section 48-121 . . . provides for compensation for three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore [sic].

198 Neb. at 384, 253 N.W.2d at 33. Although we recognize that the provisions of § 48-121 have been revised from time to time, historically, our cases as described below have noted that loss of earning capacity calculations were relevant to determining an award under § 48-121(1) and (2) and, since 2007, such calculation is relevant to a potential award under § 48-121(3).

Turning to the current statute, the first sentence of the second paragraph of § 48-121(3) provides:

> In any case in which there is a loss or loss of use of more than one member or parts of more than one member set forth in this subdivision, but not amounting

> to total and permanent disability, compensation benefits shall be paid for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively.

The last sentence of the second paragraph of § 48-121(3) states that where there is "permanent partial loss of the use or function of any of the members mentioned in" § 48-121(3), the employee shall receive compensation benefits in the proportionate amount based on the schedule set forth in the first paragraph of § 48-121(3). The second paragraph of § 48-121(3) thus provides for compensation where there is more than one member involved. Rodgers was awarded benefits under this second paragraph of § 48-121(3). The third paragraph of § 48-121(3), as previously noted, provides a discretionary remedy consisting of a loss of earning capacity award in lieu of scheduled member compensation where two or more members are involved and there is a 30-percent loss of earning capacity. Rodgers was denied benefits under this third paragraph of § 48-121(3).

[5-8] With the third paragraph of § 48-121(3) in mind, we turn to our familiar canons of statutory construction. The language of a statute 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. *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013). In other words, absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning. *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014). And when construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.* 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. *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

In its order, the court found that Rodgers was entitled to scheduled member compensation under § 48-121(3) but not

entitled to consideration for a loss of earning capacity benefit under § 48-121(3). By its ruling and award, the court implicitly found that Rodgers suffered a "loss of use" as to each the left knee and the right knee for purposes of the award under the second paragraph of § 48-121(3) but explicitly found that he did not suffer a "loss of use" of the left knee for purposes of the third paragraph of § 48-121(3). That is, the court found "loss of use" of the left knee for the second paragraph but not "loss of use" of the left knee for the third paragraph.

In its award, the court stated that in order to perform a loss of earning power calculation "there must be at least a functional loss of use in the form of permanent physical restrictions for each scheduled member." That is, the court concluded that under the statute, an expert opinion regarding permanent loss of bodily function as to each scheduled member was necessary before a loss of earning power calculation could be performed. Rodgers contends on appeal that "[t]he appropriate place to scrutinize restrictions . . . under [the third paragraph of] § 48-121(3) is at the point of the loss of earnings capacity analysis" and that the Workers' Compensation Court erred when it required the existence of expert proof of loss of bodily function qua permanent physical restrictions before the court could perform a loss of earning capacity analysis. Brief for appellant at 13. We agree with Rodgers' contention.

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. *Hess v. State, supra*. We conclude as a matter of law that the compensation court incorrectly interpreted the third paragraph of § 48-121(3). As explained below, the court's interpretation of the third paragraph of § 48-121(3) by which it added an additional element, i.e., proof of functional loss in the form of permanent physical restrictions as to each member notwithstanding undisputed evidence of permanent impairment, in order to calculate a loss of earning power is not supported by the language of the statute, logic, or our jurisprudence.

The plain language of the third paragraph of § 48-121(3) guides our resolution of this case. First, the plain language

of the third paragraph of § 48-121(3) *does not* require the loss of bodily function proof that the court insists on. Second, the language *does require* that, if the threshold requirements are met, including a request by the employee for loss of earning capacity compensation, and in the compensation court's discretion the scheduled member benefits resulting from the same accident or illness do not adequately compensate the employee, then the compensation court shall "determine the employee's loss of earning capacity consistent with the process for such determination under subdivision (1) or (2) of this section."

In considering the court's additional element, i.e., requiring expert proof of permanent physical restrictions as to each member, we conclude that there is simply nothing in the plain language of the statute that provides for or warrants adding this extra requirement. To the extent the court believes this additional requirement is necessary to show loss of use in the third paragraph of § 48-121(3), we note that the court did not similarly encumber its finding of loss of use in the second paragraph. It is not sensible to read "loss of use" in these adjoining paragraphs as requiring different sets of proof. Further, the court's award, which is not challenged by the Nebraska State Fair, was supported by an undisputed permanent impairment rating as to each knee. We have often noted the necessity, in the alternative, of proof of impairment or restrictions at the loss of earning analysis stage, but we have not been directed to authority which requires proof of both impairment and restrictions before undertaking a loss of earning capacity analysis. See, e.g., *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 206, 639 N.W.2d 94, 103 (2002) (providing for alternative proofs and stating in context of vocational rehabilitation benefits that "[w]ithout impairment *or* restrictions, there can be no disability or labor market access loss").

In considering the court's ruling which in effect provides that it cannot perform a loss of earning capacity calculation without expert loss of bodily function proof as to each member, such conclusion is not consistent with the statute's directive that a loss of earning capacity calculation be performed "consistent with the process for such determination under

subdivision (1) or (2) [of § 48-121],” because the “process” for such determination decidedly does not require such proof. Our case law confirms this.

Acknowledging as we have that § 48-121 has been revised from time to time, we have commented on the “process” and stated that “[a]n employee’s disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee’s diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician’s evaluation and assessment of the employee’s loss of bodily function.” *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990). Elsewhere, we have stated that “[i]f the injury falls under either subdivision (1) or (2) [of § 48-121], a determination must be made as to the employee’s loss of employability or earning capacity, and loss of bodily function is not at issue.” *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 385, 253 N.W.2d 30, 34 (1977). See, similarly, *Kleiva v. Paradise Landscapes*, 227 Neb. 80, 416 N.W.2d 21 (1987).

We have frequently observed that earning power is not synonymous with either wages or loss of physical function. E.g., *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). Thus, although loss of physical function may affect a worker’s ability to procure and hold employment, contrary to the court’s conclusion in this case, we cannot say that the absence of expert proof of functional loss prevents the performance of a loss of earning capacity calculation. Indeed, to the contrary, we have stated in a variety of settings that degree of disability may be determined without expert evidence and that the court may rely on a claimant’s testimony. E.g., *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). The compensation court’s interpretation is not consistent with the established process for consideration of loss of earning capacity under § 48-121(1) and (2) and is therefore not a proper interpretation of the directive in the third paragraph of § 48-121(3).

With the addition of the current third paragraph of § 48-121(3), the Legislature clearly intended to extend the opportunity to receive benefits for loss of earning capacity

to workers with multiple member injuries resulting from the same accident or illness and for whom there is evidence of a 30-percent loss of earning capacity. In this case, the record undisputedly shows that Rodgers had been assigned a 2-percent permanent partial impairment rating for his left knee and a 40-percent permanent partial impairment rating for his right knee, Rodgers' injuries resulted from the same accident, the vocational counselor determined that Rodgers' loss of earning capacity "would be approximately 65%," and Rodgers requested loss of earning compensation.

[9] As a general rule, the Nebraska Workers' Compensation Act should be construed to accomplish its beneficent purposes. *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013). Reading an additional requirement of expert proof of permanent restrictions for each injured member into the statute, as the compensation court has done, impedes accomplishing the extension of the potential for workers to receive loss of earning power benefits and is not consistent with the "process" for determining loss of earning capacity under § 48-121(1) or (2).

We conclude that the third paragraph of § 48-121(3) does not require expert proof of permanent physical restrictions assigned to each injured member in order to perform the loss of earning capacity assessment thereunder, and the compensation court's conclusion to the contrary was error.

CONCLUSION

The compensation court erred as a matter of law when it concluded that there must be expert opinion of permanent physical restrictions as to each injured member in order to perform a loss of earning capacity assessment under the third paragraph of § 48-121(3) and declined to exercise its discretion on this basis. We therefore reverse, and remand the cause for a decision consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NEBRASKA ON BEHALF OF B.M., A MINOR CHILD, APPELLANT, V. BRIAN F., APPELLEE.

846 N.W.2d 257

Filed May 16, 2014. No. S-12-1123.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, an appellate court will affirm the trial court's decision absent an abuse of discretion.
2. **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.
3. **Paternity: Child Support.** Pursuant to Neb. Rev. Stat. § 43-1402 (Reissue 2008), child support in a paternity action is to be determined in the same manner as in cases of a child born in lawful wedlock.
4. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered.
5. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
6. ____: ____. The paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.
7. **Modification of Decree: Child Support: Proof.** The party seeking the modification of child support has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification.
8. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term in which it was issued.

Appeal from the District Court for Douglas County: PETER C. BATAILLON, Judge. Reversed and remanded for further proceedings.

Kathryn L. Hoyme and Sara E. Preisinger for appellant.

Brian F., pro se.

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

MILLER-LERMAN, J.

NATURE OF CASE

Brian F. signed a notarized "Acknowledgement of Paternity" on January 16, 1995, stating that he is the biological father of B.M., the minor child at issue in this case. Shirley M. had given birth to B.M. in August 1994. The State of Nebraska on behalf of B.M. filed a "Petition for Establishment of Paternity and Support" in the district court for Douglas County, and a decree of paternity was filed on July 18, 1996. The decree established Brian as the legal father of the child and ordered him to pay child support. In 2009, Brian's child support payment was ordered increased. Brian testified that he had suspicions he was not the biological father in 1996.

In 2011, Brian sought to modify the child support. He filed pleadings in November 2011 and February and June 2012, seeking to reduce or terminate his child support obligation. During the course of the modification proceedings, genetic testing results excluded Brian as the biological father of B.M. No guardian ad litem was appointed to protect the child. Because of the genetic testing results, in an order filed October 29, 2012, the district court for Douglas County treated the action as a challenge to the acknowledgment, as though pursued under Neb. Rev. Stat. § 43-1409 (Reissue 2008); "[set] aside the finding of paternity," as recommended by the referee; and terminated Brian's child support obligation. The State on behalf of B.M. appeals, claiming, inter alia, that the district court erred when it "void[ed] the determination of paternity . . . and terminat[ed] [Brian's] child support obligation." As explained below, although Brian remains free to do so, the validity of the judgment of paternity has not been attacked by Brian and the State has not agreed to set aside the paternity decree. And although we are not unsympathetic to Brian's current status, we nevertheless must conclude, based on established principles, that the district court erred when it converted the action to modify child support to a disestablishment action and terminated child support based solely on the

results of genetic testing. We therefore reverse the order of October 29, 2012, and remand the cause for a determination of modification of child support.

STATEMENT OF FACTS

The minor child at issue in this case, B.M., was born in August 1994. Approximately 5 months after the birth of B.M., on January 16, 1995, Brian signed a notarized "Acknowledgement of Paternity," in which he acknowledged that he was the biological father of B.M. On July 18, 1996, a decree of paternity was filed. Under the decree, Shirley was found to be the mother of B.M. The record in the present case suggests that in the paternity action proceeding, the acknowledgment served as a basis for the factual finding that Brian was the biological father and the judgment of paternity established that Brian was the legal father. See Neb. Rev. Stat. § 43-1412 (Cum. Supp. 1996). The decree serves as a judgment. The decree of paternity also ordered Brian to pay child support in the amount of $50 per month and to provide health insurance for B.M. The decree and acknowledgment were received as evidence in the current proceeding to modify support.

On December 15, 2008, the State, which was providing public assistance, filed an application for modification of child support. The district court entered an order on February 18, 2009, increasing Brian's child support payments to $369 per month. Brian testified that he was aware of this child support order because the money was taken out of his paycheck.

On November 17, 2011, Brian, pro se, filed a "Petition for Modification of Child Support." In his petition, Brian alleged that his existing child support obligation created a severe economic hardship and attached a "Child Support Worksheet," outlining his request for a reduction in child support. Brian also made a request for genetic testing. The State filed its answer on January 20, 2012. On February 13, Brian filed another "Petition for Modification of Child Support." The February 13 "Petition for Modification of Child Support" included documentation, including a "Child Support Worksheet," a letter from his employer regarding salary, pay stubs, and letters regarding delinquent taxes. Evidently, the matter was referred to a child

support referee, who, on February 16, ordered genetic testing for Brian, Shirley, and B.M., the results of which excluded Brian as the biological father of B.M.

On June 12, 2012, Brian filed a form titled "Application and Affidavit to Obtain Termination of Child Support" and attached the results of the DNA test. Brian used the Nebraska pro se form which lists the customary reasons for termination of child support, i.e., death, emancipation, or marriage of the child, or the child's attaining the age of 19 years. When Brian filed this application to terminate child support, like an adoptive father, Brian was not a biological father, but he was the legal father.

A hearing was held before a child support referee for the district court on June 25, 2012. At the start of the hearing, the referee stated that "[t]his matter comes on for hearing on a Motion to Terminate Child Support." Brian appeared at the hearing, and he testified under oath in his own behalf. Brian did not claim he had not been intimate with Shirley. Instead, he testified that "sometime around—between '94 and '96," he "had suspicions that [he] was not the father." The DNA test results were received in evidence. The State offered and the referee received the notarized "Acknowledgement of Paternity" signed by Brian. Brian testified that he recognized his signature on the document.

At the close of the June 25, 2012, child support hearing, without reference to the economic situation of the parties or the best interests of the child, the referee recommended terminating Brian's child support obligation, because of the results of the genetic testing. The referee stated that "you're not the dad, so to hold you responsible in the future is unconscionable. So that's what I'm going to recommend." The referee recommended a termination date as of the end of the month in which the results were reported.

The referee's written report filed June 28, 2012, stated that Brian "seeks to terminate his child support obligation based upon genetic testing that excluded him as the biological father of the minor herein." The referee recommended that "the child support obligation should be terminated with the end of the month in which the genetic test results were reported" and

further recommended that the district court "sign an order setting aside the finding of paternity and terminating the child support obligation herein as of May 31, 2012." The child support referee did not base his decision on child support calculations or base his reasoning on Brian's financial situation.

On June 28, 2012, the State filed its exceptions to the referee's findings. The district court held two hearings on the State's exceptions. At no time during the proceedings was a guardian ad litem appointed to represent the child. The first hearing was held on August 3, and Brian appeared pro se. At the August 3 hearing, the State offered and the court received the record of the hearing before the referee, and the court took judicial notice of the court file. The State argued that Brian had signed the notarized "Acknowledgement of Paternity" in 1995 and that Brian has "held himself out to be the legal father of this child. [Brian] has never filed anything to attack or dispute the accuracy of the acknowledgement." The State further argued that

> the law states that the father can still attack the signed acknowledgment. And I believe the statute is . . . § 43-1409. He can attack the acknowledgment stating it was signed . . . through duress or fraud . . . . But it's my understanding that [Brian] has not appeared today stating he signed that acknowledgment due to fraud or duress.

The version of § 43-1409 to which the State referred was enacted in 1997 and generally provides methods to rescind or challenge the acknowledgment, but that after the rescission period, the unchallenged acknowledgment serves as a legal finding of paternity. The State further argued that because Brian signed and had the acknowledgment notarized, his paternity could not be disestablished under Neb. Rev. Stat. § 43-1412.01 (Reissue 2008). Section 43-1412.01, to which the State referred, became operative in 2008 and generally provides for the statutory disestablishment of paternity based on genetic testing, with certain exceptions.

The State also raised an argument based on equity. The State asserted that Brian had "slept on his rights," because he had stated at the hearing before the referee that he suspected as

early as 1996 that he was not the biological father of the child, but he did not take action until now, and that therefore, the court should not find in Brian's favor.

At the August 3, 2012, hearing, the district court stated that it assumed Shirley "knew that she had sex with other people during this time than [Brian]" and asked the State if it had "thought about going after the mother for not telling the truth about this stuff?" There was a discussion regarding the fact that the State could not realistically seek to collect its expenditures from another putative father at this late date, because under Neb. Rev. Stat. §§ 43-512.03 and 43-1411 (Reissue 2008), the State can attempt to collect only until the child turns 18, and B.M. would turn 18 that August.

After the August 3, 2012, hearing, the district court filed an order on August 8. As to Brian's application regarding child support, the order stated that "[d]uring the pendency of this matter, [Brian's] child support obligation is suspended as of May 31, 2012. This Court suspends the child support for good cause shown as [Brian] is not the biological father of the minor child." The order, however, was not limited to child support.

In the August 8, 2012, order, the district court further determined that the disestablishment statute, § 43-1412.01, was not applicable to this case, because Brian signed the acknowledgment in 1995 and § 43-1412.01 did not go into effect until 2008. The district court then stated that the acknowledgment statute, § 43-1409, the rescission or challenge portions of which became law pursuant to 1997 Neb. Laws, L.B. 752, was applicable to this case and that Brian could challenge the acknowledgment by showing fraud, duress, or material mistake of fact under that statute. The court stated that it had found material mistake of fact to be implicit in Brian's applications to reduce or terminate child support and suggested that Brian amend his application to allege fraud, duress, or mistake of fact with specificity. The court gave Brian leave to amend. The district court scheduled another hearing for October 22.

The second hearing before the district court was held on October 22, 2012. Brian stated that he had not filed an

amended complaint as the district court had suggested in its August 8 order, and neither Brian nor the State offered any additional evidence. At the hearing, the State indicated that "[Brian] has failed to do what [the court] asked in [the August 8] order, which was to amend his pleading to include some kind of legal defense or to attack the paternity. He has not alleged fraud or duress at this time." The State reiterated its arguments that Brian had not challenged the acknowledgment under § 43-1409 or sought to disestablish paternity under § 43-1412.01 and that Brian had slept on his rights.

After the October 22, 2012, hearing, the district court filed its second order on October 29. In the order, the district court stated that no additional evidence was offered at the October 22 hearing and the district court determined that "there is no further issue in this matter as the Court has already found and had already agreed with the Referee in this matter." Therefore, the district court accepted the referee's recommendation to "[set] aside the finding of paternity" and further determined that Brian "is not the biological father of the minor child and that his child support obligation is terminated as of May 31, 2012."

The State appeals.

ASSIGNMENTS OF ERROR

The State claims on appeal that the district court erred when it (1) "void[ed] the determination of paternity . . . and terminat[ed] [Brian's] child support obligation" and (2) "grant[ed] any relief to [Brian] as [Brian] failed to bring the question of paternity in a timely manner."

STANDARDS OF REVIEW

[1,2] Modification of child support payments is entrusted to the trial court's discretion, and although, on appeal, the issue is reviewed de novo on the record, we will affirm the trial court's decision absent an abuse of discretion. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013). 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. *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013).

ANALYSIS

Brian brought this action to modify or terminate his child support obligation. Nevertheless, in addition to terminating child support, the district court on its own initiative converted this action for the modification or termination of child support into an action challenging the "Acknowledgement of Paternity" and, further, adopted the child support referee's recommendation to "[set] aside the finding of paternity." We determine that the district court improperly expanded the scope of this action when it converted the matter into an action to disestablish paternity. And, because Brian was still legally the father under the paternity decree, the district court further erred when it terminated child support based solely on the finding that Brian was not the biological father of the child. We reverse the October 29, 2012, order and remand the cause for further proceedings limited to modification of child support.

Brian, as the Legal Father, Applied to Modify Child Support. The Application to Modify Was Subject to Established Modification Principles.

The child at issue in this case, B.M., was born in August 1994. In January 1995, Brian signed a notarized acknowledgment, and in July 1996, a decree was filed which found that Brian is the legal father of B.M. Section 43-1409, as it existed when Brian signed the acknowledgment, provided that the "signing of a notarized acknowledgment . . . by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support." § 43-1409 (Cum. Supp. 1996). This version of § 43-1409 creates an evidentiary rebuttable presumption of paternity and provides that the acknowledgment is admissible evidence. Compare *Cesar C. v. Alicia L.*, 281 Neb. 979, 985, 800 N.W.2d 249, 254 (2011) (stating as to later version

of § 43-1409 that "the proper legal effect of a signed, unchallenged acknowledgment of paternity is a finding that the individual who signed as the father is in fact the legal father"). Accordingly, given the unchallenged acknowledgment and the decree, since 1996, there has been a finding of paternity as well as a judgment of paternity, the latter of which established Brian as the legal father.

In the present action, Brian filed applications to modify or terminate his child support obligation starting in November 2011. Brian filed these applications under the same case number, docket 949, No. 623, under which the initial paternity decree was entered and previous modifications of child support have been conducted. The same case number has been utilized because Brian's effort to modify or terminate child support is supplementary to the original proceeding, and not the commencement of a new action. See *State ex rel. Gurnon v. Harrison*, 245 Neb. 295, 512 N.W.2d 386 (1994) (determining that in filiation proceeding, application to modify decree for child support is not independent proceeding or commencement of new action, but, rather, is supplementary to original proceeding).

[3] Brian's applications filed herein were limited to modifying or terminating child support; he did not claim that he wished to challenge the signed, notarized acknowledgment, disestablish paternity, or vacate or set aside the decree of paternity. Pursuant to Neb. Rev. Stat. § 43-1402 (Reissue 2008), child support in a paternity action is to be determined in the same manner as in cases of a child born in lawful wedlock. Section 43-1402 provides in relevant part:

> The father of a child whose paternity is established either by judicial proceedings or by acknowledgment as hereinafter provided shall be liable for its support to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support.

See, also, *Henke v. Guerrero*, 13 Neb. App. 337, 692 N.W.2d 762 (2005); *Weaver v. Compton*, 8 Neb. App. 961, 605 N.W.2d 478 (2000). The district court should have treated this action simply as a child support modification case filed by the legal

father "whose paternity [was] established . . . by judicial proceedings." See § 43-1402.

[4-7] We have stated that a party seeking to modify a child support order must show a material change in circumstances which (1) occurred subsequent to the entry of the original decree or previous modification and (2) was not contemplated when the decree was entered. *Freeman v. Groskopf*, 286 Neb. 713, 838 N.W.2d 300 (2013); *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009). We have stated that

> [a]mong the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. But, the paramount concern in child support cases, whether in the original proceeding or subsequent modification, remains the best interests of the child.

Incontro v. Jacobs, 277 Neb. at 282-83, 761 N.W.2d at 558. The party seeking the modification has the burden to produce sufficient proof that a material change of circumstances has occurred that warrants a modification and that the best interests of the child are served thereby. *Incontro v. Jacobs, supra*. These established principles are applicable to Brian's application to modify or terminate child support.

The District Court Improperly Expanded the Child Support Modification Proceedings.

Actions to determine parental support and paternity are statutory and governed by Neb. Rev. Stat. §§ 43-1401 through 43-1418 (Reissue 2008 & Supp. 2013). In its August 8, 2012, order, the district court discussed its construction of the scope of this action. It referred to both the disestablishment statute, § 43-1412.01, and the acknowledgment statute, § 43-1409.

Section 43-1412.01, operative in 2008, generally provides a statutory remedy by which to set aside a judgment of paternity, thus disestablishing the parent-child relationship, including

where genetic testing excludes the individual as the father. Section 43-1412.01 provides:

> An individual may file a complaint for relief and the court may set aside a final judgment, court order, administrative order, obligation to pay child support, or any other legal determination of paternity if a scientifically reliable genetic test performed in accordance with sections 43-1401 to 43-1418 establishes the exclusion of the individual named as a father in the legal determination. . . . A court shall not grant relief from determination of paternity if the individual named as father (1) completed a notarized acknowledgment of paternity pursuant to section 43-1408.01, (2) adopted the child, or (3) knew that the child was conceived through artificial insemination.

Brian did not seek to utilize this statute, and we believe that neither disestablishment nor the setting aside of the decree was at issue in the case. The district court concluded that based on ex post facto principles, § 43-1412.01 was not applicable.

After determining that § 43-1412.01 was not applicable to this case, the district court considered the acknowledgment statute, § 43-1409, as it has essentially existed since 1997. This version of § 43-1409 provides in part:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. The signed, notarized acknowledgment is subject to the right of any signatory to rescind the acknowledgment within the earlier of (1) sixty days or (2) the date of an administrative or judicial proceeding relating to the child, including a proceeding to establish a support order in which the signatory is a party. After the rescission period a signed, notarized acknowledgment is considered a legal finding which may be challenged only on the basis of fraud, duress, or material mistake of fact with the burden of proof upon the challenger, and the legal responsibilities, including the child support

> obligation, of any signatory arising from the acknowledgment shall not be suspended during the challenge, except for good cause shown.

Brian did not seek to utilize § 43-1409, and we believe that rescission of the acknowledgment was not an issue in the case. Referring to the post-1997 version of § 43-1409, the district court concluded in its August 8, 2012, order that "[t]he statute that is applicable is section 43-1409 [as initially enacted in 1997]." The district court erred when it concluded that § 43-1409 applied to this case, and we add, parenthetically, that had rescission of the acknowledgment been at issue, the 1995 version, not the post-1997 version, of § 43-1409 would have applied.

In its August 8, 2012, order, the district court used the provisions of the post-1997 version of § 43-1409 as its framework. Under this version of the statute, a notarized unchallenged acknowledgment is considered a legal finding of paternity. The district court reasoned that even though Brian had not attacked the acknowledgment, because the genetic testing results excluded Brian as the biological father of B.M., a "material mistake of fact is implicit in the [child support modification] allegations of [Brian]." The district court gave Brian leave to amend and suggested "there may be allegations of fraud and duress that [Brian] may wish to allege and he may also wish to allege more specificity with regard to the mistake of fact." The addition of these allegations would mirror the post-1997 version of § 43-1409.

Notwithstanding the district court's suggestion, Brian did not amend his pleadings and did not challenge the "Acknowledgement of Paternity" under § 43-1409. Nevertheless, in its October 29, 2012, order, the district court stated that it

> found that there is no further issue in this matter as the Court has already [on August 8] found and had already agreed with the Referee in this matter. As such, the Referee's decision [which included the recommendation that the district court enter an order setting aside the finding of paternity] is hereby re-affirmed and the Court

> accepts the Referee's decision and finds that [Brian] is not the biological father of the minor child and that his child support obligation is terminated as of May 31, 2012. Any arrearage that was accrued prior to May 31, 2012 is still to be paid by [Brian].

The State has appealed from the October 29 order in general and specifically asserts that by adopting the child support referee's recommendation to "[set] aside the finding of paternity," the district court improperly voided the determination of paternity. We agree with the State.

Brian's pleadings indicate that because he believed genetic testing would show that he was excluded as the biological father of B.M., his child support obligation should be reduced or terminated. He also attached financial information to support a modification based on economic hardship. His applications made no reference to the acknowledgment, see § 43-1409, disestablishment as a concept, see § 43-1412.01, or the suggestion that the decree of paternity should be set aside or vacated. Compare, *In re Interest of Kodi L.*, 287 Neb. 35, 840 N.W.2d 538 (2013) (challenger specifically invoked § 43-1409 in challenge to acknowledgment under § 43-1409); *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012) (ex-husband invoking § 43-1412.01 could attempt to overcome marital presumption of paternity in dissolution decree by seeking to disestablish under § 43-1412.01).

As we noted above, actions to determine paternity and parental support are governed by §§ 43-1401 through 43-1418. We have recognized that paternity proceedings are purely statutory and that because the statutes regarding paternity proceedings modify the common law, they must be strictly construed. See *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999). In *Cross*, we stated:

> This court has long recognized that paternity proceedings "are purely statutory and the courts can try such issues and make such orders, in them, as the statute contemplates and none other." *Peters v. Killian*, 63 Neb. 57, 58, 87 N.W. 1049, 1050 (1901). At common law, the father of a child born out of wedlock had no legal obligation to support the child; that common-law rule was changed by

> legislative action. *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943). Statutes which modify or abrogate the common law are to be strictly construed. *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). This court has held that relief in paternity actions is limited to that provided in the statutes. See, *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960); *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957).

257 Neb. at 780, 600 N.W.2d at 784.

We recognize that *Cross* was decided before we adopted the liberalized rules of notice pleading, so its strength to the extent it applies to the pleading practice in paternity proceedings is in doubt. We have explained more recently in *Mahmood v. Mahud*, 279 Neb. 390, 396, 778 N.W.2d 426, 431 (2010), how a trial court should consider a party's request for relief under liberalized pleading, and stated that "[p]laintiffs are not required to plead legal theories or cite appropriate statutes . . . ." In *Mahmood*, the plaintiff sought a domestic abuse protection order, but the trial court issued a harassment protection order. In affirming the order, we recognized that the technical difference between a domestic abuse protection order and a harassment protection order was subtle, albeit similar, and that the thrust of the plaintiff's petition had nevertheless conveyed the plaintiff's claim.

In the present case, the district court, evidently applying liberal pleading concepts, found that Brian's modification of child support applications were implicitly seeking to disestablish his parent-child relationship with B.M. To strengthen its reading of the applications, the district court suggested that Brian amend his application by making specific allegations. Upon Brian's failure to amend, and without the State's agreement, the district court nevertheless set aside the finding of paternity. Compare *State on behalf of L.L.B. v. Hill*, 268 Neb. 355, 356, 682 N.W.2d 709, 711 (2004) (stating in paternity case involving child support arrearages that "[t]he State on behalf of [the child] does not contest the vacation of the paternity determination"). With respect to the practice employed by the district court, we have stated that a "trial judge may on occasion hasten the process along by suggesting to one party

that he or she will favorably entertain a particular pleading. Nevertheless, that practice is to be discouraged." *Jim's, Inc. v. Willman*, 247 Neb. 430, 434, 527 N.W.2d 626, 630 (1995), *disapproved on other grounds, Gibilisco v. Gibilisco*, 263 Neb. 27, 637 N.W.2d 898 (2002). The concurring opinion in *Jim's, Inc.* states that the practice should be "condemned" and "prohibited." 247 Neb. at 435, 527 N.W.2d at 630 (Caporale, J., concurring).

Unlike the subtle distinctions between a domestic abuse protection order and a harassment protection order at issue in *Mahmood*, there can be no confusion between or equating of an application to reduce monetary support for a child and an application to sever the legal relationship between a parent and child. The remedies are vastly different. To read a disestablishment action into a modification for child support application takes a lighthearted view of terminating a most important legal and social relationship. Even under liberal pleading practice, we cannot endorse the severing of the parent-child relationship simply because a party appears before a fact finder who sympathetically expands the action. As reflected in our discussion below regarding vacating judgments, we do not think it is prudent to invite adjudicated fathers who are subject to the pre-1997 version of § 43-1409, to sever their parent-child relationship merely by filing any pleading to which the results of genetic testing are attached.

Disestablishing the parent-child relationship has consequences. Although not brought on as a disestablishment matter, in the context of termination of parental rights, it has been stated that

> termination of the legal relationship between parent and child is a grave proceeding. A court order terminating parental rights renders the parent "a legal stranger to the child" and severs "all parental rights." . . . The preservation of the family, and in particular the parent-child relationship, is an important goal for not only the parents but also government itself.

Weaver v. Roanoke Dept. of Human Res., 220 Va. 921, 926, 265 S.E.2d 692, 695 (1980) (citations omitted). See, also, *Roth v. Weston*, 259 Conn. 202, 231, 789 A.2d 431, 448

(2002) (stating that termination of parental rights "is the *complete severance* by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent") (emphasis in original). We recognize that the record in the present case indicates that there is no social relationship between Brian and B.M. Nevertheless, we have recognized that a child can be harmed when a father seeks to set aside paternity. See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012). The legal effect of disestablishment can cut off inheritance. See Neb. Rev. Stat. §§ 30-2201 to 30-2902 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013). And, as this case illustrates, a delay in seeking to disestablish can hinder the State's support collection process. See §§ 43-512.03 and 43-1411. Thus, although notice pleading has liberalized requirements, it is not without limits. See 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1215 at 197 (3d ed. 2004) (recognizing that even though pleading rules are generally less stringent for pro se litigants, "there are limits"). See, also, *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985) (stating that "[p]rinciples requiring generous construction of *pro se* complaints are not . . . without limits" and that while trial courts are to construe pro se complaints liberally, they are not required to "conjure up questions never squarely presented to them"). The district court erred when it expanded the child support modification proceeding.

Although we believe that the proceeding should have been limited to ruling on modification of child support, we are aware that the dissent has concluded that Brian's applications should be viewed as constructively amended and liberally construed as a disestablishment case and that the district court properly addressed and correctly decided such issue. Relying on § 43-1409 as it existed when Brian signed the acknowledgment, the dissent reasons that, given the results of the genetic testing, Brian has "rebutted the presumption of paternity [in § 43-1409], [and] he had no obligation to continue paying child support and the State had no right to seek it." The dissent adds that the "State may not continue to seek support from an unmarried father who rebuts a presumption

of paternity." Implicit in the dissent's reasoning is the proposition that when the presumption of paternity in the pre-1997 version of the acknowledgment is rebutted, there is no longer a legal basis for child support. But the source of the child support obligation in this case is not the acknowledgment, but, rather, the decree of paternity and support, and the decree has not been vacated. We do not believe that rebutting or collaterally attacking the facts in an acknowledgment which served as a basis for the factual finding that Brian was "actually the father" in the paternity action is tantamount to vacating the decree containing the judgment that Brian is the legal father and ordering child support. See § 43-1412(1).

In this case, the district court found that Brian was not the biological father and set aside a finding of paternity. Under the dissent's view, if the court finds the individual is not the biological father, the judgment of paternity and child support evaporates. To the contrary, however, a finding that an individual is not a biological father is not the equivalent of a finding that an individual is not the legal father. To overcome the judgment which established Brian as the legal father, Brian would need to set aside the judgment, which he remains eligible to attempt.

The disestablishment statute, § 43-1412.01, was enacted in 2008, and we make no comment regarding its application or availability to Brian. In order for Brian to disestablish under non-§ 43-1412.01 principles, Brian would need to overcome the "res judicata" effect of the finding that Brian is the legal father in the judgment of paternity and child support and to take steps to vacate the judgment of paternity. See *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012) (stating that to overcome res judicata effect of presumption of paternity in dissolution decree, legal father would need to take steps to vacate decree). Even under liberal pleading principles, we cannot—knowing that the State objects to voiding paternity—agree to read Brian's applications to modify or terminate child support as pleadings seeking to vacate the decree of paternity.

Our case of *State on behalf of L.L.B. v. Hill*, 268 Neb. 355, 682 N.W.2d 709 (2004), is instructive and consistent with our

analysis. In *Hill*, we applied equitable principles and stated that because of an adjudicated father's "inexcusable lack of diligence," 268 Neb. at 360, 682 N.W.2d at 713, the trial court's decision to vacate his child support arrearages should be reversed. Although the question on appeal was limited to an issue involving child support arrearages, *Hill* illustrates the appropriate procedural approach to be followed in the instant case.

In *Hill*, an individual who had been determined to be the legal father in a paternity decree in 1996 sought to be relieved of child support obligations in 2002, based on genetic testing showing he was not the biological father. In *Hill*, we stated that "[i]n 2002, DNA tests showed that [the individual] was not [the child's] father, and [the individual] moved to vacate the paternity decree." 268 Neb. at 356, 682 N.W.2d at 710-11. Elsewhere in the opinion, we stated that in 2002, the individual also "filed a motion to terminate [child support]." *Id.* at 357, 682 N.W.2d at 711. In *Hill*, we stated that "[t]he court granted the motion and vacated the decree, as well as child support arrearages. The State on behalf of [the child] does not contest the vacation of the paternity determination and concedes that [the individual] should not be liable for future child support." 268 Neb. at 356, 682 N.W.2d at 711. The foregoing facts from our 2004 opinion demonstrate that for an individual determined to be the legal father in 1996—before the 1997 revisions to the acknowledgment statute, § 43-1409, and the 2008 passage of the disestablishment statute, § 43-1412.01—the recognized method was to file a discrete motion to vacate the paternity decree. In *Hill*, a discrete motion to vacate the decree was filed and granted and the district court and parties recognized the necessity of deciding the individual's motion to set aside the paternity decree before terminating child support based solely on genetic testing results. The district court granted the unmarried father's motion to vacate the paternity decree, thus eliminating the individual's status as the legal father, and then granted his motion to terminate child support which had been ordered during the time the individual was the legal father. The procedure was embraced by the district court, the parties, and this court.

[8] It has been observed that "finality of judgments is an important concept in our system of jurisprudence, because it enables the parties to litigation to know once and for all their rights and obligations." *Dougherty v. Swift-Eckrich, Inc.*, 4 Neb. App. 653, 658, 547 N.W.2d 522, 525 (1996). Nevertheless, in civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment during the term in which it was issued. *Fitzgerald v. Fitzgerald*, 286 Neb. 96, 835 N.W.2d 44 (2013). The paternity decree was filed in 1996, so this avenue is not available to Brian. The district court's inherent power to vacate the judgment, as extended by statute, has also expired. See Neb. Rev. Stat. § 25-2001(1) (Reissue 2008). Another avenue to vacate a paternity judgment might include § 25-2001(4)(c), providing for relief from fraud by the successful party or relief due to "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." The standard for showing fraud or newly discovered evidence is high. *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012). Another avenue sometimes available is to invoke the concurrent independent equity jurisdiction of the court which allows the court to modify its own decree. See, e.g., *State on behalf of L.L.B. v. Hill*, 268 Neb. 355, 682 N.W.2d 709 (2004). In the dissolution of marriage context of *Alisha C.*, we stated that "[t]here 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." 283 Neb. at 347, 808 N.W.2d at 882.

The dissent, perhaps recognizing the necessity to set aside the decree in order to vacate the legal finding of paternity, concludes that "the obvious remedy, for petitioners like Brian at least, is § 43-1409, as it existed in 1995." That statute provided in its entirety as follows:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. Such a signed and notarized acknowledgment or a certified copy or certified

> reproduction thereof shall be admissible in evidence in any proceeding to establish support.

This statute is merely an evidentiary presumption. See, also, § 43-1412(1) (providing for admissibility of acknowledgment in proceeding to establish paternity). Further, unlike the 1997 and later versions of § 43-1409 which provide a method to rescind or challenge acknowledgments and state that an unchallenged acknowledgment "is considered a legal finding" of paternity, the above-quoted statutory language does not in and of itself serve to make the acknowledgment a legal finding of paternity. The finding of paternity in the instant case is found in the decree; the pre-1997 version of § 43-1409 is not the vehicle to undo the judgment—although it may be helpful with respect to evidentiary matters in a proper proceeding in which the judgment is sought to be set aside. We strictly construe paternity statutes, and we are not inclined to create a novel remedy by broadly reading an evidentiary paternity statute. Section 43-1409 as it existed in 1995 does not create a remedy to vacate the judgment of paternity. In sum, unlike the district court and the dissent, we do not read Brian's applications to modify or terminate child support as seeking disestablishment nor do we read them as urging the court to vacate its judgment of paternity for purposes of disestablishing his parent-child relationship with B.M.

The Only Issue Before the District Court Was Modification of Child Support. We Discuss the Relevance of Genetic Testing Results.

Brian was found to be the legal father in the decree entered on July 18, 1996, and ordered to pay child support. The dissent aptly characterizes Brian's June 12, 2012, pleading as his "application to terminate his child support obligation based on genetic testing." It is not uncommon for an individual such as Brian to assert that because DNA testing excludes him as the biological father of a child, his court-ordered child support obligation should be reduced or terminated. However, nothing in our case law, the Nebraska statutes, or the Nebraska Child Support Guidelines indicates that genetic testing excluding a legal father as the biological father of a child is sufficient

evidence standing alone to establish a material change in circumstances warranting the modification or termination of child support which has previously been ordered in an existing paternity and child support judgment.

There is jurisprudence elsewhere regarding the significance of DNA results in an action to modify child support. The law has been summarized as follows:

> Results of DNA testing showing that the adjudicated father is not the child's biological father does not, by itself, constitute sufficient evidence to establish a material and substantial change in circumstances warranting modification or termination of the [child] support obligation, or that the support modification is in the child's best interests.

14 C.J.S. *Children Out-of-Wedlock* § 126 at 426 (2006). We agree with the foregoing statement of the law. See, also, *In re J.I.Z.*, 170 S.W.3d 881 (Tex. App. 2005).

Much like the instant case, in *In re J.I.Z.*, an adjudicated father moved to modify child support payments after obtaining DNA test results that excluded him as the child's biological father, and the trial court granted his motion and reduced his child support payments to zero. In reversing the trial court's decision, like us, the Texas Court of Appeals reasoned that the adjudicated father "should not . . . be allowed to avert his duty of support by filing a motion to decrease his support payments to zero on the basis of DNA results without first overturning the parentage judgment or terminating his parentage." *Id.* at 884. Focusing on the child support issue, the appellate court determined that the adjudicated father did not provide evidence to establish a material and substantial change in circumstances to warrant a modification of child support to zero. The appellate court stated that it was "not free to adopt a rule that would allow an adjudicated father to be relieved of his support obligations simply by coming forward with DNA evidence post-decree that tends to exclude him as the biological father." *Id.* at 885. See, also, *In re T.S.S.*, 61 S.W.3d 481 (Tex. App. 2001).

In another modification of child support case, it was observed:

> Continuation of a support obligation after an adjudicated father discovers that he is not the child's biological father may be "unjust or inappropriate," and the elimination of that obligation will be in the best interest of the obligor/father. Modification of support, however, does not alter the legal relationship between the parties, and the trial court must also find that modification is in the child's best interest.

Leguillon v. Leguillon, 124 Ohio App. 3d 757, 765, 707 N.E.2d 571, 577 (1998). We agree with the reasoning in the foregoing decisions and apply such reasoning to this case. It was an abuse of discretion to terminate child support based solely on genetic test results when the child support obligation had its origins in the unchallenged judgment of paternity.

CONCLUSION

In a decree entered on July 18, 1996, Brian was found to be the legal father of B.M. and ordered to pay child support. Brian testified he had suspicions he was not the biological father in 1996, but he waited until 2011 to satisfy his curiosity. The passage of time complicates the resolution of this appeal. Although Brian remains free to do so, no application to vacate the decree establishing Brian as the legal father has been filed by Brian, and the validity of this judgment has not been challenged. No guardian ad litem was appointed to protect the child's interests. The district court erred when it terminated the child support obligation of the legal father, Brian, based solely on the finding that Brian was not the biological father of B.M. The district court further erred when, on its own initiative, it expanded this proceeding for a modification or termination of child support into a challenge to the "Acknowledgement of Paternity" under the post-1997 version of § 43-1409 and treated the matter as a disestablishment case and set aside the finding of paternity. Although we are not unsympathetic to Brian's current status, for the reasons explained in the above analysis, we reverse the October 29, 2012, order of the district court in which the court treated this modification of child support proceeding as a successful challenge to the acknowledgment, adopted the child support referee's recommendation to

"[set] aside the finding of paternity," and terminated Brian's child support obligation. The cause is remanded for a determination of modification of child support consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., concurring.

I do not necessarily agree with the majority's premise that the district court should have treated this action only as a child support modification case and, therefore, erred in considering disestablishment of Brian's paternity. While I concede it is difficult to determine from the pleadings the precise remedy Brian sought to employ, it is clear enough that he challenged the fact of his paternity based upon the DNA test results. But I agree that the judgment of the district court must be reversed, because there is no legal basis in the record before us for vacating the 1996 judgment which determined that Brian was the father of the child.

The court is in apparent agreement that the record affords no basis for vacating the judgment of paternity under Neb. Rev. Stat. § 25-2001 (Reissue 2008), Neb. Rev. Stat. § 43-1412.01 (Reissue 2008), the post-1997 version of Neb. Rev. Stat. § 43-1409 (Reissue 2008), or the equity jurisdiction of the district court. For the reasons stated in the majority and separate concurring opinions, I agree that § 43-1409 as it existed in 1995 did not provide a remedy but was only an evidentiary presumption which merged into the judgment of paternity. When a judgment becomes final, it is simply too late to rebut an evidentiary presumption upon which it is based. Were that not so, and if parties were free to challenge a judgment years after its entry simply by showing that the underlying facts are different than what the court determined them to be, no judgment would ever be final.

That said, I do not particularly like the result which the court reaches in this case. It is logical and fair that a man who can conclusively prove that he is not the biological father of a child and has never assumed a paternal role in the child's life should not be required to pay child support. Were this a case involving a determination of paternity in the first instance,

that is the result which the law would compel us to reach. But here, Brian seeks to disprove paternity after a final judgment declared him to be the father of the child. He can only prevail by having that judgment vacated so as to disestablish his paternity, and on the record before us, he has not presented any legal basis for doing so. In my view, this court should not bend long-settled law regarding the finality of judgments in order to reach what I acknowledge would be the better result in this case.

HEAVICAN, C.J., joins in this concurrence.

CASSEL, J., concurring.

I write separately primarily to emphasize my respectful disagreement with the dissent's central premise: "Under the 1995 version of the statute,[1] if Brian rebutted the presumption of paternity, he had no obligation to continue paying child support and the State had no right to seek it." Contrary to the dissent's premise, the presumption was merely an evidentiary device that merged into the judgment entered on July 18, 1996. From that point forward, the *judgment* finally determined the issue of Brian's legal status as father. Unless and until the controlling judgment is properly vacated or modified in an appropriate proceeding, Brian's legal status as father continues unchanged.

Under the statutes as they existed at the time, Brian's signed acknowledgment of paternity created an evidentiary presumption. The statute relied upon by the dissent contains two sentences. The first sentence states, "The signing of a notarized acknowledgment . . . by the alleged father shall create a rebuttable presumption of paternity as against the alleged father."[2] A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof.[3] In most instances, a presumption imposes on the party against whom it is directed the

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[1] Neb. Rev. Stat. § 43-1409 (Cum. Supp. 1996).

[2] *Id*.

[3] *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved in part on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

burden of proving that the nonexistence of the presumed fact is more probable than its existence.[4] The second sentence of the statute confirms its evidentiary character by making the acknowledgment "admissible in evidence in any proceeding to establish support."[5]

The statutes then creating the action for determination of paternity and support fortify the presumption's evidentiary status. One statute authorized a "civil proceeding to establish the paternity of a child."[6] The next statute specified procedures in such actions.[7] The method of trial was to be "the same as that in other civil proceedings."[8] The alleged father and mother were declared "competent to testify."[9] In specified instances, uncorroborated testimony was deemed insufficient to support a finding or verdict of paternity.[10] But most important to the case before us, the acknowledgment was declared to be "admissible in evidence in any proceeding to establish paternity without the need for foundation testimony or other proof of authenticity or accuracy."[11] This makes it abundantly clear that, at the time, an acknowledgment in a paternity proceeding functioned as a piece of *evidence*.

Brian had his opportunity to rebut the presumption in the proceedings leading to the entry of the 1996 decree. Brian does not argue that the district court lacked either subject matter or personal jurisdiction. The decree recited that Brian failed to answer or otherwise plead and failed to appear at trial. There is nothing in the record to dispute that recitation. The procedural statute proclaimed the consequences: "If it is determined in [the establishment] proceeding that the alleged father is

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[4] See, Neb. Evid. R. 301, Neb. Rev. Stat. § 27-301 (Reissue 2008); *Dawes, supra* note 3.

[5] § 43-1409.

[6] Neb. Rev. Stat. § 43-1411 (Cum. Supp. 1994).

[7] Neb. Rev. Stat. § 43-1412 (Cum. Supp. 1996).

[8] § 43-1412(1).

[9] *Id*.

[10] See *id*.

[11] See *id*.

actually the father of the child, a judgment shall be entered declaring the alleged father to be the father of the child."[12] The court entered the judgment, i.e., the decree.[13] The judgment declared Brian to be the father. No appeal was taken. Brian failed to rebut the presumption when he had the opportunity to do so. The function of the acknowledgment ceased when the judgment came into existence.

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.[14] Upon the entry of judgment and passage of the appeal time, the evidence supporting the judgment no longer mattered. From that point forward, the judgment became controlling in establishing Brian as the child's legal father.

Over 15 years later, Brian sought modification of support. At this point, the presumption of the acknowledgment had no purpose. It had long been replaced by the paternity judgment. As the judgment approached its 16th anniversary, Brian filed another pleading, using a standard form for termination of child support. But this form, no matter how liberally construed, did not seek vacation or modification of the judgment declaring him to be the father of the child.

Even if the standard form could be read as an attempt to invoke the remedy enacted in 2008,[15] the district court clearly did not believe that it was proceeding under that section. The court's August 8, 2012, order stated that the new statute was "not applicable to the situation at bar, otherwise it would be an ex post facto law." But more important, where an individual seeks to implement this remedy, the statute expressly requires the court to "appoint a guardian ad litem to represent the interest of the child."[16] During the proceedings leading

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[12] See *id*.

[13] See *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986) (judgment of court of equity is called decree).

[14] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[15] See Neb. Rev. Stat. § 43-1412.01 (Reissue 2008).

[16] *Id*.

to this appeal, the court did not appoint a guardian ad litem. Consequently, the court was not proceeding under this statute, even if we assume that this remedy would otherwise have been available.

I now turn to the first of two other aspects of the dissent meriting attention. The dissent cites several cases[17] for the proposition that "setting aside a paternity decree under a district court's equity jurisdiction is contrary to our cases holding that equitable relief is not available under the paternity statutes." But none of the cited cases involves setting aside a judgment or decree. Each addresses the relief available in an action to determine paternity. In one case, a man unsuccessfully attempted to use an equitable action to have himself declared the father of two children born out of wedlock.[18] In a different case—a divorce action where the nullity of the marriage was decreed—the statute then allowed the court to make provision for the care, custody, and maintenance of the children of the parties and this court affirmed, after noting that the court would not have had the authority to entertain an independent action to determine the paternity of a child born out of wedlock.[19] In the final case, this court held that an action in equity could not be maintained against the representative of the estate of a deceased alleged father by children born out of wedlock to obtain money for their support, maintenance, and education for the period subsequent to the father's death.[20] None of the cases cited by the dissent hold, or even suggest, that the ordinary powers and remedies regarding vacating of a judgment do not apply to a judgment of paternity under § 43-1412.

The framework for a district court to vacate or modify its own judgment is so well known that it hardly requires

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[17] *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960); *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957); *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943).

[18] See *Paltani, supra* note 17.

[19] See *Timmerman, supra* note 17.

[20] See *Carlson, supra* note 17.

citation. In one of our most recent cases, we reviewed the court's authority to do so.[21] First, in civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.[22] One subsection of a statute provides for the exercise of this inherent power after the end of the term upon a motion filed within 6 months after the entry of judgment.[23] Another subsection of the same statute authorizes a district court to vacate or modify its own judgments or orders, after term, upon one or more specified grounds.[24] Finally, a district court has the power to vacate or modify a judgment after term under the court's independent equity jurisdiction.[25] Of course, equitable remedies are generally not available where there exists an adequate remedy at law.[26] And any litigant who seeks equity must herself do equity.[27]

Finally, I address the dissent's assertion that "if no procedure existed for challenging a paternity finding, then in 2008, the Legislature had no need to prohibit a court from granting relief from a determination of paternity if the petitioner had signed an acknowledgment."[28] The dissent errs in two aspects.

First, the dissent's premise is incorrect. A procedure did exist. As I have already expounded, the district court's jurisdiction to vacate or modify its own judgments is well settled. But while a procedure existed prior to the 2008 amendment, the likelihood of successfully challenging a paternity finding was quite small as a result of two decisions of this court. First,

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[21] See *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014).

[22] *Id*.

[23] See, Neb. Rev. Stat. 25-2001(1) (Reissue 2008); *Carlson, supra* note 21.

[24] See, § 25-2001(4); *Carlson, supra* note 21.

[25] See, *Carlson, supra* note 21; *Roemer v. Maly*, 248 Neb. 741, 539 N.W.2d 40 (1995).

[26] *Carlson, supra* note 21.

[27] *Roemer, supra* note 25.

[28] See § 43-1412.01.

in *DeVaux v. DeVaux*,[29] we held that a finding of paternity in a decree dissolving a marriage prevented the parties from relitigating paternity. Second, in *McCarson v. McCarson*,[30] we held that an allegation of fraud on the part of the mother at the time of the decree was sufficient to overcome a demurrer to the father's attempt to invoke § 25-2001(4) to modify the decree adjudicating his paternity. But as we noted in *McCarson*,[31] the statutory remedy was only available for 2 years after the judgment was rendered or made. Thus, while a statutory remedy existed, it was very narrow.

Second, the 2008 statute[32] was clearly driven by the limited procedures available to challenge a finding of paternity. It may be that the Legislature also recognized that a 1997 amendment to § 43-1409[33] designated a signed and notarized acknowledgment, after a rescission period, as a "legal finding which may be challenged only on [specified grounds]." Indeed, we later observed that a judicial proceeding was not needed to establish a child's paternity where a properly signed and notarized acknowledgment legally established the father's paternity as to the child specified in the acknowledgment.[34] Obviously, our jurisprudence regarding vacating or modifying judgments would not apply to a "legal finding" created without a judicial proceeding. The Legislature may have recognized that because it had created such an extrajudicial finding, it also needed to create a remedy for setting aside such a determination. The 2008 amendment more broadly enabled challenges to paternity findings originating from either judicial proceedings or the 1997 amendment to § 43-1409.

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[29] *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994) (superseded by statute as stated in *Alisha C. v. Jeremy C.*, 283 Neb. 340, 808 N.W.2d 875 (2012)).

[30] *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002) (superseded by statute as stated in *Alisha C., supra* note 29).

[31] *Id.*

[32] § 43-1412.01.

[33] See § 43-1409 (Reissue 1998).

[34] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

Of course, the 1997 amendment did not apply to the case before us, where the paternity judgment was entered in 1996. Brian's legal status as father was established by the 1996 judgment rather than the signed acknowledgment.

While I understand the dissent's concern about requiring Brian to pay support for a child that genetic testing apparently establishes was not his biological offspring, the dissent too lightly dismisses the consequences to the child from a termination of the legal relationship of parent and child. This relationship is constitutionally protected.[35] Both parents and their children have cognizable substantive due process rights to the parent-child relationship.[36] The dissent would approve a procedure that failed to protect the child's rights. I cannot do so.

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[35] See *In re Interest of Meridian H.*, 281 Neb. 465, 798 N.W.2d 96 (2011).

[36] *Id.*

CONNOLLY, J., dissenting.

Brian raised his claim that he was not the minor's biological father. The State acknowledged his claim and litigated the issue. The referee concluded that Brian had proved he was not the minor's father. He recommended that the district court enter an order to set aside the paternity finding. The district court agreed that Brian was not the father and terminated his child support obligation. Yet the majority opinion, through a series of legal contortions, manages to avoid the issue that the parties tried.

Neither the State nor the majority dispute the court's finding that Brian is not the minor's father. It is true that only a little more than a year's child support obligation is at issue. But the incorrect pleading rules that the majority applies to reverse the court's judgment are no small matter. I cannot join in that opinion.

I do not agree that Brian failed to directly attack the judgment of paternity. His pro se form petition requested a reduction in the amount of his obligation *and* genetic testing. We do not have a transcript of the hearing on his motion for genetic testing, but after a hearing, a referee granted Brian's

request, with the costs taxed to Brian. In May 2012, the State reported to Brian that he was not the minor's biological father. Crucially, the majority acknowledges that a month later, on June 12, 2012, Brian filed a pro se form entitled "Application and Affidavit to Obtain Termination of Child Support." But Brian did not check any box on the form corresponding to the stated reasons for terminating his support obligation. Instead, he wrote in "Genetic Testing attached," which referred to the State's May report that he was not the minor's biological father.

The district court's order characterized Brian's pleadings as follows:

> On November 17, 2011, [Brian] filed a Petition for Modification of Child Support. In that Petition, [he] requested that there be a DNA test on the minor child to determine whether [he] was the biological father of the minor child. [He] *also* requested a reduction in child support due to his reduction in income.

(Emphasis supplied.) Clearly, the district court viewed Brian's pleadings as asserting alternative claims for relief: (1) a claim for a reduction of the support obligation because of a change in income and (2) a claim for termination of support because he was not the minor's father. Of course, our pleading rules permit a party to raise separate, and even inconsistent, claims.[1]

Equally important, the State litigated whether Brian's paternity should be disestablished. At the start of the hearing before the referee, he stated that he was conducting a hearing on Brian's motion to terminate his child support obligation. The State responded as follows: "Your honor, the State would object to the Motion to Terminate in what appears to be a motion to disestablish." But the State objected to the motion on the merits, not as beyond the scope of Brian's pleading or the court's authority to address. The State defended against Brian's claim and presented evidence on his signed acknowledgment. The referee's report stated that the matter before it

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[1] See *TFF, Inc. v. SID No. 59*, 280 Neb. 767, 790 N.W.2d 427 (2010), citing Neb. Ct. R. Pldg. § 6-1108(e)(2).

was Brian's "'Application and Affidavit to Obtain Termination of Support.'"

Moreover, in response to the referee's report, the State took "exception to the recommendation of the Referee regarding the Motion for *Termination of Support and Disestablishment* filed by [Brian]." (Emphasis supplied.) The State further litigated Brian's claim to disestablish his paternity before the district court.

The State does not claim on appeal that the disestablishment issue is not properly before us. It indisputably knew the issue that it was litigating. And both the referee and the district court reached decisions based on Brian's June 12, 2012, pleading—his application to terminate his child support obligation based on genetic testing. Obviously, even if his original petition were not clear enough to raise his claim to disestablish paternity, the pleadings were constructively amended by his June 12 pleading and the State's implied consent to litigate that issue.[2] It is inconsistent with rule 15(b) of the Nebraska Court Rules of Pleading in Civil Actions[3] for an appellate court to disregard the result of a trial when the parties agreed to try the issue.[4] So the majority opinion's focus on rules for a modification of a support obligation is irrelevant. Because the court concluded that Brian successfully disestablished his paternity, it had no need to consider whether to modify his support obligation.

But because the district court mistakenly concluded that the post-1997 version of § 43-1409[5] governed Brian's claim to disestablish paternity, it gave Brian an opportunity to amend his pleadings and both parties an opportunity to present evidence on the reasons for which § 43-1409 now authorizes a collateral attack on a finding of paternity: duress, fraud, or material mistake of fact.

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[2] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 815, 708 N.W.2d 235, 243 (2006). See, also, *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

[3] See Neb. Ct. R. Pldg. § 6-1115(b).

[4] See *Blinn, supra* note 2.

[5] Neb. Rev. Stat. § 43-1409 (Reissue 2008).

That the court ordered an additional hearing is not surprising. The State was relying on a statute that did not exist in 1995 when Brian signed the acknowledgment of paternity, and the court did not know exactly what the paternity statutes provided in 1995. Moreover, in its first order, the court specifically determined that Brian's application to terminate his child support obligation had raised the disestablishment claim and implicitly raised a mistake of fact. So the court's additional hearing was not an attempt to improperly expand the proceeding to include the disestablishment issue. Nor did the court improperly suggest that it would favorably entertain Brian's amended pleading. The State benefited from an opportunity to present evidence on the issues that the court believed were relevant.

More important, the majority's insinuations are simply beside the point. The court was mistaken in its belief that duress, fraud, or material mistake of fact was at issue. In 1995, § 43-1409 provided the following:

> The signing of a notarized acknowledgment, whether under section 43-1408.01 or otherwise, by the alleged father shall create a rebuttable presumption of paternity as against the alleged father. Such a signed and notarized acknowledgment or a certified copy or certified reproduction thereof shall be admissible in evidence in any proceeding to establish support.[6]

Under the 1995 version of the statute, if Brian rebutted the presumption of paternity, he had no obligation to continue paying child support and the State had no right to seek it. It was not until 1997 that the Legislature amended § 43-1409 to require an unmarried man, who could prove that he was not a child's biological or adoptive father, to nonetheless support that child, unless he could also prove that he signed an acknowledgment of paternity because of fraud, duress, or mistake of fact.[7] But the limitations of fraud, duress, or

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[6] See, Neb. Rev. Stat. § 43-1409 (Cumm. Supp. 1996); 1994 Neb. Laws, L.B. 1224, § 58.

[7] See 1997 Neb. Law, L.B. 752, § 101.

mistake for rebutting the presumption of paternity did not apply to Brian.

A legislative act operates only prospectively and not retroactively unless the Legislature's intent and purpose that it should operate retroactively are clearly disclosed.[8] Statutes affecting substantive matters are not applied retroactively; disputes regarding such rights are governed by the statutes in effect at the time of the disputed transaction or event.[9] The 1997 amendments to the paternity statutes were substantive and do not apply retroactively to an acknowledgment signed in 1995. So that portion of the court's order dealing with a material mistake of fact is superfluous and immaterial to the issue before this court. Obviously, if the district court had known what § 43-1409 required in 1995, it would not have ordered an additional hearing. Instead, it would have realized that the only issue was whether Brian had rebutted the presumption of paternity—which burden he had clearly met.

Having cleared the statutory underbrush, the primary issue, according to the majority opinion, is whether Brian's pleadings were sufficient to put the State on notice of his claim. *Mahmood v. Mahmud*[10] governs that issue. There, we explained that our pleading practices have been liberalized since 2003: "A party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. Plaintiffs are not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted."[11]

Mahmood illustrates that under our liberal pleading rules, we focus on whether the plaintiff's petition or complaint

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[8] See, e.g., *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 829 N.W.2d 717 (2013); *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001); *Kratochvil v. Motor Club Ins. Assn.*, 255 Neb. 977, 588 N.W.2d 565 (1999); *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995).

[9] See, e.g., *Smith, supra* note 8; *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992).

[10] *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

[11] *Id.* at 396, 778 N.W.2d at 431.

was sufficient to give the defendant notice of the claim to be defended against. Even if a plaintiff cites the wrong statute or uses an incorrect form to assert a claim for relief, this error will not preclude a trial court from considering the claim and granting relief when the petition or complaint is sufficient to put the defendant on notice of the plaintiff's claim.

The application of our pleading rules cannot turn on an appellate court's approval or disapproval of the claim presented. The district court did not, as the majority opinion states, "read a disestablishment action into a modification for child support application." That claim was fairly presented—as illustrated by the referee's interpretation, the State's interpretation, and the district court's interpretation of his pleadings.

It is true that a child born out of wedlock has a statutory right to receive support from the child's father.[12] But as we have previously recognized, unmarried men also have substantial rights at stake in proceedings to impose child support obligations.[13] These considerations do not become irrelevant if the obligor later claims that he was the victim of paternity fraud.

Moreover, under the common law, the father of a child born out of wedlock had no duty to support his child.[14] We strictly construe paternity statutes precisely because they are in derogation of the common law.[15] As we have stated, "'A fundamental fact necessary to sustain an order of child support is paternity by the man judicially obligated to pay such support.'"[16] So if the Legislature has determined that an unmarried father can rebut a presumption of paternity, it is not for this court

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[12] See Neb. Rev. Stat. § 43-1411 (Reissue 2008).

[13] See *Carroll v. Moore*, 228 Neb. 561, 423 N.W.2d 757 (1988), citing *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981).

[14] See, *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957); *Carlson v. Bartels*, 143 Neb. 680, 10 N.W.2d 671 (1943).

[15] See, *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Timmerman, supra* note 14.

[16] *Cross, supra* note 15, 257 Neb. at 781, 600 N.W.2d at 784.

to sit as a super-legislature and discourage such actions by imposing stricter pleading requirements than the pleading rules that apply in any other proceeding.

It is true that in *State on behalf of L.L.B. v. Hill*,[17] the trial court sustained a motion to vacate a paternity decree that it had entered several years earlier. But in *Hill*, we did not address the court's authority to grant this equitable relief or to terminate future support obligations. The only issue on appeal was the court's vacation of arrearages, and we concluded that the adjudicated father's lack of diligence precluded him from seeking that relief.

But setting aside a paternity decree under a district court's equity jurisdiction is contrary to our cases holding that equitable relief is not available under the paternity statutes.[18] Moreover, Nebraska does not have a procedural equivalent of rule 60 of the Federal Rules of Civil Procedure,[19] which permits a court to grant prospective relief from a judgment because it is no longer equitable. Finally, if the majority actually believes that a district court has equity powers to grant prospective relief from a paternity decree, it should be interpreting the court's order as doing just that. But that issue need not be reached because the obvious remedy, for petitioners like Brian at least, is § 43-1409, as it existed in 1995.

The majority concedes that the only basis for the paternity decree is Brian's acknowledgment and that § 43-1409 provides a method to rescind or challenge such acknowledgments. In 1995, there was no time limitation for that challenge. But the majority attempts to evade that problem by concluding that in 1995, § 43-1409 created merely an evidentiary presumption for a proper proceeding, but not a remedy. The majority clearly believes that when Brian signed the acknowledgment, no statutory procedure existed for challenging a finding of paternity if the acknowledged father initially believed he was

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[17] *State on behalf of L.L.B. v. Hill*, 268 Neb. 355, 682 N.W.2d 709 (2004).

[18] See, e.g., *Paltani v. Creel*, 169 Neb. 591, 100 N.W.2d 736 (1960); *Timmerman, supra* note 14; *Carlson, supra* note 14.

[19] See Fed. R. Civ. P. 60(b)(5).

the father or could not afford to challenge a paternity petition. I do not agree that the Legislature intended to permit an acknowledged father to rebut a presumption of paternity but nonetheless left him high and dry, without a procedure for asserting that challenge.

Moreover, if no procedure existed for challenging a paternity finding, then in 2008, the Legislature had no need to prohibit a court from granting relief from a determination of paternity if the petitioner had signed an acknowledgment.[20] Notably, the 1995 acknowledgment that Brian signed did not inform him that he would be unable to challenge the acknowledgment even if he later learned that he was not the child's biological father. The only constructive notice he had of the acknowledgment's consequences was § 43-1409. That statute would have reasonably led him to conclude that he could challenge the acknowledgment by rebutting the presumption of paternity.

One more point, and I am done. I recognized that the State alternatively argues that Brian should be equitably estopped or barred by the doctrine of laches from challenging his paternity because he sat on his rights until the minor, B.M., was nearly 17 years old. But even if equitable relief were available under the paternity statutes, equity strives to do justice.[21] And the State's argument ignores the fact that adjudicated fathers are commonly low income and without the means to prove their claims if they later learn they are not the biological father.[22] This record certainly suggests that Brian lacked the wherewithal to defend his rights.

Although Brian had suspicions that he might not be the minor's father, he was living in Minnesota when he was served with notice of the State's paternity action and did not appear for that proceeding or for the subsequent 2009 modification

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[20] See Neb. Rev. Stat. § 43-1412.01 (Reissue 2008).

[21] *Floral Lawns Memorial Gardens Assn. v. Becker*, 284 Neb. 532, 822 N.W.2d 692 (2012).

[22] See, e.g., Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. Gender Race & Just. 617 (2012).

proceeding. But in 2009, when the minor was removed from his mother's home, the payee for Brian's support payments was changed to a man whom the mother had stated was the minor's biological father. After Brian found out he was not the minor's father, he tried to do something about his support obligation. He stated that he unsuccessfully asked for genetic testing for years from child support services. He eventually received help with court filings from legal aid services in Minnesota, which resulted in the 2012 order for genetic testing, followed by his disestablishment claim. I do not believe that these facts show inexcusable neglect.

More important, equitable relief is not available under the paternity statutes. As explained, these statutes are strictly construed because they are in derogation of the common law. The parties are limited to the remedies provided by statute, which do not include claims for equitable relief.[23] So under the 1995 version of § 43-1409, the State may not continue to seek support from an unmarried father who rebuts a presumption of paternity.

In sum, the majority's opinion appears to be a triumph of form over substance. It concludes that Brian's pro se filings were insufficient to present a disestablishment claim despite the State's interpreting his pleadings as presenting this claim and defending against it; despite the referee's specific statement that the matter before him was Brian's June 2012 pleading; despite the district court's interpretation of his pleadings as presenting alternative claims for relief; and, most important, despite our own pleading rules and case law that require this court to decide the issues presented by this appeal.

The majority has effectively held that all adjudicated fathers signing an acknowledgment before 2008 have no procedure to overcome the "res judicata" effect of the paternity decree and prove that they are not the acknowledged child's biological father. Under the majority opinion, a man who is not the child's father can be coerced to make future support payments to a man who is the child's father, even upon a demonstrated

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[23] See, e.g., *Paltani, supra* note 18; *Timmerman, supra* note 14; *Carlson, supra* note 14.

falsehood. This result demonstrates that without a remedial procedure in place, hospital acknowledgments of paternity easily become a child support system that is unconcerned with actual paternity.[24]

McCormack, J., joins in this dissent.

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[24] See Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 Fam. L.Q. 51 (2006).

State of Nebraska, appellee, v. Yai Bol, also known as Daniel D. Matit, appellant.

846 N.W.2d 241

Filed May 16, 2014. No. S-13-317.

1. **Constitutional Law: Search and Seizure: Investigative Stops: Arrests: Probable Cause.** The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. This guarantee requires that an arrest be based on probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.
2. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, the appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that the appellate court reviews independently of the trial court's determination.
3. **Criminal Law: Investigative Stops: Motor Vehicles: Police Officers and Sheriffs.** A traffic stop requires only that the stopping officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime.
4. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a traffic violator, the stop is objectively reasonable.
5. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account.
6. ____: ____: ____. The factual basis for an investigatory stop need not arise from the officer's personal observation, but may be supplied by information acquired from another person.
7. **Investigative Stops: Arrests: Police Officers and Sheriffs: Probable Cause.** Under what is commonly called the collective knowledge doctrine, an officer who does not have personal knowledge of the facts establishing probable cause

for the arrest or reasonable suspicion for the stop may nevertheless make an arrest or a stop if the officer is merely carrying out directions of another officer who does have probable cause or reasonable suspicion.

8. **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.
9. **Prior Convictions: Proof.** In a proceeding to enhance punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.
10. **Prior Convictions: Records: Proof.** The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.
11. **Drunk Driving: Prior Convictions: States.** Under Nebraska law, a prior conviction for purposes of a prosecution for driving under the influence includes any conviction under a law of another state if, at the time of the conviction, the offense would have been a violation of Nebraska's driving under the influence statutes.
12. **Drunk Driving: Prior Convictions: States: Proof.** Where prior convictions of driving under the influence in other states are alleged as grounds for sentence enhancement, the prosecutor is required to present a court-certified copy or an authenticated copy of a prior conviction in another state which shall be prima facie evidence of such prior conviction.
13. **Criminal Law: Judgments: Records.** A court has inherent power in a criminal case to correct its records to reflect the "truth," nunc pro tunc.
14. **Judgments: Records.** The purpose of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded.
15. ____: ____. It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.
16. **Judgments.** Clerical errors may be corrected by an order nunc pro tunc, but judicial errors may not.
17. **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.
18. ____: ____. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

19. **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.

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

Dennis R. Keefe, Lancaster County Public Defender, Jennifer M. Houlden, and, on brief, Elizabeth D. Elliott, for appellant.

Jon Bruning, Attorney General, George R. Love, and Joel R. Rische, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Yai Bol, also known as Daniel D. Matit, was convicted of one count of driving under the influence (DUI) with refusal of a chemical test and one count of driving during revocation. He appeals, challenging his convictions and sentences. Finding no error, we affirm the judgment of the district court.

I. FACTS

An information filed in the district court for Lancaster County charged Matit, also known as Bol, with three counts. The charges arose out of a traffic stop that occurred on May 7, 2012. The information was later amended to charge Bol, also known as Matit, with two counts: DUI with refusal of a chemical test, three prior convictions, and driving during revocation or impoundment, first offense. Because the operative information uses the name "Bol," so will we in this opinion.

1. MOTION TO SUPPRESS

Bol filed a motion to suppress evidence gathered during the traffic stop, claiming police lacked probable cause to initiate the stop. Sgt. Benjamin Miller of the Lincoln Police Department testified at a hearing on the motion. Miller testified that he was on patrol in the area of 13th and E Streets in Lincoln, Nebraska, at about 1:20 a.m. on May 7, 2012. While traveling west, he saw a sport utility vehicle (SUV)

traveling east toward his patrol car begin to make a right turn at the intersection of 14th and E Streets, then erratically change direction, and then make another erratic turn, so that it ultimately made a complete U-turn and was heading west. The SUV did not use turn signals. After the SUV turned to head west, it almost immediately parked along the street. As Miller passed the SUV, he noticed it was parked almost 3 feet from the curb, which he believed was a violation of a city ordinance.

Miller decided to turn his car around and contact the driver of the SUV. As he did so, he saw Officer Anthony Gratz of the Lincoln Police Department turn onto E Street and drive toward the parked SUV. Miller asked Gratz to make contact with the driver of the SUV, because Gratz could get there more quickly. Gratz was thus the first officer to contact the SUV driver; Miller arrived shortly after Gratz.

After hearing this evidence, the district court denied Bol's motion to suppress. It found there was probable cause for police to initiate contact with the driver of the SUV based on Miller's observations of the erratic driving, the failure to use turn signals, and the manner in which the SUV was parked.

2. Trial

The case proceeded to a jury trial. At trial, Miller again explained what he observed prior to contacting the driver of the SUV and explained that he learned upon contacting the driver that he was Bol. Miller testified that he immediately noticed both that Bol had "bloodshot, watery eyes" and that there was an "odor of alcoholic beverage coming" from Bol and the SUV.

Bol agreed to participate in field sobriety tests, and Miller administered three: the horizontal gaze nystagmus test, the nine-step walk-and-turn test, and the one-leg stand test. Miller testified that Bol showed signs of impairment on each test. After Miller administered the tests, he placed Bol in his patrol car and asked him to take a preliminary breath test. Bol refused.

Miller then transported Bol to a detoxification center. At the center, Miller read Bol a postarrest chemical test

advisement form, which informed Bol that he was required to take a chemical test and that refusal to do so was a separate crime. Bol refused to submit to the chemical test. Miller testified that after Bol refused the chemical test, Miller read Bol his *Miranda* rights.[1] Miller further testified that based upon his experience and training, Bol was under the influence of alcohol.

After Miller's testimony, the State rested. Bol's counsel then moved for a directed verdict, which was denied. Counsel for the State then informed the court, "I guess there's an issue we have to take up as far — There's a trial stipulation that did not get into evidence." The court then acknowledged that there had been no evidence presented on the charge of driving under revocation and asked, "So, are we going to take out" that count? The State responded that it was asking for leave to reopen its case in chief to submit a written stipulation entered into by the parties on the revocation issue, which stipulation it had inadvertently failed to offer into evidence. Over Bol's objection, the court allowed the State to offer the written stipulation as an exhibit. The stipulation states that on May 7, 2012, Bol's driver's license had been administratively revoked.

Bol then testified in his own defense. He acknowledged that he also goes by the name "Daniel Matit." He stated that he performed the U-turn because he was looking for a parking spot and there was one available on the south side of the street. He thought the turn might have been erratic because his SUV was quite large and he was having trouble with its power steering. Bol testified that he parked the SUV close to the curb. He denied drinking on May 7, 2012, and testified that Miller gave him *Miranda* warnings prior to asking him to take a preliminary breath test. Bol stated that he refused that test and the later chemical test based on his understanding that anything he said or did could be used against him. Bol admitted that he was read the postarrest chemical test

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

advisement and that he understood it was a crime not to take the test.

Gratz also testified and generally corroborated Miller's testimony about how the traffic stop occurred. He was unable to recall many details about the stop, however. After deliberation, the jury returned a verdict of guilty on both counts.

3. Sentencing

A sentence enhancement hearing was held on February 14, 2013. The State attempted to establish that Bol had three prior DUI convictions: one in Hall County, Nebraska, and two in Vermont. Bol objected to the Vermont convictions. After an enhancement hearing, the district court entered an order finding Bol had two prior DUI convictions, making the current conviction a third offense. Four days later, the court entered an order "nunc pro tunc," finding Bol had three prior DUI convictions, making the current conviction a fourth offense.

Bol was sentenced to 2 to 3 years' imprisonment for fourth-offense DUI with refusal of a chemical test and to 6 months' imprisonment for driving under revocation, the sentences to run concurrently. He filed this timely appeal.

II. ASSIGNMENTS OF ERROR

Bol assigns (1) the district court abused its discretion in failing to grant the motion to suppress, (2) the district court abused its discretion by allowing the State to reopen its case after it rested, (3) the evidence adduced at trial was insufficient to sustain a conviction for DUI with refusal of a chemical test, (4) the district court erred in finding the Vermont convictions were valid prior convictions for purposes of sentence enhancement, (5) the district court erred in issuing the order nunc pro tunc and changing the number of prior convictions from two to three, and (6) the sentences imposed by the district court were excessive.

III. ANALYSIS

1. Motion to Suppress

[1,2] The Fourth Amendment guarantees the right to be free of unreasonable search and seizure. This guarantee requires that

an arrest be based on probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.[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. 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.[3]

[3,4] Bol argues that the police lacked authority to contact him. A traffic stop requires only that the stopping officer have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime.[4] In this context, if an officer has probable cause to stop a traffic violator, the stop is objectively reasonable.[5] The district court found there was probable cause for police to initiate contact with Bol, because Miller observed Bol's erratic driving, his failure to use turn signals, and the irregular manner in which the SUV was parked. These findings of fact are not clearly erroneous, and we agree they provided police with at least the reasonable suspicion necessary to initiate contact with Bol.

Bol contends the motion to suppress should have been granted, because Gratz, the first officer to make contact with him, did not personally testify about the facts justifying the stop. Bol contends that it is "unreasonable that the Court should rely upon an officer's explanation of what another officer considered appropriate grounds to initiate a traffic stop."[6] But even assuming this is so, that is not what happened in this case. Miller testified about the grounds he considered appropriate to initiate the stop. And Miller testified

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[2] *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010).

[3] *Id.*

[4] *Id.*

[5] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 158, 184 L. Ed. 2d 78.

[6] Brief for appellant at 24.

that based on those grounds, he asked Gratz to initiate contact with Bol.

[5-7] In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account.[7] The factual basis for a stop "'need not arise from the officer's personal observation, but may be supplied by information acquired from another person.'"[8] Under what is commonly called the collective knowledge doctrine, an officer who does not have personal knowledge of the facts establishing probable cause for the arrest or reasonable suspicion for the stop may nevertheless make an arrest or a stop if the officer is merely carrying out directions of another officer who does have probable cause or reasonable suspicion.[9] It is thus clear that the relevant analysis is whether the information Miller possessed justified the traffic stop, not what information Gratz had prior to initiating the stop. And as we have noted, the information Miller possessed supplied reasonable suspicion to justify the initial contact with Bol. The district court did not err in denying the motion to suppress.

2. State's Reopening of Its Case in Chief

After it rested, the State requested leave to reopen its case in chief in order to submit an exhibit that it had inadvertently failed to offer into evidence. The court allowed the State to do so. Bol asserts this was error.

In criminal prosecutions, the withdrawal of a rest in a trial on the merits is within the discretion of the trial court.[10] Bol contends that the district court abused its discretion because it

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

[8] *Id.* at 50, 783 N.W.2d at 620, quoting *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989).

[9] *State v. Wollam, supra* note 2, citing *State v. Wegener*, 239 Neb. 946, 479 N.W.2d 783 (1992).

[10] *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990), *disapproved on other grounds, State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

"abused its position as a neutral party and encouraged the State to reopen its case to present evidence."[11]

Bol relies heavily on *State v. Gray*.[12] In *Gray*, the defendant was found guilty of forgery. An enhancement hearing was held prior to his sentencing, and at that hearing, the State offered three exhibits as evidence of his prior convictions and then rested. The defendant was then granted a continuance. Before the hearing resumed, the court, on its own motion, notified all parties that the exhibits offered by the State were not sufficient to prove the prior convictions, because they contained no showing that the defendant had knowingly and intelligently waived counsel at the time he pled to the convictions. After receiving this notification from the court, the State sought to withdraw its rest to present additional evidence, and the court allowed it to do so. The defendant appealed, and the Nebraska Court of Appeals concluded the court had abused its discretion in allowing the State to withdraw its rest. It reasoned that the judge had "departed from his role as neutral fact finder" by informing the State that the evidence was insufficient and then allowing the State to produce additional evidence.[13]

Two other Nebraska cases are also of import. In *State v. Thomas*,[14] the defendant was charged with failure to appear and a jury trial was held. The State called two witnesses, offered certain exhibits, and then rested. The defendant moved for a directed verdict, contending the prosecution was barred by the statute of limitations, because the State had failed to produce evidence showing an exception to the statute of limitations applied. The State then moved for leave to withdraw its rest in order to adduce evidence on the issue, and the court allowed it to do so. On appeal, the defendant contended this was an abuse of discretion, because had the court not so acted, he would

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[11] Brief for appellant at 26.

[12] *State v. Gray*, 8 Neb. App. 973, 606 N.W.2d 478 (2000), *overruled in part on other grounds, State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001).

[13] *Id.* at 992, 606 N.W.2d at 495.

[14] *State v. Thomas, supra* note 10.

have been entitled to a directed verdict in his favor. We held the court did not abuse its discretion in allowing the State to withdraw its rest.

In *State v. McKay*,[15] the defendant was charged with assault by a confined person. After the State rested, the defendant moved for a directed verdict, arguing the State failed to prove that he was "legally" confined at the time of the assault and thus failed to prove an element of the offense. Although the court agreed with the defendant's legal argument, it granted the State's motion to withdraw its rest in order to present additional evidence on the issue. On appeal, the defendant contended this was an abuse of discretion, because the court had concluded the State had failed to prove its case prior to resting. The Court of Appeals found the facts in *McKay* were comparable to those in *Thomas*, not those in *Gray*. It reasoned that an abuse of discretion was found in *Gray* not because the State was allowed to fill in gaps in proof, but because the court failed to maintain the appearance of impartiality.

The instant case is also much more similar to *Thomas* than to *Gray*. It is true that without the evidence submitted by the State after being allowed to withdraw its rest, Bol could not have been convicted of driving during a period of revocation. However, *Thomas* makes it clear that withdrawal of rest to fill in gaps in proof is proper, as long as the court does not advocate for or advise the State to withdraw its rest. Here, Bol argues that the court alerted the State that it had failed to offer proof of the driving on revocation charge and thus acted improperly. But this is not what the record shows. It is clear that the State initiated discussion about the lack of proof on the revocation charge with the court, and it was only after the State had initiated the discussion that the court agreed there had been a lack of proof on the issue. On the facts before us, the court did not improperly abdicate its role as a neutral fact finder and did not abuse its discretion in allowing the State to withdraw its rest to put on additional evidence.

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[15] *State v. McKay*, 15 Neb. App. 169, 723 N.W.2d 644 (2006).

3. Sufficiency of Evidence

[8] Bol argues the evidence was insufficient to support the jury's verdict. In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[16] 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.[17]

In his brief, Bol challenges the sufficiency of the evidence as it relates to both his conviction for DUI and his conviction for refusing to submit to a chemical test. But his arguments go to nothing more than the credibility of the witnesses or factual disputes between the witnesses. Viewed in the light most favorable to the State, the evidence is sufficient to support both convictions.

4. Prior Convictions

(a) Identity of Person Convicted

At the enhancement hearing, the State sought to establish that Bol had three prior DUI convictions: one in Hall County and two in Vermont. Bol does not dispute the Hall County conviction, but he contends on appeal that the State failed to prove that he was the defendant in the two Vermont prosecutions.

[9,10] In a proceeding to enhance punishment because of prior convictions, the State has the burden of proving such prior convictions by a preponderance of the evidence.[18] The existence of a prior conviction and the identity of the accused as the person convicted may be shown by any competent

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[16] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013); *State v. McGee*, 282 Neb. 387, 803 N.W.2d 497 (2011).

[17] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013); *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[18] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

evidence, including the oral testimony of the accused and duly authenticated records maintained by the courts or penal and custodial authorities.[19]

[11,12] Under Nebraska law, a prior conviction for purposes of a DUI prosecution includes any conviction under a law of another state if, at the time of the conviction, the offense would have been a violation of Nebraska's DUI statutes.[20] Where prior DUI convictions in other states are alleged as grounds for DUI sentence enhancement, the prosecutor is required to present "a court-certified copy or an authenticated copy of a prior conviction in another state" which "shall be prima facie evidence of such prior conviction."[21] In the context of Nebraska's habitual criminal statute, we have held that an authenticated record establishing a prior conviction of a defendant with the same name is prima facie evidence sufficient to establish identity for the purpose of enhancing punishment and, in the absence of any denial or contradictory evidence, is sufficient to support a finding that the accused has been convicted prior thereto.[22] The same principle applies to proof of prior convictions under Nebraska's DUI statutes.

One of the Vermont convictions was in 2006. The 2006 Vermont conviction record identifies the defendant as "Yai Bol" and "Yai D. Bol," born on January 1, 1986. At the enhancement hearing, Bol testified that he was born on January 1, 1986. Thus, Bol has the same name and birth date as the person convicted of DUI in Vermont in 2006. This is sufficient to establish a prima facie showing that he is that person.

Bol contends that because he denied being the person convicted in Vermont in 2006, the burden shifted to the State to show he was that person. But we do not see any such denial in the record before us. At the enhancement hearing, Bol was not asked any questions about the 2006 Vermont conviction, and

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

[20] See Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2012).

[21] § 60-6,197.02(2).

[22] *State v. Dixon, supra* note 18; *State v. Thomas, supra* note 19.

he made no reference to it in his testimony. Accordingly, the prima facie showing was not rebutted, and the evidence was sufficient to establish that Bol was the same person convicted of DUI in Vermont in 2006.

The other Vermont conviction occurred in 2009. The record from this conviction identifies the defendant at various places as "Daniel A. Matit," "Daniel D. Matit," and "Daniel Matit," born on January 1, 1989. It was established at trial that Bol uses the name "Daniel Matit." The 2009 conviction record indicates that the "Daniel Matit" convicted was married and living at a street address in Vergennes, Vermont. It also reflects that at the time of his arrest, he was driving a green Ford Explorer registered in Mississippi. At the enhancement hearing, Bol denied that he was convicted of DUI in Vermont in 2009. He stated that he had never been married. He acknowledged living in Vermont in 2009, but he testified that he never resided at the street address shown on the 2009 conviction record. On cross-examination, however, Bol admitted that in 2009, he owned a green Ford Explorer which was registered in Mississippi. Although there is a discrepancy between Bol's stated birth date of January 1, 1986, and the January 1, 1989, birth date reflected in the 2009 Vermont conviction records, the 1989 date is also reflected in the 2011 Hall County DUI conviction record of "Daniel D. Matit." At the enhancement hearing, Bol's counsel acknowledged that he was the person identified in the Hall County record.

There is also fingerprint evidence linking Bol to a person named "Yai Bol" who resided in Vermont in 2009. David Sobotka, a fingerprint examiner for the identification bureau of the Lincoln Police Department, testified that he compared fingerprint cards of "Yai Dau Bol" and "Daniel Deng Matit" which he obtained from the "IAFIS" database of the Federal Bureau of Investigation (FBI). The fingerprints did not match, and Sobotka testified that this meant that there is a "Daniel Matit" who is not the same person as the "Yai Bol" who provided the fingerprints.

But Sobotka also compared the fingerprints of "Yai Dau Bol" obtained from the FBI database to fingerprints from

"Daniel Deng Matit" taken by the Lincoln Police Department on May 7, 2012, and determined they were made by the same person. He also compared Bol's fingerprints from the FBI database and Matit's fingerprints taken by the Grand Island, Nebraska, police department in 2011 and determined they were made by the same person. Finally, Sobotka compared the same fingerprints of Bol from the FBI database with those of a "Yai Bol" who was arrested in Vermont on various charges in May 2009, approximately 2 months after the Vermont DUI conviction which is at issue. Again, the two sets of fingerprints matched. The date of birth of "Yai Bol" on the Vermont fingerprint card was January 1, 1986. Also, the photograph on the Vermont fingerprint card bears a striking resemblance to the photographs on the Lincoln and Grand Island fingerprint cards.

Thus, the record reflects (1) that Bol had the same name as the person convicted of DUI in Vermont in 2009, (2) that Bol lived in Vermont in 2009, (3) that Bol owned a green Ford Explorer registered in Mississippi which matches the description of the vehicle operated by the person who was convicted of DUI in Vermont in 2009, and (4) that the date of birth on the 2009 Vermont conviction matches the date of birth which Bol gave to Grand Island police when he was arrested for DUI in 2011. On this record, the State proved by a preponderance of the evidence that Bol is the same person who was convicted of DUI in Vermont in 2009.

For completeness, we note Bol's additional argument that the State should not be permitted to rely on the principle of collateral estoppel to argue that he is barred from challenging the use of the 2009 Vermont conviction to enhance his current conviction on the ground that it was used to enhance a DUI conviction in Lancaster County, Nebraska, in 2012. It is clear from the record that the court did not refer to the Lancaster County conviction or the use of the 2009 Vermont conviction to enhance that conviction in its finding that the current conviction is Bol's fourth offense. Therefore, we need not reach the collateral estoppel argument, because an appellate court is not obligated to engage in an analysis that is not necessary to

adjudicate the case and controversy before it.[23] We note, however, that we recently held that collateral estoppel principles do not apply at enhancement proceedings.[24]

(b) Number of Prior Convictions

When entering a judgment of conviction for DUI, "the court shall, as a part of the judgment of conviction, make a finding on the record as to the number of the convicted person's prior convictions."[25] Following the enhancement hearing in this case, the district court entered an order finding that Bol "has two prior convictions for [DUI], making the current [DUI] conviction a third offense." Four days later, the court entered an order nunc pro tunc, in which it stated that "[d]ue to a scrivener's error," it was amending its prior order to read:

> Hav[ing] reviewed the evidence presented at the enhancement hearing held on February l4, 2013, including the prior convictions, fingerprint documents and testimony, the court finds that [Bol] has three prior convictions for [DUI] (i.e., Chittenden County, Vermont (2006); Addison County, Vermont (2009); and Hall County, Nebraska (2011)), making the current [DUI] conviction a fourth offense.

At the subsequent sentencing hearing, the court stated, "I truly do not understand how or why I typed and then signed [the order] showing a third offense rather than a fourth offense, because those findings were not and are not consistent with the evidence presented at the enhancement hearing." The court continued by noting that the order nunc pro tunc reflected the evidence from the enhancement hearing that Bol had three prior DUI convictions that could be used for enhancement purposes. The court also noted that it had determined Bol was represented by counsel or waived counsel at all critical stages in each of those cases. Bol argues that the court erred

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[23] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013); *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[24] *State v. Bruckner*, 287 Neb. 280, 842 N.W.2d 597 (2014).

[25] § 60-6,197.02(3).

in issuing the order nunc pro tunc changing the number of prior convictions.

[13-16] A court has inherent power in a criminal case to correct its records to reflect the "truth," nunc pro tunc.[26] The purpose of an order nunc pro tunc is to correct a record which has been made so that it will truly record the action had, which through inadvertence or mistake was not truly recorded.[27] It is not the function of an order nunc pro tunc to change or revise a judgment or order, or to set aside a judgment actually rendered, or to render an order different from the one actually rendered, even though such order was not the order intended.[28] Clerical errors may be corrected by an order nunc pro tunc, but judicial errors may not.[29]

In *State v. Painter*,[30] a district court sitting as an intermediate appellate court entered an order affirming what it characterized as concurrent sentences imposed by a county court. On its own motion, the district court subsequently entered an order nunc pro tunc stating that its reference to concurrent sentences was incorrect and that the sentences were to be served consecutively, as the county court had pronounced them. We determined that the district court erred in designating its second order as "nunc pro tunc," because "the error was not committed by the scrivener but was caused by a misstatement made by the judge."[31] But reasoning that "[w]hat the court entitles the order . . . is not controlling,"[32] we examined whether the court had authority to modify its earlier order and concluded that it did.

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[26] *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Kortum*, 176 Neb. 108, 125 N.W.2d 196 (1963).

[27] See, *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990); *Continental Oil Co. v. Harris*, 214 Neb. 422, 333 N.W.2d 921 (1983).

[28] *Id.*

[29] *Interstate Printing Co. v. Department of Revenue, supra* note 27. See, also, *State v. Painter*, 224 Neb. 905, 402 N.W.2d 677 (1987).

[30] *State v. Painter, supra* note 29.

[31] *Id.* at 912, 402 N.W.2d at 682.

[32] *Id.*

In this case, as in *Painter*, the error in question was a misstatement by the judge, not an error by a scrivener. Thus, the second order which modified the court's finding with respect to the number of prior convictions cannot be properly termed an order nunc pro tunc. But if the court had jurisdiction and authority to enter the second order, its incorrect characterization as an order nunc pro tunc is of no consequence.[33]

Relying upon *State v. Cousins*,[34] Bol argues that the district court lacked authority to find that he had three prior DUI convictions after previously determining that he had only two. In *Cousins*, we held that a district court lacks authority to modify a valid criminal sentence after it is pronounced, even if the modification is for the purpose of imposing the sentence which the judge had originally intended to impose. We have consistently applied this principle in subsequent cases involving the pronouncement or imposition of criminal sentences.[35]

But these cases are not controlling here, because we are not dealing with a purported modification of a sentence. Instead, the district court's order finding there were two prior convictions was simply a finding of fact which, like other facts in the case, would subsequently be considered by the court in imposing a sentence. Nothing prevents a court from changing a factual finding while it still has jurisdiction over the case.

In *State v. Hausmann*,[36] we observed that "[j]udicial efficiency is served when any court . . . is given the opportunity to reconsider its own rulings, either to supplement its reasoning or correct its own mistakes." Here, the district court realized its own error prior to entry of final judgment when it still had jurisdiction over the case, and it acted appropriately to

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[33] See *id*.

[34] *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981).

[35] See, *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013); *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009); *State v. Schnabel*, 260 Neb. 618, 618 N.W.2d 699 (2000).

[36] *State v. Hausmann*, 277 Neb. 819, 827, 765 N.W.2d 219, 225 (2009).

correct its finding regarding the number of prior convictions to properly reflect the evidence before it. The fact that the court incorrectly labeled its corrective order "nunc pro tunc" does not invalidate it. We conclude that the district court did not err in modifying its prior finding to reflect that Bol had three prior DUI convictions instead of two.

5. Excessive Sentences

Bol contends the sentences imposed by the district court are excessive. DUI, aggravated fourth offense, is a Class III felony.[37] A Class III felony is punishable by a minimum of 1 year's imprisonment and a maximum of 20 years' imprisonment, a $25,000 fine, or both.[38] The court sentenced Bol to 2 to 3 years' imprisonment for the DUI conviction. Driving under revocation is a Class II misdemeanor.[39] A Class II misdemeanor is punishable by up to 6 months' imprisonment, a $1,000 fine, or both.[40] The court sentenced Bol to 6 months' imprisonment for the conviction of driving under revocation. Both sentences were thus within the statutory limits.

[17-19] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[41] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[42] 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

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[37] Neb. Rev. Stat. § 60-6,197.03(8) (Cum. Supp. 2012).

[38] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012).

[39] Neb. Rev. Stat. § 60-4,108 (Cum. Supp. 2012).

[40] Neb. Rev. Stat. § 28-106 (Cum. Supp. 2012).

[41] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013); *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[42] *State v. Dixon*, *supra* note 41.

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.[43]

The presentence report indicates that Bol has filed two other appeals. One, decided by this court, involved a conviction for DUI, fourth offense, a Class III felony.[44] The second was decided by the Court of Appeals and involved a conviction for criminal impersonation, a Class IV felony.[45] Bol's criminal history also includes a DUI in Vermont in 2005, for which he was incarcerated for 6 to 11 months; a DUI in Texas in 2008, disposition unknown; possession of cocaine and providing false information to a police officer in Vermont in 2009, for which he was fined $5,500 and ordered to serve 1½ to 2½ years in prison, but the sentences were suspended; a DUI and refusal to submit to a chemical test in Hall County in 2011, for which he was fined and placed on probation; and a third-offense DUI in Lancaster County in 2011, for which he was sent to jail for 120 days. He also was convicted of third degree domestic assault in Hall County in 2012 and was sentenced to 60 days in jail.

The sentences imposed by the trial court were within the statutory limits. Based on Bol's criminal record and after considering the relevant sentencing factors, we conclude the district court did not abuse its discretion in imposing the sentences.

IV. CONCLUSION

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

AFFIRMED.

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[43] *State v. McGuire, supra* note 41; *State v. Dixon, supra* note 41.

[44] *State v. Matit, post* p. 163, 846 N.W.2d 232 (2014).

[45] *State v. Bol*, 21 Neb. App. 931, 845 N.W.2d 606 (2014).

STATE OF NEBRASKA, APPELLEE, V. DANIEL D. MATIT, ALSO KNOWN AS YAI BOL, APPELLANT.

846 N.W.2d 232

Filed May 16, 2014. No. S-13-318.

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, the appellate court reviews the trial court's findings for clear error, but whether those facts trigger or violate Fourth Amendment protections is a question of law that the appellate court reviews independently of the trial court's determination.
2. **Evidence: Appeal and Error.** In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **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.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.
5. **Arrests: Search and Seizure: Probable Cause: Words and Phrases.** An arrest is a highly intrusive detention (seizure) of a person that must be justified by probable cause.
6. **Warrantless Searches: Probable Cause: Police Officers and Sheriffs.** Probable cause to support a warrantless arrest exists only if the officer has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.
7. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.
8. **Probable Cause: Police Officers and Sheriffs.** Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed. But implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.
9. **Probable Cause: Appeal and Error.** An appellate court determines whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.

10. **Drunk Driving: Circumstantial Evidence.** Circumstantial evidence may serve to establish the operation of a motor vehicle for purposes of Nebraska's driving under the influence statutes.
11. **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.
12. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.

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

Dennis R. Keefe, Lancaster County Public Defender, Jennifer Houlden, and, on brief, Elizabeth D. Elliott, and Claire K. Bazata, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, George R. Love, and Joel R. Rische, Senior Certified Law Student, for appellee.

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

STEPHAN, J.

Daniel D. Matit, also known as Yai Bol, was charged with and convicted of fourth-offense driving while under the influence (DUI). Matit was sentenced to a term of imprisonment of 2 to 3 years and his driver's license was revoked for 15 years. He appeals his conviction and sentence. Finding no reversible error, we affirm.

BACKGROUND

At approximately 1 a.m. on March 5, 2012, Sgt. Benjamin Miller of the Lincoln Police Department was conducting surveillance in a marked police car in the area of 13th and E Streets in Lincoln, Nebraska. Miller's car was parked about 1½ blocks east of an apartment complex he was watching. Miller saw a vehicle parked on a concrete drive between the street

and the sidewalk in what Miller referred to as "the city right of way" in front of the apartment complex. At various times, he saw people approach the vehicle.

On five separate occasions, Miller observed the taillights of the vehicle come on and saw exhaust coming from the tailpipe, making him believe the vehicle had been started, as if to drive away. Each time, the vehicle's engine stayed on for a few minutes, but the vehicle did not move. Miller also saw a person who had been seated in the driver's seat exit the vehicle, urinate on a nearby tree, and then return to the vehicle.

Based on his observations, Miller made contact with the person in the vehicle, who provided identification demonstrating that he was Matit. Miller later learned that Matit also uses the name "Yai Bol" and that the vehicle was registered to Bol. Miller noticed that Matit's eyes were bloodshot and watery and that there was a strong odor of alcoholic beverage about Matit's person. In addition, Matit's speech was slurred and his dexterity was poor. Miller asked Matit to get out of the car, and when Matit did not cooperate, Miller opened the door and helped him out of the vehicle. As they approached Miller's police car, Miller noticed that Matit stumbled and staggered. Miller administered the horizontal gaze nystagmus test to Matit and observed impairment. Miller did not ask Matit to complete additional standardized field sobriety tests, because Matit was uncooperative and Miller was concerned about safety. Miller asked Matit to take a preliminary breath test. Matit refused, and Miller transported him to a detoxification center. After Matit was placed under arrest, he provided a breath sample. The test showed Matit's blood alcohol level was .216.

Matit was charged by information in Lancaster County District Court with DUI, over .15 concentration, and three prior convictions. One of the prior offenses was alleged to have occurred in Hall County, Nebraska, and the other two were alleged to have occurred in Vermont.

Matit filed a motion to suppress in which he asserted that police "lacked probable cause to contact, stop, detain, and/or arrest" him. He generally argued that Miller was not justified

in pursuing a DUI investigation after contacting him, because he was parked on private property. After conducting a suppression hearing, the district court entered an order denying the motion. The court found that Matit's vehicle was "parked in virtually the middle of that portion of the concrete drive located between the street and the sidewalk (i.e., in the public right-of-way), facing towards the courtyard of the apartment complex." After considering this court's decisions in *State v. Prater*[1] and *State v. McCave*[2] the court reasoned that whether the concrete drive was open to public access was a fact question to be addressed by the jury, thus implicitly finding that Miller's belief the drive was open to public access was reasonable.

The case proceeded to trial, at which Miller testified as a witness for the State as summarized above, and Matit testified in his own behalf. Matit acknowledged that he also uses the name "Yai Bol." He testified that on March 5, 2012, he visited a friend at the 13th and E Streets location and remembered sitting in the vehicle in the drive, but he did not remember starting the vehicle. He said the vehicle was never moved while he was there. He was drinking beer that night, starting at 11 p.m. while at a friend's house. Although he admitted he was intoxicated, Matit denied drinking any alcohol in the car. He also denied urinating on a tree.

The jury found Matit guilty of DUI with a concentration of more than .15 of 1 gram or more by weight of alcohol per 210 liters of his breath at the time he was operating or in the actual physical control of a motor vehicle. After an enhancement hearing, the court entered an order finding Matit had two prior convictions for DUI, making the current conviction a third offense. Four days later, the court entered an order "nunc pro tunc," finding that Matit had three prior convictions for DUI, making the current conviction a fourth offense. Matit was sentenced to a term of 2 to 3 years in prison, to be served consecutively to his sentences in another case, and

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

[2] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

his driver's license was revoked for 15 years. He filed this timely appeal.

ASSIGNMENTS OF ERROR

Matit assigns, restated, (1) that the district court erred in overruling his motion to suppress for lack of probable cause to arrest because his vehicle was on private property not open to public access, (2) that the evidence was insufficient to support his conviction, (3) that the district court erred in ruling that two prior convictions could be used for sentence enhancement, (4) that the district court erred in issuing an order nunc pro tunc which changed the number of prior convictions from two to three, and (5) that the district court abused its discretion by imposing an excessive sentence.

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, an appellate court applies 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.[3]

[2] 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.[4]

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[5]

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[3] *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[4] *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[5] *State v. Sikes*, 286 Neb. 38, 834 N.W.2d 609 (2013).

ANALYSIS

Probable Cause for Arrest

Nebraska's DUI statutes do not apply to operation or control of a vehicle on private property that is not open to public access.[6] Matit contends that Miller lacked probable cause to arrest him because his vehicle was parked on private property that was not open to public access at all relevant times.

[4-6] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[7] An arrest is a highly intrusive detention (seizure) of a person that must be justified by probable cause.[8] Probable cause to support a warrantless arrest exists only if the officer has knowledge at the time of the arrest, based on information that is reasonably trustworthy under the circumstances, that would cause a reasonably cautious person to believe that a suspect has committed or is committing a crime.[9]

[7-9] Probable cause is a flexible, commonsense standard that depends on the totality of the circumstances.[10] Probable cause is not defeated because an officer incorrectly believes that a crime has been or is being committed.[11] But implicit in the probable cause standard is the requirement that a law enforcement officer's mistakes be reasonable.[12] We determine

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[6] Neb. Rev. Stat. § 60-6,108(1) (Reissue 2010); *State v. McCave, supra* note 2.

[7] *State v. McCave, supra* note 2; *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[8] *State v. McCave, supra* note 2. See, also, *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009).

[9] *State v. McCave, supra* note 2. See, also, *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006) (citing *Beck v. State of Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964)); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[10] *State v. McCave, supra* note 2. See, also, *State v. Smith, supra* note 7; *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993).

[11] *State v. McCave, supra* note 2. See, also, *State v. Smith, supra* note 7.

[12] *State v. McCave, supra* note 2. See, also, *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

whether probable cause existed under an objective standard of reasonableness, given the known facts and circumstances.[13]

The key inquiry in this case is whether it was reasonable for Miller to conclude that Matit's vehicle was situated on property which was open to public access. We considered the question of whether a roadway was open to public access in *State v. Prater*[14] and *State v. McCave*,[15] reaching a different result in each case. In *Prater*,[16] the defendant was found slumped over in the driver's seat of a vehicle with its engine running in an apartment complex parking lot. He was charged with violating an Omaha city ordinance that was substantially the same as § 60-6,108(1) in that it applied "'anywhere throughout the city except private property which is not open to public access.'"[17] We stated that property is "'"open to public access"'" if the public has permission or the ability to enter and noted that this was primarily a question of fact.[18] We concluded that the trial court did not err in finding that the city ordinance applied to the parking lot, which was also used by maintenance workers and guests of residents, and thus was open to public access.

In *McCave*,[19] the defendant's vehicle was parked in a residential driveway, with a portion of the vehicle overhanging the sidewalk. We held that the residential driveway was not open to public access as a matter of law because it met the statutory definition of "private road or driveway," i.e., a "'way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons.'"[20] We further reasoned that

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[13] *Id.*

[14] *State v. Prater, supra* note 1.

[15] *State v. McCave, supra* note 2.

[16] *State v. Prater, supra* note 1.

[17] *Id.* at 657, 686 N.W.2d at 898 (emphasis omitted).

[18] *Id.* at 658, 686 N.W.2d at 898.

[19] *State v. McCave, supra* note 2.

[20] *Id.* at 515, 805 N.W.2d at 307, quoting Neb. Rev. Stat. § 60-649 (Reissue 2010).

this characterization was not affected by the fact the vehicle overhung the sidewalk, because the sidewalk was not intended for use by vehicles.

Matit's vehicle was parked on a paved area between the sidewalk and the street. The arresting officer testified that he understood this area was a part of the city's right-of-way. He also testified that he had observed the area on other occasions and had seen vehicles park in and then leave the paved area. He understood the paved area was so used by both residents of the apartment complex and nonresidents. Based on this evidence, the district court did not err in finding that Miller had a reasonable belief that the vehicle was situated on property that was open to public access.

Miller was justified in approaching the vehicle after observing the driver exit the vehicle and urinate on a tree, which was an unlawful act. When Miller encountered Matit in an intoxicated state, he had probable cause for the arrest because he had observed Matit start the vehicle on several occasions while it was situated on what the officer reasonably believed to be a part of a public roadway. The district court did not err in denying Matit's motion to suppress.

Sufficiency of Evidence

The State charged Matit with violating Neb. Rev. Stat. § 60-6,196 (Reissue 2010) by operating or being in actual physical control of a motor vehicle upon a highway or anywhere throughout the state except for private property not open to public access while under the influence of alcohol, or with a concentration of .08 of 1 gram or more by weight of alcohol per 210 liters of his breath. Matit does not dispute the fact that he had a breath alcohol concentration in excess of the lawful limit at the time of his arrest. But he challenges the sufficiency of the evidence to support his conviction on the ground that the State did not prove that he operated or was in actual physical possession of a motor vehicle on a roadway or other area to which the public had access. Our standard of review with respect to this claim is very narrow, in that we must find the evidence to be sufficient if there is any evidence, when viewed in a light favorable to the prosecution, upon which a rational

finder of fact could conclude that the State met its burden of proof beyond a reasonable doubt.[21]

The evidence with respect to Matit's operation or physical control of the vehicle came primarily from the testimony of Miller. He testified that on five separate occasions, he saw Matit start the parked vehicle. Miller could tell the vehicle had been started, because the headlights and taillights came on and exhaust came out of the tailpipe. Each time, the vehicle's engine ran for a few minutes and was then turned off. When Miller approached the vehicle, he saw the ignition keys near the console next to the driver's seat.

[10] Circumstantial evidence may serve to establish the operation of a motor vehicle for purposes of the DUI statutes.[22] And we have recognized that starting a vehicle is an act within the meaning of "operating" a motor vehicle.[23] Viewing the evidence in this case in a light most favorable to the State, as our standard of review requires, we conclude that there was evidence upon which a rational finder of fact could conclude that Matit was operating or in actual physical control of the vehicle immediately prior to his arrest.

Miller testified at trial, as he did at the suppression hearing, that Matit's vehicle was situated on the paved area between the street and the sidewalk. He testified that based upon his understanding of the laws and ordinances of the city of Lincoln, the area where the vehicle was parked was a public right-of-way owned by the city of Lincoln. He testified that no portion of Matit's vehicle impeded the sidewalk. Miller also testified that the area between the street and the sidewalk was open to both pedestrian and vehicular traffic. Whether Matit's vehicle was situated on property open to public access was a question of fact.[24] There was sufficient evidence upon which a rational finder of fact could resolve that question

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[21] *State v. Wiedeman, supra* note 4.

[22] See, *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001); *State v. Hanger*, 241 Neb. 812, 491 N.W.2d 55 (1992).

[23] *State v. Portsche, supra* note 22.

[24] See *State v. Prater, supra* note 1.

in the affirmative and, thus, sufficient evidence to support the conviction.

Excessive Sentence

Matit argues that the sentence imposed on him is excessive. He was sentenced to a term of 2 to 3 years in prison, to be served consecutively to his sentences in another DUI case. His driver's license was also revoked for 15 years.

Matit was found guilty of a Class III felony,[25] which carries a minimum sentence of 1 year in prison and a maximum of 20 years in prison, a $25,000 fine, or both.[26] His sentence falls within the statutory range for a Class III felony.

[11,12] 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.[27] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[28] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[29]

The presentence report indicates that Matit has filed two other appeals. One was recently resolved by this court in *State v. Bol*,[30] when we affirmed his convictions for DUI, refusal to take a chemical test, and driving during revocation. The other was decided by the Nebraska Court of Appeals and involved

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[25] Neb. Rev. Stat. § 60-6,197.03(8) (Cum. Supp. 2012).

[26] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012).

[27] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[28] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[29] *State v. Sikes, supra* note 5.

[30] *State v. Bol, ante* p. 144, 846 N.W.2d 241 (2014).

a conviction for criminal impersonation, a Class IV felony.[31] Matit's criminal history also includes a DUI in Vermont in 2005, for which he was incarcerated for 6 to 11 months; a DUI in Texas in 2008, disposition unknown; possession of cocaine and providing false information to a police officer in Vermont in 2009, for which he was fined $5,500 and ordered to serve 1½ to 2½ years in prison, but the sentences were suspended; a DUI and refusal to submit to a chemical test in Hall County in 2011, for which he was fined and placed on probation; and a third-offense DUI in Lancaster County in 2011, for which he was sent to jail for 120 days. He was also convicted of third degree domestic assault in Hall County in 2012 and was sentenced to 60 days in jail.

The sentence imposed by the trial court was within the statutory limits for a Class III felony. Based on Matit's criminal record and considering all of the relevant sentencing factors, we conclude the district court did not abuse its discretion in imposing the sentence.

Prior Convictions and Order Nunc Pro Tunc

Matit argues the district court erred in using two prior Vermont convictions to enhance his sentence and in issuing an order nunc pro tunc changing the number of prior convictions from two to three. Both of these assignments of error arise from proceedings that were consolidated at trial with proceedings involving a separate DUI prosecution of Matit. The appeal from that separate prosecution was resolved by this court in *State v. Bol*,[32] and in that opinion, we concluded identical assignments of error were without merit. We reach the same conclusion here.

CONCLUSION

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

Affirmed.

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[31] *State v. Bol*, 21 Neb. App. 931, 845 N.W.2d 606 (2014).

[32] *State v. Bol, supra* note 30.

GEORGE WINGFIELD, APPELLANT, V. HILL BROTHERS TRANSPORTATION, INC., APPELLEE.

846 N.W.2d 617

Filed May 16, 2014. No. S-13-716.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.
2. ____: ____. An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. ____: ____. The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly wrong.
4. **Workers' Compensation.** In workers' compensation cases, the heart injury causation issue consists of two elements: (1) legal causation and (2) medical causation.
5. **Workers' Compensation: Proof.** When a preexisting disease or condition is present, the Nebraska Supreme Court has adopted the following test for legal causation: An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.
6. ____: ____. If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by a preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury.
7. ____: ____. In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability.
8. **Workers' Compensation.** A claimant in a workers' compensation case involving a preexisting condition may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition, no disability would have resulted.
9. ____. When a workers' compensation claimant has suffered a heart attack, the foremost and essential problem is causation, that is, whether the employment caused an employee's injury or death from a heart attack.

10. ____. The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.

Appeal from the Workers' Compensation Court: JOHN R. HOFFERT, Judge. Affirmed.

Stacy L. Morris, of Lamson, Dugan & Murray, L.L.P., for appellant.

Caroline M. Westerhold, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

CASSEL, J.

INTRODUCTION

This case requires us to decide whether the causation standard applicable to workers' compensation claims involving injury from heart attack was properly extended to an episode of deep vein thrombosis and pulmonary embolism. In heart attack cases, a claimant is required to prove both legal and medical causation. The compensation court applied this split test of causation and dismissed for failure to establish the medical cause prong. The split test arises from the difficulties in attributing the cause of a heart attack to the claimant's work. Because deep vein thrombosis and pulmonary embolism present these same difficulties and are similar in origin to a heart attack, we conclude that the split test was properly applied to the claimant's injuries in this case.

BACKGROUND

George Wingfield appeals from the dismissal of his claim for workers' compensation benefits. Wingfield filed a workers' compensation claim on January 30, 2012, alleging that he sustained personal injuries in the form of deep vein thrombosis and pulmonary embolism in an accident that occurred on February 26, 2010. In his petition, he alleged that his injuries arose out of the course and scope of his employment with

Hill Brothers Transportation, Inc. (Hill Brothers), as an over-the-road truckdriver.

As a truckdriver, Wingfield was normally required to work 10 hours per day and would be seated during that time period. The compensation court received evidence that prolonged sitting is a risk factor for the development of deep vein thrombosis, or a blood clot forming in the deep venous system. Wingfield had been a truckdriver for approximately 35 years. However, he had been employed by Hill Brothers for only approximately 1 month before the February 26, 2010, accident.

On the evening of February 25, 2010, Wingfield parked his truck in Grand Island, Nebraska, and went to bed. He felt fine that evening but awoke the next morning not feeling well. He left Grand Island around 1 or 2 p.m. on February 26 and notified Hill Brothers' dispatch that he was not feeling well and was "headed home for days off."

As the day went on, Wingfield developed chest pains and contacted his doctor. A nurse told him to come to his doctor's office as quickly as possible. Wingfield arrived at his doctor's office and was then hospitalized. He was diagnosed with deep vein thrombosis in his left leg, and although it was unconfirmed, the presence of a pulmonary embolism was deemed likely.

The compensation court received evidence that a pulmonary embolism usually arises from deep vein thrombosis. When a blood clot in the deep venous system breaks off, it may travel through the heart and enter the pulmonary system. A pulmonary embolism occurs when the blood clot reaches a point within the artery of the lung where it can no longer pass through and so becomes lodged. Depending upon the size of the clot and whether it compromises the blood supply into the lung, a pulmonary embolism can be fatal.

After the February 26, 2010, accident, Wingfield had a filter implanted to prevent future pulmonary embolisms. He also experienced pain in his legs, swelling in his legs and feet, blood clots behind his knees, leg sores, shortness of breath, and difficulty standing and sitting for long periods of time. Although he returned to his employment with Hill Brothers,

he needed to take more frequent breaks to walk around and exercise. He quit working for Hill Brothers when he injured his lower back in a fall from his truck in October 2010.

Although Wingfield alleged that he developed deep vein thrombosis and pulmonary embolism as a result of the February 26, 2010, accident, that episode was not Wingfield's first diagnosis of those conditions. Wingfield had been hospitalized for the same conditions on two prior occasions before starting his employment with Hill Brothers. The first episode occurred in September 2005. As a result of that episode, Wingfield filed a workers' compensation claim in Missouri, claiming that he was "[d]riving a truck and developed deep vein thrombosis and pulmonary embolism." This claim is ongoing.

Wingfield's second episode of deep vein thrombosis and pulmonary embolism occurred on December 31, 2009, approximately 1 month before he began his employment with Hill Brothers. On that day, Wingfield saw his doctor and complained of shooting pain in his sternal area, shortness of breath, and pain in his legs and behind his left knee. He was hospitalized and diagnosed with deep vein thrombosis in his left lower extremity and "bilateral pulmonary emboli" in his pulmonary arteries. As a result of these prior episodes of deep vein thrombosis and pulmonary embolism, Wingfield was prescribed lifetime or long-term use of anticoagulation medication to prevent the formation of future blood clots.

The compensation court dismissed Wingfield's claim for benefits with respect to the February 26, 2010, accident. In doing so, the court noted that Wingfield's prior episodes of deep vein thrombosis and pulmonary embolism required it to consider the appropriate level of proof necessary to establish that his injuries arose out of his employment with Hill Brothers. For guidance, the court looked to *Leitz v. Roberts Dairy*,[1] in which we indicated that causation in heart attack cases requires proof of both legal and medical causation. The court applied this split test of causation to Wingfield's claim, finding that "the distinction between the movement of a blood clot (prompted by prolonged sitting at work) through

[1] *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991).

a vein leading to the lung (pulmonary embolism) and a clot . . . flowing through an artery to the heart (heart attack) is less than clear."

After applying the split causation test, the compensation court concluded that Wingfield had failed to prove medical causation—that the employment contributed in some material and substantial degree to cause the injury.[2] In support of its conclusion, the court relied upon the opinion of Dr. Michael Del Core, who was retained to review the medical records in this case. Del Core concluded that Wingfield was "not adequately anticoagulated" at the time of his admission to the hospital on February 26, 2010. His anticoagulation medication was at a nontherapeutic level and was consistent with a person who was not taking any type of anticoagulation medication. Thus, Del Core concluded that the "February 26 episode of pulmonary emboli was not specifically work related but rather a combination of multiple risk factors, most importantly, inadequate anticoagulation at the time of admission."

The compensation court found Del Core's opinion to be persuasive and, thus, concluded that Wingfield had failed to establish that his employment with Hill Brothers caused the February 26, 2010, accident. It therefore dismissed Wingfield's claim. Wingfield timely appealed, and we moved the case to our docket pursuant to statutory authority.[3]

ASSIGNMENTS OF ERROR

Wingfield assigns that the compensation court erred in (1) applying the causation standard used in heart attack cases; (2) finding that his injury did not arise out of the course and scope of his employment with Hill Brothers; (3) sustaining Hill Brothers' objection to exhibits regarding medical bills and mileage reimbursement requests; and (4) failing to calculate his average weekly wage and award temporary total disability benefits, permanent total disability benefits, past medical bills, future medical expenses, penalties, attorney fees, and interest.

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[2] See *id.*

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

STANDARD OF REVIEW

[1] Pursuant to Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court did not support the order or award.[4]

[2,3] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[5] The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly wrong.[6]

ANALYSIS

We first address Wingfield's assertion that the compensation court erred in applying the split test of causation to his injuries of deep vein thrombosis and pulmonary embolism. We then turn to whether the court erred in finding that his injuries did not arise out of the course and scope of his employment with Hill Brothers. Because these two issues control the disposition of Wingfield's remaining assignments of error, they comprise the majority of our analysis.

Causation

We first note that the record clearly establishes that Wingfield had a preexisting condition of deep vein thrombosis prior to his employment with Hill Brothers. We must therefore determine the proper causation standard applicable to his February 26, 2010, episode of deep vein thrombosis and pulmonary embolism. The compensation court applied the split causation test applicable to a claimant with a preexisting

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[4] *Stueve v. Valmont Indus.*, 277 Neb. 292, 761 N.W.2d 544 (2009).

[5] *Id.*

[6] *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990).

condition in a heart attack case. But Wingfield contends that the court should have applied the causation standard applicable to a claimant with a preexisting condition in a case not involving heart attack.

[4-6] As noted above, in heart attack cases, the heart injury causation issue consists of two elements: (1) legal causation and (2) medical causation.[7] When a preexisting disease or condition is present, we have adopted the following test for legal causation: An exertion- or stress-caused heart injury to which the claimant's preexisting heart disease or condition contributes is compensable only if the claimant shows that the exertion or stress encountered during employment is greater than that experienced during the ordinary nonemployment life of the employee or any other person.[8] If it is claimed that an injury was the result of stress or exertion in the employment, medical causation is established by a showing by a preponderance of the evidence that the employment contributed in some material and substantial degree to cause the injury.[9]

[7,8] But in compensation cases not involving injury from heart attack, a claimant with a preexisting condition must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability.[10] Such claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition, no disability would have resulted.[11]

[9] In determining the proper causation standard applicable to Wingfield's injuries, we review the rationale for the

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[7] See *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997).

[8] *Id.*

[9] *Id.*

[10] See *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

[11] *Id.*

development of the split causation test in heart attack cases for guidance. When a workers' compensation claimant has suffered a heart attack, the foremost and essential problem is causation, that is, whether the employment caused an employee's injury or death from a heart attack.[12] This is because the generalized nature of heart attack cases makes it difficult to attribute the attack to the work.[13] But disability or death from heart attack is not compensable unless the injury or death arose out of the employment.[14] Thus, the question to be determined is whether the injury was the result of a personal rather than an employment risk.[15] The split test of causation helps to resolve this question. Through the separation of legal and medical causation, it is possible to compensate those heart attack victims whose work placed a greater strain on their hearts than would ordinary nonemployment life.[16]

Under the legal test, the claimant must establish that the proximate cause of the heart attack was work related and thereby break any causal connection between the natural progression of a preexisting condition or disease and the injury at the workplace.[17] Otherwise, the fact that the heart injury occurred at work would be strictly fortuitous.[18] Under the medical test, "the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this collapse."[19] The medical test establishes whether the exertion contributed causally to the collapse as a matter of medical fact.[20]

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[12] *Zessin, supra* note 7.

[13] *Morton v. Hunt Transp.*, 240 Neb. 63, 480 N.W.2d 217 (1992).

[14] See *Sellens v. Allen Products Co., Inc.*, 206 Neb. 506, 293 N.W.2d 415 (1980).

[15] *Id.*

[16] *Morton, supra* note 13.

[17] See *Leitz, supra* note 1.

[18] *Id.*

[19] 2 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 46.03[1] at 46-6 (2013).

[20] *Id.*, § 46.03[8].

The above review reveals that the split test of causation developed as a result of the difficulties in distinguishing those injuries from heart attack that arose from a personal, rather than an employment, risk. But workers' compensation cases not involving heart attack do not present such difficulties in determining causation. That is why in *Engel v. Nebraska Methodist Hospital*,[21] we declined to extend the exertion "'greater than nonemployment life'" test to the claimant's back injury. In that case, we emphasized the unique problem of proving causation in heart attack cases and concluded that there was no reason to extend the rule to other cases where the proof of causation is not usually as complex.[22] We similarly declined to extend the split test of causation to the claimant's carpal tunnel syndrome in *Morton v. Hunt Transp*.[23] In *Morton*, we again reasoned that the claimant's injury shared none of the difficulties of etiology surrounding heart attacks and reaffirmed that the split test of causation has no application to injuries for which difficult issues of causation are not present.[24]

But we have not limited the split test of causation to injuries arising from heart attack. In *Smith v. Fremont Contract Carriers*,[25] we recognized that the split causation test was logically applicable to stroke cases. In doing so, we acknowledged the unique problem of proving causation of a heart attack when a preexisting condition is present and recognized that such a problem is also present when a claimant has suffered a stroke.[26]

We see the same problem of proving causation in Wingfield's injuries of deep vein thrombosis and pulmonary embolism. The compensation court received evidence that Wingfield's injuries

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[21] *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 883, 312 N.W.2d 281, 285 (1981).

[22] See *id*.

[23] *Morton, supra* note 13.

[24] See *id*.

[25] *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984).

[26] See *id*.

could have arisen from multiple causes, both personal and employment related. These causes included inadequate anticoagulation, obesity, trauma, surgery, heredity, prolonged sitting, and smoking. Thus, Wingfield's injuries are distinguishable from the claimants' injuries in *Engel* (back injury) and *Morton* (carpal tunnel syndrome) where it was clear that the injuries in those cases were precipitated by some employment-related risk or event.

The possible causes for Wingfield's development of deep vein thrombosis and pulmonary embolism demonstrate that his injuries were akin to the generalized nature of heart attacks, making it difficult to factually attribute his injuries to the work.[27] As in cases of heart attack or stroke, the compensation court was required to address complex issues of causation and to determine whether Wingfield's injuries arose from a personal or employment-related risk. We therefore find it logical that the court extended the split test of causation to Wingfield's injuries in this case.

In concluding that the compensation court did not err in applying the split test of causation to Wingfield's injuries, we also note the similarities in origin between his injuries and a heart attack. As the court observed, the significance of a blood clot forming in the deep venous system and causing pulmonary embolism, rather than a blood clot forming in an artery of the heart and causing heart attack, is less than clear. Common knowledge informs us that both conditions share many of the same risk factors. That a blood clot might develop in one part of the body rather than another does not strike us as warranting the application of two different standards of causation.

We also reject Wingfield's argument that the legal cause prong of the split causation test cannot be applied to his injuries. Wingfield argues that because his injuries were caused by inactivity, there is no stress or exertion by which to determine legal causation. But Wingfield's argument ignores that "stress" encompasses more than physical activity. Stress also includes "a physical, chemical, or emotional factor . . .

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[27] See *Morton, supra* note 13.

to which an individual fails to make a satisfactory adaptation, and which causes physiologic tensions that may be a contributory cause of disease."[28] We make no comment as to whether Wingfield's inactivity constitutes stress in this sense. We merely note that the lack of physical activity precipitating Wingfield's injuries does not render the legal cause prong inapplicable to his claim. This assignment of error is without merit.

Course and Scope of Employment

Wingfield assigns that the compensation court erred in finding that his injuries did not arise out of the course and scope of his employment with Hill Brothers. In support of this assigned error, he argues that the court ignored the fact that he passed a physical examination prior to beginning his employment with Hill Brothers, that the court erroneously made findings of fact with respect to the expert testimony offered by the parties, and that the court incorrectly relied upon the opinion of Del Core.

[10] We see no need to address Wingfield's specific arguments as to this assignment of error. The issue in regard to causation of an injury or disability is one for determination by the fact finder, whose findings will not be set aside unless clearly wrong.[29] The compensation court found that Wingfield had failed to establish the medical cause prong of the split causation test. Its determination was not clearly wrong. As we have noted, to establish medical causation, Wingfield was required to show that his employment contributed in some material and substantial degree to cause his injuries. But Del Core opined that the primary and most likely cause of the February 26, 2010, accident was Wingfield's inadequate level of anticoagulation—a factor independent of his employment with Hill Brothers. The court found this evidence to be persuasive, and it was entitled to do so. The single judge of the

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[28] Webster's Third New International Dictionary of the English Language, Unabridged 2260 (1993).

[29] *Way, supra* note 6.

Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility.[30] This assigned error is without merit.

Remaining Assignments of Error

Wingfield's remaining assignments of error assert that the compensation court erred in (1) sustaining Hill Brothers' objection to exhibits regarding medical bills and mileage reimbursement requests and (2) failing to calculate his average weekly wage and award temporary total disability benefits, permanent total disability benefits, past medical bills, future medical expenses, penalties, attorney fees, and interest. Because the compensation court correctly found that Wingfield had failed to prove that his injuries arose out of the course and scope of his employment with Hill Brothers, it did not err in excluding evidence as to his expenses or in failing to award the requested relief. These assignments of error lack merit.

CONCLUSION

The split test of causation developed in the context of heart attack cases due to the difficulties in attributing the cause of a heart attack to the claimant's work. Because complex issues of causation were present in Wingfield's injuries, and the injuries could have arisen from personal or employment-related risks, we find no error in the application of the split causation test to this case. And because the compensation court's finding as to causation was not clearly wrong, we reject Wingfield's remaining assignments of error. The dismissal of Wingfield's claim is affirmed.

Affirmed.

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[30] See *Swanson, supra* note 10.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. GREGORY A. PIVOVAR, RESPONDENT.

846 N.W.2d 655

Filed May 23, 2014. No. S-12-1165.

1. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
2. ____. In determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's actions both underlying the events of the case and throughout the proceeding, as well as any aggravating or mitigating factors.

Original action. Judgment of suspension.

John W. Steele, Assistant Counsel for Discipline, for relator.

D.C. "Woody" Bradford III, of Bradford & Coenen, L.L.C., for respondent.

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

PER CURIAM.

I. NATURE OF CASE

The issue presented is what discipline should be imposed on Gregory A. Pivovar, respondent, for his violation of certain provisions of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. Judgment was previously entered on the pleadings as to the facts. Briefing and oral argument were ordered on the issue of discipline.

Upon consideration, we adopt the referee's recommendation of a 45-day suspension followed by 2 years of monitored probation.

II. FACTS

On September 12, 1979, respondent was admitted to practice law in Nebraska. He has received four previous private reprimands.

The instant disciplinary proceedings relate to formal charges filed on December 12, 2012, by the Counsel for Discipline of the Nebraska Supreme Court, relator. In these charges, relator alleged that certain acts of respondent during his representation of Danny Robinson violated respondent's oath of office as an attorney and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), and 3-508.4 (misconduct). Respondent admitted certain allegations, but he denied that he had violated his oath of office or any of the Nebraska Rules of Professional Conduct.

On August 16, 2013, a hearing was held before a court-appointed referee. Based on the evidence adduced at the hearing, the referee filed a report.

The referee's findings may be summarized as follows: In March 2008, respondent was appointed to represent Robinson on a motion for postconviction relief from Robinson's first degree murder conviction. Respondent represented Robinson at an evidentiary hearing on the motion for postconviction relief.

The district court denied Robinson's motion, and respondent sent a letter to Robinson informing him of that decision. Respondent advised Robinson that respondent would need to be reappointed before respondent could represent Robinson on appeal. Respondent enclosed an application to proceed in forma pauperis and the necessary poverty affidavit. However, respondent did not include a notice of appeal or advise Robinson that there were only 30 days to file an appeal (until March 19, 2010). Robinson later sent the district court a letter requesting the reappointment of respondent for purposes of appeal and the application to proceed in forma pauperis with the necessary poverty affidavit.

On March 18, 2010, the district court granted Robinson's application to proceed in forma pauperis and appointed respondent as counsel on appeal. On March 22, respondent received notice of the appointment. The following day, upon reviewing Robinson's file, respondent discovered that no notice of appeal had been filed.

Respondent testified that after he discovered that there was no appeal, he "'"[s]tuck [his] head in the sand."'" He did not contact the district court to discuss the fact that he had not received notice of his appointment until after the deadline for filing an appeal had passed. Respondent researched the problem but "'did nothing more.'" At the hearing before the referee, respondent testified that he "'"[a]bsolutely"'" should have done more to resolve the problem.

In the months following respondent's appointment to serve as Robinson's appellate counsel, Robinson made "'numerous attempts'" to contact respondent by telephone and letter. Respondent did not answer "'[m]ost'" of these communications. Respondent testified he told Robinson that he was "'"working on whether [Robinson] had an appeal or not."'" However, Robinson testified that respondent said he was working on writing the appellate brief. The referee determined that respondent waited until November 27, 2010, to inform Robinson that an appeal had not been timely filed.

The referee concluded there was "'no dispute that the respondent "put his head in the sand" and failed to communicate with . . . Robinson.'" The referee noted that the main problem was the lack of communication with Robinson, not the missed opportunity to appeal. The referee explained that "even though the appeal time was apparently blown in the first instance, subsequently, . . . Robinson's appeal was permitted and the appeal was properly docketed."

The referee found by clear and convincing evidence that respondent had failed to (1) competently represent Robinson, (2) act with reasonable diligence, and (3) properly communicate with Robinson. The referee determined that respondent had engaged in conduct prejudicial to the administration of justice. Thus, the referee concluded that respondent had violated his oath of office as an attorney and §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), and 3-508.4 (misconduct).

The referee recommended discipline in the form of a 45-day suspension followed by 2 years of probation with a practice monitor. The referee took into account respondent's four prior private reprimands arising from five separate complaints.

The referee also considered the "overwhelming showing of support" for respondent by members of the legal community and the fact that respondent was cooperative and "generally remorseful."

No exceptions were taken by either party to the referee's report. As such, pursuant to Neb. Ct. R. § 3-310(L), the relator moved for judgment on the pleadings and asked this court to impose the recommended sanction. We granted the motion in part with the following minute entry: "Judgment on the pleadings granted, limited as to the facts. Parties directed to brief the issue of discipline. Matter to proceed to briefing and oral argument."

III. STANDARD OF REVIEW

A proceeding to discipline an attorney is a trial de novo on the record.[1]

IV. ASSIGNMENTS OF ERROR

Neither party has taken exception to the referee's report. Neither party assigns any error.

V. ANALYSIS

1. Background

Because the motion for judgment on the pleadings was granted as to the facts, the issue before us is the appropriate discipline.[2] Under Neb. Ct. R. § 3-304(A), we may impose one or more of the following disciplinary sanctions:

> (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[.]

[1,2] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we

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[1] *State ex rel. Counsel for Dis. v. Cording*, 285 Neb. 146, 825 N.W.2d 792 (2013).

[2] See *id.*

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.[3] In determining the proper discipline of an attorney, we consider the attorney's actions "both underlying the events of the case and throughout the proceeding," as well as any aggravating or mitigating factors.[4]

Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[5] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[6]

2. Respondent's Conduct

Respondent's conduct surrounding Robinson's appeal fell below the standards expected of an attorney under the Nebraska Rules of Professional Conduct.

Respondent was not thorough in preparation of the materials necessary for Robinson to appeal from the denial of postconviction relief or in communicating with Robinson about how to proceed with an appeal. Although respondent provided Robinson with several of the documents necessary to perfect an appeal and provided Robinson with some pertinent information, respondent failed to provide Robinson with a notice of appeal or to inform Robinson that he had only 30 days to appeal.

Respondent's representation of Robinson on appeal lacked competence, diligence, and promptness. On the day after receiving the order of appointment, respondent learned that an appeal had not been perfected. Despite this discovery, respondent made no significant effort to resolve the problem.

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[3] *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012).

[4] See *id.* at 359, 820 N.W.2d at 867.

[5] *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

[6] *Id.*

Although Robinson's appeal was eventually docketed, this was not due to efforts of respondent.

Our main concern is respondent's lack of communication with his client. Section 3-501.4(a) states that an attorney must do the following:

> (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) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Respondent's interaction with Robinson did not meet these standards. After respondent was appointed to represent Robinson on appeal, respondent did not reply to Robinson's repeated attempts at communication via telephone and letter. Additionally, respondent did not keep Robinson reasonably informed about the status of the appeal. Respondent waited over 8 months before he told Robinson that his appeal had not been perfected. This delay is far from diligent or prompt.

3. Aggravating and Mitigating Circumstances

(a) Aggravators

As the referee noted, respondent's prior instances of discipline are aggravating factors.[7] Respondent has four prior private reprimands. All but one of these reprimands involved the failure to communicate.

In December 1997, respondent was reprimanded for violating the provisions of the then-existing Code of Professional

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[7] See *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012).

Responsibility relating to misconduct[8] and client funds.[9] Respondent had cashed a check from a client instead of depositing it as required by the Code of Professional Responsibility.

In July 2002, respondent was retained to prepare an application for modification of child support. Respondent prepared the application but failed to use the client's proper name. Thereafter, he failed to make the necessary revisions to the application. He did not appear at a scheduled meeting with the client or respond to the client's attempts at communication. The client terminated respondent's services and requested an itemized statement and return of her deposit. Respondent failed to comply with these requests, and when the client submitted a request for fee arbitration with the help of the Nebraska State Bar Association, respondent did not reply. In May 2003, respondent was privately reprimanded for violating the provisions of the Code of Professional Responsibility relating to misconduct[10] and competency.[11]

In 2010, two separate grievances were brought against respondent. One client reported that respondent had failed to file an appellate brief. A second client terminated respondent's services because of his failure to communicate with the client. The client requested an itemized statement and refund of any unearned fees, neither of which respondent provided. Respondent had not deposited the prepaid fees into his client trust account. Additionally, he did not respond to inquiries from the Counsel for Discipline. For these actions, respondent was reprimanded in July 2010 for violating his oath of office as an attorney; §§ 3-501.1 (competence), 3-501.3 (diligence), and 3-501.4 (communications); and Neb. Ct. R. of Prof. Cond. §§ 3-501.5 (fees), 3-501.16 (declining or terminating representation), and 3-508.1 (bar admission and disciplinary matters).

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[8] See Canon 1, DR 1-102(A)(1), of the Code of Professional Responsibility.

[9] See Canon 9, DR 9-102(A)(1) and (2), of the Code of Professional Responsibility.

[10] See DR 1-102(A)(1).

[11] See Canon 6, DR 6-101(A)(3), of the Code of Professional Responsibility.

Most recently, in December 2012, respondent was privately reprimanded for violating §§ 3-501.4 (communications) and 3-508.4(a) and (d) (misconduct). Respondent had been retained to represent an individual on his motion for postconviction relief, but he did little work on the case. At one point, respondent went almost 6 months without taking any action in the case. When respondent conducted depositions, he did not inform the client that he was doing so. The client repeatedly contacted respondent without reply. Based on these actions, respondent was "sternly reprimanded."

(b) Mitigators

The referee identified several mitigating factors, including respondent's remorseful attitude and cooperation throughout the disciplinary proceedings. The referee also considered the overwhelming showing of support for respondent from members of the legal community. Letters were received in support of respondent from 21 members of the legal community, including retired district court judges, an assistant attorney general, public defenders, county attorneys, and individual attorneys. Several letters were also received from individuals attesting to respondent's involvement in the community.

Based on these factors, the referee concluded as follows:

> If we did not have the overwhelming demonstration of support for [respondent], I would tend to agree with the Relator that the suspension should be 90 days followed by a one-year probation with a practice monitor.
>
> However, I believe that this extraordinary level of support should be given some weight in regard to the punishment of [respondent]. Additionally, I have taken into consideration that . . . Robinson's situation was not ultimately harmed, in light of the fact that his appeal was ultimately perfected and is now being processed.

We agree with the referee that respondent's remorseful attitude and cooperation in these proceedings are mitigating factors.[12] But the fact that Robinson's appeal was ultimately

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[12] See *State ex rel. Counsel for Dis. v. Wadman*, 275 Neb. 357, 746 N.W.2d 681 (2008).

allowed to proceed does not change the fact that respondent failed to reply to Robinson's repeated telephone calls and letters and waited over 8 months to inform Robinson about the problems with his appeal. "'Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.'"[13]

4. Sanction Imposed in Similar Case

In *State ex rel. Counsel for Dis. v. Seyler*,[14] we imposed only a 30-day suspension on an attorney who had repeatedly failed to respond to discovery requests and court orders, failed to attend hearings, and failed to keep his clients reasonably informed. Unlike respondent, the attorney in *Seyler* had no prior disciplinary proceedings.

5. Conclusion as to Discipline

The evidence establishes that respondent's representation of Robinson violated his oath of office as an attorney and §§ 3-501.1 (competence), 3-501.3 (diligence), 3-501.4 (communications), and 3-508.4 (misconduct). Respondent's representation was not competent, prompt, or diligent. Furthermore, respondent failed to keep Robinson informed and to promptly respond to Robinson's repeated attempts at communication.

The evidence shows that respondent is well respected by the legal community, that he is generally remorseful, and that he cooperated with relator. However, respondent has four prior private reprimands, three of which involved a failure to communicate with clients.

Given the pattern of poor communication exhibited in respondent's prior reprimands, we find that the referee's recommendation of a 45-day suspension followed by 2 years of

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[13] *Palik, supra* note 3, 284 Neb. at 359, 820 N.W.2d at 867 (quoting § 3-501.3, comment 3).

[14] *State ex rel. Counsel for Dis. v. Seyler*, 283 Neb. 401, 809 N.W.2d 766 (2012).

monitored probation is appropriate. No exceptions have been taken to this recommendation, and we hereby adopt it.

Upon due consideration of the record, we find that respondent should be and hereby is suspended from the practice of law for a period of 45 days, effective immediately. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. We also direct respondent to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012), § 3-310(P) (rev. 2014), and Neb. Ct. R. § 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

At the end of the 45-day suspension, respondent may apply to be reinstated to the practice of law, provided that he has demonstrated his compliance with § 3-316 and further provided that relator has not notified this court that respondent has violated any disciplinary rule during his suspension. Upon reinstatement, respondent shall complete 2 years of monitored probation. During the period of probation, respondent will be monitored by an attorney licensed to practice law in the State of Nebraska and approved by relator. The monitoring plan shall include but not be limited to the following:

(1) On a monthly basis, respondent shall provide the monitoring attorney with a list of all 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 type of case (i.e., criminal, dissolution, probate, contract, et cetera), (c) the date of the last contact with the client, (d) the last date and type of work completed on the case, (e) the next type of work and date to be completed on the case, and (f) any applicable statute of limitations and its date;

(2) On a monthly basis, respondent shall meet with the monitoring attorney to discuss respondent's pending cases;

(3) Respondent shall work with the monitoring attorney to develop and implement appropriate office procedures to ensure that client matters are handled in a timely manner; and

(4) If at any time the monitoring attorney believes respondent has violated a disciplinary rule or has failed to comply

with the terms of probation, the monitoring attorney shall report the same to relator.

VI. CONCLUSION

It is the judgment of this court that respondent should be and hereby is suspended from the practice of law for a period of 45 days, effective immediately. It is the further judgment of this court that upon completion of the period of suspension and reinstatement to the bar, respondent shall be placed on monitored probation for 2 years, subject to the terms set forth above.

JUDGMENT OF SUSPENSION.

McCORMACK, J., not participating.

KIM CONROY, TAX COMMISSIONER, AND RUTH SORENSON, PROPERTY TAX ADMINISTRATOR, APPELLANTS, V. KEITH COUNTY BOARD OF EQUALIZATION AND CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, APPELLEES.

846 N.W.2d 634

Filed May 23, 2014. No. S-13-277.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews 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 not arbitrary, capricious, or unreasonable.
3. **Taxation: Appeal and Error.** An appellate court reviews questions of law arising during appellate review of decisions by the Tax Equalization and Review Commission de novo on the record.
4. **Judgments: Jurisdiction.** Jurisdictional questions that do not involve a factual dispute present questions of law.
5. **Constitutional Law: Intent.** Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.
6. **Constitutional Law: Courts: Intent.** If the meaning is clear, the Nebraska Supreme Court gives a constitutional provision the meaning that laypersons would obviously understand it to convey.

7. **Jurisdiction: Appeal and Error.** An appellate court has a duty to raise and determine any jurisdictional issue of its own accord.
8. **Constitutional Law: Statutes.** The rules of statutory interpretation apply to constitutional interpretation as well.
9. **Statutes.** When a statute specifically provides for exceptions, items not excluded are covered by the statute.
10. **Constitutional Law.** In the interpretation of the Constitution, a specific clause will be given effect as against a general clause in such manner as to give meaning to both, and the language of the specific clause will not be restricted by the language of the general clause.
11. **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 Tax Equalization and Review Commission. Affirmed in part, and in part vacated.

Jon Bruning, Attorney General, and Jonathan D. Cannon, Special Assistant Attorney General, for appellants.

Randy Fair, Keith County Attorney, for appellee Keith County Board of Equalization.

Charles D. Brewster, of Anderson, Klein, Swan & Brewster, for appellee Central Nebraska Public Power and Irrigation District.

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

WRIGHT, J.

I. NATURE OF CASE

For tax year 2011, the county assessor of Keith County, Nebraska, decided to assess property taxes on several parcels of land that were owned by Central Nebraska Public Power and Irrigation District (Central) but leased to private parties. In regard to each leased parcel, the county assessor sent a "Notice of Taxable Status" to Central. Central protested the tax assessment, and the Keith County Board of Equalization (Board) recommended "approving Central's protests and not tax[ing] the land."

The Tax Commissioner and the Property Tax Administrator of the Nebraska Department of Revenue appealed to the Tax Equalization and Review Commission (TERC), which affirmed

the Board's decision that the relevant parcels "should not be taxed," because Central had already made a payment "in lieu of tax" for that year pursuant to article VIII, § 11, of the Nebraska Constitution. The Tax Commissioner and Property Tax Administrator now appeal from TERC's order. We affirm in part, and in part vacate TERC's order.

II. SCOPE OF REVIEW

[1-3] We review TERC decisions for errors appearing on the record. *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013). When reviewing a judgment for errors appearing on the record, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. *Id.* We review questions of law arising during appellate review of TERC decisions de novo on the record. *Id.*

[4] Jurisdictional questions that do not involve a factual dispute present questions of law. *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

[5,6] As in statutory interpretation, the construction of constitutional provisions requires us to apply basic tenets of interpretation. Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary. *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013). If the meaning is clear, we give a constitutional provision the meaning that laypersons would obviously understand it to convey. *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

III. FACTS

The original appellants were Douglas A. Ewald, who served as the Tax Commissioner at the time the appeal was initiated, and Ruth Sorensen, Property Tax Administrator, of the Department of Revenue. After this appeal was argued and submitted, we sustained the appellants' motion to substitute Kim Conroy, the current Tax Commissioner, for Ewald. Hereinafter, we refer to the appellants as "the Department."

Central is a political subdivision of the State of Nebraska that owns and manages Lake McConaughy and over 38,000

acres of land surrounding it. Central provides irrigation, hydropower generation, endangered species management, and recreational opportunities for the public. As a public power and irrigation district, Central makes an annual payment in lieu of tax pursuant to article VIII, § 11. The record reflects that Central made a payment in lieu of tax for tax year 2011.

This appeal involves 13 parcels of land around Lake McConaughy that Central leases to other parties. Four of the parcels are leased to private businesses that put the land to commercial use. Eight of the parcels are leased to Lake McConaughy Lessees, Inc., which in turn sublets the parcels to individuals for residential use. The final parcel is leased directly to an individual who uses the land for a single-family residence. In all cases except one, the lessees or sublessees, and not Central, own the improvements on the parcels.

For tax year 2011, the Keith County assessor determined that Central was liable for property taxes on the relevant parcels, because the parcels were being "leased out for residential or commercial use" and should be "treated uniformly & equitably with other governmental properties leased out for other than public purposes." Upon receiving a "Notice of Taxable Status" for each parcel, Central filed protests with the Board, claiming that the parcels were exempt from taxation under Neb. Rev. Stat. § 77-202(1)(a) (Supp. 2011). This statute provides in pertinent part that property of the state or a governmental subdivision is exempt from taxation when it is used for a public purpose. The Board recommended "approving Central's protests and not tax[ing] the land."

In the case of all 13 parcels, the Department appealed the Board's determinations to TERC, alleging that the parcels were not being used for a public purpose. TERC sent notice of the appeals to the Board, Central, and the Department, but not to the lessees of the parcels. It held a consolidated hearing at which the parties adduced evidence as to the use of the parcels by the lessees or sublessees, Central's reasons for leasing the parcels, and Central's obligations to manage Lake McConaughy. During the hearing, the Department asked TERC to take judicial notice of the legislative history of several statutes governing the taxation of public property. TERC stated

that it would take "statutory notice" of the legislative history "to the extent allowed in [its] own rules."

The Department argued that to the extent any of the relevant parcels were not being used for a public purpose, the parcels were subject to taxation under article VIII, § 2, of the Nebraska Constitution, regardless of the fact that Central had made a payment in lieu of tax for tax year 2011. It asserted that leasing the relevant parcels to private individuals for residential or commercial use was not a public purpose. Central argued that the dominant purpose of leasing the relevant parcels was to provide a "buffer zone" for Lake McConaughy as required by Central's Federal Energy Regulatory Commission permit and that the parcels were thus used for a public purpose.

TERC affirmed the decisions of the Board. It rejected the argument that Central's property tax liability was determined based on the use of its property, pursuant to article VIII, § 2. Consequently, TERC did not decide whether the relevant parcels were used for a public purpose. Instead, TERC concluded that the applicable issue was Central's payment in lieu of tax under article VIII, § 11. It found that § 11 was "consistent and harmonious" with the public purpose requirement of § 2, because § 2 "specifically limits the ability of the Legislature to impose or authorize property taxes or further payments in lieu of property taxes to those instances as provided by law."

TERC found it was "uncontested that Central is a political subdivision organized primarily for the production of irrigation and electricity and that Central has made annual payments in lieu of taxes as required by Article VIII, Section 11 of the Nebraska Constitution." It also found that the language of § 11 prevented the assessment of property taxes on any of Central's land. Accordingly, TERC held that Central was "not liable for additional tax obligations for real property in these appeals." It ordered that there should be "no assessed value" and "no separate property tax obligation" for the relevant parcels for tax year 2011, because "any and all property tax obligations [had] been included in Central's payment in lieu of taxes."

The Department timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this

state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

IV. ASSIGNMENTS OF ERROR

The Department principally assigns that TERC erred by concluding pursuant to article VIII, § 11, that property held by a public power and irrigation district upon which payments in lieu of tax are made is exempt from all other taxes, regardless of whether the property is being used for a public purpose. Specifically, the Department assigns, summarized and restated, that TERC erred in concluding that its interpretation of article VIII, § 2, was consistent and harmonious with § 11; in failing to consider Nebraska statutes that create a mechanism for imposing taxes upon those who lease property from the state or a governmental subdivision; and in failing to address whether the relevant parcels were being used for a public purpose. The Department also assigns that TERC erred by taking "statutory notice" and not judicial notice of the legislative history offered by the Department.

V. ANALYSIS

1. Jurisdiction

The Department initially claimed that it filed its appeals with TERC pursuant to Neb. Rev. Stat. § 77-202.04 (Cum. Supp. 2010), under which its appeals would not have been timely. In responding to the Department's appeals to TERC, Central had alleged that the appeals were untimely and moved to dismiss all 13 appeals, but TERC did not rule on the matter and Central did not raise the issue on appeal. The Department has since abandoned its claim that its appeals were filed under § 77-202.04.

[7] Nonetheless, an appellate court has a duty to raise and determine any jurisdictional issue of its own accord. See *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013). Therefore, we directed the parties to file supplemental briefs on the question whether the Department had timely filed its appeals from the Board's decisions.

In an appeal from the determination of a county board of equalization, Neb. Rev. Stat. § 77-5013(2) (Cum. Supp.

2012) states generally that "[i]f no date is otherwise provided by law, then an appeal shall be filed within thirty days after the decision, order, determination, or action appealed from is made." In their supplemental briefs, both parties argue that the Department's appeals were governed by one of these alternative appellate deadlines. We agree.

As contemplated by § 77-5013(2), there is an alternative timeframe for an appeal from a determination whether property of the state or a governmental subdivision is used for a public purpose. See Neb. Rev. Stat. § 77-202.12 (Reissue 2009). The procedure for such an appeal is set in motion when the county assessor sends notice of taxable status to the governmental entity. See *id*. If the governmental entity has leased the property and does not intend to voluntarily pay the tax, it is to forward the notice to the lessee. See *id*. The governmental entity and the lessee can appeal the taxation to the county board of equalization. See *id*. In turn, the decision of the county board of equalization can be appealed to TERC. See *id*. Such an appeal must be made "on or before June 1." See *id*.

In the instant case, the parties availed themselves of the procedure in § 77-202.12. The county assessor sent a "Notice of Taxable Status" to Central for each of the relevant parcels. But Central, instead of forwarding the notices to its lessees, filed protests with the Board. The Board approved Central's protests, and the Department appealed to TERC.

Given the manner in which the proposed taxation and the protests were framed, the issue to be decided by the Board, and the determination from which the Department appealed, was whether the relevant parcels were used for a public purpose. The county assessor sought to assess property taxes against Central on the ground that the parcels were not being used for a public purpose. She recommended to the Board that Central's parcels "be treated uniformly & equitably with other governmental properties leased out for other than public purposes." In its protests, Central alleged that the parcels were being used for a public purpose and were thus exempt under § 77-202(1)(a). The Board recommended "approving Central's protests and not tax[ing] the land."

Once the appeals were docketed with TERC, Central's payment in lieu of tax became the applicable issue, and TERC did not decide whether the parcels were being used for a public purpose. But this does not alter the fact that the appeals were taken pursuant to § 77-202.12.

For the aforementioned reasons, the Department's appeals were governed by the June 1 deadline of § 77-202.12(3). The Department filed its appeals with TERC on June 1, 2011. As such, the Department's appeals were timely and TERC had subject matter jurisdiction.

However, TERC could not consider whether property taxes on the relevant parcels could be assessed against Central's lessees without exceeding its jurisdiction in this case. TERC affirmed the Board's approval of Central's protests. But TERC also ordered that the "Subject Properties should not be taxed," that there should be "no assessed value" and "no separate property tax obligation" for the relevant parcels, and that "any and all property tax obligations" on the parcels were covered by Central's payment in lieu of tax. These orders did not determine the use of the respective parcels but had implications regarding the lessees, against whom property taxes on the parcels might be assessed pursuant to Neb. Rev. Stat. § 77-202.11(1) (Reissue 2009) if the use was not an authorized public use. Although the order was limited to the 2011 tax year, through these orders, TERC precluded the assessment of property taxes on the parcels against the lessees.

The lessees had not been sent notice by the county assessor or Central, despite the fact that §§ 77-202.11 and 77-202.12 provide direct and indirect methods, respectively, for providing such notice. The lessees were not parties to the protests before the Board, even though lessees of public property have the ability to protest under § 77-202.12(2). The lessees were not made parties in the appeals before TERC, and they did not intervene.

Without the lessees being parties to the action, TERC could not determine whether there should be a separate tax obligation on the parcels or whether the parcels had an assessed value. Furthermore, for reasons that we will explain later in this opinion, TERC could not make a determination as to the

lessees' tax obligations without also determining whether the parcels were or were not used for a public purpose. TERC did not make this determination as to public purpose, and such determination was not required in order for TERC to conclude that Central was not liable for the assessments on the parcels.

Because TERC lacked jurisdiction to decide whether property taxes on the relevant parcels could be assessed against the lessees, this court necessarily lacks jurisdiction to review that aspect of TERC's decision. Even so, we have the power to "determine whether [we lack] jurisdiction over an appeal because the lower court lacked jurisdiction to enter the order; to vacate a void order; and, if necessary, to remand the cause with appropriate directions." See *In re Interest of Trey H.*, 281 Neb. 760, 767, 798 N.W.2d 607, 613 (2011).

Despite the fact that TERC lacked jurisdiction to determine whether property taxes on the relevant parcels could be assessed against the lessees, TERC had jurisdiction to consider Central's tax liability. Our jurisdiction is similarly limited to review of that question.

2. Whether Property Taxes Can Be Assessed Against Central

The remaining question is: Did Central's payment in lieu of tax exempt it from liability for property taxes regardless of whether the parcels were used for an "authorized public purpose"? TERC concluded that "Central is not liable for additional tax obligations" for tax year 2011, because Central had made a payment in lieu of tax for that year. We agree and, therefore, affirm that part of TERC's order that Central was not liable for additional tax obligations on the relevant parcels.

(a) Effect of Article VIII, § 11, Payment in Lieu of Tax

Central made its payment pursuant to article VIII, § 11, which states in pertinent part as follows:

> Every public corporation and political subdivision organized primarily to provide electricity or irrigation

> and electricity shall annually make the same payments in lieu of taxes as it made in 1957, which payments shall be allocated in the same proportion to the same public bodies or their successors as they were in 1957.
>
> . . . The payments in lieu of tax as made in 1957, together with any payments made as authorized in this section *shall be in lieu of all other taxes*, payments in lieu of taxes, franchise payments, occupation and excise taxes, but shall not be in lieu of motor vehicle licenses and wheel taxes, permit fees, gasoline tax and other such excise taxes or general sales taxes levied against the public generally.

(Emphasis supplied.)

As in statutory interpretation, the construction of constitutional provisions requires us to apply basic tenets of interpretation. Constitutional provisions are not open to construction as a matter of course; construction is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary. *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013). If the meaning is clear, we give a constitutional provision the meaning that laypersons would obviously understand it to convey. *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

As it relates to whether Central is obligated to pay property taxes in addition to making a payment in lieu of tax, the meaning of article VIII, § 11, is clear. Central's payment in lieu of tax for a particular tax year eliminated its liability for property taxes in that same year.

Article VIII, § 11, requires "[e]very public corporation and political subdivision organized primarily to provide electricity or irrigation and electricity" to make an annual payment "in lieu of tax." "In lieu of" means "in the place of" or "instead of." Webster's Third New International Dictionary of the English Language, Unabridged 1306 (1993). Thus, a payment made "in lieu of" a tax is a payment made instead of that tax. Any payment made "in lieu of tax" under § 11 is in lieu of "all other taxes" except the specific taxes or fees described in the Nebraska Constitution. We interpret "all" according to its

plain and ordinary sense—"the whole amount or quantity of." Webster's, *supra* at 54.

[8,9] We also interpret the phrase "in lieu of all other taxes" in light of the exceptions listed. The rules of statutory interpretation apply to constitutional interpretation as well. See *Hall v. Progress Pig, Inc.*, 259 Neb. 407, 610 N.W.2d 420 (2000). One of these rules provides that "'[w]hen a statute specifically provides for exceptions, items not excluded are covered by the statute.'" See *Chapin v. Neuhoff Broad.-Grand Island, Inc.*, 268 Neb. 520, 527, 684 N.W.2d 588, 593 (2004) (alteration in original), quoting *Knight v. Johnson*, 741 S.W.2d 842 (Mo. App. 1987). We apply this rule when interpreting article VIII, § 11, which specifically provides that certain taxes are not covered by a payment in lieu of tax. The language of § 11 does not include property taxes within this exception. This omission means that property taxes are covered by the phrase "all other taxes." Accordingly, property taxes are among the taxes covered by a payment in lieu of tax.

(b) Article VIII, § 2, Public Purpose Requirement Not Relevant

A payment in lieu of tax made pursuant to article VIII, § 11, has the effect of exempting Central from paying property taxes by taking the place of any property tax obligations it might otherwise have been required to pay for that tax year. But it is incorrect to read § 11 as "exempting" the parcels in question. The language of § 11 does not indicate that the property of political subdivisions governed by § 11 is completely exempt from taxation.

Despite this distinction between Central's exemption by payment in lieu of tax and an exemption for the property itself, the Department argues that TERC erred by failing to consider the public purpose requirement found in article VIII, § 2, which relates to the exemption of public property. The Department claims it was error for TERC to conclude that article VIII, § 11, made consideration of public purpose unnecessary. We do not agree. Consideration of the parcels' use was not necessary for TERC's determination that Central was not liable for property taxes.

(i) Analysis of Constitutional Language

Article VIII, § 2, exempts the property of the state or a governmental subdivision from taxation if it is used for an authorized public purpose and gives the Legislature discretion to decide how to treat public property that is not used for an authorized purpose. Section 2 provides:

> The property of the state and its governmental subdivisions . . . shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature. To the extent such property is not used for the authorized public purposes, the Legislature may classify such property, exempt such classes, and impose or authorize some or all of such property to be subject to property taxes or payments in lieu of property taxes *except as provided by law*.

(Emphasis supplied.)

The phrase "except as provided by law" indicates that other laws, including provisions of the Nebraska Constitution, may limit the Legislature's ability to tax a governmental subdivision which has property not used for a public purpose. The Legislature's broad discretion regarding such taxation must yield to more specific limitations when such limitations are imposed by the Nebraska Constitution.

Article VIII, § 11, provides a specific limitation on the Legislature's ability to assess property taxes against a political subdivision that provides electricity or irrigation and electricity. This provision does not completely limit the Legislature's ability to tax the public property of such governmental subdivisions, but it does place a limitation on the Legislature's power to hold certain parties liable for such taxes. See § 11. Therefore, article VIII, § 2, requires deference to § 11 and the tax limitation provided therein.

[10] Such deference is consistent with our principles of constitutional interpretation. In the interpretation of the Constitution, a specific clause will be given effect as against a general clause in such manner as to give meaning to both,

and the language of the specific clause will not be restricted by the language of the general clause. *Garrotto v. McManus*, 185 Neb. 644, 177 N.W.2d 570 (1970). Article VIII, §§ 2 and 11, each discuss the payment of taxes by political subdivisions. Section 2 applies to all governmental subdivisions. But § 11 applies to only one specific type of governmental subdivision—those organized for the purpose of providing electricity or irrigation and electricity. Because § 11 is the more specific provision, we will not interpret it as being limited by the language of § 2.

Our principles of constitutional construction also constrain us from adding words to the constitutional language as written. See *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013). The language of article VIII, § 11, does not indicate that a payment in lieu of tax takes the place of a political subdivision's tax obligations only to the extent its property is used for an authorized public purpose. Rather, § 11 provides that such payments "shall be in lieu of all other taxes." As such, we will not read a public purpose requirement into § 11.

The Department highlights that article VIII, § 2, begins with the phrase "Notwithstanding Article I, section 16, Article III, section 18, or Article VIII, section 1 or 4, of this Constitution or any other provision of this Constitution to the contrary . . . ." We acknowledge that this language gives § 2 precedence over contrary constitutional provisions. However, we do not accept the Department's premise that article VIII, § 11, is contrary to § 2. Section 2 contemplates that the Legislature's ability to tax public property not used for a public purpose may be constrained by other laws. Therefore, a provision such as § 11 that imposes tax limitations is not inherently inconsistent with § 2. Furthermore, §§ 2 and 11 can be interpreted harmoniously, as we will explain below.

(ii) Article VIII, §§ 2 and 11, Can Be Interpreted Harmoniously

Contrary to the arguments of the Department, an interpretation that declines to read a public purpose requirement into article VIII, § 11, does not make it conflict with article VIII, § 2, or "misconstrue[]" the relevant constitutional provisions.

See brief for appellants at 13. The statutory scheme that allows for the assessment of property taxes against the lessees of public property gives effect to § 2 without disregarding the limitations imposed by § 11.

Article VIII, § 2, gives the Legislature the authority to decide how it will treat public property that is not used for an authorized purpose. Among other things, the Legislature is vested with the specific authority to "impose or authorize some or all of such property to be subject to property taxes." See § 2.

Pursuant to this authority, the Legislature enacted a statutory scheme that places liability for property taxes on the lessees of public property not used for an authorized purpose. Section 77-202.11(1) provides that "[l]eased public property, other than property leased for a public purpose as set forth in subdivision (1)(a) of section 77-202, shall be taxed or exempted from taxation as if the property was owned by the leaseholder." Taxes assessed against the lessee

> shall be due and payable in the same manner as other property taxes and shall be a first lien upon the personal property of the person to whom assessed until paid and shall be collected in the same manner as personal property taxes as provided in [Neb. Rev. Stat. §§] 77-1711 to 77-1724 [(Reissue 2009 & Cum. Supp. 2010)].

§ 77-202.11(3).

As with all lessees of public property, lessees of the property of a political subdivision organized primarily to provide electricity or irrigation and electricity may be subject to taxation under § 77-202.11. Article VIII, § 11, does not exempt such lessees, and the language of the statute provides no exemptions, see § 77-202.11. Rather, the statute contemplates that lessees may be taxed for property owned by a political subdivision even if the political subdivision makes a payment in lieu of tax under § 11. The statute provides: "*Except as provided in Article VIII, section 11, of the Constitution of Nebraska*, no in lieu of tax payments . . . shall be made with respect to any leased public property to which this section applies." § 77-202.11(5) (emphasis supplied). This evinces the Legislative intent that in relation to public property owned

by a political subdivision governed by § 11, property taxes (assessed against the lessee) and a payment in lieu of tax may both be collected.

Even if § 77-202.11 were ambiguous on this issue, the legislative history indicates that the Legislature's intent in enacting § 77-202.11 was to allow for the assessment of property taxes against the lessees of property owned by a political subdivision making a payment in lieu of tax under article VIII, § 11. Section 77-202.11 was enacted by L.B. 271. See 1999 Neb. Laws, L.B. 271. During floor debate on L.B. 271, the bill's sponsor discussed how it would apply to Central's lessees: "If this bill is passed . . . the county assessors will be assigning a value to the underlying land, and because there is a lease . . . that value will then be included on the tax rolls, but it won't be a liability of Central, it will be a liability of the leaseholder . . . ." See Floor Debate, Revenue Committee, 96th Leg., 1st Sess. 3775 (Apr. 12, 1999). The sponsor also stated that under L.B. 271, the lessees of public utilities would be required to "pay a tax on the underlying ground." See Floor Debate, Revenue Committee, 96th Leg., 1st Sess. 6533 (May 12, 1999).

Allowing for taxation of the lessees of political subdivisions governed by article VIII, § 11, carries out the purpose of article VIII, § 2, to tax or exempt public property based upon whether it is used for an authorized public purpose. The statute allows for taxation of lessees when the leased public property is not being used for an authorized purpose. See § 77-202.11(1). Leased public property that is used for an authorized public purpose is specifically exempted. See *id*.

At the same time, the statutory scheme created by § 77-202.11 respects the limitations of article VIII, § 11, that prevent the assessment of property taxes against political subdivisions making a payment in lieu of tax. Under § 77-202.11(3), lessees can be assessed property taxes directly, without exposing the political subdivision to liability for taxes upon the property leased to private individuals or entities. The statute specifically states that "[t]he state or its governmental subdivisions shall not be obligated to pay the taxes upon failure of the lessee to pay. . . . No lien or

attachment shall be attached to the property of the state or the governmental subdivisions for failure of the lessee to pay the taxes due." See *id*. Because a political subdivision is not liable for the taxes assessed against its lessees, the assessment of property taxes on the lessees of property owned by political subdivisions making a payment in lieu of tax does not violate § 11.

Section 77-202.11 creates a statutory scheme that is consistent with both the public purpose requirement of article VIII, § 2, and payments in lieu of tax made pursuant to article VIII, § 11. Section 11 exempts political subdivisions which make payments in lieu of tax from taxation. Section 2 and the statutory scheme enacted pursuant thereto permit the Legislature to impose property taxes on lessees of those subdivisions to the extent the property is not used for an authorized public purpose. Under this scheme, the public purpose requirement of § 2 applies to the taxation of lessees despite the fact that the political subdivisions are exempt as per § 11.

The Department agrees that article VIII, §§ 2 and 11, have been harmonized through the legislative scheme allowing for taxation of Central's lessees. But it further asserts that TERC erred by not considering whether the lessees should have been taxed under this scheme for property not used for an authorized public purpose. For the reasons noted previously, TERC did not have jurisdiction to reach the issue of the lessees' liability. Therefore, we do not consider the Department's arguments in relation to whether the lessees should have been taxed.

(c) Conclusion as to Central

Article VIII, § 11, controls the determination whether Central is liable for property taxes. Under § 11, Central's payment in lieu of tax for tax year 2011 took the place of any property tax obligations it might otherwise have been required to pay, regardless of the purpose for which the property was being used. Therefore, Central was not obligated to pay property taxes once it made the annual payment in lieu of tax.

TERC did not err in reading article VIII, §§ 2 and 11, to be consistent and harmonious or in concluding, based on § 11, that Central was not subject to property taxes for tax year

2011, because it had already made a payment in lieu of tax for that year.

Under § 77-202.11, public purpose would have been determinative of the lessees' tax liability on the relevant parcels. However, for the reasons noted previously, TERC did not have jurisdiction to reach the issue of the lessees' liability. We vacate that part of TERC's order which stated that there should be no separate property tax obligation for the subject properties, there should be no assessed value of the subject property, and any and all property tax obligations had been included in Central's payment in lieu of tax. We make no determination whether the lessees can be assessed property taxes for 2011 and subsequent tax years.

3. Other Assignment of Error

[11] The only remaining assignment of error is that TERC erred in taking "statutory notice" and not judicial notice of the legislative history offered by the Department. Because this case presents questions of constitutional interpretation and not statutory interpretation, we need not consider whether TERC gave the legislative history sufficient weight and consideration. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

VI. CONCLUSION

We affirm TERC's finding that Central is not liable for additional tax obligations for real property owned by Central and that any such tax obligations are included in Central's annual payment in lieu of tax. To the extent that TERC's order can be interpreted to mean that a lessee's property tax obligation is included in Central's payment in lieu of tax, it is vacated and is of no force and effect. The issue of a lessee's liability was not before TERC.

Affirmed in part, and in part vacated.

DONNA L. GARZA, NOW KNOWN AS DONNA L. FAUST AMAN, APPELLEE AND CROSS-APPELLANT, V. ARTURO GARZA, APPELLANT AND CROSS-APPELLEE.

846 N.W.2d 626

Filed May 23, 2014. No. S-13-606.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court. The same standard applies to the modification of child support.
2. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
3. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.
4. ____. Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits.
5. **Divorce: Attorney Fees.** A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.
6. ____: ____. In awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Wendy J. Ridder, of Law Offices of Daniel P. Bracht, P.C., L.L.O., for appellant.

Benjamin M. Belmont, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellee.

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

HEAVICAN, C.J.

I. INTRODUCTION

Arturo Garza filed an application to modify child support and parenting time. The district court found a material

change in circumstances, made certain changes to the parties' parenting time, and reduced Garza's child support obligation. Garza appeals, and Donna L. Garza, now known as Donna L. Faust Aman (Faust Aman), cross-appeals. We affirm.

II. BACKGROUND

Garza and Faust Aman were married in July 2005. The parties separated in December of that same year, and Faust Aman filed for divorce on December 22. One child, a son, was born of the marriage in December 2005, after Faust Aman filed for divorce. A decree and parenting plan was entered on May 2, 2007.

The original decree and parenting plan awarded sole primary and legal custody to Faust Aman. As relevant to the current application for modification, Garza was awarded alternating weekend visitation and was ordered to pay $500 per month in child support.

In approximately February 2010, Garza, who had been unemployed, moved from Omaha, Nebraska, to Lenexa, Kansas, to take a new job. On February 2, 2012, Garza filed an application, and later an amended application, for modification of the decree and parenting plan, alleging that his move to Kansas was a material change in circumstances. On March 2, Faust Aman filed an answer; on March 5, she filed a motion for an order to show cause why Garza should not be held in contempt of court for "willfully and contemptuously violating the terms and conditions of the Decree of Dissolution."

Following a hearing, Garza was found in contempt because he owed Faust Aman $7,683.89 in child support, $10,601 for childcare expenses, and $31,000 for the divorce property settlement. Garza was allowed to purge the contempt by paying $3,000 in child support; being current in his payments of child support and childcare expenses when making his regular payments in April, May, and June; and paying attorney fees. Garza was purged of the contempt on May 7, 2012.

In the midst of the contempt proceedings, on or about March 30, 2012, Garza was laid off from his job. On September 12, Garza filed a second amended application for modification. He alleged a material change in circumstances for various

reasons, notably his relocation to Lenexa, the fact that the minor child was now school age, Faust Aman's new job, and the loss of his job.

Garza was still out of work at the time of the trial on his application for modification. Garza testified that he had been looking for a job since he was laid off and testified that he had searched in Lenexa, Omaha, and surrounding areas. Garza testified that he was willing to take a job in a field other than his chosen field of medical equipment planning and that he had even applied for food services jobs, all to no avail.

Garza has numerous complaints about Faust Aman and his access to their son. As relevant to this appeal, Garza complains that after moving to Lenexa, he asked Faust Aman on more than one occasion to transport their son to Mound City, Missouri, or roughly halfway between Omaha and Lenexa, so that Garza could exercise his visitation. But Faust Aman informed Garza that she was "'not able to meet [him] halfway.'" She testified that oftentimes, she could not meet with her "upper management" until late in the day, and that therefore, she was not able to leave work early on Friday afternoons on a regular basis.

Following trial on the application for modification, the district court found Garza's move to Kansas was a material change in circumstances. But the district court noted that the move on Garza's part was voluntary. As such, it denied Garza's request that Faust Aman should have to transport the couple's son to the halfway point for visitation so long as Garza remained unemployed, but granted his request for transportation under limited circumstances once Garza was again employed. Specifically, once Garza was again employed, Faust Aman would be required to meet Garza at a location chosen by the parties, but only for the return trip on the last alternating weekend visitation of a month when that visitation ended on a Sunday.

Garza's request to lower his child support obligation to the minimum $50 per month payment was denied. The district court did lower his child support obligation from $500 to $305 per month.

Finally, Garza was ordered to pay Faust Aman attorney fees of $2,500, due when he was again employed. Garza's request for attorney fees was denied.

Garza appeals, and Faust Aman cross-appeals.

III. ASSIGNMENTS OF ERROR

On appeal, Garza assigns, restated and renumbered, that the district court erred in (1) splitting transportation for visitation as it did, (2) calculating the reduction in Garza's child support obligation, and (3) awarding Faust Aman attorney fees.

On cross-appeal, Faust Aman assigns, consolidated, that the district court erred in reducing Garza's child support obligation.

IV. STANDARD OF REVIEW

[1] Modification of a dissolution decree is a matter entrusted to the discretion of the trial court, whose order is reviewed de novo on the record, and which will be affirmed absent an abuse of discretion by the trial court.[1] The same standard applies to the modification of child support.[2]

[2] In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.[3]

V. ANALYSIS

Three issues are presented by this appeal: (1) visitation transportation, (2) child support, and (3) attorney fees.

1. Visitation Transportation

In his first assignment of error, Garza assigns that the district court erred in its order regarding visitation transportation. On this point, the district court ordered Faust Aman to meet Garza halfway between Omaha and Lenexa to pick up the couple's son at the end of each visit, to commence after Garza is again employed. Garza instead sought an order

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[1] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

[2] *Id.*

[3] *Finney v. Finney*, 273 Neb. 436, 730 N.W.2d 351 (2007).

requiring Faust Aman to meet him halfway for each visit, effective immediately.

We agree that Garza's move to Lenexa was a material change in circumstances.[4] But we find no error in the district court's order on transportation. Garza voluntarily moved to Lenexa. And Faust Aman testified as to the reasons why transporting their son halfway to Lenexa was not feasible for her. Reviewing the record de novo for an abuse of discretion, we find the district court's order was not error. Garza's first assignment of error is without merit.

2. Child Support

In his second assignment of error, Garza assigns that the district court erred in calculating his child support obligation. On cross-appeal, Faust Aman assigns that the district court erred in finding a material change in circumstances supporting any reduction in child support and further erred in reducing Garza's child support obligation under the doctrine of unclean hands.

(a) Faust Aman's Assignments of Error on Cross-Appeal

We first address Faust Aman's claim that there was no material change in circumstances that would support a reduction in Garza's child support obligation.

We agree with Garza that his lack of employment is a material change in circumstances. At trial in March 2013, Garza presented evidence that he was laid off from his employment in late March 2012 and that he had been searching for a job since that time. Garza also presented testimony that he had received unemployment from the State of Kansas and later from the federal government, though at the time of trial, he was ineligible for benefits. He testified he could reapply at a later date.

Having concluded there was a material change in circumstances, we turn to Faust Aman's argument that the district court erred by not finding Garza to have unclean hands. The

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[4] See Neb. Rev. Stat. § 42-364 (Cum. Supp. 2012). See, also, *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

doctrine of unclean hands can be invoked to bar a petitioner's claim for relief, when the "evidence shows that the petitioner is able to pay the arrearage or is unable to pay through some unintentional conduct on his part."[5]

The record shows that Garza was unemployed at least twice over the last few years. There is no evidence that this unemployment was due to any bad faith on his part. As such, we cannot conclude that the district court erred in failing to find that Garza had unclean hands. Faust Aman's second assignment of error on cross-appeal is without merit.

(b) Garza's Assignments of Error on Appeal

We now turn to Garza's various assignments of error regarding his child support obligation. They can be summarized into three groups: the district court erred in (1) making certain deductions from Faust Aman's income, (2) calculating Garza's income and in not deviating from the Nebraska Child Support Guidelines for Garza's travel expenses, and (3) not lowering Garza's child support obligation to a minimum $50 support level.

(i) Faust Aman's Income

Garza makes several arguments regarding the district court's calculation of Faust Aman's income. He argues that the district court erred in not including Faust Aman's bonus and in deducting from Faust Aman's income her 401K contribution and her dental and vision insurance premiums. All of Garza's arguments are without merit.

First, the district court did not err in not including Faust Aman's bonus, which was speculative in nature, in her income.[6] Nor did the district court err in deducting her 401K contribution. Though Faust Aman had not currently been making such a contribution, she testified that this was due to Garza's failure to be current on his child support obligation. Finally, the district court did not err in allowing a deduction

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[5] *Voichoskie v. Voichoskie*, 215 Neb. 775, 779, 340 N.W.2d 442, 445 (1983).

[6] See *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001).

for dental and vision insurance premiums, both of which are permitted under the guidelines.[7]

(ii) Garza's Income and Travel Expenses

Garza next argues that the district court erred in calculating his monthly income and in not allowing him a deviation from the guidelines for his travel expenses. We disagree.

First, a review of the record demonstrates that the district court calculated Garza's earning capacity, and not his actual earnings, at $1,720 a month. Based upon the evidence presented, this was appropriate.[8]

Garza also argues that the district court should have deviated from the guidelines as a result of some of his travel expenses. Again we disagree. Deviation from the guidelines is discretionary,[9] and we cannot conclude that the district court was wrong, given the evidence that Garza voluntarily moved to Lenexa.

(iii) Minimum Support Level

Finally, Garza argues that the district court should have lowered his child support obligation to the minimum support level of $50 per month. We disagree.

Neb. Ct. R. § 4-209 outlines the minimum support order. The purpose of § 4-209 is to provide for some support even in cases of very low income in order to reinforce the duties and obligations of being a parent.

But this case does not present a low-income situation, and thus, § 4-209 has no application. Instead, as noted above, Garza's monthly income was properly calculated at $1,720 a month. Even with a child support obligation of $305 a month, Garza's monthly income would not fall below the minimum levels of $973 established by Neb. Ct. R. § 4-218 (rev. 2014).

Garza's argument is without merit, as is his second assignment of error.

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[7] Neb. Ct. R. § 4-215(A) (rev. 2011).

[8] See Neb. Ct. R. § 4-204.

[9] Neb. Ct. R. § 4-210.

3. Attorney Fees

Finally, Garza argues that the district court erred in awarding Faust Aman attorney fees.

[3-5] Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of attorney fees.[10] Customarily, attorney fees are awarded only to prevailing parties or assessed against those who file frivolous suits.[11] A uniform course of procedure exists in Nebraska for the award of attorney fees in dissolution cases.[12] Thus, there was authority, in this modification of a dissolution decree case, for the awarding of attorney fees.

[6] It has been held that in awarding attorney fees in a dissolution action, a court shall consider the nature of the case, the amount involved in the controversy, the services actually performed, the results obtained, the length of time required for preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services.[13]

The Nebraska Court of Appeals has further held that

> it is not strictly necessary for an applicant for attorney fees to introduce specific evidence to support an award of attorney fees, but before an award of attorney fees will be affirmed on appeal, the record must contain the information that shows that the award is within the range of the trial court's discretion. . . . If the contents of the record, i.e., pleadings, introduced discovery documents, time spent in court as shown by the court record, and doubtless many other items which will support the award, do show the allowed fee not to be unreasonable, then that fee would not be untenable or an abuse of discretion.[14]

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

[11] *Id.*

[12] See *Nimmer v. Nimmer*, 203 Neb. 503, 279 N.W.2d 156 (1979).

[13] See *Boamah-Wiafe v. Rashleigh*, 9 Neb. App. 503, 614 N.W.2d 778 (2000).

[14] *Id.* at 519, 614 N.W.2d at 789.

The best practice will always be to provide an affidavit or other evidence such as testimony or exhibits as detailed above, and we certainly encourage doing so. With such evidence, a party is assured that both the trial court and the appellate court will not be required to scour a record in an effort to support attorney fees in any particular case.

We will not absolutely require the filing of an affidavit. As the Court of Appeals noted in *Boamah-Wiafe v. Rashleigh*,[15] "if the contents of the record . . . do show the allowed fee not to be unreasonable, then that fee would not be untenable or an abuse of discretion." But we emphasize that the filing of an affidavit or presentation of other evidence will always be the preferable way to support the award of attorney fees. Litigants who do not file an affidavit or present other evidence risk the loss of attorney fees, because of the difficulty of discerning such information from the record alone.

We cannot conclude that this fee was unreasonable. The original application to modify was filed over 2 years ago. Three different applications to modify were filed. Counsel for Faust Aman pursued and succeeded in having Garza held in contempt for failing to pay child support, the property settlement, and other expenses. Discovery was conducted, including depositions.

We find no merit to Garza's final assignment of error.

VI. CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[15] *Id.*

In re Estate of Jack H. Gsantner, deceased. Ryan Gray, Personal Representative of the Estate of Jack H. Gsantner, deceased, appellant, v. Kevin J. Gustafson et al., appellees.

846 N.W.2d 646

Filed May 23, 2014. No. S-13-633.

1. **Judgments: Jurisdiction.** Jurisdictional questions that do not involve a factual dispute present questions of law.
2. **Decedents' Estates: Appeal and Error.** Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **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.
5. **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.
6. **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.
7. **Decedents' Estates.** A proceeding under the Nebraska Probate Code is a special proceeding.
8. **Final Orders: Words and Phrases.** A substantial right under Neb. Rev. Stat. § 25-1902 (Reissue 2008) is an essential legal right.
9. **Final Orders: Appeal and Error.** A substantial right is involved 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.
10. **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.
11. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Appeal from the County Court for Douglas County: LAWRENCE E. BARRETT, Judge. Affirmed.

Andrew C. Sigerson and Lyndsay N. Bonwell, of Andrew C. Sigerson, P.C., L.L.O., for appellant.

Dean F. Suing and David A. Castello, of Katskee, Henatsch & Suing, for appellees.

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

WRIGHT, J.

NATURE OF CASE

Ryan Gray, personal representative of the estate of Jack H. Gsantner, appeals from the orders of the county court awarding him a fee of $25,000 and overruling his motion to alter or amend the award. Finding no error on the record, we affirm the award of a personal representative fee of $25,000.

SCOPE OF REVIEW

[1] Jurisdictional questions that do not involve a factual dispute present questions of law. *Pinnacle Enters. v. City of Papillion*, 286 Neb. 322, 836 N.W.2d 588 (2013).

[2,3] Appeals of matters arising under the Nebraska Probate Code are reviewed for error on the record. See *In re Estate of Failla*, 278 Neb. 770, 773 N.W.2d 793 (2009). 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. *Krings v. Garfield Cty. Bd. of Equal.*, 286 Neb. 352, 835 N.W.2d 750 (2013).

FACTS

Gsantner died in February 2012. He was survived by neither a spouse nor children. His funeral services were provided by an Omaha, Nebraska, mortuary, of which Gray is the managing officer. Several months after the funeral, the estate owed $3,120.55 in funeral expenses.

As a creditor of Gsantner's estate, the mortuary sought appointment of Gray as personal representative in intestacy. In April 2012, he was informally appointed to serve in that capacity. In November, the county court entered an order of intestacy and formally appointed Gray as personal representative of the estate.

At the time of Gray's informal appointment, the value of the estate was estimated to be $127,400. Following Gray's informal appointment, he discovered the estate had extensive assets that were previously unknown to him. Gray also learned that Gsantner had executed a will. The final value of the estate was $5,180,514.23.

In December 2012, Gray filed a petition for formal probate of the will, determination of heirs, tentative determination of the inheritance tax, partial distribution of the estate, and payment of attorney fees and the personal representative fee. He submitted a request for fees in the amount of 5 percent of the gross estate, to be distributed equally between attorney fees and the personal representative fee. Five heirs of the estate (appellees) objected to Gray's request for fees as "excessive and unwarranted" under Neb. Rev. Stat. § 30-2480 (Reissue 2008). At appellees' request, the county court scheduled an evidentiary hearing to determine reasonable fees.

After the evidentiary hearing was scheduled but before it took place, appellees recommended a partial award of the personal representative fee in the amount of $17,500, "without prejudice" to the county court's final determination regarding the fee. The court granted appellees' request and awarded Gray a "partial fee" of $17,500.

At the evidentiary hearing, Gray and appellees adduced evidence to support a wide range of personal representative fees. The county court ultimately received all the exhibits into evidence.

In support of Gray's request for a personal representative fee in the amount of 2½ percent of the estate, Gray offered affidavits from five attorneys with experience in probate matters. These attorneys commented on (1) the size and complexity of Gsantner's estate, (2) the amount of work Gray had expended on his duties as personal representative (over 400 hours),

(3) the opportunity costs Gray had forgone in his regular employment while serving as personal representative, and (4) the quality and skill of Gray's work. Based on these facts, the various attorneys stated that a reasonable fee for Gray would range between 1 and 3 percent of the estate or between $150 and $225 per hour.

One of the affidavits submitted by Gray was from Thomas B. Thomsen, the attorney representing Gsantner's estate. Thomsen opined that Gray's performance was comparable to that of "any large bank trust department" and "any attorney [Thomsen had] ever worked with as personal representative" and that Gray "earned the maximum fee to be paid to a personal representative under Nebraska law." Another one of the attorneys providing an affidavit in support of Gray's position stated that Gray's "standard of work and detail in this estate approache[d] the level of professional fiduciary services and . . . merit[ed] fees approaching the level of a professional fiduciary."

Appellees offered the affidavit of a sixth Nebraska attorney, who opined, based on his experience, that a personal representative fee constituting 2½ percent of the gross estate was "excessive" and "would not be reasonable compensation as contemplated by Neb. Rev. Stat. §30-2480." This attorney also stated that he would expect a court to award a fee of $15 to $25 per hour to a lay personal representative with no preexisting fee arrangement with the decedent.

The county court determined that Gray was entitled to a personal representative fee in the amount of $25,000. The court noted that Gray had "maintained a log that recorded his mileage and hours expended on behalf of the estate," that this log was not offered into evidence, and that the "only indication in the other affidavits was that . . . Gray had spent approximately 400 hours in his duties." As compensation for those 400 hours, the award of $25,000 equated to $62.50 per hour.

On May 8, 2013, Gray filed a "motion to Reconsider" pursuant to Neb. Rev. Stat. § 25-1329 (Reissue 2008). On June 5, he filed an "Amended Motion to Reconsider." Because Gray filed each of these motions pursuant to § 25-1329, they functioned as motions to alter or amend.

In the amended motion, Gray alleged that at a prior hearing, he had attempted "to submit a log, or statement of the Personal Representative's time and efforts expended," and that he had only recently learned the documentation had not been received as an exhibit. At the hearing on Gray's motion, he asked the county court for "the ability to enter the log book" so that the award of fees could be reconsidered in light of that evidence.

The county court orally overruled the motion to reconsider at the conclusion of the hearing. On July 5, 2013, the court entered an order consistent with that ruling, which stated in its entirety: "This matter came on for hearing on June 21, 2013[,] on the Personal Representative's Motion to Reconsider. Motion to Reconsider is overruled."

Gray timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008). Appellees moved for summary dismissal for lack of jurisdiction, claiming that the order awarding personal representative fees was not a final order. We overruled the motion and allowed the case to proceed to oral argument.

ASSIGNMENT OF ERROR

Gray assigns that the county court erred in finding that the personal representative fee awarded to him was reasonable under § 30-2480.

ANALYSIS

Jurisdiction

[4] We first address whether the order awarding the personal representative fee was a final order. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012).

[5,6] 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. *Id*. 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. *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

We have not previously considered whether an order awarding a personal representative fee is a final, appealable order. In *In re Estate of Lehman*, 135 Neb. 592, 283 N.W. 199 (1939), we addressed the finality of orders awarding executors' fees. The orders in that case were for "partial distribution and allowances of executors' fees." See *id*. at 601, 283 N.W. at 203. The first awarded $1,400 in partial fees to each executor for his or her actions from April 30, 1928, to October 31, 1931. The second ordered $4,000 in partial fees for the executors' actions from October 31, 1931, to October 31, 1935. Each order was a partial fee and did not constitute a final award of executors' fees. On these facts, we held that the orders awarding partial executors' fees were "interlocutory orders and not final orders." *Id*. Our holding was specifically limited to "such orders sought to be appealed from" in that case. *Id*. Therefore, we did not create a bright-line rule that would be applicable in the case at bar. We did not make our determination of finality based upon § 25-1902, which, at that time, was codified at Comp. Stat. § 20-1902 (1929).

It is now standard practice for an appellate court to consider the finality of an order entered in probate proceedings under the rubric of § 25-1902. See, e.g., *In re Estate of McKillip, supra*; *In re Estate of Muncillo*, 280 Neb. 669, 789 N.W.2d 37 (2010); *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007); *In re Estate of Peters*, 259 Neb. 154, 609 N.W.2d 23 (2000); *In re Estate of Snover*, 233 Neb. 198, 443 N.W.2d 894 (1989). Thus, we employ § 25-1902 to determine whether the order awarding Gray a personal representative fee of $25,000 was a final order.

[7] The first and third categories of final orders in § 25-1902 are not at issue in the case at bar, so the question is whether the order awarding a personal representative fee of $25,000 affected a substantial right and was made in a special proceeding. A proceeding under the Nebraska Probate Code is a special proceeding. See *In re Estate of McKillip, supra*. The question is whether the order affected a substantial right.

[8-10] A substantial right under § 25-1902 is an essential legal right. *In re Estate of McKillip, supra*. A substantial right is involved 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." *Id*. at 373, 820 N.W.2d at 875. Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend. *In re Estate of McKillip, supra*.

Gray argues that the order awarding a personal representative fee of $25,000 affected a substantial right, because as personal representative, he had a substantial legal right to reasonable compensation under § 30-2480. We agree. The order affected a substantial right because under the facts of this case, the order finally determined Gray's claim for reasonable compensation. Under § 30-2480, a personal representative is "entitled to reasonable compensation for his services." Gray was formally appointed as personal representative of Gsantner's estate and was entitled to "reasonable compensation." It was the award of $25,000 that determined the amount of compensation Gray was to receive.

At the time of the county court's order awarding a personal representative fee of $25,000, the estate had been partially distributed and Gray continued to serve as personal representative. Nonetheless, the court awarded Gray the entire amount of compensation to which the court found he was entitled for his services. Whereas the court's previous award of $17,500 noted that the award was a partial fee, the order in question did not include any language that would indicate the award was subject to later revision or augmentation. When Gray brought his application for fees, he had not requested hourly compensation, which would change in the event of further work, but a percentage of the estate. Also, the award was

made after the court conducted a special evidentiary hearing on the issue of fees. Thus, we conclude that the court's order awarding a personal representative fee of $25,000 was a final order that determined what constituted reasonable compensation for Gray's services.

In setting the amount of reasonable compensation at $25,000, the order disposed of Gray's claim under § 30-2480. The order awarded the only personal representative fee Gray was going to receive. The order was dispositive of Gray's claim for reasonable compensation under § 30-2480 and thus affected a substantial right.

Appellees argue that under § 25-1902, it is not sufficient that the order awarding a personal representative fee of $25,000 affected a substantial right of Gray. They assert that in order to be final, the order must affect a substantial right of the estate, not a substantial right of the personal representative. We disagree. The only support appellees provide for this proposition is *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011), which is not applicable to the case at bar.

In re Adoption of Amea R., supra, considered whether a son could appeal from an order prohibiting him from participating in adoption proceedings initiated by his father. The son had sought to intervene in the proceedings not in his own behalf, but in a representative capacity as his father's "next friend." *Id.* at 753, 807 N.W.2d at 739. Because the son did not have a direct interest in the adoption proceedings, we concluded that his right to participate was vicarious to that of his father and, consequently, was not a substantial right under § 25-1902.

Appellees compare Gray's right to reasonable compensation to those of the son in *In re Adoption of Amea R., supra*. According to appellees' motion for summary dismissal, Gray's right is "vicarious and ancillary to the rights of the underlying estate" and is not a substantial right for purposes of § 25-1902.

But appellees' reliance on *In re Adoption of Amea R., supra*, is clearly misplaced. The relationship between Gray and Gsantner's estate is not analogous to that between the son and his father in that case. As a properly appointed personal

representative, Gray had a right to reasonable compensation under § 30-2480. That right existed independently of the rights of the estate. It was not dependent upon the rights of another party, as in *In re Adoption of Amea R., supra*. Additionally, because of the right bestowed by § 30-2480, Gray had a direct interest in the proceedings giving rise to the order from which he now appeals.

Because Gray's right to reasonable compensation was not vicarious, *In re Adoption of Amea R., supra*, provides no support for appellees' argument that under § 25-1902, a final order does not exist unless a substantial right of the underlying estate is affected. The county court's order awarding a personal representative fee of $25,000 determined the total amount of Gray's compensation, and as such, it affected Gray's substantial right and was a final order. See § 25-1902. Thus, we have jurisdiction to consider Gray's appeal from that order.

Amount of Personal Representative Fee

Gray assigns that the county court erred in awarding him a personal representative fee of only $25,000. We review the award for error appearing on the record. See *In re Estate of Failla*, 278 Neb. 770, 773 N.W.2d 793 (2009). As such, our inquiry is "whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable." See *Krings v. Garfield Cty. Bd. of Equal.*, 286 Neb. 352, 356, 835 N.W.2d 750, 753 (2013).

Under § 30-2480, Gray was entitled to "reasonable compensation." The term "reasonable compensation" is not defined in § 30-2480. However, Neb. Rev. Stat. § 30-2482(2) (Reissue 2008) provides a list of factors "to be considered as guides in determining the reasonableness of a fee" awarded to a personal representative. These factors are provided to aid in reviewing a personal representative fee when it is before a court on the petition for review of an interested person. See § 30-2482. The factors to be considered are as follows:

> (a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly;

> (b) The likelihood, if apparent to the personal representative, that the acceptance of the particular employment will preclude the person employed from other employment;
>
> (c) The fee customarily charged in the locality for similar services;
>
> (d) The amount involved and the results obtained;
>
> (e) The time limitations imposed by the personal representative or by the circumstances;
>
> (f) The nature and length of the relationship between the personal representative and the person performing the services; and
>
> (g) The experience, reputation, and ability of the person performing the services.

§ 30-2482(2). These factors provide an indication of what facts the Legislature intended to be considered when determining a reasonable fee.

The affidavits adduced by Gray and appellees provided information relevant to many of these factors. The affidavits presented by Gray opined that Gsantner's estate was complex and required extraordinary amounts of work by Gray, which he performed competently, professionally, and at great opportunity cost. These affidavits stated that a customary personal representative fee was between 1 and 3 percent of the estate or between $150 and $225 per hour.

In contrast, the affidavit proffered by appellees described the estate as "fairly 'liquid'" and emphasized that Gray was a "lay" personal representative. According to appellees' evidence, a lay personal representative typically received between $15 and $25 per hour. After weighing this evidence, the county court determined that Gray was entitled to $25,000 for his services.

[11] Gray asks us to reverse the award of $25,000, because the award disregards the evidence he submitted. In doing so, he asks us to reweigh the evidence. We decline to do so. In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the

successful party, who is entitled to every reasonable inference deducible from the evidence. *In re Trust of Hrnicek*, 280 Neb. 898, 792 N.W.2d 143 (2010). When viewed in the light most favorable to appellees, the evidence supports the county court's award of a $25,000 personal representative fee.

The county court was presented with a wide range of evidence on the complexity of Gsantner's estate and what level of compensation would be customary for Gray's work, which are factors to be considered under § 30-2482. Indeed, the facts were far from "undisputed," as Gray contends. See brief for appellant at 21. Although Gray's evidence indicated that the estate was complex, that the quality of his work was equal to that of a large bank trust department, and that his work deserved much greater compensation, other evidence was to the contrary. Appellees' evidence showed that the estate was not complex, Gray's work was not out of the ordinary, and an award of $25,000 was reasonable given the customary compensation for such work.

It was within the province of the county court to decide upon which evidence it would rely. It was also within the court's discretion to weigh the factors that were relevant to its determination of reasonableness. Since appellees' evidence supported the award of a personal representative fee of $25,000, we cannot say that this award was contrary to the law. Neither can we say that it was arbitrary, capricious, or unreasonable. Therefore, we affirm the order of the county court.

CONCLUSION

For the foregoing reasons, we conclude that we have jurisdiction over this appeal and we affirm the award of a personal representative fee of $25,000.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. STEVEN D. AVEY, APPELLANT.

846 N.W.2d 662

Filed May 30, 2014. No. S-13-666.

1. **Criminal Law: Courts: Appeal and Error.** In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion.
2. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
3. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Appeal and Error.** An appellate court independently reviews questions of law in appeals from the county court.
5. **Criminal Law: Courts: Appeal and Error.** When deciding appeals from criminal convictions in county court, an appellate court applies the same standards of review that an appellate court applies to decide appeals from criminal convictions in district court.
6. **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.
7. **Constitutional Law: Search and Seizure.** It is axiomatic that for the protections of the Fourth Amendment to apply, a seizure must have occurred.
8. ____: ____. A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.

Appeal from the District Court for Lancaster County, JOHN A. COLBORN, Judge, on appeal thereto from the County Court for Lancaster County, LAURIE YARDLEY, Judge. Judgment of District Court affirmed.

Mark E. Rappl for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Steven D. Avey appeals the order of the district court for Lancaster County which affirmed his convictions in the county court for Lancaster County for driving under the influence (DUI), third offense, and for failure to yield the right-of-way. At issue in the county court and on appeal to the district court were the merits of Avey's motion to suppress in which he claimed to have been seized in violation of Fourth Amendment protections when, at a police officer's request, he returned to the scene of a motor vehicle accident. Both courts rejected Avey's claim, as do we. Accordingly, we affirm.

STATEMENT OF FACTS

Avey was involved in an accident on the evening of August 10, 2012. Avey pulled his vehicle out of a parallel parking space along 13th Street in Lincoln, Nebraska, and collided with a vehicle driven by Benjamin Howard. Avey got out of his vehicle and made contact with Howard. Avey gave Howard information, including his name, address, and telephone numbers, as well as his insurance information. Howard did not have his insurance information to give to Avey. After Howard told Avey that he had called the police and that they were on their way, Avey told Howard that he was going to leave because he had already given Howard the necessary information.

Shortly after Avey left, Officer Joseph Fisher arrived at the accident scene and interviewed Howard. Howard gave Fisher the information that Avey had given him, including Avey's telephone number. Fisher called Avey, asked him whether he had been involved in an accident, and asked him to return to the scene, which Avey did. Fisher made contact with Avey at the driver's side door of Avey's vehicle. Fisher observed that Avey had watery eyes, and he noticed a moderate smell of alcohol. Fisher performed field sobriety tests on Avey, and, based on the results of the tests, Avey was cited for DUI.

Avey was also cited for failure to yield in connection with the accident.

The State filed a complaint against Avey in the county court for Lancaster County charging him with DUI in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) and with failure to yield the right-of-way after stopping or parking in violation of Neb. Rev. Stat. § 60-6,150 (Reissue 2010). The State alleged in the complaint that Avey had two prior convictions for DUI.

Avey filed a motion to suppress evidence obtained as a result of what he asserted was a seizure in violation of the Fourth Amendment. Avey contended that he was seized when Fisher called him and required him to return to the accident scene. At a hearing on the motion to suppress, Fisher testified that he had not ordered Avey to return to the scene but that he had merely requested that he return. Fisher wanted Avey to return, because Fisher estimated that the damage to Howard's vehicle was over $1,000 which would require the filing of a report with the State. At the time he called Avey, Fisher did not suspect that alcohol had been involved and instead he suspected that Avey was guilty of negligent driving, which was a traffic infraction. Fisher conceded on cross-examination at the suppression hearing that he did not recall the exact words he said when he called Avey and that it was "possible" that he had told Avey that if he did not return he would be cited for leaving the scene of an accident.

Avey testified at the suppression hearing that Fisher called and told him that he needed to return to the accident scene. Avey testified that he asked Fisher what would happen if he did not return and that Fisher replied that he would be charged with leaving the scene of an accident. When asked at the hearing whether he felt compelled to return, Avey replied, "I thought it would be a good idea."

At the conclusion of the hearing, the county court announced its decision overruling the motion to suppress. In announcing its decision, the county court found that "it was [Avey's] choice to get in the car to come down" and that Avey "could have told the officer [he] wasn't feeling well, or he didn't want to" but Avey did not give Fisher "any indication that he didn't want

. . . to come down or couldn't come down." The county court further stated that because it appeared that Avey "had committed at least a traffic infraction, and was going to get a ticket if he came back down, . . . it was reasonable for the officer to call him to come back down and complete the investigation." The county court stated that it did not know of any case law that "says a phone call asking him to come back down to the scene to finish conducting an investigation is a seizure." The county court concluded that there was not a seizure, and it therefore overruled the motion to suppress.

The case proceeded to a bench trial. The parties stipulated to the evidence subject to Avey's renewed motion to suppress, which the county court again overruled. The county court found Avey guilty of DUI and of failure to yield. The county court thereafter found the DUI to be a third offense and sentenced Avey to 30 days in jail, 3 years' probation, a $1,000 fine, and a 2-year license revocation for the DUI conviction. The county court imposed a $75 fine for failure to yield.

Avey appealed his convictions and sentences to the district court. He claimed that the county court had erred when, inter alia, it overruled his motion to suppress. Avey argued to the district court that he was seized when he was required to return to the scene of the accident. The district court rejected Avey's claims on appeal and affirmed Avey's county court convictions and sentences.

Avey appeals the district court's affirmance of his county court convictions.

ASSIGNMENT OF ERROR

Avey claims that the district court erred when it affirmed the county court's order overruling his motion to suppress.

STANDARDS OF REVIEW

[1-5] In an appeal of a criminal case from the county court, the district court acts as an intermediate court of appeals, and its review is limited to an examination of the record for error or abuse of discretion. *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011). Both the district court and a higher appellate court generally review appeals from the county court for

error appearing on the record. *Id*. 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*. But we independently review questions of law in appeals from the county court. *Id*. When deciding appeals from criminal convictions in county court, we apply the same standards of review that we apply to decide appeals from criminal convictions in district court. *Id*.

[6] 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. *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

ANALYSIS

Avey claims that the district court erred when it affirmed the county court's order overruling Avey's motion to suppress. We conclude that the county court did not err when it concluded that there was no seizure that would have triggered Fourth Amendment protections and that therefore the district court did not err when it affirmed the order overruling Avey's motion to suppress.

[7,8] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013). The present case involves an allegation of an unreasonable seizure. With respect to such a claim, it is axiomatic that for the protections of the Fourth Amendment to apply, a seizure must have occurred. *State v. Hedgcock*, 277 Neb. 805, 765 N.W.2d 469 (2009). A seizure in the Fourth Amendment context occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *Id*.

To determine whether an encounter between an officer and a citizen reaches the level of a seizure under the Fourth Amendment, we employ the analysis set forth in *State v. Van Ackeren*, 242 Neb. 479, 486-87, 495 N.W.2d 630, 636 (1993), in which we described the three levels, or tiers, of police-citizen encounters as follows:

> "The first tier of police-citizen encounters involves no restraint of the liberty of the citizen involved, but rather the voluntary cooperation of the citizen is elicited through non-coercive questioning. This type of contact does not rise to the level of a seizure and therefore is outside the realm of [F]ourth [A]mendment protection. . . . The second category, the investigative stop, is limited to brief, non-intrusive detention during a frisk for weapons or preliminary questioning. This type of encounter is considered a 'seizure' sufficient to invoke [F]ourth [A]mendment safeguards, but because of its less intrusive character requires only that the stopping officer have specific and articulable facts sufficient to give rise to reasonable suspicion that a person has committed or is committing a crime. . . . The third type of police-citizen encounters, arrests, are characterized by highly intrusive or lengthy search or detention. The [F]ourth [A]mendment requires that an arrest be justified by probable cause to believe that a person has committed or is committing a crime."

Quoting *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984).

In his motion to suppress, Avey asserted that he was seized in violation of the Fourth Amendment when Fisher called him and told him that he needed to return to the scene of the accident. Because it concluded that Avey was not seized for purposes of triggering Fourth Amendment protections, the county overruled the motion to suppress.

In reaching its conclusion, the county court made factual findings that Fisher's telephone call to Avey was "a phone call asking him to come back down to the scene to finish conducting an investigation" and that Avey's return to the scene in response to the call was his "choice to get in the car to

come down." The county court effectively found that Fisher's call to Avey was a request and that Avey willingly returned to the scene rather than being compelled to do so. These findings are supported by testimony of both Fisher and Avey at the suppression hearing.

The record shows that Fisher testified that he asked Avey to return and that he did not order Avey to return. Although Avey testified that Fisher said that Avey would be charged with leaving the scene of an accident if he did not return and Fisher testified that such comment was possible, there was contrary evidence that it was Avey's choice to return. Avey was asked by his attorney, "[D]id you feel compelled to come back . . . ?" Rather than simply agreeing with this description, Avey replied, "I thought it would be a good idea." Given the testimony, we determine that the county court's findings that Fisher asked Avey to return and that Avey made a choice to return were not clear error.

Based on these findings, the county court made the legal conclusion that there was no seizure that would trigger Fourth Amendment protections. We agree with this legal conclusion. In *State v. Burdette*, 259 Neb. 679, 702, 611 N.W.2d 615, 633 (2000), we stated that a defendant who voluntarily accompanied officers to the sheriff's headquarters was not seized "because one who voluntarily accompanies the police for questioning has not been seized for Fourth Amendment purposes." By the same reasoning, we conclude as a matter of law that Avey was not seized when he voluntarily returned to the scene for questioning with regard to the accident.

We further note that the testimony shows that Avey decided to return based on a single telephone call of relatively brief duration rather than circumstances indicating that Fisher made persistent requests or pressured Avey to return. Other courts commenting on the significance of police telephone calls to identified suspects have determined that such contact, even if abusive, does not constitute a restraint on the suspect's freedom so as to elevate the call into a seizure for purposes of the Fourth Amendment. E.g., *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194 (7th Cir. 1985). Facts such as the ease with which an individual can hang up and sometimes the distance

of the caller are cited as factors inconsistent with restraint. *Id*. We agree that these are relevant considerations.

Given the voluntariness with which Avey returned to the scene and the facts surrounding the telephone call, in the present case, we conclude there was no seizure. Fourth Amendment protections were not triggered, and there was no constitutional violation requiring suppression of evidence.

CONCLUSION

We conclude that under the facts as found by the county court, Avey was not seized for Fourth Amendment purposes, and that therefore, the county court did not err when it overruled his motion to suppress and the district court did not err when it affirmed this ruling. We affirm the district court's decision which affirmed Avey's convictions and sentences.

AFFIRMED.

MICHAEL DANIELS, APPELLEE, V. RUBY MALDONADO-MORIN, APPELLANT.

847 N.W.2d 79

Filed May 30, 2014. No. S-13-738.

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 was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Parental Rights: Child Custody.** The custodial parent has the right to travel between states and the right to migrate, resettle, find a new job, and start a new life.
4. **Child Custody.** To prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
5. ____. The paramount consideration on a motion to remove a child to another jurisdiction is whether the proposed move is in the best interests of the child.

6. **Child Custody: Visitation.** In considering a motion to remove a child to another jurisdiction, the purpose of requiring a legitimate reason is to prevent the custodial parent from relocating the child because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.
7. **Child Custody.** Absent aggravating circumstances, the Nebraska Supreme Court has held that career advancement of the parent, career advancement of the new spouse, and the desire to form a new family unit through remarriage are legitimate reasons to remove a child to another jurisdiction.
8. ____. Absent evidence of an ulterior motive, a custodial parent's desire to live with his or her current spouse, who is located outside of the custodial jurisdiction, is a legitimate reason to remove the minor child.

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

George T. Babcock, of Law Offices of Evelyn N. Babcock, and Mark John Malousek for appellant.

John F. Eker III for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Ruby Maldonado-Morin seeks to remove her biological child, Deonte Daniels, to Mexico to live with her husband of 12 years, who was recently deported. Michael Daniels (Daniels), Deonte's biological father, has joint legal custody and resists the removal. Upon Daniels' motion for summary judgment, the district court found as a matter of law that Maldonado-Morin did not have a legitimate reason to remove Deonte to Mexico and dismissed her countercomplaint. Maldonado-Morin now appeals.

BACKGROUND

Daniels and Maldonado-Morin are the biological parents of Deonte, who was born in 1999. In 2004, the district court granted Daniels and Maldonado-Morin joint legal custody of Deonte. Since his birth, Deonte has lived primarily with Maldonado-Morin.

In 2001, Maldonado-Morin married Jose Morin. Maldonado-Morin and Morin are the biological parents of two children, born in 2004 and 2005. According to Maldonado-Morin, Morin has been in Deonte's life since 2001 and treats Deonte as his own son.

In 2013, Daniels filed a "Complaint to Modify" seeking sole care, custody, and control of Deonte. In his complaint, Daniels alleged that there has been a material change in circumstance, because Morin had been deported to Mexico and Maldonado-Morin had announced that she and Deonte would join Morin in Mexico.

Maldonado-Morin answered and filed a countercomplaint. In her countercomplaint, Maldonado-Morin requested permission to permanently remove Deonte to Mexico. She alleged that Morin had been deported to Mexico and that it would be in Deonte's best interests to move to Mexico with her.

Daniels filed a motion for summary judgment on Maldonado-Morin's countercomplaint. The district court granted the motion. In its order, the district court found that Maldonado-Morin sought removal to be with Morin in Mexico. The district court found as a matter of law that Maldonado-Morin's reason was not a legitimate reason for removal. Having found that the threshold test of legitimate reason for removal had not been met, the district court did not address whether the move was in Deonte's best interests.

ASSIGNMENTS OF ERROR

Maldonado-Morin assigns that the district court erred in granting the motion for summary judgment and in dismissing her countercomplaint.

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.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[2]

ANALYSIS

The only issue presented by this appeal is whether Maldonado-Morin's desire to live with her deported husband is a legitimate reason for removing Deonte from the state. We cannot say, as a matter of law, that Maldonado-Morin's desire to live with her deported husband is not a legitimate reason for removal. Her husband's deportation, in and of itself, does not legally prevent a finding that she had a legitimate reason for the removal.

[3] The proper starting point for legal analysis when the State is involved in family relations is always the fundamental constitutional rights of a parent.[3] The custodial parent has the right to travel between states and the right to "migrate, resettle, find a new job, and start a new life."[4] We have stated that an award of custody is not and should not be a sentence of immobilization.[5] Both parents, custodial and noncustodial, also have the constitutional right to the care, custody, and control of their children.[6]

[4,5] Therefore, to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first

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[1] *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[2] *Id.*

[3] *In re Interest of Xavier H.*, 274 Neb. 331, 740 N.W.2d 13 (2007).

[4] *Shapiro v. Thompson*, 394 U.S. 618, 629, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969), *overruled on other grounds, Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[5] See, *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985); *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985).

[6] *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

satisfy the court that he or she has a legitimate reason for leaving the state.[7] After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.[8] The paramount consideration is whether the proposed move is in the best interests of the child.[9]

[6-8] The purpose of requiring a legitimate reason is to prevent the custodial parent from relocating the child because of an ulterior motive, such as frustrating the noncustodial parent's visitation rights.[10] Absent aggravating circumstances, we have held that career advancement of the parent,[11] career advancement of the new spouse,[12] and the desire to form a new family unit through remarriage are legitimate reasons to remove a child to another jurisdiction.[13] Our precedent has recognized that absent evidence of an ulterior motive, a custodial parent's desire to live with his or her current spouse, who is located outside of the custodial jurisdiction, is a legitimate reason to remove the minor child.[14] These reasons do not compose the exclusive list of legitimate reasons.[15]

It is conceded by both parties that Maldonado-Morin's reason for wanting to remove Deonte is to live with Morin in

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[7] *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

[8] *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[9] See *id.*

[10] See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

[11] *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002); *Kalkowski v. Kalkowski, supra* note 7; *Farnsworth v. Farnsworth, supra* note 10.

[12] *Vogel v. Vogel, supra* note 8; *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994).

[13] See, *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000); *Harder v. Harder, supra* note 12; *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987); *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986).

[14] See, *McLaughlin v. McLaughlin, supra* note 11; *Vogel v. Vogel, supra* note 8; *Jack v. Clinton, supra* note 13; *Kalkowski v. Kalkowski, supra* note 7; *Harder v. Harder, supra* note 12; *Gerber v. Gerber, supra* note 13; *Maack v. Maack, supra* note 13.

[15] *Jack v. Clinton, supra* note 13.

Mexico. At this stage, given the state of the record and the requirement that we view the evidence most favorably to Maldonado-Morin, we cannot conclude as a matter of law that she had no legitimate reason for the removal. The district court ruled, in effect, that deportation of a custodial parent's husband can never be a legitimate reason for removal. We disagree. Further, we find that the reasons for Morin's deportation are largely irrelevant unless the circumstances indicate that Maldonado-Morin is seeking to remove Deonte in order to frustrate Daniels' custody and visitation rights. Such evidence, if presented to the district court, could certainly preclude the existence of a legitimate reason for removal.

But at this stage, no such evidence is before us. We find, viewing the facts in a light most favorable to Maldonado-Morin, that the record demonstrates Maldonado-Morin's husband of over 12 years has been forced to move to Mexico and that Maldonado-Morin wants herself, Deonte, and Morin's biological children to live with him. In that sense, this case is no different than a custodial parent's wanting to move to another jurisdiction to live with a new spouse or a custodial parent whose current spouse is required by his or her employment to move. Therefore, the district court erred in finding as a matter of law that wanting to live with a deported husband cannot be a legitimate reason.

Daniels argues that our precedent requires financial improvement for a reason to relocate to be legitimate. We disagree. Often the reason for relocation is to improve employment, but our precedent does not limit a custodial parent's legitimate reason for removing a child to financial considerations.[16]

Daniels also argues that Morin's deportation was necessarily caused by a bad act. He asserts that we should not allow the bad acts of the custodial parent's new spouse to create a legitimate reason for removal. Although we understand Daniels' concern, Morin's deportation does not alone demonstrate that Maldonado-Morin sought removal to interfere or impede with Daniels' parental and custodial rights.

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[16] See, e.g., *id.*; *Farnsworth v. Farnsworth, supra* note 10.

Therefore, we hold that the district court erred in finding as a matter of law that Maldonado-Morin did not have a legitimate reason for relocation. We remand this cause for a trial upon the merits of Maldonado-Morin's countercomplaint and Daniels' "Complaint to Modify."

CONCLUSION

The district court erred in its determination that Maldonado-Morin's desire to live with Morin in Mexico is not a legitimate reason for removal as a matter of law. We reverse the court's order and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

CONNOLLY, J., concurring.

I concur in the judgment of the majority opinion. I write separately because I disagree with a key overly broad statement in the opinion that could create confusion in our removal jurisprudence. I agree that the court erred in determining that Morin's deportation, in itself, was an illegitimate reason to remove Deonte from the country and that the cause must be remanded for further proceedings. But I disagree with the statement that "the reasons for Morin's deportation are largely irrelevant unless the circumstances indicate that Maldonado-Morin is seeking to remove Deonte in order to frustrate Daniels' custody and visitation rights."

In my opinion, this statement is too broad, particularly when the removing parent wants to remove a child from the country to live with a new spouse who has been deported. I recognize that some of our cases have made broad statements about a removal's being "required by the custodial parent's remarriage."[1] But the reason that the remarriage required removal in those cases was the new spouse's occupation or business in another jurisdiction, which is not the case here. Similarly, we have held that a new spouse's enhanced career opportunities in a new location are a legitimate reason to

[1] See *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987).

remove a child out of jurisdiction.[2] The only case in which we did not discuss the new spouse's out-of-state employment or business was a 1-page per curiam opinion.[3] And our records of the case show that the new spouse was employed as the manager of an out-of-state business.

But if—as the majority opinion implicitly concludes—the only *illegitimate* reason for removing a child from Nebraska is the removing parent's desire to frustrate the other parent's visitation or custody rights, then trial courts should dispense with the legitimate reason inquiry. First, the removing parent could always claim that either she or her new spouse had always wanted to live in the new location, thereby rendering the inquiry irrelevant. Second, the custodial parent's motive for the removal is already a factor under the best interests component of the test in *Farnsworth v. Farnsworth*.[4] If a parent's desire to frustrate the other parent's rights is the *only* consideration in determining whether a legitimate reason exists, then the inquiry is a redundant component of the removal test.

But I do not agree that the legitimate reason inquiry should be redundant. For example, if a custodial parent's new spouse had a successful business in a different state but was a convicted child molester, I do not believe that the custodial parent's desire to live with the new spouse would constitute a legitimate reason to remove the child—even if the parent was not trying to frustrate the other parent's rights. Similarly, I would not agree that the custodial parent had a legitimate reason to remove a child to live with a new spouse who was unemployed if the custodial parent had no realistic opportunity to improve his or her own career at the new location. I believe these scenarios would take our case law further than intended.

It seems to me that the majority's reasoning—removal is largely irrelevant absent a desire to frustrate the other parent's

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[2] See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994).

[3] See *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986).

[4] See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999).

rights—is particularly troublesome when the custodial parent's new spouse was deported from the country. First, when people who are illegally in the country marry a U.S. citizen, they can sometimes adjust their status and remain in the country.[5] Here, we do not know whether this option was available or even attempted. Second, we do not know whether the spouse was removed because of a deportable criminal conviction.[6]

If the new spouse made no attempt to resist removal when status adjustment was available, would we still conclude that the custodial parent had a legitimate reason to remove the child from the country? What if the spouse was deported because of a conviction for sexual abuse of a minor[7] or drug dealing[8]? In my opinion, these possibilities illustrate that a court must consider the reason for a new spouse's deportation when determining whether the custodial parent has a legitimate reason to remove a child to live with that spouse. And if the only response to these concerns is that they fall under the best interests component of the test, then the inquiry into a legitimate reason for removal is irrelevant.

In sum, I do not believe that the bare desire to live with a new spouse is sufficient—standing alone—to conclude that a parent requesting removal does, or does not, have a legitimate reason for the request.

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[5] See, 8 U.S.C. §§ 1153 and 1154 (2006 & Supp. V 2011); *Williams v. Secretary, U.S. Dept. of Homeland Sec.*, 741 F.3d 1228 (11th Cir. 2014).

[6] See 8 U.S.C. § 1227(a)(2) (2006 & Supp. V 2011).

[7] *U.S. v. Vidal-Mendoza*, 705 F.3d 1012 (9th Cir. 2013).

[8] *Gutierrez v. U.S.*, No. 13-10990, 2014 WL 1227482 (11th Cir. Mar. 26, 2014).

STATE OF NEBRASKA, APPELLEE, V. ENDRE B. TURNER, ALSO KNOWN AS ANDRE B. TURNER, APPELLANT.

847 N.W.2d 69

Filed May 30, 2014. No. S-13-846.

1. **Motions to Suppress: Confessions: Constitutional Law: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.
3. **Confessions: Due Process.** The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.
4. **Confessions.** Whether a confession or statement was voluntary depends on the totality of the circumstances.
5. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.
6. **Confessions: Proof.** The State has the burden to prove that a defendant's statement was voluntary and not coerced.
7. **Confessions**. A defendant's confession may be involuntary and inadmissible if obtained in exchange for a promise of leniency.
8. ____. An improper promise of leniency will not render a confession involuntary unless it overcomes the defendant's free will and impairs his or her capacity for self-determination.

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

Thomas C. Riley, Douglas County Public Defender, Douglas A. Johnson, and Ryan Locke, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

CASSEL, J.

INTRODUCTION

Endre B. Turner appeals from his convictions for first degree murder, use of a deadly weapon to commit a felony, and possession of a weapon by a prohibited person. The charges against Turner arose from the shooting of Richard Harrison during the burglary of Harrison's home. Turner argues that his confession to the shooting and burglary was involuntary because it was the product of threats, coercion, and inducements of leniency made by police officers. We find no merit to this argument. Although officers misrepresented that felony murder would receive a lesser sentence than premeditated murder, after reviewing the totality of the circumstances surrounding the confession, we conclude that the misinformation regarding possible sentences did not overcome Turner's will and cause him to confess. We therefore affirm his convictions and sentences.

BACKGROUND

On September 29, 2011, Harrison's mother returned home from work and found Harrison lying on the floor of his bedroom. She could not find a pulse and noticed blood in his bedroom closet, where his head and upper body were lying. She called the 911 emergency dispatch center, and paramedics pronounced Harrison dead when they arrived at the scene. The autopsy of Harrison's body revealed that he had been shot multiple times by a .22-caliber firearm with a right-hand twist.

Harrison's mother informed police officers that the television in Harrison's bedroom had been moved and that several of Harrison's possessions were missing. These missing possessions included a "PlayStation 3" video game system and an "HTC Evo" cell phone. Officers obtained the serial number of the missing PlayStation, and the police department's pawn unit began to monitor local pawnshops for a PlayStation with a matching serial number.

Following up on a comment posted to an online article regarding Harrison's death, officers made contact with a witness who saw a man running from Harrison's home on the

afternoon of the shooting and burglary. Brian Jones was driving eastward on Grand Avenue in Omaha, Nebraska, at approximately 3 or 4 p.m. As he approached the top of a hill, he saw a man "coming up running off the front porch or front step" of Harrison's home. The man "hit the ground" and then stopped and looked in Jones' direction. Jones described that the man was black, had a light complexion, was about 6 feet tall with a medium build, and had a tattoo on the side of his neck.

The police department's pawn unit then matched the serial number of Harrison's PlayStation to a PlayStation that had been pawned on October 24, 2011. Officers obtained the pawned PlayStation, the pawn card, and surveillance footage showing the individuals who had pawned the PlayStation. The pawn card established that the PlayStation had been pawned by Jasmine Coleman. However, the pawnshop's surveillance footage showed that Coleman had been accompanied by a black male with a light complexion.

The pawned PlayStation was tested for fingerprints, and a match was returned. The fingerprints were identified as belonging to Turner, and Turner's parole officer confirmed that Turner was the black male accompanying Coleman on the pawnshop's surveillance footage. Jones, the witness who saw a man running from Harrison's home on the day of the shooting and burglary, identified Turner as the man he saw in a photographic lineup and at trial.

Officers learned that Turner was scheduled to meet with his parole officer on November 9, 2011, and so decided to interview him at the parole office on that day and to simultaneously execute a search warrant for his residence. Upon execution of the warrant, officers were informed that Turner and Coleman resided in the basement of the residence. In a basement bedroom, officers discovered a .22-caliber revolver in a backpack in the bedroom closet and a charger for an HTC Evo cell phone on a nightstand. Testing of the revolver confirmed that it had a right-hand twist.

Turner's interview at the parole office was conducted by Sgt. Donald Ficenec and Det. Daryl Krause of the Omaha Police Department. Turner was advised of his *Miranda* rights,

and he agreed to speak with the officers. The officers first questioned Turner on where he had obtained the PlayStation that he and Coleman pawned on October 24, 2011. But Turner denied any involvement in the burglary of Harrison's home or in Harrison's death. Ficenec then advised him that a .22-caliber revolver had been found in his home and claimed that ballistics testing would confirm that the revolver had fired the bullets recovered from Harrison's body.

The officers next attempted to ascertain how the shooting occurred, informing Turner that they knew what happened and who did it, but not "how it all went down and why." In order to obtain this information, the officers represented that "[i]t makes a difference" how the shooting occurred:

> Ficenec: It makes a difference if you go and break into somebody's house because you got a personal revenge against this guy. Let's say that this guy you found out had, I don't want to say something that's—I don't mean to offend you—let's say that this guy, you had found out that this guy had an affair with [Coleman]. So you were pissed off at him, so you were going to go over there and you were going to go get him because of that, okay. That's one thing. All you're trying to do, you got out of jail, you don't have much money, you're trying to get started again with the jobs and stuff—it takes a while to get some paychecks and get some money set aside. So you revert back to your old M.O.—your old habits. Maybe you're only going to do this for a little while until you get back on your feet, who knows? But you go in, you get surprised. You don't want to hurt anybody, you don't intend to hurt anybody. But you go in there, you get surprised, you just got out of jail, you're trying to start all over. What I'm saying is, you can see how that's a big difference between something like that, and something like I said if we find out that maybe he knew [Coleman]. Maybe he had had some phone—some contacts with [Coleman], you know. There would be a big difference between the one case and the other, right? What I'm saying is, I can't crawl into your head. So I don't know exactly—cause I wasn't there—I can prove

who did it. I can collect all the evidence, like the DNA evidence at the house to show that you were in the house. I can prove—you know—do the ballistics testing to show that that's the gun.

Turner: (indiscernible)

Ficenec: I can get the evidence to prove it, alright—

Turner: But how?

Ficenec: But what I'm saying is—what I'm saying is—if I wasn't there, I can't tell you exactly how it went down. And that makes a big difference.

The officers then focused on convincing Turner that they knew the shooting was unintentional and that Turner was not an evil person. They confronted Turner with various lies he had told them, claiming that the lies made him look like a bad, evil person. But Turner continued to maintain his innocence. However, after the officers discovered the presence of Harrison's HTC Evo cell phone on Turner's person, they returned to their previous theme that it would make a difference whether the shooting was accidental or premeditated—indicating that Turner would receive a lesser sentence if the shooting had not been planned:

Turner: Man, I'm going to get life for this shit.

Krause: No, you're not.

Turner: (Indiscernible) thousand, I'm going to get a hundred years.

Ficenec: I'm going to tell you this. I can't tell you what the potential penalty could be. I mean I'm not going to bullshit you. Could you potentially get life? Is that a possibility? I mean, I'm not a judge, I'm not a prosecutor.

Turner: Yeah.

Ficenec: So what I'm saying is, it could be a possibility. That's why I'm trying to tell you, it's such a big difference how and why this happened . . . .

. . . .

Ficenec: To illustrate it if, "All I'm trying to do is go in there and take his PlayStation I don't want any trouble. I don't want to hurt anybody. I just want to go in there and take his PlayStation when things go bad and

> I get surprised and I react and I make a mistake." That's one thing. It's another thing that, "I knew this person. I had a grudge against this person. I didn't like this person. I went in there because I wanted this person dead." I mean, that's what I'm saying. It's two hugely different circumstances even though it's the same result in the end. And when you go to court, when it comes time for a judge—we've got all the evidence to prove it. We've been laying a lot of it out there for you. Well, when you go to court and it comes time for a judge to decide, "Is this a case where somebody deserves life in jail?" that's going to be part of the consideration. . . . I'm not trying to put words in your mouth, but that's just why it makes sense to me that this probably was a situation where you didn't intend to hurt anybody, you didn't want to hurt anybody, where like I said, you got surprised, things went bad, and you got scared. So that's all—that's what I'm saying. There's a big difference, okay? You can have the same charge that one person gets life for and then another person gets ten years for.
>
> Krause: Or 1 to 10. What he's basically saying, to sum it up in layman's terms, because we do a lot of the legal jargon, you may not, sometimes things are accidents, sometimes things are not. You hate him, you didn't like what he was doing, not an accident. Going in, trying to get a PlayStation, "Oh, fuck," accident. Those are different. The end result is the same, what led up to it is different. That's what people look at.

After this exchange, the officers again emphasized that Turner did not want to look like an evil person, and they exhorted him to "do the right thing":

> Krause: Help me explain it, okay? You have to think what's good now. I mean, what's your mom and dad going to think? They're going to think you're evil and you tried to do this? You know what I'm saying, man?
>
> Turner: (indiscernible)
>
> Krause: That's not—you're getting worked up, Bud. Don't do that.
>
> Turner: I don't know, man.

Krause: Then do the right thing now.

Turner: I might be in jail for a long-ass time.

Krause: You might not. Don't think about that. I don't know, okay? I'm with you right here. I don't know the circumstances that's going to happen, but I do know that you want to tell me, I can see it, because you know what happened was wrong and you're not a bad person. You believe in God, right?

. . . .

Krause: This is your soul you're talking about. If you know you didn't mean to do it, then just tell me.

Turner: I didn't.

Krause: Then explain the circumstances and help me explain and show everybody that this is not what happened. Help me because I'm the only one . . . that can help you explain and back up what you're laying out how this—that you didn't meant to do this, because right now it looks like you meant to do it by lying to me and—

Turner: But I didn't though.

. . . .

Turner: It was just, like—fuck it, man, it was spur of the moment.

Turner then confessed the details of the shooting and burglary. He was taken to the police department, where officers interviewed him for several more hours. While Turner was in the interview room at the police department, officers permitted Coleman to enter and speak with him. Turner stated to Coleman, "I'm about to get like, life."

Turner was charged with first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Before trial, Turner moved to suppress on multiple grounds any and all statements made by him to police officers, including that the statements were involuntary. The district court conducted a hearing on Turner's motion and found that "his in[-]custodial interrogation did not produce any statements as a result of any force, any threat of force or any promises of any kind." It therefore overruled his motion. Turner renewed his objection at trial, and it was again overruled.

The jury returned a verdict finding Turner guilty on all charges. He was sentenced to life imprisonment on the murder conviction, a minimum and maximum term of 40 years' imprisonment on the use of a deadly weapon conviction, and a minimum and maximum term of 3 years' imprisonment on the possession of a deadly weapon conviction. Turner timely appeals.

ASSIGNMENTS OF ERROR

Turner assigns that the district court erred in overruling his motion to suppress and in admitting his confession into evidence at trial, because his confession was the product of threats, coercion, and inducements of leniency made by police officers.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.[1]

ANALYSIS

[2] Turner assigns that his confession to the shooting and burglary was involuntary because it was the product of threats, coercion, and inducements of leniency made by police officers. However, the argument in his brief on appeal focuses solely on his assertion that his confession was induced by promises of leniency. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[2] We therefore limit our review to whether Turner's confession was involuntary as the product of promises of leniency.

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[1] *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011).

[2] *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[3-6] We first recall governing principles of law pertaining to the admissibility of a confession. The Due Process Clause of U.S. Const. amend. XIV and the due process clause of Neb. Const. art. I, § 3, preclude admissibility of an involuntary confession.[3] Whether a confession or statement was voluntary depends on the totality of the circumstances.[4] Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the 14th Amendment.[5] The State has the burden to prove that a defendant's statement was voluntary and not coerced.[6]

Turner argues that his confession was involuntary because it was induced by an implied promise that he would receive a lesser sentence if he confessed that the shooting was accidental. As evidence of this implied promise, he points to Ficenec's statements that it made "a big difference" how and why the shooting occurred and to Krause's statement that the possible penalty could be 1 to 10 years' imprisonment if the shooting was accidental. He claims that these statements constituted an implied promise of leniency which overcame his will and caused him to confess. He further argues that the officers' statements were deceptive because first degree murder encompasses felony murder—which does not require a showing of malice, intent, or premeditation.

Turner is correct in his assertion that the officers deceived him during the course of the interview at the parole office. Ficenec's statements as to there being "a big difference" how and why the shooting occurred, and specifically Krause's statement that Turner could get 1 to 10 years' imprisonment if the shooting was accidental, incorrectly indicated that felony murder would receive a lesser sentence than premeditated murder. These statements were deceptive because both felony

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[3] *State v. Thomas*, 267 Neb. 339, 673 N.W.2d 897 (2004), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[4] *State v. Ray*, 266 Neb. 659, 668 N.W.2d 52 (2003).

[5] *Landis, supra* note 1.

[6] *Thomas, supra* note 3.

murder and premeditated murder constitute murder in the first degree,[7] and both may be treated as either a Class I or Class IA felony,[8] punishable by death or life imprisonment.[9]

[7,8] But the fact that the officers deceived Turner during the course of the interview does not end our analysis. We have recognized that a defendant's confession may be involuntary and inadmissible if obtained in exchange for a promise of leniency.[10] However, an improper promise of leniency will not render a confession involuntary unless it overcomes the defendant's free will and impairs his or her capacity for self-determination.[11] Thus, whether the confession was voluntary in this case turns upon whether the misinformation regarding possible sentences overcame Turner's will and caused him to confess. And as noted above, our determination as to whether a confession was voluntary depends on the totality of the circumstances.

We have previously noted that a deceptive statement regarding possible sentences is only one of several factors to be considered.[12] In *State v. Thomas*,[13] we determined that the defendant's confession was voluntary and not caused by misinformation regarding possible sentences due to the presence of three factors. These factors included that (1) the officers returned to previous themes between the discussion of possible penalties and the defendant's confession, (2) the defendant indicated a knowledge that he could receive life imprisonment for the crime both before and after his confession, and (3) the confession occurred after an officer indicated that he did not know what sentence would be imposed.[14]

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

[8] See *id*.

[9] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012).

[10] *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993).

[11] *Smith v. Bowersox*, 311 F.3d 915 (8th Cir. 2002); *Thomas, supra* note 3.

[12] See *Thomas, supra* note 3.

[13] *Id*.

[14] *Id*.

We find that *Thomas* controls our determination as to the voluntariness of the confession in this case. Each of the factors we identified in *Thomas* is present and leads us to the conclusion that the misinformation regarding possible sentences did not overcome Turner's will and cause him to confess. However, in relying upon the factors identified in *Thomas*, we must first note that our standard of review has since changed. In *Thomas*, we reviewed the district court's determination that the defendant voluntarily confessed for whether the court was clearly wrong.[15] As noted above, our current standard of review entails two parts: We review the trial court's findings of historical fact for clear error and independently decide whether those facts suffice to meet constitutional standards.[16] However, this change does not affect the applicability of the above factors to our analysis of the confession in this case.

As in *Thomas*, Turner's confession did not follow the discussion in which the officers misrepresented that a lesser sentence would be imposed for felony murder. Rather, his confession was immediately preceded by the officers' return to the prior theme of Turner not being a bad, evil person; Krause's exhortation to "do the right thing"; and the colloquy regarding Turner's belief in God and the fate of his soul. Thus, the dialog immediately preceding Turner's confession supports the conclusion that his confession was primarily motivated by remorse and a desire to do the right thing—not to receive a lesser sentence.

As to the second factor we identified in *Thomas*, Turner indicated both before and after his confession that he was aware he could receive a sentence of life imprisonment. Before Turner confessed at the parole office, he stated, "Man, I'm going to get life for this shit." And after he confessed and was transferred to the police department, Turner stated to Coleman, "I'm about to get like, life." Thus, this factor indicates that Turner did not believe his confession precluded him from receiving life imprisonment.

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[15] See *id*.

[16] See *Landis, supra* note 1.

Finally, like the defendant in *Thomas*, Turner confessed after officers stated that they did not know what sentence would be imposed. In response to Turner's statement, "I'm going to get a hundred years," Ficenec replied, "I can't tell you what the potential penalty could be. I mean I'm not going to bullshit you. Could you potentially get life? Is that a possibility? I mean, I'm not a judge, I'm not a prosecutor." And during the colloquy immediately preceding Turner's confession, Krause stated, "I don't know, okay?" in response to Turner's assertion that he "might be in jail for a long-ass time." Thus, although they incorrectly indicated that felony murder would receive a lesser sentence, the officers made no representations as to what sentence Turner would receive if convicted. This factor supports the conclusion that Turner's confession was not motivated by a belief that he would receive a particular sentence.

Although not acknowledged in Turner's brief, at oral argument, he recognized the applicability of *Thomas* to this case. But he attempted to distinguish *Thomas* on the basis of the close proximity between the misinformation regarding possible sentences and his confession. Specifically, he claimed that he confessed only 39 seconds after Krause indicated that the possible penalty for felony murder could be 1 to 10 years' imprisonment.

We disagree that this case is distinguishable from *Thomas* on the basis that only 39 seconds separated Turner's confession from the misinformation regarding possible sentences. First, our opinion in *Thomas* makes no mention of the specific period of time that passed between the misinformation regarding possible sentences and the defendant's confession in that case. We noted only that the officers returned "for several minutes" to the previous theme of the defendant's being a good person before he confessed.[17] And Turner admitted at oral argument that he was unaware of how much time passed between the misinformation regarding possible sentences and the defendant's confession in *Thomas*.

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[17] *Thomas, supra* note 3, 267 Neb. at 345, 673 N.W.2d at 904.

Second, we disagree that Turner's confession immediately followed Krause's statement that the penalty for felony murder could be 1 to 10 years' imprisonment. Although Turner followed Krause's statement by asking what could happen to him if he was to say that the shooting was accidental, he did not expressly confess to the shooting and burglary until approximately 3 minutes 35 seconds after Krause's statement. And as noted above, during this period immediately before his confession, the officers returned to the previous theme of Turner's not being a bad, evil person and exhorted him to do the right thing and to consider how he would be perceived. We therefore find Turner's argument that this case is distinguishable from *Thomas* to be unpersuasive.

We do not find this case to be distinguishable from *Thomas* in any relevant way. In both cases, officers misrepresented that felony murder would receive a lesser sentence than premeditated murder and used the same "big difference" language. However, in each case, the confession was immediately preceded by themes other than possible sentences, the defendant demonstrated knowledge that he could receive a life sentence before and after he confessed, and the confession followed statements by officers that they did not know what sentence would be imposed. Although we do not condone the deceptive tactics used by the officers in this case, the totality of the circumstances demonstrates that the misinformation regarding possible sentences did not overcome Turner's will and cause him to confess. We therefore find no merit to Turner's argument that his confession was involuntary, and so we affirm his convictions and sentences.

CONCLUSION

Although Turner is correct in his assertion that police officers deceived him as to the potential penalty for felony murder, the totality of the circumstances shows that this misinformation did not overcome his will and cause him to confess. The dialog immediately preceding Turner's confession demonstrates that his primary motivation was remorse and a desire to do the right thing. Additionally, the officers denied any knowledge of the sentence Turner would receive, and Turner

indicated that he knew he could receive life imprisonment notwithstanding his confession. We therefore conclude that Turner's confession was voluntary and, thus, properly admissible at trial. We affirm his convictions and sentences.

AFFIRMED.

WAYNE G., APPELLANT, V.
JACQUELINE W., APPELLEE.
847 N.W.2d 85

Filed June 6, 2014. No. S-12-1037.

1. **Juvenile Courts: Judgments: Appeal and Error.** Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings. However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
3. **Appeal and Error.** An appellate court may, at its option, notice plain error.
4. **Parental Rights: Mental Competency: Guardians Ad Litem: Case Disapproved: Appeal and Error.** Where an appellate court finds that multiple statutory grounds support termination of parental rights, including, but not limited to, Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 2012), a failure to appoint a guardian ad litem for the parent is error, but not error requiring automatic reversal. In that circumstance, the failure to appoint a guardian ad litem will generally not require reversal unless it is assigned as error on appeal and shown to have been prejudicial to the parent. To the extent that *In re Interest of Presten O.*, 18 Neb. App. 259, 778 N.W.2d 759 (2010), is inconsistent with this holding, it is disapproved.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges, on appeal thereto from the County Court for Seward County, GERALD E. ROUSE, Judge. Judgment of Court of Appeals affirmed.

Jerrod P. Jaeger, of Jaeger Law Office, P.C., L.L.O., for appellant.

Eric J. Williams for appellee.

Gregory C. Damman, of Blevens & Damman, guardian ad litem.

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

STEPHAN, J.

The Nebraska Court of Appeals affirmed the judgment of the county court for Seward County terminating the parental rights of Wayne G. to Jaidyn G., a minor child, on the petition of Jacqueline W., Jaidyn's mother. We granted Wayne's petition for further review primarily to consider inconsistencies in decisions of this court and the Court of Appeals regarding the effect of a trial court's failure to appoint a guardian ad litem for a person whose parental rights are sought to be terminated under Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 2012).

BACKGROUND

The published opinion of the Court of Appeals sets forth the facts of this case in considerable detail.[1] We summarize only those facts necessary for our further review of that court's decision.

Jacqueline met Wayne in California in 2001 or 2002. A daughter, Jaidyn, was born to the couple in 2006. Later that year, Jacqueline left Wayne and moved to Nebraska, taking Jaidyn with her.

On September 27, 2011, Wayne filed a "Complaint to Acknowledge Paternity and Establish Custody and Parenting Time" in the district court for Seward County. Jacqueline filed an answer in which she admitted that Wayne was Jaidyn's biological father but denied that he was a fit parent. On February 24, 2012, Jacqueline filed a petition for termination of parental rights under Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2012). Three days later, Jacqueline filed an amended petition which alleged that termination of Wayne's parental rights was in Jaidyn's best interests and that § 43-292(1), (2), (4), (5), and (9) were grounds for termination. The case was transferred to the Seward County Court, and a trial was held

[1] *Wayne G. v. Jacqueline W.*, 21 Neb. App. 551, 842 N.W.2d 125 (2013).

on September 10 and October 1. The county court appointed a guardian ad litem for Jaidyn, but not for Wayne.

A number of witnesses—including Jacqueline, her adult daughter, and Wayne's adult daughter—testified that Wayne has a history of abusive behavior. There was testimony that Wayne had struck his ex-wife, Jacqueline, and a number of minor children who had lived in his house. Witnesses testified that Wayne had made numerous threats to the lives and physical well-being of persons in a domestic relation to him. There was also testimony that Wayne has a 25-year history of crack cocaine use.

Wayne admitted to having a substantial criminal record. His convictions include, but are not limited to, grand larceny, grand theft, forgery, inflicting corporal injury on a spouse/cohabitant (multiple convictions), criminal contempt, petty theft, disobeying a court order (multiple convictions), possession of a controlled substance/paraphernalia (multiple convictions), false imprisonment, and threaten crime with intent to terrorize. Wayne also admitted that his parental rights to one of his other daughters had been terminated.

Evidence of Wayne's mental illness was adduced. Wayne admitted that he has been diagnosed with adult attention deficit hyperactivity disorder, posttraumatic stress disorder, and depression. Testimony was heard from Wayne and other witnesses as to the diagnosis and treatment of his mental illness.

Wayne acknowledged that he had a checkered past, but testified that he had turned his life around in the last 3 years and was ready to have a greater role in Jaidyn's life. Wayne testified that he was now "properly medicated" and had not consumed crack cocaine within the previous 2 years. His girlfriend of nearly 1 year testified that Wayne had been appropriately interacting with her adult son and several of her minor nephews.

Jacqueline remarried in June 2012, and she testified that her husband had a good relationship with Jaidyn. Her husband testified that Jaidyn sometimes called him "daddy" and that he intended to adopt her if Wayne's parental rights were terminated.

On October 3, 2012, the Seward County Court entered an order terminating Wayne's parental rights to Jaidyn. The court concluded that termination was in Jaidyn's best interests and, identifying subsections (2), (4), (5), and (9) as the "relevant portion[s]" of § 43-292, found that "one or more grounds exist in support of termination of parental rights."

Wayne appealed the termination of his parental rights to the Court of Appeals. His brief assigned as error the county court's findings that (1) one of the grounds in § 43-292 existed and (2) termination was in Jaidyn's best interests. Wayne did not assign as error the county court's failure to appoint him a guardian ad litem, although he did argue that such appointment was mandatory and that the failure was plain error requiring reversal.

The Court of Appeals affirmed, finding that the evidence established grounds for termination under § 43-292(2), that Wayne was unfit to parent Jaidyn, and that termination was in Jaidyn's best interests.[2] Because the court concluded that grounds for termination existed under § 43-292(2), it declined to review Wayne's assignment of error as to the other subsections of § 43-292.[3] The Court of Appeals did not address the county court's failure to appoint a guardian ad litem for Wayne.

ASSIGNMENTS OF ERROR

In his petition for further review, Wayne assigns, renumbered, that the Court of Appeals erred by (1) not addressing the county court's failure to appoint a guardian ad litem and (2) finding the evidence sufficient to terminate his parental rights under § 43-292(2).

STANDARD OF REVIEW

[1] Cases arising under the Nebraska Juvenile Code are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's

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[2] *Id.*

[3] *Id.*

findings.[4] However, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.[5]

ANALYSIS

Guardian Ad Litem

[2] Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.[6] Jacqueline alleged and the county court found the following grounds for termination stated in § 43-292:

> (2) The parents have substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection;
>
> . . . .
>
> (4) The parents are unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior, which conduct is found by the court to be seriously detrimental to the health, morals, or well-being of the juvenile;
>
> (5) The parents are unable to discharge parental responsibilities because of mental illness or mental deficiency and there are reasonable grounds to believe that such condition will continue for a prolonged indeterminate period;
>
> . . . .
>
> (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.

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[4] *In re Interest of Rylee S.*, 285 Neb. 774, 829 N.W.2d 445 (2013).

[5] *Id.*

[6] *In re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007); *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005).

The Nebraska Juvenile Code provides, at Neb. Rev. Stat. § 43-292.01 (Reissue 2008):

> When termination of the parent-juvenile relationship is sought under subdivision (5) of section 43-292, the court shall appoint a guardian ad litem for the alleged incompetent parent. The court may, in any other case, appoint a guardian ad litem, as deemed necessary or desirable, for any party. The guardian ad litem shall be paid a reasonable fee set by the court and paid from the general fund of the county.

It is only when termination is sought under § 43-292(5) that a court is required to appoint a guardian ad litem for the parent. Here, we are presented with the following question: When termination of parental rights is sought on multiple grounds, including § 43-292(5), and an appellate court finds that at least one ground other than § 43-292(5) is established by clear and convincing evidence and that termination is in the best interests of the child, is the failure of the trial court to appoint a guardian ad litem for the parent pursuant to § 43-292.01 plain error requiring reversal?

The starting point in our analysis is this court's decision in *In re Interest of M.M., C.M, and D.M.*[7] In that case, § 43-292(5) was the sole statutory ground for termination of a mother's parental rights, and the trial court did not appoint a guardian ad litem for the mother. We reasoned that even though the mother was at all times represented by appointed counsel, the appointment of a guardian ad litem was "mandatory" and the failure to make the appointment was "plain error which requires that the judgments be reversed."[8] Two justices dissented, reasoning the error was not prejudicial to the mother and thus did not warrant reversal.[9]

Later, in *In re Interest of Presten O.*,[10] the Court of Appeals applied the holding in *In re Interest of M.M., C.M.,*

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[7] *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988).

[8] *Id.* at 390, 431 N.W.2d at 613.

[9] *Id.* (Boslaugh, J., dissenting; Hastings, C.J., joins).

[10] *In re Interest of Presten O.*, 18 Neb. App. 259, 778 N.W.2d 759 (2010).

and D.M. where multiple statutory grounds for termination, including § 43-292(5), were alleged and found, but the trial court failed to appoint a guardian ad litem for the parent. The court concluded that because the State sought termination "based, in part, on . . . § 43-292(5),"[11] appointment of a guardian ad litem was mandatory and the failure to make the appointment was plain error requiring reversal. A concurring opinion stated that "there are circumstances, such as those present in this case, where a parent is not prejudiced by the failure to appoint a guardian ad litem," noting that the parent was clearly competent and "fully capable of understanding the legal proceedings and the ultimate implication of those proceedings."[12] However, the concurring judge reasoned that under the principle of vertical stare decisis, he was required by *In re Interest of M.M., C.M., and D.M.* to concur in the judgment.

The Court of Appeals' disposition of the instant case is inconsistent with *In re Interest of Presten O.* Here, as in *In re Interest of Presten O.*, termination was sought in part on § 43-292(5) and no guardian ad litem was appointed for the parent. But the Court of Appeals did not find plain error as it did in *In re Interest of Presten O.* And there is tension between *In re Interest of Presten O.* and the long-established principle that if an appellate court determines that the lower court correctly found termination of parental rights to be appropriate under one of the statutory grounds set forth in § 43-292, the appellate court need not further address the sufficiency of the evidence under any other statutory ground.[13]

We have also addressed the different but related issue of the effect of not alleging § 43-292(5) as a ground for termination when there is a question about the parent's mental health. In *In re Interest of J.N.V.*,[14] a mother was diagnosed with

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[11] *Id.* at 263, 778 N.W.2d at 762.

[12] *Id.* at 265, 778 N.W.2d at 763 (Irwin, Judge, concurring).

[13] See, e.g., *In re Interest of Jagger L.*, 270 Neb. 828, 708 N.W.2d 802 (2006).

[14] *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986).

significant mental illness but the State sought and obtained termination of her parental rights solely on the basis of neglect under § 43-292(2). This court affirmed the termination, concluding that "[w]hile it might have been kinder in these sad and unfortunate circumstances for the State to have proceeded under § 43-292(5), it was not required to do so."[15] Three justices dissented, reasoning that this disposition "ignore[d] a statutory requirement and deprive[d] a mentally ill mother of the valuable right to have her interests protected by a guardian ad litem."[16]

This issue arose again in *In re Interest of Michael B. et al.*,[17] a case in which the State sought termination under § 43-292(2), (4), (6), and (7), but nevertheless introduced evidence that the mother had a mental deficiency that prevented her from reuniting with and caring for her children. On appeal, the mother urged us to adopt the view of the dissent in *In re Interest of J.N.V.* We declined to do so, reasoning that the only action which a guardian ad litem could have taken to benefit the mother would have been to retain experts to rebut the State's evidence of her mental deficiency. We concluded that because mental deficiency was not a ground for termination, any such rebuttal would not have altered the outcome of the case. But we also concluded that it was improper for the State to adduce evidence of the mother's mental deficiency where it had not asserted § 43-292(5) as a ground for termination. However, we affirmed the judgment upon finding that there was clear and convincing evidence "independent of any mental deficiency" that the grounds for termination stated in § 43-292(4) existed.[18]

[3] An appellate court may, at its option, notice plain error.[19] In cases decided after *In re Interest of M.M., C.M., and D.M.*,[20]

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[15] *Id.* at 112, 395 N.W.2d at 761.

[16] *Id.* at 114, 395 N.W.2d at 762 (Caporale, J., dissenting; Krivosha, C.J., and Shanahan, J., join).

[17] *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

[18] *Id.* at 557, 604 N.W.2d at 413.

[19] *Cesar C. v. Alicia L.*, 281 Neb. 979, 800 N.W.2d 249 (2011).

[20] *In re Interest of M.M., C.M., and D.M., supra* note 7.

we have clarified that plain error must be not only plainly evident from the record but also of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.[21] Thus, an error, no matter how apparent from the record, cannot be "plain error" if it does not meet the requisite threshold of prejudice. Where § 43-292(5) is one of multiple statutory grounds alleged to support termination of parental rights, the failure of the trial court to appoint a guardian ad litem for the parent may or may not be prejudicial, depending upon the specific facts of the case.

[4] Of course, trial courts should comply with the statutory directive of § 43-292.01 and appoint a guardian ad litem for a parent whenever § 43-292(5) is alleged as a basis for terminating parental rights. And counsel should assist the court by making a timely request for such appointment. But we decline to extend the holding of *In re Interest of M.M., C.M., and D.M.* to a case where there are grounds for termination other than or in addition to § 43-292(5). We hold that when termination of parental rights is sought on multiple grounds, including § 43-292(5), and an appellate court finds that at least one ground other than § 43-292(5) is established by clear and convincing evidence and that termination is in the best interests of the child, the failure of the trial court to appoint a guardian ad litem for the parent pursuant to § 43-292.01 is error, but not plain error requiring automatic reversal. In that circumstance, the failure to appoint a guardian ad litem will generally not require reversal unless it is assigned as error on appeal and shown to have been prejudicial to the parent. In such cases, if the record establishes that another statutory ground for termination exists, independent of any mental deficiency of the parent, the failure to appoint a guardian ad litem may be harmless error. Here, we need not engage in a harmless error analysis, because the doctrine of plain error does not apply and the failure of the county court to appoint a guardian ad litem was not assigned as error on appeal. To the extent that *In re Interest*

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[21] *Cesar C. v. Alicia L., supra* note 19; *In re Interest of Jamyia M.*, 281 Neb. 964, 800 N.W.2d 259 (2011).

of Presten O.[22] is inconsistent with our holding in this case, it is disapproved.

Evidence of Neglect

In its de novo review of the record, the Court of Appeals determined that there was sufficient evidence to support termination under § 43-292(2), i.e., that Wayne had "substantially and continuously or repeatedly neglected and refused to give the juvenile or a sibling of the juvenile necessary parental care and protection." Without repeating the Court of Appeals' detailed summary of the evidence, we agree that it was sufficient to support the court's determination.

CONCLUSION

For the reasons discussed, we affirm the judgment of the Court of Appeals which affirmed the judgment of the county court for Seward County.

Affirmed.

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[22] *In re Interest of Presten O.*, *supra* note 10.

Cassel, J., dissenting.

The majority concedes that failure to appoint a guardian ad litem (GAL) results in plain error requiring reversal[1] where a termination of parental rights is sought based on the ground of a parent's mental illness or mental deficiency.[2] But the majority effectively holds that even where a termination is sought and actually adjudicated on a parent's mental illness or mental deficiency, the mere presence of other grounds eliminates the plain error arising from the failure to appoint a GAL. And further, the majority suggests that even if the failure to appoint a GAL in a termination sought upon the ground of mental illness or deficiency was properly assigned as error, it may not be reversible despite the clear statutory mandate. I respectfully disagree.

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[1] See *In re Interest of M.M., C.M., and D.M.*, 230 Neb. 388, 431 N.W.2d 611 (1988).

[2] See Neb. Rev. Stat. § 43-292(5) (Cum. Supp. 2012).

The statute[3] imposes a mandatory duty to appoint a GAL where termination is sought on the basis of the parent's mental illness or deficiency. A termination under § 43-292(5) applies where a parent is "unable to discharge parental responsibilities because of mental illness or mental deficiency" and the condition is expected to continue for a "prolonged indeterminate period." "When termination of the parent-juvenile relationship *is sought under subdivision (5)* of section 43-292, the court *shall* appoint a [GAL] for the alleged incompetent parent."[4] As a general rule, the use of the word "shall" is considered to indicate a mandatory directive, inconsistent with the idea of discretion.[5] And, as the majority concedes, this court has previously held that the appointment was "mandatory" and that the failure to appoint a GAL was plain error.[6]

The Legislature's purpose in mandating such appointments seems abundantly clear—to dispel any taint upon the termination of a mentally ill parent's rights arising from the very nature of the parent's condition. A parent's right to raise his or her child is constitutionally protected.[7] This court has frequently noted the constitutional protection accorded to the relationship between parent and child.[8] The U.S. Supreme Court has repeatedly recognized this protected status.[9] The Legislature is presumed to know the general condition surrounding the subject matter of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the

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[3] Neb. Rev. Stat. § 43-292.01 (Reissue 2008).

[4] § 43-292.01 (emphasis supplied).

[5] *Drummond v. State Farm Mut. Auto. Ins. Co.*, 280 Neb. 258, 785 N.W.2d 829 (2010).

[6] *In re Interest of M.M., C.M., and D.M., supra* note 1.

[7] *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012).

[8] See, e.g., *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992).

[9] See, *Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *M. L. B. v. S. L. J.*, 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996); *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).

legislation.[10] Thus, in enacting § 43-292.01, the Legislature presumably understood the constitutional significance of the parent-child relationship. Similarly, 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 the Legislature did so with full knowledge of the preexisting legislation and the decisions of the Nebraska Supreme Court construing and applying that legislation.[11] Thus, when the Legislature enacted this requirement in 1998,[12] it did so with a full appreciation of the constitutional protection afforded to the parent's rights.

The situation in *In re Interest of Presten O.*[13] was materially different. In that case, the biological mother was ordered to submit to a competency evaluation, which revealed that she was competent to understand the legal proceedings. It was in that context that the concurring judge stated, "[T]here [was] no indication that [the mother] would have benefited in any way by the appointment of a [GAL]."[14] Here, there is no indication in the record of any competency evaluation. The majority notes that testimony was heard from the father and other witnesses regarding the diagnosis and treatment of his mental illness. But the majority does not identify any testimony or other evidence in the instant case bearing on the father's competency in the termination proceeding.

But, more important, neither the majority nor the concurring judge in *In re Interest of Presten O.* explains why the presence of other grounds for termination eliminates or detracts from the Legislature's purpose in mandating appointment of a GAL for a parent where termination is sought under § 43-292(5). The Legislature focused on the parent's mental illness or deficiency. It implemented a prophylactic remedy. The language

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[10] *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008).

[11] *White v. State*, 248 Neb. 977, 540 N.W.2d 354 (1995).

[12] See 1998 Neb. Laws, L.B. 1041.

[13] *In re Interest of Presten O.*, 18 Neb. App. 259, 778 N.W.2d 759 (2010).

[14] *Id.* at 265, 778 N.W.2d at 763 (Irwin, Judge, concurring).

of the statute is clear. If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.[15] The majority does not explain why proof of other grounds at the conclusion of the evidence excuses the failure to adhere to the statutory mandate at the commencement of the proceeding. The existence of other grounds for termination does not relate in any logical way to the impact of mental illness or mental deficiency upon the parent's ability to understand and fully participate in the proceedings. The majority introduces doubt and uncertainty into a very precise statutory requirement. I would not do so.

And in the face of the clear statutory mandate, I would not invent an element of discretion, even if a competency evaluation had been conducted and presented. Had the Legislature intended to allow a court to waive the requirement where it was satisfied of the parent's capacity to understand and participate in the proceedings, it certainly could have done so. But it did not. The Legislature declined to provide any such authority to the trial court, which would be in the best position to consider evidence regarding the parent's capacity and to exercise discretion. This court, in contrast, reviews only the cold record. Where the Legislature did not provide such discretion to the trial court, I cannot believe it intended this court to make such determinations from the bare record presented on appeal.

The majority also relies on two other decisions, but neither decision detracts from the clear mandate of the statute where termination is sought under § 43-292(5). In one case, this court acknowledged that the party seeking termination was not required to invoke subsection (5) even though there may have been evidence to support it.[16] In the other case, where termination was not sought under subsection (5) but the State adduced evidence of a parent's mental deficiency, this court upheld the termination.[17] This court determined that the

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[15] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

[16] See *In re Interest of J.N.V.*, 224 Neb. 108, 395 N.W.2d 758 (1986).

[17] See *In re Interest of Michael B. et al.*, 258 Neb. 545, 604 N.W.2d 405 (2000).

evidence of mental deficiency should not have been received, but found that there was clear and convincing evidence supporting termination under subsection (4)[18] "independent of any mental deficiency."[19] In both cases, the party seeking termination did *not* invoke subsection (5). And where subsection (5) is not invoked, it is clear that the appointment of a GAL is discretionary.[20] The majority may have a good argument to be addressed to the Legislature to widen the mandate of § 43-292.01, but it does not logically follow that these cases support ignoring the mandate where subsection (5) *is* invoked and, indeed, is *adjudicated*. When the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem and not attacking the problem at all.[21] In § 43-292.01, the Legislature imposed a specific procedural device where termination is "sought under subdivision (5)" of § 43-292. Neither case cited by the majority provides a good reason for ignoring this concededly "mandatory" requirement.[22]

The party initiating a termination proceeding has a choice whether to invoke the ground of a parent's mental illness or mental deficiency. Here, the other parent chose to do so. Moreover, the trial court ultimately found clear and convincing evidence of the existence of such mental illness or deficiency. Having placed this issue in controversy, the initiating parent should have ensured that the statutory mandate was carried out. I would not excuse her failure to do so.

Because termination was "sought" under § 43-292(5), both the plain language of the statute and this court's precedent

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[18] § 43-292(4) (parents unfit by reason of debauchery, habitual use of intoxicating liquor or narcotic drugs, or repeated lewd and lascivious behavior).

[19] *In re Interest of Michael B. et al., supra* note 17, 258 Neb. at 557, 604 N.W.2d at 413.

[20] See § 43-292.01 ("court may, in any other case, appoint a [GAL], as deemed necessary or desirable, for any party").

[21] *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[22] See *In re Interest of M.M., C.M., and D.M., supra* note 1.

dictate that appointment of a GAL was "mandatory" and that the county court's failure to make the appointment was plain error.[23] Unless the court is prepared to overrule this precedent, it should be followed. I respectfully dissent from the majority's failure to do so.

MILLER-LERMAN, J., joins in this dissent.

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[23] See *id.*

MARTIN V. LINSCOTT, INDIVIDUALLY AND ON BEHALF OF SHASTEEN, LINSCOTT & BROCK, P.C., A NEBRASKA PROFESSIONAL CORPORATION, APPELLANT, V. ROLF EDWARD SHASTEEN AND TONY J. BROCK, APPELLEES.

847 N.W.2d 283

Filed June 6, 2014. No. S-13-597.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.
2. **Contracts: Parties: Intent.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.
3. **Contracts: Parties.** A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.
4. **Contracts: Parties: Intent.** An implied contract arises where the intention of the parties is not expressed in writing but where the circumstances are such as to show a mutual intent to contract.
5. **Contracts: Proof.** Evidence of facts and circumstances, together with the words of the parties used at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter on hand, would be justified in inferring such a contract or promise, is sufficient.
6. **Contracts: Parties: Intent.** The determination of the parties' intent to make a contract is to be gathered from objective manifestations—the conduct of the parties, language used, or acts done by them, or other pertinent circumstances surrounding the transaction.
7. **Contracts: Intent.** If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.

8. **Contracts.** Partial performance can remove uncertainty in the terms of a contract and establish that an enforceable contract has been formed.
9. **Contracts: Parties: Intent.** The interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.
10. **Contracts: Statute of Frauds: Time: Words and Phrases.** For purposes of the statute of frauds, a contract "not to be performed within one year" is one which by its terms cannot be performed within 1 year.
11. **Contracts: Statute of Frauds: Time.** A contract is not within the statute of frauds merely because it may, or probably will, not be performed within 1 year.
12. ____: ____: ____. An oral agreement is valid under the statute of frauds if it is capable of being performed within 1 year from the date of making.
13. **Contracts: Parties: Intent.** To be void, the express terms of a contract must show that performance was to occur outside of 1 year or the facts must show that the parties could not have intended for performance to be completed within 1 year.
14. **Contracts: Time.** Even if a contract is not performed within 1 year, it is not void if it is capable of being performed within 1 year.
15. **Pleadings.** An affirmative defense must be specifically pled to be considered.
16. **Pleadings: Notice.** The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.
17. **Pleadings: Appeal and Error.** An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal.
18. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.
19. ____. The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.
20. **Waiver: Appeal and Error.** Errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
21. **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.
22. ____. Errors argued but not assigned will not be considered on appeal.

Appeal from the District Court for Lancaster County: JAMES T. GLEASON, Judge. Reversed and remanded for further proceedings.

V. Gene Summerlin and Marnie A. Jensen, of Husch Blackwell, L.L.P., for appellant.

Victor E. Covalt III and Adam R. Little, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellees.

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

McCORMACK, J.

NATURE OF CASE

Martin V. Linscott brought suit individually and derivatively on behalf of Shasteen, Linscott & Brock, P.C. (SLB), against Rolf Edward Shasteen and Tony J. Brock for one-third of attorney fees recovered from SLB cases that existed at the time Linscott withdrew as a shareholder. After a bench trial, the district court held that Linscott was not owed any attorney fees because there was not an enforceable contract and the "unfinished business rule" was not applicable. Linscott now appeals.

BACKGROUND

On July 8, 2002, Linscott, Shasteen, and Brock formed the law firm SLB, a Nebraska professional corporation. In 2004, Linscott drafted a proposed shareholder agreement that specified how attorney fees would be divided if a shareholder left the firm. The proposed agreement contemplated that the departed attorney would receive a one-third share of all fees from existing in-process cases and that the firm would receive two-thirds. The proposed agreement was never executed by Linscott, Shasteen, or Brock.

Shortly after the proposed shareholder agreement was circulated, Shasteen and Brock left a signed letter on Linscott's office chair. The letter requested that Linscott leave SLB. The letter stated, "Keep all your cases and we'll keep ours or we can divide them as per the proposed agreement."

Linscott withdrew from the day-to-day operations of SLB and began practicing law with a new firm. On September 16, 2004, Shasteen and Brock changed the name of SLB to Shasteen, Brock & Scholz, P.C. That same day, Linscott sent an e-mail to Shasteen and Brock discussing "issues" arising from Linscott's leaving. In particular, the e-mail stated, "Cases: Should be handled as proposed in the agreement, me paying you 2/3 of the fees on my SLB cases, you paying me 1/3 of the remaining SLB cases . . . ."

Beginning on September 17, 2004, Linscott began sharing fees with Shasteen and Brock. From that date through January 10, 2005, Linscott sent 42 fee checks to Shasteen and Brock totaling $39,519.49. Likewise, starting on September 20, 2004,

and concluding on December 28, 2004, Shasteen and Brock sent 26 fee checks totaling $44,147.46 to Linscott. The 68 checks exchanged represented fees from a total of 134 cases. The fees were sent without reducing the amounts for expenses or overhead.

On September 17, 2004, Linscott sent an e-mail to Shasteen and Brock indicating that he intended to pay them for their portion of fees collected from three clients. On September 20, 2004, Linscott e-mailed Shasteen and Brock and stated that he had showed his office staff how to divide fees and that he intended to continue splitting fees the "same way" as they had been doing. The e-mail further stated, "I am going to honor our fee arrangement and trust that you will do the same, so I'm not going to require any additional documentation other than maybe the disbursement letter on non [sic] weekly checks (settlements). Let me know if you disagree."

In a response e-mail sent on September 22, 2004, Brock did not object to the fee arrangement. On November 17, Linscott sent a letter to Shasteen and Brock, which stated, "As far as the fees are concern [sic], I think things are working well on our cases where fees are currently being generated." In a response letter dated November 29, 2004, Shasteen disagrees with certain requests made by Linscott but does not discuss or contest the fee arrangement between the parties. On January 24, 2005, Shasteen sent Linscott an SLB case list, which indicated cases that existed at the time of Linscott's departure which were retained by Shasteen and Brock.

According to Brock, this exchange of fees from September 17, 2004, through January 10, 2005, was done without his knowledge. When Brock learned of this arrangement, he ordered it to stop. Shasteen and Brock stopped sending checks on December 28, 2004. Linscott sent his last fee check on January 10, 2005.

Linscott filed his complaint with the Lancaster County District Court. He pleaded five counts: corporate derivative claims for injunctive relief and an accounting and individual claims for an accounting, breach of contract, and breach of fiduciary duty. Shasteen and Brock did not file a counterclaim for the return of the fees they had already sent to

Linscott. The trial was bifurcated in two parts: liability and damages. After a bench trial on liability, the district court held that Linscott was entitled to an accounting and found that there was an enforceable agreement.

The damages portion of the trial was held on March 2, 2012. In its order dated February 28, 2013, the district court vacated its reception of the summary exhibits 88 through 92.

Upon reconsideration, the district court found that there was an absence of specific material terms—in particular, a definition of "'net fees'" in the unexecuted written agreement—that precluded the possibility of an implied contract. It further concluded that even if there was an oral contract, the contract would be void under the statute of frauds. The district court held that Shasteen and Brock had no obligation to Linscott to share any additional attorney fees. Upon a motion for new trial, the district court further found that the "unfinished business rule" has no application to this case. The district court found that absent an enforceable agreement, all payments made were voluntary. The district court concluded that Shasteen and Brock were under no obligation to continue payments.

ASSIGNMENTS OF ERROR

Linscott assigns that the district court erred by (1) concluding that the agreement was unenforceable due to the statute of frauds, (2) concluding that the unfinished business rule was not applicable to Linscott's request for an accounting, (3) concluding that Linscott was not entitled to an accounting, (4) failing to award damages to Linscott based on the accounting, (5) reversing its liability judgment following the damages trial, (6) reversing its receipt into evidence of Linscott's exhibits 88 through 92, and (7) failing to award prejudgment interest to Linscott.

STANDARD OF REVIEW

[1] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusions.[1]

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[1] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

ANALYSIS

The issues presented by this appeal are whether the district court erred as a matter of law in holding (1) that the absence of specific material terms, in particular, that the definition of "net fees" prevents a finding an implied contract was formed, and (2) that the statute of frauds barred the action. We reverse the district court's order and find that it erred as a matter of law on both findings.

It is conceded by Linscott that the proposed shareholder agreement was not executed, but he argues that an implied contract was created by the conduct of the parties. We therefore begin our analysis by setting out the established Nebraska law on implied in fact contracts.

[2,3] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.[2] A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.[3]

[4-7] An implied contract arises where the intention of the parties is not expressed in writing but where the circumstances are such as to show a mutual intent to contract.[4] Evidence of facts and circumstances, together with the words of the parties used at the time, from which reasonable persons in conducting the ordinary affairs of business, but with special reference to the particular matter on hand, would be justified in inferring such a contract or promise, is sufficient.[5] The determination of the parties' intent to make a contract is to be gathered from objective manifestations—the conduct of the parties, language used, or acts done by them, or other pertinent circumstances

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[2] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[3] *Id.*

[4] See, *id.*; *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000).

[5] *Woods v. Woods*, 177 Neb. 542, 129 N.W.2d 519 (1964).

surrounding the transaction.[6] If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.[7]

Here, Linscott alleges that prior to his departure from SLB, the parties had discussed the proposed shareholder agreement that allocated fees on an equal basis between each shareholder. The letter signed by Shasteen and Brock stated, "Keep all your cases and we'll keep ours or we can divide them as per the proposed agreement." The testimony indicates that the "proposed agreement" refers to the shareholder agreement concerning the fee split. In an e-mail sent the next day, Linscott informed Shasteen and Brock that he chose to divide the fees as per the agreement.

Linscott alleges that Shasteen and Brock did not object to Linscott's decision on the fee division until months after the performance began. With Shasteen and Brock's apparent acquiescence, Linscott went forward with the agreement and had his office staff begin dividing fees. Shasteen and Brock also went forward with the agreement and began exchanging checks with Linscott. A total of 68 checks were exchanged over several months, which Linscott alleges were in accord with the proposed agreement. From this evidence, Linscott argues an implied contract was formed. The district court disagreed for two reasons.

First, the district court found that the parties did not define specific material terms of the alleged contract; however, it provided only one example. It stated that the "most flagrant absence is any definition in paragraph 4 of [the proposed shareholder agreement] of what is intended by the parties by the use of the words, 'net fees.'" It is unclear from the district court's order how the lack of a definition for the term "net fees" prevents the formation of a contract between the parties. But the district court seemed to find this lack of definition decisive. The court made no factual findings on the surrounding circumstances of the transaction. Due to the lack of factual findings in the order, it appears from our reading that the

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[6] *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999).

[7] *City of Scottsbluff v. Waste Connections of Neb., supra* note 2.

district court found the absence of any definition of the term "net fees" to be a legal barrier to the formation of an enforceable contract.

Such a finding is incorrect. The proposed shareholder agreement is only one circumstance surrounding the alleged implied in fact contract that can help determine the intentions of the parties on how the fees were to be split. Other circumstances include the parties' objective manifestations, such as their conduct surrounding the transaction.[8]

[8,9] For instance, it is a relevant circumstance that the parties split fees by exchanging a total of 68 checks. And it is well established that partial performance can remove uncertainty in the terms of a contract and establish that an enforceable contract has been formed.[9] In fact, we have stated that the interpretation given to a contract by the parties themselves while engaged in the performance of it is one of the best indications of true intent and should be given great, if not controlling, influence.[10]

It was, therefore, error for the district court to reason that the lack of a written definition for the term "net fees" bars a finding of an enforceable contract. At its core, an implied contract arises where the intention of the parties is not expressed in writing but where the surrounding circumstances are such to show a mutual intent to contract.[11] Although the proposed shareholder agreement is a circumstance that could help determine the terms of the implied contract, the conduct and partial performance of the parties are also integral to that determination. And that conduct could also help define the terms of the agreement. On remand, the district court should determine whether all of the surrounding facts and circumstances of this transaction created an implied in fact contract and whether

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[8] *Kaiser v. Millard Lumber, supra* note 6.

[9] Restatement (Second) of Contracts § 34(2) (1981); 42 C.J.S. *Implied Contracts* § 1 (2007).

[10] See, *City of Scottsbluff v. Waste Connections of Neb., supra* note 2; *International Harvester Credit Corp. v. Lech*, 231 Neb. 798, 438 N.W.2d 474 (1989).

[11] *City of Scottsbluff v. Waste Connections of Neb., supra* note 2.

such facts and circumstances can define the terms of the alleged agreement.

Second, the district court found that if there was an implied contract, it was void under the statute of frauds, because the contract could not be performed within 1 year. Again, we disagree.

[10-12] The statute of frauds provides, in relevant part: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof . . . ."[12] "A contract 'not to be performed within one year' is one which by its terms cannot be performed within 1 year."[13] A contract is not within the statute of frauds merely because it may, or probably will, not be performed within 1 year.[14] To state the rule in positive terms, an oral agreement is valid under the statute of frauds if it is capable of being performed within 1 year from the date of making.[15] The determination of whether a contract falls within the statute of frauds is a question of law.[16]

[13] Here, the record does not establish that this implied contract could not be performed within 1 year. Each of the open cases subject to the implied contract could have wrapped up within the year either by settlement, dismissal, or final disposition. Nothing by the terms of the oral contracts indicates that such occurrence was impossible. To be void, the express terms of a contract must show that performance was to occur outside of 1 year or the facts must show that the parties could not have intended for performance to be completed within 1 year.[17] Neither situation is applicable here.

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[12] Neb. Rev. Stat. § 36-202 (Reissue 2008).

[13] *Rath v. Selection Research, Inc.*, 246 Neb. 340, 343, 519 N.W.2d 503, 506 (1994).

[14] *Johnson v. First Trust Co.*, 125 Neb. 26, 248 N.W. 815 (1933).

[15] *Rath v. Selection Research, Inc., supra* note 13.

[16] 37 C.J.S. *Statute of Frauds* § 228 (2008).

[17] See, *id.*; *Powder River Live Stock Co. v. Lamb*, 38 Neb. 339, 56 N.W. 1019 (1893).

[14] In response, Shasteen and Brock argue that the fact the actual performance of this contract has taken over 7 years indicates the impossibility of the contract's being performed within 1 year. However, even if a contract is not performed within 1 year, it is not void if it is capable of being performed within 1 year.[18] Although 7 years indicate the unlikelihood of the contract's being performed within 1 year, it does not establish that the implied contract could not have been performed within 1 year had it been carried out in a different manner.[19]

Additionally, Shasteen and Brock make two arguments that appear under the statute of frauds argument section. First, they argue that the partial performance is insufficient to avoid the statute of frauds. This argument is irrelevant, because we hold that the statute of frauds is not applicable.

[15-17] Second, Shasteen and Brock argue that Nebraska corporate law under Neb. Rev. Stat. § 21-2069 (Reissue 2012) requires such a shareholder agreement to be in writing. This argument is unrelated to the Nebraska statute of frauds found under § 36-202, which was relied upon by the district court in its order. This argument is a new affirmative defense. Matters which seek to avoid a valid contract are affirmative defenses.[20] An affirmative defense must be specifically pled to be considered.[21] The only affirmative defense raised by Shasteen and Brock is that the "alleged 'Shareholders Agreement' cannot be enforced as enforcement thereof is barred by the applicable statute of fraud and is not signed by the parties." The key to determining the sufficiency of pleading an affirmative defense is whether it gives the plaintiff fair notice of the defense.[22] The reference to the "applicable statute of fraud" is in clear reference to § 36-202, as evidenced by our use of the term

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[18] See *id*.

[19] See 13 Samuel Williston, A Treatise on the Law of Contracts § 39:1 (Richard A. Lord ed., 4th ed. 2013).

[20] *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

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

[22] *Stevenson v. Wright*, 273 Neb. 789, 733 N.W.2d 559 (2007).

in prior cases.[23] Use of the term "applicable statute of fraud" would not give Linscott fair notice of the potential affirmative defense found under § 21-2069. An affirmative defense not raised or litigated in the trial court cannot be urged for the first time on appeal.[24]

Therefore, the district court erred as a matter of law in determining that the oral contract was void under the statute of frauds.

The remaining assignments of error, as well as the remaining arguments made by both parties, will not be addressed in this opinion and should be made before the district court on remand. Specifically, we find that it is unnecessary to address the assignment of error regarding the unfinished business rule at this time. The unfinished business rule states that absent a contrary agreement, any income generated through the winding up of unfinished business of a partnership is allocated to the former partners according to their respective interests in the partnership.[25] Having decided to remand this cause to the district court for a determination of whether there was a contrary implied in fact contract, we need not address whether the unfinished business rule is applicable.

[18-20] Linscott also assigns that the district court erred in denying receipt of four exhibits, but he failed to make such an argument in his opening brief. Errors that are assigned but not argued will not be addressed by an appellate court.[26] Linscott's attempt to make the argument for the first time in the reply brief is too late. The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.[27] Errors not assigned in an appellant's initial brief are

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[23] See, e.g., *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013); *Rath v. Selection Research, Inc., supra* note 13.

[24] *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000).

[25] *Schrempp and Salerno v. Gross*, 247 Neb. 685, 529 N.W.2d 764 (1995).

[26] *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

[27] *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

thus waived and may not be asserted for the first time in a reply brief.[28]

[21] As for the final assignment of error concerning prejudgment interest, the district court has not made a ruling on prejudgment interest or the amount of damages because it found no liability. It is a longstanding rule that we will not consider an issue on appeal that was not presented to or passed upon by the trial court.[29] Therefore, on remand, Linscott can argue such issues before the district court.

[22] We also want to note that in Linscott's opening brief's statement of facts, Linscott discusses a client's workers' compensation and uninsured motorist claim. In his argument section, Linscott argues that the attorney fees received by Linscott for this underinsured motorist claim are not subject to the SLB fee split agreement. But such argument was not assigned as error. Errors argued but not assigned will not be considered on appeal.[30] This is a damages issue, which can be addressed by the district court on remand if it finds liability.

CONCLUSION

We conclude that the district court erred as a matter of law in determining that the lack of specific material terms, particularly the definition of "net fees," prevents a finding of an implied in fact contract. We also find that the district court erred, as a matter of law, in its determination that the statute of frauds rendered any implied contract void. For those reasons, we reverse the judgment and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[28] *Id.*

[29] *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014).

[30] *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013).

STATE OF NEBRASKA, APPELLEE, V. LOGAN HETTLE, APPELLANT.

848 N.W.2d 582

Filed June 6, 2014. No. S-13-661.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Statutes: Appeal and Error.** The meaning and interpretation of a statute are questions of law, which an appellate court reviews independently of the lower court.
3. **Speedy Trial: Other Acts.** If a defendant is not brought to trial before the running of the time for trial under Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012), as extended by excluded time periods, the defendant shall be entitled to absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.
4. **Speedy Trial: Complaints: Indictments and Informations.** For cases commenced with a complaint in county court but thereafter bound over to district court, the 6-month statutory speedy trial period does not commence until the filing of the information in district court.
5. **Speedy Trial: Complaints.** In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.
6. **Speedy Trial.** It is axiomatic that under the speedy trial statutes, an accused cannot and should not be permitted to take advantage of a delay where the accused is responsible for the delay by either action or inaction.
7. **Speedy Trial: Indictments and Informations: Lesser-Included Offenses.** Under the tacking-and-tolling approach, the time between dismissal of an information and refiling is not includable, or is tolled, for purposes of the statutory 6-month period. However, any nonexcludable time that passed under the original information is tacked onto any nonexcludable time under the refiled information, if the refiled information alleges (1) the same offense charged in the previously dismissed information, (2) an offense committed simultaneously with a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information.
8. **Speedy Trial: Indictments and Informations: Complaints.** If the amendment to the complaint or information does not change the nature of the charge, then the time continues to run against the State for purposes of the speedy trial act.
9. **Indictments and Informations: Complaints: Other Acts.** If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information.
10. ____: ____: ____. The original charges have not been "abandoned" or "dismissed" when an amended complaint or information continues to make those charges, but additionally charges a different crime.

11. **Speedy Trial.** If there is no abandonment or dismissal of charges, a tacking-and-tolling analysis is superfluous to those charges.
12. **Speedy Trial: Indictments and Informations.** It is logically inconsistent that time pending under abandoned and dismissed charges ought to tack onto time pending under the amended information that supposedly abandoned and dismissed those very same charges.
13. **Indictments and Informations: Complaints.** While two complaints or informations cannot coexist at the same moment, it does not necessarily follow that every act or motion made under a superseded complaint or information is dismissed, abandoned, or extinguished by operation of law.
14. **Indictments and Informations: Other Acts.** A prior defense motion for indefinite continuance remains effective as to all charges in an amended information when the amended information charges some of the same crimes as the preceding information, as well as additional crimes unrelated to the same facts of the preceding information.
15. **Speedy Trial: Statutes: Intent: Waiver: Appeal and Error.** There is no language in Neb. Rev. Stat. § 29-1207(4)(b) (Cum. Supp. 2012) indicating intent to limit the scope of the waiver provided therein, and an appellate court will not read into the statute a meaning that was not there.
16. **Motions for Continuance: Indictments and Informations.** Without severance of the individual charges from the pending prosecution, a motion for continuance is not applied piecemeal to certain charges under the information, but not to others.
17. **Constitutional Law: Speedy Trial.** The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.
18. ____: ____. Neb. Rev. Stat. § 29-1207 (Cum. Supp. 2012) provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions.
19. **Speedy Trial: Words and Phrases.** A speedy trial, generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary, vexatious, and oppressive delay.
20. **Speedy Trial: Waiver.** If delay is attributable to the defendant, then the defendant's waiver of his or her right to a speedy trial may be given effect under standard waiver doctrine.
21. **Attorney and Client: Time.** Because the attorney is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is charged to the defendant.
22. **Constitutional Law: Speedy Trial.** Barring extraordinary circumstances, a defendant's constitutional right to a speedy trial is not denied when the defendant does not want a speedy trial.
23. **Constitutional Law: Criminal Law: Pretrial Procedure: Time.** The Fifth Amendment has only a limited role to play in protecting against oppressive delay in the criminal context.

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

James R. Mowbray and Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

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

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

MCCORMACK, J.

NATURE OF CASE

The defendant appeals from the denial of his motion for absolute discharge, alleging that the delay in bringing him to trial violated his statutory and constitutional rights to a speedy trial and his right to due process. At issue is whether the defendant's indefinite motion for continuance was automatically extinguished by the State's amended information, thereby relieving the defendant of his duty under Neb. Rev. Stat. § 29-1207(4)(b) (Cum. Supp. 2012) to give notice of request for trial in order to end the continuance and its accompanying statutory waiver of the right to a speedy trial. We affirm the judgment of the district court.

BACKGROUND

On November 12, 2010, a complaint was filed in county court alleging seven counts against Logan Hettle. Count 1 was sexual penetration of T.S. without consent on or about August 1 through 31, 2009. Count 2 was knowingly restraining or abducting T.S. on or about August 1 through 31, 2009. Count 3 was sexual penetration of L.F. without consent on or about July 4 through August 31, 2010. Count 4 was sexual contact of L.F. without consent on or about July 4 through August 31, 2010. Count 5 was sexual contact of T.S. without consent on or about August 1 through 31, 2009. Count 6 was attempted sexual contact of A.S. without consent on or about October 5, 2009. Count 7 was sexual contact of C.N. without consent on or about June 1 through August 31, 2008.

On January 19, 2011, counts 1 through 3 were bound over to district court and counts 4 through 7 were dismissed. On February 2, the State filed an information in district court charging four counts against Hettle. Count 1 charged sexual penetration of T.S. without consent on or about August 1 through 31, 2009, a Class II felony. Count 2 charged restraining or abducting T.S. under terrorizing circumstances or risk of serious bodily injury on or about August 1 through 31, 2009, a Class IIIA felony. Count 3 charged sexual penetration of L.F. without consent on or about July 4 through August 31, 2010, a Class II felony. Count 4 charged sexual contact of L.F. without consent on or about July 4 through August 31, 2010, a Class I misdemeanor.

Hettle was arraigned. On February 14, 2011, defense counsel filed a motion to transfer to juvenile court, which was denied on April 12. A defense motion for discovery made on June 1 was ruled on June 27. On July 19, the court appointed the Commission on Public Advocacy (the Commission) to represent Hettle. On July 21, the Commission asked for a continuance for research and discovery, with no stated end date. On August 4, the Commission moved for release of a video, which was ordered released on August 5.

On December 12, 2011, the State filed an amended information alleging five counts. Count 1 was identical to count 1 of the original information. Count 2 charged the same crime of sexual penetration of L.F. without consent, but extended the date range to May 1 through September 31, 2009. Count 3 charged the same crime of sexual penetration of L.F. without consent, but narrowed the date to on or about July 4, 2010. Count 4 increased the charge to sexual penetration of L.F. without consent, a Class II felony, and narrowed the date to on or about August 6, 2010. Count 5 charged attempted sexual assault of A.S. on or about October 5, 2009, a Class II misdemeanor.

On December 30, 2011, Hettle moved to sever counts 1 and 5 from counts 2 through 4.

For reasons that are not clear from the record, on March 28, 2012, a probable cause hearing was held in county court wherein the court found probable cause as to counts 1 through

4, but dismissed count 5 of the amended information. Hettle's objection to the county court's jurisdiction was overruled, and the case was bound over again to district court.

On October 22, 2012, the district court denied Hettle's December 30, 2011, motion to sever. That same date, the court scheduled trial for April 2 through 5, 2013. Hettle lodged no objection to the proposed trial date. Instead, when the district court asked the Commission, "Unless you have time earlier, then we could bump somebody else," the Commission replied, "It's up to the Court. I don't know what you want to do. That's fine, Judge."

On April 1, 2013, Hettle filed a motion for absolute discharge under § 29-1207(3); article I, § 11, of the Constitution of the State of Nebraska; and the 5th, 6th, and 14th Amendments to the U.S. Constitution. Hettle has been free on bail during the entire pendency of the charges against him. The court denied the motion for discharge, and Hettle appeals.

ASSIGNMENT OF ERROR

Hettle assigns that the district court erred in overruling his motion for absolute discharge.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.[1]

[2] The meaning and interpretation of a statute are questions of law, which we review independently of the lower court.[2]

ANALYSIS

Statutory Right to Speedy Trial

[3-5] If a defendant is not brought to trial before the running of the time for trial under § 29-1207, as extended by excluded time periods, the defendant shall be entitled to

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[1] *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014).

[2] See *id.*

absolute discharge from the offense charged and for any other offense required by law to be joined with that offense.[3] For cases commenced with a complaint in county court but thereafter bound over to district court, the 6-month statutory speedy trial period does not commence until the filing of the information in district court.[4] In cases commenced and tried in county court, the 6-month period within which an accused must be brought to trial begins to run on the date the complaint is filed.[5]

[6] It is axiomatic that under the speedy trial statutes, an accused cannot and should not be permitted to take advantage of a delay where the accused is responsible for the delay by either action or inaction.[6] Section 29-1207(4)(b) specifically provides that the period of delay resulting from a continuance granted at the request or with the consent of the defendant or his or her counsel is to be excluded in computing the time for trial. A 2010 amendment to § 29-1207(4)(b) further elaborates:

> A defendant who has sought and obtained a continuance which is indefinite has an affirmative duty to end the continuance by giving notice of request for trial or the court can end the continuance by setting a trial date. When the court ends an indefinite continuance by setting a trial date, the excludable period resulting from the indefinite continuance ends on the date for which trial commences. A defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his

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[3] See Neb. Rev. Stat. § 29-1208 (Cum. Supp. 2012).

[4] See, *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002); *State v. Boslau*, 258 Neb. 39, 601 N.W.2d 769 (1999).

[5] *State v. French*, 262 Neb. 664, 633 N.W.2d 908 (2001); *State v. Hutton*, 11 Neb. App. 286, 648 N.W.2d 322 (2002). See, also, *State v. Curry*, 18 Neb. App. 284, 790 N.W.2d 441 (2010).

[6] See, *State v. Mortensen, supra* note 1; *State v. Turner*, 252 Neb. 620, 564 N.W.2d 231 (1997). See, also, *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983), *overruled on other grounds, State v. Murphy*, 225 Neb. 797, 587 N.W.2d 384 (1998).

> or her counsel extends the trial date beyond the statutory six-month period.

In *State v. Mortensen*,[7] we explained that § 29-1207(4)(b) "provides for a permanent waiver of the statutory right to a speedy trial." We observed that "[t]here is no language in the statute that indicates an intent to limit the scope of the waiver provided therein," and we refused to read into the statute a meaning that was not there.[8]

Hettle concedes that when the newly appointed Commission filed its motion to continue on July 21, 2011, the 6-month statutory period had not yet run. The motion stated:

> COMES NOW [Hettle], by and through counsel and moves this Court to continue the trial currently scheduled for August 2, 2011 for the reason that the . . . Commission . . . was appointed to represent [Hettle] on July 19, 2011 and that further time is needed for case research and discovery purposes.

The motion was for an indefinite continuance.[9] The district court granted the motion.

Hettle never gave the district court notice thereafter of request for trial. Although the court eventually set a trial date, due to Hettle's motion for discharge, trial has not commenced. The district court, in denying Hettle's motion for absolute discharge under § 29-1207, concluded that the continuance has not ended and that Hettle waived his right to a speedy trial. We agree.

Hettle gives no particular reason why his counsel failed to give the district court notice of request for trial. He instead presents a complex argument as to how the State's amendment of the charges on December 12, 2011, operated as a matter of law to abandon and dismiss the original information and thereby extinguish his motion for indefinite continuance. At the same time, Hettle argues that the nonexcludable time that passed under the original information should be tacked onto

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[7] *State v. Mortensen, supra* note 1, 287 Neb. at 165, 841 N.W.2d at 400.

[8] *Id.*

[9] See, *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

the nonexcludable time that passed under the amended information. With such extinguishment of the motion for continuance and tacking of nonexcludable periods, Hettle argues the 6-month statutory period was exceeded by January 2013.[10]

[7] Hettle's arguments stem from case law in which we combined tacking and tolling in calculating the 6-month statutory speedy trial period. Under this tacking-and-tolling approach, the time between dismissal of an information and refiling is not includable, or is tolled, for purposes of the statutory 6-month period.[11] However, any nonexcludable time that passed under the original information is tacked onto any nonexcludable time under the refiled information, if the refiled information alleges (1) the same offense charged in the previously dismissed information, (2) an offense committed simultaneously with a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information.[12] Without this approach, whenever a prosecutor desired a postponement of trial beyond the statutory 6-month period, the State could regularly evade the Nebraska speedy trial act simply by dismissing a charge and refiling the same charge to acquire a new 6-month period.[13]

In *State v. French*,[14] we considered what periods of time are tacked onto a refiled complaint charging the same offense as the original complaint when an intervening amended complaint had dropped the original charged offenses in favor of different offenses. Put another way, we considered whether the period of time before dismissal that was pending under an amended complaint that charged none of the same crimes as the refiled complaint was, like a period during actual

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[10] See brief for appellant at 12.

[11] *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), *disapproved on other grounds, State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890.

[12] See *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991). See, also, *State v. Trammell*, 240 Neb. 724, 484 N.W.2d 263 (1992).

[13] See *State v. Sumstine, supra* note 12.

[14] *State v. French, supra* note 5.

dismissal, tolled for purposes of the statutory speedy trial calculation. We held that only the nonexcluded time pending under the original complaint that charged the same offenses as the refiled complaint could be tacked with the time pending under the refiled complaint. The speedy trial clock did not run during the period of the abandoned amended complaint.

[8,9] We said in *French* that the amended complaint, which "charges a different crime, without charging the original crime(s)," acted as a "dismissal" or "abandonment" of the original complaint.[15] We explained in this regard that a distinction should be made between an "*amendment to*" a complaint or information and an "*amended*" complaint or information, stating:

> If the amendment to the complaint or information does not change the nature of the charge, then obviously the time continues to run against the State for purposes of the speedy trial act. If the second complaint alleges a different crime, without charging the original crime(s), then it is an amended complaint or information and it supersedes the prior complaint or information.[16]

From this tacking-and-tolling case law, Hettle asserts four legal premises. First, Hettle asserts that an information alleging a different crime, but also alleging the original crimes, is an "amended" information, not an "amendment to" the information, and therefore operates as a dismissal and abandonment of the original information in its entirety. Second, Hettle asserts that if the original information is thus dismissed and abandoned, any outstanding defense motions are automatically extinguished. Third, Hettle asserts that nonexcluded time pending in the district court under a dismissed and abandoned information was not, like his motions, extinguished, and must be tacked onto the time pending for the same charges under the amended information. Finally, in contravention of the authority already set forth above,[17] Hettle asserts that the time the

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[15] *Id.* at 670, 633 N.W.2d at 914.

[16] *Id.*

[17] See, *State v. Karch, supra* note 4; *State v. Boslau, supra* note 4.

"new" misdemeanor charge was pending briefly in county court should be tacked to the time pending for that charge under the amended information in district court.

Applying these assertions more specifically to the facts of this case, Hettle argues that all the felony counts of the amended information relate to the same incidents or were committed simultaneously with the felonies alleged in the original information. The State agrees. Hettle then asserts that the misdemeanor charge was never properly dismissed by the county court. Again, the State agrees. Hettle asserts that the addition of this new misdemeanor charge transformed the amended information into a dismissal and abandonment of the original information, pursuant to *French*. Here, the State and Hettle part ways.

Hettle concedes that the prolonged period of time his motions were pending in district court under the amended information were excludable; therefore, extinguishing his indefinite continuance, alone, would not put the trial beyond the 6-month statutory period. Hettle asserts, however, that the period of nonexcludable time pending for the felony charges under the original information in district court and the nonexcludable time the misdemeanor charge was pending in county court should be tacked onto the nonexcludable time pending under the amended information. The State has characterized this as Hettle's trying to "have [his] cake and eat it, too."

We have never addressed tacking and tolling when the amended information charges a different crime but also the original crimes. We begin by observing that other courts consistently hold under such circumstances that the original and new charges run on different speedy trial clocks, so long as the "new" charge was not one required to be joined with the original charges under double jeopardy principles.[18] The

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[18] See, *U.S. v. Walker*, 545 F.3d 1081 (D.C. Cir. 2008); *U.S. v. Young*, 528 F.3d 1294 (11th Cir. 2008); *U.S. v. Alford*, 142 F.3d 825 (5th Cir. 1998); *United States v. Heldt*, 745 F.2d 1275 (9th Cir. 1984); *U.S. v. Howard*, 63 F. Supp. 2d 728 (E.D. Va. 1999); *Clevenger v. State*, 967 So. 2d 1039 (Fla. App. 2007); *People v. Davis*, 369 Ill. App. 3d 384, 867 N.E.2d 987, 311 Ill. Dec. 1 (2006).

original charges continue with the same speedy trial clock, while the new charges begin with their own new speedy trial clock.[19]

The reason for such a rule is that as to the charges the government is not required to join with the offenses previously charged, the government could easily obtain a "fresh speedy trial clock" by simply waiting until completion of the prosecution for the original charges and beginning a new prosecution on the additional charges.[20] And there is

> no logical basis for concluding that, when the government chooses to add in a superseding indictment charges that it is not required to join with the charges contained in the original indictment, it must bring the defendant to trial on the added charges within the time period remaining on the speedy trial clock applicable to the charges contained in the original indictment.[21]

We agree with this reasoning. Whether there may be any other objection to the joinder of the original and the additional charges is another question not pertinent to the issue before us.

[10,11] We derive from this, and it comports with common sense, that the original charges have not been "abandoned" or "dismissed" when an amended complaint or information continues to make those charges, but additionally charges a different crime. The time continues to run as to the charges that have not changed. If there is no abandonment or dismissal of the charges, a tacking-and-tolling analysis is superfluous.

[12] Thus, assuming for the moment that tacking-and-tolling case law translates in any way to the affirmative duty under § 29-1207(4)(b), the motion for continuance would at most be extinguished as to the new misdemeanor crime alleged in the amended information. We agree with the State that Hettle belies this very point by arguing that the time pending under the original information for the felony charges should

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[19] See *id.*

[20] *U.S. v. Alford, supra* note 18, 142 F.3d at 829.

[21] *Id.*

be tacked onto the time pending for the felony charges under the amended information. It is logically inconsistent that time pending under abandoned and dismissed charges ought to tack onto time pending under the amended information that supposedly abandoned and dismissed those very same charges. Charges are either the same or different. They cannot be different for purposes of extinguishing a motion for continuance but the same for purposes of effectively continuing to run the statutory speedy trial clock.

[13] However, we do not accept the premise that a *French* "dismissal" of the preceding information, or any part thereof, is determinative of whether an indefinite motion for continuance has been extinguished. We doubt that in other circumstances, where a favorable motion or order had been made under the preceding information, Hettle would venture such an argument. While certainly two complaints or informations cannot coexist at the same moment, it does not necessarily follow that every act or motion made under a superseded complaint or information is dismissed, abandoned, or extinguished by operation of law.

In fact, at least one court has held that prior tolling motions continue to apply to cases refiled after *actual dismissals*, so long as the refiled charges arose from the same or related incidents or acts of the dismissed indictment, complaint, or information.[22] And courts that have addressed the question of amendments charging both new and old crimes hold that a defense motion for continuance or similar tolling motion remains effective as to both the new and old charges, regardless of the tacking-and-tolling speedy trial analysis applicable to those charges.[23] The Fifth Circuit Court of Appeals in *U.S. v. Gonzales*[24] stated, "Unless the district court has ruled that the superseding indictment moots the pending motions," "motions pending on the original charges toll the running of the speedy-trial clock

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[22] See *Palmer v. State*, 76 So. 3d 1016 (Fla. App. 2011).

[23] *U.S. v. Gonzales*, 897 F.2d 1312 (5th Cir. 1990); *Atkins v. State*, 785 So. 2d 1219 (Fla. App. 2001); *State v. Blackburn*, 118 Ohio St. 3d 163, 887 N.E.2d 319 (2008).

[24] *U.S. v. Gonzales, supra* note 23, 897 F.2d at 1316-17.

for the new charges, regardless of when the clock begins to run for the new charges." Such a rule is not prejudicial to the defendant, who can easily start the clock running again by invoking a demand for a speedy trial.[25]

[14,15] Admittedly, no court has addressed the very precise question of whether a prior defense motion for indefinite continuance remains effective as to all charges in an amended information when the amended information charges some of the same crimes as the preceding information, as well as additional crimes unrelated to the same facts of the preceding information. But we find that the mandate of § 29-1207(4)(b) is clear. As we said in *State v. Mortensen*, there is no language in the statute indicating intent to limit the scope of the waiver provided therein, and we will not read into the statute a meaning that was not there.[26]

[16] We have no basis from which to conclude that the Legislature intended a motion for indefinite continuance in an ongoing prosecution under the same case number to apply only to those charges that were pending at the time the motion was made, but not as to any charges later added by amendment. It would make little sense to apply a motion for continuance, based on the general need to prepare for trial, to only old charges and not new. Motions for continuance are to continue the trial. Without severance of the individual charges from the pending prosecution, a motion for continuance is not applied piecemeal to certain charges under the information, but not to others. And as one court has explained, tolling motions that operate by law do not require, at the time they are made, knowledge of future additional charges.[27]

If Hettle no longer wished for his indefinite motion for continuance to remain operative as a waiver to his statutory right to a speedy trial, he could have easily given the court notice of his request for trial, in accordance with § 29-1207(4)(b). He did not do so. While Hettle argues that it should have been

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[25] *Atkins v. State, supra* note 23.

[26] *State v. Mortensen, supra* note 1.

[27] See *State v. Blackburn, supra* note 23.

apparent that he no longer needed time to prepare for trial, the statute puts the onus on the defendant. The State has no obligation to second-guess the defendant's strategic decisions, although it would have been free to press for a speedier trial for the public interest in avoiding stale evidence, a backlog in the court, and opportunities for the accused to commit other crimes.[28]

The State's addition of the misdemeanor charge to the information did not change Hettle's obligations under § 29-1207(4)(b). Therefore, as provided in § 29-1207(4)(b), the waiver and excludable period under the motion for continuance did not end until either Hettle gave the court notice of trial or a trial commenced on the court's own motion. Because neither of those events has occurred, the 6-month statutory period has not run and Hettle's motion for absolute discharge was properly denied.

Constitutional Right to Speedy Trial

[17,18] Hettle next argues that the court erred in denying his motion for discharge based on the constitutional right to a speedy trial. The constitutional right to a speedy trial is guaranteed by U.S. Const. amend. VI and Neb. Const. art. I, § 11. The constitutional right to a speedy trial and the statutory implementation of that right exist independently of each other.[29] Nevertheless, § 29-1207 provides a useful standard for assessing whether the length of a trial delay is unreasonable under the U.S. and Nebraska Constitutions.[30] It is an unusual case in which the Sixth Amendment has been violated when the time limits under the speedy trial act have been met.[31]

[19] A speedy trial, generally, is one conducted according to prevailing rules and proceedings of law, free from arbitrary,

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[28] See *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

[29] See *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[30] See *State v. Schmader, supra* note 9.

[31] *State v. Trammell, supra* note 12.

vexatious, and oppressive delay.[32] But the right is "generically different from any of the other rights enshrined in the Constitution for the protection of the accused."[33]

It is different, first, because "[i]n addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."[34]

Second, the right is unique because "deprivation of the right may work to the accused's advantage."[35] The U.S. Supreme Court explained:

> Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-incrimination, deprivation of the right to speedy trial does not *per se* prejudice the accused's ability to defend himself.[36]

Finally, the constitutional speedy trial right is unique because it "is a more vague concept than other procedural rights."[37] There is "no fixed point" when it can be determined "how long is too long in a system where justice is supposed to be swift but deliberate."[38]

Before the U.S. Supreme Court case of *Barker v. Wingo*,[39] two rigid approaches were taken by other jurisdictions to

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[32] *State v. McNitt*, 216 Neb. 837, 346 N.W.2d 259 (1984).

[33] *Barker v. Wingo, supra* note 28, 407 U.S. at 519.

[34] *Id.*

[35] *Id.*, 407 U.S. at 521.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Barker v. Wingo, supra* note 28.

analyze the constitutional speedy trial right. Some courts set a specific period of time beyond which the constitutional right was deemed violated as a matter of law. Other courts adopted a "demand-waiver doctrine" wherein "a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded a trial."[40] In *Barker v. Wingo*, the Court rejected the rule that the defendant be offered a trial within a specified time period, concluding that such a rule would require the Court to engage in legislative or rulemaking activity. The Court also rejected the approach that restricted considerations of the speedy trial right to those cases in which the accused had demanded a speedy trial.[41]

[20] The Court instead developed a balancing test to determine whether a defendant's constitutional right to a speedy trial has been violated.[42] This balancing test involves four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.[43] However, the Court also said: "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside."[44]

[21] Subsequently, in *Vermont v. Brillon*,[45] the Court seemed to reaffirm the general principle that delay attributable to the defendant may be given effect under the standard waiver doctrine. The Court also clarified that because the attorney is the defendant's agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant's counsel is charged to the defendant. This is true, the Court held, whether counsel is privately retained or publicly assigned.[46]

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[40] *Id.*, 407 U.S. at 525.

[41] *Id.*

[42] See *State v. Loyd, supra* note 29.

[43] See *id.*

[44] *Barker v. Wingo, supra* note 28, 407 U.S. at 529.

[45] *Vermont v. Brillon*, 556 U.S. 81, 129 S. Ct. 1283, 173 L. Ed. 2d 231 (2009).

[46] *Id.*

[22] We have held that, barring extraordinary circumstances, a defendant's constitutional right to a speedy trial is not denied when the defendant does not want a speedy trial.[47] An accused cannot generally take advantage of a delay in being brought to trial where he was responsible for the delay by either action or inaction.[48] Thus, in *State v. Jameson*,[49] where the delay in bringing the defendant to trial was due to continuances by defense counsel, we held there could be no violation of the right to a speedy trial under the Sixth Amendment to the U.S. Constitution. We reasoned that "[i]t would be a strange anomaly if a defendant could first ask for a series of continuances and then be immune from prosecution because he had not been granted a speedy trial. Even under the most liberal view of the [S]ixth [A]mendment, that argument will not 'hold water.'"[50]

As already discussed in depth, Hettle asked for an indefinite continuance. And that indefinite continuance did not, as Hettle hoped, magically disappear upon the State's amendment adding a misdemeanor charge to the information. Hettle gave the district court no notice of his intention to end the continuance by requesting a trial. To the contrary, Hettle waited silently until the eve of the scheduled trial to voice any concern over the delay. We find no error in the district court's denial of the motion for discharge under the constitutional right to a speedy trial.

Due Process

[23] Finally, Hettle argues that the district court erred in denying his motion for discharge under his Fifth Amendment right to due process. The Fifth Amendment has only a "limited role to play in protecting against oppressive delay" in the criminal context.[51] It is the measure against which prearrest or

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[47] *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989).

[48] *State v. Fatica, supra* note 6.

[49] *State v. Jameson*, 224 Neb. 38, 395 N.W.2d 744 (1986).

[50] *Id.* at 43, 395 N.W.2d at 747.

[51] *United States v. Lovasco*, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

indictment delay is scrutinized.[52] We can find no case in which the Fifth Amendment is applied to a claim for delay in bringing the accused to trial after arrest or indictment.

Regardless, the due process claimant's burden is a "heavy" one, requiring a showing of both substantial actual prejudice resulting from the delay and bad faith on the part of the government.[53] We agree with the district court that Hettle failed to establish a violation of his Fifth Amendment right against oppressive delay.

CONCLUSION

We affirm the decision of the district court. In light of Hettle's statutory waiver under § 29-1207(4)(b), it is not necessary to calculate the amount of time remaining to bring him to trial under § 29-1207.[54] Once the district court reacquires jurisdiction over the cause, it is directed to set the matter for trial.

AFFIRMED.

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[52] See, *United States v. Lovasco, supra* note 51; *United States v. Marion*, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971); *U.S. v. Ross*, 703 F.3d 856 (6th Cir. 2012); *U.S. v. Colombo*, 852 F.2d 19 (1st Cir. 1988); *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996); *People v. Gay*, 2011 IL App (4th) 100009, 960 N.E.2d 1272, 356 Ill. Dec. 149 (2011); *Haire v. State*, 749 So. 2d 1130 (Miss. App. 1999); *People v. Guzman*, 163 Misc. 2d 237, 620 N.Y.S.2d 227 (1994); *State v. Jessie*, 225 W. Va. 21, 689 S.E.2d 21 (2009).

[53] *United States v. Capone*, 683 F.2d 582, 589 (1st Cir. 1982). See, also, e.g., *U.S. v. Jackson*, 446 F.3d 847 (8th Cir. 2006).

[54] See, *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014); *State v. Mortensen, supra* note 1.

LARRY BLASER AND TERRY MCCAW AND PATRICIA MCCAW, HUSBAND AND WIFE, APPELLANTS, V. COUNTY OF MADISON, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

847 N.W.2d 293

Filed June 6, 2014. No. S-13-764.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** In actions brought under the Political Subdivisions Tort Claims Act, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.
2. **Pleadings: Appeal and Error.** Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.
3. **Administrative Law: Motor Vehicles.** The placement of traffic control devices is a discretionary function, although once a decision to utilize a particular device has been made, the device is required to conform to the Manual on Uniform Traffic Control Devices.

Appeal from the District Court for Madison County: ROBERT B. ENSZ, Judge. Affirmed.

Todd B. Vetter, of Fitzgerald, Vetter & Temple, for appellants.

Vincent Valentino and Brandy Johnson for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

In 2008, Larry Blaser and Terry McCaw sustained personal injuries when Blaser drove a vehicle in which McCaw was a passenger into a washed-out area on a vacated county road in Madison County, Nebraska (the County). Blaser, McCaw, and their wives sued Madison County under the Political Subdivisions Tort Claims Act (PSTCA),[1] alleging the County was negligent. After a bench trial, the district court for Madison County found the County had breached its duty to maintain the vacated road and entered judgment against the County. The

[1] Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2007).

County appealed, and on June 6, 2012, in case No. S-11-1048, we dismissed the appeal, without opinion, because of a jurisdictional defect. The defect was corrected (the dismissal of Blaser's wife's claims), and the County filed a second appeal. In the second appeal, we determined the district court erred in finding the County had a duty to maintain the vacated road, and we reversed the judgment and remanded the cause for a new trial.[2] Following remand, the parties stipulated that the matter should be submitted to the district court on the record made at the original trial. The district court then determined that Madison County retained sovereign immunity pursuant to § 13-910(9) and entered judgment in favor of the County. After a motion for new trial was overruled, this timely third appeal was filed. We conclude the district court did not err in determining that the County retained its sovereign immunity and therefore affirm its judgment.

BACKGROUND

Facts and Procedural Background

The facts and procedural background are set forth in full in our prior opinion.[3] We restate the most relevant facts here.

On November 9, 2008, Blaser was driving his 1996 Ford Ranger pickup southbound on 545th Avenue, a vacated road in Madison County, and McCaw was riding as a passenger. While traveling on the vacated road, Blaser drove into a washout, or a large hole in the middle of the road, approximately 12 feet wide and 8 feet deep. As a result of the accident, the pickup truck was damaged, Blaser sustained minor injuries, and McCaw sustained severe injuries. Blaser, McCaw, and their wives initiated this action against the County seeking damages for the injuries resulting from the accident.

According to the trial record, 545th Avenue is a north-south roadway between 845th Road and 846th Road and 846th Road is the county line between Madison County and Pierce County, Nebraska, with Madison County lying to the south. When the

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[2] *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013).

[3] *Id.*

County vacated 545th Avenue in 2004, it qualified the vacation and retained a right-of-way over the vacated road subject to any easements of record.

In April 2005, after the County had vacated the road, road closed signs were placed at the north and south ends of the vacated road. Blaser and McCaw testified that on November 9, 2008, the day of their accident, they did not observe any road closed signs. The deputy who investigated the accident stated that a road closed sign at the north end of the vacated road had been unbolted and laid on the ground next to the upright post and was not visible from the road on the day of the Blaser/McCaw accident. Gary Drahota, a man who owned land and lived in the area, stated that he did not see a road closed sign at the north end of the vacated portion of the road at the intersection of 545th Avenue and 846th Road on October 27, 2008. Another man, who owns land surrounding the vacated road, testified that he recalled seeing a road closed sign at the north end of the vacated road a few days before the Blaser/McCaw accident.

Several weeks prior to the Blaser/McCaw accident, another accident occurred involving the same washout on the vacated road. Between October 27 and October 30, 2008, Drahota notified law enforcement that he had been traveling on the vacated road when he found an abandoned vehicle in the washout. On October 30, a deputy sheriff for the County investigated this report and found the abandoned vehicle in the washout. He approached the abandoned vehicle from the south end of the vacated road, traveling north.

Sometime after the County was notified of the abandoned vehicle and before the Blaser/McCaw accident, the County's highway superintendent was instructed to inspect the road closed signs on the vacated road. He testified that while he did inspect the south end of the vacated portion of 545th Avenue, he did not actually inspect the north end of the vacated portion of the road at the intersection of 545th Avenue and 846th Road. Regarding the north portion of the vacated road, the superintendent stated he positioned himself 2 miles north of the county line and looked to the south. He testified

that he could not see any signs from his vantage point of 2 miles away.

In their operative complaint, the Blasers and McCaws alleged that the County was negligent because it failed to "correct the malfunction, destruction, or any unauthorized removal of the Road Closed signed [sic] when it had actual and constructive knowledge and notice of the malfunction, destruction, and or [sic] removal of the sign." In its answer, the County denied many of the allegations of the complaint but admitted that, as part of the investigation by the Madison County sheriff's office, the sheriff's office located a road closed sign that had been knocked over. The record shows that the investigation occurred on November 9, 2008, the day of the accident. The County affirmatively asserted that it was immune from suit under various provisions of the PSTCA and asserted the affirmative defenses of contributory negligence, assumption of the risk, and alternative safe route. One particular defense under the PSTCA provides that a political subdivision retains sovereign immunity from "[a]ny claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign . . . unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal."[4]

Initial Determination by District Court

After a bench trial, the district court determined that the County negligently breached a duty to maintain the vacated road and that the breach was a proximate cause of the accident. Although it noted that the evidence regarding the existence and position of the road closed sign on the day of the accident was in dispute, the court made no finding as to whether the sign was up or down on the day of the accident. The court ultimately entered a judgment for damages in favor of Blaser and the McCaws.

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[4] § 13-910(9).

Prior Appeals

We dismissed the County's initial appeal because of a jurisdictional defect.[5] In the second appeal, we determined the district court erred in finding the County had a duty to remedy the condition of the vacated road, reasoning it had no duty to maintain the road after vacating it. Instead, we concluded the County had only the duty to do what a reasonable County would do, having vacated a road but retaining a right-of-way.[6] We stated that the scope of this duty was "less than the obligation to fully maintain" the road as though it were a public road, but was "more than no obligations, as with a completely vacated road."[7] Citing the proposition that the "issues in a case are framed by the pleadings,"[8] we noted that the operative complaint alleged that the County breached its duty by "'failing to correct the malfunction, destruction, or any unauthorized removal of the Road Closed'"[9] sign when the County had actual or constructive knowledge and notice of the malfunction, destruction, or unauthorized removal. We determined that the "central issue in the case was whether the County met its obligations relative to the warning sign it had chosen to erect,"[10] and we remanded the cause with directions

> to find whether the County had actual or constructive notice that *its warning sign was down* on the date of the accident and whether the County had reasonable time to correct the problem. These findings will determine whether the County retained sovereign immunity, as the County claims under § 13-910(9).[11]

After the opinion was released, the County filed a motion for rehearing asserting that our opinion was unclear as to

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[5] See *Blaser v. County of Madison, supra* note 2.

[6] *Id.*

[7] *Id.* at 308, 826 N.W.2d at 568.

[8] *Id.* at 309, 826 N.W.2d at 568, citing *Richards v. Meeske*, 268 Neb. 901, 689 N.W.2d 337 (2004).

[9] *Id.* at 309, 826 N.W.2d at 568.

[10] *Id.* at 311, 826 N.W.2d at 569.

[11] *Id.* (emphasis supplied).

the scope of the remand. Specifically, the County sought clarification as to whether the remand was limited to a determination of the road closed sign issue or whether it was for a new trial on all issues and defenses. On March 20, 2013, we overruled the motion for rehearing with a minute entry stating: "Cause reversed and remanded for a new trial on all issues."

Proceedings Following Remand

After issuance of our mandate and remand to the district court, Blaser and the McCaws (appellants) moved for leave to file a second amended complaint. Specifically, they sought to amend their allegation of breach of duty to assert the following:

> [The] County was negligent and breached its duty to [appellants] by failing to exercise the degree of care that would be exercised by a reasonable county under the circumstances, which negligence includes, but is not limited to:
>
> A. Failing to prevent motorists from driving into the hole in the road when it knew that motorists continued to use the publicly retained right of way.
>
> B. It knew or should have known that any sign posted was not effective to prevent travel on right of way by motorists.
>
> C. Failing to properly sign the road as required by the Manual on Uniform Traffic Control Devices[.]
>
> D. Failing to inspect the signs when it knew or should have known that the signs were not effective.
>
> E. Failing to correct the malfunction, destruction, or any unauthorized removal of the Road Closed signed [sic] when it had actual and constructive knowledge and notice of the malfunction, destruction, and or removal of the sign, which sign would have notified the traveling public that the section of road was vacated and contained dangers thereon.

The district court denied leave to amend, reasoning the last allegation was part of the original complaint and the first four

allegations had "been addressed by the Supreme Court and rejected as a duty greater than legally required."

The parties then stipulated that the case could be submitted on the testimony, exhibits, and stipulations contained in the bill of exceptions from the second appeal. After considering this record again, limiting itself to what it considered the law of the case after the second appeal, the district court found the County was entitled to sovereign immunity under § 13-910(9). In doing so, the court found that the road closed sign was down on the day of the accident, it was down only 2 or 3 days prior to the accident, and the County had no actual or constructive knowledge that it was down during this time period. The district court refused to consider whether the road closed sign complied with the Manual on Uniform Traffic Control Devices (Manual), reasoning that the "propriety of the sign" was "not an issue on remand." It also did not consider appellants' argument that the road closed sign was "malfunctioning" within the meaning of § 13-910(9), because it was not "functioning properly" at the time of the accident in that it was not preventing motorists from using the vacated road.

After the district court denied the motion for new trial, appellants perfected this timely appeal.

ASSIGNMENTS OF ERROR

Appellants assign, restated and consolidated, that the district court erred in (1) limiting its analysis of the County's entitlement to sovereign immunity only to the issues of whether the road closed sign was up or down and whether the County had a reasonable time to remedy the situation if the sign was down, instead of also determining whether the road closed sign was functioning properly on the day of the accident and whether the County had actual or constructive knowledge that it was not functioning properly and a reasonable amount of time to remedy the problem; (2) finding the propriety of the road closed sign and its compliance with the Manual were not issues on remand; and (3) failing to grant leave to amend the complaint following our remand.

STANDARD OF REVIEW

[1] In actions brought under the PSTCA, an appellate court will not disturb the factual findings of the trial court unless they are clearly wrong.[12]

[2] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.[13]

ANALYSIS

Sovereign Immunity

This action was brought against the County pursuant to the PSTCA, which waives a political subdivision's sovereign immunity under limited conditions. Certain claims are exempt from the waiver of sovereign immunity and cannot be brought against a political subdivision.[14] These exempt claims are set forth in § 13-910, which provides that the PSTCA shall not apply to:

> (2) Any claim based upon the exercise or performance of or the failure to exercise or perform a discretionary function or duty on the part of the political subdivision or an employee of the political subdivision, whether or not the discretion is abused;
>
> . . . .
>
> (9) Any claim arising out of the malfunction, destruction, or unauthorized removal of any traffic or road sign, signal, or warning device unless it is not corrected by the political subdivision responsible within a reasonable time after actual or constructive notice of such malfunction, destruction, or removal. Nothing in this subdivision shall give rise to liability arising from an act or omission of

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[12] *Blaser v. County of Madision, supra* note 2; *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[13] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

[14] See, § 13-910; *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011); *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010).

> any political subdivision in placing or removing any traffic or road signs, signals, or warning devices when such placement or removal is the result of a discretionary act of the political subdivision.

The County alleged as an affirmative defense that appellants' claims fell within these and other exemptions to the PSTCA's waiver of sovereign immunity.

Although our prior opinion remanded the cause for a new trial on all issues, we specifically directed the district court to "make findings regarding the warning sign issue as these facts relate to the County's claim of sovereign immunity under § 13-910(9)."[15] It is entirely reasonable that the district court did so as a threshold matter before reaching the merits of the claims, because if a political subdivision proves that a claim comes within an exception pursuant to § 13-910, then the claim is barred by sovereign immunity and the political subdivision cannot be liable.[16] After reviewing the evidence, the district court found that the road closed sign which had been posted at the north end of the vacated roadway had been removed "within two to three days prior to the day of the accident or on that day" and that the County "was not notified that the sign was down during this time period." The court further concluded that because the County had no actual or constructive notice that the sign was down, it "had no reasonable time to remedy the same." Appellants do not specifically assign that these factual findings were clearly erroneous, and we conclude they were not.

But appellants contend that the district court's analysis did not go far enough. They argue that the district court "failed to address whether the sign was functioning properly."[17] In this regard, they rely on a passage in our prior opinion stating that the district court should determine "whether the County had

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[15] *Blaser v. County of Madision, supra* note 2, 285 Neb. at 301, 826 N.W.2d at 563.

[16] See *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

[17] Brief for appellants at 27.

actual or constructive knowledge that its road closed sign at the north end of the vacated road was not functioning properly on the day of the accident."[18] Although we acknowledge our use of the phrase "functioning properly" may have been somewhat imprecise, clearly, a warning sign which has been removed without authorization of the political subdivision which erected it is not "functioning properly."

But appellants contend it means more. Relying on our use of the phrase "functioning properly," they assert that the district court erred in its interpretation of the word "malfunction" as it is used in § 13-910(9). They argue that there was a "malfunction" of the road closed sign, because even when it was in place, it was "not functioning properly" in that it did not prevent motorists from entering the vacated roadway. And they contend that the County had actual knowledge of this "malfunction" in ample time to take remedial measures which would have prevented the accident, thereby making § 13-910(9) inapplicable.

[3] But this argument necessarily implicates the § 13-910(2) discretionary function exception to the waiver of sovereign immunity which the County pled as an affirmative defense. Some background is helpful to understand why this is so. Neb. Rev. Stat. § 60-6,121 (Reissue 2010) provides: "Local authorities in their respective jurisdictions shall place and maintain such traffic control 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 . . . shall conform with the [M]anual." We have held that this statute is a legislative grant of discretion to political subdivisions with respect to the installation of traffic control devices.[19]

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[18] *Blaser v. County of Madison, supra* note 2, 285 Neb. at 292, 826 N.W.2d at 558.

[19] See, *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012); *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002). See, also, *Blaser v. County of Madison, supra* note 2.

Thus, the placement of traffic control devices is a discretionary function, although once a decision to utilize a particular device has been made, the device is required to conform to the Manual.[20]

We decline appellants' invitation to equate "malfunction" as used in § 13-910(9) with a lack of efficacy, because to do so would negate the § 13-910(2) discretionary function exception. The County had complete discretion in determining what type of traffic control device to use, or whether to use any traffic control device at all. Although any device it chose to utilize had to comply with the specifications of the Manual for that device,[21] the Manual does not establish legal requirements for the use of any specific device, but, rather, contemplates the exercise of engineering judgment in determining whether to use a particular traffic control device at a particular location.[22] Thus, even if the County had come to the conclusion that the sign which it chose to use was not effective in keeping motorists off the vacated road, it had complete discretion to decide whether to keep the sign or to utilize some alternative means, such as a different type of sign or a barricade. The fact that the sign may not have been effective when it was in place cannot constitute a "malfunction" within the meaning of § 13-910(9).

Appellants also contend that the road closed sign which the County erected at the north end of the vacated road did not conform to the Manual. There is evidence that the road closed sign which Madison County erected was yellow and diamond shaped, whereas the Manual indicates a rectangular black and white sign was appropriate. But we need not determine in this case whether the sign erected complied with the Manual, because any deviation from the specifications of the Manual is immaterial. The district court found the sign had been removed without the knowledge or authorization of the County 2 or 3

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[20] *Shipley v. Department of Roads, supra* note 19; *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005).

[21] *Id.*

[22] *Shipley v. Department of Roads, supra* note 19.

days prior to the accident. Because the sign was not up on the date of the accident, the fact that it may have deviated from the specifications of the Manual with respect to color and shape could not, as a matter of law, have been a proximate cause of the accident.

We conclude that the district court complied with our mandate by making a threshold determination of whether the County retained sovereign immunity with respect to appellants' claims. Its resolution of that issue in favor of the County was based upon factual findings which are not clearly erroneous, and the court made no error of law.

Denial of Leave to Amend

The district court did not abuse its discretion in denying appellants' motion for leave to amend their complaint. Their proposed new allegations that the County failed to prevent motorists from entering the road or take action after learning that motorists were using the road despite the presence of a road closed sign implicate discretionary functions, for the reasons explained above. Their allegation that the County negligently failed to inspect the sign is subsumed within the district court's finding that the sign was removed within 2 to 3 days prior to the accident without the County's actual or constructive knowledge. Finally, the proposed allegation that the sign did not comply with the specifications of the Manual is entirely irrelevant given the court's finding that the sign was not in place at the time of the accident.

CONCLUSION

As we noted in *Shipley v. Department of Roads*[23] and *McCormick v. City of Norfolk*,[24] because immunity necessarily implies that a "wrong" has occurred, some tort claims against political subdivisions will inevitably go unremedied. That is the circumstance here. Clearly, the County could have exercised its discretion to take additional precautionary measures

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[23] *Id.*

[24] *McCormick v. City of Norfolk, supra* note 19.

which may have prevented this accident. But because it retains sovereign immunity with respect to such discretionary functions, it cannot be held legally liable for its inaction. For these reasons, we affirm the judgment of the district court.

AFFIRMED.

HEAVICAN, C.J., not participating.

RFD-TV, LLC, APPELLANT, V. WILDOPENWEST FINANCE, LLC, DOING BUSINESS AS WOW! CABLE, AND KNOLOGY, INC., APPELLEES.

849 N.W.2d 107

Filed June 13, 2014. No. S-13-581.

1. **Motions to Dismiss: Jurisdiction: Pleadings: Evidence.** When a trial court relies solely on pleadings and supporting affidavits in ruling on a motion to dismiss for want of personal jurisdiction, the plaintiff need only make a prima facie showing of jurisdiction to survive the motion. However, if the court holds an evidentiary hearing on the issue or decides the matter after trial, then the plaintiff bears the burden of demonstrating personal jurisdiction by a preponderance of the evidence.
2. **Jurisdiction: Appeal and Error.** An appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Motions to Dismiss: Appeal and Error.** In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
4. **Judgments: Appeal and Error.** An appellate court determines questions of law independently of the determination reached by the lower court.
5. **Courts: Jurisdiction: Pleadings: Affidavits.** A trial court may elect to decide the issue of personal jurisdiction before trial, or it may defer the matter until trial. A trial court also has discretion in electing whether to decide a matter based on pleadings and affidavits, or conduct a hearing and receive evidence.
6. **Summary Judgment: Motions to Dismiss: Proof.** If a motion to dismiss is treated as one for summary judgment, then the movant carries the burden of showing that there is no genuine issue as to any material fact.
7. **Summary Judgment: Motions to Dismiss: Jurisdiction: Affidavits.** When the issue on a motion to dismiss is personal jurisdiction, affidavits may be submitted without converting the motion into one for summary judgment.
8. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
9. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether

the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

10. ____: ____: ____. When a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process.
11. ____: ____: ____. Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person.
12. **Jurisdiction: States.** When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
13. **Due Process: Jurisdiction: States.** The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
14. **States: Parties: Statutes.** Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed as modified.

Steven D. Davidson and Krista M. Eckhoff, of Baird Holm, L.L.P., for appellant.

Megan S. Wright, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and Vince M. Roche, of Davenport, Evans, Hurwitz & Smith, L.L.P., for appellees.

HEAVICAN, C.J., STEPHAN, MCCORMACK, and CASSEL, JJ., and INBODY, Chief Judge.

HEAVICAN, C.J.

I. INTRODUCTION

RFD-TV, LLC (RFD), filed a complaint against WildOpenWest Finance, LLC, doing business as WOW! Cable (WOW), and Knology, Inc., for breach of contract related to the termination of a cable television affiliation agreement. The defendants moved to dismiss the complaint for lack

of personal jurisdiction. After a hearing, the district court dismissed the case with prejudice. RFD appeals. We affirm as modified.

II. BACKGROUND

Appellant, RFD, is a television programming service focused on the interests of rural and agricultural counties. RFD is a Delaware limited liability company that claims Omaha, Nebraska, as its principal place of business. Knology and WOW are cable television providers operating in several locations, including Kansas and South Dakota. Knology is a Delaware corporation with its principal place of business in Georgia. WOW is a Delaware limited liability company with its principal place of business in Colorado. Neither Knology nor WOW has subscribers in the State of Nebraska, and neither company maintains a physical presence in Nebraska.

On December 14, 2009, RFD executed an affiliation agreement (Sunflower Agreement) with The World Company, doing business as Sunflower Broadband Corporation (Sunflower). The Sunflower Agreement granted Sunflower a nonexclusive right and license to distribute RFD programming to Sunflower's subscribers in Lawrence, Kansas, in exchange for a monthly per-subscriber license fee. The Sunflower Agreement was for an initial term of 5 years, expiring on December 13, 2014. The Sunflower Agreement provides that it "shall be governed by, construed, and enforced in accordance with the laws of the State of Nebraska" and states that "[a]ny dispute arising in or relating to this Agreement shall be resolved by binding arbitration in Omaha, Douglas County, Nebraska . . . ." Knology purchased Sunflower's assets in August 2010. Prior to acquiring Sunflower, Knology was providing cable service to subscribers in Sioux Falls and Rapid City, South Dakota.

In June 2012, Knology became a wholly owned subsidiary of WOW. In October, Knology and WOW informed RFD that as of December 1, 2012, they no longer intended to provide RFD programming to their subscribers. Knology and WOW ceased distribution of RFD programming and did not pay fees to RFD in December 2012.

On December 28, 2012, RFD filed a complaint alleging that Knology had ratified and adopted the Sunflower Agreement by distributing RFD programming to its subscribers in both Kansas and South Dakota and paying RFD the monthly fee according to the pricing structure provided in the Sunflower Agreement. In its complaint, RFD alleges Knology breached the Sunflower Agreement when it stopped making monthly fee payments to RFD before the contract expired.

Knology and WOW (hereinafter collectively appellees) filed a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(2), alleging that the district court did not have personal jurisdiction over them and alternatively asking for a declaration regarding arbitration. The district court held a hearing on the motion. There was no oral testimony at the hearing, but the court received evidence in the form of an affidavit from each party.

Appellees offered into evidence an affidavit from Peter Smith, senior vice president of programming and advertising sales for WOW. In Smith's affidavit, he points out that RFD's production facilities and network operations are located in Nashville, Tennessee, and that the signal for RFD-TV is uploaded from Nashville. Smith also notes that under Knology's asset purchase agreement with Sunflower, Knology assumed only certain, specified contracts between Sunflower and programmers like RFD and that the Sunflower Agreement was not one of the contracts assumed by Knology.

Attempting to refute RFD's claim that Knology assumed the Sunflower contract by performing under its terms, Smith states that Knology is a member of the National Cable Television Cooperative, Inc. (NCTC), which acquires programming rights from cable networks on behalf of its members. On December 9, 2002, NCTC entered into an agreement with RFD Communications, Inc., allowing NCTC members to distribute RFD's programming. The NCTC agreement expired at the end of 2007. However, after the NCTC agreement expired, Knology continued to provide RFD services to its subscribers in South Dakota, paying fees to RFD on a month-to-month basis.

According to Smith, after Knology acquired Sunflower in 2010, it provided RFD programming to its subscribers in both Kansas and South Dakota under the continuing month-to-month arrangements originating from the NCTC agreement. Knology claims it paid RFD the same rate of $0.154 per subscriber both prior to and after acquiring Sunflower and adding the Kansas market, suggesting that Knology's actions were unaffected by the terms of the Sunflower Agreement. Smith notes that representatives from RFD tried to convince Knology to sign an affiliation agreement in 2011 and 2012, but Knology never signed such an agreement.

Smith asserts that no one from Knology or WOW has ever traveled to Nebraska to meet with RFD representatives regarding its services. According to Smith, appellees' contacts with RFD have been limited to sending licensing fees to RFD monthly and occasionally communicating remotely with RFD employees.

After the court received Smith's affidavit into evidence, RFD submitted the affidavit of Patrick Gottsch, founder and president of RFD, in opposition to the motion to dismiss. Gottsch states that RFD's corporate headquarters and business records are located in Nebraska and that program content decisions for RFD's Nashville production studios are made from Omaha. Gottsch also asserts that Knology paid a lower fee of $0.10 per subscriber under the NCTC agreement and that only after acquiring Sunflower did it begin paying RFD $0.154 per subscriber—a rate Gottsch asserts was calculated under the terms of the Sunflower Agreement. Gottsch asserts that Knology would not have been authorized to distribute RFD programming had the Sunflower Agreement not been assumed and ratified by Knology. Gottsch also notes that the NCTC agreement was with RFD Communications, Inc., which Gottsch suggests was a separate nonprofit entity that ceased doing business in January 2007.

After the hearing, the district court issued a brief order finding the minimum contacts requirement between appellees, as nonresident defendants, and the state had not been met and dismissing the complaint with prejudice.

III. ASSIGNMENTS OF ERROR

RFD assigns, restated, the following errors of the district court: (1) granting the motion to dismiss and, alternatively, (2) dismissing the case with prejudice.

IV. STANDARD OF REVIEW

[1] When a trial court relies solely on pleadings and supporting affidavits in ruling on a motion to dismiss for want of personal jurisdiction, the plaintiff need only make a prima facie showing of jurisdiction to survive the motion.[1] However, if the court holds an evidentiary hearing on the issue or decides the matter after trial, then the plaintiff bears the burden of demonstrating personal jurisdiction by a preponderance of the evidence.[2]

[2,3] An appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.[3] In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.[4]

[4] An appellate court determines questions of law independently of the determination reached by the lower court.[5]

V. ANALYSIS

1. Standard of Review

[5] A trial court may elect to decide the issue of personal jurisdiction before trial, or it may defer the matter until trial. A trial court also has discretion in electing whether to decide a matter based on pleadings and affidavits, or conduct a hearing and receive evidence. The plaintiff's burden of proof and

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[1] See *Ameritas Invest. Corp. v. McKinney*, 269 Neb. 564, 694 N.W.2d 191 (2005).

[2] See *id.*

[3] See *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007).

[4] See *McKinney, supra* note 1.

[5] *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

our standard of review on appeal depend on how the motion to dismiss was dealt with by the trial court.[6]

In this case, the trial court held a hearing, but the only evidence submitted by the parties was in the form of affidavits with accompanying exhibits. Because this hearing fell short of an evidentiary hearing held "in a manner similar to determining the issue at trial,"[7] we conclude that RFD was required only to make a prima facie showing of personal jurisdiction over appellees in order to survive the motion to dismiss.

[6,7] At the hearing, the court indicated to the parties that because it was accepting evidence, it was necessary to change the way the motion to dismiss was treated, and that the motion would now be treated as one for summary judgment. If a motion to dismiss is treated as one for summary judgment, then, under Neb. Rev. Stat. § 25-1332 (Reissue 2008), the movant carries the burden of showing that there is no genuine issue as to any material fact. We note for the sake of clarity that while it is true that under § 6-1112(b)(6) of the rules of pleading, when a matter outside the pleadings is presented by the parties and accepted by the trial court, a defendant's motion to dismiss is to be treated as a motion for summary judgment, in this case, the motion to dismiss was for lack of personal jurisdiction under § 6-1112(b)(2). As noted above, when the issue on a motion to dismiss is personal jurisdiction, affidavits may be submitted without converting the motion into one for summary judgment.[8] Viewed as the motion to dismiss, and not as a motion for summary judgment, RFD was required only to make a prima facie showing of jurisdiction.

2. Personal Jurisdiction

In RFD's first assignment of error, it alleges that the court erred in dismissing the complaint, because RFD made a prima

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[6] See *Horvath v. Nash*, 802 F. Supp. 146 (W.D. Mich. 1992).

[7] *Cutco Industries v. Naughton*, 806 F.2d 361, 364 (2d Cir. 1986). See, also, *Kowalski-Schmidt v. CLS Mortg., Inc.*, 981 F. Supp. 105 (E.D.N.Y. 1997).

[8] See *SK Finance SA v. La Plata County, Bd. of Com'rs*, 126 F.3d 1272 (10th Cir. 1997). See, also, *Dairy Farmers of America, Inc. v. Bassett & Walker*, 702 F.3d 472 (8th Cir. 2012).

facie showing that the district court had personal jurisdiction over appellees. RFD argues two theories for finding personal jurisdiction: (1) that appellees voluntarily assented to jurisdiction of the courts in Nebraska by consenting to provisions in the Sunflower Agreement which required arbitration in Omaha and (2) that appellees have sufficient minimum contacts with Nebraska by establishing a long-term relationship with a Nebraska business.

[8,9] Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[9] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[10]

[10] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2008), provides that a court may exercise personal jurisdiction over a person "[w]ho has any . . . contact with or maintains any . . . relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States." When a state construes its long-arm statute to confer jurisdiction to the fullest extent permitted by the Due Process Clause, the inquiry collapses into the single question of whether exercise of personal jurisdiction comports with due process.[11]

[11-13] Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts

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[9] *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013); *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013); *S.L., supra* note 3; *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006); *Diversified Telecom Servs. v. Clevinger*, 268 Neb. 388, 683 N.W.2d 338 (2004).

[10] *Abdouch, supra* note 9; *VKGS, supra* note 9; *S.L., supra* note 3; *Brunkhardt v. Mountain West Farm Bureau Mut. Ins.*, 269 Neb. 222, 691 N.W.2d 147 (2005); *Kugler Co. v. Growth Products Ltd.*, 265 Neb. 505, 658 N.W.2d 40 (2003).

[11] *Abdouch, supra* note 9; *VKGS, supra* note 9.

by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person.[12] When considering the issue of personal jurisdiction, it is essential in each case that there be some act by which the defendant purposely avails himself or herself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.[13] The benchmark for determining whether the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.[14]

(a) Arbitration Clause

RFD first argues that the district court erred in dismissing the complaint for lack of personal jurisdiction because appellees voluntarily assented to jurisdiction of the courts in Nebraska by consenting to provisions in the Sunflower Agreement which required arbitration in Omaha.

We have held that consent to a valid and enforceable choice of forum clause in a contract is sufficient to satisfy due process, waive the requirement of minimum contacts, and submit a nonresident to the jurisdiction of the forum state.[15] RFD asserts that arbitration clauses that provide for a particular forum constitute forum selection clauses. In its brief, RFD cites primarily federal cases suggesting that consent to an arbitration clause necessarily includes an implicit consent to be sued in the same state.[16] We note that those cases generally involve efforts to

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[12] *Ashby, supra* note 5.

[13] *Clevinger, supra* note 9; *Kugler Co., supra* note 10.

[14] *Abdouch, supra* note 9; *VKGS, supra* note 9; *S.L., supra* note 3.

[15] *McKinney, supra* note 1.

[16] See, *St. Paul Fire and Marine v. Courtney Enterprises*, 270 F.3d 621 (8th Cir. 2001); *Matter of Management Recruiters Intern. and Nebel*, 765 F. Supp. 419 (N.D. Ohio 1991); *Armstrong v. Associates Intern. Holdings Corp.*, 242 Fed. Appx. 955 (5th Cir. 2007).

compel arbitration[17] and that here, RFD never sought to compel arbitration under the Sunflower Agreement.

However, we need not decide whether consent to an arbitration clause can ever subject a party to jurisdiction in the forum state, because we find that in this case, RFD has failed to make a prima facie case that appellees were subject to the arbitration clause at issue. Although RFD need not prove its breach of contract claims at the motion to dismiss stage, in order to subject appellees to jurisdiction in Nebraska, it is necessary to do more than put forward an unsupported allegation.[18]

Appellees were not signatories to the Sunflower Agreement. They also did not expressly assume the agreement when they purchased Sunflower's assets. RFD asserts appellees assumed the contract by performing under its terms. Specifically, RFD states that appellees paid a lower rate per subscriber prior to acquiring Sunflower and that after acquiring Sunflower, appellees paid RFD according to the fee schedule provided in the Sunflower Agreement. However, the evidence in the record does not support this assertion. Attached to RFD's affidavit from Gottsch are invoices showing the rate used to calculate the fees owed by Knology, but the invoice from 2010 suggests that Knology paid the same rate both prior to and after the August 2010 acquisition of Sunflower. We find no other evidence in the record supporting RFD's assertion.

We conclude that the district court did not err in finding RFD had failed to make a prima facie showing that appellees had voluntarily subjected themselves to the jurisdiction of Nebraska courts by consenting to the arbitration clause in the Sunflower Agreement.

(b) Minimum Contacts

RFD next argues that the district court erred in finding it did not have personal jurisdiction over appellees because the

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[17] See *Foster v. Device Partners Intern., LLC*, No. C 12-02279(DMR), 2012 WL 6115618 (N.D. Cal. Nov. 21, 2012) (unpublished decision).

[18] See *Socialist Workers Party v. Attorney General of U. S.*, 375 F. Supp. 318 (1974).

long-term business relationship between RFD and appellees created sufficient minimum contacts with this state.

[14] Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities.[19] Mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction,[20] but, as we noted in *Kugler Co. v. Growth Products Ltd.*,[21] the existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction. In *Kugler Co.*, we said we would also look at the prior negotiations between the parties and the contemplated consequences of their dealings.[22]

In this case, viewing the evidence in the light most favorable to RFD, appellees paid licensing fees to a party in this state for a product received from another state and distributed as a service to customers in other states. Appellees also occasionally used telephone, e-mail, and mail to discuss and pay invoices from RFD. Although monthly payments were made over the course of at least 2 years, the evidence in the record suggests that the actual business dealings between RFD and appellees were extremely limited; appellees paid to provide services based on terms negotiated by other parties (Sunflower and NCTC). The record suggests that the only direct conversation about contract terms between RFD and appellees consisted of appellees' rejecting RFD's efforts to get appellees to enter into contract negotiations.

Generally, Nebraska courts would be in the best position to apply Nebraska law, as required by the choice of law provision in the Sunflower Agreement. Nonetheless, here, we find that RFD failed to make a prima facie showing that appellees had

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[19] *Kugler Co., supra* note 10.

[20] *Clevinger, supra* note 9.

[21] *Kugler Co., supra* note 10.

[22] *Id.*

sufficient minimum contacts with this state to subject them to the jurisdiction of our courts. The district court did not err in dismissing the complaint for lack of personal jurisdiction.

3. Dismissal With Prejudice

In RFD's second assignment of error, it asserts that the district court erred in dismissing the case with prejudice, thereby preventing RFD from refiling the case in the proper forum. We find the issue to be less cut-and-dried than the briefs of the parties would suggest.

There is no statutory grant of judicial discretion to decide whether to dismiss with or without prejudice on a motion to dismiss for lack of personal jurisdiction.[23] Thus, we find this issue to be a question of law. The Eighth Circuit has said that "a dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits and res judicata precludes further litigation."[24] However, the Full Faith and Credit Clause of the U.S. Constitution requires a court to recognize a judgment from another jurisdiction only if the court rendering the judgment had jurisdiction over the subject matter and parties.[25] Thus, a dismissal for lack of personal jurisdiction, even a dismissal with prejudice, should not prevent RFD from pursuing its claims in an appropriate forum.[26]

On the other hand, a dismissal with prejudice would preclude RFD from filing a second suit with the same claims in a Nebraska court. Under the doctrine of collateral estoppel, the findings in this opinion would have a similar preclusive effective. However, as noted by the Eighth Circuit in *Pohlmann v. Bil-Jax, Inc.*,[27] because personal jurisdiction is

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[23] See, Neb. Rev. Stat. § 25-601(1) (Reissue 2008); *In re Guardianship of David G.*, 18 Neb. App. 918, 798 N.W.2d 131 (2011). Cf. *United States v. Taylor*, 487 U.S. 326, 108 S. Ct. 2413, 101 L. Ed. 2d 297 (1988).

[24] *Jaramillo v. Burkhart*, 59 F.3d 78, 79 (8th Cir. 1995).

[25] See *Baker v. General Motors Corp.*, 522 U.S. 222, 118 S. Ct. 657, 139 L. Ed. 2d 580 (1998).

[26] See *Deckert v. Wachovia Student Financial Services*, 963 F.2d 816 (5th Cir. 1992).

[27] *Pohlman v. Bil-Jax, Inc.*, 176 F.3d 1110 (8th Cir. 1999).

determined at the time a suit is commenced, it is possible that due to future events, this legal situation could change. Although it seems unlikely under the facts of this case, if, for example, appellees were to relocate to Nebraska, then personal jurisdiction over appellees in a subsequent suit could be proper in this state.

We also note that in this case, both parties agreed in briefs and in arguments before this court that the dismissal should have been without prejudice. For these reasons, we find that the district court erred in dismissing the case with prejudice and its judgment is ordered modified to a dismissal without prejudice.

VI. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed as modified.

AFFIRMED AS MODIFIED.

WRIGHT, CONNOLLY, and MILLER-LERMAN, JJ., not participating.

CHRISTOPHER M. PAYNE, APPELLANT, V.
NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

848 N.W.2d 597

Filed June 13, 2014. No. S-13-627.

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, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013), may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **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.
3. **Constitutional Law: Prisoners: Courts.** The U.S. Constitution guarantees prisoners a right to access the courts.
4. **Prisoners: Courts: Words and Phrases.** Meaningful access to the courts is the capability to bring actions seeking new trials, release from confinement, or vindication of fundamental civil rights.

5. **Constitutional Law: Prisoners: Courts.** The constitutional right to access the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.
6. **Prisoners: Courts.** The right of access to the courts does not afford prisoners unlimited access to prison law libraries.
7. ____: ____. The number of hours of library access alone is not determinative of whether a prisoner's right to access the court has been violated.
8. **Prisoners: Courts: Claims: Damages: Proof.** To establish a violation of the right of meaningful access to the courts, a prisoner must establish the State has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury, that is, the hindrance of a nonfrivolous and arguably meritorious underlying legal claim.
9. **Constitutional Law: Prisoners: Courts.** The State is not obligated under the Constitution to enable inmates to litigate effectively once in court.
10. ____: ____: ____. Access to legal materials under the constitutional right to access the courts is required only for unrepresented litigants.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Christopher M. Payne, pro se.

Jon Bruning, Attorney General, and Amie Larson for appellees.

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

MCCORMACK, J.

NATURE OF CASE

Christopher M. Payne, an inmate incarcerated at the Tecumseh State Correctional Institution (TSCI), challenges TSCI operational memorandums that generally limit an inmate's access to the law library to 1 hour per day. The district court for Lancaster County granted summary judgment and found that Payne failed to prove an actual injury caused by the library time regulations. Payne now appeals.

BACKGROUND

On November 21, 2011, Payne filed a petition for declaratory judgment pursuant to Nebraska's Administrative

Procedure Act,[1] alleging that TSCI operational memorandums Nos. 107.01.01(II)(A)(3) and 116.01.02(III)(A)(3) were invalid and unconstitutional because they restrict his law library time in violation of his right to access the courts. Payne also requested that any other Nebraska Department of Correctional Services or TSCI regulation which limits or restricts his access to the law library be found invalid. Payne named the Department of Correctional Services, the warden of TSCI, and the librarian of TSCI as defendants. In his petition, Payne alleges that he had four other civil actions and two criminal postconviction actions that he had filed or that he had planned on filing. One of his postconviction actions was being handled by counsel, and the rest were being undertaken pro se. He alleges additional law library time is necessary to litigate those actions.

Inmates in the general population at TSCI are allowed 1 hour of law library time per day. To receive library time, inmates are required to request a library pass. The library pass regulations are outlined in TSCI operational memorandum No. 107.01.01. TSCI issues passes to the library for every inmate who seeks access; however, there is a library capacity limit of 28 total people, which includes inmates, inmate workers, and staff. The pass system was designed to help ensure that the number of people in the library does not exceed the library's capacity. According to the librarian of TSCI, unrestricted access to the library is not possible, because all inmates are allowed access to the law library services. Without the pass system, TSCI would be unable to provide availability to all inmates.

If an inmate has a court date and shows he has an exigent circumstance, he may request and be allowed an extra hour of library time temporarily. The inmate is required to request the extra hour of law library time 30 days in advance.

In the library, inmates are allowed to make photocopies for legal purposes, including legal documents. Inmates are allowed

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[1] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013).

to make notes during law library time so that they can continue to work in their living unit. The law library is intended to be for legal research only.

Ultimately, the district court granted summary judgment in favor of the defendants and found that there was no genuine issue of material fact that Payne did not show an actual injury to a nonfrivolous and arguably meritorious claim as a result of the challenged TSCI regulations and the limits on his access to the law library.

ASSIGNMENTS OF ERROR

Payne assigns that the district court erred in (1) applying the federal standard for determining standing on this state law claim and (2) finding that the defendants were entitled to judgment as a matter of law.

STANDARD OF REVIEW

[1] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act, §§ 84-901 to 84-920, may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[2]

[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]

ANALYSIS

The primary issue for this appeal is whether the 1-hour-per-day regulation on Payne's law library time created an actual injury sufficient to meaningfully deny Payne access to the courts. We find that Payne did not prove an actual injury, and we affirm the district court's order.

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[2] *Gridiron Mgmt. Group v. Travelers Indemnity Co.*, 286 Neb. 901, 839 N.W.2d 324 (2013).

[3] *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014).

[3-5] The U.S. Constitution guarantees prisoners a right to access the courts.[4] Meaningful access to the courts is the capability to bring "'actions seeking new trials, release from confinement, or vindication of fundamental civil rights.'"[5] This right "'requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.'"[6]

[6,7] However, there is not "an abstract, freestanding right to a law library or legal assistance," and therefore, "an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense."[7] The right of access to the courts "'does not afford prisoners unlimited access to prison law libraries.'"[8] And the number of hours of library access alone is not determinative of whether a prisoner's right to access the court has been violated.[9]

[8] To establish a violation of the right of meaningful access to the courts, "a prisoner must establish the state has not provided an opportunity to litigate a claim challenging the prisoner's sentence or conditions of confinement in a court of law, which resulted in actual injury, that is, the hindrance of a nonfrivolous and arguably meritorious underlying legal claim."[10] As the U.S. Supreme Court stated, the constitutional right to access the courts

> does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to

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[4] *Murray v. Giarratano*, 492 U.S. 1, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989).

[5] *White v. Kautzky*, 494 F.3d 677, 680 (8th Cir. 2007).

[6] *Id.* at 679.

[7] *Lewis v. Casey*, 518 U.S. 343, 351, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996).

[8] *Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999).

[9] See *Lewis v. Casey, supra* note 7.

[10] *White v. Kautzky, supra* note 5, 494 F.3d at 680.

> slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.[11]

Instead, prisoners are guaranteed "the conferral of a capability—the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts."[12]

We begin with Payne's assignment of error on standing. Payne argues that the district court impermissibly applied federal principles on standing to his state action. We find no merit to this argument. The district court did not hold that Payne lacked standing to sue in Nebraska courts. Rather, the district court found that the underlying claim by Payne failed on the merits because there was not an actual injury. Although the U.S. Supreme Court's majority opinion in *Lewis v. Casey*[13] frames the issue of actual injury as a standing issue, an actual injury is also required to be successful on the merits. Therefore, we will not address standing, but, rather, we will address whether Payne demonstrated an actual injury sufficient to constitute a violation of his constitutional right to access the courts.[14]

In his brief, Payne argues that the law library regulations are not justified because of a lack of legitimate security considerations. However, whether the law library restrictions are justified becomes an issue only if a constitutional right is impinged.[15] And the constitutional right to access the courts is only impinged if the regulation(s) hindered a nonfrivolous and arguably meritorious legal claim.

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[11] *Lewis v. Casey, supra* note 7, 518 U.S. at 355 (emphasis in original).

[12] *Id.*, 518 U.S. at 356.

[13] *Lewis v. Casey, supra* note 7.

[14] See *id.*

[15] See *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987).

The record demonstrates that Payne had seven pending "lawsuits" at the time of deposition. After reviewing the record, we find, as did the district court, that there is no evidence that the law library restrictions hindered a nonfrivolous and arguably meritorious legal claim challenging his sentence or the condition of his confinement. We now address each lawsuit.

Two of Payne's seven "lawsuits," which are better classified as "legal claims," involve tort claims raised with the State Tort Claims Board. As already stated, the constitutional right to access the courts guarantees access to the courts only to attack sentences, directly or collaterally, and to challenge the conditions of confinement.[16] Neither of the claims before the State Tort Claims Board challenges his sentence or condition of his confinement and, therefore, cannot be the basis for an actual injury.

Next, Payne has two claims, at both the state and federal level, that the library regulations have interfered with his ability to litigate constitutional violations regarding his prisoner mail. Although these claims deal with the condition of his confinement, they fail, because the evidence, even when viewed in the light most favorable to Payne, does not establish an actual hindrance to either claim. The federal lawsuit, case No. 4:11CV3017, has been filed in the U.S. District Court and has proceeded through the summary judgment stage. The federal lawsuit was still pending at the time of Payne's deposition for this case. Further, seeing that the federal suit was successfully filed and has been successfully defended by Payne through the summary judgment stage, the evidence simply does not support a finding that the law library restrictions prevented Payne from bringing his prisoner mail challenge to the federal court.

[9] Likewise, the evidence establishes that the state claim also has not been hindered. Although this claim has not yet been filed, the record does contain a complete draft of the prisoner mail complaint to be filed in state court. There is no evidence in the record that the complaint requires more library research time to be filed. In fact, Payne testified that

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[16] *Lewis v. Casey, supra* note 7.

his concern "isn't the adequacy of the filing itself. It's the sufficiency of the time to litigate later." The U.S. Supreme Court in *Lewis v. Casey* specifically denied that the state was obligated to enable inmates "to *litigate effectively* once in court."[17] Rather, the state is required only to allow the prisoner the opportunity to bring to court a grievance.[18] Even when viewing the evidence in the light most favorable to Payne, there is no evidence that the regulations have hindered Payne's ability to bring his mail grievance to the attention of the state courts.

Further, Payne has had two civil actions filed in the district court for Johnson County under cases Nos. CI11-95 and CI11-123. But, again, the record establishes that neither was hindered by law library restriction, because both lawsuits were frivolous and without merit. In case No. CI11-95, Payne filed a lawsuit regarding telephone access. The district court dismissed the action because Payne failed to perfect service and because sovereign immunity barred the action. On appeal, the Nebraska Court of Appeals granted summary affirmance and cited *Martin v. Nebraska Dept. of Corr. Servs.*,[19] which held that sovereign immunity bars suits which seek to compel state officials to take affirmative action. Thus, there is no material issue of fact that the lawsuit was ultimately frivolous and that Payne did not suffer an actual injury in case No. CI11-95. No amount of legal research could have changed the outcome.

In case No. CI11-123, Payne attempted to appeal the denial of his informal grievances regarding the Department of Correctional Services' denial of his attempt to correspond by mail. The district court dismissed his claim under § 84-917(1), because the informal grievances did not constitute a final decision in a contested case. There is no argument made by Payne as to why additional law library time could have rectified the lack of a final decision in a contested case. Case No. CI11-123

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[17] *Id.* at 354 (emphasis in original).

[18] *Id.*

[19] *Martin v. Nebraska Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003).

was ultimately a meritless claim, and its dismissal cannot be attributed to the law library regulations.

[10] And finally, Payne had two postconviction actions pending at the time of his deposition. His postconviction action filed in Sarpy County District Court is being handled by hired counsel. Access to legal materials is required only for unrepresented litigants.[20] The other postconviction action is being handled pro se. The complaint has been filed and at the time of Payne's deposition was in process. There is again no evidence in the record on how the law library regulations hindered his ability to bring his pro se postconviction action to the court.

In conclusion, there is no material issue of fact that Payne has not suffered an actual injury due to the law library regulations he complains of. He has been able to repeatedly bring his grievances to court. These grievances are backed by research and are, considering their pro se nature, well written. What Payne is really complaining about is his lack of litigation success, not access to the courts. As explained above, the U.S. Supreme Court has explicitly stated that a prisoner's right to access the courts does not include the right to litigate effectively.[21] Therefore, we affirm the district court's grant of summary judgment. There is no material factual dispute that the law library regulations did not hinder a nonfrivolous and arguably meritorious legal claim regarding Payne's sentences or conditions of confinement.

CONCLUSION

We find that there is no material factual dispute, even when viewing the facts in the light most favorable to Payne, that the law library regulations did not hinder a nonfrivolous and arguably meritorious legal claim regarding Payne's sentences or conditions of confinement. Therefore, the district court's order granting summary judgment is affirmed.

AFFIRMED.

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[20] *Campbell v. Clarke*, 481 F.3d 967 (7th Cir. 2007).

[21] *Lewis v. Casey, supra* note 7.

Bonnie Nichols, appellant, v. Margie Nichols, appellee.

847 N.W.2d 307

Filed June 13, 2014. No. S-13-841.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. ____: ____. Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.
4. **Judgments: Final Orders: Equity.** In an equitable case, conditional orders are void insofar as they purport to be final judgments.
5. **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.
6. **Judgments: Final Orders.** "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.
7. ____: ____. 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.
8. **Judgments: Final Orders: Time: Appeal and Error.** An appeal cannot be taken from a conditional order purporting to dismiss a pleading in the future upon the occurrence of an event.
9. **Constitutional Law: Jurisdiction: Appeal and Error.** Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.
10. **Actions: Judgments: Final Orders.** A conditional order is not a judgment, because it is not the final determination of the rights of the parties in an action.
11. **Motions to Dismiss: Judgments: Complaints: Appeal and Error.** No appeal can be taken from an order that grants a motion to dismiss a complaint but allows time in which to file an amended complaint; such a conditional order is not a judgment.

Appeal from the District Court for Lancaster County: Stephanie F. Stacy, Judge. Appeal dismissed.

Megan N. Mikolajczyk and David A. Domina, of Domina Law Group, P.C., L.L.O., for appellant.

No appearance for appellee.

Jon Bruning, Attorney General, and James D. Smith for amicus curiae State of Nebraska.

Jennifer Gaughan for amicus curiae Legal Aid of Nebraska.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

Martin A. Cannon, Edward A. Morse, and Andrew M. Hollingsead for amicus curiae Thomas More Society-Omaha.

Dave Bydalek, of Nebraska Family Alliance, and James R. Cunningham, of Nebraska Catholic Conference, for amici curiae Nebraska Family Alliance and Nebraska Catholic Conference.

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

CASSEL, J.

INTRODUCTION

Bonnie Nichols attempted to obtain a dissolution of her Iowa same-sex marriage to Margie Nichols. The district court granted Margie's motion to dismiss but allowed Bonnie to amend her complaint. The court's order purported to dismiss Bonnie's complaint in the future if she failed to amend it within a specified time. After the time expired and without further court action, Bonnie appealed. The court's conditional order, under long-established precedent, cannot perform as a final judgment. Nebraska statutes govern judgments and appeal procedures, and Nebraska's shift to notice pleading did not change those statutes. Because there was no final judgment, we must dismiss the appeal.

BACKGROUND

According to the complaint, Bonnie and Margie were married in Iowa in 2009. In 2012, Bonnie filed a complaint in the district court for Lancaster County to dissolve the union

described in the complaint. The complaint also requested a determination of custody and parenting time for the parties' child and an equitable division of the parties' property.

Margie moved to dismiss the action. She alleged that a Nebraska court lacked jurisdiction to dissolve a same-sex marriage.

On August 30, 2013, the district court entered an order granting Margie's motion to dismiss for lack of subject matter jurisdiction. The court concluded that it lacked subject matter jurisdiction to dissolve the same-sex marriage, because granting a dissolution of marriage under Nebraska law necessarily involves recognizing the marriage and Nebraska's Constitution prohibits recognizing a same-sex marriage.[1] The court also rejected Bonnie's argument that Nebraska courts have jurisdiction under the doctrine of comity. The court gave Bonnie 15 days to file an amended complaint if she wished to pursue relief under a different legal theory. The order stated, "If no Amended Complaint is filed within 15 days, this matter will stand dismissed, with prejudice."

Bonnie did not file an amended complaint. The district court did not enter a judgment dismissing the action. On September 27, 2013, Bonnie filed a notice of appeal, stating that an order was entered on August 30 and "was formally dismissed with prejudice on September 14, 2013." We granted Bonnie's petition to bypass the Nebraska Court of Appeals and directed supplemental briefing regarding the continued vitality of our conditional order case law.

ASSIGNMENTS OF ERROR

Bonnie assigns, restated and consolidated, that the district court erred in (1) failing to give full faith and credit to a valid marriage in a sister state; (2) dismissing the complaint based on Neb. Const. art. I, § 29, when that provision violates provisions and amendments of the U.S. Constitution; and (3) denying Bonnie equal protection of the law and refusing to exercise

[1] See Neb. Const. art. I, § 29.

subject matter jurisdiction on the ground that the parties are of the same gender.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[2]

ANALYSIS

[2,3] We must first confront the absence of a judgment dismissing the complaint. 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.[3] For an appellate court to acquire jurisdiction of an appeal, the party must be appealing from a final order or a judgment.[4] The court's August 30, 2013, order gave Bonnie time to file an amended complaint and stated that the matter would stand dismissed if no amended complaint was filed within 15 days. This was a conditional order.

[4-7] In an equitable case, conditional orders are void insofar as they purport to be final judgments.[5] This is because 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.[6] "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.[7] 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

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[2] *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[3] *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

[4] *Jacobitz v. Aurora Co-op*, 287 Neb. 97, 841 N.W.2d 377 (2013).

[5] See *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006).

[6] *Fitzgerald v. Community Redevelopment Corp.*, 283 Neb. 428, 811 N.W.2d 178 (2012).

[7] *Id.*

the court as to whether the conditions have been met, at which time a final judgment may be made.[8]

[8] We have long held that an appeal cannot be taken from a conditional order purporting to dismiss a pleading in the future upon the occurrence of an event. In *Federal Land Bank of Omaha v. Johnson*,[9] the trial court sustained a demurrer and ordered that "'the Plaintiff be and it hereby is allowed ten days in which to further amend its Petition and upon Plaintiff's failure to so amend, this matter shall be automatically dismissed at Plaintiff's cost.'" This court determined that the order was a conditional order and not a final judgment and, thus, that an appeal from it could not be taken. And in *Schaad v. Simms*,[10] the trial court entered in its docket notes, "'Plaintiff is given 14 days to file second amended petition or to select to stand on amended petition, in which instance [one of the defendants] will stand dismissed from this action without further hearing.'" But because there was no order actually dismissing the action, we determined that there was no final and appealable order and, thus, no appellate jurisdiction. We have consistently rejected attempts to appeal from orders purporting to become effective in the future upon the failure of a condition.[11]

Bonnie urges that our conditional order jurisprudence was abandoned in Nebraska's shift to a notice pleading system. We disagree. Since our move to a notice pleading system, we have not discussed the appealability of a conditional order. In one instance, a conditional order was followed by a final judgment and we addressed the appeal's merits.[12] But in that case, we did not discuss jurisdiction.

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[8] *Id.*

[9] *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 878, 415 N.W.2d 478, 479 (1987).

[10] *Schaad v. Simms*, 240 Neb. 758, 484 N.W.2d 474, 475 (1992).

[11] See, e.g., *County of Sherman v. Evans*, 247 Neb. 288, 526 N.W.2d 232 (1995); *Snell v. Snell*, 230 Neb. 764, 433 N.W.2d 200 (1988); *Building Systems, Inc. v. Medical Center, Ltd.*, 228 Neb. 168, 421 N.W.2d 773 (1988); *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973).

[12] See *State ex rel. Jacob v. Bohn*, 271 Neb. 424, 711 N.W.2d 884 (2006).

[9] The shift from code to notice pleading did not change the statutory procedures governing judgments and appeals. Except in those cases wherein original jurisdiction is specially conferred by Neb. Const. art. V, § 2, the Nebraska Supreme Court exercises appellate jurisdiction, and such appellate jurisdiction can be conferred only in the manner provided by statute.[13] Thus, we must look to our statutes to determine whether we have jurisdiction of an appeal.

[10] Treating a conditional order as appealable would not be consistent with our statutory framework governing judgments and appeals. First, a conditional order is not a judgment, because it is not "the final determination of the rights of the parties in an action."[14] Thus, by definition, a conditional order is not a judgment. Second, our statute requires a specific procedure for entry of a judgment in order to measure the time for appeal from the clerk's file stamp on the judgment. In 1999, the Legislature amended the law concerning judgments to clarify when rendition and entry of a judgment occurs.[15] Rendition of a judgment happens when the judge makes and signs a written notation of the relief granted or denied in an action.[16] "The entry of a judgment . . . occurs when the clerk of the court places the file stamp and date upon the judgment . . . ."[17] The date of entry stamped on the judgment is used to determine the time for appeal.[18] Thus, the statute dictates that the time for taking an appeal will be measured uniformly from the date of the court clerk's file stamp on the judgment. The 1999 legislation made corresponding changes to other statutes governing appeals.[19] These amendments ensured certainty in the appeal process.

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[13] *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

[14] See Neb. Rev. Stat. § 25-1301(1) (Reissue 2008).

[15] See 1999 Neb. Laws, L.B. 43, § 3.

[16] See § 25-1301(2).

[17] § 25-1301(3).

[18] See *id*.

[19] See L.B. 43, § 8 et seq.

Allowing an appeal to be taken from a conditional order would defeat the purpose of this legislation.

Because Nebraska did not adopt the federal rules governing judgments and appeals, federal case law provides little assistance. We often look to federal decisions for guidance where our rule of procedure is identical to the equivalent federal rule.[20] Although Nebraska's notice pleading rules largely import the language of the equivalent federal rules, the federal courts follow a different framework of rules governing entry of judgment and taking of appeals. Federal courts have pointed to Fed. R. Civ. P. 58, a rule that addresses entering judgment. But Nebraska did not adopt rule 58; rather, our jurisprudence is driven by statute. Consequently, the federal decisions are not persuasive authority.

But, for the sake of completeness, we note that most federal courts reach the same result regarding conditional orders. The U.S. Supreme Court has determined that an order dismissing a complaint, but granting leave to amend, is not final.[21] Numerous federal circuit courts articulate the same principle in various ways. Several circuits have held that an order dismissing a complaint with leave to amend is not final.[22] One circuit court added that when it is clear that the pleading may be saved by proper amendment, there is no appealable order

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[20] See, e.g., *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013) (looking to federal decisions for guidance regarding Neb. Ct. R. Pldg. § 6-1112(b)).

[21] See *Jung v. K. & D. Mining Co.*, 356 U.S. 335, 78 S. Ct. 764, 2 L. Ed. 2d 806 (1958).

[22] See, e.g., *Hunt v. Hopkins*, 266 F.3d 934 (8th Cir. 2001); *Trotter v. Regents of University of New Mexico*, 219 F.3d 1179 (10th Cir. 2000); *Santoro v. CTC Foreclosures Services Corp.*, 193 F.3d 1106 (9th Cir. 1999); *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir. 1990); *Blanco v. United States*, 775 F.2d 53 (2d Cir. 1985); *Richards v. Dunne*, 325 F.2d 155 (1st Cir. 1963); *Groves v. City of Darlington, S.C.*, 346 Fed. Appx. 965 (4th Cir. 2009). See, also, *Anastasiadis v. S.S. Little John*, 339 F.2d 538 (5th Cir. 1964) (order staying action for period of time to allow commencement of action in different jurisdiction at which time court would enter order dismissing action was conditional and not final).

where the court dismisses the complaint without prejudice to amendment.[23]

We acknowledge that the federal courts are not unanimous. Some courts have reasoned that a dismissal order with leave to amend becomes final as of the end of the amendment period or when a plaintiff appeals, thereby waiving the filing of an amended complaint.[24] Another circuit court has stated that an order granting a motion to dismiss the complaint, without prejudice, was final where the plaintiff clearly indicated an intent to stand on the original complaint and that once the amendment period expired, the order had the effect of dismissing the improperly pleaded claims with prejudice.[25]

State courts with notice pleading systems also tend to take two different approaches. One approach is to declare an order dismissing the complaint but granting leave to amend to be interlocutory and not appealable by the plaintiffs.[26] The other approach is to treat the order as final when the plaintiff files a notice of appeal instead of filing an amended complaint.[27] But as we have already determined, only the first approach is consistent with Nebraska's statutory framework governing judgments and appeals.

[11] We believe our jurisprudence regarding the appealability of conditional orders remains sound after our move to a notice pleading system, and we continue to adhere to it. Thus, no appeal can be taken from an order that grants a motion to dismiss a complaint but allows time in which to

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[23] See *Azar v. Conley*, 480 F.2d 220 (6th Cir. 1973).

[24] See, *Phonometrics v. Hospitality Franchise Systems*, 203 F.3d 790 (Fed. Cir. 2000); *Albiero v. City of Kankakee*, 122 F.3d 417 (7th Cir. 1997); *Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442 (11th Cir. 1986).

[25] *Frederico v. Home Depot*, 507 F.3d 188 (3d Cir. 2007). See, also, *Borelli v. City of Reading*, 532 F.2d 950 (3d Cir. 1976) (plaintiff can convert dismissal with leave to amend into final order by electing to stand on complaint).

[26] See *Day v. Coffey*, 68 N.C. App. 509, 315 S.E.2d 96 (1984).

[27] See, e.g., *Purnell v. Covington County Bd. of Educ.*, 519 So. 2d 560 (Ala. Civ. App. 1987); *Garver v. Public Service Company of New Mexico*, 77 N.M. 262, 421 P.2d 788 (1966); *Avin v. Verta*, 106 A.2d 145 (D.C. 1954).

file an amended complaint; such a conditional order is not a judgment.

CONCLUSION

Because Bonnie appealed from a conditional order and not a final judgment, we lack jurisdiction over the appeal. Therefore, we must dismiss the appeal.

APPEAL DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
WELLINGTON J. CARNGBE, APPELLANT.
847 N.W.2d 302

Filed June 13, 2014. No. S-13-1077.

1. **Sentences: Appeal and Error.** Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Sentences.** Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.
4. **Statutes: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
7. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
8. **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.
9. **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.

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

Dennis R. Keefe, Lancaster County Public Defender, and Timothy M. Eppler for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Wellington J. Carngbe pled no contest to one count of burglary. He was sentenced to 6 to 8 years' imprisonment and given credit for time served of 4 days. Carngbe appeals. We affirm as modified.

FACTUAL BACKGROUND

According to the factual basis provided by the State, on August 21, 2012, a break-in was reported at a residence located in rural Lancaster County. Several items were stolen, including $400, a bowie knife, a PlayStation 3 video game system, several PlayStation games, and a laptop computer. An older model white Cadillac had been seen in the area around the time of the incident.

Several days later, on August 24, 2012, a home invasion robbery occurred at a location near the site of the first break-in, again in Lancaster County. A Dodge Neon was seen in the area.

The next day, August 25, 2012, law enforcement located and stopped the Neon. Carngbe and another individual were in the vehicle. Consent was given for a search of the vehicle, and the bowie knife and the PlayStation were found inside the vehicle. The laptop was found in a later search of Carngbe's home. The plates on the Neon were later found to belong to a white Cadillac registered in Carngbe's name.

Carngbe was arrested after the traffic stop on August 25, 2012. Two citations were issued: one for possession of stolen property; the other for possession of a concealed weapon, robbery, and possession of a deadly weapon by a prohibited person. Carngbe was charged by information on September 21 for burglary and attempted robbery for the August 24 incident. This case was docketed as No. CR 12-1012 in the district court.

Carngbe was held at Lancaster County corrections pending trial in case No. CR 12-1012 from August 26 to October 16, 2012, and again from October 21, 2012, to March 10, 2013, for a total of 193 days. A jury trial began March 6. Following trial, Carngbe was acquitted.

Carngbe was then charged by information on May 10, 2013, for burglary and possession of a deadly weapon by a prohibited person for the August 21, 2012, incident. This case was docketed as No. CR 13-508 in the district court and is the case currently on appeal. Carngbe was arrested on that information on May 15, 2013, and arraigned that same day. He pled no contest to burglary on September 19, and the possession of a deadly weapon charge was dismissed.

Carngbe was sentenced on November 26, 2013, to 6 to 8 years' imprisonment. Citing Neb. Rev. Stat. § 83-1,106(4) (Reissue 2008), Carngbe argued that he was entitled to credit for time served of 197 days—4 for the current charge and 193 for the time he was incarcerated pending his trial in case No. CR 12-1012. The district court rejected Carngbe's claim as to the 193 days, but gave him credit for time served of 4 days.

ASSIGNMENTS OF ERROR

Carngbe assigns that the district court erred in (1) not giving him credit for time served of 193 days from case No. CR 12-1012 and (2) imposing an excessive sentence.

STANDARD OF REVIEW

[1] Whether a defendant is entitled to credit for time served and in what amount are questions of law. An appellate court reviews questions of law independently of the lower court.[1]

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[1] *State v. Wills*, 285 Neb. 260, 826 N.W.2d 581 (2013).

[2] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[2]

[3] Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.[3]

ANALYSIS

Interpretation of § 83-1,106

In his first assignment of error, Carngbe assigns that the district court erred in not crediting his sentence for time served of 193 days. Carngbe contends that he is entitled to this credit under § 83-1,106(4).

[4,5] This case presents an issue of statutory interpretation. We give statutory language its plain and ordinary meaning.[4] And in construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[5]

Section 83-1,106 provides in relevant part:

> (1) Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services, the county board of corrections, or, in counties which do not have a county board of corrections, the county sheriff.
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> . . . .
>
> (4) If the offender is arrested on one charge and prosecuted on another charge growing out of conduct which

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[2] *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013).

[3] *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[4] *State v. Schanaman*, 286 Neb. 125, 835 N.W.2d 66 (2013).

[5] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

> occurred prior to his or her arrest, credit against the maximum term and any minimum term of any sentence resulting from such prosecution shall be given for all time spent in custody under the former charge which has not been credited against another sentence.

Relying on the plain language of § 83-1,106, we conclude Carngbe is entitled to credit for time served under subsection (4). Here, Carngbe was arrested for the August 24, 2012, incident and acquitted. But Carngbe was later prosecuted for the August 21 break-in, which occurred prior to Carngbe's August 25 arrest.

We are not persuaded by the State's contention that for § 83-1,106(4) to apply, the conduct in question must be the same or related to the conduct for which time was originally served. There is nothing in the plain language of § 83-1,106(4) that requires such a relationship.

[6] Moreover, there is such a relationship required under § 83-1,106(1). That subsection provides that credit shall be given for time served "as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based." If this court were to read the requirement of such a relationship into § 83-1,106(4), it would render that subsection superfluous to § 83-1,106(1). But a court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[6]

We conclude that Carngbe is correct that he was entitled to credit for time served for the time that he spent in custody prior to his acquittal for the August 24, 2012, incident. We modify Carngbe's sentence accordingly.

Excessive Sentence

[7,8] Carngbe also assigns that the district court erred in imposing upon him an excessive sentence. The relevant principles of law are well known. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court

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

abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[7] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[8]

[9] 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.[9]

Carngbe pled no contest to burglary, which is a Class III felony. Class III felonies are punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both.[10] Thus, Carngbe's sentence of 6 to 8 years' imprisonment did not exceed the statutory limits.

Nor was Carngbe's sentence otherwise excessive. Carngbe has a criminal record that includes minor traffic violations, but also charges for marijuana possession, possession of a controlled substance with intent to deliver, unauthorized use of a financial transaction document, disturbing the peace, obstructing a peace officer, and third degree domestic assault.

The district court noted during sentencing that Carngbe indicated he wanted to take responsibility for his actions, yet he had failed to appear in court on a few occasions, and also did not show up for his appointment with a probation officer in connection with his presentence investigation. The district court noted, and we agree, that such actions were "not signs of responsibility."

The district court did not abuse its discretion in sentencing Carngbe to 6 to 8 years' imprisonment. Carngbe's second assignment of error is without merit.

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[7] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[8] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[9] *Id.*

[10] Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2012).

CONCLUSION

Carngbe is entitled to credit for 197 days for time served, or 193 days for his prior criminal case wherein he was acquitted and another 4 days for time served on this charge. We therefore modify Carngbe's sentence to provide for a credit for time served of 197 days. As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

JACK L. IRWIN, APPELLANT, V.
WEST GATE BANK, APPELLEE.
848 N.W.2d 605

Filed June 20, 2014. No. S-13-322.

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. ____: ____. 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. **Appeal and Error.** In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.
4. **Contracts: Consideration.** Consideration is an essential element to the validity of a contract.
5. **Security Interests.** A secured party has a right but not a duty to take possession of collateral.
6. ____. A secured party has no duty to preserve, move, or store secured property over which it has no physical control or possession.

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

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Brian S. Kruse, of Rembolt Ludtke, L.L.P., for appellee.

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

PER CURIAM.

NATURE OF CASE

Jack L. Irwin appeals the order of the district court for Lancaster County in which the court found that the parties had not entered into an enforceable contract and entered judgment in favor of West Gate Bank (West Gate) on Irwin's claim for breach of contract or breach of warranty. We affirm.

STATEMENT OF FACTS

The parties in this case are connected to one another through a bankrupt corporation named Shade, Inc. Irwin owned a commercial building in which Shade was a tenant; Irwin also owned a warehouse that Shade rented to store personal property. West Gate held notes payable from Shade; the notes were secured by Shade's personal property. In 2002, Shade defaulted on the notes. After collecting from guarantors, West Gate was still owed a considerable sum from Shade.

In early 2005, Irwin approached West Gate requesting assistance with regard to an issue relating to Shade. Shade was delinquent on its rent for the warehouse. Irwin had found a new tenant but needed to move Shade's personal property to a nearby bay before the new tenant could move in. West Gate's president, Carl Sjulin, told Irwin that West Gate would not object to Irwin's moving the property. Irwin stated that he would have his attorney draft a document to memorialize the understanding between Irwin and West Gate. The resulting document was titled "Abandonment" (Abandonment document) and provided in its entirety as follows:

> For good and valuable consideration, the receipt of which is hereby acknowledged, and including the financial responsibility for the expense of dismantling, moving and storage, West Gate . . . , 6003 Old Cheney Road, Lincoln, Nebraska 68516, for itself, and for anyone claiming through it, hereby abandons all of its right, title and interest in and to the personal property of Shade, Inc., including equipment, furniture, fixtures, machinery, goods, tools, leasehold improvements and materials, whether manufactured or awaiting manufacture, currently

> located at 5049 Russell Circle, Lincoln, Nebraska, or 5100 North 57th Street, Lincoln, Nebraska. This abandonment is made to . . . Irwin, the owner of 5049 Russell Circle and 5100 North 57th Street, and past landlord of Shade, Inc., where such personal property is currently located. West Gate . . . hereby also agrees to hold . . . Irwin harmless from any claims made to such property through West Gate . . . , in any fashion. This abandonment may be signed and delivered by facsimile, and any such copy shall be as effective as an original.

The Abandonment document was dated January 12, 2005, and was signed by Sjulin as West Gate's president.

Shade filed for bankruptcy in April 2005 in the U.S. Bankruptcy Court for the District of Nebraska. Irwin filed a claim in Shade's bankruptcy case in which he asserted that West Gate had "'abandoned'" its security interest in Shade's personal property to Irwin. In July 2006, Shade's bankruptcy trustee filed a motion to sell Shade's personal property free and clear of liens. Irwin resisted the trustee's motion, but the trustee proceeded with an auction of the personal property, and in August, the bankruptcy court granted the trustee's motion and confirmed the sale of the personal property. Irwin testified that he had unsuccessfully bid $175,000 for the property.

In January 2007, the trustee filed a notice of intent to distribute the proceeds of the auction to West Gate, which, the trustee asserted, had a perfected security interest in the property. Irwin filed an objection, asserting that he rather than West Gate was entitled to the proceeds. At an evidentiary hearing in the bankruptcy court on the trustee's notice of intent to distribute, Irwin presented evidence to support his objection. Irwin's evidence included the Abandonment document. The evidence also included the affidavit of Sjulin in which he asserted that West Gate had not assigned or terminated its security interest in Shade's personal property. On May 17, the bankruptcy court filed an order in which it overruled Irwin's resistance and approved distribution of the proceeds to West Gate. In the order, the bankruptcy court stated the following with regard to Irwin's objection:

> The objection of . . . Irwin is overruled. The "ABANDONMENT" document is not an assignment of a perfected security interest and it is not a release of the perfected security interest. The document may give . . . Irwin some claim against West Gate . . . , but as between the trustee and the secured creditor [West Gate], it is the trustee's obligation to turn over the proceeds and the personal property to the secured creditor.

Irwin appealed the bankruptcy court's order to the U.S. Bankruptcy Appellate Panel for the Eighth Circuit. On July 27, 2007, the appellate panel dismissed the appeal as moot. The appellate panel stated in its judgment:

> The bankruptcy court denied [Irwin's] motion for a stay pending an appeal and when a similar request was not made of us, the trustee distributed the money pursuant to the bankruptcy court's order. The trustee now moves to dismiss the appeal as moot.
>
> Because [Irwin] did not obtain a stay pending appeal nor make West Gate . . . a party to this appeal, we would be unable to grant effective relief to [Irwin], even if we thought his appeal had merit. Under the bankruptcy court's order, [Irwin] is free to make a claim against West Gate . . . in another forum under its "Abandonment."

Irwin thereafter filed this action against West Gate in the district court for Lancaster County. In the operative amended complaint filed February 27, 2012, Irwin asserted four claims for relief, three of which were later withdrawn. The claim that remained was labeled as a claim for "Breach of Contract and/or Warranty." Irwin alleged that West Gate had breached its obligations under the Abandonment document by failing to pay the auction sale proceeds over to Irwin.

West Gate filed an answer in which it denied, inter alia, that it had breached any obligation under the Abandonment document. West Gate alleged various affirmative defenses, including allegations that because of the bankruptcy court's May 17, 2007, order, Irwin's claims were barred by res judicata or claim preclusion and Irwin was collaterally estopped or barred by issue preclusion from making certain allegations in his complaint. West Gate also affirmatively alleged that the

purported contract between Irwin and West Gate lacked consideration. West Gate filed a counterclaim in which it alleged that to the extent the court construed the Abandonment document to convey West Gate's security interest to Irwin, the document was the result of a mutual mistake and did not fully state the agreement or intention of the parties; West Gate requested the court to order reformation to reflect the parties' mutual understanding and intent. During the course of these proceedings, West Gate has referred to various authorities, stating that "[i]f the debt is not transferred, neither is the security interest." See *In re Leisure Time Sports, Inc.*, 194 B.R. 859, 861 (9th Cir. 1996). These references were in support of West Gate's position that it was a legal impossibility to convey the security interest to Irwin without also transferring the underlying debt, the latter of which was not claimed by Irwin.

After a bench trial which included testimony from both Irwin and Sjulin, the district court filed its order on March 14, 2013. The court first considered the extent to which Irwin's claims were precluded by the bankruptcy court's decision. The court noted that the bankruptcy court order had provided that the Abandonment document was not an assignment or a release of West Gate's perfected security interest; the district court therefore found that the "doctrine of res judicata" applied to any claim by Irwin that the Abandonment document granted him a perfected security interest or represented a release by West Gate of its perfected security interest in the personal property of Shade. The court concluded, however, that the bankruptcy court's order did not preclude any other claim that Irwin might have against West Gate with respect to the Abandonment document.

The court therefore considered Irwin's claim for breach of contract or warranty. The court determined that the Abandonment document was not an enforceable contract, because, inter alia, there was no consideration exchanged between the parties and there was no mutual understanding of what the document was intended to mean or of its purpose. The court also determined that there was nothing in the document that could be interpreted as a warranty from West Gate

to Irwin. Having determined that the document was neither an enforceable contract nor a warranty, the court concluded that there was no merit to Irwin's claim of a breach of contract or warranty as alleged in the amended complaint. The court therefore entered judgment in West Gate's favor on Irwin's claims, and it dismissed West Gate's counterclaim for reformation as moot.

Irwin appeals the district court's order.

ASSIGNMENTS OF ERROR

Irwin claims that the district court erred when it determined that (1) "res judicata" would apply to his claims that the Abandonment document was an assignment or release of West Gate's security interest in the personal property of Shade and (2) the Abandonment document was not an enforceable contract or a warranty.

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. *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013). When reviewing questions of law, however, we have an obligation to resolve the questions independently of the conclusion reached by the trial court. *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 810 N.W.2d 677 (2012).

ANALYSIS

Correctness of the District Court's Ruling Regarding the Preclusive Effect of the Bankruptcy Court Order Is Not Determinative of the Claim in This Action and Need Not Be Considered.

Irwin claims in his first assignment of error, restated, that the district court erred when it determined that based on the "doctrine of res judicata," the order of the bankruptcy court precluded further litigation of whether the Abandonment document served as a release or assignment of West Gate's security interest in Shade's property. No party challenges the portion of the district court's order which determined that the

bankruptcy court order did not preclude further litigation as to whether West Gate breached the terms of the Abandonment document or any purported warranty contained therein. No party challenged the district court's authority to go forward with the trial of the only surviving claim in the operative complaint, i.e., Irwin's claim that West Gate breached the Abandonment document and/or the warranty. Given the foregoing, the correctness of the district court's order, which determined that the bankruptcy order precluded potential further litigation of whether the Abandonment document served as a release or assignment of West Gate's security interest in Shade's property, is not relevant to any issue in the case or necessary to the resolution of this appeal and we need not consider this assignment of error. See *Recio v. Evers*, 278 Neb. 405, 771 N.W.2d 121 (2009) (appellate court is not obligated to engage in analysis which is not needed to adjudicate controversy before it).

The District Court's Rulings That There Was No Consideration and That the Abandonment Document Was Not an Enforceable Contract or a Warranty Were Not Error.

Irwin next claims that the district court erred when it determined that the Abandonment document was not an enforceable contract or a warranty. Because the court's determination that there was no consideration was correct, its determination that there was not an enforceable contract was also correct. We reject this assignment of error.

[3] We note first that although Irwin assigns error to the court's finding that the document did not contain a warranty, he makes no specific argument regarding the existence of a warranty other than the general argument he makes to the effect that the court erred when it found that the document was not an enforceable contract. In order to be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013). Therefore, we do not separately consider whether the

district court erred when it found that the document did not contain a warranty.

In this action, Irwin contended that a binding contract existed between himself and West Gate and that he sought to enforce what he believed were the terms of the Abandonment document. Among West Gate's affirmative defenses was the allegation that the purported contract "lacks consideration." The burden of proving insufficient consideration was on West Gate, which it successfully did. See *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998).

[4] Lack of consideration is relevant to whether the parties have formed an enforceable contract. See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 820, 708 N.W.2d 235, 245 (2006) (stating that contract requires offer, acceptance, "and consideration furnished for its enforceability"). We have approved the proposition that "consideration is an essential element to the validity of a contract." *Middagh v. Stanal Sound Ltd.*, 222 Neb. 54, 59, 382 N.W.2d 303, 307 (1986). Actual consideration is therefore relevant to whether an enforceable contract was formed.

We have long observed: "'That the contract was lacking in consideration from its inception may be shown by extrinsic evidence, providing the proof thereof does not contradict or vary the contractual consideration named in the written contract . . . .'" *Barth v. Reber*, 135 Neb. 25, 28, 280 N.W. 219, 220 (1938). A statement that consideration for a promise was received is a statement of fact, not a term of the contract. As a statement of fact, it may be explained or contradicted by extrinsic evidence. The Restatement (Second) of Contracts § 71, comment *b*. at 173 (1981), states that "a mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases there is no consideration . . . ."

In this case, the Abandonment document provides: "For good and valuable consideration, the receipt of which is hereby acknowledged, and including the financial responsibility for the expense of dismantling, moving and storage, West Gate . . . hereby abandons all of its right, title and interest in and to the personal property of Shade . . . ." Irwin

approached West Gate because West Gate held a secured interest in Shade's property. The enumerated consideration in the Abandonment document for West Gate's promise was Irwin's relieving West Gate of its duty to care for and move Shade's property. This is the consideration named in the document, and extrinsic evidence could be used to show that such consideration was meaningless and that hence, there was no consideration. See *Barth, supra*.

The district court received evidence which showed that West Gate's involvement in the property was by virtue of its security interest in such collateral but that it had not taken possession of the property. West Gate had no other interest in the property. Irwin testified that the sole consideration to West Gate, as recited in the Abandonment document, was being relieved of what he believed was West Gate's obligation to dismantle, move, or store Shade's property. However, West Gate had no such obligation.

[5,6] A secured party has a right but not a duty to take possession of collateral. Neb. U.C.C. § 9-609 (Reissue 2001). See, also, Neb. U.C.C. § 9-601 (Cum. Supp. 2012). If it takes possession, a secured party has a duty to use reasonable care in the custody and preservation of collateral. Neb. U.C.C. § 9-207(a) (Cum. Supp. 2012). The cases show that a secured party has no duty to preserve, move, or store secured property over which it has no physical control or possession. E.g., *City Nat. Bank v. Unique Structures, Inc.*, 49 F.3d 1330 (8th Cir. 1995). See 8 William D. Hawkland & Frederick H. Miller, Uniform Commercial Code Series § 9-207:1 (Cum. Supp. 2013-14) (cases collected). Where West Gate had no control or possession of the property, the Abandonment document's relief from the purported duty of West Gate was meaningless and could not constitute consideration for West Gate's promise. The district court's determination that there was no consideration was correct, and thus, there was no enforceable contract, as the district court ruled.

CONCLUSION

Because the district court's determination regarding the preclusive effect of the bankruptcy court's ruling with respect

to an assignment or release of West Gate's security interest did not affect the court's consideration of the breach of contract or warranty claim in this case, we need not review the correctness of such determination on appeal. The district court's determinations that there was no consideration and that the Abandonment document was not an enforceable contract were correct. We therefore affirm the judgment of the district court.

AFFIRMED.

IN RE ESTATE OF RALPH GREB, DECEASED. FIRST NEBRASKA TRUST COMPANY, PERSONAL REPRESENTATIVE OF THE ESTATE OF RALPH GREB, DECEASED, APPELLEE AND CROSS-APPELLEE, V. RICHARD GREB, APPELLEE AND CROSS-APPELLANT, AND NANETTE J. WRIGHT, APPELLANT AND CROSS-APPELLEE.

848 N.W.2d 611

Filed June 20, 2014. No. S-13-543.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Decedents' Estates: Judgments: Appeal and Error.** When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.
3. **Decedents' Estates: Appeal and Error.** The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous.
4. **Joint Tenancy: Banks and Banking.** Neb. Rev. Stat. § 30-2718(a) (Reissue 2008) provides that a multiple-party account may be with or without a right of survivorship between the parties.
5. **Decedents' Estates: Banks and Banking: Contracts.** Neb. Rev. Stat. § 30-2719(a) (Reissue 2008) provides that a contract of deposit establishes the type of account if the contract contains provisions in substantially the form provided by that subsection.
6. **Corporations: Collateral Attack.** A private party may collaterally attack the legal stature of a corporate entity if it has been dissolved and retains neither a de jure nor a de facto existence.
7. **Corporations.** A de facto corporation exists when there has been a good faith attempt to organize the corporation, statutory requirements have been colorably complied with, and the corporation has exercised the functions or conducted the business that it was organized to perform.

8. **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.
9. **Courts: Jurisdiction: States.** Before entangling itself in messy issues of conflict of laws, a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.
10. ____: ____: ____. In answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.
11. **Jurisdiction: States.** In conflict-of-law analysis, an actual conflict exists when a legal issue is resolved differently under the law of two states.
12. **Contracts.** For the resolution of conflict of laws involving contracts, the Nebraska Supreme Court has adopted the Restatement (Second) of Conflict of Laws § 188 (1971).

Appeal from the County Court for Lancaster County: THOMAS W. FOX, Judge. Affirmed.

Stanton N. Beeder and Kara J. Ronnau, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellant.

Timothy L. Moll, Ramzi J. Hynek, and Sheila A. Bentzen, of Rembolt Ludtke, L.L.P., for appellee First Nebraska Trust Company.

J.L. Spray and Christina L. Usher, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Richard Greb.

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

CASSEL, J.

INTRODUCTION

We decide three principal issues regarding the final order distributing the probate estate of Ralph Greb in kind to two beneficiaries. One beneficiary appeals on two issues; the other cross-appeals on the third issue. First, two multiple-party bank accounts were correctly excluded from the probate estate, because the challenger failed to meet her burden of proving lack of survivorship rights. Second, because a corporation dissolved by the State of Nebraska for failure to pay taxes continued as a de facto corporation, Ralph's gifts of corporate stock during his lifetime were not part of his probate estate. Finally, because one beneficiary was not obligated to pay indebtedness owed to the estate by the beneficiary's spouse,

the lower court did not err in ordering distribution of the asset in kind to both beneficiaries. We affirm the county court's order of distribution.

BACKGROUND

Ralph died on December 25, 2010. He was survived by his two children, Richard Greb and Nanette J. Wright. Ralph's will appointed Richard as his personal representative. However, due to disagreements between Richard and Nanette regarding the estate, First Nebraska Trust Company (FNTC) was retained to serve as personal representative.

Ralph's will provided for his estate to be distributed to a "Family Trust," of which Richard was appointed trustee. Once the trust was funded, its assets were to be distributed equally to Richard and Nanette. But in order to avoid administrative fees and expedite the distribution of the estate, FNTC and Richard (as trustee) entered into an "Acknowledgment and Consent," providing for the direct distribution of the estate's assets to the beneficiaries.

FNTC conducted an inventory and investigation of the estate's assets. It filed a short-form inventory on March 27, 2012, and an amended verified petition for approval of distributions on April 12. In the amended petition, FNTC indicated that the estate was the holder of various debts valued at $234,739, which it denoted and we will refer to as "Wright Notes." As evidence of the Wright Notes, FNTC attached a series of correspondence between Ralph, Nanette, and Nanette's husband, John Wright. The correspondence included a letter signed by John, acknowledging various debts he owed to Ralph; a listing of the various debts signed by John and Ralph; an unsigned letter from Nanette, disputing the listing of the debts; and two repayment checks signed by Nanette.

FNTC acknowledged the existence of an ongoing dispute between Richard and Nanette as to the enforceability of the Wright Notes. Rather than attempting to collect the debts, FNTC proposed to distribute the Wright Notes equally to Richard and Nanette in kind. Richard filed an objection, claiming that the Wright Notes were joint and several liabilities of Nanette and John. He therefore requested that the

Wright Notes be converted into cash or cash equivalent and distributed solely to Nanette, with him receiving an equivalent value in cash.

Nanette filed her own objection to FNTC's proposed distribution. Her objection focused on three specific properties identified by FNTC in the short-form inventory of the estate. These properties included a U.S. Bank account, a Wells Fargo Bank account, and 301 shares of stock in G & G Sheet Metal Company (G&G).

On the short-form inventory, FNTC indicated that the U.S. Bank and Wells Fargo Bank accounts were multiple-party accounts owned by Ralph and Richard as joint tenants. It further identified the accounts as nonprobate property. But Nanette contended that no documents or evidence had been presented demonstrating that the accounts were held with rights of survivorship. She therefore asserted that the proceeds of the accounts should be distributed equally to the beneficiaries, rather than passing solely to Richard.

As to the 301 shares in G&G, Nanette alleged that the short-form inventory reflected neither Ralph's true number of shares nor the value of those shares at the time of his death. In support of these allegations, Nanette claimed that G&G had been involuntarily dissolved on April 16, 1999, by Nebraska's Secretary of State for nonpayment of taxes. She therefore contended that any transfer of shares, payment of dividends, or extension of loans by the corporation after that date was void and should be considered a nullity. As a result, the estate would be reattributed any shares Ralph had transferred after G&G's dissolution, and the value of those shares would be increased as funds G&G had loaned or paid out were returned to the corporation.

The county court conducted a hearing on Richard's and Nanette's objections and the proposed distribution. A representative from FNTC testified as to its efforts to determine the ownership of the U.S. Bank and Wells Fargo Bank accounts. FNTC first requested copies of the signature cards for the accounts. Although neither bank complied, U.S. Bank produced copies of the account's statements. A subpoena duces tecum was served upon Wells Fargo Bank, and it produced

a signature card from Citizens State Bank with an account number identical to the number of the Wells Fargo Bank account. The signature card from Citizens State Bank showed that the account was opened as a joint tenancy with a right of survivorship.

Based upon its investigation into the ownership of the accounts, FNTC confirmed that it became clear that U.S. Bank and Wells Fargo Bank treated the accounts as joint tenancies with rights of survivorship. Richard's testimony also confirmed that the accounts were held with rights of survivorship. Richard explained that he was an owner of the U.S. Bank account when it was opened and that the account was with a right of survivorship. As to the Wells Fargo Bank account, Richard testified that Ralph added him as a joint tenant in 1996. Ralph wanted Richard to have the account's funds upon Ralph's death in order to equalize his and Nanette's inheritances.

With respect to Ralph's shares in G&G, the county court received evidence that Ralph was G&G's sole shareholder until 2000. Between 2000 and 2006, Ralph transferred 699 of his initial 1,000 shares to Richard and Richard's wife, Nancy Greb. As noted above, at the time of Ralph's death, he possessed 301 shares of G&G's stock.

Richard then testified as to the legal status and activities of G&G. He had served as an officer of the corporation and sat on its board of directors since at least 1985. He stated that he was unaware of the corporation's dissolution until 2012. He further averred that Ralph had been unaware of the dissolution at the time of his death. The county court received evidence that G&G continued to operate normally notwithstanding its dissolution. The corporation continued to hold annual meetings of its shareholders and board of directors, file annual income tax returns, conduct small jobs and consulting work, issue new stock certificates, pay dividends, and extend loans to officers and other business entities.

Finally, the county court received testimony from Nanette. She first confirmed that she was a resident of Arizona. As to the Wright Notes, she explained that she became aware of the obligation John owed to Ralph through hearing that John and Ralph had invested in several properties. As to her liability on

the Wright Notes, she stated that she was never asked to sign an obligation or a guarantee or to undertake repayment. She further averred that she had no intention of assuming John's obligations to Ralph.

The county court entered an order on May 22, 2013, overruling Richard's and Nanette's objections and approving the proposed distribution of the estate. The court first addressed Richard's claim that the Wright Notes should be distributed solely to Nanette. The court recognized that a conflict of laws existed between Nebraska and Arizona as to Nanette's liability on the Wright Notes, but found that Nebraska law applied. And because Nanette could not be held liable on the notes under Nebraska law, the court approved their equal distribution in kind.

As to the U.S. Bank and Wells Fargo Bank accounts, the county court noted that the contracts of deposit for the accounts had not been offered into evidence and that the accounts' proceeds were in Richard's possession. It therefore concluded that Nanette had the burden of proving that Ralph did not intend for the accounts to be with rights of survivorship. Finding that Nanette had failed to meet this burden, the court concluded that the accounts were not part of the estate.

With respect to Ralph's shares in G&G, the county court recognized that the corporation had been dissolved, but concluded that it continued as a de facto corporation after its dissolution. Consequently, the court found that Nanette, as a private party, could not attack its status or activities. The court further noted that the transfers of stock made by Ralph to Richard and Nancy were expressly authorized by Neb. Rev. Stat. § 21-20,155(2)(b) (Reissue 2012). That section provides that dissolution of a corporation shall not prevent the transfer of its shares or securities.

Finding Richard's and Nanette's objections to be without merit, the county court ordered FNTC to proceed with the proposed distribution of the estate. Nanette filed a timely notice of appeal, and Richard cross-appealed. We moved the case to our docket pursuant to statutory authority.[1]

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

ASSIGNMENTS OF ERROR

We consolidate and restate Nanette's numerous assignments of error in the county court's May 22, 2013, order. First, the court erred in excluding the U.S. Bank and Wells Fargo Bank accounts from the probate estate. Second, the court erred in (1) finding that Nanette lacked standing to contest G&G's corporate status or activities and (2) failing to find that G&G's postdissolution activities were unlawful.

We have also consolidated and restated the multiple assignments of error in Richard's cross-appeal. The court erred in (1) finding that Nanette was not liable on the Wright Notes and (2) approving the equal distribution of the notes in kind.

STANDARD OF REVIEW

[1-3] An appellate court reviews probate cases for error appearing on the record made in the county court.[2] When reviewing questions of law in a probate matter, an appellate court reaches a conclusion independent of the determination reached by the court below.[3] The probate court's factual findings have the effect of a verdict, and an appellate court will not set those findings aside unless they are clearly erroneous.[4]

ANALYSIS

We first address Nanette's assignments of error regarding the U.S. Bank and Wells Fargo Bank accounts and G&G's corporate status and activities. We then turn to Richard's cross-appeal and his assignments of error with respect to the distribution of the Wright Notes.

U.S. Bank and Wells Fargo Bank Accounts

Nanette contends that the county court erred in excluding the U.S. Bank and Wells Fargo Bank accounts from the probate estate. It is uncontested that Richard was a joint owner of the

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[2] *In re Estate of Odenreider*, 286 Neb. 480, 837 N.W.2d 756 (2013).

[3] *Id.*

[4] *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009).

accounts and that he was in possession of the proceeds of both accounts on the hearing date.

[4] At the hearing, FNTC's officer correctly recognized that the ownership of the accounts' proceeds upon Ralph's death did not automatically flow from Richard's status as a joint owner. Neb. Rev. Stat. § 30-2718(a) (Reissue 2008) provides that a multiple-party account may be with or without a right of survivorship between the parties. And in a probate proceeding, the determination of whether a multiple-party account is with or without a right of survivorship turns upon the contract of deposit.

[5] Neb. Rev. Stat. § 30-2719(a) (Reissue 2008) provides that a contract of deposit establishes the type of account if the contract contains provisions in substantially the form provided by that subsection. The sample account form of § 30-2719(a) includes provisions for designation of various features, including ownership ("Single-Party Account" or "Multiple-Party Account"); rights at death (including, inter alia, "Right of Survivorship," "POD (Pay on Death) Designation," or single-party account passing at death as part of party's estate); and "Agency (Power of Attorney) Designation."[5] Thus, in *Eggleston v. Kovacich*,[6] we determined that the district court erred in looking to extrinsic evidence when the contract of deposit contained provisions substantially in the form provided by § 30-2719(a) and established that the account was with a right of survivorship.

But when a contract of deposit does not contain provisions substantially in the form provided by § 30-2719(a), the account (including rights at death) is governed by the type of account that most nearly conforms to the depositor's intent.[7] Moreover, in *Eggleston*, we noted that extrinsic evidence of the depositor's intent is relevant only when the contract of deposit is not in substantially the form provided by § 30-2719(a).[8]

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[5] See *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

[6] *Id.*

[7] See § 30-2719(b).

[8] *Eggleston, supra* note 5.

Where the contract does not follow the statutory form and, thus, extrinsic evidence of the depositor's intent is permitted, the party not in possession of the proceeds of a disputed account has the burden to move forward with evidence of the depositor's intent in creating the account.[9] And in a dispute regarding the ownership of an account arising from the depositor's death, such intent must be proved by a greater weight of the evidence only.[10]

Nanette argues that the contracts of deposit for the U.S. Bank and Wells Fargo Bank accounts were submitted into evidence and established that the accounts were without rights of survivorship. As to Wells Fargo Bank, we agree that a contract of deposit was submitted into evidence. The signature card at the time of creation of the account by Wells Fargo Bank's predecessor, Citizens State Bank, references contractual terms and contains the signatures of the account's owners, Ralph and his wife. This signature card clearly states that at that time, the account was owned as joint tenants with a right of survivorship. Thus, the county court's finding that no contract was in evidence was not entirely accurate. But this signature card was silent as to Richard's relationship to the account. Thus, in that sense, the court correctly determined that the material contract was not in evidence.

Although the Citizens State Bank signature card specified that the account included the right of survivorship, the card was not a contract of deposit in substantially the form provided by § 30-2719(a). It did not contain provisions for designation of ownership type or agency. Thus, the signature card itself was not determinative of whether the account was with or without a right of survivorship. Rather, under § 30-2719(b), evidence of Ralph's intent was also relevant in determining the ownership of the account and its proceeds.

Because Richard was in possession of the proceeds of the Wells Fargo Bank account, Nanette had the burden of proving that Ralph did not intend the account to be with a right of survivorship. She failed to do so. The signature card indicated

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[9] *Krzycki v. Krzycki*, 284 Neb. 729, 824 N.W.2d 659 (2012).

[10] See *id.*

that the account was originally opened with a right of survivorship. And Richard testified that Ralph added him as a joint owner with the intent that he would become the sole owner of the account upon Ralph's death. Thus, the evidence established that Ralph intended the account to be with a right of survivorship. Because Richard and Ralph were the joint owners of the account upon Ralph's death, the account and its proceeds passed to Richard as his sole property. Nanette's assertion that the account was part of the estate is without merit.

As to the U.S. Bank account, the contract of deposit was not offered into evidence. The only documents pertaining to the U.S. Bank account received by the county court were the monthly statements associated with the account. While the statements list both Ralph and Richard as owners, they do not contain contractual terms or the signatures of the account's owners.

Without the contract of deposit, evidence of Ralph's intent in creating the U.S. Bank account was relevant in determining whether the account was with or without a right of survivorship. But Nanette argues that the failure to submit the contract into evidence precluded the county court from receiving extrinsic evidence of Ralph's intent under § 30-2719(b). In support of this argument, she cites to our statement in *Eggleston* that a court may look to extrinsic evidence to determine the intention of the depositor only when the contract of deposit is not substantially in the form outlined by § 30-2719(a).[11] But this statement was premised upon the contract of deposit's being in evidence. If the contract has been submitted into evidence and is substantially in the form provided by § 30-2719(a), the contract must control and extrinsic evidence is irrelevant. But without the contract of deposit before it, a court cannot determine whether the contract is substantially in the form provided by § 30-2719(a). Extrinsic evidence as to the depositor's intent then becomes relevant in determining the ownership of the account and its proceeds.

Because Richard was in possession of the U.S. Bank account and its proceeds, Nanette had the burden to establish

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[11] See *Eggleston, supra* note 5.

that Ralph did not intend the account to be with a right of survivorship. But she again failed to meet this burden. Rather, the statements for the account listed Ralph and Richard as joint owners. And Richard testified that the account was opened with a right of survivorship. Thus, the account and its proceeds became the property of the surviving party or parties upon Ralph's death. Consequently, we find no merit to Nanette's assertion that the account was part of Ralph's probate estate.

Status and Activities of G&G

Nanette contends that the county court erred in concluding that she lacked standing to challenge the status and activities of G&G. She further claims that the court erred in failing to find that the activities undertaken by G&G after its dissolution were unlawful.

In addressing Nanette's claims, we assume without deciding that the county court was an appropriate forum in which to determine the lawfulness of G&G's activities and its corporate status. Clearly, that court had exclusive original jurisdiction to determine whether shares of G&G's stock owned by Ralph were assets of his probate estate.[12]

[6] Nanette's standing to challenge the status and activities of G&G turns upon whether it continued as a de jure or de facto corporation after its dissolution. As we expressed in *Ethanair Corp. v. Thompson*,[13] a private party may collaterally attack the legal stature of a corporate entity if it has been dissolved and retains neither a de jure nor a de facto existence. Because Nanette was not a shareholder, director, or creditor of G&G, as a private party, she could challenge the status and activities of G&G only if it retained neither a de jure nor a de facto existence after its dissolution.

[7] We agree with the county court that G&G continued as a de facto corporation after its dissolution. We have stated that a de facto corporation exists when there has been a good faith

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[12] See Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 2012).

[13] *Ethanair Corp. v. Thompson*, 252 Neb. 245, 561 N.W.2d 225 (1997).

attempt to organize the corporation, statutory requirements have been colorably complied with, and the corporation has exercised the functions or conducted the business that it was organized to perform.[14] G&G met all of these requirements.

The evidence received by the county court showed that G&G continued to conduct business and to observe the formalities of the corporate form notwithstanding its dissolution. G&G continued to hold annual meetings of its shareholders and board of directors, to elect officers, and to file annual income tax returns after its dissolution. It also continued to authorize and extend loans to its officers and other business entities, undertake small jobs, and conduct consulting work. We therefore conclude that G&G colorably complied with statutory requirements and conducted the business that it was organized to perform. Additionally, as G&G was incorporated under Nebraska law and dissolved without Richard's or Ralph's knowledge, we conclude that a good faith attempt to organize was made. We therefore find no merit to Nanette's assertion that G&G failed to meet the requirements for de facto corporation status.

But Nanette also argues that the de facto corporation doctrine no longer exists under Nebraska law. In support of this argument, she claims that the doctrine was abolished by the Legislature's enactment of the Business Corporation Act.[15] We disagree. We rendered our decision in *Ethanair Corp.* after the enactment of the Business Corporation Act[16] and acknowledged the doctrine's viability in that case.[17] Further, the Business Corporation Act contains no reference to the de facto corporation doctrine.[18] Although the act contains sections governing the commencement of corporate existence[19] and imposing liability upon persons purporting to act as or on behalf of a corporation

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[14] See *id.*

[15] Neb. Rev. Stat. § 21-2001 et seq. (Reissue 2012).

[16] See, generally, 1995 Neb. Laws, L.B. 109.

[17] See *Ethanair Corp., supra* note 13.

[18] See § 21-2001 et seq.

[19] § 21-2019(1).

with knowledge that no incorporation has taken place,[20] these provisions do not address all of the issues responsible for the development of the doctrine. This is apparent in light of the present case where, unbeknownst to its directors and officers, a lawful corporation was involuntarily dissolved. We therefore reject Nanette's assertion that the de facto corporation doctrine has been abolished in Nebraska.

[8] Because G&G continued as a de facto corporation after its dissolution, Nanette, as a private party, lacked standing to contest its status and activities. We therefore find no error in the county court's order overruling her objection as to Ralph's shares in G&G. Although the court made an additional finding that G&G was expressly authorized to approve the transfers of Ralph's shares under § 21-20,155(2)(b), we see no need to comment on the correctness of this finding. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[21] Because Nanette lacked standing to attack G&G's status and activities, she necessarily lacked standing to challenge its approval of the stock transfers.

Finally, Nanette attempts to characterize her objection as merely alerting FNTC, as personal representative, to G&G's unlawful activities following its dissolution. This characterization is irrelevant. Nanette objected to G&G's status and activities; FNTC did not. Nanette was without standing to do so. These assignments of error lack merit.

Wright Notes

In his cross-appeal, Richard asserts that the county court erred in finding that Nanette was not liable on the Wright Notes and in approving their equal distribution in kind. In support of these assertions, he argues that the court should have applied Arizona law in analyzing Nanette's liability on the notes.

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[20] § 21-2020.

[21] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

Before addressing Richard's specific arguments, we first observe that our probate statute expresses a preference for distributions in kind.

> (a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:
>
> . . . .
>
> (4) The residuary estate shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.[22]

Thus, the ultimate focus is whether it is practicable to distribute undivided interests in the Wright Notes. Richard effectively asserted that distribution in kind was not practicable because, he claimed, Nanette was equally liable with her husband, John, on the notes.

[9-11] In addressing Richard's arguments, we must first determine whether the county court correctly found that a conflict of laws existed. We have previously noted that before entangling itself in messy issues of conflict of laws, a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states.[23] Thus, in answering any choice-of-law question, the court first asks whether there is any real conflict between the laws of the states.[24] An actual conflict exists when a legal issue is resolved differently under the law of two states.[25]

We agree with the county court that a conflict of laws existed between Nebraska and Arizona as to Nanette's liability on the Wright Notes. Other than the two repayment checks signed by Nanette, her signature does not appear on any of the documents evidencing the Wright Notes. And she testified

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[22] Neb. Rev. Stat. § 30-24,104 (Reissue 2008).

[23] *American Nat. Bank v. Medved*, 281 Neb. 799, 801 N.W.2d 230 (2011).

[24] *Id.*

[25] *Id.*

that she was never asked to sign an obligation or a guarantee and had no intention of assuming John's obligations to Ralph. Thus, under Nebraska law, Nanette was not a comaker on the notes and could not be held jointly and severally liable.[26] But under Arizona law, we have observed that the absence of one spouse's signature on a promissory note does not bar the enforcement of a judgment on the note against the spouses' community property.[27] We therefore agree that a conflict of laws existed.

[12] For the resolution of conflict of laws involving contracts, this court has adopted the Restatement (Second) of Conflict of Laws § 188.[28] Under the Restatement, in the absence of an effective choice of law by the parties, a court is to consider several contacts in determining the law applicable to an issue.[29] These contacts include (1) the place of contracting; (2) the place of negotiation of the contract; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties.[30]

With respect to the above factors, the county court found that Ralph was domiciled in Nebraska and was a resident of Nebraska. It further found that the debts were partially negotiated in Nebraska and that payments were made to Ralph in Nebraska. These factual findings were not clearly erroneous. We therefore agree that the majority of contacts weighed in favor of applying Nebraska law. Consequently, Nanette could not be held liable on the Wright Notes and the court did not err in approving their equal distribution in kind. These assignments of error also lack merit.

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[26] See Neb. U.C.C. § 3-116 (Reissue 2001).

[27] See *American Nat. Bank, supra* note 23.

[28] Restatement (Second) of Conflict of Laws § 188(2) (1971). See *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 696 N.W.2d 431 (2005).

[29] See Restatement, *supra* note 28.

[30] *Id.*

CONCLUSION

We find no error in the county court's disposition of the various objections raised by the beneficiaries of the estate. The order of the county court overruling the beneficiaries' objections and ordering FNTC to proceed with the proposed distribution of the estate is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
MATTHEW BERNEY, APPELLANT.
847 N.W.2d 732

Filed June 20, 2014. Nos. S-13-829, S-13-830.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **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.
4. **Sentences.** Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.
5. ____. Unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other.

Appeals from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed in part, and in part remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, and John P. Ashford for appellant.

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

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL JJ.

WRIGHT, J.

NATURE OF CASE

Matthew Berney pled no contest to two counts of burglary. The district court held a habitual criminal enhancement hearing under Neb. Rev. Stat. § 29-2221 (Reissue 2008) and determined Berney to be a habitual criminal. He was sentenced to a term of 10 to 10 years' imprisonment for each conviction, and the court ordered the terms be served consecutively. Berney appeals, arguing that the court imposed excessive sentences and abused its discretion by imposing consecutive mandatory minimum sentences on the enhanced convictions. We affirm his convictions and his sentences of 10 to 10 years' imprisonment for each conviction, but we remand the cause for a determination by the sentencing court whether the sentences are to be served concurrently or consecutively.

SCOPE OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013).

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

FACTS

On April 22, 2013, as part of a plea agreement, Berney pled no contest to two counts of burglary. On August 28, the district court held a habitual criminal enhancement hearing. It received evidence that Berney had at least two felony convictions, had served a minimum prison sentence of 1 year with the Nebraska Department of Correctional Services, and was represented by counsel during the prior proceedings. The court found that the prior convictions met the criteria of § 29-2221 for being a habitual criminal. It then found Berney to be a habitual criminal.

At sentencing, the district court reviewed a presentence investigation prepared and submitted by the state probation office and a sentencing memorandum prepared by Berney's counsel. The court heard testimony that Berney had spent much of his adult life struggling with methamphetamine addiction. Berney's attorney conveyed a message from Berney's mother that drug abuse made him someone his family did not recognize, but that when he was not on drugs, he tried "to do good things for other people." Berney had significant support at the time of sentencing, including addiction services. He also showed remorse for his actions.

After allocution, the district court sentenced Berney to a term of 10 to 10 years' imprisonment for each burglary conviction. Based on its interpretation of *State v. Castillas, supra*, the court concluded it was required to order the sentences to be served consecutively.

Berney timely appealed the sentences of the district court. We moved the case to our docket on our own motion. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

Berney assigns that the district court erred and abused its discretion by (1) imposing excessive sentences and (2) imposing mandatory minimum sentences to be served consecutively on the convictions enhanced by the habitual criminal statute.

ANALYSIS

Court Did Not Abuse Its Discretion in Sentencing

Berney argues that the district court abused its discretion in sentencing him to two consecutive sentences of 10 years' imprisonment, because it did not take into account mitigating factors that were relevant to him. He argues that the court did not consider the nonviolent nature of the offenses, that methamphetamine use was a mitigating factor, and that he took responsibility for his actions. He also argues the court should have taken into account treatment options that were available.

The State argues that the district court did not abuse its discretion, because it imposed the absolute minimum sentences

available. Because Berney was found by the court to be a habitual criminal, his convictions were punishable by a mandatory minimum of 10 years' imprisonment and a maximum of 60 years' imprisonment. He was sentenced to 10 to 10 years' imprisonment for each conviction, and the district court did not have discretion to impose anything less.

[3] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013). 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. *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

Nebraska's habitual criminal statute provides:

> Whoever has been twice convicted of a crime, sentenced, and committed to prison, in this or any other state . . . 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 . . . .

§ 29-2221(1).

The district court determined, after a hearing, that Berney was a habitual criminal. Based on that determination, the minimum sentence the court could impose was a term of not less than 10 years. The court imposed a sentence of 10 years for each burglary conviction. It was not an abuse of discretion to sentence Berney to a term of 10 to 10 years' imprisonment for each burglary conviction.

Mandatory Consecutive Minimum Sentence

Berney argues that Nebraska law does not require mandatory minimum sentences for crimes enhanced under the habitual criminal statute to be served consecutively. He asserts the district court improperly concluded that *State v. Castillas, supra*, required it to order the sentences be served consecutively. He argues that the statement in *Castillas* requiring mandatory

minimum sentences to be imposed consecutively was not germane to the holding affirming the defendant's sentences and therefore does not bind the lower courts. We agree.

In *Castillas*, the defendant's crimes, three counts of use of a deadly weapon to commit a felony, carried mandatory minimum sentences that were required by statute to be served consecutively to all other sentences imposed. Berney's convictions for burglary did not require a mandatory minimum sentence. See Neb. Rev. Stat. § 28-507 (Reissue 2008). Berney concedes that after he was found to be a habitual criminal, the mandatory minimum sentence of 10 years had to be imposed for each burglary conviction. But he asserts that the habitual criminal statute does not require the sentences to be served consecutively and that, therefore, the court erred as a matter of law in so concluding.

The State argues that *Castillas* required all mandatory minimum sentences to be served consecutively regardless of the statutory language of the offense. It asserts there is no difference between mandatory minimums that arise out of a specific offense and mandatory minimums that arise out of a habitual criminal enhancement. It claims there is no distinction between crimes which are required by statute to be served consecutively and all other crimes and enhancements that do not state whether the sentence must be served concurrently or consecutively. We disagree.

In *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), we considered the defendant's claim that the sentence imposed by the trial court differed from the court's stated intention at sentencing. The defendant was convicted of multiple crimes, including three counts of use of a deadly weapon to commit a felony under Neb. Rev. Stat. § 28-1205 (Cum. Supp. 2012). He was sentenced to 5 to 10 years in prison on each conviction of use of a deadly weapon, as well as being sentenced to 5 to 20 years in prison for each conviction of discharging a firearm and 5 to 10 years in prison for second degree assault. The court ordered all sentences to be served consecutively.

When the trial court in *Castillas* announced the defendant's sentences, it informed him that he would be eligible for parole in 25 years. On appeal, the defendant argued that

based on the requirements for mandatory minimum sentences for the use of a weapon, and because the court ordered all the sentences to be served consecutively, he would not be eligible for parole in 25 years, but, rather, 27½ years. We agreed, but affirmed his sentences.

In *Castillas*, our focus was on the calculation to determine parole eligibility and whether a discrepancy between the trial court's intention and the actual sentence imposed resulted in prejudice to the defendant. We determined that although the court erred in its mathematical determination of the defendant's parole eligibility date, he was not prejudiced, because his sentences were still within the statutory limits.

In *Castillas*, the defendant's convictions for use of a deadly weapon to commit a felony required the trial court to impose both a mandatory minimum sentence and to order these sentences to be consecutive to any other sentence imposed. See § 28-1205(1)(c) and (3) and Neb. Rev. Stat. § 28-105(1) (Reissue 2008). In our analysis of the actual time the defendant had to serve before he would be eligible for parole, we had to take into account the mandatory minimums for the use of a weapon convictions and that the statute required a mandatory minimum sentence for each conviction for use of a weapon to be served consecutively to any other sentence imposed. The court ordered all of the defendant's sentences to run consecutively, not just his convictions for use of a deadly weapon.

When determining the amount of time the defendant in *Castillas* would be required to serve before being eligible for parole, we stated: "Mandatory minimum sentences cannot be served concurrently. A defendant convicted of multiple counts each carrying a mandatory minimum sentence must serve the sentence on each count consecutively." 285 Neb. at 191, 826 N.W.2d at 268. We were not speaking of enhancements under the habitual criminal statute, but of those specific crimes that required a mandatory minimum sentence to be served consecutively to other sentences imposed.

There is a distinction between a conviction for a crime that requires both a mandatory minimum sentence and mandates consecutive sentences, and the enhancement of the penalty for

a crime because the defendant is found to be a habitual criminal. In the former, the mandatory minimum sentence must be served consecutively to any other sentence imposed, because the statute for that crime requires it. In the latter, the law does not require the enhanced penalty to be served consecutively to any other sentence imposed. The sentence is left to the discretion of the court.

In the case at bar, burglary does not require a mandatory minimum sentence. The fact that the punishment was enhanced under the habitual criminal statute does not require the enhanced mandatory minimum penalties for such crimes to be served consecutively. Because the crime of burglary did not require mandatory minimum sentences, it was error for the district court to rely upon *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), as authority that sentences enhanced under the habitual criminal statute must be served consecutively to each other.

The defendant in *Castillas* was convicted of crimes that carried mandatory minimums which were required by statute to be served consecutively to all other sentences imposed. Berney's convictions for burglary did not require mandatory minimum sentences, but were enhanced under the habitual criminal statute. This distinction is important. The habitual criminal statute requires a mandatory minimum sentence of 10 years. See § 29-2221(1). But nothing in the habitual criminal statute requires the enhanced sentences to be served consecutively.

[4,5] Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013). Unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other. *State v. King*, 275 Neb. 899, 750 N.W.2d 674 (2008).

In *State v. King, supra*, the defendant was convicted of first degree sexual assault, kidnapping, and robbery. His sentences on these convictions were enhanced under the habitual criminal statute. He successfully appealed his habitual criminal

status, and on remand, the trial court sentenced him to a greater aggregate sentence but a term that would have equaled his sentence under the habitual criminal statute. In his subsequent appeal, we concluded that the trial court correctly sentenced the defendant on resentencing in order to have him serve the same amount of time in prison as it originally intended. We stated: "The court was required to impose mandatory minimum terms of 10 years for each felony conviction once it had found King to be a habitual criminal. But it was not required to impose consecutive sentences for these offenses." *Id*. at 907, 750 N.W.2d at 680.

Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination. *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013). We conclude that the habitual criminal statute does not require a court to impose the enhanced sentences consecutively to each other. See *State v. King, supra*. In the case at bar, the district court incorrectly concluded that the habitual criminal statute required the enhanced sentences be served consecutively to each other.

Trial courts have discretion to determine if a sentence will be served concurrently or consecutively. See *State v. Policky, supra*. In the case at bar, the court erroneously concluded that it was required to impose consecutive sentences on the two burglary convictions that were enhanced by the habitual criminal statute. Because the court believed it was required to impose the sentences consecutively, we cannot determine from the record whether it was the court's intention to require Berney to serve two consecutive 10-year sentences or whether, if permitted by law, the court would have ordered Berney's mandatory minimum sentences as enhanced to be served concurrently. We therefore remand the cause to the district court for resentencing to determine whether the sentences, as enhanced, should be served concurrently or consecutively.

CONCLUSION

Because the district court found Berney to be a habitual criminal, it was required to sentence him to a minimum of 10 years' imprisonment for each burglary conviction. We affirm

his convictions and the finding that he is a habitual criminal. We also affirm the sentences of 10 years for each burglary conviction, as enhanced. However, we remand the cause to the district court to determine whether the sentences should be served concurrently or consecutively.

AFFIRMED IN PART, AND IN PART REMANDED FOR RESENTENCING.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. NICK A. SIMON, RESPONDENT.

848 N.W.2d 642

Filed June 27, 2014. Nos. S-12-498, S-13-1149.

Original actions. No. S-12-498 dismissed as moot. Judgment of suspension in No. S-13-1149.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the conditional admission filed by Nick A. Simon, respondent, on April 22, 2014, in case No. S-13-1149. The court accepts respondent's conditional admission and enters an order of an indefinite suspension with no possibility for reinstatement until June 1, 2015, and 2 years of monitored probation following reinstatement.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 14, 2009. At all relevant times, he was engaged in the private practice of law in Omaha, Nebraska. On December 31, 2013, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent in case No. S-13-1149. The formal charges consist

of nine counts against respondent, and all the counts relate to respondent's mishandling of immigration matters. The nine counts generally allege misconduct, incompetence, failure to communicate, and failure to act diligently. In the nine counts, it was alleged that by his conduct, respondent had violated his oath of office as an attorney, Neb. Rev. Stat. § 7-104 (Reissue 2012), and Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence); 3-501.3 (diligence); 3-501.4(a)(3), (4), and (5) (communications); and 3-508.4(a) and (d) (misconduct).

By way of background, respondent was temporarily suspended by this court on August 31, 2012, in case No. S-12-498. The application for temporary suspension to which respondent consented was based on the grievance of one client, and the allegations relating to this one client became count I in the formal charges filed in case No. S-13-1149, described above. Respondent has not been reinstated since he was temporarily suspended. By virtue of our resolution of the instant case, case No. S-12-498 is dismissed as moot.

On April 22, 2014, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313 of the disciplinary rules, in which he conditionally admitted that he violated his oath of office as an attorney and conduct rules §§ 3-501.1; 3-501.3; 3-501.4(a)(3), (4), and (5); and 3-508.4(a) and (d). In the conditional admission, respondent outlined his mental health issues and steps taken to cope. Respondent knowingly chose not to challenge or contest the truth of the matters conditionally admitted and waived all proceedings against him in connection therewith in exchange for an indefinite suspension with no possibility for reinstatement until June 1, 2015, and 2 years of monitored probation following reinstatement. If accepted, the 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: During the first 6 months of probation, respondent will meet with and provide the monitor a weekly list of cases for which respondent is currently responsible, which list shall include the date the attorney-client relationship began; the general type of case;

the date of last contact with the client; the last type and date of 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; any applicable statutes of limitations and their dates; and the financial terms of the relationship (hourly, contingency, et cetera). After the first 6 months through the end of the probation, respondent shall meet with the monitor on a monthly basis and provide the monitor with a list containing the same information set forth above. Respondent shall reconcile his trust account within 10 days of receipt of the monthly bank statement and provide the monitor with a copy within 5 days, and respondent shall submit a quarterly compliance record to the Counsel for Discipline demonstrating that respondent is adhering to the foregoing terms of probation. The quarterly report shall include a certification by the monitor that the monitor has reviewed the report and that respondent continues to abide by the terms of probation. 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 proposed discipline "will protect the public, the reputation of the Bar and the administration of justice."

Upon due consideration, we approve the conditional admission, and we order an indefinite suspension effective immediately with no possibility of reinstatement until June 1, 2015, and, following reinstatement, 2 years of monitored probation subject to the terms outlined above.

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 conditionally admitted. We further determine that by his conduct, respondent violated conduct rules §§ 3-501.1; 3-501.3; 3-501.4(a)(3), (4), and (5); and 3-508.4(a) and (d); and his oath of office as an attorney licensed to practice law in the State of Nebraska. Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Case No. S-12-498 is dismissed as moot. In this case, S-13-1149, respondent is indefinitely suspended from the practice of law, effective immediately, with no possibility of reinstatement until June 1, 2015. Should respondent apply for reinstatement, his reinstatement shall be conditioned upon respondent's being on probation for a period of 2 years, 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 (rev. 2014), and upon failure to do so, he shall be subject to punishment for contempt of this court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb.

Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) of the disciplinary rules within 60 days after the order imposing costs and expenses, if any, is entered by the court.

No. S-12-498 dismissed as moot.

Judgment of suspension in No. S-13-1149.

Wright, J., not participating.

In re Rolf H. Brennemann Testamentary Trust. Kim Abbott, beneficiary, appellant, v. John E. Brennemann et al., Trustees, appellees.

849 N.W.2d 458

Filed June 27, 2014. No. S-12-1029.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record. But when an equity question is presented, appellate review of that issue is de novo on the record.
2. **Trusts: Records.** Where a trustee fails to maintain proper records, all doubts regarding his administration of the trust are resolved against him.
3. **Trusts: Proof.** An accounting is ordinarily an appropriate remedy for a breach of the duty to inform and report. And if ordered, the trustees would have the burden to prove its completeness and accuracy once questioned.
4. **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.

Petition for further review from the Court of Appeals, Inbody, Chief Judge, and Moore and Riedmann, Judges, on appeal thereto from the County Court for Grant County, James J. Orr, Judge. Judgment of Court of Appeals affirmed in part and in part reversed, and cause remanded for further proceedings on the issue of attorney fees.

David A. Domina and Jeremy R. Wells, of Domina Law Group, P.C., L.L.O., for appellant.

Neil E. Williams and Nathaniel J. Mustion, of Lane & Williams, P.C., L.L.O., for appellees.

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

CONNOLLY, J.

SUMMARY

Kim Abbott sued the trustees of her grandfather's testamentary trust for breach of their fiduciary duties. The county court dismissed her complaint, and the Nebraska Court of Appeals affirmed. The Court of Appeals essentially concluded that although the trustees had breached their duty to inform and report, that breach was harmless.[1] We agree with the Court of Appeals' general legal framework and conclusion that the breach was harmless. But we disagree with the Court of Appeals' conclusion that annual schedule K-1 tax reports were sufficient to reasonably inform beneficiaries of the trust and its administration. And we conclude that the county court should revisit the issue of attorney fees in light of our disposition of the merits of this appeal. We affirm in part, and in part reverse and remand for further proceedings on that issue.

BACKGROUND

THE TESTAMENTARY TRUST

Rolf H. Brennemann (Rolf) died in 1976. His will established the "Rolf H. Brennemann Testamentary Trust." The trust was to hold shares in the "Rolf H. Brennemann Company," the primary asset of which was a 5,425-acre ranch located in Grant and Cherry Counties, Nebraska. At all material times, the trust held 42.42 percent of the company's shares, with the balance being distributed among the individual family members. The will appointed Rolf's three children, Edward Brennemann, Mamie Brennemann, and Rolf William Brennemann (Bill), as trustees. The will also provided that if any of them were unable to serve, or ceased to serve, the oldest son of that person would then serve as trustee.

The trust was to pay its net income to Bessie Brennemann, Rolf's wife, for as long as she lived. When Bessie died, the trust was to pay its net income to Rolf's three children, in equal shares. When Rolf's last child died, the trust was to distribute its holdings to Rolf's grandchildren.

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[1] See *In re Rolf H. Brennemann Testamentary Trust*, 21 Neb. App. 353, 838 N.W.2d 336 (2013).

Factual Background

In 1982, Edward died, at which time his oldest son, John E. Brennemann, became a trustee. In 1986, the trustees (Rolf's children Bill and Mamie, and Rolf's grandchild John) petitioned the county court to allow them to vote company stock. The trustees alleged that the company had significant liabilities, had not paid dividends, and was not providing income to the trust. The trustees alleged that John had offered to buy the ranch and that they had accepted his offer. Kim later offered to buy the ranch, but the trustees rejected her offer. The court ultimately authorized the trustees to vote the stock and sell the ranch to John and his wife. The court reviewed the purchase agreement and determined that the sale price was at or above fair market value and was the most advantageous price the trustees could secure.

The purchase agreement set forth an installment payment plan for a total purchase price of $494,021: $16,000 at the execution of the agreement, $144,000 at closing, and $344,021 in nine annual payments, with a 10-percent interest rate and a balloon payment of the unpaid principal and interest on July 1, 1996. Following the sale of the ranch, and having no other assets, the company was dissolved. In 1996, John and his wife executed two agreements with the various parties extending the original purchase agreement for 10 years and 3 years respectively, at an 8-percent interest rate.

In 1998, after Bessie died, Rolf's three children (or their issue) began receiving the trust income. In 2002, Bill died, at which time his children, including Kim, became qualified beneficiaries of the trust and Bill's oldest son became a trustee. In 2006, presumably because John had made all the payments, the bank issued a trustee's deed of reconveyance for the ranch to John and his wife.

The Litigation Begins

In 2009, the trust's accountant, Dan Gilg, sent a letter to Kim (and presumably other beneficiaries) indicating that the trust contained roughly $75,000 and recommending that the trust be terminated because it was "non-economical." This prompted Kim to take action because she believed that there

should have been more money in the trust. In April 2010, Kim filed a complaint against the trustees seeking a full and complete accounting of their actions and payment of income derived from the administration of the trust, along with costs and attorney fees. Following their answer and cross-petition, the trustees provided an accounting which covered January 1, 2002, through April 30, 2010, and they also provided updates throughout the proceedings.

In August 2010, Kim amended her complaint. She alleged that the accounting was incomplete and that the trustees had breached their fiduciary duties. Specifically, she alleged that they had breached their duties to maintain trust records, to properly inform and report to the beneficiaries, and to administer the trust in good faith. She also requested, in addition to the requests made in her original complaint, that the court order the trustees to pay moneys to restore the balance of the trust to what would have been there had the trustees fulfilled their fiduciary duties.

The Trial

At trial, and in summary, Mamie testified that she believed that the trustees had properly administered the trust, that the sale of the ranch was justified by its indebtedness, that the extension agreements were done so that the trust would continue to provide income to Bessie during her lifetime, that John had made all the necessary payments for the ranch, and that the older trust documents (before 2002) were unavailable because the various banks and accounting firms had destroyed them.

John testified similarly. John also testified about the indebtedness on the ranch, about how the trustees tried to pay the debt without selling the ranch, and that he thought the trust should be terminated. John also explained that he had received trust documents from the trust's accountant, but was unable to locate them.

Kim testified that after receiving the letter from Gilg, she requested an accounting because she believed that there should have been more money to distribute to the grandchildren upon Mamie's death. She stated that she thought the trustees had

breached their duties, in essence, because the trustees could not account for the trust's activity from 1976 through 2002, because there were basically no records showing that John had made the required payments, and because of the extension agreements and lack of charged interest coming into the trust. She also stated that once she became a beneficiary, she received annual schedule K-1 tax reports, which included information such as interest, her share of income, and expenses.

The parties also presented testimony and documents regarding the trust's financial information. Josh Weiss, Kim's expert, testified that based upon his review of various documents, the trust should have had more money. Gilg, the trust's accountant, testified that Weiss' calculations did not take into account several items, such as the company's indebtedness and taxation on the ranch's sale. He also testified that all of the trustees had acted properly, that John had made all the necessary payments, and that, in his opinion, "the beneficiaries did not suffer any monetary losses by reason of the trustees' administration of the trust."[2]

The County Court's Order

The county court made several relevant factual findings. The court found that the trustees provided each of the beneficiaries, including Kim, annual schedule K-1 tax reports "showing the beneficiaries their respective share of income and/or loss from the Trust estate." The court found that Kim requested a formal accounting from the trustees in December 2009 and that the trustees had provided a complete accounting in 2010, which "dated back to 2002." The court found that the trustees were "unable to provide documentation for the years prior to 2002 because such documentation has been destroyed."

The court noted that Kim's main argument was that because the trustees were "unable to provide documentation from 1976 to 2002, the court must therefore assume that there were breaches of duty" which caused damage to Kim. The court determined, however, that it was Kim's burden to prove that the trustees had breached their fiduciary duties and that her

[2] *Id.* at 363-64, 838 N.W.2d at 344.

argument was "an attempt to improperly switch the burden of proof" to the trustees.

The court concluded that Kim had not met her burden. As to the various claims of damages, the court rejected those claims. Kim asserted that the trustees could not account for $307,942.71 in principal and interest owed to the trust from the ranch's sale. The court noted that Kim

> want[ed] the court to therefore assume those payments were not received, or, that any bills, taxes and expenses the [trustees] claim were paid out of the princip[al] were not valid expenditures. Despite [Kim's] having the burden to prove these assertions, the evidence presented convinces the court those payments were in fact paid.

As to Kim's claim that the trustees had failed to collect certain interest on late payments, the court did not believe there were late payments. And even if there were, the court believed any accrued interest would have been much lower. The court also determined that the trustees would have been well within their rights to waive any late fees "considering the entire circumstance of this family trust." Finally, regarding Kim's allegation of "unaccounted princip[al] growth," the court found that Kim's expert was not credible and that the alleged damages were too speculative. The court dismissed Kim's complaint, denied Kim costs and attorney fees, and denied the trustees' request to terminate the trust.

The Court of Appeals' Opinion

On appeal, Kim assigned as error the trial court's (1) failing to shift the burden of proof to the trustees when the trustees failed to provide a full accounting; (2) finding that she had not met that burden (which she should not have borne) when proof of her claims rested within the exclusive control of the trustees; (3) finding that schedule K-1 tax reports were sufficient accountings when no such forms were actually in evidence; and (4) failing to award attorney fees.

The Court of Appeals first addressed the burden of proof. The court began by noting: "In Nebraska, the issue of the burden of proof in testamentary trust cases has not frequently been addressed, and there is no Nebraska case law directly

addressing the issue of the burden of proof for the duty to inform and account to beneficiaries."[3] The court then cited outside jurisdictions for the proposition that there is a presumption that a trustee has acted in good faith and that the burden is on the one questioning the trustee's actions and seeking to establish a breach of trust to prove the contrary.[4]

The Court of Appeals then looked toward the Restatement (Third) of Trusts.[5] The court observed that under the Restatement, the trustee has a duty to keep records and provide reports and to show that his accounting was correct and proper.[6] Further, if the trustee does not "maintain necessary books and records,"[7] "'the presumptions are all against him, obscurities and doubts being resolved adversely to him . . . .'"[8] But the court noted that the Restatement also stated, "When a plaintiff brings suit against a trustee for breach of trust, the plaintiff generally bears the burden of proof."[9] After setting forth these propositions, the court reviewed the county court's order and concluded that it had not failed to properly shift the burden of proof, but instead had concluded that Kim had not met her initial burden.

In assessing that conclusion, the Court of Appeals focused on the trustees' alleged breach of their duty to inform and

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[3] *Id.* at 366, 838 N.W.2d at 346.

[4] See, *In re Rolf H. Brennemann Testamentary Trust, supra* note 1 (citing *Salem v. Lane Processing Trust*, 72 Ark. App. 340, 37 S.W.3d 664 (2001); *Gregory v. Moose*, 266 Ark. 926, 590 S.W.2d 665 (Ark. App. 1979); *Estate of James Campbell, Decsd.*, 42 Haw. 586 (1958); *Jarvis v. Boatmen's National Bank of St. Louis*, 478 S.W.2d 266 (Mo. 1972); *First National Bank of Kansas City v. Hyde*, 363 S.W.2d 647 (Mo. 1962); *In re Estate of Damon*, No. 28378, 2011 WL 576588 (Haw. App. Feb. 18, 2011) (unpublished disposition listed at 125 Haw. 242, 257 P.3d 1219 (2011)).

[5] Restatement (Third) of Trusts § 83 (2007).

[6] See *id.*, § 83, comments *a.* and *a(1).* and accompanying Reporter's Note. See, also, Alan Newman et al., The Law of Trusts and Trustees § 961 (3d ed. 2010); 90A C.J.S. *Trusts* § 689 (2010).

[7] See Restatement, *supra* note 5, § 83, comment *a(1).* at 204-05.

[8] *Id.*, Reporter's Note comments *a.* and *a(1).* at 208 (citing *Wood et al. v. Honeyman et al.*, 178 Or. 484, 169 P.2d 131 (1946)).

[9] See Restatement (Third) of Trusts § 100, comment *f.* at 68 (2012).

report. The court's analysis addressed three periods: 1976 to 2002, 2002 to 2005, and 2005 to 2009. Regarding the first period, the court concluded that Kim had met her burden because "[t]he trustees could not provide an adequate accounting of the trust from 1976 through 2002 . . . ."[10] But the court determined that contrary to Kim's central argument, the record showed that John had made all necessary payments. The court therefore found the breach harmless.

Regarding the second period, the Court of Appeals determined that Kim had not met her burden. Under the law at that time (before the adoption of the Nebraska Uniform Trust Code[11]), the trustees were required only to keep each beneficiary "reasonably informed" of the trust and its administration.[12] The court concluded that the trustees did so and that therefore, they did not breach their duty to inform and report, because they sent Kim annual schedule K-1 tax reports.

Regarding the third period, the Court of Appeals determined that Kim had met her burden. The schedule K-1 tax reports, which the court found sufficient to keep her "'reasonably informed,'" did not satisfy the Nebraska Uniform Trust Code's additional reporting requirements in § 30-3878(c), which came into effect in 2005.[13] Nevertheless, the court determined that the trustees had cured the breach once they filed a full accounting (for 2002 to 2010). Thus, the court found the breach, and any related error by the trial court, harmless.

Finally, after noting that whether to award attorney fees was within the trial court's discretion, the Court of Appeals affirmed the trial court's decision not to award attorney fees. The court recited the applicable propositions of law and held simply: "Having reviewed the record, and based upon the circumstances of this case, we conclude that the trial court did

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[10] See *In re Rolf H. Brennemann Testamentary Trust, supra* note 1, 21 Neb. App. at 370, 838 N.W.2d at 348.

[11] See Neb. Rev. Stat. §§ 30-3801 to 30-38,110 (Reissue 2008, Cum. Supp. 2012 & Supp. 2013).

[12] See Neb. Rev. Stat. § 30-2814 (Reissue 1995).

[13] *In re Rolf H. Brennemann Testamentary Trust, supra* note 1, 21 Neb. App. at 372, 838 N.W.2d at 349. See 2005 Neb. Laws, L.B. 533, § 45.

not abuse its discretion in denying [Kim's] request for attorney fees . . . ."[14] The court affirmed the trial court's order.

ASSIGNMENTS OF ERROR

In her petition for further review, restated and consolidated, Kim assigns that the Court of Appeals erred in (1) presuming that the trustees acted in good faith and placing the burden of proof on Kim to prove breaches of trust, particularly where the trustees failed to properly maintain trust records; (2) concluding that schedule K-1 tax reports were sufficient to reasonably inform beneficiaries; and (3) not awarding her attorney fees.

STANDARD OF REVIEW

[1] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record. But when an equity question is presented, appellate review of that issue is de novo on the record.[15]

ANALYSIS

We understand Kim's general position to be this: The trustees breached their duty to inform and report throughout the life of the trust. She argues that because they failed to properly maintain trust records, they cannot fully account for the trust's administration and its assets. And she argues that because they cannot fully account, it is appropriate to surcharge them for the difference between the money on hand and the money she alleges should have been there had the payments for the sale of the ranch been made to the trust and properly managed. We also understand that on appeal, Kim takes no issue with the sale of the ranch in 1986, the $160,000 downpayment at that time, or the refinancing agreements in 1996.

Regarding the Court of Appeals' decision, Kim agrees that the court's focus on the trustees' duty to inform and report,

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[14] *In re Rolf H. Brennemann Testamentary Trust, supra* note 1, 21 Neb. App. at 375, 838 N.W.2d at 350-51.

[15] See *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

and whether they violated that duty, was appropriate. But Kim takes issue with the court's statements regarding the burden of proof and whether a trustee's actions are entitled to a presumption of propriety. She takes issue with the court's concluding that the trustees' distribution of schedule K-1 tax reports satisfied their duty to inform and report before adoption of the Nebraska Uniform Trust Code. She also contests the court's conclusion that any breaches of trust were harmless. And Kim argues that the court erred in failing to award attorney fees. We will address each issue in turn.

Kim first takes issue with the Court of Appeals' statements regarding the allocation of the burden of proof and a trustee's actions being entitled to a presumption of propriety. In its opinion, the court cited to outside authorities for the proposition that "the presumption is that a trustee has acted in good faith and that the burden is on the one questioning his actions and seeking to establish a breach of trust to prove the contrary."[16] Kim argues that this does not square with our law, either statutory or jurisprudential, and that the burden should always be on the trustees to be able to accurately account for the trust's administration.

Specifically, Kim argues in her brief on further review that the Court of Appeals erred in "holding a beneficiary bears the initial burden of proof that trustees failed to account . . . where she proved no accounting was rendered but was not able to prove what happened to trust funds because the records were in the trustees' sole control." Thus, it appears that Kim understood the court to require her not only to prove that she had not received an accounting, i.e., a breach of the duty to inform and report, but also to prove what happened to the trust's assets. Kim also argues that the court erred in "creat[ing] a presumption [of propriety] where . . . incomplete records were kept, no accountings were rendered annually, and no documents supported a 'catchup' accounting." Thus, it appears that Kim understood the court to have applied a presumption of propriety to the trustees' actions even where

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[16] *In re Rolf H. Brennemann Testamentary Trust, supra* note 1, 21 Neb. App. at 367, 838 N.W.2d at 346 (citations omitted).

the trustees failed to properly account and their recordkeeping was abysmal.

[2,3] But Kim's argument misperceives what the Court of Appeals did. The Court of Appeals simply set forth the general framework for analyzing alleged breaches of trust. The Court of Appeals did not hold, however, that the trustees' actions in this case were presumed correct. This is because any presumption in the trustees' favor obviously disappeared once it became clear that they had failed to properly maintain trust records. It is well established that where a trustee fails to maintain proper records, all doubts regarding his administration of the trust are resolved against him.[17] Nor did the Court of Appeals hold that Kim was required to prove the disposition of trust assets or the accuracy of the trustees' accounting. She was required only to prove that the trustees breached their duty to inform and report; in other words, that as a beneficiary, she was entitled to certain information, and that the trustees had not provided it.[18] An accounting is ordinarily an appropriate remedy for a breach of the duty to inform and report.[19] And if ordered, the trustees would have had the burden to prove its completeness and accuracy once questioned.[20] But here, the trustees could provide only a partial accounting because they had not properly maintained trust records. Under these circumstances, ordering an accounting would be futile and the court had discretion to award "any other appropriate relief."[21] But the Court of Appeals determined that no other relief was warranted; we will discuss that conclusion in detail below.

As for the propositions themselves—that a trustee's actions are presumed proper and that the burden rests on a plaintiff to

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[17] See, e.g., *In re Estate of Hedke*, 278 Neb. 727, 775 N.W.2d 13 (2009); *Honeyman et al., supra* note 8; Restatement, *supra* note 5, § 83, comment *a(1)*.; Newman et al., *supra* note 6.

[18] See §§ 30-2814 and 30-3878.

[19] See § 30-3890.

[20] See, e.g., *In re Estate of Marlin*, 140 Neb. 245, 299 N.W. 626 (1941); Newman et al., *supra* note 6; 90A C.J.S., *supra* note 6.

[21] See § 30-3890(b)(10). See, also, 90A C.J.S., *supra* note 6.

prove a breach of trust—we think they are correct. We first note that there is little difference between the two: to say that a court presumes that a trustee's actions are correct is simply another way of saying the burden rests on a plaintiff to prove a breach of trust. But regardless, these appear to be well-established propositions. In addition to the cases cited by the Court of Appeals, we have found other cases supporting these propositions.[22] Secondary authorities, such as the Restatement, treatises, and legal encyclopedias, likewise support these propositions.[23] And Kim has not pointed us to any persuasive authority that does not. So we see no error in the court's statements regarding a presumption of propriety and the burden of proof or in the framework the court employed.

Kim next takes issue with the Court of Appeals' substantive analysis, which it broke down into three periods: 1976 to 2002, 2002 to 2005, and 2005 to 2009. The court concluded that the trustees had breached their duty to inform and report for each period except for 2002 to 2005. Under the law at the time, absent a request for an accounting, the trustees were required only to keep Kim "reasonably informed of the trust and its administration."[24] The court concluded that the trustees' providing Kim with annual schedule K-1 tax reports was sufficient to meet that obligation. Kim argues that this was error because schedule K-1 tax reports basically offer only limited information regarding the recipient's taxable income; thus, they are not sufficient to meet the trustees' duty to inform and report.

We agree with Kim. At the time, § 30-2814 required that absent a request for an accounting, the trustees keep Kim "reasonably informed of the trust and its administration." And

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[22] See, e.g., *Lopez v. Lopez*, 250 Md. 491, 243 A.2d 588 (1968); *Van de Kamp v. Bank of Am. Nat. Trust*, 204 Cal. App. 3d 819, 251 Cal. Rptr. 530 (1988); *Elmhurst Nat. Bank v. Glos*, 99 Ill. App. 2d 74, 241 N.E.2d 121 (1968).

[23] See, Restatement, *supra* note 9; George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 871 (2d ed. 1995); 90A C.J.S., *supra* note 6, § 600.

[24] See § 30-2814.

while there are no schedule K-1 tax reports in evidence, testimony at trial indicated that they basically contained only information regarding Kim's taxable income from the trust. As such, the trustees' providing it to Kim each year could not satisfy their duty to keep her "reasonably informed *of the trust and its administration*." So we disagree with the Court of Appeals on the scope of the trustees' breach of their duty to inform and report. We conclude that at no time during the relevant period did the trustees satisfy that duty.

The question remains whether Kim was entitled to relief. Section 30-3890 lists various remedies for breaches of trust, including an accounting, and a catchall provision allowing a court to award "any other appropriate relief."[25] Kim argues that the accounting she received was insufficient because it did not account for trust assets from the trust's inception. It went back only to 2002. Also, she asserts it lacked any supporting documentation because the trustees failed to maintain trust records. She argues that in such a situation, surcharging the trustees for any amount they cannot properly account for is appropriate, and that the Court of Appeals erred in failing to award any relief.

We disagree. Although the trustees' conduct fell below acceptable standards, we agree with the Court of Appeals that the trustees' breach of their duty to inform and report was essentially harmless. Despite the trustees' failure to properly account and maintain trust records, what records and evidence which are available show that the trust received the payments for the ranch and that the trustees appropriately managed the money.

Mamie and John both testified that John had made all the payments for the ranch, as did Gilg, the trust's accountant. The available financial records, as well as inferences that may be drawn from the evidence, support this conclusion. Exhibit 103, the original purchase agreement, required John to make payments to the Bank of Hyannis, a third-party bank which acted as trustee and held the deed of trust to the ranch.

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[25] § 30-3890(b)(10). See, also, 90A C.J.S., *supra* note 6.

Exhibit 104, the amortization schedule, has notes indicating that John made the annual payments up until July 1996, at which time, the parties refinanced the purchase agreement. At that time, the remaining principal owed was $254,825.37. Exhibit 105 shows that there were two refinancing agreements extending the payment plans: one for 3 years with the bank (which had acquired Bill's son's interest) for $45,405.30, and one for 10 years with the other parties for $209,420.07. Those amounts totaled the remaining principal owed. In July 2006, the bank (which both held the deed of trust and had a vested interest in a portion of the proceeds) issued a deed of reconveyance for the property, which indicates that John made all of the payments. At trial, even Kim's expert admitted that a commercial bank would not issue a deed of reconveyance if there was not proof that John had made every payment.

Regarding the disposition of those payments, the record convinces us that the trustees appropriately managed the money. The ranch sold for $494,021; of that amount, $160,000 went to pay closing costs and existing liabilities. The trust was entitled to 42.42 percent of what remained, which was $141,691.71. Exhibit 101, Rolf's will, indicates that the trust was to maintain the principal while paying out the interest to the income beneficiaries. Testimony at trial indicated that each ranch payment was made up of principal and interest, and subject to significant taxation. Although the trustees could not provide a full accounting, the records from 2002 to 2010 indicated that they paid out interest income to the beneficiaries during that period. And there were no allegations that the interest had not been paid out throughout the life of the trust. Because the trustees paid out the interest to the beneficiaries, the trustees had to pay the trust's other liabilities from the principal.

The trustees would then deposit the remaining money into a Franklin Templeton income fund. The cost basis of the Franklin Templeton fund in January 2008 was $139,795.27, which was very close to the principal amount the trust was entitled to from the sale of the ranch. The record shows that the Franklin Templeton fund lost a significant amount of money during the 2008 economic downturn before the trustees withdrew the money from the fund. But no one argued

at trial that investment in the Franklin Templeton fund was irresponsible; on the contrary, Kim's own expert testified that it was reasonable at the time. And the remaining money amount squared with what Gilg represented the trust to have during litigation. Thus, our review of the record shows that the trustees' breach of their duties did not harm the trust or the beneficiaries.

[4] The final issue is whether the court should have awarded attorney fees to Kim. On appeal, a trial court's decision awarding or denying attorney fees will be upheld absent an abuse of discretion.[26] The Court of Appeals concluded that "[h]aving reviewed the record, and based upon the circumstances of this case, . . . the trial court did not abuse its discretion by denying [Kim's] request for attorney fees . . . ."[27] Kim argues that this was error, essentially because the trustees clearly breached their duty to inform and report, and that some sanction is necessary.

The Nebraska Uniform Trust Code explicitly provides when attorney fees are appropriate in trust administration cases. Section 30-3893 states: "In a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy."

Here, the trustees clearly breached their duty to inform and report, and did so for decades. They were unable to properly account to Kim because they failed to properly maintain trust records. In such a situation, Kim had little choice but to resort to litigation to resolve any doubts about the trust's administration. Even though the trustees' conduct ultimately did not harm Kim or the trust, that became clear only *after* litigation—litigation made necessary by the trustees' breach of their duties.

Under these circumstances, we agree that the Court of Appeals erred in summarily affirming the county court's ruling

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[26] See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007).

[27] *In re Rolf H. Brennemann Testamentary Trust, supra* note 1, 21 Neb. App. at 375, 838 N.W.2d at 350-51.

not to award attorney fees, particularly where that ruling was premised on the county court's erroneous conclusion that Kim had failed to prove a breach of trust. But we hesitate to award fees ourselves, because we are reviewing a cold record and the county court oversaw the litigation. The county court is thus in the best position to determine, in light of our disposition of the merits of this appeal, whether "justice and equity" require attorney fees, and in what amount. We reverse, and remand for the court to do so.

CONCLUSION

We agree with the Court of Appeals' general legal framework and ultimate conclusion that the trustee's breach was harmless. We disagree, however, with the Court of Appeals' conclusion that annual schedule K-1 tax reports were sufficient to reasonably inform beneficiaries of the trust and its administration. And we conclude that the county court should revisit the issue of attorney fees in light of our disposition of the merits of this appeal.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS ON THE ISSUE OF ATTORNEY FEES.

WRIGHT, J., not participating.

PERRY ELTING ET AL., APPELLEES, V. KERWIN ELTING, APPELLANT.

849 N.W.2d 444

Filed June 27, 2014. No. S-13-551.

1. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
2. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.

4. **Actions: Pleadings: Equity.** The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought.
5. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
6. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
7. **Principal and Agent.** Actual authority is authority that the principal expressly grants to the agent or authority to which the principal consents.
8. ____. The scope of an agent's authority is a question of fact.
9. **Ratification: Agents.** Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.
10. ____: ____. Retention of benefits secured by an agent's unauthorized act with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the agent's act.
11. **Ratification.** Whether there has been a ratification is ultimately and ordinarily a question of fact.
12. **Ratification: Proof.** Because ratification is an affirmative defense, the burden of proving ratification rests on the party alleging the defense.

Appeal from the District Court for Nuckolls County: VICKY L. JOHNSON, Judge. Affirmed.

Daniel E. Klaus and Sheila A. Bentzen, of Rembolt Ludtke, L.L.P., for appellant.

Steven E. Guenzel and Cameron E. Guenzel, of Johnson, Flodman, Guenzel & Wedger, for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

Glenn Elting and Sons was a family farming partnership that was formed in 1976 among Glenn Elting and his sons, Kerwin Elting and Perry Elting, all as managing partners. The partners who comprised the partnership changed over the years. The managing partners during the time period relevant to the issues in this case were: Kerwin; Perry; Kerwin's son, Carl Elting; and Perry's son, Knud Elting. On March 30, 2011, Perry, Knud, and Perry's wife, ReJean Elting, the appellees, filed this action in the district court for Nuckolls County

against Kerwin, the appellant. The amended complaint was filed on January 22, 2013. The appellees alleged that Kerwin had entered into a series of grain contracts on behalf of the partnership without the authority to do so, resulting in significant losses to the partnership. The appellees sought damages based on these losses.

After a bench trial, the district court filed its order on May 30, 2013, in which it found in favor of the appellees. The district court determined that Kerwin did not have authority to enter into the contracts and that his actions were not ratified. The district court further determined that Kerwin was not shielded by the limitation of liability clause contained in the controlling partnership agreement. The district court awarded judgment in favor of the appellees in the amount of $1,072,175 plus prejudgment interest. Kerwin appeals. Finding no error, we affirm.

STATEMENT OF FACTS

In 1976, Glenn Elting and Sons, a farming partnership, was formed among Glenn and his two sons, Kerwin and Perry. The partnership was later expanded and included as partners Glenn's wife, Esther Elting; Kerwin's wife, Patricia Elting; and Perry's wife, ReJean Elting; however, the management of the partnership remained with Glenn, Kerwin, and Perry.

The partnership had an established decisionmaking process: The managing partners would have informal discussions regarding whether and how to proceed, and once a consensus was reached, the partners would proceed. No documents recorded the discussions or decisions of the managing partners. Once a decision was made, Glenn, and later Kerwin, was responsible for carrying out the decision, including signing contracts on the partnership's behalf.

On January 31, 2005, the partners entered into the "Amended and Restated Partnership Agreement for Glenn Elting and Sons" (Partnership Agreement). The Partnership Agreement did not change how the partnership made decisions. Paragraph 5.1 of the Partnership Agreement provided that the partnership was to be managed by the managing partners, and paragraph 5.2 provided that the managing partners were Glenn, Kerwin,

and Perry. Paragraph 5.3 provided that at any time there were more than two managing partners, "the approval of a majority of the Managing Partners shall be required for the Managing Partners to act on behalf of the Partnership, unless unanimous approval of the Managing Partners is required for such action by another provision of [the Partnership] Agreement." Paragraph 5.4 of the Partnership Agreement contained a limitation of liability clause, which provided:

> Liability of Managing Partners. No Managing Partner shall be liable to the Partnership or to any other Partner for any action taken in good faith and reasonably believed by such Managing Partner to be in the best interest of the Partnership or taken in reliance on the provisions of [the Partnership] Agreement, or for good faith errors of judgment, but shall only be liable for willful misconduct or gross negligence in the performance of his or her duties.

In 2008, Kerwin's son, Carl, and Perry's son, Knud, joined the partnership and became additional managing partners. At this point, the managing partners were Kerwin, Perry, Carl, and Knud. On February 8, 2008, the partners entered into the "First Amendment to Amended and Restated Partnership Agreement for Glenn Elting and Sons" to reflect this change. This amendment to the Partnership Agreement did not change any other provisions of the Partnership Agreement regarding how decisions were made. When this amendment to the Partnership Agreement was signed, Glenn and Esther were no longer partners, and they are not involved in this appeal. As noted, the managing partners in 2008 thus were Kerwin, Perry, Carl, and Knud. Kerwin's wife, Patty, and Perry's wife, ReJean, remained as partners, but they did not have a significant role in managing the partnership.

In December 2008, Knud withdrew from active participation in the partnership and ceased his day-to-day involvement in the partnership's activities. However, Knud's status as a managing partner remained unchanged. Kerwin, Perry, and Carl continued to make the decisions involving the partnership.

In 2007, prior to the time that Carl and Knud became partners, the partnership had entered into hedge contracts with

Cargill, Inc., and Aurora Cooperative to sell all of the partnership's anticipated corn production for the years 2008, 2009, and 2010. The partnership contracted to sell approximately half of its corn production to Cargill and the other half to Aurora Cooperative. It is undisputed that the initial hedge contracts with Cargill and Aurora Cooperative were entered into with the knowledge and consent of the managing partners at the time, Glenn, Kerwin, and Perry.

In approximately 2008, Cargill began offering a product called a focal point contract. The focal point contract allowed a farmer to "unlock" the price of hedged corn and allow it to float with the market based upon the increase or decrease in the market between the opening and closing dates specified in the focal point contract. The focal point contract generally was an amendment to the original hedge contract. If the market moved up and the price per bushel increased between the opening and closing dates, then the increased amount would be added to the price per bushel agreed to in the original hedge contract, minus a service fee of 3 cents per bushel. If the price per bushel decreased between the opening and closing dates, then the decreased amount, plus the 3-cent service fee, would be subtracted from the price per bushel agreed to in the original hedge contract. Because all the focal point contracts assessed the same 3-cent fee per bushel, a farmer entering into the focal point contract was predicting and hoping that the market would move up at least 3 cents per bushel during the time that the contract was open in order to maintain at least the same return as would have obtained on the original hedge contract after the payment of service fees.

In 2008 and 2009, Kerwin entered into a series of focal point contracts with Cargill on behalf of the partnership (Focal Point contracts). Cargill's local representative had in-person and telephone conversations with Kerwin regarding the Focal Point contracts. Kerwin entered into the Focal Point contracts on behalf of the partnership at three times. The first set of contracts opened with 240,000 bushels on May 2, 2008, and closed on May 8. The second set of contracts opened with 1,750,000 bushels on September 8 and 26, 2008, and closed on September 12 and October 7, respectively. The third set of

contracts opened on June 23, 2009, and closed on July 1. As a result of the first set of Focal Point contracts, the partnership gained $23,400. As a result of the second and third sets of contracts, the partnership lost significant money. In total, the partnership lost $2,144,350 on the three sets of Focal Point contracts from the originally contracted price.

Sometime in late 2008 or early 2009, Kerwin and Perry started having discussions with respect to dissolving the partnership. A "Partnership Separation Agreement" had been signed on February 8, 2008, which was the same date that the amendment to the Partnership Agreement changing membership was signed. On April 27, 2009, Kerwin, Patricia, and Carl signed a separation notice stating that they wished to dissolve the partnership in accordance with the partnership separation agreement. According to the findings of the district court, the performance of the first two sets of Focal Point contracts did not affect the decision to dissolve the partnership.

Before the partnership dissolved, in late 2007 or early 2008, the partnership began banking with the First National Bank of Fairbury (FNB). The partnership worked primarily with Dick Hoppe, a senior vice president and senior agriculture loan specialist. The partnership's primary purpose of banking with FNB was to secure an operating note, which operated as a line of credit to secure the year's farming expenses. Before agreeing to lend the partnership money, Hoppe needed to review the partnership's financial information. Kerwin was primarily responsible for compiling the information. Kerwin provided Hoppe with the raw data, and Hoppe prepared a balance sheet and cashflow projections. FNB determined that the partnership was creditworthy, and the banking relationship began in January 2008. The 2007 balance sheet was signed by Glenn, Perry, and Kerwin, who were the managing partners at that time.

On January 9, 2009, Hoppe met with Kerwin, Carl, Perry, and ReJean for their annual meeting to review the partnership's financial information, including the 2008 balance sheet and cashflow projections for 2009, in order to renew the partnership's line of credit. At that meeting, Kerwin, Perry, and

Carl each signed the 2008 balance sheet for the partnership. Immediately above their signatures, the balance sheet stated:

> For the purpose of securing credit from time to time this statement is furnished and is certified to be true and correct. I (or We) agree to notify the bank promptly of any material change herein. . . . False statement may be subject to prosecution under Title 18 of the US Code. I (or We) have read the above statement before signing . . . .

The 2008 balance sheet, as well as the cashflow projections for the upcoming 2009 crop year, reflected the price of the Cargill corn after the gains from the May 2008 Focal Point contracts and the losses from the September 2008 Focal Point contracts. There is dispute as to how specific the review of the partnership's financial information was during the annual meetings with Hoppe, including the January 2009 meeting.

After the proceedings to dissolve the partnership began, Kerwin and Carl began farming together and Perry and Knud began farming together. Once the partnership stopped farming, Kerwin and Perry needed to establish separate relationships with FNB. To do so, they each needed to provide FNB with financial information to show that they were creditworthy.

When Perry and Knud began the preparation of their balance sheets and cashflow projections for 2010, they called various vendors to obtain input costs. They also called the Cargill elevator to determine their contract grain price, and the numbers they were provided were apparently based on the price in the original hedge contracts from 2008 and did not include adjustments due to the Focal Point contracts. Knud provided this information to Hoppe, who then completed the balance sheet.

In Hoppe's review of Perry and Knud's financial information, he noticed that Perry and Knud's numbers differed from Kerwin and Carl's numbers with respect to the price of the contracted corn. The Focal Point contracts with Cargill had been divided evenly between Kerwin and Perry in the dissolution documents, so the numbers should have matched. Kerwin's numbers reflected the prices that had been adjusted due to the Focal Point contracts, whereas Perry's did not.

Hoppe informed Perry and Knud that their financial numbers did not match Kerwin and Carl's. Perry and Knud testified that this is the first time they learned of the Focal Point contracts.

On March 30, 2011, the appellees filed their complaint in the district court against Kerwin, seeking $867,000 in damages, which represented their understanding of their portion of the total partnership losses from the Focal Point contracts. The appellees alleged that Perry and Knud had not been consulted regarding whether the partnership should enter into the Focal Point contracts, that they had never voted to enter into the Focal Point contracts, and that Kerwin lacked authority to enter into the Focal Point contracts on behalf of the partnership.

On January 14, 2013, the appellees moved to amend their complaint, because they learned through discovery documents that there were other Focal Point contracts that Kerwin had entered into on behalf of the partnership of which the appellees were unaware. Based on these other Focal Point contracts, the appellees alleged that they were entitled to an additional $226,525, which represented their share of the losses resulting from these additional Focal Point contracts. The district court granted the appellees' motion to amend their complaint.

In response to the appellees' complaint and amended complaint, Kerwin alleged in his answer that he had received authorization to enter into the Focal Point contracts on behalf of the partnership and that even if he lacked such authority, the appellees had ratified his actions. Kerwin further alleged that he was shielded from any liability by the limitation of liability clause in the Partnership Agreement. He also alleged that the appellees' additional claims in their amended complaint were barred by the statute of limitations.

A bench trial was held on January 29 and 30, 2013. The appellees called three witnesses, including Perry, Knud, and the Cargill representative. Portions of Kerwin's deposition were also read into the record. The appellees offered and the court received seven exhibits, including: the Partnership Agreement, the first amendment to the Partnership Agreement,

purchase contracts with Cargill, and the Focal Point contracts with Cargill. Kerwin called three additional witnesses, including Kerwin, Hoppe, and Carl. Kerwin offered, and the court received, 24 exhibits, including: the partnership separation agreement; Hoppe's notes regarding meetings with the partners; the partnership's financial information, including balance sheets and projected cashflow statements; and contracts between the partnership and Aurora Cooperative.

At trial, Kerwin and Carl generally testified that they were familiar with the Focal Point contracts, and that the contracts were entered into after all the managing partners—Kerwin, Perry, Knud, and Carl—had fully discussed the matter and had come to a consensus that all partners wanted to enter into the Focal Point contracts. In contrast, Perry and Knud generally testified that they were not aware of the Focal Point contracts prior to the partnership's entering into them and that they had not authorized Kerwin to enter into them on behalf of the partnership.

After the bench trial, on May 30, 2013, the court filed its order in which it determined that Kerwin lacked authority to enter into the Focal Point contracts on behalf of the partnership; that Kerwin's actions had not been ratified; and that because Kerwin lacked authority, he was not shielded from liability by the limitation of liability provision in the Partnership Agreement. The court found Kerwin liable to the appellees for $1,072,175 plus prejudgment interest.

Kerwin appeals.

ASSIGNMENTS OF ERROR

Kerwin claims on appeal that the district court erred when it (1) found that Kerwin did not have authority to enter into the Focal Point contracts on behalf of the partnership, (2) found that the other managing partners did not ratify Kerwin's actions in entering into the Focal Point contracts, (3) found that the limitation of liability clause did not shield Kerwin from liability, and (4) awarded prejudgment interest to the appellees. Because the fourth assignment of error is not argued in Kerwin's brief, we do not consider it. See *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

STANDARDS OF REVIEW

[1-3] In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Liljestrand v. Dell Enters.*, 287 Neb. 242, 842 N.W.2d 575 (2014). In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). See, also, *Black v. Brooks*, 285 Neb. 440, 827 N.W.2d 256 (2013). 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. *Black v. Brooks, supra*.

ANALYSIS

The legal framework for our analysis is Nebraska's Uniform Partnership Act of 1998 (1998 UPA), found at Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2009), as well as the terms of the Partnership Agreement. The 1998 UPA is Nebraska's counterpart to the model act known as the Revised Uniform Partnership Act (RUPA). See, *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013); *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008). After January 1, 2001, the 1998 UPA became applicable to any Nebraska partnership, including those partnerships formed prior to January 1, 1998. See §§ 67-464 and 67-467. It is not disputed that the 1998 UPA applies to this case.

[4] As an initial matter, we must determine the nature of the action brought by the appellees, because the nature of the action will determine our standard of review. Under § 67-425(2)(a) of the 1998 UPA, a partner may maintain an action against another partner for legal or equitable relief. The nature of an action, whether legal or equitable, is determinable from its main object, as disclosed by the averments of the pleadings and the relief sought. *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

[5] Kerwin contends that because this case involves an action among partners, it is necessarily an action in equity rather than an action at law and that our standard of review should be de novo on the record. Kerwin refers us to cases such as *Robertson v. Jacobs Cattle Co., supra*, involving an action for a partnership dissolution and accounting between partners which we deemed as one in equity and properly reviewed de novo on the record. In *Robertson*, we noted that on appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.

[6] Kerwin's characterization of this case as an action in equity does not accurately assess the substance of the appellees' claim. In this case, the appellees alleged that Kerwin breached the Partnership Agreement, a contract, and sought damages. The appellees did not request an accounting nor did they seek to dissolve the partnership. We have stated that a suit for damages arising from breach of a contract presents an action at law. *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 810 N.W.2d 677 (2012). Because this is a suit for damages arising from breach of the Partnership Agreement, the action is one at law, and we apply the applicable standards of review recited earlier in this opinion. In this regard, we repeat that the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong and add that an appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013). With the foregoing framework and standard of review in mind, we turn to Kerwin's assignments of error and in so doing, refer at length to the district court's detailed findings and opinion.

Kerwin Was Not Authorized by the Partnership to Enter Into the Focal Point Contracts.

In Kerwin's first assignment of error, he claims that the district court erred when it determined that Kerwin did not

have authority to enter into the Focal Point contracts on behalf of the partnership. We find no merit to this assignment of error.

[7,8] With respect to a partner's agency to act on behalf of a partnership, § 67-413(1) of the 1998 UPA provides that "[e]ach partner is an agent of the partnership for the purpose of its business." Because each partner is an agent of the partnership, the partner must have authority in order to act on behalf of the partnership. We have stated that "[a]ctual authority is authority that the principal expressly grants to the agent or authority to which the principal consents." *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 717, 773 N.W.2d 145, 150 (2009). See, also, Restatement (Third) of Agency § 2.01, comment *c*. at 81 (2006) (stating that "[a]ctual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation"). The scope of an agent's authority is a question of fact. *Koricic v. Beverly Enters. - Neb., supra*.

The Partnership Agreement in this case contains language regarding the partners' authority to act on behalf of the partnership. Paragraph 5.1 of the Partnership Agreement provides that the management of the partnership is vested in the managing partners. At all relevant times, the four managing partners were Kerwin, Perry, Carl, and Knud. Paragraph 5.1 further provides that the managing partners "shall have power and authority to manage all business and affairs of the Partnership, which power and authority shall include, but is not limited to . . . entering into and terminating lease agreements and other contracts." Paragraph 5.3 states in part that "[a]t any time in which there are more than two (2) Managing Partners, the approval of a majority of the Managing Partners shall be required for the Managing Partners to act on behalf of the Partnership . . . ."

Pursuant to the language of the Partnership Agreement, approval of at least three of the four managing partners was required in order for Kerwin to have had authority to act on behalf of the partnership and to enter the partnership into

the Focal Point contracts. For completeness, we note that the record indicates that in the course of the conduct of the partnership's affairs, some incidental decisions, such as getting a tire fixed, were not viewed as requiring the approval of a majority of the managing partners. However, it is undisputed that entering into the Focal Point contracts was viewed as a significant decision, and it naturally follows that such decision required approval of a majority of the managing partners as provided in paragraph 5.3 of the Partnership Agreement.

At the bench trial, evidence was adduced regarding whether Kerwin was authorized to enter into the Focal Point contracts on the partnership's behalf. The partners agree that Kerwin was generally responsible for handling the paperwork of the partnership, including the signing of contracts on behalf of the partnership. Kerwin and Carl both testified that the managing partners discussed and agreed that the partnership should enter into the Focal Point contracts. In contrast, Perry and Knud both testified that they were unaware of the Focal Point contracts prior to the time the partnership entered into them. Perry and Knud testified that the managing partners never discussed entering into the Focal Point contracts and that they never agreed to authorize Kerwin to enter into them on behalf of the partnership.

In its order, the district court delineated a number of factors it considered in making its finding that Perry and Knud did not authorize Kerwin to enter the partnership into the Focal Point contracts. The district court evaluated the credibility of the witnesses and found Perry and Knud to be credible. As stated above, in a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Liljestrand v. Dell Enters.*, 287 Neb. 242, 842 N.W.2d 575 (2014). We generally defer to a trial court's assessment of conflicting evidence, because the trial court had the advantage of hearing and observing important parts of evidence that are not readily apparent from a cold record. *Id.* The court stated that it considered the fact that after it was decided that the partnership would be dissolved and the families had agreed to begin farming separately, Perry and Knud prepared their separate 2010 financial information

for FNB without adjusting the price of corn for the losses due to the Focal Point contracts. In this regard, the court noted "the consternation which erupted once it became known that Perry and Kerwin were presenting corn prices to [FNB] which should have matched, but did not." Also in support of its decision finding Perry and Knud more credible was the fact that when filing their original complaint, the appellees omitted some of the Focal Point contracts entered into in 2008, which they were apparently unaware of until discovery took place prior to trial.

In support of its findings, the court further stated that

> [i]t has considered that if all four [managing] partners were aware of the opening up of the [Focal Point] contracts, and watched the spectacular drops in the value of their corn crop, it would seem that someone would remember a specific, undoubtedly unpleasant conversation, between [sic] the partners regarding the ultimate decisions to close the [Focal Point] contracts. One would also think that such an incredible loss in corn contract prices would have been cited as a reason to end the partnership, but it was not. [The court] has considered the fact that the last group of Focal Point contracts were [sic] apparently entered into after the parties had agreed to dissolve the partnership and go their separate ways. It does not seem plausible that partners whose business relationship had reached to the point of dissolution a few short weeks or months earlier would agree to open up additional contracts with another potential for significant loss.

The district court added that it "considered the demeanor, conduct, testimony, statements in conflict between witnesses, and conflicts within the witness's own testimony. It credits the version that Perry and Knud told and finds that they were unaware of the Focal Point contracts until Perry and Knud began their separate relationship with FNB." Given the foregoing, the district court found that Perry and Knud were unaware of the Focal Point contracts until after they were entered into and it found that Perry and Knud did not agree to enter the partnership into the Focal Point contracts. Therefore, the

district court found that Kerwin was not authorized to enter into the Focal Point contracts on the partnership's behalf.

As stated above, the scope of an agent's authority is a question of fact. *Koricic v. Beverly Enters. - Neb.*, 278 Neb. 713, 773 N.W.2d 145 (2009). The district court found that Perry and Knud did not agree to enter into the Focal Point contracts and that therefore, there was not approval by a majority of the managing partners to enter into the Focal Point contracts as was required by paragraph 5.3 of the Partnership Agreement. There is sufficient evidence to support these findings. The district court's finding that Kerwin did not have authority to enter the partnership into the Focal Point contracts was not clearly wrong.

Kerwin's Actions of Entering the Partnership Into the Focal Point Contracts Were Not Ratified.

In Kerwin's second assignment of error, he claims that the district court erred when it found that his actions were not ratified. Kerwin argues that even if he lacked authority to enter into the Focal Point contracts on behalf of the partnership, Perry and/or Knud nevertheless ratified his actions, and he is relieved of liability. We find no merit to this assignment of error.

[9-12] As we have noted above, "[e]ach partner is an agent of the partnership for the purpose of its business." § 67-413(1). Regarding ratification, § 4.01 of the Restatement (Third) of Agency (2006) provides in part:

> (1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.
>
> (2) A person ratifies an act by
>
> (a) manifesting assent that the act shall affect the person's legal relations, or
>
> (b) conduct that justifies a reasonable assumption that the person so consents.

Id. at 304. We have previously stated:

> Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.

> Further, retention of benefits secured by an agent's unauthorized act with knowledge of the source of such benefits and the means by which they were obtained is a ratification of the agent's act. And whether there has been a ratification is ultimately and ordinarily a question of fact. Because ratification is an affirmative defense, the burden of proving ratification rest[s] on the [party alleging the defense].

Brook Valley Ltd. Part. v. Mutual of Omaha Bank, 285 Neb. 157, 168-69, 825 N.W.2d 779, 789 (2013). In this case, Kerwin affirmatively pled ratification in his "Third Affirmative Defense" and therefore, Kerwin had the burden to show that his actions were ratified. The district court found that they were not.

In order for a previously unauthorized act to be ratified, the ratifying partners must have actual knowledge of the unauthorized act before they can ratify the action. Section 4.06 of the Restatement provides that "[a] person is not bound by a ratification made without knowledge of material facts involved in the original act when the person was unaware of such lack of knowledge." *Id.* at 336. Comment *b.* to § 4.06 further explains:

> A person who has ratified is not bound by the ratification if it was made without knowledge of material facts about the act of the agent or other actor. Thus, ratification concerns actions that have already taken place, of which the person is aware, not actions or events that may occur in the future. The burden of establishing that a ratification was made with knowledge is on the party attempting to establish that ratification occurred.

Id. at 336.

Comment *b.* to § 4.06 at 336 clarifies the nature of the knowledge needed for ratification, providing that "[r]atification requires that the principal have actual knowledge of material facts, not notice as defined in § 1.04(4)." The definition of notice in § 1.04(4) of the Restatement includes constructive knowledge, and states in part that "[a] person has notice of a fact if the person knows the fact, has reason to know the fact, has received an effective notification of the fact, or should

know the fact to fulfill a duty owed to another person." *Id.* at 70. Therefore, the Restatement (Third) of Agency makes it clear that the ratifying partners must have actual knowledge, not merely constructive knowledge, of the previously unauthorized act before they can ratify the act. Mere notice as defined in § 1.04(4) does not equate to knowledge for ratification purposes.

Kerwin argues that evidence of constructive knowledge on the part of the ratifying partners is sufficient for the other partners to have ratified a previously unauthorized act. He asserts that both Perry and Knud ratified the partnership's participation in the Focal Point contracts. In particular, he contends that Perry had constructive knowledge of the Focal Point contracts, because at the FNB meeting on January 9, 2009, Perry signed the first page of the 2008 balance sheet, and elsewhere in the document, the price of corn was adjusted for the Focal Point contracts. Kerwin contends that in signing the balance sheet, Perry indicated that he had read the entire document and was aware of its contents. Kerwin asserts that if Perry had had any questions or concerns regarding the price of the corn, he would have raised them at the FNB meeting. Kerwin further asserts that the Focal Point contracts were kept in an unlocked filing cabinet in the partnership's office and that the managing partners had access to them at any time and could have reviewed them.

We reject Kerwin's argument that constructive knowledge is sufficient for ratification in this case. None of the cases upon which Kerwin relies involved partners or a partnership ratifying the previously unauthorized act of another partner based upon constructive knowledge. By way of example, *Eicher v. Mid America Fin. Invest. Corp.*, 275 Neb. 462, 748 N.W.2d 1 (2008), involved whether a person who signed a contract for the sale of his home had constructive knowledge of the content contained in the contract. *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011), involved whether a person who had signed a release of liability had constructive knowledge of the contents of the release. In the instant case, the 2008 balance sheet signed by

Perry has not been determined to be a contract, and it is not a release of liability, therefore, neither *Eicher* nor *Gonzalez* controls our analysis.

As noted above, the Restatement (Third) of Agency (2006) provides that actual knowledge, not constructive knowledge, is required for ratification, and we determine that this principle is applicable in this case. Whether there has been a ratification is ultimately and ordinarily a question of fact. *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013). In the bench trial, both Perry and Knud testified and the court found that they were "adamant that they had no knowledge of the Focal Point contracts." In the district court's order, the court stated that it considered Perry's testimony that he trusted Kerwin "to do the book work" for the partnership and that "[i]t is clear that Perry is not a detail-oriented person." In weighing the testimony, the court stated that although "[t]here is some evidence that Perry, at a minimum, had the ability to notice that the contract price had changed on some of the corn," the district court found that Perry and Knud were credible witnesses and ultimately found that neither Perry nor Knud had actual knowledge of the Focal Point contracts for purposes of ratification.

Because actual knowledge of the Focal Point contracts was required in order for Perry or Knud to ratify Kerwin's decision to enter into them on behalf of the partnership, and because Perry and Knud lacked such actual knowledge, they could not, and did not, ratify Kerwin's decision to enter into the Focal Point contracts on the partnership's behalf. Given our standard of review, we cannot say that the district court was clearly wrong when it found that neither Perry nor Knud ratified Kerwin's actions.

The Limitation of Liability Clause in the Partnership Agreement Does Not Shield Kerwin From Liability.

In Kerwin's third assignment of error, he argues that the limitation of liability clause found in paragraph 5.4 of the Partnership Agreement shields him from liability for the losses

resulting from his unauthorized actions, and he claims that the district court erred in not so determining. We find no merit to this assignment of error.

Paragraph 5.4 of the Partnership Agreement states:

> Liability of Managing Partners. No Managing Partner shall be liable to the Partnership or to any other Partner for any action taken in good faith and reasonably believed by such Managing Partner to be in the best interest of the Partnership or taken in reliance on the provisions of [the Partnership] Agreement, or for good faith errors of judgment, but shall only be liable for willful misconduct or gross negligence in the performance of his or her duties.

The 1998 UPA provides that the relations among the partners and between the partners and the partnership are generally governed by their partnership agreement. § 67-404(1). Under the 1998 UPA, a partnership agreement may place some limitations on the partners' duty of care, as is done in paragraph 5.4 of the Partnership Agreement, but it may not unreasonably reduce the duty of care in some scenarios. See, e.g., §§ 67-404(2)(d) and 67-424(3) (regarding conduct and winding up of partnership). See, also, § 67-433(2)(c) (regarding dissociation). Section 67-404 of the 1998 UPA provides in part:

> (1) Except as otherwise provided in subsection (2) of this section, relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, the [1998 UPA] governs relations among the partners and between the partners and the partnership.

The 1998 UPA is Nebraska's counterpart to the model act known as RUPA. Section 67-404 of the 1998 UPA is equivalent to § 103 of RUPA. Comment 6 to § 103 of RUPA states:

> [P]artnership agreements frequently contain provisions releasing a partner from liability for actions taken in good faith and in the honest belief that the actions are in the best interests of the partnership and indemnifying the partner against any liability incurred in connection with

> the business of the partnership if the partner acts in a good faith belief that *he has authority to act*.

Robert W. Hillman et al., The Revised Uniform Partnership Act § 103, comment 6 at 44 (2013-14 ed. 2013) (emphasis supplied).

In this case, the district court determined that because Kerwin's actions in entering into the Focal Point contracts were not authorized by the partnership, his actions were not shielded by the limitation of liability clause. The district court reasoned that "[a]s Kerwin had no right to bind [the partnership] to the Focal Point contracts without a majority vote of the [managing] partners, his entering into the [Focal Point] contracts was outside his duties as a partner and therefore not 'taken in reliance on the provisions of' the Partnership Agreement." The district court therefore determined that Kerwin was not shielded by the limitation of liability clause in the Partnership Agreement. We believe the district court's reasoning is incomplete, but we agree with the ultimate determination that Kerwin is not shielded from liability under paragraph 5.4 of the Partnership Agreement.

Paragraph 5.4 quoted above provides for several scenarios which excuse liability, and as we read it, the actions which gave rise to each scenario must have been taken in good faith. The district court made no specific comment on whether Kerwin's conduct was taken in "good faith," but we believe the court's factual findings are inconsistent with good faith; thus, Kerwin is not shielded from liability under any scenario in paragraph 5.4 of the Partnership Agreement.

According to the court's findings, Kerwin acknowledged that a consensus of the managing partners was required to enter into the Focal Point contracts and contended that a consensus had been reached. To the contrary, the district court found that Perry and Knud had no prior knowledge of the Focal Point contracts. The court found that "consternation . . . erupted once it became known that Perry and Kerwin were presenting corn prices to [FNB] which should have matched, but did not." The court stated that, if all four managing partners had watched the "spectacular drops in the value of their corn crop, it would seem that someone would remember a specific, undoubtedly

unpleasant conversation," but that there was no such exchange. The district court noted that the Focal Point contracts led to an "incredible loss in corn contract prices [which] would have been cited as a reason to end the partnership, but it was not." The district court found that "the partnership lost significant money" as a result of the second and third series of contracts. The district court found the total loss was $2,144,350. The district court determined that Kerwin's actions were outside and therefore not "'taken in reliance on the provisions of'" the Partnership Agreement.

The findings by the district court in this case wherein Kerwin shared neither the fact of entering into the Focal Point contracts nor the fact of repeated significant losses with his partners cannot be explained by oversight or forgetfulness. Kerwin's failure to mention the exposure of the partnership on the front side of the Focal Point contracts and the over $2 million loss on the back side, does not meet the measure of candor expected among partners. Despite his assertion of good faith, Kerwin was not forthright with his partners about important matters and the facts are inconsistent with Kerwin's having taken action in good faith. Because good faith is required to shield Kerwin from liability under each scenario in paragraph 5.4 of the Partnership Agreement, given the absence of good faith, Kerwin cannot take advantage of the provisions of paragraph 5.4, as the district court determined.

CONCLUSION

We determine that the district court was not clearly wrong when it determined that Kerwin was not authorized to enter into the Focal Point contracts on behalf of the partnership and when it determined that Kerwin's actions of entering into the Focal Point contracts on the partnership's behalf were not ratified. We further determine that the limitation of liability clause in the Partnership Agreement did not shield Kerwin from liability for the partnership's losses due to the Focal Point contracts. We therefore affirm the order of the district court awarding judgment and damages to the appellees.

AFFIRMED.

Sanitary and Improvement District No. 424 of Douglas County, Nebraska, appellee, v. Tristar Management, LLC, a Nebraska limited liability company, appellant.

850 N.W.2d 745

Filed June 27, 2014. No. S-13-582.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **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.
4. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law that an appellate court independently reviews.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Reversed and remanded with directions.

Christian R. Blunk, of Harris Kuhn Law Firm, L.L.P., for appellant.

Mark J. LaPuzza, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

NATURE OF CASE

Tristar Management, LLC (Tristar), appeals the order of the district court for Douglas County in which it ruled that the special assessment liens levied by Sanitary and Improvement District No. 424 of Douglas County, Nebraska (the SID), against five parcels of real estate located within the SID survived Tristar's acquisition of title to the parcels by the issuance to Tristar of treasurer tax deeds under Neb. Rev. Stat.

§ 77-1837 (Reissue 2009). Because we conclude that the liens were foreclosed by the issuance of the tax deeds, the district court erred as a matter of law. We reverse the order entering summary judgment in favor of the SID and denying Tristar's motion for summary judgment, and we remand the cause with directions.

STATEMENT OF FACTS

This case involves five parcels of real estate that are located within the boundaries of the SID: lots 46, 53, 54, 94, and 176 (the Properties). The Properties are located in Stone Park, which is a subdivision in Douglas County. The parties stipulated to the underlying facts as follows:

> 1. That the special assessments on [the Properties] were levied on December 3, 1999 by the [SID] via special assessment in the amount of $8,496.57 per Lot. Interest as of 2.28.13 totals $12,576.15 for a total per Lot of $21,072.72.
>
> 2. That the [Properties] had been in a 2005 tax sale auction and were subsequently sold under Neb. Rev. Stat. § 77-190[1] et [seq]. [(Reissue 2009)] collection of delinquent real property taxes through district court proceedings to HBI, LLC pursuant to Douglas County District Court case CI 1082, Page 845 entitled Adair Asset Mgmt v. East. . . .
>
> 3. HBI, LLC brought Douglas County District Court matter CI 1099-167, HBI, LLC v. Sanitary Improvement District 424, against [the] SID . . . seeking declaratory action. [The] SID . . . answered and cross claimed the sale was improper and that [the] SID . . . was not properly served. . . .
>
> 4. Douglas County District Court matter CI 1099-167 was dismissed with prejudice. . . .
>
> 5. A Special Warranty Deed #2011030257 was filed [by HBI, LLC] with the Douglas County Register of Deeds office on April 5, 2011, [whereby the SID became titleholder,] along with the accompanying Real Estate Transfer Statement Form 521, designating the address of MARK LaPUZZA, Pansing Hogan Ernst & Bachman,

10250 Regency Circle, Suite 300, Omaha, NE 68114 as the place to send tax statements. . . .

6. [At some point] TRISTAR . . . became the assignee of the [2009] Tax Certificates attached to the following [Properties:]

2009-2311	Lot 46
2009-2356	Lot 94
2009-2873	Lot 176
2009-3348	Lot 53
2009-3376	Lot 54

7. TRISTAR commenced in March, 2012 under Neb. Rev. Stat. § 77-180[1] et [seq]. [(Reissue 2009)] the collection of property tax by sale of real property and caused the attached Notices to be delivered by certified mail, receipt requested to the SID's address of record. See attached Exhibit "6" for each Lot['s] respective Notice and green card c/o MARK LaPUZZA, 10250 Regency Circle, Suite 300, Omaha, NE 68114 which all green cards were signed for and returned.

8. TRISTAR further published the Notice on each respective Lot. . . .

9. On various dates, TRISTAR applied for Tax Deeds on each of the respective properties. . . .

10. On various dates, the Deeds were granted and subsequently recorded. . . .

11. The SID . . . took no action to redeem the Certificates within each respective certificate's 90-day redemption period.

12. [The SID's] chairman is Lori Bachman, 6228 North 153rd Avenue, Omaha, NE 68116. [The SID's] clerk is Tom Umthun, 6214 North 154th Street, Omaha, NE 68116.

13. The record of address of the SID for the Lots certified by the Douglas County Assessor for the period of January 1, 2012 to June 30, 2012 is c/o Mark LaPuzza, 10250 Regency Cir., Suite 300, Omaha, NE. . . .

As reflected in the stipulated facts, the SID became the titleholder of the Properties in 2011 and, through assignment, Tristar became the holder of five 2009 tax certificates

on the Properties. In March 2012, Tristar began proceedings to redeem the tax certificates under statutes in chapter 77, article 18, of the Nebraska Revised Statutes relating to the "Collection of Delinquent Real Property Taxes by Sale of Real Property." Tristar published notices regarding its intent to redeem the tax certificates and mailed notices to the address of the SID's attorney, Mark LaPuzza, who had been designated as the place to send tax statements to be paid by the SID on the Properties. Tristar then applied for and obtained from the Douglas County treasurer the tax deeds to the Properties pursuant to § 77-1837.

As will be explained more fully below in our analysis, there are two processes through which a holder of tax certificates can exercise his or her rights to the property purchased at a tax sale. Under chapter 77, article 18, the holder of a tax certificate can obtain a tax deed from the county treasurer, after having given proper notice; we refer to this as the "tax deed" method. Under chapter 77, article 19, the holder of a tax certificate can foreclose upon the tax lien in a court proceeding and compel sale of the property, yielding a sheriff's deed, under Neb. Rev. Stat. § 77-1902 (Cum. Supp. 2012); we refer to this as the "judicial foreclosure" method. See, generally, *Knosp v. Shafer Properties*, 19 Neb. App. 809, 820 N.W.2d 68 (2012).

In this case, after Tristar had obtained tax deeds for the Properties under the "tax deed" method under chapter 77, article 18, the SID filed its complaint against Tristar in the district court for Douglas County on August 21, 2012. This case gives rise to the instant appeal. The SID asserted two causes of action. "Count I" was an action to quiet title in the Properties in the SID. The SID alleged that the tax deeds held by Tristar were void due to lack of proper notice to the SID. The SID also sought orders declaring that its special assessments levied in 1999 continued to be valid liens on the Properties and that Douglas County's public tax records should reflect such special assessment liens. "Count II" was an action for foreclosure of the liens for the special assessments.

On October 11, 2012, Tristar filed a motion to dismiss count II for failure to state a claim. On January 11, 2013, the

district court sustained Tristar's motion to dismiss count II of the complaint.

On February 12, 2013, Tristar filed a motion for summary judgment, and a hearing was held on the motion on March 1. The bill of exceptions from the hearing includes a set of "Stipulated Facts" and eight exhibits. At the hearing, the district court granted Tristar's motion for leave to file its answer out of time. In its answer with regard to count I, Tristar affirmatively averred that the SID had been properly notified and served under the relevant statute in chapter 77, article 18, including Neb. Rev. Stat. § 77-1832 (Reissue 2009). Tristar also affirmatively averred that "TRISTAR tax deeds are valid and have cleared the title[s] from all liens, interests, and encumbrances of record." (Emphasis in original.) Tristar requested an order stating that the special assessments were no longer valid liens on the Properties. After the hearing on Tristar's motion for summary judgment, the SID filed its cross-motion for summary judgment, stating that its motion could be considered in connection with the evidence adduced at the hearing on Tristar's motion for summary judgment.

The district court filed its order on June 13, 2013, ruling on the parties' cross-motions for summary judgment. It is this order from which Tristar appeals. In its order, the district court stated that "[a]t issue is whether or not a tax deed issued by a county treasurer excludes any lien on real estate for special assessments levied by a sanitary improvement district."

In making its determinations in its June 13, 2013, order, the district court relied upon § 77-1902 from the judicial foreclosure statutes. Section 77-1902 provides:

> When land has been sold for delinquent taxes and a tax sale certificate or tax deed has been issued, the holder of such tax sale certificate or tax deed may, instead of demanding a deed or, if a deed has been issued, by surrendering the same in court, proceed in the district court of the county in which the land is situated to foreclose the lien for taxes represented by the tax sale certificate or tax deed and all subsequent tax liens thereon, excluding any lien on real estate for special assessments levied by any sanitary and improvement district which special

> assessments have not been previously offered for sale by the county treasurer, in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917. Such action shall only be brought within six months after the expiration of three years from the date of sale of any real estate for taxes or special assessments.

Based on § 77-1902, the district court concluded that the tax deeds issued to Tristar by the Douglas County treasurer did not foreclose or extinguish the special assessment liens held by the SID. The district court reasoned that "[f]oreclosing special assessments upon the issuance of a treasurer's deed would nullify the priority given to special assessments as set forth in Neb. Rev. Stat. 77-1902." Because of this determination, the district court stated that the issue regarding whether Tristar gave proper notice to the SID when Tristar was in the process of obtaining its tax deeds was moot and need not be decided.

Given the foregoing determinations, the district court denied Tristar's motion for summary judgment and granted the SID's motion for summary judgment. The district court ordered that the Properties

> are not subject to foreclosure or termination pursuant to the treasurer[']s deed[s] received by Tristar . . . from the Douglas County Treasurer and that the special assessments levied by [the SID] on December 3, 1999 continue to be a valid lien against each of the [Properties] until paid and that Douglas County should amend its public tax records to reflect such special assessments against the [Properties].

Tristar appeals.

ASSIGNMENTS OF ERROR

Tristar claims on appeal, restated, that the district court erred when it (1) granted the SID's motion for summary judgment and denied Tristar's motion for summary judgment, (2) found that the tax deeds issued to Tristar did not foreclose or terminate the SID's special assessment liens and that the

special assessment liens continued to be valid liens against the Properties, (3) applied § 77-1902 to a proceeding for a tax deed, (4) failed to address the issue of the sufficiency of the notice provided by Tristar to the SID in obtaining its tax deeds and found such issue moot, (5) failed to find that Tristar's notice to the SID was sufficient, (6) impliedly found that the SID had standing to bring count II for foreclosure of the special assessment liens, and (7) failed to address Tristar's argument that because the SID filed the special warranty deeds to the Properties in 2011, the doctrine of merger should be applied to conclude that the SID's special assessment liens merged with the SID's interest as a titleholder.

STANDARDS OF REVIEW

[1,2] A quiet title action sounds in equity. *Obermiller v. Baasch*, 284 Neb. 542, 823 N.W.2d 162 (2012). On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination. *Id.*

[3] 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. *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[4] Statutory interpretation presents a question of law that an appellate court independently reviews. *SourceGas Distrib. v. City of Hastings*, 287 Neb. 595, 844 N.W.2d 256 (2014).

ANALYSIS

The central issue in this appeal is the correctness of the district court's order in which it concluded that the SID's special assessment liens survived issuance of the tax deeds to Tristar. The court reached this conclusion by applying § 77-1902, which effectively provides for the survival of sanitary improvement district special assessment liens in judicial foreclosure proceedings under Neb. Rev. Stat. § 77-1901

et seq. (Reissue 2009 & Cum. Supp. 2012), to the tax deed process Tristar had pursued under the treasurer's tax deed statutes found at Neb. Rev. Stat. § 77-1801 et seq. (Reissue 2009 & Cum. Supp. 2012). As explained below, we conclude that the district court erred as a matter of law when it applied the chapter 77, article 19, provision to the transfer of property under chapter 77, article 18, and we reverse, and remand with directions. Given the disposition of this appeal, we find it unnecessary to reach certain assignments of error and we combine and comment only briefly on other issues raised in this appeal.

Merger.

We turn first to Tristar's contention that because the lesser interests, i.e., special assessment liens, merged into the greater interests, i.e., titles, held by the same entity, after the SID gained title, the SID had no lienhold interests to protect. See, generally, *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994). Tristar contends that due to merger, the SID lacked standing to bring count II, in which it sought to foreclose on its liens, and that the district court erred when it denied the portions of Tristar's motions seeking to dispose of count II.

The procedural posture of this case is complex and does not warrant repeating. In sum, the record shows that the district court dismissed the SID's count II earlier in the pendency of the case and did not properly reinstate it. Count II stands dismissed. Thus, to the extent the order on appeal purports to rule on count II, such rulings are a nullity and are vacated. Further, with respect to merger, for purposes of our consideration of the central issue in the case, our analysis will assume that the SID's special assessment liens did not merge into the SID's title, and therefore, we proceed to consider the survival of the SID's special assessment liens following the issuance of the tax deeds to Tristar.

Notice.

We turn next to Tristar's claim that the district court erred when it failed to rule on the SID's contention that notice

to the SID of the pending issuance of tax deeds to Tristar was not sufficient. Tristar maintains that application of the law to the stipulated facts shows that notice was sufficient. We agree.

The SID relied on Neb. Rev. Stat. § 25-510.02(3) (Cum. Supp. 2012) in support of its argument. Given its disposition on the merits favorable to the SID, the district court ruled that the "issue of the sufficiency of notice provided to SID 424 is moot" and did not address the issue. The SID did not cross-appeal the district court's treatment of notice.

A county treasurer's tax deed is presumptive evidence that procedures required by law to make a good and valid tax sale and vest title in the purchaser were done. See, § 77-1842; *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004). As to proper notice under the tax deed method, § 77-1832 provides in part:

> (1) Service of the notice provided by subsection (1) of section 77-1831 shall be made by:
>
> (a) Personal or residence service as described in section 25-505.01 upon every person in actual possession or occupancy of the real property and upon the person in whose name the title to the real property appears of record who can be found in this state; or
>
> (b) Certified mail, return receipt requested, upon the person in whose name the title to the real property appears of record who cannot be found in this state or who cannot be served by personal or residence service to the address where the property tax statement was mailed and upon every encumbrancer of record in the office of the register of deeds of the county. Whenever the record of a lien shows the post office address of the lienholder, notice shall be sent by certified mail, return receipt requested, to the holder of such lien at the address appearing of record.

The parties stipulated to the following facts, which we repeat because, taken together, they show sufficient notice: A "Special Warranty Deed" was filed with the Douglas County register of deeds at instrument No. 2011030257, on April 5, 2011, whereby the SID became the titleholder of the Properties. Also

filed with such "Special Warranty Deed" was a "Real Estate Transfer Statement Form 521." Item No. 19 of "Form 521" designated LaPuzza and his office address as the address of record to which the tax statements should be sent.

Tristar, through assignment, was the holder of the five 2009 tax certificates (Nos. 2009-2311, 2009-2356, 2009-2873, 2009-3348, and 2009-3376) when the SID did not pay the general real property taxes on the Properties. During March 2012, Tristar caused the redemption notices authorized by § 77-1831 to be delivered by certified mail, receipt requested, to the address of record where the property tax statements were mailed pursuant to § 77-1832. As noted in the stipulated facts, this address was designated by the SID under "Form 521" filed with the "Special Warranty Deed" as "c/o MARK LaPUZZA, 10250 Regency Circle, Suite 300, Omaha, NE 68114." Tristar also published the notices, pursuant to § 77-1834.

On various dates in July to August of 2012, Tristar applied for the tax deeds to the Properties, pursuant to § 77-1831 et seq. At the time Tristar applied for the tax deeds, affidavits of service of notice were provided to the Douglas County treasurer pursuant to § 77-1833, as was proof of publication pursuant to § 77-1835. The Douglas County treasurer, pursuant to § 77-1837, issued the respective tax deeds. The SID took no action to redeem the tax certificates within the 90-day redemption period or at any time prior to the redemption period. According to the stipulated facts, the Douglas County assessor's office certified that the address of record for the SID for tax purposes on the Properties was "c/o Mark LaPuzza, 10250 Regency Cir[cle], Suite 300, Omaha, NE."

Despite the foregoing undisputed facts, the SID relied on Neb. Rev. Stat. § 25-501 et seq. (Reissue 2008 & Cum. Supp. 2012) to support its claim of inadequate notice. The SID specifically contends that, as a political subdivision, service should have been made on a board member or officer. See § 25-510.02(3). The statutes upon which the SID relies are general service statutes and do not control. Instead, the specific statutes, § 77-1831 and following, control proper notice relative to the issuance of tax deeds and provide, inter alia,

that notice be given to the address of record provided by the SID to the county for delivery of its tax statement. Because notice was given to the address so designated, we determine that notice was sufficient, and the district court should have so determined.

Misapplication of § 77-1902.

The district court relied on § 77-1902 when it concluded that the SID's special assessment liens survived the issuance of the tax deeds to Tristar. It was on this basis that the district court denied Tristar's motion for summary judgment and granted the SID's motion for summary judgment. In its order, the district court stated that the SID's assessment liens "continue to be a valid lien against each of the [Properties] until paid and that Douglas County should amend its public tax records to reflect such special assessments against the [Properties]."

Tristar claims that the district court erred when it invoked § 77-1902—found in chapter 77, article 19, pertaining to judicial foreclosures—and applied it to the tax deed process found in chapter 77, article 18, pursued by Tristar. We agree that the district court erred.

Statutory interpretation presents a question of law that an appellate court independently reviews. *SourceGas Distrib. v. City of Hastings*, 287 Neb. 595, 844 N.W.2d 256 (2014). Because the district court erred in its reading and application of a statute, it erred as a matter of law, and because the material facts are not in dispute, we reverse the district court's order granting summary judgment in favor of the SID and remand the cause with directions to enter summary judgment in favor of Tristar and other directions.

As a general matter, when a county treasurer sells real property for delinquent taxes, the purchaser receives a "tax certificate," but the owner of the property can redeem the property by paying the delinquent taxes plus interest. See *Knosp v. Shafer Properties*, 19 Neb. App. 809, 820 N.W.2d 68 (2012). In several of our cases, we have described the "two courses of action by which the purchaser of a tax certificate may proceed—the purchaser can either wait and obtain a [tax] deed

of conveyance [from the treasurer] for the property or obtain an order of foreclosure [from a court] and compel the sale of the property." *INA Group v. Young*, 271 Neb. 956, 960, 716 N.W.2d 733, 737 (2006). See, also, *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007). The former method is sometimes referred to as the "tax deed" procedure and is authorized by § 77-1837, and the latter is sometimes referred to as a "judicial foreclosure" and is governed by § 77-1901 et seq. The cases of *INA Group, supra*; *Ottaco Acceptance, Inc., supra*; and *Knosp, supra*, explain the two methods in greater detail.

Although the two methods bear similarities, they are neither comparable nor fungible. For example, notice procedures concerning the tax deed process are well defined in § 77-1831 and subsequent statutes, so as to give interested parties notice of the holder's intent to apply for the tax deed and provide such parties an opportunity to take action to protect their interests. In the face of inaction, the treasurer issues the tax deeds. In contrast, notice procedures concerning judicial foreclosure, in § 77-1901 et seq., are designed to bring interested parties into the judicial foreclosure proceeding so that they may be heard together and competing interests reconciled.

Although the overall objective of both procedures is the recovery of unpaid taxes on real property, these "are two separate and distinct methods for the handling of delinquent real estate taxes." *Brown v. Glebe*, 213 Neb. 318, 320, 328 N.W.2d 786, 788 (1983). We have observed that the two "methods are neither the same nor duplicative of each other, and the provisions of Chapter 77, article 18, are not interchangeable with the provisions of Chapter 77, article 19." 213 Neb. at 321, 328 N.W.2d at 788. This principle applies to the instant case.

The Nebraska Court of Appeals has recently considered the issue of whether a lien on a piece of real property was foreclosed by the issuance of a treasurer's tax deed under § 77-1837. See *Knosp, supra*. After reviewing the arguments of the parties, the relevant statutes, and our jurisprudence, the Court of Appeals held that "a treasurer's tax deed, issued pursuant to § 77-1837 and in compliance with Neb. Rev. Stat. §§ 77-1801 to 77-1863 (Reissue 2009), passes title free and

clear of all previous liens and encumbrances." *Knosp*, 19 Neb. App. at 810, 820 N.W.2d at 70. This holding is supported by earlier case law cited in *Knosp*. See, e.g., *Sanford v. Scott*, 105 Neb. 479, 484, 181 N.W. 148, 150 (1920) (concluding that county treasurer's tax deed "conveyed the title to the defendant . . . free from the lien of plaintiff's mortgage"). Although the lienholder in *Knosp* was a private entity, the holding in *Knosp* applies to the SID, because the SID, albeit public, is not a general taxing authority and does not enjoy general priority. Compare, e.g., Neb. Rev. Stat. § 77-203 (Reissue 2009) ("taxes on real property shall be a first lien"); Neb. Rev. Stat. § 14-557 (Reissue 2012) ("general municipal taxes upon real estate [levied by cities of the metropolitan class] shall be a first lien").

We have long held that title passes free and clear of all previous liens and encumbrances pursuant to the judicial foreclosure method found in chapter 77, article 19. E.g., *Polenz v. City of Ravenna*, 145 Neb. 845, 18 N.W.2d 510 (1945). And under *Knosp* and earlier cases cited therein, the same is true when the tax deed method found in chapter 77, article 18, is utilized. This being so, the portion of § 77-1902 added in 1996 upon which the district court relied, which effectively excludes special assessments levied by sanitary improvement districts from the free and clear effects of judicial foreclosure, is an exception to the common law. See 1996 Neb. Laws, L.B. 1321. Accordingly, we read it narrowly, and limit its application to the judicial foreclosure statutory method in which it was placed by the Legislature. See *ML Manager v. Jensen*, 287 Neb. 171, 175, 842 N.W.2d 566, 571 (2014) (stating that "if a statute is in derogation of common law, it is to be strictly construed"). As we observed in *Brown*, discussing chapter 77, articles 18 and 19, "[t]here is no authority in this court to transfer a portion of one statute to another." 213 Neb. at 321, 328 N.W.2d at 788. The terms of § 77-1902 are limited by law and logic to application in the judicial foreclosure method.

For completeness, we note that, expanding on the theme in § 77-1902, the Legislature amended § 77-1914 effective August 27, 2011, to provide that the sheriff's deed which results from the judicial foreclosure proceeding passes title to

the purchaser free and clear of all liens and interests of all persons who were parties to the proceedings, "excluding any lien on real estate for special assessments levied by any sanitary and improvement district." As with § 77-1902, this provision is inapplicable to tax deeds, and furthermore, it is a substantive change which was not in effect in 2009 when the tax certificates were issued. See § 77-1837.01.

In this case, the SID had numerous opportunities to protect its interests. Tristar lists these opportunities as including: by paying real estate taxes when they came due, by redeeming the property within the 3-year redemption period after issuance of the tax certificates, or by foreclosing its special assessment liens under § 77-1917.01, which provides in part:

> When such special assessments have become delinquent, without the real property against which they are assessed being first offered at tax sale by the tax sale certificate method or otherwise, the municipal corporation or district involved may itself as party plaintiff proceed in the district court of the county in which the real estate is situated to foreclose, in its own name, the lien for such delinquent special assessments in the same manner and with like effect as in the foreclosure of a real estate mortgage, except as otherwise specifically provided by sections 77-1903 to 77-1917, which shall govern when applicable.

See, also, § 77-1858 (providing for sale as requested by sanitary and improvement district). However, the SID did not pursue these avenues.

Tristar elected to exercise its rights to the Properties pursuant to the tax deed method. Tristar recorded its tax deeds, and thereafter, the SID filed this action. Summary judgment was granted in favor of the SID on the surviving quiet title claim. In a quiet title action, the SID was required to prove that it was the owner of the legal or equitable title to the Properties or had some interest therein superior to the rights of Tristar. *Knosp v. Shafer Properties*, 19 Neb. App. 809, 820 N.W.2d 68 (2012). See, also, *Weesner v. Weesner*, 168 Neb. 346, 95 N.W.2d 682 (1959). Based on our analysis above, title passed

to Tristar free and clear of all previous liens and encumbrances as a matter of law and the SID's special assessment liens did not survive the transfer to Tristar. The SID did not meet its burden of showing it had an enforceable interest that entitled it to judgment, and the district court erred when it granted summary judgment in favor of the SID, entered orders accordingly, and denied Tristar's motion for summary judgment.

CONCLUSION

The treasurer tax deeds issued to Tristar pursuant to § 77-1837 and in compliance with § 77-1801 et seq. passed title to Tristar free and clear of all previous liens and encumbrances, including the special assessment liens of the SID. The district court erred when it applied § 77-1902 from the judicial foreclosure statutes to this case involving the treasurer tax deed method and reached a contrary conclusion. We reverse the order of the district court granting summary judgment to the SID and denying Tristar's motion for summary judgment, and remand the cause with directions to enter judgment in favor of Tristar on the SID's complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V.
THOMAS P. MERCHANT, APPELLANT.
848 N.W.2d 630

Filed June 27, 2014. No. S-13-903.

1. **Jury Instructions: Appeal and Error.** Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.

4. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
5. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.
6. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that a questioned jury instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
7. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
8. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution.
9. ____: ____. On appeal, the law-of-the-case doctrine is a rule of practice that operates to direct an appellate court's discretion, not to limit its power.
10. **Motor Vehicles: Licenses and Permits: Words and Phrases.** The definition of a motor vehicle dealer under Neb. Rev. Stat. § 60-1401.26 (Reissue 2010) entails three requirements. To be a motor vehicle dealer, a person must (1) not be a bona fide consumer; (2) be actively and regularly engaged in selling, leasing for a period of 30 or more days, or exchanging new or used motor vehicles; and (3) buy, sell, exchange, cause the sale of, or offer or attempt to sell new or used motor vehicles.
11. **Motor Vehicles: Licenses and Permits.** A person is subject to the licensure requirement of Neb. Rev. Stat. § 60-1403.01(1) (Reissue 2010) as a motor vehicle dealer only if all three requirements of Neb. Rev. Stat. § 60-1401.26 (Reissue 2010) are met.
12. **Jury Instructions: Appeal and Error.** A jury instruction that omits an element of the offense from the jury's determination is subject to harmless error review.
13. **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.
14. **Criminal Law: Evidence: Double Jeopardy: New Trial: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict. If it was not, then double jeopardy forbids a remand for a new trial.
15. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in

the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

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

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Reversed and remanded for a new trial.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

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

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

PER CURIAM.

INTRODUCTION

Thomas P. Merchant appeals his conviction, after a second trial, for acting as a motor vehicle dealer, auction dealer, motor vehicle salesperson, or dealer's agent without the required license under the Motor Vehicle Industry Regulation Act.[1] His first conviction was reversed by this court in *State v. Merchant* (*Merchant I*)[2] because of improperly admitted evidence. Merchant now contends that the jury instructions given at his second trial misstated the definition of motor vehicle dealer. We agree. In order to qualify as a motor vehicle dealer, a person must be actively and regularly engaged in one of the statutory enumerated acts.[3] But the instructions given at Merchant's second trial omitted this requirement from the elements of the offense. We reverse, and remand for a new trial.

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[1] Neb. Rev. Stat. § 60-1401 et seq. (Reissue 2010).

[2] *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013).

[3] See § 60-1401.26.

BACKGROUND

The facts surrounding the charges against Merchant are outlined in *Merchant I*. We briefly recite them here. Merchant undertook a series of transactions with Nebraska Auto Auction, Inc. (NAA), involving the sale and purchase of motor vehicles on June 1, 2011. NAA is an automobile auction company that facilitates sales and purchases between dealers. It holds a valid Nebraska auction license, and by law, only licensed dealers can participate in auctions held by NAA.

NAA requested a copy of Merchant's motor vehicle dealer's license, but he never provided a copy. NAA reported Merchant to the Nebraska Motor Vehicle Industry Licensing Board. After determining that he did not possess a dealer's license, the State charged him with being an unlicensed dealer.

After a jury trial, Merchant was convicted. He appealed, and we reversed his conviction and remanded the cause for a new trial due to the improper admission of expert testimony.

In analyzing Merchant's first trial, we also provided guidance as to the jury instructions given by the district court. We observed that the instructions correctly required the jury to determine that Merchant was not a bona fide consumer, but were incomplete for assuming that he was a motor vehicle dealer. Merchant's status as a motor vehicle dealer was an essential element of the offense that was required to be determined by the jury. We therefore instructed the district court to add an instruction charging the jury to determine whether "Merchant bought, sold, exchanged, caused the sale of, or offered or attempted to sell new or used motor vehicles on or around June 1, 2011."[4]

A second jury trial was held. The State presented evidence that NAA facilitated transactions for Merchant involving the sale and purchase of motor vehicles on two occasions in May and June 2011. Specifically, the State's evidence showed that on June 1, NAA facilitated transactions in which Merchant sold 10 or more vehicles and purchased 19 vehicles. The State further established Merchant's lack of a motor vehicle dealer's license. After the State rested, Merchant moved to

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[4] *Merchant I, supra* note 2, 285 Neb. at 471, 827 N.W.2d at 485.

dismiss on the ground that the State had failed to prove a prima facie case.

In arguing that the State had failed to prove a prima facie case, Merchant cited to the definition of "[m]otor vehicle dealer" as provided by § 60-1401.26. That section defines a motor vehicle dealer as

> any person, other than a bona fide consumer, actively and regularly engaged in the act of selling, leasing for a period of thirty or more days, or exchanging new or used motor vehicles . . . who buys, sells, exchanges, causes the sale of, or offers or attempts to sell new or used motor vehicles.[5]

Because a motor vehicle dealer was defined as any person "actively and regularly engaged" in one of the enumerated acts, Merchant contended that there was insufficient evidence to prove such active and regular engagement.

The district court overruled Merchant's motion, finding that his status as a motor vehicle dealer was a question of fact for the jury and that the State had presented sufficient evidence to submit the issue. The court then conducted the jury instruction conference. The court's jury instruction No. 3 as to the elements of the offense provided, in pertinent part:

> Regarding the crime of Unlawful Sale or Purchase of Motor Vehicle, the State must prove beyond a reasonable doubt that:
>
> 1. . . . Merchant bought, sold, exchanged, caused the sale of, or offered or attempted to sell new or used motor vehicle; and
>
> 2. On the day he sold or purchased a motor vehicle described in paragraph 1, . . . Merchant did not possess a valid Nebraska Motor Vehicle Dealer's license, Motor Vehicle Auction Dealer license, Motor Vehicle Salesperson license, or Motor Vehicle Dealer's Agent license, and
>
> 3. Any one of the following:
>
> a. . . . Merchant did not acquire the vehicle he sold or purchased for use in business or for pleasure purposes, or

[5] § 60-1401.26.

> b. the motor vehicle sold was not titled in . . . Merchant's name, or
>
> c. the motor vehicle sold was not registered to . . . Merchant in accordance with the laws of his resident state, or
>
> d. . . . Merchant sold more than eight registered motor vehicles within a twelve month period;
>
> and
>
> 4. . . . Merchant did so on or about June 1, 2011, in Lancaster County, Nebraska.

When given the opportunity to object to the above instruction, Merchant requested that the district court give his proposed instructions. The court declined to do so.

The jury returned a verdict finding Merchant guilty of the unlawful sale or purchase of a motor vehicle. He was found to be a habitual criminal and sentenced to imprisonment for a minimum term of 12 years and a maximum term of 26 years. Merchant timely appeals.

ASSIGNMENTS OF ERROR

Merchant assigns that the district court erred in (1) utilizing instruction No. 3, rather than his proposed instructions, and (2) overruling his motion for directed verdict.

STANDARD OF REVIEW

[1,2] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[6] 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.[7]

[3,4] In a criminal case, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged or the evidence is so doubtful in character, lacking probative value, that a finding

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[6] *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013).

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

of guilt based on such evidence cannot be sustained.[8] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.[9]

ANALYSIS

Before addressing the merits of Merchant's assignments of error, we first review the licensure requirements under the Motor Vehicle Industry Regulation Act. Section 60-1403.01(1) provides that "[n]o person shall engage in the business as, serve in the capacity of, or act as a motor vehicle . . . dealer, salesperson, auction dealer, [or] dealer's agent . . . in this state without being licensed by the board under the Motor Vehicle Industry Regulation Act."

The State charged Merchant under § 60-1416, which states that "[a]ny person acting as a motor vehicle dealer, . . . auction dealer, motor vehicle . . . salesperson, [or] dealer's agent . . . without having first obtained the license provided in section 60-1406 is guilty of a Class IV felony . . . ."

The act provides definitions of the above persons subject to the licensure requirement. The most significant to this appeal is the definition of motor vehicle dealer, which has been provided above. But it is relevant to note that a bona fide consumer is expressly excluded from the definition of motor vehicle dealer.[10] Section 60-1401.07 defines a bona fide consumer as

> an owner of a motor vehicle . . . who has acquired such vehicle for use in business or for pleasure purposes, who has been granted a certificate of title on such motor vehicle, . . . and who has registered such motor vehicle . . . all in accordance with the laws of the residence of the owner, except that no owner who sells more than eight registered motor vehicles . . . within a twelve-month period shall qualify as a bona fide consumer.

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[8] *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[9] *Id.*

[10] See § 60-1401.26.

Three other definitions of persons subject to the licensure requirement are also pertinent to our analysis. Because this appeal does not involve motorcycles or trailers, we omit portions of the definitions pertaining to those items. Similarly, we omit language addressing multiple dealerships. Section 60-1401.11 defines "[d]ealer's agent" as "a person who acts as a buying agent for one or more motor vehicle dealers . . . ." Section 60-1401.05 defines "[a]uction dealer" as "any person engaged in the business of conducting an auction for the sale of motor vehicles . . . ." And § 60-1401.27 defines "[m]otor vehicle . . . salesperson" as "any person who, for a salary, commission, or compensation of any kind, is employed directly by [a] licensed Nebraska motor vehicle dealer . . . to sell, purchase, or exchange or to negotiate for the sale, purchase, or exchange of motor vehicles . . . ."

Having reviewed the applicable law, we now turn to Merchant's first assignment of error regarding instruction No. 3.

Instruction No. 3

[5,6] We first recall governing principles of law relating to a claim of erroneous jury instructions. We have stated that all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating reversal.[11] And the appellant has the burden to show that a questioned jury instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[12]

As noted above, in *Merchant I*, we found the instructions given at Merchant's first trial to be incomplete. In order to find Merchant guilty, the instructions correctly required the jury to determine that he was not a bona fide consumer, but assumed that he qualified as a motor vehicle dealer. We therefore directed the district court to add an instruction charging the

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[11] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[12] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

jury to determine whether "Merchant bought, sold, exchanged, caused the sale of, or offered or attempted to sell new or used motor vehicles on or around June 1, 2011."[13]

In the present appeal, Merchant contends that we erred in our analysis of the jury instructions in *Merchant I*. He argues that the instruction we directed the district court to utilize at his second trial (which was incorporated into instruction No. 3) misstated the statutory definition of motor vehicle dealer by failing to require that he be actively and regularly engaged in one of the enumerated acts. Thus, he claims that instruction No. 3 caused him prejudice by omitting a material element of the offense.

[7,8] But we must first address the State's argument that Merchant is barred from challenging instruction No. 3. Although not expressly acknowledged, the State implicitly relies upon the law-of-the-case doctrine for its argument. Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.[14] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution.[15]

Merchant failed to move for rehearing from our analysis of the jury instructions in *Merchant I*. Consequently, upon remand, our findings as to the jury instructions became the law of the case and conclusively settled the issue for purposes of all subsequent stages of the prosecution. Thus, under the doctrine, the district court lacked the ability to deviate from our findings at Merchant's second trial and was required to incorporate the instruction we provided in *Merchant I*, notwithstanding any claim of error that Merchant might raise.[16]

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[13] *Merchant I, supra* note 2, 285 Neb. at 471, 827 N.W.2d at 485.

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

[15] *Id.*

[16] See *State v. White*, 257 Neb. 943, 601 N.W.2d 731 (1999).

[9] We, however, are not so bound. On appeal, the law-of-the-case doctrine is a rule of practice that operates to direct an appellate court's discretion, not to limit its power.[17] And we have recognized that the doctrine does not apply if considerations of substantial justice suggest a reexamination of the issue is warranted.[18] Considerations of substantial justice are present in this case.

[10,11] We agree that we erred in our analysis of the jury instructions in *Merchant I*. The instruction we directed the district court to incorporate into instruction No. 3 misstated the statutory definition of motor vehicle dealer. The instruction we provided omitted the "actively and regularly engaged" requirement of § 60-1401.26. Under that section, the definition of motor vehicle dealer entails three requirements. To be a motor vehicle dealer, a person must (1) not be a bona fide consumer; (2) be actively and regularly engaged in selling, leasing for a period of 30 or more days, or exchanging new or used motor vehicles; and (3) buy, sell, exchange, cause the sale of, or offer or attempt to sell new or used motor vehicles.[19] A person is subject to the licensure requirement of § 60-1403.01(1) as a motor vehicle dealer only if all three of these requirements are met.

Because instruction No. 3 failed to charge the jury to determine whether Merchant was "actively and regularly engaged" in one of the acts enumerated by § 60-1401.26, it omitted a material element of the offense from the jury's determination. Such instructional error necessarily implicates considerations of substantial justice, because it violates a defendant's Sixth Amendment guarantee to trial by jury.[20]

[12] But the omission of an element of the offense from the jury's determination is not a constitutional violation requiring

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

[18] See *id*.

[19] See § 60-1401.26.

[20] See, *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Ryan*, 249 Neb. 218, 543 N.W.2d 128 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

automatic reversal. Such error is not structural—so affecting the framework within which the trial proceeds that it affects the entire trial process and renders it fundamentally unfair.[21] Rather, an instruction that omits an element of the offense from the jury's determination is subject to harmless error review.[22]

[13] We have stated that 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.[23] Where a court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error, it should not find the error harmless.[24]

We do not find that the instructional error was harmless in this case. That is, we cannot say beyond a reasonable doubt that the jury would still have found Merchant guilty had it been required to find that he was "actively and regularly engaged" in one of the statutory enumerated acts. At Merchant's second trial, the State presented evidence that he undertook transactions with NAA involving the sale and purchase of motor vehicles on two separate occasions. Although one of these occasions involved the sale and purchase of a significant number of motor vehicles, we are unable to conclude beyond a reasonable doubt that the jury would have found such transactions to constitute active and regular engagement.

[14,15] Because the omission of the active and regular engagement requirement from instruction No. 3 was not harmless, it warrants reversal and remand for a new trial. But Merchant argues that retrial is prohibited by the Double Jeopardy Clause. With one minor exception, we disagree. Upon finding reversible error in a criminal trial, an appellate court

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[21] See *Neder, supra* note 20.

[22] See, *id.*; *State v. Abram*, 284 Neb. 55, 815 N.W.2d 897 (2012).

[23] *Abram, supra* note 22.

[24] See *Neder, supra* note 20.

must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict.[25] If it was not, then double jeopardy forbids a remand for a new trial.[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.[27]

Although we acknowledge that this is a close case, when viewed in the light most favorable to the prosecution, we find that the total evidence admitted by the district court was sufficient to sustain a guilty verdict. The evidence received at Merchant's second trial established that he undertook transactions with NAA involving the sale and purchase of motor vehicles on two separate occasions within a 2-month period. And the June 1, 2011, transaction involved the sale of approximately 10 vehicles and the purchase of 19 more. In our view, this evidence was sufficient for a jury to conclude that Merchant was actively and regularly engaged in the acts of selling or exchanging new or used motor vehicles. Further, this evidence established that Merchant was not a bona fide consumer, because he sold more than eight motor vehicles within a 12-month period.[28] And because the State proved that Merchant bought and sold motor vehicles without any of the licenses set out in § 60-1406, there was sufficient evidence from which the jury could find all of the elements of acting as a motor vehicle dealer, motor vehicle salesperson, or dealer's agent without a license.

However, there was no evidence that Merchant was "engaged in the business of conducting an auction for the sale of motor vehicles."[29] The evidence showed that Merchant sold and

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[25] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[26] *Id.*

[27] *State v. Nero*, 281 Neb. 680, 798 N.W.2d 597 (2011).

[28] See § 60-1401.07.

[29] § 60-1401.05 (defining "[a]uction dealer").

purchased vehicles through an auction dealer, but not that he was engaged in the business of conducting an auction. Thus, upon remand, he cannot be retried for acting as an auction dealer. This does not affect the other three alternatives for violation of § 60-1416, namely, acting as a motor vehicle dealer, motor vehicle salesperson, or dealer's agent.

Based upon our above analysis, we reverse the judgment of conviction and remand the cause for a new trial. In doing so, we wish to make clear that this decision is based upon our own error in *Merchant I*. The district court did nothing but faithfully follow our direction in instructing the jury at Merchant's second trial. Upon retrial, the district court should craft an instruction charging the jury to determine whether Merchant acted as a motor vehicle dealer, motor vehicle salesperson, or dealer's agent without having first obtained the required license at the time he undertook the transactions with NAA.

Characterizing the offense as an unlawful sale or purchase of a motor vehicle is likely to cause confusion and render the instructions unintelligible, because reference would be required to a complicated series of statutes. Instead, the offense could be described as acting as a motor vehicle dealer, motor vehicle salesperson, or dealer's agent without a license. The State chose to charge Merchant with a single offense that can be committed in more than one way. It may be feasible for the trial judge to craft an elements instruction that begins by charging the jury to determine whether Merchant acted (1) as a motor vehicle dealer, motor vehicle salesperson, or dealer's agent; (2) without the appropriate license; (3) on or about June 1, 2011, in Lancaster County. The elements instruction could then charge the jury on the statutory elements that the State must prove beyond a reasonable doubt to show that Merchant acted, respectively, as a motor vehicle dealer, motor vehicle salesperson, or dealer's agent. But the instructions must be tailored to the evidence at the new trial. And they could vary depending upon which one or more of the three ways of committing the offense could be supported by the evidence. We decline to tie the hands of the trial judge in crafting an appropriate set of instructions.

DIRECTED VERDICT

[16] Merchant contends that the district court erred in overruling his motion for directed verdict. Although the record does not show that Merchant ever moved for a directed verdict, he moved to dismiss after the close of the State's case in chief. And we have stated that a motion to dismiss for failure to prove a prima facie case should be treated as a motion for a directed verdict.[30] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.[31] And in reviewing a criminal conviction, we view the evidence in the light most favorable to the State.[32]

Merchant argues that the evidence presented at his second trial was insufficient to establish that he was "actively and regularly engaged" in one of the acts enumerated by § 60-1401.26. Based upon our above analysis, we disagree. As we have already noted, although this is a close case, we view the evidence of the transactions Merchant undertook with NAA as being sufficient to support a finding that he was actively and regularly engaged in the acts of selling or exchanging new or used motor vehicles. Because Merchant limited his argument to the definition of a motor vehicle dealer, we do not address the motion insofar as it was addressed to the alternatives of acting as a motor vehicle salesperson or a dealer's agent. This assignment of error is without merit.

CONCLUSION

Although we analyzed the jury instructions in this case in *Merchant I*, we erred in instructing the district court as to the statutory definition of motor vehicle dealer. Our error resulted in a material element of the offense being omitted from the jury's determination and caused Merchant prejudice. We reverse Merchant's conviction for acting as a motor vehicle

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[30] See *State v. Jonusas*, 269 Neb. 644, 694 N.W.2d 651 (2005).

[31] *Id.*

[32] See *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995).

dealer, motor vehicle salesperson, dealer's agent, or auction dealer without the required license and remand the cause for a new trial. Because there was no evidence to show that Merchant was acting as an auction dealer, he cannot be retried on that alternative means of committing the offense. Thus, the new trial must be limited to the other three alternatives for which Merchant was charged.

REVERSED AND REMANDED FOR A NEW TRIAL.

GARY M. LENZ, APPELLEE, V. CENTRAL PARKING SYSTEM OF NEBRASKA, INC., AND NEW HAMPSHIRE INSURANCE COMPANY, APPELLANTS.

848 N.W.2d 623

Filed June 27, 2014. No. S-13-930.

1. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Workers' Compensation: Limitations of Actions.** Determining when the statute of limitations starts under Neb. Rev. Stat. § 48-137 (Reissue 2010) presents a question of law.
4. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
5. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.
6. **Workers' Compensation.** Disability as a basis for compensation under Neb. Rev. Stat. § 48-121(3) (Reissue 2010) is determined by the loss of use of a body member, not loss of earning power.
7. **Appeal and Error.** An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.

Appeal from the Workers' Compensation Court: THOMAS E. STINE, Judge. Affirmed.

Tiernan T. Siems and Karen M. Keeler, of Erickson & Sederstrom, P.C., for appellants.

Patrick B. Donahue, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Gary M. Lenz was injured in an accident arising out of and in the course of his employment as an outdoor parking lot attendant. More than 2 years after the last voluntary payment of benefits by Central Parking System of Nebraska, Inc., and New Hampshire Insurance Company (collectively Central) but within 2 years of the partial amputation of the fifth metatarsal in Lenz' right foot, he sought additional benefits for his work-related injury. The question presented is whether the partial amputation was a material change in condition and substantial increase in disability that would permit Lenz to seek benefits more than 2 years after Central's last voluntary payment. We affirm the judgment of the Workers' Compensation Court that awarded benefits.

SCOPE OF REVIEW

[1-3] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions. *Deleon v. Reinke Mfg. Co.*, 287 Neb. 419, 843 N.W.2d 601 (2014). Statutory interpretation presents a question of law. *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013). The interpretation and meaning of a prior opinion present a question of law. *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011). "Determining when the statute of limitations starts under [Neb. Rev. Stat.] § 48-137 [(Reissue 2010)] presents a question of law." *Obermiller v. Peak Interest*, 277 Neb. 656, 658, 764 N.W.2d 410, 412 (2009).

[4] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds

that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. Neb. Rev. Stat. § 48-185 (Cum. Supp. 2012). See, also, *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013).

FACTS

On December 20, 2008, Lenz developed frostbite on his right foot while performing his duties as an outdoor parking lot attendant. It was not disputed that the accident and resulting injury arose out of and in the course of Lenz' employment with Central. The parties agreed that Lenz was earning an average weekly wage of $194.25 for purposes of temporary disability benefits and $310 for purposes of permanent disability benefits.

Until mid-2009, Central voluntarily paid for the medical treatment of Lenz' frostbite injury, including two surgeries. Central paid temporary total disability benefits of $86.33 from December 21, 2008, through June 21, 2009, for a total of $2,256.91. The record does not indicate that the parties entered into a written agreement regarding Lenz' compensation.

In April 2009, Lenz moved to Colorado, where he continued treatment for the frostbite injury. He submitted his medical bills to a Colorado indigent care program and not to Central's workers' compensation insurance carrier.

Lenz returned to Nebraska in February 2012. Because the ulcers caused by the frostbite injury had not healed, he continued to receive medical treatment. In September, he was hospitalized for an infection in the ulcers. The infection spread to the fifth metatarsal in Lenz' right foot, and on October 31, a partial amputation of the fifth metatarsal was performed.

In January 2013, Lenz filed a petition with the Workers' Compensation Court, seeking temporary total and permanent partial disability benefits, reimbursement of medical expenses, and vocational rehabilitation benefits. He requested temporary total disability benefits of $129.50 from the date of the

accident through May 2009 and permanent partial disability benefits of $206.67 for 30 weeks based upon a 20-percent disability of his right foot. Central affirmatively alleged that his petition was barred by the statute of limitations in Neb. Rev. Stat. § 48-137 (Reissue 2010).

The relevant issues considered at trial before the Workers' Compensation Court were whether Lenz' petition was time barred by the applicable statute of limitations, whether he was entitled to benefits, and if so, what benefits he should be awarded. It was not disputed that Lenz' petition was filed more than 2 years after Central's last payment of benefits.

Lenz asserted that his petition was not barred by § 48-137, because the action was commenced within 2 years of a substantial and material worsening of his condition. He asked the Workers' Compensation Court to apply the exception to § 48-137 recognized in *White v. Sears, Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988).

Central claimed that pursuant to recent case law, the exception in *White* was unenforceable. And in the event that the Workers' Compensation Court concluded the exception did apply, Central claimed that there had not been a substantial change in Lenz' condition to justify application of the exception and that Lenz could have filed his petition much earlier than January 2013.

Lenz testified that in late 2012, the injury to his right foot "changed and worsened" and ultimately required a partial amputation of the fifth metatarsal in his right foot. According to Lenz, after the partial amputation, the ulcers resulting from the frostbite injury fully healed. Although his condition had improved, he still experienced pain in his right foot. He admitted that he could have filed his petition for workers' compensation benefits sooner, but stated that in May 2009, his claims representative told him that "[his] workman's comp case [was] pretty well finished."

Lenz offered the deposition of Dr. Steven Black, the medical director of the Nebraska Medical Center's Center for Wound Healing. Black explained that prior to the partial amputation, Lenz was "subject to frequent and near continuous episodes of recurrence of the ulcers." After reviewing Lenz' medical

records, Black opined that Lenz' condition got "significantly worse" in 2012 due to the bone infection and that Lenz had not reached maximum medical improvement until at least 6 months after the partial amputation. He concluded that Lenz had a permanent partial disability to the right foot of 20 percent, "[b]ased on the fact that [Lenz] cannot carry out a job on his feet or in cold weather without ulceration . . . ."

The Workers' Compensation Court determined that "part of the relief requested by [Lenz was] time barred pursuant to § 48-137," but that Lenz was "entitled to additional benefits related to the amputation of his fifth metatarsal." The court found that Lenz' injury was not latent and progressive, but that the infection of the bone, diagnosed on October 28, 2012, and the resulting partial amputation constituted a "material and substantial increase in disability resulting from the original work injury." Because Lenz had filed his petition within 2 years of that material and substantial change, the court held that the petition was timely under *White*.

The Workers' Compensation Court concluded that Lenz had "sustained [a] 20[-]percent permanent impairment to his right foot as a direct result of the material and substantial increase in incapacity related to the October 28, 2012[,] worsening of [his] condition." The court awarded 30 weeks of permanent partial disability in the amount of $206.67 per week, to begin April 28, 2013. It awarded reimbursement for medical expenses and mileage incurred on and after October 28, 2012.

Central timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

Central assigns, restated and reordered, that the Workers' Compensation Court erred in (1) finding that Lenz' claim was not barred by the statute of limitations, (2) finding that Lenz suffered a material and substantial increase in disability, (3) misapplying the law regarding a material and substantial increase in disability, (4) failing to follow the most recent precedent, and (5) entering an award in Lenz' favor.

ANALYSIS

As an initial matter, we note that Lenz' petition sought benefits for two separate time periods: (1) from the time of the accident through May 2009 and (2) after the partial amputation. The Workers' Compensation Court determined that Lenz' petition was time barred to the extent it sought benefits accruing prior to the partial amputation but was timely in its request for benefits accruing after the partial amputation. Lenz did not cross-appeal to challenge the determination that his petition was an untimely request for those earlier benefits. As such, we do not address that aspect of the court's ruling. We are concerned solely with whether Lenz' request for benefits accruing after the partial amputation was time barred.

Statute of Limitations

Section 48-137 provides in relevant part:

> In case of personal injury, all claims for compensation shall be forever barred unless, within two years after the accident, the parties shall have agreed upon the compensation payable under the Nebraska Workers' Compensation Act, or unless, within two years after the accident, one of the parties shall have filed a petition as provided in section 48-173. . . . When payments of compensation have been made in any case, such limitation shall not take effect until the expiration of two years from the time of the making of the last payment.

Our case law recognizes two exceptions to § 48-137. See *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997). "The first . . . is the situation where the injury is 'latent and progressive' and is not discovered within 2 years of the accident which caused the injury." *Id.* at 420, 557 N.W.2d at 666. The second exception is applicable to the case at bar and is articulated in *White v. Sears, Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988).

In *White*, we examined the timeliness of the employee's petition for workers' compensation benefits. She had been injured in 1983, after which her employer voluntarily paid compensation until September 1984. She did not file a petition in the Workers' Compensation Court until 1987, after she

had allegedly "suffered a material change in her condition which necessitated additional medical care and for which she had suffered increased disability." See *id*. at 370, 431 N.W.2d at 642. The Workers' Compensation Court dismissed the petition because it was filed more than 2 years after the last payment.

We concluded that the Workers' Compensation Court erred in dismissing the employee's petition as untimely. We reasoned that

> [w]here there is no dispute about the compensable nature of the injury which the worker sustained, and the employer has voluntarily paid compensation to the injured worker, the right to receive additional compensation in the event of a material increase in disability resulting from the injury is still available.

Id. at 371-72, 431 N.W.2d at 643. We stated that in the event the parties do not agree about this additional compensation, "the worker's remedy is to file a petition in the compensation court." See *id*. at 372, 431 N.W.2d at 643. In light of the statute of limitations in § 48-137, we held that "[s]uch a petition must be filed within 2 years from the time the employee knows or is chargeable with knowledge that the employee's condition has materially changed, and there has been such a substantial increase in disability as to entitle the employee to additional compensation." See *White*, 230 Neb. at 372, 431 N.W.2d at 643.

Central argues that based upon our reasoning in *Bassinger v. Nebraska Heart Hosp*., 282 Neb. 835, 806 N.W.2d 395 (2011), the exception for a material change in condition and substantial increase in disability is unenforceable. We disagree.

In *Bassinger*, we held that the common-law misrepresentation defense was not enforceable by either the Workers' Compensation Court or this court due to its equitable nature. We explained that claims for workers' compensation benefits cannot be barred on equitable grounds, because (1) the "Workers' Compensation Court does not have equity jurisdiction" and (2) we do not have the "authority to apply equitable principles" to the Nebraska Workers' Compensation Act. See *Bassinger*, 282 Neb. at 846, 847, 806 N.W.2d at 403,

404. We stated that the misrepresentation defense concerned issues of public policy that were solely within the province of the Legislature and was a limitation on benefits that was not authorized by the Nebraska Workers' Compensation Act. Therefore, we overruled *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979), in which we had previously adopted the common-law misrepresentation defense.

The exception to § 48-137 established in *White v. Sears, Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988), is clearly distinguishable from the common-law misrepresentation defense addressed in *Bassinger*. The exception recognized in *White* was not based on equitable principles or defenses but was based upon our statutory interpretation.

Since our decision in *White*, the Legislature has not amended § 48-137 to preclude application of the exception to the statute of limitations in the event of a material change in condition and substantial increase in disability. The appellate courts in Nebraska have recognized this exception on multiple occasions in the 26 years since *White*. See, *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001); *Snipes v. Sperry Vickers*, 251 Neb. 415, 557 N.W.2d 662 (1997); *Wissing v. Walgreen Company*, 20 Neb. App. 332, 823 N.W.2d 710 (2012). None of these decisions have prompted an amendment by the Legislature.

[5] When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *Dawes, supra*. Because the Legislature has acquiesced to the exception for a material change in condition and substantial increase in disability established in *White*, we continue to apply it.

Central argues that this exception does not apply to Lenz' petition, because he "did not have a worsening of his condition and he had reason to file suit before he did." See brief for appellants at 16. We do not agree.

Lenz was not required to demonstrate that he could not have filed a petition earlier than he did. Part of our rationale

in *White* was that an injured employee cannot bring a claim for additional compensation unless and until such a change has taken place. Given that fact, we explained the exception as follows: "Such a petition must be filed within 2 years from the time the employee knows or is chargeable with knowledge that the employee's condition has materially changed, and there has been such a substantial increase in disability as to entitle the employee to additional compensation." See *id*. at 372, 431 N.W.2d at 643. We concluded that the employee's petition in *White* met the requirement of being filed within 2 years of a qualifying change, and we did not discuss whether she could have filed a petition sooner.

Similarly, in the instant case, we are concerned only with whether Lenz' petition was filed within 2 years of a change in condition that (1) was material and (2) resulted in a substantial increase in disability as to entitle him to additional compensation. We find that his petition was filed within 2 years of a material change in condition that resulted in a substantial increase in disability.

In October 2012, Lenz developed an infection of the fifth metatarsal in his right foot. He had previously suffered infections of the ulcers caused by frostbite. Although Lenz "underwent short periods of time where the wound would heal, . . . he was subject to frequent and near continuous episodes of recurrence of the ulcers." But the infection that occurred in October 2012 was distinct from the continuous problems with the ulcers. It was an infection of the bone, not merely the ulcers on the skin. Black described the infection as an occurrence that made Lenz' injury "significantly worse."

Due to the infection of the bone, Lenz experienced nausea and an extremely high temperature. The infection resulted in partial amputation of the right foot to remove the bone that was infected. Such a procedure had not previously been required to treat Lenz' injury. Based on these facts, it is clear that Lenz suffered a material change in condition in October 2012 and experienced more than just a continuation of the prior problems associated with the frostbite injury.

[6] Lenz' change in condition resulted in an increase in disability that entitled him to additional compensation. Lenz'

work-related injury was an injury to a scheduled member identified in Neb. Rev. Stat. § 48-121(3) (Reissue 2010). Disability as a basis for compensation under § 48-121(3) is determined by the "loss of use of a body member," not loss of earning power. See *Risor v. Nebraska Boiler*, 277 Neb. 679, 695, 765 N.W.2d 170, 185 (2009). The extent of disability to a scheduled member can be expressed in terms of percent. See, e.g., *Castro v. Gillette Group, Inc.*, 239 Neb. 895, 479 N.W.2d 460 (1992).

There was no evidence that Lenz had been awarded compensation for any level of disability in his right foot prior to the amputation. Black concluded that after the partial amputation, Lenz had a 20-percent impairment to his right foot. This was based on the fact that Lenz "cannot carry out a job on his feet or in cold weather without ulceration." Black also based this determination on the sixth edition of the "American Medical Association Guides to Permanent Impairment." This evidence established that the infection of the bone and the partial amputation resulted in a substantial increase in disability in Lenz' right foot which entitled him to additional compensation.

In October 2012, Lenz suffered a material change in condition and substantial increase in disability that would allow him to file a claim within 2 years of that change in condition. He filed his petition on January 2, 2013. Because the petition was filed within 2 years of the material change in condition and substantial increase in disability, it was timely under the exception to § 48-137 established in W*hite v. Sears, Roebuck & Co.*, 230 Neb. 369, 431 N.W.2d 641 (1988). The Workers' Compensation Court did not err in applying the exception to § 48-137 for a material change in condition and substantial increase in disability. It did not err in refusing to dismiss as untimely Lenz' petition for benefits accruing after the partial amputation.

Other Assignments of Error

[7] Several of Central's assignments of error are broad enough to encompass the specifics of the award entered by the Workers' Compensation Court. However, Central's arguments

on appeal are focused solely on the statute of limitations question. Aside from asserting that the Workers' Compensation Court should not have considered Lenz' petition, Central does not challenge the benefits awarded. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court. *Jeremiah J. v. Dakota D.*, 287 Neb. 617, 843 N.W.2d 820 (2014). Therefore, we do not examine the award of benefits on appeal.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the Workers' Compensation Court.

AFFIRMED.

IN RE INTEREST OF JOSEPH S. ET AL., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLANT, V. KERRI S., APPELLEE.

849 N.W.2d 468

Filed July 3, 2014. No. S-13-339.

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. **Constitutional Law: Due Process: Juvenile Courts: Parental Rights: Appeal and Error.** The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling.

Petition for further review from the Court of Appeals, IRWIN, PIRTLE, and BISHOP, Judges, on appeal thereto from the Separate Juvenile Court of Douglas County, ELIZABETH CRNKOVICH, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Donald W. Kleine, Douglas County Attorney, and Jennifer Chrystal-Clark for appellant.

Thomas C. Riley, Douglas County Public Defender, Christine D. Kellogg, and Zoë Wade for appellee.

Maureen K. Monahan, guardian ad litem.

Robert McEwen and Sarah Helvey, for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Heavican, C.J.

INTRODUCTION

The State of Nebraska appealed an order of the separate juvenile court of Douglas County finding the State had failed to present a prima facie case that the three minor children of Kerri S. were within the meaning of Neb. Rev. Stat. § 43-292(2) (Cum. Supp. 2012) because Kerri had substantially and continuously or repeatedly neglected and refused to give necessary parental care and protection to the children, and determining that it was not in the best interests of the children to terminate Kerri's parental rights. The Nebraska Court of Appeals held that Kerri's noncompliance with voluntary State-offered services may not serve as a basis to terminate parental rights.[1] We granted the State's petition for further review. Our opinion discusses when procedural due process is triggered in parental rights termination cases. Ultimately, we reverse the decision of the Court of Appeals and remand the cause for further proceedings.

BACKGROUND

Kerri is the biological mother of Joseph S., born in January 2000; William S., born in November 2005; and Steven S., born in December 2006.

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[1] See *In re Interest of Joseph S. et al.*, 21 Neb. App. 706, 842 N.W.2d 209 (2014).

In March 2009, Kerri and her children came to the attention of the Department of Health and Human Services (DHHS) due to concerns about Kerri's drug use and improper supervision of the children. Melissa Misegadis, a family permanency supervisor with Nebraska Families Collaborative (NFC), testified that she had been involved with the family since July 2010. Misegadis testified that the children had been returned to Kerri's care in February 2010, but that they returned to foster care shortly after Misegadis became involved in the case. The children remained out of Kerri's care for exactly 1 year. Kerri received drug testing and mental health treatment, among other services. In the fall of 2010, Kerri tested positive for cocaine. Misegadis testified that Kerri did not always consistently participate in services offered by DHHS, but that ultimately, Kerri completed a court-ordered and court-monitored plan. The children were returned to Kerri's care, and that case was closed in November 2011. The case had been open for approximately 32 months.

In January 2012, DHHS received reports that Kerri had left the children with a relative and was unable to be reached. Calls to the DHHS hotline again expressed concerns that Kerri was not properly supervising the children and might be using drugs. Kerri indicated a willingness to work with DHHS on a voluntary basis, and the case was transferred to NFC. Kerri began voluntary services which included drug testing and temporary placement of the children into foster care for a period of 180 days. During the 180-day period, Kerri was not consistent in completing the requested drug testing, participating in weekly visitation with the children, or attending therapy. Kerri tested positive for amphetamines or methamphetamine three times and admitted to using marijuana one time.

Another family permanency specialist with NFC testified that she conducted a drop-in visit to Kerri's home 9 days before the children were to return home. The visit revealed the home was in disarray, with graffiti on the walls, empty alcohol bottles around the home, and numerous unmade beds without sheets. During the visit, there were approximately five adults in the home who appeared to be residing there, but whom Kerri described as friends there to help her get the home ready for

the children's return. NFC received information from relatives of Kerri, as well as information from law enforcement, which raised additional concerns about Kerri's ability to care for the children safely. NFC made the decision to request that DHHS be granted temporary custody of the children.

On August 9, 2012, the State filed a motion for temporary custody. The juvenile court granted DHHS temporary custody of the children the same day. After August, Kerri became increasingly difficult to locate and her participation in voluntary services was sporadic. Kerri began living with a friend and was unable to attend regular visitation with the children.

In December 2012, the State filed an amended petition. Counts I and II of the amended petition alleged that the children were at risk of harm under Neb. Rev. Stat. § 43-247(3) (Reissue 2008) due to Kerri's drug use, failure to participate in voluntary services, failure to provide safe housing, and failure to provide proper parental care. Counts III and IV alleged that Kerri had substantially and continuously or repeatedly neglected and refused to give the children necessary parental care and protection and sought termination of Kerri's parental rights under § 43-292(2).

The juvenile court held a hearing on March 13, 2013. After the State presented evidence, Kerri moved to dismiss. The court denied the motion as to counts I and II, finding the State had proved by a preponderance of the evidence that the children were within the meaning of § 43-247(3) and therefore within the jurisdiction of the court. However, the court granted the motion to dismiss as to counts III and IV, finding the State had failed to present a prima facie case that termination of Kerri's parental rights was appropriate under § 43-292(2). The court ordered the children to remain in the temporary custody of DHHS.

The State appealed, arguing it had proved by clear and convincing evidence that Kerri's parental rights should be terminated pursuant to § 43-292(2) because Kerri had substantially and continuously neglected and refused to provide necessary parental care and that termination was in the children's best interests.

On appeal, the Court of Appeals found that Kerri had been denied due process of law and therefore held that Kerri's noncompliance during the voluntary phase of the case was not acceptable evidence to be used to satisfy the requirements of § 43-292(2).[2] We granted the State's petition for further review.

ASSIGNMENT OF ERROR

The State argues that the Court of Appeals erred in finding that the State failed to present clear and convincing evidence that termination of the parental rights of Kerri was appropriate and in the best interests of her minor children.

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.[3]

[2] The determination of whether the procedures afforded an individual comport with constitutional requirements for procedural due process presents a question of law. In reviewing questions of law, an appellate court in termination of parental rights proceedings reaches a conclusion independent of the lower court's ruling.[4]

ANALYSIS

In its petition for further review, the State maintains that it presented sufficient evidence to the juvenile court to prove by clear and convincing evidence that termination of Kerri's parental rights was appropriate and in the children's best interests. The Court of Appeals determined that Kerri was denied due process of law, and therefore held that evidence of Kerri's

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[2] *Id.*

[3] *In re Interest of Karlie D.*, 283 Neb. 581, 811 N.W.2d 214 (2012).

[4] *In re Interest of Davonest D. et al.*, 19 Neb. App. 543, 809 N.W.2d 819 (2012).

noncompliance with voluntary services could not be used to satisfy the State's burden of proof.

We have repeatedly held that "procedural due process is applicable to a proceeding for termination of parental rights."[5] However, we have never stated precisely what due process is required in a termination proceeding, instead noting that due process is "necessarily and inherently flexible."[6]

In *In re Interest of L.V.*,[7] we held that due process in a termination of parental rights proceeding requires, at a minimum,

> notice to the person whose right is affected by a proceeding, that is, timely notice reasonably calculated to inform the person concerning the subject and issues involved in the proceeding; a reasonable opportunity to refute or defend against a charge or accusation; a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by constitution or statute; and a hearing before an impartial decisionmaker.

In *In re Interest of Kantril P. & Chenelle P.*,[8] we noted that the requirements set forth in *In re Interest of L.V.* were not exclusive.

The record in this case shows that from the time the petition to adjudicate the children was filed on August 9, 2012, Kerri was afforded adequate procedural due process. The juvenile court ordered the children placed in the temporary custody of DHHS on August 9. The record shows that on August 22, Kerri's counsel appeared in juvenile court for a detention hearing, which was continued. A guardian ad litem for the children had also been appointed by this time. At a detention hearing September 19, Kerri was informed of her rights pursuant to Neb. Rev. Stat. § 43-279.01 (Reissue 2008). The State sought

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[5] *In re Interest of L.V.*, 240 Neb. 404, 412, 482 N.W.2d 250, 256 (1992).

[6] *Id.* at 413, 482 N.W.2d at 257.

[7] *Id.* at 413-14, 482 N.W.2d at 257.

[8] *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999).

continued custody of the children, and Kerri did not resist the State's request. A case settlement conference was held on October 16. The juvenile court set a date for an adjudication hearing and ordered mutual and reciprocal discovery.

The amended petition, seeking termination of Kerri's parental rights, was filed on December 19, 2012. Kerri's attorney was served with the petition as well as a copy of the State's motion for service by publication. The court allowed service by publication and indicated it would hear the amended petition on March 13, 2013. Kerri filed a motion to strike the amended petition, alleging that it did not provide her with adequate time to prepare defenses to the additional allegations. After a hearing, the motion was denied. Kerri then filed a motion to bifurcate, which was also denied. The denial of these motions was not raised on appeal. Kerri was present, with counsel, at the adjudication hearing. She was permitted to cross-examine the State's witnesses and present evidence. Nothing in the record indicates that she was denied an impartial decisionmaker.

The record demonstrates that Kerri was afforded all of the due process requirements set forth in *In re Interest of L.V.* However, the guardian ad litem and amicus curiae cite federal case law and suggest that Kerri was entitled to additional procedural due process in January 2012, when the State initiated Kerri's participation in voluntary services. Although we agree with Kerri that use of coercive tactics by the State could trigger due process requirements prior to the formal filing of a petition in court, we find no due process violation in this case.

In *Croft v. Westmoreland County Children and Youth*,[9] the Third Circuit found a violation of a father's substantive and procedural due process rights where a caseworker gave the father an ultimatum: leave his home and daughter for the duration of the county's investigation into sexual abuse, or the caseworker would take the child physically from the home that night and place her in foster care. In finding that the ultimatum had violated the father's rights, the court emphasized

[9] *Croft v. Westmoreland County Children and Youth*, 103 F.3d 1123 (3d Cir. 1997).

that the caseworker lacked objectively reasonable grounds for believing any abuse had occurred. Similarly, in *Starkey v. York County*,[10] a Third Circuit district court found a procedural due process violation where, after bringing their son to a hospital with a head injury, the parents were not informed of their right to an attorney or a hearing when given an ultimatum: leave their home and not have unsupervised contact with their children during an abuse investigation, or the county would seek an emergency court order and take custody of the children.

Croft and *Starkey* are distinguishable from the case at bar. There is no evidence in the record that Kerri was given an ultimatum when the State offered voluntary services in January 2012. In other words, the record does not show that the coercive tactics used by state officials in *Croft* and *Starkey* are present in this case. Kerri has not argued that her compliance was not voluntary, and we will not make such an assumption. Additionally, Kerri has never argued that the State lacked reasonable grounds for believing she was unable to properly care for the children in January 2012, and the record does not support such a finding.

In *Starkey*, the court rejected the holding of another case, *Dupuy v. Samuels*,[11] in which the Seventh Circuit found no due process violation where the parents had their children removed from the home without first being afforded a hearing. While the Seventh Circuit acknowledged that there is some coercive nature to any threat of formal removal proceedings, it found this to be insufficient to invalidate the parents' consent, noting the situation was similar to a plaintiff's threatening to proceed to trial in order to induce a defendant to settle a case. The Sixth Circuit explicitly adopted the reasoning of *Dupuy* in *Smith v. Williams-Ash*.[12] However, the Sixth Circuit distinguished that case, involving parents who voluntarily consented to have their children removed from their home due to unsanitary

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[10] *Starkey v. York County*, No. 1:11-cv-00981, 2012 WL 9509712 (M.D. Pa. Dec. 20, 2012) (memorandum opinion).

[11] *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006).

[12] *Smith v. Williams-Ash*, 520 F.3d 596 (6th Cir. 2008).

conditions, from *Dupuy* because the court found there were material questions of fact involving whether the social worker improperly threatened that the parents would go to jail if they withdrew from the voluntary plan.[13] We find *Dupuy* and *Smith* persuasive and conclude that there is no evidence in this record demonstrating that Kerri was coerced into accepting or continuing with voluntary services through NFC.

We have said that "'there is no requirement that the juvenile court must institute a plan for rehabilitation of a parent.'"[14] There was no such plan here, and the State did not seek to terminate Kerri's parental rights based on her failure to comply with a court-ordered plan. Instead, the State sought to terminate based on evidence that Kerri had substantially and continuously or repeatedly neglected and refused to give necessary parental care and protection. Thus, evidence of Kerri's noncompliance with voluntary State-offered services, as well as evidence from the prior case with DHHS, closed less than 3 months before DHHS again received concerning information and Kerri began voluntary services with NFC, was relevant to the State's case.

We find that the State made at least a prima facie case that the requirements of § 43-292(2) were met due to a 4-year history of drug use and improper supervision. On remand, the juvenile court should consider all of the evidence presented to determine whether the State has demonstrated by clear and convincing evidence that termination of Kerri's parental rights is appropriate and in the best interests of the children.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is reversed and this case is remanded to the juvenile court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[13] *Id.* (Gilman, J., dissenting).

[14] *In re Interest of Joshua M. et al.*, 251 Neb. 614, 632, 558 N.W.2d 548, 561 (1997) (quoting *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990)).

LANA L. WARNER, APPELLANT AND CROSS-APPELLEE, V.
LEE M. SIMMONS AND NIOBRARA RIVER RANCH, L.L.C.,
APPELLEES AND CROSS-APPELLANTS.
849 N.W.2d 475

Filed July 3, 2014. No. S-13-392.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, which an appellate court independently decides.
2. **Jury Instructions.** The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Invitor-Invitee: Negligence: Liability.** A land possessor is not liable to a lawful entrant on the land unless the land possessor had or should have had superior knowledge of the dangerous condition on the land.

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

Gregory R. Coffey, of Friedman Law Offices, P.C., L.L.O., for appellant.

Robert S. Lannin, of Shively & Lannin, P.C., L.L.O., and Victor E. Covalt III, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Appellant, Lana L. Warner, was injured when she fell while using a wooden plank walkway at a cabin owned by appellee Lee M. Simmons, doing business as Niobrara River Ranch, L.L.C. Warner sued Simmons and Niobrara River Ranch, alleging negligence for failure to maintain, failure to inspect, or failure to warn of a dangerous condition. A jury returned a verdict in favor of Simmons and Niobrara River Ranch. Warner appeals, arguing that the Nebraska jury instruction on burden

of proof in premises condition liability cases is not compatible with Nebraska's comparative fault statute, Neb. Rev. Stat. § 25-21,185.09 (Reissue 2008). We affirm.

BACKGROUND

On Thursday, August 24, 2006, Warner and a group of friends took a "float trip" on the Niobrara River. The group had arranged to stay near Valentine, Nebraska, at a Niobrara River Ranch cabin owned by Simmons. The cabin was in a group of three that Simmons built in 1998. The cabins were labeled "south," "middle," and "north." Warner's group was assigned to the north cabin. Between the road and the north cabin, Simmons had placed 3-foot-long 2- by 8-inch cedar planks end to end, forming a walkway, ending approximately 6 feet from the cabin at a grassless patch.

On the evening of Friday, August 25, 2006, Warner and her friends returned from dinner in Valentine and walked toward the cabin where they were staying. According to Warner, Warner was walking behind her sister and as her sister stepped on the end of the last plank, the board tilted and hit Warner's foot, causing Warner to fall. Warner was taken by ambulance to a hospital in Valentine, where an x ray showed that Warner had suffered a fracture of the left tibial plateau and that she would need surgery. Warner was transferred to a Lincoln, Nebraska, hospital, where there was an orthopedic surgeon. After surgery, Warner was unable to put her full weight on her leg for approximately 4 months and used a walker to get around. Warner testified that for 2½ years, she experienced pain in her leg when walking.

On August 20, 2010, Warner filed an amended complaint against Simmons and Niobrara River Ranch, alleging that she was injured as a direct and proximate result of the defendants' negligence in failing to inspect the premises, maintain the premises in a reasonably safe manner, or warn Warner of the dangerous condition on the premises. In his answer, Simmons alleged that Warner's injury was the result of her own acts or her contributory negligence. The case proceeded to a jury trial on April 4, 2013.

Simmons stated during his deposition that he was primarily responsible for maintenance and upkeep on the property and that although he did not perform periodic inspections, per se, he is "always looking or seeing if there's something that needs to be fixed. And if there is, then [he] fix[es] it." When shown a photograph of Warner and her friends on the porch of the cabin, Simmons suggested that the photograph must have been taken the morning after Warner and her friends arrived, because he brought the group dinner the night they arrived and "would have noticed if there was a protruding board like that." Simmons was asked whether he agreed that the board closest to the cabin was protruding at the grassless patch, and Simmons answered, "It appears to be in this photo. And it appears that it isn't in a straight line with the other boards." Simmons testified that the board in the photograph looked like something he would have noticed needed to be fixed.

One of Warner's friends who was on the trip in 2006 testified that when she first arrived at the cabin and saw the plank walkway, she immediately thought "it looked much easier to me not to walk on the planks." Clarke testified,

> They just didn't look even to me. And when you're carrying things, I just thought not to have to look down at these planks and think about where you're walking, it was just easier to walk on the sides. So I always did. And there was — you could see where other people had thought the same thing because . . . there was grass there but there was a path there where you could see other people had done the same thing.

Warner testified that when the group returned from dinner on August 25, 2006, she noticed the planks for the first time and "thought, well, those planks are there for a reason. I — you know, I'm going to walk on them because I'm steady on my feet, you know, I don't fall."

After the parties rested, the court held a jury instruction conference. At the jury instruction conference, Warner objected to the burden of proof section of jury instruction No. 2, which followed the language of NJI2d Civ. 8.26 and read:

> Before the Plaintiff can recover against the Defendants, they [sic] must prove, by the greater weight of the evidence, each and all of the following with respect to one or more of the Defendants:
>
> 1. That the Defendants either created the condition, knew of the condition, or by the exercise of reasonable care, would have discovered the condition;
>
> 2. That the Defendants should have realized that the condition involved an unreasonable risk of harm to lawful entrants;
>
> 3. That the Defendants should have expected that lawful entrants such as the Plaintiff either:
>
> a. would not discover or realize the danger; or
>
> b. would fail to protect themselves against the danger;
>
> 4. That one or more of Defendants failed to use reasonable care to protect lawful entrants against the danger;
>
> 5. That the condition was a proximate cause of some damage to the Plaintiff; and
>
> 6. The nature and extent of that damage.

Warner submitted a proposed instruction that essentially omitted the third element and would have required Warner to prove the following:

> 1. That there was a condition on the Defendant[s'] property that represented an unreasonable risk of harm to lawful entrance [sic] on the property;
>
> 2. That the Defendant[s] either created the condition, knew of the condition, or by the exercise of reasonable care, would have discovered the condition;
>
> 3. That the Defendant[s] failed to use reasonable care to protect lawful entrance [sic] against the danger;
>
> 4. That the condition was a proximate cause of some damage to . . . Warner; and
>
> 5. The nature and extent of that damage.

The court overruled Warner's objection, noting that it would follow the Nebraska pattern jury instructions.

The jury returned a verdict in favor of Simmons and Niobrara River Ranch. Warner appealed and filed a petition

to bypass the Nebraska Court of Appeals. We moved the case to our docket.

ASSIGNMENTS OF ERROR

Warner asserts that the district court erred in giving NJI2d Civ. 8.26 on burden of proof in premises condition liability cases because, she asserts, that jury instruction is not compatible with § 25-21,185.09. Simmons cross-appeals, arguing that the district court erred in refusing to give Nebraska jury instruction NJI2d Civ. 3.01 on the right to assume another's reasonable care.

STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, which an appellate court independently decides.[1]

ANALYSIS

Warner asserts that the district court erred in giving Nebraska jury instruction NJI2d Civ. 8.26 on burden of proof in premises condition liability cases because, she asserts, that jury instruction is not compatible with § 25-21,185.09. Warner argues that her proposed replacement instruction would have "shift[ed] issues related to the plaintiff's knowledge of or ability to avoid the condition [from] a burden of proof under plaintiff's prima facie case to the defendant[s'] burden of proof under their affirmative defenses."[2]

[2,3] The general rule is that whenever applicable, the Nebraska Jury Instructions are to be used.[3] In an appeal based

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[1] *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 828 N.W.2d 147 (2013); *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 799 N.W.2d 249 (2011); *Robinson v. Dustrol, Inc.*, 281 Neb. 45, 793 N.W.2d 338 (2011); *Sinsel v. Olsen*, 279 Neb. 38, 777 N.W.2d 54 (2009).

[2] Brief for appellant at 7.

[3] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006); *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006); *Curry v. Lewis & Clark NRD*, 267 Neb. 857, 678 N.W.2d 95 (2004); *Walkenhorst v. State*, 253 Neb. 986, 573 N.W.2d 474 (1998).

on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[4]

Warner correctly asserts that the elements of a plaintiff's burden of proof in premises liability cases as outlined in NJI2d Civ. 8.26 are derived from case law from a time when the law in Nebraska was that a plaintiff's recovery was barred if her contributory negligence was simply more than slight. Warner cites to *Burns v. Veterans of Foreign Wars*,[5] in which we held that "[t]he open or obvious nature of a dangerous condition in or on a possessor's land does not automatically relieve the possessor from liability for injury resulting from the dangerous condition." We went on to state that a possessor of land may be liable if he should expect that the invitee will fail to protect himself against the dangerous condition.[6] NJI2d Civ. 8.26 reflects our holding in that case by requiring proof that the defendants should have expected that lawful entrants such as the plaintiff either would not discover or realize the danger or would fail to protect themselves against the danger.

Three years after *Burns* was decided, in 1992, § 25-21,185.09 replaced the "more than slight" bar with a comparative fault standard allowing a plaintiff to recover so long as her negligence was less than the total negligence of all persons against whom recovery was sought. In 1996, this court abolished the distinction between invitee and licensee in *Heins v. Webster County*.[7] However, in 2003, this court reaffirmed the elements

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[4] *InterCall, Inc. v. Egenera, Inc.*, *supra* note 1; *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007); *Domjan v. Faith Regional Health Servs.*, 273 Neb. 877, 735 N.W.2d 355 (2007); *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007); *Orduna v. Total Constr. Servs.*, 271 Neb. 557, 713 N.W.2d 471 (2006).

[5] *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 853, 438 N.W.2d 485, 491 (1989).

[6] *Id.* (quoting *Corbin v. Mann's Int'l Meat Specialties*, 214 Neb. 222, 333 N.W.2d 668 (1983)).

[7] *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

for a land possessor's liability for injury to a lawful visitor in *Herrera v. Fleming Cos.*,[8] including the requirement that "the defendant should have expected that a lawful visitor such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger." This element follows the language of the Restatement (Second) of Torts § 343.[9] The requirement is further clarified in the context of known or obvious dangers in § 343A of the Restatement, which we cited in *Aguallo v. City of Scottsbluff*,[10] when we said,

> Generally, when the danger posed by a condition is open and obvious, the owner or occupier is not liable for harm caused by the condition. [Citation omitted.] However, "[d]espite the fact that the danger may be open and obvious or known, the possessor of the land may owe the duty if he should expect that the [lawful visitor] will fail to protect himself against the hazard."

Warner suggests that the elements outlined in our prior case law are not compatible with the comparative fault standard adopted in 1992 because, she asserts, the elements require the plaintiff to disprove her own contributory negligence. Warner argues that the third element in particular is properly placed as part of the defendant's affirmative defense. We disagree. Although Warner suggests that this element requires a plaintiff to prove what she specifically did not know in a particular case, that argument mischaracterizes the purpose of the element.

[4] Though we have abolished the distinction between invitee and licensee, it remains true that a land possessor is not liable to a lawful entrant on the land unless the land possessor had or should have had superior knowledge of the dangerous condition on the land.[11] The third element of NJI2d

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[8] *Herrera v. Fleming Cos.*, 265 Neb. 118, 122, 655 N.W.2d 378, 382 (2003).

[9] Restatement (Second) of Torts § 343 (1965).

[10] *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 814, 678 N.W.2d 82, 93 (2004).

[11] See *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988).

Civ. 8.26 clarifies the scope of a land possessor's duty by addressing what a land possessor could reasonably expect a lawful entrant to know.

As previously mentioned, NJI2d Civ. 8.26 follows the language of the Restatement (Second) of Torts, but it is also consistent with the Restatement (Third) of Torts.[12] As comment *a*. to the Restatement (Third) of Torts § 51 explains, land possessors have a duty to attend "to the foreseeable risks in light of the then-extant environment, *including foreseeable precautions by others*."[13] This is true regarding all dangerous conditions on the land, but as comment *k*. explains, "[k]nown or obvious dangers pose less of a risk than comparable latent dangers because those exposed can take precautions to protect themselves."[14]

Jury instruction No. 2 was a correct statement of the law regarding a plaintiff's burden of proof in premises condition liability cases, and the district court did not err in giving that instruction. Because we find no error, we do not reach Simmons' argument on cross-appeal.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

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[12] Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2012).

[13] *Id*., § 51, comment *a*. at 243 (emphasis supplied).

[14] *Id*., § 51, comment *k*. at 251.

MICHAEL SIMMONS, APPELLEE AND CROSS-APPELLANT, V. PRECAST HAULERS, INC., AND CHEROKEE INSURANCE COMPANY, ITS WORKERS' COMPENSATION INSURER, APPELLANTS AND CROSS-APPELLEES.

849 N.W.2d 117

Filed July 3, 2014. No. S-13-848.

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. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
4. **Workers' Compensation: Health Care Providers.** Generally, pursuant to Neb. Rev. Stat. § 48–120 (Cum. Supp. 2012), an employee may be reimbursed for nursing care in the employee's home or at a nursing home, when such care is necessitated by a work-related injury, so long as the cost of the care is fair and reasonable.
5. ____: ____. There are three basic requirements that must be met before compensation may be rendered for care to an injured employee by the spouse in the home: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the spouse must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse.
6. ____: ____. A person rendering necessary medical services to a disabled worker on an "as-needed" basis need not render the services during each moment of compensated time, but, rather, must be available to perform the needed services during the times when needed.
7. ____: ____. For compensability of in-home care, the focus is on the nature of the service provided, not the status or devotion of the provider of the service.
8. **Workers' Compensation: Attorney Fees.** Attorney fees in workers' compensation cases are allowable only pursuant to statutory authorization.
9. ____: ____. The determination of an award of attorney fees pursuant to Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012) must be calculated on a case-by-case basis.

Appeal from the Workers' Compensation Court: LAUREEN K. VAN NORMAN, Judge. Affirmed.

Gregory D. Worth, of McAnany, Van Cleave & Phillips, P.A., for appellants.

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

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

MCCORMACK, J.

NATURE OF CASE

Michael Simmons, while employed by Precast Haulers, Inc., sustained extensive injuries when he was run over by a fully loaded tractor-trailer. Precast Haulers concedes that the injuries and the related medical bills are compensable, but on appeal, Precast Haulers challenges the trial court's order requiring it to provide a wheelchair-accessible van; to pay for the in-home care provided by Michael's wife, Courtney Simmons; and to pay for Michael's attorney fees under Neb. Rev. Stat. § 48-125 (Cum. Supp. 2012). Michael cross-appeals for additional attorney fees.

BACKGROUND

The parties stipulated that Michael was employed by Precast Haulers on October 14, 2011, when he sustained compensable injuries to his whole body during the course of his employment. At the time of the accident, Michael was attempting to activate a hydraulic lever on a tractor-trailer when he slipped and fell to the ground. The tires of the fully loaded tractor-trailer ran over Michael's body, crushing him.

Michael suffered extensive crush injuries from the accident. His injuries included the following: complex pelvic fractures; bowel and bladder dysfunction; lumbar spine fracture; SI joint crush injury; retroperitoneal hemorrhage; urethral injury; fractures to his hands, arms, feet, ankles, and legs; Chopart's amputation of his right foot; left upper arm degloving injury; skin grafting; ileus; traumatic neuropathy; buttocks pressure

wounds; scrotal injury; rectal injury; abdominal wall wounds; splenic injury; bladder rupture; depression; anxiety; adjustment disorder; posttraumatic stress disorder; and cognitive defects. Michael's right foot was amputated. Michael's left foot required multiple grafting surgeries.

Due to his injuries, Michael was hospitalized from October 14 to December 23, 2011. Complications from his injuries required him to be in and out of inpatient care for several more months after December 23.

When Michael did return home, he required 24-hour in-home nursing to allow him to continue his outpatient recovery and rehabilitation. The uncontested evidence at trial establishes that Michael cannot care for himself without assistance. He needs assistance with everything from preparing food to bathing. Michael requires assistance to change his catheter and colostomy bags. Michael's wounds require bandages to be changed and for the wounds to be packed.

Additionally, Michael has limited mobility and needs assistance moving. When he first returned home, Michael was unable to stand and required assistance to get into and out of his recliner. Due to repeated surgeries, Michael has had to learn how to walk three different times. At the time of trial, Michael could walk with his walker only 30 to 50 yards before needing a break. Michael primarily uses a heavy manual wheelchair for mobility. The heavy wheelchair was on loan from the University of Kansas Hospital. Precast Haulers' insurance company did not provide Michael with a manual wheelchair until a week before the trial, which was held on May 30, 2013.

The wheelchairs Michael was provided with are heavy and cannot roll on carpet very well. Michael cannot push himself through his yard and cannot move on his gravel driveway. He cannot put the wheelchair in a vehicle himself, and it is difficult for Courtney to do so. Michael testified that he can drive a car and that he still has his license. However, when he drives by himself, he has to leave his nonmotorized wheelchair in the driveway.

Michael's doctors recommended that he receive custom wheelchairs and a wheelchair accessible van. In February 2012, Michael was issued a "Physician's Order" to receive a

custom powered wheelchair, a custom manual wheelchair, and a wheelchair accessible van. Numerous other similar orders were subsequently made. In an affidavit, one of Michael's treating physicians concurred with his associate physicians that Michael required a custom manual wheelchair, a custom powered wheelchair, a powered scooter, and a wheelchair accessible van to assist in his outpatient recovery and rehabilitation from his work-related injuries.

Michael's 24-hour in-home care was originally provided by hired professionals. However, after 1½ months of 24-hour care, Michael could not tolerate having a night nurse. Michael's wife, Courtney, took over Michael's care from 7 p.m. to 7 a.m. Monday through Friday and for 24 hours per day on the weekends. During the week, Courtney works a full-time job outside the home. Therefore, from 7 a.m. to 7 p.m., Monday through Friday, Robin Chynoweth, a certified nursing assistant, provides Michael's care.

Courtney has replaced all but one of the certified nursing assistants. With the help of her son, Courtney provides care for Michael 108 hours per week. She testified that for a 6-month period, she moved an air mattress into the living room, where Michael slept, to care for him overnight. She provides all of the care of a nursing professional. In addition to the services provided by Chynoweth, Courtney changes Michael's fentanyl bandages and can give Michael his medication. Chynoweth's certification does not allow her to perform those functions.

At trial, Courtney testified that on the weekdays, she spends at least 3 hours per day directly assisting Michael and spends 8 to 12 hours per day on the weekend. Courtney stated that if she did not provide the care, 24-hour nursing care would be required, and that the nurses hired would need to be more qualified than Chynoweth. Courtney feared that if not for her care, Michael would need to be in a nursing home. Michael's treating physicians agreed with Courtney and averred in their affidavits that if Courtney was not available to provide assistance to Michael, additional in-home nursing services would have been required to allow Michael to continue his outpatient recovery and rehabilitation.

The trial court also received evidence concerning the payment of Michael's medical bills. Exhibit 5 in the record contains affidavits from representatives from the various medical care providers that took care of Michael after his accident. Each affidavit states the total bill, the amount of unpaid charges, and whether Cherokee Insurance Company made timely payments within 30 days. By way of example, the exhibit contains an affidavit from Bryan Medical Center. Michael received care at Bryan Medical Center from October 14 to November 22, 2011, incurring charges of $729,109.16. A representative from Bryan Medical Center requested payments from Cherokee Insurance Company on December 13, 2011, and again on March 21, April 6 and 9, May 7, July 24 and 26, August 7 and 29, and October 9, 2012. By October 9, no payments had yet been received. And as of May 7, 2013, when the affidavit was signed, $110,279.89 was still outstanding.

Exhibit 6, which was compiled by Michael's attorneys, is a demonstrative exhibit detailing the charges incurred, paid, and outstanding prior to and after the filing of the petition in this case. The medical bills at the time of trial totaled $2,161,555.30, of which $426,195.89 was still outstanding. Prior to the filing of the petition, Michael had incurred $1,498,065.68 in medical bills and the Cherokee Insurance Company had paid only $25,021.72.

Michael's counsel offered exhibit 7, a billing statement for services provided by Michael's counsel in this case. The affidavit states that reasonable rates of $150 per hour were charged by the attorneys and $75 per hour for the paralegals. The services and expenses listed by Michael's counsel totaled $36,555.

Prior to trial, Precast Haulers stipulated that Michael has been temporarily totally disabled and will remain temporarily totally disabled as the result of his work-related injuries indefinitely into the future. Precast Haulers also stipulated that Michael is entitled to an award of future medical care to treat his work-related injuries.

The issues remaining for determination by the trial court were Michael's entitlement to attorney fees for late payment of medical expenses, Michael's entitlement to certain assistive

devices, and whether Courtney was owed for home health care services provided. After receiving evidence and hearing testimony, the trial court held that (1) Precast Haulers was to provide and pay for a custom lightweight wheelchair, a custom powered wheelchair, and a wheelchair accessible van; (2) Precast Haulers was to reimburse Michael for home health care services provided by Courtney, in the amount of $1,080 per week, which is 108 hours multiplied by $10 per hour, and reimburse Michael for services rendered from the time he was released from the hospital to the date of trial in the total sum of $69,428.57; and (3) Precast Haulers was to pay Michael's attorney fees in the amount of $36,555.

ASSIGNMENTS OF ERROR

Precast Haulers assigns that the trial court erred in finding that (1) Michael was entitled to attorney fees pursuant to § 48-125 in the amount of $36,555, (2) Courtney was entitled to compensation for the provision of home health care, and (3) Michael was entitled to a wheelchair accessible van.

On cross-appeal, Michael assigns that the trial court erred as a matter of law by limiting the amount of § 48-125 attorney fees awarded to the time expended by his attorneys.

STANDARD OF REVIEW

[1,2] 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] In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court, the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.[2]

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[1] *Kim v. Gen-X Clothing*, 287 Neb. 927, 845 N.W.2d 265 (2014).

[2] *Id.*

[3] In testing the sufficiency of the evidence to support the findings of fact in a workers' compensation case, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[3]

ANALYSIS

Wheelchair Accessible Van

Precast Haulers argues that the evidence does not support an award of a wheelchair accessible van. We disagree. We find the evidence provided in the record is sufficient competent evidence to support the trial court's award.

Neb. Rev. Stat. § 48-120(1)(a) (Cum. Supp. 2012) of Nebraska's workers' compensation statutes, states in part:

> The employer is liable for all reasonable medical, surgical, and hospital services, including plastic surgery or reconstructive surgery but not cosmetic surgery when the injury has caused disfigurement, appliances, supplies, prosthetic devices, and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment.

The issue of whether a wheelchair accessible van is an "appliance" under this state's workers' compensation statute is one of first impression. Although the statutes under which they were operating are not identical to Nebraska's, other courts have found that a wheelchair accessible van qualifies as an "appliance,"[4] a "'mechanical appliance,'"[5] an "'artificial replacement,'"[6] and an "orthopedic appliance."[7] Other courts, such as the Michigan Supreme Court, have found that the van itself, as a vehicle, is not an "appliance," but that the term

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[3] *Id.*

[4] *Manpower Temporary Services v. Sioson*, 529 N.W.2d 259, 264 (Iowa 1995).

[5] *Crouch v. W. Va. Workers' Comp. Com'r*, 184 W. Va. 730, 733, 403 S.E.2d 747, 750 (1991).

[6] *Meyer v. N.D. Workers Comp. Bureau*, 512 N.W.2d 680, 684 (N.D. 1994).

[7] *Griffiths v. W.C.A.B.*, 596 Pa. 317, 321, 943 A.2d 242, 244 (2008).

encompasses the necessary modifications to the van to make it operable by the worker.[8]

When interpreting provisions of the Nebraska Workers' Compensation Act, our court has consistently given the act a liberal construction to carry out justly its beneficent purpose to provide an injured worker with prompt relief from the adverse economic effects caused by a work-related injury or occupational disease.[9] Therefore, although we have not previously explicitly defined "appliance," we have broadly interpreted the term. In *Miller v. E.M.C. Ins. Cos.*,[10] we held that home modifications for a man bound to a wheelchair could be medical expenses under the appliances or supplies categories. We stated that the modifications are compensable if they are "'required by the nature of the injury'" and if the modifications "'relieve pain or promote and hasten the employee's restoration to health and employment.'"[11]

Precast Haulers argues that a wheelchair accessible van is not a "medical service" which will relieve Michael's pain or hasten his restoration to health and employment. Precast Haulers also argues that Michael does not want a wheelchair accessible van and that Michael would not be able to drive it. Precast Haulers also notes other transportation services are available to Michael.

We reject each of Precast Haulers' arguments. The uncontested evidence in the record indicates that a wheelchair accessible van will hasten Michael's restoration to health and employment. One of Michael's treating physicians averred that Michael required a wheelchair accessible van to assist in his outpatient recovery and rehabilitation from his work-related injuries. There is no evidence in the record that a wheelchair accessible van would not help in his restoration to health.

Precast Haulers' other arguments are weak at best. The overwhelming testimony given by Michael indicates that he

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[8] *Weakland v. Toledo Engineering Co., Inc.*, 467 Mich. 344, 656 N.W.2d 175 (2003).

[9] *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

[10] *Miller v. E.M.C. Ins. Cos.*, 259 Neb. 433, 610 N.W.2d 398 (2000).

[11] *Id.* at 451, 610 N.W.2d at 412 (quoting § 48-120).

wants to gain independence by having a wheelchair accessible van. Although Precast Haulers asserts that Michael cannot drive, Michael testified that he can drive and that he still has his driver's license. There is no evidence from Michael's doctors that Michael cannot or should not drive. Precast Haulers' argument also ignores that a wheelchair accessible van is necessary to allow Michael and his family to transport his new powered wheelchair, which was awarded by the trial court. Without a wheelchair accessible van, it is logical to assume that it may be difficult, if not impossible, for Michael and Courtney to transport his new powered wheelchair. And finally, although Michael has been provided with a transportation service to his medical appointments, it does not provide transportation for his personal needs.

In conclusion, the record provides sufficient competent evidence to establish that a wheelchair accessible van is an "appliance" that will help restore Michael's health. We, therefore, cannot say that the trial court was clearly wrong in determining that Precast Haulers should pay for a wheelchair accessible van.

On-Call Compensation for Spouse

Precast Haulers argues that the evidence is not sufficient to support Courtney's receiving compensation for the provision of home health care for 48 hours of care on the weekends and 12 hours of care each weekday. In support of this argument, Precast Haulers argues that many of the hours spent by Courtney "on-call" were spent sleeping, completing ordinary household duties, and caring for herself, which hours should be considered noncompensable.

[4,5] Generally, pursuant to § 48-120, an employee may be reimbursed for nursing care in the employee's home or at a nursing home, when such care is necessitated by a work-related injury, so long as the cost of the care is fair and reasonable.[12] We have repeatedly stated that it is not essential

[12] *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990).

that the service be furnished by a doctor, nurse, or other medical person.[13] With this understanding, we have allowed payments to spouses[14] and unrelated persons[15] who provide the care. There are three basic requirements that must be met before compensation may be rendered for care to an injured employee by the spouse in the home: (1) The employer must have knowledge of the employee's disability and need of assistance as a result of a work-related accident; (2) the care given by the spouse must be extraordinary and beyond normal household duties; and (3) there must be a means of determining the reasonable value of the services rendered by the spouse.[16]

[6] Ordinary housekeeping tasks, which generally include cleaning, preparation of meals, and washing and mending clothes, are noncompensable.[17] Compensable tasks include serving meals in bed, bathing and dressing, administering medication, and assisting with sanitary functions.[18] However, we have held that a person rendering necessary medical services to a disabled worker on an "as-needed" basis need not render the services during each moment of compensated time, but, rather, must be available to perform the needed services during the times when needed.[19] We stated, quoting the Rhode Island Supreme Court case of *Bello v. Zavota Bros. Transp. Co., Inc.*,[20] as follows:

> "The fact that [a person] may not have been actively performing a strictly medical task at each and every

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[13] See, *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr.*, 228 Neb. 38, 421 N.W.2d 25 (1988); *S & S LP Gas Co. v. Ramsey*, 201 Neb. 751, 272 N.W.2d 47 (1978).

[14] *Spiker v. John Day Co.*, 201 Neb. 503, 270 N.W.2d 300 (1978) (superseded by statute on other grounds as stated in *Koterzina v. Copple Chevrolet*, 1 Neb. App. 1000, 510 N.W.2d 467 (1993)).

[15] *S & S LP Gas Co. v. Ramsey, supra* note 13.

[16] *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., supra* note 13.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Bello v. Zavota Bros. Transp. Co., Inc.*, 504 A.2d 1015 (R.I. 1986).

> moment of the day does not mean that she should not be compensated for her continuous attendance. This case is analogous to the situation in which a night nurse watches over a sleeping patient. The fact that the patient sleeps through the night does not support an argument that the nurse should not be paid for the night. He or she must be present and available to meet the patient's needs, not according to some preestablished timetable, but as the patient experiences them."[21]

The fact that an attendant service provider may perform household tasks during "on-call" time does not alter either the need for or the nature of the services provided.[22]

[7] Precast Haulers attempts to distinguish this precedent by arguing that because Courtney is Michael's spouse, she should not be compensated for her "on-call" time. We find no relevant distinction between a spouse and a nonrelated third party, so long as the evidence supports compensability under the three-part test set out in *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr.*[23] For compensability of in-home care, our focus is on the "'nature of the service provided, not the status or devotion of the provider of the service.'"[24] A paid third-party nurse might read, nap, or perform household tasks and would nevertheless be compensated for that time.[25] Therefore, if the spouse is providing the same service while "on-call," the fact that the spouse is able to sleep or perform household tasks during that time is likewise irrelevant.[26] "This

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[21] *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., supra* note 13, 228 Neb. at 46, 421 N.W.2d at 30.

[22] *Id.* (citing *Standard Blasting & Coating v. Hayman*, 476 So. 2d 1385 (Fla. App. 1985)).

[23] *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., supra* note 13.

[24] *Spiker v. John Day Co.*, *supra* note 14, 201 Neb. at 522, 270 N.W.2d at 310 (Brodkey, J., concurring; Boslaugh, McCown, and White, C. Thomas, JJ., join).

[25] *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., supra* note 13 (citing *Brown v Eller Advertising Co*, 111 Mich. App. 538, 314 N.W.2d 685 (1981)).

[26] *Id.*

is so because, if the employer provided the services of an outside professional, that professional would be entitled to pursue his or her own interests during such 'on call' periods without diminution of compensation."[27] Compensation for a claimant's spouse for "on-call" nursing hours is allowed if supported by the evidence.[28]

Here, the evidence clearly supports all three of our requirements for spousal compensation. Precast Haulers does not contest that it had knowledge of Michael's disability and need of assistance as a result of a work-related accident or that there was a means of determining the reasonable value of the services rendered by Courtney. Rather, Precast Haulers argues that the evidence supports compensation of only 50 hours per week for services provided by Courtney, not 108 hours. We disagree.

This is a sufficiency of the evidence issue; therefore, every controverted fact must be resolved in favor of the successful party and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.[29] We begin by repeating that Precast Haulers does not contest that Michael needs 24 hours of care per day. In fact, Michael received 24 hours of care per day from paid third-party providers for 1½ months after he returned home from the hospital. The testimony of Michael, Courtney, and Chynoweth all support that Courtney has completely replaced the care of the night and weekend nurses. Indeed, Courtney has gone beyond the medical services the nurses originally provided. Courtney helps Michael move, bathes him, feeds him, tends to his open wounds, provides him with medication, and is available should he need emergency care. Michael's treating physicians have ordered 24-hour care for Michael and have averred that if Courtney were not available to provide assistance to Michael, additional in-home nursing services would

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[27] *Edward Kraemer & Sons, Inc. v. Downey*, 852 P.2d 1286, 1289 (Colo. App. 1992).

[28] *Close v. Superior Excavating Co.*, 166 Vt. 318, 693 A.2d 729 (1997); *Edward Kraemer & Sons, Inc. v. Downey, supra* note 27.

[29] *Kim v. Gen-X Clothing, supra* note 1.

be required to allow Michael to continue his outpatient recovery and rehabilitation. No evidence in the record indicates to the contrary.

When viewing this evidence in the light most favorable to Michael, it is apparent that the sum of $1,080 per week, with back compensation for a total of 64⅔ weeks for the services provided by Courtney, was reasonable and supported by sufficient competent evidence.

Attorney Fees

Finally, both parties argue that the trial court erred in the amount of attorney fees it awarded. Precast Haulers argues that the award of the entire amount of attorney fees requested was unreasonable and excessive. On cross-appeal, Michael argues that the amount of § 48-125 attorney fees awarded should not be limited to the hours worked by the attorneys, because Precast Haulers would be rewarded by delaying payment. We hold that the trial court did not err in awarding the full amount of attorney fees and no more.

[8] Attorney fees in workers' compensation cases are allowable only pursuant to statutory authorization.[30] Section 48-125(2)(a) states in part:

> Whenever the employer refuses payment of compensation or medical payments subject to section 48-120, or when the employer neglects to pay compensation for thirty days after injury or neglects to pay medical payments subject to such section after thirty days' notice has been given of the obligation for medical payments, and proceedings are held before the compensation court, a reasonable attorney's fee shall be allowed the employee by the compensation court in all cases when the employee receives an award.

The purpose of the provision for attorney fees in § 48-125 is to encourage prompt payment by making delay costly if an employer neglects to pay medical payments after 30 days' notice has been given of the obligation for the

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[30] *Elwood v. Panhandle Concrete Co.*, 236 Neb. 751, 463 N.W.2d 622 (1990).

medical payments.[31] Nonpayment of medical bills can have an extremely deleterious result for an injured worker.[32] Necessary medical care may be delayed for months pending litigation, which in itself may cause more severe permanent injury.[33]

[9] The determination of an award of attorney fees pursuant to § 48-125 must be calculated on a case-by-case basis.[34] In making that calculation, the trial court should consider, as in other attorney fee contexts, the value of legal services rendered by an attorney by considering the amount involved, 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.[35] Particular attention should be given to the amount of legal work performed in relation to the amount of the unpaid medical bill and the amount of the unpaid medical bill in relation to the workers' compensation award received.[36]

Precast Haulers argues that the award for attorney fees was unreasonable for three reasons: (1) Michael's counsels' work involved minimal legal skill, (2) Precast Haulers has been late in paying a small amount of the bills, and (3) attorney fees awarded should be only for fees directly attributed to the collection of unpaid bills. We find each argument to be without merit.

The trial court specifically found:

> This case involved extremely complex documentation, and while not all of the issues were litigated at trial, a very thorough set of exhibits was prepared and a

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[31] *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999) (Gerrard, J., concurring; McCormack, J., joins).

[32] *Id.*

[33] *Id.*

[34] *Harmon v. Irby Constr. Co.*, *supra* note 31.

[35] *Id.*

[36] *Id.*

> competent brief was presented. Counsel has gone to great lengths to ensure that all of the medical documentation was comprehensible to the Court.

We give deference to the findings of the trial court. Considerable time was put into compiling the medical records, and a trial was held. Precast Haulers does not contest the number of hours worked by Michael's counsel. We find Precast Haulers' contention that opposing counsel did little to no skilled work to be wholly without merit.

Additionally, Precast Haulers' argument that very few bills were paid late is not supported by the record. At the time the petition was filed, the trial court found that Michael had incurred $1,498,065.68 in compensable medical expenses, but only approximately $25,000 had been paid. The record indicates that demands for payment had been made by certain medical providers over a month prior to the filing of the petition. Bryan Medical Center had requested payment a total of 11 times, and the first payment from Precast Haulers was not received until a year after the first request. After our review of the record, we cannot find error in the trial court's factual finding that payment was unjustifiably delayed on the majority of Michael's medical bills.

And finally, Precast Haulers argues that under *Harmon v. Irby Constr. Co.*,[37] the attorney fees should be limited to the fees directly attributable to the collection of unpaid medical bills. In *Harmon*, $3,904 in attorney fees was awarded for the late payment of a $165 medical bill.[38] We found the attorney fees to be unreasonable, because only a fraction of the fees could be directly attributed to the collection of the unpaid medical bill. In fact, as noted by the concurring opinion, it was clear from the record that the collection of this medical bill was incidental to the filing of the plaintiff's claim for permanent total disability benefits.[39] Our opinion in *Harmon* does not, as Precast Haulers contends, affirmatively state that only attorney

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[37] *Id.*

[38] *Id.*

[39] *Id.* (Gerrard, J., concurring; McCormack, J., joins).

fees directly related to the collection of unpaid medical bills can be awarded. Rather, we simply found that the attorney fees in that case were unreasonable. As explained in the concurring opinion, it is appropriate to assess the "entire attorney fee in those cases where one of the underlying reasons for the filing of the workers' compensation claim is to establish compensability for a delinquent medical bill."[40] We find this statement is consistent with the statute. Section 48-120 does not limit reasonable attorney fees to those directly attributable to the collection of an unpaid medical bill. Rather, as already discussed, what constitutes reasonable attorney fees is determined on a case-by-case basis.[41]

In this case, we find that the trial court did not err in awarding the full amount of attorney fees. The primary reason that Michael filed this petition was Precast Haulers' and its insurer's failure to promptly pay for his medical expenses and bills. There was no controversy regarding the compensability of Michael's injuries. As discussed in the trial court's order and in this opinion, had Precast Haulers and its insurer paid Michael's bills and medical expenses, Michael would likely not have incurred such a hefty bill for attorney fees.

Michael's cross-appeal wants to take it one step further. Michael argues that reasonable attorney fees under our precedent can be, as a matter of law, greater than the actual attorney fees and expenses billed. Michael's argument is that due to the large amount of unpaid medical bills, the interest Precast Haulers' insurer made from late payment is greater than the award of attorney fees, and that thus, there is little deterrent in the trial court's award.

Regardless of whether a trial court could, as a matter of law, find reasonable attorney fees to be greater than the hours billed and expenses, the trial court did not do so in this case. We find that the trial court did not clearly err in awarding only the hours billed and expenses, $36,555. There is no indication in the trial court's order that the judge felt that she was limited,

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[40] *Id.* at 431, 604 N.W.2d at 821.

[41] *Harmon v. Irby Constr. Co.*, *supra* note 31.

as a matter of law, in the amount she could award attorney fees. Rather, the record shows that she awarded the entire amount requested by Michael. Exhibit 7 is the attorney fees and expenses given to the court, which total $36,555. Nowhere in the record does it appear that the trial court was asked to award more than that amount. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.[42] With no indication in the record that this issue was presented, we cannot say as a matter of law that the trial court erred in not awarding attorney fees greater than the amount billed. It is incumbent upon the party appealing to present a record that supports the errors assigned.[43]

Again, we stress that the determination of an award of attorney fees pursuant to § 48-125 must be calculated on a case-by-case basis.[44] The determination of the amount of attorney fees is necessarily a question of fact that requires a factual determination on several factors.[45] We, therefore, give great deference to the trial court's findings of fact and find that the trial court did not clearly err in awarding only the full amount of attorney fees requested by Michael.

CONCLUSION

For the reasons stated herein, we affirm the decision of the trial court.

AFFIRMED.

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[42] *In re Interest of Kodi L.*, 287 Neb. 35, 840 N.W.2d 538 (2013).

[43] See, e.g., *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998).

[44] See *Harmon v. Irby Constr. Co., supra* note 31.

[45] *Id.*

In re 2007 Administration of Appropriations of the Waters of the Niobrara River. Joe McClaren Ranch, L.L.C., and Weinreis Brothers Partnership, appellants, v. Nebraska Public Power District and Nebraska Department of Natural Resources, appellees.

851 N.W.2d 640

Filed July 11, 2014. No. S-13-702.

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, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal conclusions made by the director.
2. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted.

Appeal from the Department of Natural Resources. Affirmed.

Donald G. Blankenau, Thomas R. Wilmoth, and Vanessa A. Silke, of Blankenau, Wilmoth & Jarecke, L.L.P., for appellants.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Nebraska Public Power District.

Jon Bruning, Attorney General, Justin D. Lavene, and Emily K. Rose for appellee Department of Natural Resources.

Steven C. Smith and Lindsay R. Snyder, of Smith, Snyder & Petitt, a general partnership, for amicus curiae Nebraska State Irrigation Association.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

HEAVICAN, C.J.

INTRODUCTION

Joe McClaren Ranch, L.L.C., and Weinreis Brothers Partnership, junior river water appropriators, hold appropriations to divert water from the Niobrara River (Niobrara). The junior appropriators petitioned for a hearing before the Nebraska Department of Natural Resources (Department) after receiving closing notices in favor of senior appropriations claimed by the Nebraska Public Power District (NPPD) for its Spencer hydropower plant. The junior appropriators challenged the Department's administration of the Niobrara and sought to stay any future closing notices. On remand from this court, the Department held a hearing and issued an order denying the junior appropriators' claims. The junior appropriators appeal. We affirm.

BACKGROUND

Joe McClaren Ranch owns real property along the Niobrara in Cherry County, Nebraska. Joe McClaren Ranch applied for an appropriation to divert water from the Niobrara in 2006. When this case began, Jack Bond also owned real property in Cherry County along the Niobrara and held five appropriation rights from the Niobrara for irrigation and domestic purposes, as well as two appropriations from tributaries to the Niobrara for irrigation. Bond's appropriations had priority dates between 1969 and 2006. In 2011, Bond sold his property and assigned his water appropriations to Weinreis Brothers Partnership. The partnership was subsequently added as a party in this case, and Bond was permitted to withdraw.

NPPD is the owner or lessee of three water appropriations for hydropower generation for its Spencer plant located near Spencer, Nebraska. NPPD's appropriations date back to 1896, 1923, and 1942. The Spencer plant is located approximately 145 miles downstream from Joe McClaren Ranch's and Weinreis Brothers Partnership's real property.

On March 2, 2007, NPPD sent a letter to the Department calling for water administration on the Niobrara for the benefit of appropriations for its Spencer plant. On May 1, the Department issued closing notices to approximately 400 junior

appropriators, including Joe McClaren Ranch and Bond, directing them to cease water diversions from the Niobrara. On May 11, the junior appropriators filed a request for a hearing with the Department pursuant to Neb. Rev. Stat. § 61-206 (Reissue 2009). The administration of the Niobrara was delayed at NPPD's request, but on August 1, the Department again issued closing notices to the junior appropriators.

On August 17, 2007, the junior appropriators petitioned for a condemnation award in a separate proceeding, causing the Department to dismiss the junior appropriators' request for a hearing as moot. The junior appropriators appealed. We reversed, and remanded.[1]

After a hearing to consider the junior appropriators' challenges, the Department determined that the appropriation of the Niobrara was proper. The junior appropriators again appealed to this court, and we again reversed, and remanded, finding that the Department had improperly limited the scope of the proceedings to exclude the common-law issues of abandonment and statutory forfeiture from nonuse.[2] In our opinion, we found that the statutory procedure for cancellation of appropriations provided in Neb. Rev. Stat. §§ 46-229.02 to 46-229.05 (Reissue 2010) did not abrogate the common-law methods of cancellation and stated: "On remand, the Department is directed to determine whether NPPD's appropriations have been abandoned or statutorily forfeited in whole or in part."[3]

The parties stipulated that the previously admitted testimony and exhibits would be admitted at the new hearing, subject to some previous objections. The hearing officer also took notice of the legislative history of 1993 Neb. Laws, L.B. 302, over objection by the junior appropriators.

The evidence showed that prior to 2007, no owner of the Spencer plant had placed a call for administration of the

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[1] *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[2] *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012).

[3] *Id.* at 658, 820 N.W.2d at 67.

Niobrara in over 50 years. NPPD's water resources manager placed the call for administration in 2007, after learning through conversations with the Department in 2006 that, unlike the North Platte and Platte River Basins, the Department was not proactively administering the portion of the Niobrara near Spencer on a regular basis.

NPPD and its predecessor had been maintaining and generating power at the plant, which has been in continuous operation since 1927, except when closed for maintenance or repair. When NPPD placed the call for administration, it was current on lease payments for its water rights. The Spencer plant's three appropriations amount to a total water discharge of 2,035 cubic feet per second (cfs). On approximately 30 separate dates in 2006, the Spencer plant took through its facilities the total amount of flow allotted in NPPD's appropriations for the plant.

After receiving NPPD's call, several flow measurements were taken near Spencer. Initially, these measurements indicated that the discharge was sufficient to meet NPPD's appropriations. However, on April 30, 2007, a measurement was taken approximately 10 miles upstream of the Spencer plant, indicating the total discharge to be 1,993.73 cfs, which was insufficient for the appropriations associated with the plant. After this measurement, on May 1, the Department issued the first set of closing notices to approximately 400 junior appropriators. Administration of the river was delayed in June and July, at NPPD's request, to allow time for NPPD to get subordination agreements in place. By entering into subordination agreements, junior appropriators pay a fee to continue to use water to which the senior appropriator would otherwise be entitled. Another measurement taken on July 31 indicated a total discharge of 902.72 cfs. As a result of this measurement, on August 1, the Department again issued closing notices to junior appropriators.

After the second hearing on remand, the Department issued an order denying the junior appropriators' claims and finding that NPPD did not abandon or statutorily forfeit any or all of its appropriations. The junior appropriators appeal.

ASSIGNMENTS OF ERROR

The junior appropriators assign the following errors of the Department, restated and reordered: (1) relying on evidence from the hearing officer, which evidence attacked this court's conclusions about common-law abandonment and this court's instructions on remand; (2) finding the junior appropriators failed to prove NPPD had abandoned its appropriations; (3) finding the junior appropriators failed to prove NPPD had statutorily forfeited its appropriations; (4) issuing closing notices without taking into account the subordination agreements and express limitations in NPPD's appropriations; and (5) failing to conduct a futile call analysis.

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, which include the meaning of statutes, a reviewing court is obligated to reach its conclusions independent of the legal conclusions made by the director.[4]

ANALYSIS

Legislative History of L.B. 302.

In its first assignment of error, the junior appropriators assert that the Department erred by relying on evidence from the hearing officer, which evidence they claim collaterally attacked this court's conclusions about common-law abandonment and statutory forfeiture. These alleged errors stem from the Department hearing officer's taking notice of the legislative history of L.B. 302, which amended Neb. Rev. Stat. § 46-229 (Reissue 2010).

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[4] *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004); *In re Water Appropriation A-4924*, 267 Neb. 430, 674 N.W.2d 788 (2004); *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

The junior appropriators suggest that the hearing officer's decision to take notice of the legislative history, without prompting from either party, constituted improper advocacy. Although the junior appropriators' brief suggests they perceive bias extending beyond official notice of the legislative history, we note that the only relevant objection appearing in the record is the objection to the legislative history and, therefore, this is the only issue preserved for our review.

The Administrative Procedure Act specifically permits an agency to take official notice of cognizable facts if notice is given to the parties, as it was here.[5] Nothing in the act requires such notice to be requested by one of the parties.[6] We have long held that courts may take judicial notice of legislative history,[7] and we see no reason why agencies would not also be permitted to do so.

The Department's order states the legislative history was admitted because it was relevant and not before the Department at the previous hearing, nor in the record for this court to review on the previous appeal.

As we stated in our prior opinion, "[S]tatutes 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."[8] We have also stated, "For a court to inquire into a statute's legislative history, the statute in question must be open to construction. A statute is open to construction when its terms require interpretation or may reasonably be considered ambiguous."[9]

The legislative history for L.B. 302 was not relevant to the hearing on remand, because this court had previously

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[5] Neb. Rev. Stat. § 84-914(5) (Reissue 2008).

[6] Cf. Neb. Rev. Stat. § 27-201(3) (Reissue 2008).

[7] See, e.g., *Dairyland Power Co-op v. State Bd. of Equal.*, 238 Neb. 696, 472 N.W.2d 363 (1991).

[8] *In re 2007 Appropriations of Niobrara River Waters, supra* note 2, 283 Neb. at 653, 820 N.W.2d at 64.

[9] *In re Interest of Destiny A. et al.*, 274 Neb. 713, 720, 742 N.W.2d 758, 764 (2007).

held, "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."[10] Our prior holding indicates that we did not need to look at the statute's legislative history for intent because the language of the statute is unambiguous. Furthermore, as we also noted in our previous opinion, "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."[11]

Our holding on the issue of whether the statute abrogated the common law is the law of the case. Thus, the legislative history of L.B. 302 was not relevant and the Department clearly erred in admitting it.

[2] We have held that to constitute reversible error in a civil case, the wrongful admission of evidence must unfairly prejudice a substantial right of a litigant complaining about the evidence admitted.[12] After reviewing the record, it does not appear that any relevant evidence was excluded as a result of the Department's decision to admit the legislative history. Additionally, the Department made findings of fact, supported by other relevant evidence, including expert testimony and numerous exhibits, related to both abandonment and statutory forfeiture. We conclude the decision to admit the legislative history was harmless error that did not unfairly prejudice a substantial right of the junior appropriators, and we are able to consider the junior appropriators' other assignments of error.

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[10] *In re 2007 Appropriations of Niobrara River Waters, supra* note 2, 283 Neb. at 653, 820 N.W.2d at 64.

[11] *Id.* at 641, 820 N.W.2d at 56.

[12] *Kvamme v. State Farm Mut. Auto. Ins. Co.*, 267 Neb. 703, 677 N.W.2d 122 (2004).

Abandonment.

In its second assignment of error, the junior appropriators assert that the Department erred in finding the junior appropriators failed to prove NPPD had abandoned its appropriations in whole or in part. The junior appropriators primarily argue that NPPD's failure to call for administration of the river or enter into more subordination agreements with junior appropriators prior to 2007 demonstrates an intent to abandon its appropriations.

Abandonment is a common-law principle. In *State v. Nielsen*,[13] which we discussed in our prior opinion in this case, we stated that "'"'[a]bandonment' is 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."'"

The junior appropriators cite *Mader v. Mettenbrink*,[14] an easement case, for the proposition that acquiescence in adverse acts may evidence abandonment. The junior appropriators do not, however, point to any case law which holds that the failure to place a call for administration, while continuing to use water, may demonstrate an intent to abandon. We also find it persuasive that the Supreme Court of Colorado, in considering the validity of a no-call agreement, held, "There is no requirement that a senior water right holder place a call on the river to effectuate its water rights . . . ."[15]

In finding NPPD did not intend to abandon all or part of its appropriations, the Department noted that the Spencer plant had been in operation, generating power since 1927. NPPD had expended significant funds to staff, operate, and maintain its facility. NPPD was current on lease payments for its appropriations and had, at various points, used the full amount of flow granted in its three appropriations. The Department also noted that NPPD's water resources manager had been under

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[13] *State v. Nielsen*, 163 Neb. 372, 381, 79 N.W.2d 721, 728 (1956) (quoting *State v. Oliver Bros.*, 119 Neb. 302, 228 N.W. 864 (1930)).

[14] *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954).

[15] *City of Englewood v. Burlington Ditch*, 235 P.3d 1061, 1069 (Colo. 2010) (en banc).

the mistaken assumption that the Niobrara was proactively administered by the Department, like the North Platte and Platte River Basins. These facts refute any presumption that NPPD's failure to place a call prior to 2007 was evidence that it intended to abandon its appropriations.

The dissent argues that NPPD has "never protected" its 1942 appropriation. However, we emphasize that our focus is on what evidence in the record demonstrates that NPPD intended to abandon its rights, rather than what evidence there is that NPPD acted to preserve its rights. Furthermore, although the dissent suggests that NPPD should have protested the roughly 400 applications for new appropriations that followed NPPD's 1942 appropriation, we have recently reiterated that the "threatened" injury of a new appropriation does not confer standing to challenge an application for an appropriation.[16] Finally, if we were to find that NPPD was required to protect its appropriations, which were public record, by objecting to new applications, we see no reason why the roughly 400 junior appropriators that followed would not also have been required to protect theirs.

In short, the dissent asserts that the Department's method of administering the waters of the Niobrara River Basin is fundamentally flawed and suggests that we impose additional burdens on NPPD as a result. To do so would uproot nearly a century of water law in this state and, further, would stray from the specific issues of this case.

The Department's determination that NPPD did not intend to abandon any or all of its appropriations was supported by competent and relevant evidence and was not arbitrary, capricious, or unreasonable. Therefore, we conclude that the Department did not err in finding the junior appropriators failed to prove NPPD abandoned its appropriations in whole or in part.

Statutory Forfeiture.

In its third assignment of error, the junior appropriators assert that the Department erred in finding the junior

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[16] *In re Application A-18503*, 286 Neb. 611, 838 N.W.2d 242 (2013).

appropriators failed to prove NPPD had statutorily forfeited its appropriations in whole or in part.

The Department's order attempts to address forfeiture from nonuse, but begins that section by stating that "[s]tatutory forfeiture is governed by *Neb. Rev. Stat.* §§ 46-229 through 46.229.05." This is contrary to our holdings in *Nielsen* and our prior opinion in this case that statutory forfeiture is independent of the cancellation proceedings provided for in §§ 46-229 to 46-229.05. We note that the dissent also addresses statutory forfeiture and cites to chapter 46 of the Nebraska Revised Statutes for the proposition that an appropriation may be forfeited "in whole or in part." However, what is at issue in this appeal is common-law nonuse, which is governed by Neb. Rev. Stat. § 25-202 (Reissue 2008).

In *Nielsen*, we found that in addition to loss through abandonment, an appropriation right could be lost through nonuse for the period of statutory limitations relating to real estate.[17] Under § 25-202, "An action for the recovery of the title or possession of lands, tenements, or hereditaments . . . can only be brought within ten years after the cause of action accrues." In other words, a lack of beneficial use for more than 10 years may result in the loss of an appropriation.

In finding nonuse in *Nielsen*, we noted that the predecessor in title did not do any work on the irrigation system of the premises, did not irrigate the farm for the 11-year period of possession, and ignored a cancellation proceeding notice.[18] In *Kersenbrock v. Boyes*,[19] we found nonuse of an appropriation where, for more than 10 years, the claimant's dam was not in a condition to generate power to pump water for irrigation or run a gristmill.

The Department's order improperly focuses on a finding that there was not sufficient evidence to justify a cancellation proceeding under §§ 46-229 to 46-229.05. Despite reliance on the incorrect statutes, the Department made factual findings

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[17] *Nielsen, supra* note 13.

[18] *Id.*

[19] *Kersenbrock v. Boyes*, 95 Neb. 407, 145 N.W. 837 (1914).

based on the evidence in this case that do not support a finding of nonuse. NPPD's Spencer plant was operating by using water from the Niobrara to generate power and had been doing so for more than the past 10 years.

The junior appropriators suggest that NPPD was not using all of its 2,035 cfs for the past 10 years. Even assuming, as do the junior appropriators and the dissent, that it is possible to lose part of an appropriation, the evidence showed that at numerous points in 2006, NPPD was utilizing the full 2,035 cfs. As such, it is clear that any partial nonuse of the water did not continue for a 10-year period.

Because the Department's factual findings demonstrate there was no 10-year period of nonuse, we conclude NPPD did not statutorily forfeit its appropriations under § 25-202.

Limitations on NPPD's Appropriations.

In its fourth assignment of error, the junior appropriators assert that the Department erred in issuing closing notices without taking into account the subordination agreements and express limitations in NPPD's appropriations.

A field office supervisor for the Department testified that the subordination agreements with NPPD were taken into consideration by the Department. He testified that the Department's policy was to not send closing notices to junior appropriators who have a subordination agreement with the senior appropriator. The junior appropriators suggest the Department's policy of allowing the senior appropriator to place a call for the full amount of its appropriations despite the existence of subordination agreements permits the senior appropriator to collect both money and water.

However, if the junior appropriator is allowed to use water because of a subordination agreement, the senior appropriator is not receiving that to which it is otherwise entitled. It is possible that there are times when the flow of the river might be such that NPPD receives its full 2,035 cfs, despite continued use of water by junior appropriators with subordination agreements. However, if this were always the case, we assume that junior appropriators would not enter into voluntary subordination agreements. Instead, as is clear from the record in

this case, the flow of the river often is not sufficient for all potential users. At these times, NPPD collects a fee from the junior appropriators with subordination agreements, but it does not receive the water that it otherwise would receive, because the junior appropriators with subordination agreements do not receive closing notices. We disagree with the dissent that the election of remedies doctrine is applicable to this case. An appropriator is not permitted to simultaneously enforce its right against, and collect compensation from, the *same* junior appropriator. The Department's policy is not arbitrary, capricious, or unreasonable, and the Department is entitled to deference for its technical expertise in this area.[20]

There was evidence that because one of NPPD's appropriations—for 35 cfs—had, at one time, been relocated to a different point on the river, it was subject to a limitation that NPPD could only call for administration of permits upstream on Minnechaduza Creek and its tributaries. However, the evidence showed that even without considering that appropriation, the flow on April 30, 2007, fell below the amount allotted in NPPD's other two appropriations.

The Department's determination that it had properly determined the flow demand for NPPD's appropriations was supported by competent and relevant evidence and was not arbitrary, capricious, or unreasonable.

Futile Call Analysis.

In its fifth assignment of error, the junior appropriators assert that the Department erred in failing to conduct a futile call analysis.

The junior appropriators cite *State, ex rel. Cary, v. Cochran*[21] for the proposition that it "is the duty of the administrative officers of the state to determine from all available means . . . whether or not a usable quantity of water can be delivered." In

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[20] See *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987).

[21] *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 173-74, 292 N.W. 239, 246 (1940).

that case, we addressed the duty of the administrative officers after noting that "[w]hether a definite quantity of water passing a given point on the stream would, if not diverted or interrupted in its course, reach [the senior appropriator] in a usable quantity creates a very complicated question of fact."[22] We went on to say, "It necessarily follows that this finding of fact must be determined in the first instance by the officers charged with the administration of the stream. The finding of fact thus made is final unless it appears that it was unreasonable or arbitrarily made."[23]

The evidence showed that a futile call analysis was not done on the main stem of the Niobrara because it is a "wet river," meaning it always contains flowing water, and the Department determined water from the junior appropriators could therefore reach the Spencer plant. When requested by junior appropriators, futile call analyses were done on tributaries to the river with dry patches.

The Department is entitled to deference in this technical area, and the Department's determination that it had conducted a futile call analysis where appropriate was supported by competent and relevant evidence and was not arbitrary, capricious, or unreasonable.

CONCLUSION

For the foregoing reasons, the decision of the Department is affirmed.

AFFIRMED.

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[22] *Id.* at 173, 292 N.W. at 246.

[23] *Id.* at 174, 292 N.W. at 246.

CONNOLLY, J., dissenting.

The Department's method of administering the waters of the Niobrara River Basin is fundamentally flawed. The problem was caused by too many appropriations for surface water or ground water in the Niobrara River Basin. As we have previously pointed out, under the Department's regulations, it is free to designate the basin or its subparts fully appropriated based

on streamflow data and diversion records.[1] But since March 2007, the Department has instead relied on NPPD's unsatisfied total allotment to declare that the basin fully appropriated and to restrict or to close the water rights of upstream junior appropriators.

The Department's reliance on NPPD's appropriations is flawed because since 1942, NPPD has held appropriations so large that the river's flow at Spencer Dam was insufficient to satisfy NPPD's total allotment most of time. This record contains the recorded flow rates of water passing through Spencer Dam for 68 years—from 1942 to 2009. It shows that on average, Spencer Dam has received its full allotment of 2,035 cubic feet per second (cfs) for 59.7 days a year. More specifically, for 7 months of the year, from July to January, NPPD receives a flow that meets or exceeds 2,035 cfs only 2.4 percent of the time. During the remaining months, from February to June, when the river's flow is greater, it still receives a flow that meets or exceeds 2,035 cfs only 13.2 percent of the time. Yet during all these decades, NPPD has failed to protect its purported right to receive the full amount of its allotment.

Significantly, the Department treats NPPD's 2007 call as a continuing demand for its full allotment of 2,035 cfs. The record does not contain the Department's estimate of the Niobrara's average flow rate. But for this appeal, I will assume that the water flowing through Spencer Dam constitutes a close approximation of the river's average flow rate at the eastern end of the river. According to those recorded flows, from July to January of any given year, the Department will be able to shut down upstream junior appropriators for almost 97 percent of the time, and almost 87 percent of the time from February to June. These junior appropriators have made investments to use their appropriations. To permit NPPD to cause this economic harm in 2007 after acquiescing in the Department's actions for over 60 years is both unjust and contrary to the nature of its permits and the Department's actions. I believe a review of the

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[1] See *Middle Niobrara NRD v. Department of Nat. Resources*, 281 Neb. 634, 799 N.W.2d 305 (2011).

historical record, which the majority opinion largely ignores, makes these conclusions clear.

Historical Background

The record shows that NPPD holds three appropriations which make up its total allotment of 2,035 cfs. These appropriations have priority dates of 1896, 1923, and 1942, and they were acquired by private companies and a different public power district that are NPPD's predecessors in interest. In 1896, the State granted an appropriation for 35 cfs for a flour mill dam on the Minnechaduza Creek, north of Valentine, Nebraska, in the northwestern part of the state. The Minnechaduza Creek is a tributary stream to the Niobrara.

In 1923, NPPD's first hydropower predecessor requested an appropriation of 1,450 cfs to generate electricity at what would become Spencer Dam. The application provided the following average flow rates in this part of the Niobrara: At low water stage, the river supplied 1,100 cfs; at medium water stage, 1,450 cfs; and at high water stage, 3,300 cfs. The application was approved for 1,450 cfs "subject to the provisions of the Nebraska Irrigation Laws, which gives preference to appropriators using the water for domestic and agricultural uses, over those using it for manufacturing and power purposes." The dam was originally built in 1927.

By the time the 1923 application was approved, Nebraska had adopted the 1920 constitution, which included the statutory preferences for water use in times of scarcity. Additionally, however, article XV, § 6, of the Nebraska Constitution explicitly requires a user with a higher priority for the water to compensate an appropriator with a senior appropriation. So the 1923 permit's reference to Nebraska's preference laws acted as a notice that water users with higher priorities were entitled to use the water appropriated to NPPD's predecessor if they paid compensation for the water.

In 1941, the U.S. government applied for a permit to divert and store 47,670 acre-feet of water from the Niobrara River in the Box Butte Reservoir near Chadron, Nebraska. This application was part of the Bureau of Reclamation's Mirage Flats project to build a dam and irrigation canal. The dam and

reservoir operate to send stored water from the Niobrara to the Mirage Flats Canal for irrigation and domestic use. The hydropower company that is NPPD's predecessor in interest for the Spencer hydropower facility protested the government's application and the assignment of other appropriations to the government for water storage.

In 1942, while the government's application was pending, the hydropower company applied for 550 cfs, in addition to 1,450 cfs that it received under the 1923 application, to increase the river's head at the Spencer Dam. In 1943, while the company's application was pending, the hydropower company executed a subordination agreement with the government. For the agreed-upon amount of $25,000 in damages, the company subordinated to the government its 1923 appropriation for 1,450 cfs and, if approved, its 1942 application for an additional 550 cfs. The company specifically agreed that despite its priority date, its water rights would be subordinate and inferior to the government's rights to the extent that it diverted the water to the Mirage Flats Canal. The company further recognized the government's intent to use waste, seepage, and return-flow waters for irrigation. But the agreement did not apply to any waters "when and after they have become a part of the measureable flow of the main Niobrara River in the section below the diversion dam of the Project."

In September 1943, the chief of the Bureau of Irrigation, Water Power, and Drainage wrote the state engineer for the Department's predecessor that the Niobrara was over appropriated; he recommended a clause providing that the water granted under the 1942 application could be denied in times of scarcity. That recommendation was incorporated into the permit. Like the 1923 permit, the 1942 permit approved the application "subject to the provisions of Section 46-504 Complied Statutes of Nebraska 1929, which gives preference to appropriators using water for domestic and agricultural uses over those using it for manufacturing purposes." But unlike the previous permit, the 1942 permit explicitly stated the appropriation was subject to the following limitation: "[T]he records show the normal supply of water of the Niobrara River is over-appropriated, and the applicant under this permit is hereby

given notice that it may be denied the use of water during times of scarcity."

This second limitation is more than a notification that other users with a higher preference right could condemn NPPD's water rights. It operated as a conditional water right, with the Department's reserving the right to deny 550 cfs to NPPD in times of scarcity, regardless of whether other users have condemned its rights. And the record shows that this is how the Department has treated the appropriation. That is, before 2007, when considering applications with a higher use priority, the Department has treated NPPD's use of the water to produce electricity as an incidental benefit of the river's waters.

By 1964, the appropriations for hydropower at Spencer Dam were owned by the Consumers Public Power District (Consumers), which also held appropriations for a hydropower facility in Valentine. Much earlier, the Bureau of Reclamation had planned to build the Merritt Reservoir near Valentine on the Snake River, a tributary of the Niobrara. The Merritt Reservoir was intended to supply irrigation water for about 34,000 acres through a planned Ainsworth irrigation canal.

But the government recognized that the project would interfere with Consumers' power production at its Valentine and Spencer facilities. So a 10-year study was conducted to determine how much of Consumers' power production capacity would be lost from 1964, when water storage at the Merritt Reservoir began, until 1975, when the Valentine facility was estimated to reach the end of its useful life and the Spencer facility's lease would expire. In March 1964, the Bureau of Reclamation and Consumers executed a permanent subordination contract. The bureau agreed to provide a specified number of replacement kilowatt hours until January 1975 as compensation for its interference with Consumers' rights. Consumers agreed the replacement energy would constitute full compensation for its "loss of water and generating capacity." Consumers subordinated its appropriations to the government and the Ainsworth Irrigation District for the irrigation of 33,960 acres of land in the Ainsworth unit. The contract was specifically made binding on the parties' successors.

Finally, in 1996, NPPD successfully applied to change the point of diversion for the 1896 appropriation of 35 cfs to the Spencer hydropower facility. But the Department approved the transfer on the condition that NPPD could not demand this water except from the holders of specified junior appropriations that were upstream of the original mill dam on the Minnechaduza Creek.

Governing Principles

The Nebraska Constitution dedicates the "use of the water of every natural stream within the State of Nebraska . . . to the people of the state for beneficial purposes."[2] It further provides that the "right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest."[3] Under these constitutional provisions, a water appropriator has the right to use the public's water for a beneficial purpose, but does not have ownership of the water.[4] The requirement that the water be applied to a beneficial use operates as a condition subsequent on the right acquired and defines the limits of the holder's water rights.[5] So, actively applying appropriated water to a beneficial use is an ongoing requirement to maintain appropriative water rights.

To avoid waste of this resource, we have recognized common-law claims of abandonment and nonuse, in addition to the statutory cancellation procedures for nonuse.[6] We have also held that a landowner can invoke the statutory cancellation

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[2] Neb. Const. art. XV, § 5.

[3] *Id.*, § 6.

[4] See *In re Application of A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987).

[5] See, *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). *In re Application of A-15738, supra* note 4; *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956). See, also, Neb. Rev. Stat. § 46-229 (Reissue 2010).

[6] See, *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012); *In re Application of A-15738, supra* note 4; *Nielsen, supra* note 5. See, also, *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989).

procedures in a petition to the Department.[7] Here, the issues are common-law abandonment and forfeiture under the statutory cancellation procedures. For statutory cancellation, the Department must find that an appropriator has not beneficially used the water for more than 5 consecutive years.[8] But a proponent is not required to show that an appropriator has abandoned or forfeited its entire allotment. Because an appropriator must use Nebraska's waters for a beneficial purpose and to avoid waste, an appropriator's water rights can be lost in whole or in part.[9]

NPPD'S INVESTMENTS SHOULD NOT PRECLUDE A FINDING OF PARTIAL ABANDONMENT OR FORFEITURE

Under these principles, the Department should treat NPPD's appropriations as a bundle of rights, not an all or nothing proposition. I disagree with the majority's conclusion that no abandonment has occurred because NPPD was current on its lease payments, had spent money on its operations and staff, and had used its full allotment on occasion. NPPD is required to invest in its facility and personnel to protect the public and make use of the water it receives at Spencer Dam, even if the evidence shows that it had abandoned or forfeited part of its appropriations or accompanying rights.

NPPD's investments are particularly required here because Spencer Dam is a run-of-the-river dam. That means NPPD does not divert water through a canal or ditch and store it in a reservoir behind a dam. It has no permit for storage capacity to ensure that enough water flows through the dam to generate electricity even when the river's flow is low. Instead, the dam increases the height of the river's flow enough to create hydraulic "head," or pressure. As the water falls through the dam, this hydraulic pressure spins the turbines, which turn the generators that produce current. But because Spencer

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[7] See *In re 2007 Appropriations of Niobrara River Waters, supra* note 6.

[8] See § 46-229.

[9] Neb. Rev. Stat. § 46-229.02(1) (Reissue 2010). See A. Dan Tarlock, Law of Water Rights and Resources § 5:88 & n.1 (2013).

Dam spans the Niobrara, NPPD must maintain it in a manner to safely handle high flow periods and floods.[10] It is true that NPPD has made investments to handle these periods. But because NPPD must do this regardless of the size of its appropriations, I disagree that its maintenance or operating costs alone can show that it has not abandoned any part of its bundle of rights.

More important, the majority can only affirm this order by ignoring the nature of the separate appropriations held by NPPD, the scarcity of days that NPPD has actually received its full allotment, and the Department's implicit determination that other uses of the Niobrara's waters are more beneficial than NPPD's ability to produce electricity.

NPPD Has Never Protected Its Conditional Right to Demand 550 CFS Under Its 1942 Appropriation

Initially, I clarify that under its 1896 appropriation, there is no question that NPPD never had a right to demand 35 cfs from upstream junior appropriators on the Niobrara itself. The limitation in the approval of its transfer of this appropriation to Spencer Dam clearly stated that it could only demand this water from specified junior appropriators on the Minnechaduza Creek.

Moreover, I would hold that NPPD has forfeited the right to demand 500 cfs under its 1942 appropriation. The record shows that the Department specifically closed the rights of upstream junior appropriators to satisfy this appropriation. Yet, a field supervisor acknowledged that NPPD's appropriations are large enough to claim the river's entire flow for some parts of the year. And the parties stipulated that since 1942, the Department has approved more than 400 surface water appropriation applications. The Department approved these applications despite its acknowledgment in NPPD's 1942 permit that the Niobrara was over appropriated and its imputed knowledge that the flow rate at the eastern end of the Niobrara was not sufficient to satisfy NPPD's total allotment most of the year.

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[10] See Neb. Rev. Stat. §§ 46-1663 and 46-1664 (Reissue 2010).

The record shows that NPPD regularly monitors new applications for appropriations and has protested applications in the past. Clearly, it could have protested all of these 400 applications, yet it apparently did not contest the majority of them. Additionally, in December 2005 and December 2006, the Department issued reports that the Niobrara River Basin was not fully appropriated. These reports were effectively a public statement that the river still contained water for new appropriations.

The Department's actions are inconsistent with a determination that NPPD is entitled to demand its full allotment. Knowing since 1942 that the river's normal flow was already over appropriated and was insufficient to satisfy NPPD's total allotment, the Department could not have approved further appropriations unless it had concluded that NPPD did not use or was not entitled to demand its full allotment for power generation. And the record contains support for this conclusion.

While the Niobrara's flow rate has varied over the years, its flow pattern is not that different from 1923. As stated, the 1923 application for 1,450 cfs showed that Niobrara's flow would not satisfy the applicant's full request for 1,450 cfs during much of the year and would normally equal or exceed 2,035 cfs only during its high stage period. Yet before 2007, NPPD had never requested the Department to administer other water rights for NPPD's benefit, even during earlier periods of drought in the 1950's and 1970's. The record shows that NPPD has simply accepted whatever amount of water flowed to its dam.

We do not know why the Department approved 400 appropriation applications since 1942. But we know it is charged with knowledge of streamflow data and diversion records. And we cannot assume that the Department issued this many permits for diversions knowing that no unappropriated water was available.

Moreover, I disagree that NPPD had no duty to protect its rights under the 1942 appropriation. It is true that senior appropriators normally are unaffected by the initial approval of a junior appropriation. But the 1942 appropriation is different because it is a conditional right and the permit

specifically stated that the river was over appropriated. So NPPD knew that every additional appropriation would create a greater scarcity of resources that could result in a denial of its right to use 550 cfs. That is, the Department's approvals of other appropriations were contrary to NPPD's purported right to demand 550 cfs—and NPPD knew that. I do not dispute NPPD's right to use the water when it is available. But under these circumstances, NPPD's acquiescence to the Department's actions should constitute a forfeiture of its right to demand 550 cfs under its 1942 appropriation.

The Department Should Determine the Effect of NPPD's Subordination Agreements on Its Right to Demand Water From Upstream Junior Appropriators

Of course, even if NPPD cannot demand 35 cfs under its 1896 appropriation or 550 cfs under its 1942 appropriation, that conclusion would not resolve every issue in this case. Its largest appropriation was granted in 1923 for 1,450 cfs. This single appropriation was satisfied for only an average 208 days (57 percent) of the year during the 68 recorded years in this record. The question is why NPPD or its predecessors did not demand water under the 1923 appropriation in all these decades. The answer may lie in the subordination agreements with the government for the Bureau of Reclamation's irrigation projects.

A field supervisor testified that irrigation at the Ainsworth irrigation canal is known to affect the flow rate at Spencer Dam. As noted, under the 1943 and 1964 subordination agreements with the government, NPPD's predecessors subordinated its right to water for its 1923 and 1942 appropriations. So the Bureau of Reclamation was allowed to keep pumping water when the Department issued closing notices. The Department administered NPPD's 2007 call only against junior appropriators who did not have a subordination agreement with NPPD. But the junior appropriators argued that a senior appropriator could not accept compensation to take its allotted water out of the river and then demand the water from other junior appropriators. On appeal, the Department argues that

NPPD's subordination agreements did not affect NPPD's right to demand the water from other users.

The majority opinion rejects the junior appropriators' argument that permitting NPPD to demand the water from them constituted a recovery of both money and water for loss of the same appropriation right. It reasons that if a "junior appropriator is allowed to use water because of a subordination agreement, the senior appropriator is not receiving that to which it is otherwise entitled." I disagree. This reasoning is contrary to the election of remedies doctrine. An appropriator can enforce an appropriation right or a contract to compensate it for the use of its water, but it is not entitled to a double recovery for the same loss.[11]

Clearly, a senior appropriator cannot demand water from a junior appropriator which has paid compensation for the water's use.[12] But application of the election of remedies doctrine may require other considerations in the context of water law. Because the director did not decide this issue, I would remand the cause for further consideration of the evidence to determine the effect of the subordination agreements on NPPD's right to demand water from the junior appropriators.

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[11] See *Genetti v. Caterpillar, Inc.*, 261 Neb. 98, 621 N.W.2d 529 (2001).

[12] See *Clear Springs Foods, Inc. v. Spackman*, 150 Idaho 790, 252 P.3d 71 (2011).

In re Application of Loretta D. Collins for Admission to the Nebraska State Bar.

849 N.W.2d 131

Filed July 11, 2014. No. S-13-1020.

1. **Rules of the Supreme Court: Attorneys at Law: Appeal and Error.** Under Neb. Ct. R. § 3-126 (rev. 2013), the Nebraska Supreme Court considers the appeal of an applicant from a final ruling of the Nebraska State Bar Commission de novo on the record made at the hearing before the commission.
2. **Rules of the Supreme Court: Attorneys at Law.** The Nebraska Supreme Court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.

3. ____: ____. The Nebraska Supreme Court has delegated administrative responsibility for bar admissions solely to the Nebraska State Bar Commission.
4. **Attorneys at Law: Proof.** The applicant for admission to the Nebraska State Bar bears the burden of proving good character by producing documentation, reports, and witnesses in support of the application.
5. **Attorneys at Law.** Where the record of an applicant for admission to the Nebraska State Bar demonstrates a significant lack of honesty, trustworthiness, diligence, or reliability, a basis may exist for denying his or her application.
6. **Attorneys at Law: Disciplinary Proceedings.** Standing alone, a disciplinary reprimand is not a determination that a lawyer lacks the requisite character and fitness to continue practicing law.
7. **Courts: Jurisdiction: Attorneys at Law.** While the Nebraska Supreme Court is not bound by character and fitness determinations of other jurisdictions, it may consider them in assessing the qualifications of an applicant for admission to the Nebraska State Bar.

Original action. Application granted.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for applicant.

Loretta D. Collins, pro se.

Jon Bruning, Attorney General, Stephanie Caldwell, and Christopher J. Preston, Senior Certified Law Student, for Nebraska State Bar Association.

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

PER CURIAM.

Our rules permit a lawyer to be admitted to practice in Nebraska without taking the bar examination if the lawyer has attained educational qualifications at least equal to those required for applicants for admission by examination, is licensed and in good standing in the practice of law in another state, and has been actively and substantially engaged in the practice of law in another jurisdiction for 5 of the 7 years preceding the application.[1] Persons seeking admission in this way are classified as "Class 1-B applicants."[2]

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[1] Neb. Ct. R. § 3-119(B) (rev. 2013).

[2] *Id.*

Loretta Collins is a lawyer admitted to practice and in good standing in Alabama and Colorado. She moved for admission in Nebraska as a Class 1-B applicant, but the Nebraska State Bar Commission (Commission) rejected her application, finding she lacked the requisite character and fitness. Collins appeals from the Commission's decision.

I. FACTS

Collins was honorably discharged from the U.S. Navy after approximately 8 years of active duty. She has been licensed to practice law in Alabama since September 2000 and in Colorado since August 2008. She is in good standing in both states. She applied for admission to the Nebraska bar in 2013, and after reviewing her application and supporting documents, the Commission denied admission due to a lack of acceptable character and fitness. Collins appealed that decision, and an evidentiary hearing was held before the Commission. The Commission then affirmed its decision, and Collins filed this timely appeal.

1. Disciplinary Record

Collins has no disciplinary record in Colorado. However, between September 29, 2000, and March 22, 2013, five disciplinary complaints were filed against her in Alabama.

(a) Dismissed Complaints

Three of the complaints were investigated by the Alabama Disciplinary Commission (Alabama Commission) and "screened out" with no action taken. These complaints were filed on February 7, 2011; September 21, 2009; and January 16, 2004.

The February 2011 complaint arose when the Alabama Commission received notice from Collins' bank that a check had been written against her trust account and that the account lacked sufficient funds to cover the check. When contacted by the Alabama Commission, Collins discovered there had been an accounting error and remedied the account. The Alabama Commission took no further action on the complaint. Collins did not disclose this complaint and investigation on her application to be admitted to the Nebraska bar. When

questioned by the Commission, she stated she had forgotten about the complaint.

The September 2009 complaint was filed by a former client and related to the estate of the client's mother. It was investigated and then "screened out" by the Alabama Commission without further action. Collins did not disclose this complaint and investigation on her application to be admitted to the Nebraska bar. When questioned by the Commission, she stated she had forgotten about the complaint.

The January 2004 complaint involved a client's dissatisfaction with services provided by Collins. It was investigated by the Alabama Commission, and no further action was taken. Collins disclosed this complaint and investigation on her application to be admitted to the Nebraska bar.

(b) Complaints Resulting in Discipline

(i) Public Reprimand

The remaining two Alabama complaints resulted in disciplinary action against Collins. She disclosed both actions on her application to be admitted to the Nebraska bar.

The first resulted in a public reprimand and was based on facts that occurred in 2003-04. Sometime around July 2003, Collins agreed to represent Maria Oravec, an elderly woman, in an estate matter. Collins agreed to accept a $6,000 retainer and to bill at $150 per hour thereafter. Based on Collins' hourly bills, Oravec paid Collins the $6,000 plus an additional $3,750. In February 2004, Oravec terminated Collins' services. Almost immediately thereafter, Collins liquidated one of Oravec's investment accounts and deducted a $50,000 fee. Oravec and her new counsel discovered the withdrawal and sued for malpractice.

Collins maintained that in January or February 2004, the parties had renegotiated her fee to a flat $50,000, which would be due once the estate was closed. It is undisputed that her new agreement was not in writing. Collins maintained that when Oravec terminated her services, Collins contacted the Alabama Commission, explained the situation, and was advised to deduct the $50,000 fee from the estate and then withdraw.

Oravec denied agreeing to the $50,000 payment, and whether the Alabama Commission in fact so advised Collins is unclear from the record.

Oravec's new attorney testified before the Alabama Commission that Collins had performed very little work on the estate, that it was not a difficult estate, and that he would have charged Oravec approximately $2,000 total for the necessary legal work. The Alabama Commission found the fees Collins charged Oravec were clearly excessive and publicly reprimanded her. In its report and order entered after the disciplinary hearing, the Alabama Commission found that Collins acted with a "[d]ishonest or selfish motive" and that she refused to "acknowledge [the] wrongful nature of [her] conduct." Oravec also filed a separate action against Collins for malpractice. The malpractice action was settled when Collins agreed to pay $25,000 to Oravec.

(ii) Private Reprimand

On January 24, 2008, Collins' client entered into a lien assignment with a chiropractor related to treatment received by the client. The lien was for approximately $9,000. Collins settled her client's case for $3,500 and then attempted to get the chiropractor to agree to accept a lesser amount in satisfaction of the lien, but the chiropractor refused. Nevertheless, Collins paid the full $3,500 to the client. The chiropractor filed a complaint with the Alabama Commission, and Collins admitted she failed to honor the lien and eventually paid the chiropractor $2,500 from her own pocket. On February 14, 2013, the Alabama Commission accepted her conditional guilty plea and issued a private reprimand.

2. Credit and Criminal Record

Collins listed three "DEBTS: Defaults; Past Due; Revocations" on her Nebraska bar application. But when the Commission reviewed her credit history, it found 14 accounts with negative history, including six delinquent filings, seven collection actions, and one "charge off." Collins was asked by letter to "explain the omission of this information and explain the circumstances surrounding each of the negative credit

history" occurrences. She responded by letter with documentation explaining each of the accounts and that they either had been discharged or were current, but did not explain why the information was omitted from her application. During her hearing before the Commission, she stated that her failure to address the omissions "must have been an oversight" and explained that she filled out her application by utilizing a credit report and that the additional negative accounts were not on that report. Collins' credit history demonstrates she has had a credit card or charge account revoked and that she has defaulted on a student loan.

Her criminal history shows she was fined for not paying an occupational license in 2005 and was acquitted of criminal harassment charges brought against her by a former client in 2006. She did not disclose the fine to the Commission. When questioned about it, she stated she was unaware the fine qualified as a crime.

3. Bar Commission Findings

After reviewing Collins' application, the Commission had Collins appear before it for an interview. On September 10, 2013, the Commission voted to deny her application based on a lack of acceptable character and fitness. Collins appealed, and a hearing on her appeal was held on October 18. The Commission affirmed its decision to deny admission, and Collins filed this timely appeal.

II. ASSIGNMENT OF ERROR

Collins assigns, restated and summarized, that the Commission erred when it determined she did not have the present requisite character and fitness for admission to the Nebraska bar.

III. STANDARD OF REVIEW

[1] Under Neb. Ct. R. § 3-126 (rev. 2013), the Nebraska Supreme Court considers the appeal of an applicant from a final ruling of the Commission de novo on the record made at the hearing before the Commission.[3]

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[3] See *In re Application of Hartmann*, 276 Neb. 775, 757 N.W.2d 355 (2008).

IV. ANALYSIS

[2,3] This court is vested with the sole power to admit persons to the practice of law in this state and to fix qualifications for admission to the Nebraska bar.[4] Neb. Rev. Stat. § 7-102(1) (Reissue 2012) provides: "No person shall be admitted . . . unless it is shown to the satisfaction of the Supreme Court that such person is of good moral character." This court has delegated administrative responsibility for bar admissions solely to the Commission.[5]

The standards for conduct and fitness against which all applicants are measured are set out in Neb. Ct. R. § 3-112 (rev. 2013). As applicable to this case, § 3-112 provides:

> In addition to the admission requirements otherwise established by these rules, the essential eligibility requirements for admission to the practice of law in Nebraska are:
>
> (A) the ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations;
>
> . . . .
>
> (C) the ability to conduct oneself with respect for and in accordance with the law and the Nebraska Rules of Professional Conduct;
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> . . . .
>
> (F) the ability to exercise good judgment in conducting one's professional business;
>
> . . . .
>
> (H) the ability to use honesty and good judgment in financial dealings on behalf of oneself, clients, and others; [and]
>
> . . . .
>
> (J) the ability to conduct oneself professionally and in a manner that engenders respect for the law and the profession.

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[4] *Id.*

[5] *Id.*

Neb. Ct. R. § 3-116(A) (rev. 2013) further clarifies the character and fitness standards and states in part:

> The purpose of character and fitness screening before admission to the practice of law in Nebraska is to ensure the protection of the public and to safeguard the justice system. The attorney licensing practice is incomplete if only testing for minimal competence is undertaken. The public is adequately protected only by a system that evaluates character and fitness as those elements relate to the practice of law. The public interest requires that the public be secure in its expectation that those who are admitted to the practice of law are worthy of the trust and confidence clients may reasonably place in their attorneys.

[4,5] The applicant for admission to the Nebraska State Bar bears the burden of proving good character by producing documentation, reports, and witnesses in support of the application.[6] Where the record of an applicant for admission to the bar demonstrates a significant lack of honesty, trustworthiness, diligence, or reliability, a basis may exist for denying his or her application.[7] Our character and fitness standards list the relevant conduct that may be treated as cause for further inquiry before the Commission decides whether an applicant possesses the character and fitness to practice law.[8] As relevant here, that conduct includes:

> (1) misconduct in employment;
>
> (2) acts involving dishonesty, fraud, deceit, or misrepresentation;
>
> . . . .
>
> (4) neglect of financial responsibilities;
>
> (5) neglect of professional obligations;
>
> . . . .
>
> (10) disciplinary action by an attorney disciplinary agency or other professional disciplinary agency of any jurisdiction . . . ; or

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[6] *Id.*

[7] *Id.*

[8] § 3-116(F).

(11) citation, arrest, charge, or conviction for any criminal offense.[9]

When there is evidence that an applicant has engaged in any such conduct, the Commission decides whether present character and fitness to practice law in Nebraska exists.[10] In doing so, it weighs the significance of the prior conduct against the following factors:

(1) the applicant's age at the time of the conduct;
(2) the recency of the conduct;
(3) the reliability of the information concerning the conduct;
(4) the factors underlying the conduct;
(5) the seriousness of the conduct;
(6) the cumulative effect of the conduct or information;
(7) the evidence of rehabilitation;
(8) the applicant's positive social contributions since the conduct;
(9) the applicant's candor in the admissions process; and
(10) the materiality of any omissions or representations.[11]

Our task in this case is to review de novo the Commission's finding that Collins lacks the requisite character and fitness to be admitted to the Nebraska bar. Collins asserts that she is a Navy veteran and that she is licensed in good standing in both Alabama and Colorado. She further asserts that all of the conduct underlying her disciplinary actions occurred at least 2 years ago and that the omissions regarding her prior disciplinary record and her credit history were completely inadvertent and largely immaterial to the issue of her character and fitness. She contends that she simply forgot about the prior disciplinary complaints. She also relies on letters of recommendation from former clients and character references that were submitted with her application.

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[9] *Id.*

[10] § 3-116(G).

[11] *Id.*

The Commission, on the other hand, argues the record does not demonstrate present character and fitness to practice law. It relies particularly on Collins' failure to disclose the two prior disciplinary complaints and the 11 additional instances of negative credit history. It also argues that the factual circumstances underlying Collins' public reprimand for taking the $50,000 excessive fee and her private reprimand for refusing to honor the lien indicate she is of questionable professional character. The Commission further argues that her significant financial issues and the evidence of rather substantial debt negatively reflects on her character and fitness to practice law.

[6,7] Standing alone, a disciplinary reprimand is not a determination that a lawyer lacks the requisite character and fitness to continue practicing law. It is the least severe of the sanctions which may be assessed for an attorney's misconduct.[12] And, unlike suspension and disbarment, a reprimand does not curtail or extinguish a lawyer's right to practice. Multiple reprimands are, of course, cause for greater concern. But the fact that Collins remains licensed to practice in Alabama, the jurisdiction which issued the reprimands, is indicative of that State's assessment of her character and fitness to practice law. Likewise, her admission and good standing in Colorado indicate that the licensing authority of that State has deemed her character and fitness to be sufficient. While we are not bound by character and fitness determinations of other jurisdictions, we may consider them in assessing the qualifications of an applicant for admission to the Nebraska State Bar. Based upon our review of the record with respect to the Alabama reprimands received by Collins, we determine that they are insufficient to establish that Collins lacks the requisite character and fitness to practice law in Nebraska.

The Commission primarily argues that Collins' lack of candor on her application about her disciplinary history in Alabama and her financial and criminal history should preclude her admission in Nebraska. In this regard, we have held that an applicant who recklessly fills out an application,

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[12] See Neb. Ct. R. § 3-304.

as the consequence of which the application contains false answers, is just as culpable of lacking in candor in the application process as is the applicant who intends to deceive the Commission.[13] Collins acknowledges that there were mistakes on her application, but contends they were honest mistakes. We note that she did disclose four disciplinary complaints in Alabama, but that two of these were duplicative. Two of the five complaints in Alabama were not disclosed. The undisclosed complaints did not result in discipline. Collins explained that she relied on a credit report in disclosing her negative credit history and that she did not disclose her fine for failure to pay an occupation tax because she did not understand that it was a criminal infraction. While we do not condone these inaccuracies in Collins' application, we are willing to accept Collins' explanations and conclude that they are not indicative of reckless behavior which would preclude her admission in Nebraska.

In sum, we determine on the basis of our de novo review that Collins possesses sufficient character and fitness for admission to the Nebraska bar. But we note that Collins' disciplinary record in Alabama will become a part of her disciplinary record in Nebraska, which may be considered by this court in any future disciplinary proceeding.

V. CONCLUSION

For the reasons discussed, we grant Collins' Class 1-B application for admission to the Nebraska bar. She may be admitted to practice in Nebraska upon payment of the mandatory membership assessment and administration of the oath.[14]

APPLICATION GRANTED.

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[13] *In re Appeal of Lane*, 249 Neb. 499, 544 N.W.2d 367 (1996).

[14] See Neb. Ct. R. §§ 3-128 (rev. 2013) and 3-803(D) (rev. 2014).

James Dean, appellee and cross-appellant, v. State of Nebraska, appellant and cross-appellee.

Ada JoAnn Taylor, appellee, v. State of Nebraska, appellant.

849 N.W.2d 138

Filed July 18, 2014. Nos. S-12-974, S-12-975.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Tort Claims Act: Appeal and Error.** A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.
3. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.
5. **Statutes: Intent.** In construing a statute, a court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.
6. **Statutes: Legislature: Intent.** The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent. An interpretation that is contrary to a clear legislative intent will be rejected. That which is implied in a statute is as much a part of it as that which is expressed.
7. ____: ____: ____. An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.
8. **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.
9. **Immunity: Waiver: Presumptions.** 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. This principle has been said to create a presumption against waiver.
10. **Statutes: Appeal and Error.** An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.
11. **Statutes: Legislature: Intent.** 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.

12. **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.
13. ____: ____. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.
14. **Tort Claims Act: Damages: Appeal and Error.** The amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose decision will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.
15. **Statutes: Damages.** Where damages are subject to a statutory cap, the determination of damages is a two-stage process which involves an initial factual determination of the actual damages sustained by the injured party and then a legal application of the statutory cap if the actual damages exceed the statutory maximum recoverable amount.

Appeals from the District Court for Gage County: DANIEL E. BRYAN, JR., Judge. Judgment in No. S-12-974 affirmed in part and in part reversed and vacated, and cause remanded with directions. Judgment in No. S-12-975 affirmed.

Jon Bruning, Attorney General, and James D. Smith for appellant.

Herbert J. Friedman, of Friedman Law Offices, P.C., L.L.O., for appellee James Dean.

Jeffry D. Patterson and Robert F. Bartle, of Bartle & Geier Law Firm, and Douglas Stratton, of Stratton, DeLay & Doele, for appellee Ada JoAnn Taylor.

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

STEPHAN, J.

Following their pleas of guilty, James Dean and Ada JoAnn Taylor were convicted of second degree murder in connection

with the 1985 death of Helen Wilson in Beatrice, Nebraska. Both gave incriminating testimony at the trial of Joseph White who was convicted of first degree murder in connection with Wilson's death. But years later, DNA tests determined that neither Dean, Taylor, White, nor any of the other three persons convicted in connection with the crime had any involvement in it.

After they were released from prison and pardoned, Dean and Taylor brought actions against the State pursuant to the Nebraska Claims for Wrongful Conviction and Imprisonment Act[1] (the Act) which was enacted by the Nebraska Legislature in 2009.[2] The district court for Gage County found in favor of Dean and Taylor and awarded damages to each of them. In these consolidated appeals, the State contends that Dean and Taylor cannot recover under the Act, because they made false statements in connection with Wilson's murder. Dean cross-appeals, arguing that his damage award was insufficient. We affirm the judgment in favor of Taylor in its entirety and the judgment in favor of Dean with respect to the State's liability, but we reverse and vacate, and remand to the district court for a new determination of Dean's damages.

I. BACKGROUND

1. Facts

The facts of this case are undisputed. Wilson was brutally raped and murdered in her Beatrice apartment in February 1985. Bruce Allen Smith, a drifter who was in Beatrice when the crime was committed, was an early suspect. However, after a comparison of Smith's blood with blood found on Wilson's clothing appeared to preclude him, the State's focus shifted elsewhere.

Dean and Taylor were swept into the investigation in the spring of 1989, after the case had gone cold. They, along with four others, gained notoriety as the "Beatrice Six." Dean

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[1] Neb. Rev. Stat. §§ 29-4601 to 29-4608 (Cum. Supp. 2012).

[2] See 2009 Neb. Laws, L.B. 260, §§ 1 to 8.

was arrested on April 15, 1989, the day of his 25th birthday. In March 1989, authorities came to Taylor's North Carolina home at night and took her to jail in a nightgown. She was subsequently transported to Gage County a few days later.

Dean and Taylor were questioned about the murder and ultimately confessed to their involvement. Both also eventually testified at the murder trial of White, who was convicted of first degree murder for Wilson's death.

However, neither Dean nor Taylor immediately confessed. For 22 days after his arrest, Dean maintained his innocence. His confidence was shaken only after he submitted to a polygraph test and was told that the results "'did not look good.'" In addition, while in county jail, Dean received four or five visits from Dr. Wayne Price. Dr. Price was a licensed clinical psychologist who served in the dual capacity as the clinical director of the Blue Valley Mental Health Center and, unknown to Dean, a police psychologist employed by the Gage County Sheriff's Department. Dr. Price told Dean that he had "'unconscious'" knowledge of the crime and that his repressed memories would return to him in his dreams. Dean thought this theory explained his polygraph results and began purposefully using Price's techniques to recover memories.

Subsisting on 2 to 3 hours of sleep a night, Dean began to dream of Wilson's murder, believing that Price had removed "some kind of 'subconscious block.'" Prior to and during the period that Dean was purportedly recovering memories, he was shown videotape, photographs, and diagrams of the crime scene at Wilson's apartment. The photographs included personal items covered with blood and Wilson's body as it was found by law enforcement. Eventually, Dean confessed. He made six statements to law enforcement between May and September 1989, providing more detail with each additional statement. With the help of law enforcement's giving him information "in bits and pieces," Dean was eventually able to describe White's involvement in the murder.

Dean reached an agreement with the prosecution to plead guilty to second degree murder in exchange for his cooperation in the prosecution of other members of the Beatrice Six.

Dean testified at White's trial and described the various steps the six persons had taken during Wilson's murder. A jury found White guilty of first degree murder. Dean was sentenced to 10 years in prison and served approximately 5 years 5 months of his sentence.

Taylor, like Dean, initially maintained that she had no knowledge of the Wilson murder. However, when she was told shortly after arrest that there was proof of her involvement, she believed law enforcement, because "I had no reason to believe that the cops would lie to me." While held at the Gage County Detention Center, Taylor was diagnosed with "borderline personality disorder" and was administered an antipsychotic drug by Dr. Price. Because of her mental difficulties and heavy use of alcohol and drugs, Taylor doubted her own memory and asked law enforcement for "'help . . . to remember.'" Taylor received assistance from law enforcement in "remembering" the details of the crime. She eventually was able to reconstruct her supposed involvement after being "[s]upplied" with the facts of the murder, including a videotape of the crime scene. Taylor "got help from law enforcement over the course of coming up with [her] story."

Taylor reached an agreement with the prosecution to plead guilty to second degree murder in exchange for her testimony at White's trial. She was able to pepper her testimony with specific details, including that she initiated the sequence of events by knocking on the door of Wilson's apartment and that she had placed a pillow over Wilson's head during the attack. Taylor was sentenced to 40 years in prison and was incarcerated for more than 19 years.

In 2005, White filed a motion under the DNA Testing Act, Neb. Rev. Stat. §§ 29-4116 to 29-4125 (Reissue 2008), to test the genetic material left at Wilson's apartment.[3] The results of the testing implicated Smith, but none of the Beatrice Six. Dean and Taylor subsequently received pardons.

Dean and Taylor both maintain that they believed they were telling the truth when they made their statements to law

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[3] *State v. White*, 274 Neb. 419, 740 N.W.2d 801 (2007).

enforcement, pled guilty to second degree murder, and testified at White's trial.

2. Procedural Background

On February 22, 2010, Dean and Taylor filed complaints in the Gage County District Court, stating claims for relief under the Act. The prerequisites for recovery are set forth in § 29-4603, which states that to prevail, a claimant must, by clear and convincing evidence, prove:

> (1) That he or she was convicted of one or more felony crimes and subsequently sentenced to a term of imprisonment for such felony crime or crimes and has served all or any part of the sentence;
>
> (2) With respect to the crime or crimes under subdivision (1) of this section, that the Board of Pardons has pardoned the claimant, that a court has vacated the conviction of the claimant, or that the conviction was reversed and remanded for a new trial and no subsequent conviction was obtained;
>
> (3) That he or she was innocent of the crime or crimes under subdivision (1) of this section; and
>
> (4) That he or she did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another, with respect to the crime or crimes under subdivision (1) of this section, except that a guilty plea, a confession, or an admission, coerced by law enforcement and later found to be false, does not constitute bringing about his or her own conviction of such crime or crimes.

The State stipulated that Dean and Taylor could prove by clear and convincing evidence the requirements in subsections (1), (2), and (3). Dean and Taylor stipulated that all of their statements regarding the Wilson murder were factually false. The sole disputed issue under § 29-4603 was whether the factually false statements constituted "perjury," "fabricat[ed] evidence," or "false statement[s]" under § 29-4603(4).

After receiving expert testimony at trial, the district court found that Dean and Taylor both genuinely believed that they

were telling the truth during the investigation of Wilson's murder and at White's trial. Dr. Eli Chesen, a licensed psychiatrist, testified that Dean suffered from "post-traumatic distress" syndrome and "Stockholm Syndrome" when he admitted his guilt in statements to police and testified at White's trial. Dr. Chesen testified that Taylor had also suffered from Stockholm Syndrome, in addition to a "severe, schizotypical disorder." Dr. Richard Leo, a law professor with a Ph.D. in jurisprudence and social policy, reviewed both Dean's and Taylor's histories and opined that they had made "persuaded false confession[s]." Dr. Leo testified that at the time the statements and testimony were given, Dean and Taylor subjectively believed the veracity of what they said.

The district court held that as used in § 29-4603(4), "perjury," "fabricate evidence," and "false statement" each included a requirement of "knowledge and/or intent" by their plain language. As to "perjury," the court cited the definition of the crime in Neb. Rev. Stat. § 28-915(1) (Reissue 2008), which requires that the person charged did "not believe [his or her statement] to be true." The court held that the phrase "fabricate evidence" is equivalent to the word "lie" and that "lie" is defined as "a statement that one knows is false." Finally, the court focused on the word "false" in the phrase "false statement" and emphasized that "the majority of its accepted definitions . . . require intent or knowledge that one is not telling the truth." Because it found that Dean and Taylor had subjectively believed the truth of their statements, the district court determined that § 29-4603(4) was not an obstacle to their recovery. It awarded $300,000 in damages to Dean and $500,000 in damages to Taylor.

II. ASSIGNMENTS OF ERROR

The State assigns that the district court erred by construing § 29-4603(4) to include a state-of-mind element. On cross-appeal, Dean assigns that the district court erred in determining the amount of damages which proximately resulted from his conviction.

III. STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

[2] Pursuant to § 29-4607, an action under the Act is filed under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2008 & Cum. Supp. 2012). A district court's findings of fact in a proceeding under the State Tort Claims Act will not be set aside unless such findings are clearly erroneous.[5]

IV. ANALYSIS

1. State's Appeals

The State's appeal in each case rests upon the sole premise that the district court erred in determining the meaning of the phrase "false statement" as used in § 29-4603(4). We are therefore presented with an issue of statutory interpretation.

[3,4] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[6] A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.[7] Thus, we begin our inquiry by examining the plain meaning of the phrase "false statement" as it is used in § 29-4603(4). The parties do not dispute the meaning of the word "statement," but they disagree on the meaning of "false." The State's position is that a statement which is not factually accurate is necessarily "false." Dean and Taylor contend that "false" means, essentially, "known to be untrue."

Each side finds support in standard dictionary definitions of the term, which include meanings that encompass some form of scienter, such as "[d]eceitful," "lying," "dishonest,"

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[4] *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

[5] *Cingle v. State*, 277 Neb. 957, 766 N.W.2d 381 (2009).

[6] *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[7] *In re Estate of Lienemann*, 277 Neb. 286, 761 N.W.2d 560 (2009).

or "meant to deceive," and meanings that could include an innocent but factually incorrect statement, such as "[u]ntrue," "not true," or "in error."[8] The fact that the word "false" is itself reasonably susceptible of a meaning which incorporates scienter, i.e., "an intent to deceive, manipulate, or defraud,"[9] weakens the State's argument that if the Legislature had meant to modify the phrase "false statement" with the words "knowingly" or "intentionally," it would have done so. As the district court noted, it is at least equally plausible that the Legislature believed that adding a modifier such as "knowingly" or "intentionally" would be redundant.

[5,6] Because the word "false" is susceptible to more than one reasonable interpretation, we conclude that it is ambiguous and therefore subject to judicial interpretation.[10] In construing a statute, a court looks to the statutory objective to be accomplished, the evils and mischiefs sought to be remedied, and the purpose to be served. A court must then reasonably or liberally construe the statute to achieve the statute's purpose, rather than construing it in a manner that defeats the statutory purpose.[11] The fundamental objective of statutory interpretation is to ascertain and carry out the Legislature's intent. An interpretation that is contrary to a clear legislative intent will be rejected.[12] That which is implied in a statute is as much a part of it as that which is expressed.[13]

(a) Legislative History

[7] An appellate court can examine an act's legislative history if a statute is ambiguous or requires interpretation.[14] Dean

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[8] See, e.g., Black's Law Dictionary 718 (10th ed. 2014); Webster's New World College Dictionary 489 (3d ed. 1996).

[9] Black's Law Dictionary, *supra* note 8 at 1463.

[10] See *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 829 N.W.2d 652 (2013).

[11] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013); *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[12] *Fisher v. PayFlex Systems USA, supra* note 11.

[13] *Pepitone v. Winn*, 272 Neb. 443, 722 N.W.2d 710 (2006).

[14] See *Fisher v. PayFlex Systems USA, supra* note 11.

argues on appeal that "the wrongful convictions of the Beatrice Six . . . were *the reason* for the statute's enactment."[15] The legislative history certainly shows that the convictions of the Beatrice Six were on the Legislature's mind.[16] However, while helpful and informative in a general sense, the legislative history is not dispositive on the specific question of whether the Legislature intended the phrase "false statement" as used in § 29-4603(4) to include a factually inaccurate statement which the speaker genuinely believed to be true at the time it was made.

(b) Waiver of Sovereign Immunity

[8,9] The State argues that interpreting the phrase "false statement" to include a requirement of "knowledge and/or intent" is contrary to the rule of strict construction of statutes that waive sovereign immunity. 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. 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.[17] This principle has been said to create a presumption against waiver.[18]

[10,11] While this principle must be factored into our analysis, we do not regard it as dispositive. We decline to hold that the rule of strict construction for statutes waiving sovereign immunity should always trump other canons of statutory interpretation, including the overriding goal of giving effect to the purpose and intent of the Legislature when construing ambiguous language in a statute. Clearly, the Act itself is a

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[15] Brief for appellee and cross-appellant Dean at 31 (emphasis in original).

[16] See, Judiciary Committee Hearing, L.B. 260, 101st Leg., 1st Sess. 9 (Feb. 19, 2009); Floor Debates, 1st Sess. 10, 17-18, 21, 23-24, 28, 33 (Mar. 2, 2009); 1st Sess. 10-12, 15, 26, 39-40, 49-51, 54 (Mar. 3, 2009); 1st Sess. 43 (Mar. 24, 2009); and 1st Sess. 19-21, 25-26 (Mar. 25, 2009).

[17] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

[18] See *Salazar v. Scotts Bluff Cty.*, 266 Neb. 444, 665 N.W.2d 659 (2003).

waiver of sovereign immunity. Our task in these cases is to determine the scope of the waiver, given the Legislature's use of an adjective that, standing alone, may be susceptible to more than one meaning. An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.[19] 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.[20] Accordingly, we must consider the context in which the phrase "false statement" is used in the statute.

(c) Consistent, Harmonious, and Sensible

[12] 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.[21] In interpreting a statute, an appellate court will give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.[22]

The Act permits persons who are actually innocent but nevertheless convicted of a crime to seek and obtain monetary redress from the State. But in order to do so, the claimant must affirmatively prove that he or she did not engage in certain conduct, i.e., "commit or suborn perjury, fabricate

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[19] *Fisher v. PayFlex Systems USA, supra* note 11.

[20] *Anthony, Inc. v. City of Omaha*, 283 Neb. 868, 813 N.W.2d 467 (2012).

[21] *ML Manager v. Jensen, supra* note 6; *Amen v. Astrue*, 284 Neb. 691, 822 N.W.2d 419 (2012).

[22] *Id.*

evidence, or otherwise make a false statement" to bring about the conviction of the claimant or another.[23] Perjury, a Class III felony, involves the making of a "false statement under oath or equivalent affirmation" in an official proceeding by a person who "does not believe it to be true."[24] Subornation of perjury, also a Class III felony, consists of "persuad[ing], procur[ing], or suborn[ing] any other person to commit perjury."[25] Both acts involve an intent to deceive. So too does the phrase "fabricate evidence."

Section 29-4603(4) lists "perjury," "fabricate evidence," and "false statement" in a single sentence. Because the first two involve deceitful acts, it would be incongruous to define the phrase "false statement" to include a completely innocent act, particularly when doing so would disqualify an actually innocent but wrongfully convicted person from asserting a claim against the State, which is precisely the purpose of the Act. This conclusion is underscored by the fact that in general legal parlance, the phrase "false statement" is commonly understood to mean "[a]n untrue statement knowingly made with the intent to mislead."[26]

Reading the phrase "false statement" as used in § 29-4603(4) in accordance with this generally accepted meaning would not render other language in the statute meaningless or superfluous. A knowingly false statement which is not made under oath or affirmation does not constitute perjury. And one can fabricate evidence consisting of something other than a statement.

[13] But reading the phrase to include any factually incorrect statement, regardless of the maker's state of mind, would be inconsistent with the final clause of § 29-4603(4), which provides that a guilty plea, confession, or admission which is "coerced by law enforcement and later found to be false" does not constitute a bar to recovery. In these cases, the district

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[23] § 29-4603(4).

[24] § 28-915(1).

[25] § 28-915(2).

[26] Black's Law Dictionary, *supra* note 8 at 1547.

court found, and the State does not dispute, that at the time of their incriminating statements, Dean and Taylor truly believed that they and other members of the Beatrice Six were involved in the murder of Wilson and that this belief was fostered by the psychological interrogation tactics and procedures employed by law enforcement. We can think of no logical reason why the Legislature would permit an innocent person who made a false but coerced confession to recover under the Act, but deny a right of recovery to an innocent person who was mentally conditioned by improper law enforcement conduct to make statements incriminating another, fully believing such statements to be true at the time they were made. In construing a statute, an appellate court will, if possible, try to avoid a construction which would lead to absurd, unconscionable, or unjust results.[27]

For these reasons, we conclude that the district court did not err in its interpretation of the phrase "false statement" as used in § 29-4603(4) or in its finding that Dean and Taylor did not make false statements under the Act.

2. Dean's Cross-Appeal

In his cross-appeal, Dean contends that his $300,000 damage award was inadequate. This is our first opportunity to address damages recoverable under the Act. The Act itself is not specific on recoverable elements of damage, providing only that a claimant may recover "damages found to proximately result from the wrongful conviction and that have been proved based upon a preponderance of the evidence."[28] But the amount of damages is capped by § 29-4604(4), which provides: "In no case shall damages awarded under the act exceed five hundred thousand dollars per claimant per occurrence." Although not at issue here, the Act further provides that the costs of imprisonment and the value of any care or education provided to a claimant during incarceration "shall not offset

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[27] *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007); *Bohaboj v. Rausch*, 272 Neb. 394, 721 N.W.2d 655 (2006).

[28] § 29-4604(1).

damages" and that no damages are payable "for any period of time during which [the claimant] was concurrently imprisoned for any unrelated criminal offense."[29]

We conclude that a claim under the Act sounds in tort. The Act specifically provides that a claim brought pursuant to its provisions "shall be filed under the State Tort Claims Act,"[30] which defines "tort claim" as a claim against the State "for money only on account of damage to or loss of property or on account of personal injury or death."[31] With respect to such claims, the State may be held liable "in the same manner and to the same extent as a private individual under like circumstances,"[32] subject to certain exceptions not applicable here and the statutory cap on the amount of damages recoverable. The statutory cause of action by a wrongfully convicted person is akin to the tort of false imprisonment, which is characterized as an action for personal injury.[33] Generally, damages recoverable in personal injury actions include both economic and noneconomic damages. Economic damages include lost wages, impairment of earning capacity, and the reasonable value of medical services necessitated by the injury. Noneconomic damages compensate the injured person for physical pain and mental suffering.[34]

The district court found that both Dean and Taylor had been deprived of their "liberty to be free as . . . innocent citizen[s]." In its attempt to place a monetary value on the mental pain and suffering resulting from this loss, the court noted: "What price is one's liberty to be free to live [his or her] life? It is so priceless it's no wonder the legislature placed a cap on any compensation awarded to any individual for errors of a wrongful conviction and one's loss of freedom." Noting its "Herculean task" in placing a monetary value on such loss,

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[29] § 29-4604(2) and (3).

[30] § 29-4607.

[31] § 81-8,210(4).

[32] § 81-8,215.

[33] See *Gallion v. O'Connor*, 242 Neb. 259, 494 N.W.2d 532 (1993).

[34] See *id*. See, also, NJI2d Civ. 4.01.

the court found that considering the "totality of [the] circumstances" in each case, "Taylor shall recover damages found to proximately result from the wrongful conviction in the amount of $500,000.00" and "Dean shall recover damages found to proximately result from the wrongful conviction in the amount of $300,000.00."

[14,15] Generally, the amount of damages awarded in a case under the State Tort Claims Act is a matter solely for the finder of fact, whose decision will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of damages proved at trial.[35] But where damages are subject to a statutory cap, as is the case here, the determination of damages is a two-stage process which involves an initial factual determination of the actual damages sustained by the injured party and then a legal application of the statutory cap if the actual damages exceed the statutory maximum recoverable amount. For example, in *Gourley v. Nebraska Methodist Health Sys.*,[36] we reasoned that a statutory cap on damages in a medical malpractice action did not deprive the plaintiffs of the constitutional right to a jury trial, because a jury makes the determination of actual damages and the court makes the legal determination of whether the cap should apply "only after the jury has fulfilled its factfinding function." In *Connelly v. City of Omaha*,[37] an action brought pursuant to the Political Subdivisions Tort Claims Act,[38] we held that actual damages sustained by the parents of a severely injured child should first be reduced by an amount attributable to the father's comparative negligence and then, because that amount exceeded the statutory cap, reduced further to the amount of the cap. In *Staley v. City of Omaha*,[39] another action brought pursuant to the Political Subdivisions Tort Claims Act,

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

[36] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 954, 663 N.W.2d 43, 75 (2003).

[37] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[38] See Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012).

[39] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

we affirmed an order determining that the plaintiff sustained compensatory damages in the amount of $2,933,402 but entering judgment in the amount of $1 million in order to comply with the statutory cap.

In Dean's case, the district court did not make a finding as to Dean's actual damages. From a colloquy between the court and Dean's counsel during closing argument, it appears that the court was of the belief that because it had awarded the maximum statutory recovery of $500,000 to Taylor, it was required to award a lesser amount to Dean because he had served only 5 years in prison compared to the nearly 20 years served by Taylor. But if both Dean and Taylor sustained actual damages exceeding the $500,000 cap, each would be entitled to recover that amount even if Taylor's actual damages exceeded those of Dean. Because the district court did not clearly state whether its damage award to Dean was based on his actual damages without regard to the statutory cap, it is impossible to determine whether the statutory cap was applicable and properly applied. Accordingly, we reverse and vacate Dean's damage award and remand the cause with directions to the district court to first make a factual determination of the actual damages sustained by Dean and then make a legal determination of whether the statutory cap is applicable to the determination of his recovery against the State.

V. CONCLUSION

For the reasons discussed, we affirm the judgment in favor of Dean with respect to the State's liability; but we reverse and vacate the award of damages and remand the cause with directions to recalculate the amount of Dean's damages as set forth above. We affirm the judgment in favor of Taylor and against the State in all respects.

JUDGMENT IN NO. S-12-974 AFFIRMED IN PART AND IN PART REVERSED AND VACATED, AND CAUSE REMANDED WITH DIRECTIONS.
JUDGMENT IN NO. S-12-975 AFFIRMED.

J.M., as Guardian and Conservator for his minor child, C.M., appellant and cross-appellee, v. Billy L. Hobbs, appellee and cross-appellant.

849 N.W.2d 480

Filed July 18, 2014. No. S-13-616.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.
2. **Constitutional Law: Statutes: Presumptions.** A court presumes that statutes are constitutional and will not strike down a statute unless its unconstitutionality is clearly established.
3. **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.
4. ____. A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation. The prohibition aims to prevent legislation that arbitrarily benefits a special class.
5. **Constitutional Law: Statutes: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
6. **Special Legislation: Public Policy.** To be valid, a legislative classification must rest upon some reason of public policy, some substantial difference in circumstances, which would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.
7. **Constitutional Law: Special Legislation.** Legislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference. The distinctive treatment must bear some reasonable relation to the legitimate objectives and purposes of the legislative act. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.
8. **Special Legislation: Words and Phrases.** A closed class refers to when a legislative body limits a law to a present condition, with no opportunity for the numbers of the class to increase.
9. **Constitutional Law: Legislature.** The Legislature has broad discretion to make statutory classifications, but its discretion is not unlimited. The Nebraska Constitution prohibits it from making arbitrary classifications that favor select persons or objects while excluding others that are not substantially different in circumstance in relation to an act's purpose.

Appeal from the District Court for Lancaster County: Paul D. Merritt, Jr., Judge. Affirmed.

John W. Ballew, Jr., and Adam R. Little, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellant.

Dana M. London for appellee.

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

CONNOLLY, J.

I. SUMMARY

Before 2012, under Neb. Rev. Stat. § 81-2032 (Reissue 2008), a Nebraska State Patrol officer's retirement assets had absolute protection from "garnishment, attachment, levy, the operation of bankruptcy or insolvency laws, or any other process of law." Such provisions are called anti-attachment statutes.[1]

But in 2012, the Legislature amended § 81-2032(2) and other anti-attachment statutes to allow a civil judgment to attach to the distributed retirement assets of State Patrol officers and other public employees who have committed six specified crimes—if the public employee was convicted of the crime in a criminal prosecution.[2] The amendment applies retroactively to past civil judgments predicated on such crimes.

The appellant, Billy L. Hobbs, is a retired State Patrol officer who was convicted of one of the specified crimes—first degree sexual assault of a child. J.M., the victim's guardian and conservator, obtained a civil judgment against Hobbs and has twice sought an order in aid of execution. In response to J.M.'s second attempt, after the statute was amended to apply retroactively, Hobbs challenged the constitutionality of the amendment on multiple grounds. The district court determined that the amendment was unconstitutional as special legislation and dismissed J.M.'s motion.

We agree with the court that L.B. 916 arbitrarily benefits the select crime victims of its specified crimes. Simultaneously, L.B. 916 arbitrarily benefits those public employees and

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[1] *J.M. v. Hobbs*, 281 Neb. 539, 797 N.W.2d 227 (2011).

[2] See, 2012 Neb. Laws, L.B. 916; § 81-2032 (Cum. Supp. 2012).

officers whose retirement assets are not subject to attachment because (1) the act does not apply to their retirement plans or (2) they pleaded no contest or were convicted of a serious crime that is not included in the act. We conclude that under the act's stated purpose of providing compensation to the victims of serious crimes, no substantial difference exists between the favored groups of victims and employees and those victims and employees who do not receive the act's benefits. Because the class members are not substantially different, the act is special legislation. We affirm.

II. BACKGROUND

In 2006, Hobbs was convicted of first degree sexual assault of a child, C.M., when she was between the ages of 12 and 14. The assaults occurred while Hobbs was married to C.M.'s mother and living with them. A court sentenced Hobbs to 25 to 30 years' imprisonment. J.M. then sued Hobbs on C.M.'s behalf, and a court awarded J.M. a civil judgment of $325,000.

1. J.M.'s First Appeal to This Court

In J.M.'s first attempt to obtain an order in aid of execution, he alleged that Hobbs was a judgment debtor and, although incarcerated, was receiving a retirement pension from the State Patrol. Hobbs objected that under § 81-2032, his retirement assets were exempt from legal process. At that time, § 81-2032 provided that "[a]ll annuities or benefits which any person shall be entitled to receive under [the Nebraska State Patrol Retirement Act] shall not be subject to garnishment, attachment, levy, the operation of bankruptcy or insolvency law, or any other process of law whatsoever . . . ." The district court agreed that Hobbs' retirement assets were exempt from process, and we affirmed on appeal.[3]

We noted that under Neb. Rev. Stat. § 25-1572 (Reissue 2008), a court may order the execution of a judgment only against a debtor's nonexempt property. But J.M. relied on

[3] *Hobbs*, *supra* note 1.

Neb. Rev. Stat. § 25-1563.01 (Reissue 2008), which permits a judgment to attach to a judgment debtor's retirement assets except those that are reasonably necessary for the support of the debtor and any beneficiaries. J.M. argued that § 81-2032 only protected the retirement assets that Hobbs was "entitled to receive" and that once the assets were distributed, § 25-1563.01 governed whether the assets were subject to attachment. We rejected that argument.

We concluded that § 81-2032 was the more specific and, therefore, the applicable statute and that it provided broader protections than § 25-1563.01. We explained that the words "annuities" and "benefits" under § 81-2032 referred to required future payments of money. We cited federal and state court decisions rejecting a distinction between owed future payments and distributed payments under similar statutes, even if the statute did not explicitly protect future payments. We agreed that the legislative intent behind anti-attachment statutes is to protect these assets from legal process regardless of whether the payments have become due.

We further agreed with the U.S. Supreme Court that exemptions are justified by broad social policies that take precedence over courts doing equity between particular parties. So a court's carving out of particular exceptions when the exemption is especially inequitable is impracticable. We agreed that any such exceptions should be left to the Legislature.

2. Legislature Amends § 81-2032 Retroactively

In 2012, the year after we issued our opinion in J.M.'s first appeal, the Legislature amended § 81-2032 and other anti-attachment statutes for some retirement plans.[4] For retirement plans affected by the amendment, a limited attachment remedy now exists against the retirement assets of a public employee or officer who (1) was convicted of, or pleaded no contest to, one of six enumerated crimes, and (2) found liable for civil damages.[5] The affected retirement plans include the plan for

[4] See L.B. 916.

[5] See *id*.

State Patrol officers, and the six enumerated crimes include sexual assault.[6]

After this amendment, J.M., on C.M.'s behalf, filed a new motion for an order in aid of execution. Hobbs challenged the amendment as unconstitutional. As stated, the district court concluded that the statute was unconstitutional as special legislation and dismissed J.M.'s motion.

3. Scope of L.B. 916

The amendment to § 81-2032 is representative of the way that L.B. 916 amended anti-attachment statutes for all affected public employees' retirement plans. Subject to assignment under a qualified domestic relations order, an absolute exemption from attachment of retirement assets still exists for most State Patrol officers under § 81-2032(1). But L.B. 916 created six exceptions by adding subsection (2) to the statute:

> (1) Except as provided in subsection (2) of this section, all annuities or benefits . . . shall not be subject to [any] process of law whatsoever and shall not be assignable except to the extent that [they] are subject to a qualified domestic relations order . . . . The payment of any annuities or benefits subject to such order shall take priority over any payment made pursuant to subsection (2) of this section.
>
> *(2) If a member of the retirement system is convicted of or pleads no contest to a felony that is defined as assault, sexual assault, kidnapping, child abuse, false imprisonment, or theft by embezzlement and is found liable for civil damages as a result of such felony, following distribution of the member's annuities or benefits from the retirement system,* the court may order the payment of the member's annuities or benefits . . . for such civil damages, except that [those] reasonably necessary for the support of the member or any of his or her beneficiaries shall be exempt from such payment. . . . The changes made to this section by this legislative bill shall apply to

[6] See § 81-2032(2) (Cum. Supp. 2012).

> persons convicted of or who have pled no contest to such a felony and who have been found liable for civil damages as a result of such felony prior to, on, or after April 7, 2012.

(Emphasis supplied.)

The Nebraska Public Employees Retirement Systems, a state agency,[7] administers most of the retirement plans affected by L.B. 916. Those five plans are for county employees,[8] judges,[9] State Patrol officers,[10] public school employees,[11] and public employees whose retirement benefits are governed by the State Employees Retirement Act.[12]

Counties and school districts are, of course, political subdivisions.[13] In addition to the plans for county and public school employees, L.B. 916 applies to the retirement plans covering employees for three other political subdivisions: employees of a metropolitan utilities district,[14] police officers in cities of the first class,[15] and firefighters in cities of the first class.[16] Finally, L.B. 916 permits a judgment predicated upon one of the specified crimes to attach to the deferred compensation plans for employees and elected officials of municipalities, counties, or other political subdivisions—after the funds are distributed.[17]

But the State Employees Retirement Act explicitly excludes some state employees from its coverage and implicitly excludes

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[7] See, L.B. 916, §§ 12, 16, 22, 31, and 42; Neb. Rev. Stat. § 84-1503(1)(a) (Supp. 2013).

[8] See Neb. Rev. Stat. § 23-2322 (Reissue 2012).

[9] See Neb. Rev. Stat. § 24-710.02 (Cum. Supp. 2012).

[10] See § 81-2032.

[11] See Neb. Rev. Stat. § 79-948 (Cum. Supp. 2012).

[12] See Neb. Rev. Stat. § 84-1324 (Cum. Supp. 2012).

[13] Neb. Rev. Stat. § 13-2401(1) (Reissue 2012).

[14] See Neb. Rev. Stat. § 14-2111(4) (Reissue 2012).

[15] See Neb. Rev. Stat. § 16-1019(6) (Reissue 2012).

[16] See Neb. Rev. Stat. § 16-1038(6) (Reissue 2012).

[17] See Neb. Rev. Stat. § 48-1401(10) (Cum. Supp. 2012).

others by not including them in the definition of an employee covered by the act.[18] So the retirement plans of public employees and officers that are not covered by the State Employees Retirement Act are unaffected by L.B. 916 unless the act otherwise expressly affects their retirement plans. The same is true for the retirement plans of political subdivision employees and officers that are not expressly affected by L.B. 916. For example, L.B. 916 does not affect the legislatively authorized retirement plans for public employees of the State's university[19] and colleges,[20] public health departments,[21] natural resources districts,[22] and most municipal employees.[23] Summed up, political subdivisions and state agencies that are not affected by L.B.916 are free to maintain or adopt anti-attachment provisions that provide absolute protection from legal process for their employees' retirement benefits.

But even for those retirement plans that L.B. 916 expressly affects, the scope of the attachment remedy is quite limited. A judgment creditor must show that an affected public employee was convicted of an enumerated felony *and* found liable for damages in a civil action. A judgment creditor's recovery against the employee in a civil action is insufficient, standing alone, to warrant attachment of a public employee's distributed retirement assets.

The scope of the remedy is also limited by the offender's age. That is, a judgment against a young offender will often lapse because of time constraints. L.B. 916 does not require a retirement plan administrator to make a lump-sum distribution to a plan member to compensate a judgment creditor, and a judgment cannot attach to the public employee's undistributed retirement assets. Instead, a judgment creditor must wait until the employee's assets are distributed in the normal course of

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[18] See Neb. Rev. Stat. § 84-1301(9) (Supp. 2013).

[19] See Neb. Rev. Stat. § 85-106 (Reissue 2008).

[20] Neb. Rev. Stat. § 85-320 (Reissue 2008).

[21] Neb. Rev. Stat. § 71-1631(13) (Reissue 2009).

[22] See Neb. Rev. Stat. § 2-3228(1) (Reissue 2012).

[23] See Neb. Rev. Stat. §§ 14-567 and 19-3501 (Reissue 2012).

events. Yet, a judgment becomes dormant if no execution has been issued within 5 years and can only be revived within 10 years of becoming dormant.[24]

4. Legislative History

A court may review the legislative history of a statute or ordinance when considering a special legislation challenge.[25] In concluding that the selection of only six felonies under § 81-2032 constitutes special legislation, the district court reviewed the legislative history of L.B. 916. The court noted that many statements by the bill's introducer, Senator Colby Coash, showed that the Legislature intended to provide compensation to the victims of crimes that were heinous, serious, or egregious. We turn now to that history.

(a) Under the Amendment, a Judgment Only Attaches to Distributed Retirement Assets

L.B. 916 was originally introduced as 2012 Neb. Laws, L.B. 973,[26] and later incorporated into L.B. 916.[27] As introduced, L.B. 973 would have permitted a judgment to attach to an affected employee's undistributed retirement assets as soon as a victim obtained a civil judgment, except to the extent that the funds were needed for the reasonable support of the employee or his beneficiaries. So a judgment creditor would not have to wait until the funds were distributed.

But at the Nebraska Retirement Systems Committee hearing for L.B. 916, a representative for the Nebraska Public Employees Retirement Systems stated that permitting

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[24] Neb. Rev. Stat. §§ 25-1420 and 25-1515 (Reissue 2008); *Buffalo County v. Kizzier*, 250 Neb. 180, 548 N.W.2d 757 (1996).

[25] See, e.g., *D-CO, Inc. v. City of La Vista*, 285 Neb. 676, 829 N.W.2d 105 (2013); *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000).

[26] See Nebraska Retirement Systems Committee Hearing, L.B. 973, 102d Leg., 2d Sess. (Jan. 12, 2012).

[27] See Legislative Journal, Chronology of Bills, 102d Leg., 2d Sess. 136 (2012).

collection actions against retirement funds before they are distributed would create tax and payment complexities for the State. Because the retirement funds represent deferred income, garnishments of untaxed income to satisfy judgments would require the plan member to pay income tax. For defined benefit plans, preretirement disbursements would require an expert's actuarial recalculations of the member's earned benefit. Another problem would arise if a judgment creditor could garnish both vested and nonvested pension funds because, with limited exceptions (death, disability, or retirement), plan members can only obtain their own contributions if they take money from their retirement funds.[28]

In short, unless the Legislature limited the law to distributed retirement funds, the agency would incur costs for additional computer programming and obtaining actuarial recalculations.[29] Moreover, the executive director of the retirement plan for Omaha school teachers explained that its plan would lose its tax-deferred status if it distributed funds to an employee who was still an active member.[30] The Legislature specifically amended the bill to make retirement assets in the affected plans subject to attachment only after they are distributed.[31]

(b) The Legislature Intended the Amendment to Provide Compensation for the Victims of Serious Crimes

Senator Coash's statement of intent provides that L.B. 973 was enacted to give courts "an optional means of providing civil restitution to victims of particularly *heinous* crimes."[32]

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[28] Nebraska Retirement Systems Committee Hearing, 102d Leg., 2d Sess. 11-12 (Jan. 31, 2012).

[29] See *id.*

[30] See *id.*

[31] See Amend. 1739, L.B. 916, Nebraska Retirement Systems Committee, 102d Leg., 2d Sess. (Feb. 14, 2012).

[32] See Introducer's Statement of Intent, L.B. 973, Nebraska Retirement Systems Committee, 102d Leg., 2d Sess. (Jan. 31, 2012) (emphasis supplied).

Specifically, the bill authorizes a judgment to attach to public employee's retirements assets if the employee has pleaded no contest or been convicted of "felony assault, sexual assault, kidnapping, child abuse, false imprisonment, or theft by embezzlement."[33]

During the committee hearing, Senator Coash explained the bill's purpose as follows:

> This is a bill to provide justice by way of restitution to victims of *heinous crimes*, specifically to victims who have been denied payment from their aggressors because his or her assets are sheltered in their [sic] public employee retirement pensions and/or benefits, even after such pensions or benefits have been distributed from the retirement plan to employees. [A] judge may order payment if . . . [t]he public employee has been convicted of or pleads no contest in criminal court to an *egregious* felony. And you'll note that these crimes listed, such as assault, kidnapping and theft, leave behind a living, aggrieved victim. These exceptions cannot be employed, by example, for those grieving a murder victim. Second criteria, the employee [must be] found liable in a civil court following the conviction. . . . [L]et's pretend that [a victim] has survived her attack [and if the defendant] was not convicted in criminal court but was only found liable in civil court, he would not . . . fit in this exemption. . . . We purposely set the bar for this very high. You've got to get through criminal court and been convicted by a jury . . . in these very narrow crimes. . . . I understand that the state continues to have very valid reasons to protect pensions, which I fully support. I want to ensure that this policy change truly protects both the vulnerable victims of *serious* crime and the innocent family members of those that are convicted, and I have purposely set that threshold high so as to ensure restitution for the most aggrieved victims whose well-being is forever affected

[33] *Id.*

> by the crime and who may have the greatest need for that financial restitution.[34]

When asked why his bill did not include victims of a murder, Senator Coash stated the following:

> Well, we discussed that quite a bit but in the case of a murder there is no living victim that needs the funds . . . we wanted to keep this narrow. We wanted to make sure that these funds were accessed for the actual victim, not the victim's family. So we made a conscious decision to leave those out.[35]

J.M., C.M., and J.M.'s attorney all testified about this specific case in support of the bill. J.M.'s attorney stated that he had approached Senator Coash about the bill and worked with him in drafting it. He disagreed with our decision in J.M.'s first appeal and argued that he should be able to attach a judgment to distributed retirement assets. A senator specifically asked whether the attorney could attach Hobbs' retirement assets if this bill passed. He said yes, because in working with Senator Coash, he "wanted to make sure that this [legislation] applied to this particular judgment."[36] He explained that the attachment remedy "was designed to be narrow. It's not my intent to make this any more encompassing than absolutely necessary to get this young woman some compensation out of this fund . . . ."[37]

III. ASSIGNMENTS OF ERROR

J.M. assigns that the court erred in concluding that § 81-2032(2) was unconstitutional as special legislation and in overruling his motion for an order in aid of execution.

IV. STANDARD OF REVIEW

[1] The constitutionality of a statute presents a question of law, which we independently review.[38]

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[34] Nebraska Retirement Systems Committee Hearing, 102d Leg., 2d Sess. 2-3 (Jan. 31, 2012) (emphasis supplied).

[35] *Id.* at 5.

[36] *Id.* at 7.

[37] *Id.* at 8.

[38] See *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013).

V. GOVERNING PRINCIPLES

[2] We presume that statutes are constitutional and will not strike down a statute unless its unconstitutionality is clearly established.[39]

Under the special privileges and immunities clause of Neb. Const. art. III, § 18,

> [t]he Legislature shall not pass local or special laws in any of the following cases[:]
>
> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

[3,4] 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.[40] A special legislation analysis focuses on a legislative body's purpose in creating a challenged class and asks if there is a substantial difference of circumstances to suggest the expediency of diverse legislation.[41] The prohibition aims to prevent legislation that arbitrarily benefits a special class.[42]

[5,6] When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.[43] To be valid, a legislative classification must rest upon some reason of public policy, some substantial difference in circumstances, which would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.[44]

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[39] See *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

[40] *D-CO, Inc., supra* note 25.

[41] *Id.*

[42] *Id.*

[43] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[44] *D-CO, Inc., supra* note 25.

[7] And legislative classifications must be real and not illusive; they cannot be based on distinctions without a substantial difference.[45] The distinctive treatment must bear some reasonable relation to the legitimate objectives and purposes of the legislative act.[46] The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.[47] Here, the purpose is to provide compensation to the victims of serious crimes.

VI. ANALYSIS

[8] Initially, we clarify that Hobbs does not, and could not, claim that L.B. 916 created a closed class. A closed class refers to when a legislative body limits a law to a present condition, with no opportunity for the numbers of the class to increase.[48] Although the attachment remedy is limited in scope, the probability that other judgment creditors will come under the act's operation is more than theoretical.[49] So the only issue here is whether the classes benefited by the remedy were arbitrarily selected.

The district court determined that § 81-2032(2), as amended by L.B. 916, is special legislation because nothing in the legislative history explained why the six enumerated felonies—assault, sexual assault, kidnapping, child abuse, false imprisonment, or theft by embezzlement—justified favored treatment for the victims of these crimes but not the victims of other serious crimes. The court concluded that the Legislature had arbitrarily granted a benefit to the victims of the six enumerated crimes and excluded others who were not substantially different under the act's purpose.

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[45] *Id.*

[46] See *id.*

[47] *Id.*

[48] See *Kiplinger v. Nebraska Dept. of Nat. Resources*, 282 Neb. 237, 803 N.W.2d 28 (2011), *disapproved on other grounds, Banks, supra* note 38.

[49] See *id.*

J.M first contends that § 81-2032(2) is a law of general application. J.M. argues that under *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*,[50] if a statute has a legitimate purpose and treats all of the *selected* class members uniformly, it is not special legislation.

We reject this argument and J.M.'s interpretation of *Nebraska Mortgage Finance Fund*. There, during a period of high mortgage rates, the Legislature made available tax-free and low-interest revenue bonds to private mortgage lenders to encourage them to make affordable mortgage loans to persons with low and moderate incomes. The Legislature intended for the difference between what the lenders and mortgagors paid in interest to pay for the program. The legislative history showed that high mortgage rates had caused a serious shortage of decent, affordable housing near workers' jobs and had contributed to blight in cities. The fund for the bonds was overseen by a quasi-corporation operating as a governmental body with appointed officers.

We concluded that the act was a law of general applicability, not a special privilege for a select few, because the mortgage funds were equally available to all persons of low and moderate income across the state. We reasoned that the benefit received by private lending institutions from having the revenue bonds pass through them for low-interest mortgages was incidental to the act's public purpose: "The vital point in all such disbursements is whether the purpose is public. If it is, it does not matter whether the agency through which it is dispensed is public or not."[51] We concluded that the entire state benefited from the availability of decent housing. In upholding the act, we stated the following principles:

> "'An act is general, and not special or local, if it operates alike on all persons or localities of a class, or who are brought within the relations and circumstances provided

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[50] *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979).

[51] *Id.* at 460, 283 N.W.2d at 22.

> for, if the classification so adopted by the legislature has a basis in reason, and is not purely arbitrary. . . . "If a law affects equally all persons who come within its operation it cannot be local or special . . . ." . . . "A law is not local or special in a constitutional sense that operates in the same manner *upon all persons in like circumstances*." "General laws are those which relate to or bind all within the jurisdiction of the law-making power, and if a law is general and operates uniformly *and upon all brought within the relation and circumstance for which it provides* it is not a local or special law in the constitutional sense."'"[52]

J.M.'s argument hinges on a single sentence in this passage: "'"'If a law affects equally all persons who come within its operation it cannot be local or special . . . .'"'" But the passage also states that a law must operate uniformly for all persons in like circumstances under the act's purpose. So, we clearly meant that a court must consider all persons standing in similar circumstances under an act's purpose when determining whom the law effects and whether the law operates uniformly.

[9] When read in context, *Nebraska Mortgage Finance Fund* embodies this general principle: The Legislature has broad discretion to make statutory classifications, but its discretion is not unlimited. The Nebraska Constitution prohibits it from making arbitrary classifications that favor select persons or objects while excluding others that are not substantially different in circumstance in relation to an act's purpose. This interpretation is consistent with the principles that we set out above. To accept J.M.'s argument would render the special legislation provision meaningless.

Next, we turn to J.M.'s alternative argument. J.M. contends that the defined class of victims rests on a real and substantial difference from other crime victims. He argues that the Legislature correctly recognized that the victims of the six

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[52] *Id.* at 454-55, 283 N.W.2d at 19-20 (emphasis supplied).

enumerated crimes have suffered tremendous trauma and have the greatest need to recover a civil judgment against their perpetrators who were public employees. He argues that these victims often must pay for years of treatment to deal with the effects of the crime.

But Hobbs contends that there is "no substantial difference between the classes of enumerated and unenumerated felonies that would explain why one class's pension fund is protected from attachment while the other's is not."[53] He argues that the purpose of L.B. 916 is to provide compensation to the victims of serious crimes, yet it excludes the victims of many serious crimes: e.g., murder, arson, robbery, and incest. He contends that through the enumerated felonies, L.B. 916 arbitrarily benefits (1) select victims who can collect a judgment from a public employee's retirement assets and (2) those pensioners who are convicted of other serious crimes yet are protected from attachment. We agree.

It is clear that the Legislature's desire both to provide relief for victims like C.M. and to protect the retirement assets of public employees in most circumstances explains its favored treatment of select victims—and its consequential favored treatment of public employees who have committed other serious crimes. By limiting the crime victims who can use this remedy to a small group in order to protect most public employees' retirement funds, the Legislature has necessarily singled out a select group of offenders whose retirement benefits can be subject to attachment. But despite the Legislature's good intentions, the Constitution requires uniformity of laws:

> "Uniformity [of laws] is required in order to prevent granting to any person, or class of persons, the privileges or immunities which do not belong to all persons. . . . It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors

[53] Brief for appellee at 13.

that such constitutional prohibitions against special legislation were enacted."[54]

L.B. 916 cannot evade the special legislation prohibition. The most heinous crime under Nebraska law is capital murder. The victim's survivors frequently suffer real economic consequences and psychological trauma. But the act closes the door to relief for these victims. Moreover, even assuming that distinguishing between living crime victims and a murder victim's family members represents a rational distinction under the bill's purpose of providing compensation to the victims of serious crimes, the court correctly determined that the select class of living victims is arbitrary.

For example, if Hobbs had been C.M.'s father (instead of stepfather), convicted of incest, and found liable for damages in a civil action, C.M.'s trauma from the crime would be the same, if not greater. But she could not collect a judgment from Hobbs' distributed retirement assets. Similarly, we can discern no reason to favor the victims of embezzlement, a property crime, but to exclude the victims of arson. No difference in the crimes' traumatic effects justifies the diverse treatment of these victims.

Nor can we be blind to the Legislature's obvious exclusion of many retirement plans for public employees—over which it has authority—from the effects of L.B. 916. This exclusion further illustrates the arbitrariness of the selected victims who can benefit from the attachment remedy and the selected public employees whose retirement benefits are subject to attachment.

Finally, whether victims of the same crime can attach civil judgments to a public employee's distributed retirement assets will often depend on prosecutorial discretion. For example, if a victim is shot by a public employee but survives, the State might charge an assault or an attempted murder. If the State successfully prosecutes an assault, the victim can seek redress under L.B. 916 because it is an enumerated crime. But if the

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[54] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 938, 663 N.W.2d 43, 65 (2003), quoting *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

State prosecutes an attempted murder, an absolute exemption from attachment applies. A similar issue could arise if the State reduces an original enumerated charge in exchange for a plea of guilty or declines to prosecute in exchange for an employee's cooperation. But can anyone doubt that the victim's trauma is the same regardless of the State's decisions about whether or what to prosecute.

In sum, the exclusive list of felonies in § 81-2032(2) arbitrarily benefits select victims of its specified crimes and arbitrarily protects State Patrol officers who are convicted of serious felonies that are not enumerated under L.B. 916.

VII. CROSS-APPEAL

On cross-appeal, Hobbs contends that the court erred in (1) ruling that § 81-2032(2) does not violate his constitutional rights under the Equal Protection Clauses of the state and federal Constitutions and (2) failing to address his challenges under the Due Process and Impairment of Contracts Clauses of the state and federal Constitutions. But Hobbs' other constitutional challenges to the statute are moot because they have been subsumed within our holding that the statute violates the prohibition against special legislation. He does not have a legally cognizable interest in having the statute declared unconstitutional for additional reasons.[55]

VIII. CONCLUSION

The court correctly determined that the amendment to § 81-2032(2) constitutes special legislation. The Legislature's attempt to create very limited exceptions to an absolute privilege from attachment of a public employee's retirement assets has resulted in a law that benefits only a select group of victims. Simultaneously, the amendment arbitrarily protects public employees who are convicted of comparably serious crimes yet retain an absolute privilege from attachment of their retirement assets. Under the act's purpose of providing compensation to the victims of serious crimes, the favored crime victims are similar in circumstance to many other

[55] See *Big John's Billards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

serious crime victims who do not have the attachment remedy. Similarly, there is no substantial difference between the public employees subject to the remedy and those who commit many other serious crimes yet retain their privilege from attachment. Accordingly, the Legislature's preferential treatment of the favored groups and exclusion of others that are similar in circumstance runs afoul of the Constitution's prohibition against special legislation.

AFFIRMED.

WRIGHT and CASSEL, JJ., not participating.

SAM CHRISTIANSEN, AN INDIVIDUAL, APPELLEE AND CROSS-APPELLANT, V. COUNTY OF DOUGLAS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

RICH MCSHANE, ON BEHALF OF HIMSELF AND ALL SIMILARLY SITUATED PERSONS, APPELLEE AND CROSS-APPELLANT, V. COUNTY OF DOUGLAS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

849 N.W.2d 493

Filed July 18, 2014. Nos. S-13-689, S-13-691.

1. **Jurisdiction: Appeal and Error.** The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
2. **Equity: Appeal and Error.** Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.
3. **Actions: Pleadings.** Whether a particular action is one at law or in equity is determined by the essential character of a cause of action and the remedy or relief it seeks.
4. **Injunction: Equity.** An action for injunction sounds in equity.
5. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
6. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.

7. **Evidence: Appeal and Error.** When credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
8. **Wages: Words and Phrases.** Deferred compensation is defined as compensation which is earned in exchange for services rendered.
9. **Statutes: Words and Phrases.** The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
10. ____: ____. As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
11. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
12. **Political Subdivisions: Equity: Estoppel.** Although the State and its political subdivisions can be equitably estopped, the doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.
13. **Estoppel.** Equitable estoppel does not create a new right or give a cause of action; rather, it serves to protect rights already acquired.
14. **Contracts: Ratification: Words and Phrases.** Ratification is the acceptance of a previously unauthorized contract.
15. **Ratification: Agents.** Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.
16. **Contracts: Counties: Administrative Law.** A county enters into contracts by a majority vote of its board of commissioners.
17. **Principal and Agent: Contracts: Ratification.** A principal may ratify what he could have authorized.
18. **Principal and Agent: Ratification.** Essential to a valid and effective ratification of an unauthorized act is the principal's complete knowledge of the unauthorized act and all matters related to it.
19. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.

Appeals from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded with direction.

Donald W. Kleine, Douglas County Attorney, and Bernard J. Monbouquette for appellant.

Joel Bacon, Gary L. Young, Jefferson Downing, and Thomas P. McCarty, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellees.

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

CASSEL, J.

INTRODUCTION

For many years, a county's retired employees paid the same amount as active employees paid for health insurance coverage. After the county began to charge retirees a different and greater premium, they sued the county. We must decide whether the retirees had a contractual right to the previous practice and, if not, whether equitable estoppel or ratification affords them relief. We conclude that there was no contract and that the alternative doctrines provide no basis for relief. Thus, we affirm the district court's summary judgment denying the contract claim and reverse the court's decree granting injunctive relief, damages, and attorney fees, on the alternative grounds.

BACKGROUND

The Douglas County Board of Commissioners (Board) is the governing body of Douglas County, Nebraska (County). Only the Board can enter into contractual agreements on the County's behalf.

HEALTH INSURANCE

The Board has the responsibility and authority to determine who participates in the Douglas County health insurance plan (Plan) and the premiums to be paid by participants. Each year, the Board votes on a resolution to set premium rates for the Plan.

In December 1974, the Board passed a resolution which allowed employees of the County who retired between the ages of 55 and 65 to participate in the Plan until attaining age 65. This resolution applied only to employees who were qualified to participate in the County's pension plan. The December 1974 resolution did not specify the amount of premiums to be charged annually or promise that the amount would be the same as that charged to active employees.

Since that time, retired employees have paid the same premiums to participate in the Plan as active employees. Each year when the Board voted on a resolution to set premium rates, the resolution did not draw any distinction between active employees and retired employees; rather, the resolution merely referred to "employees."

Increased Charges to Retirees

In 2008 and 2009, the County was in a fiscal crisis. The County considered numerous alternatives to respond to rising costs in health insurance. One alternative was requiring retired employees to pay a different rate for health insurance than that paid by active employees. Other options included eliminating the "Rule of 75," which is an early retirement option; raising deductibles; raising copayments; establishing a wellness program; and raising premiums for all employees.

In September 2009, the Board voted unanimously to adopt resolution No. 596, which changed the amount retired employees paid toward premiums for the Plan in order to "adequately address the significantly increased health care costs impacting Douglas County's health insurance budget, and the Government and Accounting Standards Board . . . rules relating to the unfunded liability of employer health insurance for retirees." The resolution provided that the change would be effective January 1, 2010.

Resolution No. 596 set a rate for participating retired employees that was higher than the rate paid by active employees. For retired employees who had employee-only coverage, the change meant that they were required to pay 25 percent of the total premium, whereas an active employee had to pay only 7 percent. As a result, in fiscal year 2010, a retired employee's premium was $1,001.04 more per year. For retired employees who had dependents, the change meant they were required to pay 35 percent of the total premium, compared to the 15 percent an active employee was required to pay. Depending upon the number of dependents a retired employee had, the change resulted in the retired

employee's paying $2,040.36 to $2,750.04 more per year than an active employee.

Litigation

Shortly before the change was to take effect, Sam Christiansen, a retired employee of the County under age 65 who participated in the Plan, filed a complaint against the County and each commissioner of the Board, seeking injunctive and declaratory relief. Later, Rich McShane, also a retired employee of the County under age 65 who participated in the Plan, filed a similar complaint "on behalf of himself and all similarly situated persons." He identified the class as "all retired employees who are participants in the [Plan], who have retired prior to January 1, 2010, and who are not 65 years of age prior to January 1, 2010." We refer to the plaintiffs in these actions collectively as "the retirees."

The retirees sought an order temporarily and permanently enjoining the County and each commissioner of the Board from implementing resolution No. 596 and any change in the manner of assessing health care premiums. They also sought attorney fees as permitted by 42 U.S.C. § 1988(b) (2012), a declaration of the rights of the retirees under the U.S. and Nebraska Constitutions, and any monetary losses suffered.

The district court later consolidated the cases and certified the class. The court stated that commonality was established by the fact that all employees of the County received information regarding premiums to be paid for participation in the Plan postemployment. Thus, the court stated, the claims of all class members would be based on the same legal theory of breach of contract.

Partial Summary Judgment

Upon the County's motion, the district court granted a partial summary judgment. The court determined that health insurance did not qualify as deferred compensation. Accordingly, the court ruled that the County's practice of treating retired employees the same as active employees for purposes of setting health insurance premiums did not create contractual rights

protected by the Contracts Clauses of the U.S. Constitution[1] and the Nebraska Constitution.[2]

The district court denied the motion for summary judgment as to whether applying the doctrines of ratification or estoppel to the County's practice gave rise to a contractual obligation.

Evidence at Trial

Kathy Goodman, the County's pension and insurance coordinator since 1997, had the obligation to inform employees about their retirement benefits. She understood that employees relied upon this information and that it was important for the information to be accurate. She also understood that the Board had the sole authority to determine the premiums for participation in the Plan each year.

Several commissioners acknowledged that employees were not going to approach the commissioners in order to ascertain the employees' retirement benefits. Similarly, the commissioners did not expect employees to look through old Board resolutions. These commissioners testified that it was reasonable for employees to rely on Goodman and on the documents produced by Goodman and the human resources department.

Each year, after the Board set a rate structure for the Plan, Goodman provided rate sheets to employees during open enrollment. Before adoption of resolution No. 596, the rate sheets did not draw a distinction between retired and active employees; they merely listed the premiums for "employees." The retirees concluded this meant there was no difference between active employees and retired employees with regard to the cost of insurance.

Before an employee retired, Goodman provided the employee with a letter regarding retirement benefits. Before adoption of resolution No. 596, the letter stated that "[a]s an early retiree you will continue to be eligible for our group insurance plans until you become Medicare-eligible at age 65." This language was phrased as a representation about what would happen in the future until an employee turned age

[1] U.S. Const. art. I, § 10.

[2] Neb. Const. art. I, § 16.

65. The letter stated that premiums were subject to change with the upcoming year's renewal increases, but it did not state that retired employees would be treated differently than active employees.

In 2000, Goodman began conducting seminars on retirement benefits. She held the seminars at each of the County's departments and offered an open session for all employees. Most employees attended the seminars.

In connection with the seminars, Goodman created and distributed a document entitled "Douglas County Employees' Retirement Trust Fund" (Retirement Handout) to help employees understand their future retirement benefits. The Retirement Handout contained a list of frequently asked questions, including the following concerning health insurance: "Would the medical insurance premium be the same?" and "Upon retirement, are you still considered an employee as far as benefits?" Goodman included the questions because they were asked "about 90 percent of the time from employees." The Retirement Handout contained the following answer in part under the heading "Medical/Dental/Life Benefits as a Retiree":

> You are still considered an employee of Douglas County with regard to the benefit package. As an early retiree, you can continue under the medical, dental and life plan for yourself and your eligible dependents until age sixty-five (65) when you become Medicare eligible. You will have the benefits as an active employee for the premiums, changes, and Open Enrollment.

Goodman obtained approval for the Retirement Handout. According to Goodman, "[a]dministration" and the Douglas County Pension Committee approved it. Goodman believed that she presented a copy of the Retirement Handout to all of the commissioners, because they are the "governing body" and she "would present [to them] anything that is going to come from my office that has any affect [sic] on any of the benefit information."

Goodman continued to make the Retirement Handout available to employees after the seminars. The County also made the Retirement Handout available upon request to all

of its employees until January 1, 2010, when the language was changed. The payroll coordinator at the Douglas County Health Center distributed the Retirement Handout to approximately 400 employees who were eligible for retirement in 2000 and also continued to make it available for employees at the health center who "needed to look at how the insurance was figured."

Three commissioners and the human resources director testified to the effect that the language was phrased as a promise about how employees would be treated in the future, after they retired. The retirees understood the language to mean that after retirement and until age 65, they would pay the same premiums as an active employee. But Goodman testified that she was referring to the present time when making a representation about the share of premiums to be paid by a retiree. The County's chief administrative officer testified that she spoke at two seminars in 2000 and that she told the attendees there was no guarantee that benefits would be provided to them upon retirement. No one asked her whether the premiums would always be the same cost. Her understanding of written representations about the share of premiums to be paid by retired employees was that they spoke to the present time only, because the premiums could change every year and there was nothing in the union contracts or in the pay plan in regard to postemployment benefits.

On approximately November 1, 2007, the Douglas County Pension Committee posted a Web site containing a "Frequently Asked Questions" page. The page included the following question, which dealt with health insurance for retirees: "Would the medical insurance premium be the same?" The answer was: "Current eligible retirees can continue under the Douglas County benefit plan at the same monthly rate as active employees until age 65. Payments are sent directly to the benefit office by the first of each month." This question was included because it was asked 90 percent of the time by employees considering retirement. Prior to being posted, each page of the proposed Web site was reviewed by the pension committee. The pension committee included a commissioner, the chief administrative officer, the human resources director, and the County's fiscal

director. No one objected to the content. The Web site was removed after the Board approved resolution No. 596.

Evidence was adduced regarding oral representations concerning a retired employee's participation in the Plan. During employee orientations at the health center, employees often asked about their ability to participate in the Plan postretirement for the same premiums as active employees, and the payroll coordinators told them they would be able to do so until age 65. One class member testified that before retirement, he began "crunching numbers" to see how feasible it was for him to retire. He specifically asked Goodman about insurance, and he testified that she confirmed he would "get to continue paying for County health insurance as if [he] were still working" until he reached age 65. Several other retirees testified similarly.

Oral representations concerning the premiums to be paid by a retired employee were also made during negotiations of labor contracts. During the 1990's, Christiansen, who was president of one of the labor unions, was involved in negotiations with the County. He testified that the negotiator for the County and the chief administrative officer said that retired employees would be able to continue to participate in the Plan and that the premiums would be the same as that of an active employee. While negotiating, Christiansen met with commissioners and discussed health insurance. He testified:

> They knew that the insurance would be the same, the premium would be the same and that people were going to retire earlier. They also understood that that was going to be an added liability to the County and were concerned, but they certainly were willing to continue with the health benefits.

While health insurance and pensions were discussed during negotiations, the terms were never set forth in the contracts, but "[i]t was assured that those benefits would not change." Gary Kratina, a class member who also served on the union's negotiating team, heard at least two representatives of the County make the same representation.

Testimony was adduced that representations about postretirement participation in the Plan were used to recruit new

employees. McShane was involved in recruiting new employees for the sheriff's department, and based on materials he was provided, he told prospects that upon retirement, they would be able to participate in the Plan, and that retired employees were paying the same rate as active employees. Kratina testified that when he was hired in 1975, a commissioner at that time told him employees "would have insurance, and the insurance would be the same always as the employees up to age 65." Kratina heard multiple sheriffs and captains and the chief deputy sheriff tell new employees, as a "recruiting element," that upon retirement they would be able to participate in the Plan and "would have the same payments as you would as a regular employee." He testified that this was said "over and over" to recruit new employees and was included in "written literature" distributed to recruits.

The retirees viewed the representations as part of the compensation package they were receiving in exchange for the work they were performing. Several retirees testified it was important to them to know that when they retired, they would be treated the same as active employees with regard to health insurance.

Commissioner Mike Boyle, who had been a commissioner since 1997, characterized the Plan as a form of compensation to County employees. He felt that the County had promised its employees that they would be able to participate in the Plan for the same premiums as active employees and that this promise was something that the Board renewed each year when it voted on premiums. He testified that while a commissioner, he had spoken to 25 to 30 active employees and told them that upon retirement, they would be able to participate in the Plan for the same premiums as an active employee. He testified that he had seen the Retirement Handout "for quite a long time, for years, I believe."

Commissioner Kyle Hutchings testified that retired employees were allowed to participate in the Plan as a benefit of employment and not as deferred compensation. He characterized it as a gratuity because he did not feel that the County had a requirement to provide that insurance to retired employees. Hutchings was unaware of communications of any type

that the County made to its employees telling them that upon retirement, they would be able to continue in the Plan at the same monthly premium rates as active employees. Although a member of the pension committee, Hutchings testified that he first became aware of the content of the "Frequently Asked Questions" page on the pension committee Web site sometime after adoption of resolution No. 596.

Commissioner Clare Duda, who had been a commissioner for 20 years, testified that because retired employees are not covered by any union contract, they could participate in the Plan at the pleasure of the Board and at the rates set by the Board. Duda recalled discussions with Christiansen and other members of the union in the late 1990's about the need for health insurance coverage of younger retired employees. Duda testified that the Board wanted to include them in the Plan, but that the Board "would never have represented that it would be at the same rate." Prior to the vote on resolution No. 596, Duda had never visited the pension committee Web site and had not attended any seminars or read any document prepared by Goodman concerning health insurance costs for retired employees. He testified that he first saw the Retirement Handout shortly before trial and that he was confused when he testified in his deposition that he reviewed it annually.

Commissioner Mary Ann Borgeson testified that the Board prepared a budget every year and talked about continuing to provide the health insurance benefit to retired employees. She recalled negotiations with Christiansen and his fellow union members, but denied stating that retired employees would always be able to participate in the Plan at the same cost as active employees.

Commissioner Marc Kraft testified that at the time resolution No. 596 was adopted, he had no knowledge of any representations made by Goodman to County employees about the amount of health insurance premiums they would have to pay in order to participate in the Plan during retirement. He never read any handouts prepared by her that contained anything dealing with health insurance for retired employees, nor did he attend any seminars that she presented. He never read the pension committee Web site. Prior to September 2009, Kraft was

unaware that health insurance was offered to retired employees. Similarly, Commissioner Pam Tusa testified that she "had no understanding" about the ability of retired employees under age 65 to participate in the Plan.

Commissioner Chris Rodgers testified that in 2009, he was aware that retired employees under the age of 65 were allowed to participate in the Plan but was not aware of any representations made by the County's representatives, including Goodman, to employees about the amount of premiums they would pay during retirement. He never attended a seminar in which retirement benefits were discussed and never read documentation of any type that mentioned health insurance for retired employees. He did not read the pension committee Web site while a commissioner.

As of January 1, 2010, there were 250 to 275 retirees participating in the health insurance plan. At that time, between 1,850 and 2,300 active full-time employees were eligible for the benefit. If the County spread costs equally across all participants, the increase in premium costs for the retirees would not have been as significant. Although the retirees knew that insurance costs would increase incrementally every year, the amounts were not "staggering." McShane testified that subjecting the active employees to a substantial increase in premium rates would cause an "uproar." The payroll coordinator testified that "the employees would be raising Cain" if the County had attempted to raise active employees' rates to the same level it raised them for the retirees.

District Court Order and Judgment

On March 8, 2013, the district court entered an order following trial. The court found that equitable estoppel barred the County from denying the existence of a contractual obligation to treat retired employees under age 65 the same as active employees for the purpose of setting health insurance premiums. The court also stated that "[a]lthough there is likely sufficient evidence to find a contractual obligation arose via ratification, the Court will only make the finding that the Board had sufficient knowledge for ratification given all of the evidence

supporting [the retirees'] equitable estoppel claim." Having found the existence of a contractual obligation, the court determined that resolution No. 596 violated the Contracts Clauses of the U.S. and Nebraska Constitutions because it constituted a substantial impairment on the contractual obligation. In finding that the County's actions were not a legitimate exercise of sovereign powers, the court noted that there was no evidence that the disadvantages to the retirees were offset by any new comparable advantages and that other options were available to achieve the same amount of cost savings.

The district court subsequently entered a permanent injunction, enjoining the County from treating the retirees differently than active employees in determining the amount of premiums to be paid for participation in the Plan. It ordered the County to repay over $1 million in premiums. Because the court found liability under 42 U.S.C. § 1983 (2012) for the violation of the Contracts Clauses, it awarded $178,703.94 in attorney fees pursuant to 42 U.S.C. § 1988.

The County timely appealed, and the retirees filed a cross-appeal. Pursuant to statutory authority, we granted the County's petition to bypass the Nebraska Court of Appeals.[3]

ASSIGNMENTS OF ERROR

The County assigns that the district court erred in (1) exercising jurisdiction even though the retirees failed to comply with the county claims statute, (2) finding sufficient evidence of equitable estoppel to create a binding legal contract concerning the amount of health insurance premiums the retirees would pay after retirement, (3) finding that the Board ratified certain representations by County employees concerning the amount of premiums retirees would pay in order to participate in the Plan after retirement, (4) finding that various representations concerning health insurance premiums created a vested contractual obligation of the County to its retirees, (5) finding that resolution No. 596 violated the Contracts Clauses of the U.S. and Nebraska Constitutions, (6) finding that the resolution impaired the County's obligation to its retirees and was a

[3] See Neb. Rev. Stat. § 24-1106(2) (Reissue 2008).

violation of the Contracts Clauses, and (7) finding commonality and certifying a class.

On cross-appeal, the retirees assign that the district court erred in (1) granting summary judgment to the County on the retirees' claim that a contractual obligation arose under *Halpin v. Nebraska State Patrolmen's Retirement System*,[4] (2) failing to find a contract arose under *Halpin*, and (3) failing to rule that a contract arose via ratification.

STANDARD OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[5]

[2-5] Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review.[6] Whether a particular action is one at law or in equity is determined by the essential character of a cause of action and the remedy or relief it seeks.[7] The retirees claimed violations of the Contracts Clauses of the U.S. and Nebraska Constitutions. They sought injunctive relief and declaratory relief, as well as monetary damages incident to such relief. An action for injunction sounds in equity.[8] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.[9]

[6,7] Although the retirees' actions had elements of both an action in equity and one at law, we conclude that the primary objective was equitable relief, not monetary damages. On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions

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[4] *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982).

[5] *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[6] *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 121, 738 N.W.2d 813 (2007).

[7] *Id.*

[8] *Obermiller v. Baasch*, 284 Neb. 542, 823 N.W.2d 162 (2012).

[9] *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[10] But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[11]

ANALYSIS

Noncompliance With County Claims Statute

We first address the County's jurisdictional argument. The County contends that the district court lacked jurisdiction over this matter because the retirees filed their complaints with the court and not with the county board as required by the county claims statute.[12] The county claims statute provides, in pertinent part, that "[a]ll claims against a county shall be filed with the county clerk within ninety days from the time when any materials or labor, which form the basis of the claims, have been furnished or performed . . . ."[13] The purported contract at issue in this case concerns health insurance benefits. Compliance with § 23-135 was not required. We conclude that the district court properly exercised jurisdiction over the matter.

Contract Under *Halpin*

Before addressing the County's other assignments of error, we consider the retirees' claim on cross-appeal that the district court erred in failing to find a contract arose under *Halpin*[14] and in granting summary judgment to the County on that claim. The retirees argue that postretirement health insurance is a form of deferred benefit subject to *Halpin* and that the County's long practice of providing the retirees with

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[10] See *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013).

[11] See *id.*

[12] See Neb. Rev. Stat. § 23-135 (Reissue 2012).

[13] § 23-135(1).

[14] *Halpin, supra* note 4.

health insurance benefits gave rise to a contractual obligation. The retirees assert that under *Halpin*, when an employee relies upon an administrative pattern and practice regarding a deferred benefit to the employee's detriment and to the benefit of the employer, the employee has expectations protected by contract law.

Halpin involved a case decided under the Contracts Clause of the U.S. Constitution. For 10 years, the computation of a retiring patrolman's final average monthly salary included a lump-sum payment received for accumulated but unused vacation and sick leave. Effective January 4, 1979, that lump-sum payment was excluded. A retired member of the patrol brought a class action suit seeking a declaratory judgment that the final average monthly salary of a retiring patrolman should include the lump-sum payment. The trial court determined that the lump-sum payment should not be included in the final average monthly salary because the administrative policy of including such payments did not create contractual rights. On appeal, we reversed. We recognized that employee pensions were not gratuities, but, rather, were deferred compensation for services rendered. We stated that employees' rights with regard to their pensions were contractual in nature. Thus, we found that the change in calculating pension annuities resulted in an unconstitutional impairment of the retiring members' contractual rights.

[8] More recently, we considered whether an employee had a contractual right to a long-term disability policy for purposes of the Contracts Clause. In *Livingston v. Metropolitan Util. Dist.*,[15] a disabled employee relied upon *Halpin* in arguing that his contractual rights were interfered with when the portion of long-term disability coverage that provided for lifetime benefits was eliminated. We considered whether the long-term disability policy was akin to a pension or deferred compensation such that the disabled employee had a contractual right for purposes of the Contracts Clause. We reasoned that it did not meet the definition of deferred compensation, i.e., it was

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[15] *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

not "compensation which is earned in exchange for services rendered."[16] We noted that enrollment in the plan was purely voluntary and that the accrual of coverage depended upon the payment of premiums and the occurrence of an injury rather than on the rendering of services. And because the policy was not a pension or deferred compensation, we concluded that the employee had no contractual right in the policy for purposes of the Contracts Clause.

In *Livingston*, we disapproved an earlier case to the extent that it was inconsistent. We stated that *Omer v. Tagg*[17] "appears to hold, with little analysis, that health insurance is akin to deferred compensation."[18] In *Omer*, a retired patrolman sued after being told that he was ineligible to participate in the State's group insurance program. When hired, the patrolman was told by the superintendent of the patrol or one of his designees that upon retirement, the patrolman would be allowed to continue to participate in the group health insurance upon payment of the premium. We stated in *Omer* that the State's position that benefits were a gratuity was rejected in *Halpin* and that "promises made at the time of employment were for compensation to be enjoyed at retirement and constituted a contract enforceable against the State."[19] Because this reasoning, as it pertains to health insurance, was inconsistent with our opinion in *Livingston*, it was disapproved.

We adhere to the reasoning expressed in *Livingston*. The Plan in the instant case is not a pension or deferred compensation. An employee's participation in the Plan was purely voluntary, and obtaining coverage under the Plan was not contingent upon the rendering of services, but, rather, required the payment of premiums.

[9,10] Nebraska statutes differentiate between plans for health insurance for county employees and plans for retirement. A statute concerning employee benefit plans for a political

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[16] *Id.* at 307, 692 N.W.2d at 480.

[17] *Omer v. Tagg*, 235 Neb. 527, 455 N.W.2d 815 (1990).

[18] *Livingston, supra* note 15, 269 Neb. at 308, 692 N.W.2d at 481.

[19] See *Omer, supra* note 17, 235 Neb. at 530, 455 N.W.2d at 817.

subdivision, such as a county, requires only that the political subdivision "may" establish benefit plans for its employees which will provide medical coverage.[20] The word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.[21] On the other hand, a county's retirement system "shall be composed of all persons who are or were employed by member counties and who maintain an account balance with the retirement system,"[22] and "[a]ll permanent full-time employees shall begin participation in the retirement system upon employment . . . ."[23] As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.[24] Members of the retirement system are vested after 3 years of participation.[25] There is no similar statutory vesting in a health insurance plan.

Because the Plan is not a pension or deferred compensation, the retirees had no contractual right to participate in the Plan for the same premiums paid by active employees. As we concluded in *Livingston*, no analysis under the Contracts Clause is necessary. The district court did not err in determining that the County's practice of allowing retirees to participate in the Plan for the same premiums as active employees did not create contractual rights protected by the Contracts Clause and in granting summary judgment to the County on that claim.

Equitable Estoppel

We next consider whether the district court erred in finding that equitable estoppel prohibited the County from increasing the premiums to be paid by the retirees above those paid by active employees. The County argues that equitable estoppel

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[20] See Neb. Rev. Stat. § 13-1614 (Reissue 2012).

[21] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

[22] See Neb. Rev. Stat. § 23-2306(1) (Supp. 2013).

[23] § 23-2306(2)(a).

[24] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[25] See Neb. Rev. Stat. § 23-2319(3) (Supp. 2013).

cannot apply to create a contractual obligation to treat the retirees the same as regular active employees. We agree.

[11,12] The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.[26] Although the State and its political subdivisions can be equitably estopped, the doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand; in such cases, the doctrine is to be applied with caution and only for the purpose of preventing manifest injustice.[27]

[13] Equitable estoppel cannot create a contractual obligation where one does not otherwise exist. We have already concluded that the retirees had no contractual right to participate in the Plan at the same premiums as active employees. Here, the district court used estoppel to create a vested obligation on the part of the County. Equitable estoppel does not create a new right or give a cause of action; rather, it serves to protect rights already acquired.[28] It may be urged for protection of a right, but it can never create a right.[29]

Because the retirees had no contractual right to pay the same premiums as active employees, we conclude that the district court erred in using estoppel to create such a contractual obligation. Accordingly, we reverse the district court's judgment finding a contractual obligation based upon equitable estoppel.

Ratification

[14,15] We next consider whether a contractual obligation arose via ratification. Ratification is the acceptance of a

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[26] *Burns, supra* note 24.

[27] See *Berrington Corp. v. State*, 277 Neb. 765, 765 N.W.2d 448 (2009).

[28] *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

[29] See *id.*

previously unauthorized contract.[30] Ratification of an agent's unauthorized acts may be made by overt action or inferred from silence and inaction.[31]

Both parties fault the district court's determination regarding ratification. The court found that the Board had sufficient knowledge to ratify the representations made, but the court declined to specifically find a contractual obligation through ratification. The retirees argue that the court erred in failing to expressly rule that a contractual obligation arose through ratification. The County, on the other hand, argues that the court erred in concluding that the Board ratified previous representations concerning premiums to be paid by retirees.

[16,17] A county enters into contracts by a majority vote of its board of commissioners.[32] For purposes of this opinion, we assume, without deciding, that the County had the power to contract for health insurance for the retirees. A principal may ratify what he could have authorized.[33] Here, ratification of a contractual obligation could only occur by the act of a majority of the commissioners.

[18] But ratification by a majority of the Board is not supported by the evidence. Essential to a valid and effective ratification of an unauthorized act is the principal's complete knowledge of the unauthorized act and all matters related to it.[34] Thus, in order for there to have been a ratification of the representations concerning the premiums to be paid by retired employees participating in the Plan, a majority of the commissioners would have needed to know of them. But only one commissioner testified that he was aware of representations that retired employees would be treated as active employees for purposes of health insurance until age 65. A majority of the commissioners had not read the Retirement Handout and,

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[30] *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 285 Neb. 157, 825 N.W.2d 779 (2013).

[31] *Id.*

[32] See Neb. Rev. Stat. §§ 23-103 and 23-104(6) (Reissue 2012).

[33] *Millett v. Miller*, 135 Neb. 123, 280 N.W. 442 (1938).

[34] *Western Fertilizer v. BRG*, 228 Neb. 776, 424 N.W.2d 588 (1988).

thus, did not know of the representation contained therein. In a recent case involving a limited partnership, we stated that even if a majority of the limited partners had ratified the acts, there could be no ratification where the partnership agreements required consent of all of the limited partners.[35] Similarly, the Board could not create a contractual obligation through ratification when a majority of the commissioners did not even know of the representations.

The district court imputed knowledge to the commissioners. The court recognized that four commissioners testified they had not read Goodman's handouts or attended the retirement seminars, but the court stated that such inaction did not insulate the commissioners from knowledge. The court relied on *Baxter v. National Mtg. Loan Co.*,[36] where we stated:

> "[T]he principal cannot be justified in wilfully closing his eyes to knowledge. He cannot remain ignorant where he can do so only through intentional obtuseness. He cannot refuse to follow leads, where his failure to do so can only be explained upon the theory that he preferred not to know what an investigation would have disclosed. He cannot shut his eyes where he knows that irregularities have occurred. In such a case, he will either be charged with knowledge, or with a voluntary ratification with all the knowledge which he cared to have."

We decline to impute knowledge of the representations to the commissioners under the facts of this case. Evidence established that the commissioners receive many documents to review and that it is up to each commissioner to decide what to read in performing his or her duties. While information was available to them that employees were being informed they would pay the same premiums as active employees to participate in the Plan postemployment, there was no evidence that the commissioners knew irregularities were occurring or that they intentionally chose not to learn of the representations. Because the commissioners had no actual knowledge of these

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[35] See *Brook Valley Ltd. Part., supra* note 30.

[36] *Baxter v. National Mtg. Loan Co.*, 128 Neb. 537, 558-59, 259 N.W. 630, 640 (1935).

representations before they passed the resolution at issue, the district court erred in finding that the Board had sufficient knowledge to ratify the representations. We conclude that no contractual obligation arose via ratification. Although the court imputed knowledge to the Board, it appears to have declined to grant relief on the basis of ratification. Understanding the court's order to deny relief on that ground, we affirm its judgment on that issue.

Remaining Assignments of Error

[19] We have determined that the retirees did not have a contractual right in the Plan for purposes of the Contracts Clauses and that no contractual obligations arose under the theories of equitable estoppel or ratification. Because the district court's judgment must be reversed, we do not consider the County's other assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[37]

CONCLUSION

We conclude that the district court properly rejected the retirees' claim that a contractual obligation arose under *Halpin* and that the court did not err in declining to grant relief on the basis of ratification. We reverse the court's determination that equitable estoppel created a contractual obligation, and we remand the cause with direction to enter judgment for the County on the retirees' claims.

Affirmed in part, and in part reversed and remanded with direction.

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[37] *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014).

James Tierney and Jeffrey Tierney, appellants, v. Four H Land Company Limited Partnership et al., appellees.

852 N.W.2d 292

Filed July 18, 2014. No. S-13-720.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, an appellate court decides factual questions de novo on the record and will resolve questions of fact and law independently of the trial court's conclusions.
2. **Specific Performance: Contracts.** Specific performance may be granted only where there is a valid, legally enforceable contract and the party seeking specific performance has substantially complied with the terms of that contract.
3. **Contracts.** Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses.
4. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
5. **Specific Performance: Contracts: Equity.** Specific performance should be granted, as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby.
6. **Specific Performance: Equity.** A court's discretion to order specific performance is controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies.
7. ____: ____. Exoneration from specific performance may be available when specific performance would be inequitable or unjust due to hardship on the one from whom performance is sought.
8. **Specific Performance: Contracts.** Hardship arising from a circumstance unforeseeable at entry into a contract may excuse specific performance of a contract, provided that the hardship is not self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance.
9. **Contracts.** A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because the contract turns out to be difficult or burdensome to perform.
10. ____. If a party by his own contract creates a duty or imposes a charge on himself, he must under any and all conditions substantially comply with the undertaking.
11. **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 Lincoln County: WILLIAM T. WRIGHT, Judge. Reversed and remanded with direction.

James J. Paloucek, of Norman, Paloucek & Herman Law Offices, for appellants.

Jay C. Elliott, of Elliott Law Office, P.C., L.L.O., for appellees Four H Land Company Limited Partnership and Western Engineering Company, Inc.

David W. Pederson, of Pederson Law Office, and Lou Jungbauer, of Yaeger, Jungbauer & Barczak, for appellees Frank Aloi and Aloi Living Trust.

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

WRIGHT, J.

NATURE OF CASE

In 1998, James Tierney and Jeffrey Tierney entered into an agreement with Four H Land Company Limited Partnership (Four H) and Western Engineering Company, Inc. (Western), regarding operation of a sand and gravel pit on property owned by Four H. In this agreement, the Tierneys agreed to waive their right to contest the issuance of a conditional use permit (CUP) for operation of the sand and gravel pit. In return, Four H and Western accepted various conditions regarding operation of the sand and gravel pit, including reclamation of the property after expiration of the CUP.

In 2009, the Tierneys brought an action for specific performance. They alleged that Four H and Western had not fulfilled the conditions of the agreement. The district court concluded that specific performance was not an appropriate remedy and dismissed the Tierneys' action. We reverse, and remand with direction to order specific performance.

SCOPE OF REVIEW

[1] "[A]n action for specific performance sounds in equity, and on appeal, we decide factual questions de novo on the record. We will resolve questions of fact and law independently

of the trial court's conclusions." *Mogensen v. Mogensen*, 273 Neb. 208, 212, 729 N.W.2d 44, 50 (2007).

FACTS

Background

This case involves a parcel of real estate previously owned by Four H and currently owned by the Aloi Living Trust and its trustee. Henceforth, this real estate will be referred to as "the property." Under county zoning, the property was located within an "A-1 Agricultural District" and historically had been a hayfield. The Tierneys own lots 3 and 4 of the Hidden Lakes subdivision in Lincoln County, Nebraska, located immediately south of the property.

1997 CUP

In 1997, Four H applied for a CUP to operate a sand and gravel pit on the property. The application was approved by the Lincoln County Planning Commission and the Lincoln County Board of Adjustment. The Tierneys appealed approval of the 1997 CUP to the district court, and in July 1998, the 1997 CUP was set aside due to the board of adjustment's failure to follow the correct procedures for issuance of a CUP under zoning regulations.

1998 CUP and Accompanying Agreement

Four H applied a second time for a CUP, and again, the Tierneys objected to the application. To resolve their dispute regarding the sand and gravel pit operation, in August 1998, Four H, Western, the Tierneys, and the owners of lots 1 and 2 of the Hidden Lakes subdivision entered into an agreement. The agreement provided that the Tierneys and the other property owners would "waive their right to appeal . . . the issuance of the [CUP] for the sand and gravel pit operation." In return, Four H and Western accepted various conditions to the operation of the sand and gravel pit.

Four H's application for a CUP was thereafter approved. The 1998 CUP was to be effective for a period of 10 years, terminating on October 31, 2007. The agreement integrated

the terms of the 1998 CUP, "except to the extent they [were] contrary to or less restrictive than the terms" of the agreement, in which case the agreement would control.

The relevant terms of the agreement provided:

> As the operation in one phase is completed and the operation moves to the next phase, [Four H] and [Western] shall reclaim the land in the phase of prior operations by filling to at least its approximate original topography, covered with a minimum of four (4) inches of top soil and seeded with appropriate native grasses to prevent erosion and to visually restore the site, except the area to be used for a lake. This shall be done within one (1) year of termination of operations on the phase. . . . In any event, reclamation and restoration of the property shall be completed by October 31, 2008. Restoration shall be the joint and several obligation of Four H . . . , Western . . . , and any other operator of the sand and gravel pit.

The relevant provision of the 1998 CUP provided:

> At the close of each phase of the sand and gravel pit operation the area shall be leveled to its original topography within one year of termination of each phase. The areas not covered by water shall then be covered with four inches (minimum) of topsoil and seeded with appropriate native grasses to prevent erosion of the soil.

This condition was incorporated into the 1998 CUP from the original 1997 CUP. This was required by the agreement, which provided that the 1998 CUP "shall include, at a minimum, the terms and conditions contained in the [CUP] approved by the Lincoln County Planning Commission on September 9, 1997, on the initial application of [Four H]."

Action for Specific Performance

In April 2009, the Tierneys filed an action for specific performance against Four H (prior owner of the property), Western (operator of the sand and gravel pit), and the Aloi Living Trust and its trustee (current owners of the property). The Tierneys alleged that Four H and Western had "failed to meet the requirements of the [1998 CUP]" or "their

obligations under the agreement." In particular, the Tierneys claimed that

> [u]nder the [1998 CUP] and the agreement, Four H and Western were required to, and agreed that they would, no later than October, 2008, return the area of the mining operation to its original topography. Instead, Four H and Western have raised the ground level of the majority of the area of the mining operation to approximately six feet to eight feet higher than the original topography.

The Tierneys prayed for an order requiring Four H and Western to specifically perform.

Four H and Western denied that they had failed to meet their obligations under the 1998 CUP or the agreement. They claimed to have "substantially complied with and performed the obligations and requirements of the 'Agreement' dated August 11, 1998." The Aloi Living Trust and its trustee also alleged that Four H and Western had complied with the 1998 CUP and the agreement.

Summary Judgment Proceedings

All parties filed motions for summary judgment. After a hearing at which evidence was received, the district court entered summary judgment in favor of Four H, Western, and the Aloi Living Trust and its trustee. The Nebraska Court of Appeals affirmed the judgment. See *Tierney v. Four H Land Co.*, No. A-10-103, 2010 WL 4354243 (Neb. App. Nov. 2, 2010) (selected for posting to court Web site). We granted further review and reversed the judgment, because we determined that the district court judge should have recused himself. See *Tierney v. Four H Land Co.*, 281 Neb. 658, 798 N.W.2d 586 (2011). "Without addressing the underlying merits of th[e] dispute," we remanded the cause for a new hearing. *Id.* at 663, 798 N.W.2d at 591.

On remand, a different judge of the district court overruled all the motions for summary judgment. It was determined that the 1998 CUP and the agreement were ambiguous as they related to the requirements imposed upon Four H and Western

and that those ambiguities created genuine issues of material fact that prevented summary judgment.

Bench Trial and District Court Order

The case proceeded to a bench trial, which was held over 4 trial days and included a "site visit." Thereafter, the district court dismissed the Tierneys' complaint for specific performance.

The district court explained its findings of fact as to the condition of the property:

> The evidence about the topography of the subject property before and after the mining is basically undisputed. Before the gravel mining started the property was relatively level with no significant rises or depressions, was farmed primarily as a hayfield, and essentially mirrored the lay of the land on the south side of the country road . . . which separates the mined property from property owned by . . . the Plaintiffs Tierneys. Now after mining operations have been terminated, the subject property has a lake of approximately 30 acres surface area and has, around the entire perimeter of the property, a continuous earthen berm that is elevated 5 to 10 feet above the natural topography and which is approximately 100 to 150 feet in width.

The court concluded that "[e]ssentially, none of the property is currently at the elevation it was before the mine. The encircling berm is elevated above the original topography and the lake is below the original topography."

The district court concluded that the 1998 CUP and the agreement were ambiguous "in the requirements they impose[d] on [Four H and Western]." The court found that the 1998 CUP and the agreement were susceptible to at least two interpretations. It explained:

> The [1997 and 1998 CUP's and the county zoning regulations] appear to impose an unconditional requirement for a return of the land to its original topography, i.e., its natural state. The August 11, 1998 Settlement Agreement

> (which itself is incorporated into the [CUP] of the same date) arguably allows [Four H and Western] to fill excavated areas to a height above the natural topography, but not less.

(Emphasis in original.)

To resolve this apparent conflict between the 1998 CUP and the agreement, the district court examined the clause in the agreement that integrated the 1998 CUP and the agreement. The court noted the agreement stated that the terms and conditions of the 1998 CUP applied "except to the extent they are contrary to or less restrictive than the terms" of the agreement. But according to the court, the "restoration requirements of the Settlement Agreement are on their face 'less restrictive' in that they do allow 'filling' of the excavated area above the original topography, while the other documents require the area [to] 'be leveled to its original topography.'" Ultimately, the court found that the intention of the parties was to adopt the more restrictive requirement, even if it was in the 1998 CUP and not the agreement.

The district court concluded that the "most reasonable objective manifestation of the intention of the parties was the restoration of the property to its original topography, except for a small lake." Given this determination as to the intended restoration of the property and the aforementioned findings as to the actual condition of the property, the court found that Four H and Western had not met the requirements of the 1998 CUP and the agreement.

The district court next considered whether it should order specific performance. It stated that specific performance "would appear to be the only adequate remedy" due to the fact that damages "would be uncertain and difficult, if not impossible, to prove." However, the court ultimately concluded that specific performance was not an appropriate remedy, because the 1998 CUP and the agreement were not sufficiently certain and definite and the burden upon Four H and Western outweighed the benefits to the Tierneys.

The district court applied a "heightened burden of certainty and definiteness" to determine whether it should order specific

performance. It concluded the 1998 CUP and the agreement did not meet the requirements of certainty and definiteness, because identifying the intent of the parties as to restoration of the property had been "tortuous" and required interpreting the language of the agreement "in a way contrary to natural usage." (Emphasis in original.) Therefore, the court held that the 1998 CUP and the agreement were "not sufficient . . . to support specific performance."

The district court next discussed the "comparative benefits and burdens of a decree of specific performance," an analysis the court admitted had "never arisen in Nebraska." It concluded that the burdens on Four H and Western were "so out of balance" with the benefits to the Tierneys that the "overall result would be more spiteful than just." It stated that performance of the 1998 CUP and the agreement would be a project "massive in both scope and expense." Conversely, it concluded that the benefits to the Tierneys from specific performance would "essentially be aesthetic ones" and that even if specific performance were ordered, the Tierneys' "rural living circumstances [were] by no means guaranteed."

Given the "massive" burdens that specific performance would impose upon Four H and Western and the resulting "aesthetic" benefits to the Tierneys, the district court denied specific performance and dismissed the Tierneys' complaint.

The Tierneys timely appeal. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

ASSIGNMENTS OF ERROR

The Tierneys generally assign that the district court erred in failing to order specific performance of the 1998 CUP and the agreement. In particular, they assign, restated, that the court erred by (1) imposing a heightened burden of certainty and definiteness, (2) comparing the benefits and burdens of performance, and (3) allowing the property to exist in a state that violated a condition of the 1998 CUP and applicable county zoning regulations.

ANALYSIS

[2] The question presented is whether the district court erred by not ordering specific performance. Specific performance is an appropriate remedy only under certain circumstances. Specific performance may be granted only where there is a valid, legally enforceable contract, see *Marten v. Staab*, 249 Neb. 299, 543 N.W.2d 436 (1996), and the party seeking specific performance has substantially complied with the terms of that contract, see *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006). There must be no adequate remedy at law for breach of the relevant contract. See *Brown v. Knox*, 219 Neb. 189, 361 N.W.2d 540 (1985). Where a contract relates to real property, the inadequacy of a remedy at law is assumed. See *Mohrlang v. Draper*, 219 Neb. 630, 365 N.W.2d 443 (1985).

In the instant case, the district court found that the "most reasonable objective manifestation of the intention of the parties" was for the property to be restored to its original topography, except for a small lake. It also determined that (1) after completion of the sand and gravel pit operation, Four H and Western left the property at a higher elevation than before, in breach of the 1998 CUP and the agreement; (2) the Tierneys had no adequate remedy at law for Four H's and Western's breach; and (3) if the court were to order specific performance, it would order Four H and Western to

> return the topography to its natural condition of a largely level field of approximately 2770 feet elevation on the west side, gently sloping to an elevation of approximately 2765 feet on the east side, leaving a kidney-shaped lake of approximately 11 acres of surface area in the middle of the property and then cover the areas, other than the 11-acre [lake], with a minimum of 4 inches of topsoil and plant native grasses.

Four H and Western did not file a cross-appeal to challenge these findings.

After making the above findings of fact, the district court declined to order specific performance, because it found that the 1998 CUP and the agreement were not sufficiently certain and definite to support specific performance and that the

benefits of performance were greatly outweighed by the burdens of restoring the property to its original topography. We review factual questions de novo on the record and resolve questions of law independently of the district court. See *Mogensen v. Mogensen*, 273 Neb. 208, 729 N.W.2d 44 (2007). We conclude as a matter of law that the court erred in not ordering specific performance.

Heightened Burden of Certainty and Definiteness

The district court's first reason for denying specific performance was that the 1998 CUP and the agreement did not meet a "HEIGHTENED BURDEN OF CERTAINTY AND DEFINITENESS." The court found that the 1998 CUP and the agreement were ambiguous as to whether the property had to be returned to its original topography or could be returned to "at least" its original topography. Given this ambiguity, the court concluded that the 1998 CUP and the agreement were not sufficiently certain to support specific performance. We disagree.

The conditions of the 1998 CUP and the agreement, considered in pari materia, were unambiguous and clearly indicated that upon completion of the sand and gravel pit operation, Four H and Western were required to return the property to its original topography. Therefore, the terms of the 1998 CUP and the agreement were sufficiently certain and definite to allow for specific performance.

The agreement required Four H and Western to reclaim the property after each phase of the sand and gravel pit operation by "filling to at least its approximate original topography . . . except the area to be used for a lake." In terms of reclamation, the 1998 CUP imposed a stricter requirement upon Four H and Western than the agreement. The 1998 CUP required that after each phase of the operation, the property would be "leveled to its original topography." The final elevation of the property could be neither higher nor lower than the elevation prior to the sand and gravel pit operation, except for the lake.

[3] When viewed alone, the agreement arguably might be susceptible to two interpretations. It mentions "filling" the

property, but not leveling, and uses the qualifier "at least." But the requirements of the agreement cannot be interpreted alone. Whatever the construction of a particular clause of a contract, standing alone, may be, it must be read in connection with other clauses. *Hearst-Argyle Prop. v. Entrex Comm. Servs.*, 279 Neb. 468, 778 N.W.2d 465 (2010). This is particularly true in the instant case, where the parties integrated the 1998 CUP into the agreement.

We must view the agreement in connection with the 1998 CUP, even though the 1998 CUP is more restrictive in its reclamation requirements. The parties were required to comply with the provisions of both the 1998 CUP and the agreement. The only exception was that the parties would not be bound by a requirement of the 1998 CUP that was "contrary to or less restrictive than the terms" of the agreement. But the 1998 CUP could be more restrictive than the agreement. The requirements of the 1998 CUP were imposed by county zoning regulations. Therefore, because the reclamation provision of the 1998 CUP was more restrictive than the agreement, not less, it was binding upon the parties.

[4] A contract is ambiguous when a "word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Beveridge v. Savage*, 285 Neb. 991, 996, 830 N.W.2d 482, 487 (2013). When viewed in conjunction with the 1998 CUP, the agreement was susceptible of only one reasonable interpretation—that upon completion of the sand and gravel pit operation, Four H and Western were required to restore the property to its original topography. By incorporating the 1998 CUP into the agreement, the parties limited the actions that would comply with the agreement to the action required by the 1998 CUP. And the 1998 CUP clearly required a return to the original topography, as required by county zoning regulations.

Collectively, the 1998 CUP and the agreement unambiguously required a return to the original topography, except for a lake created by the extraction of gravel from the property. Both the 1998 CUP and the agreement required that reclamation of the property would occur in phases that coincided

with the phases of the sand and gravel pit operation. These phases were identified "on the site plan." The site plan was part of the application for the 1998 CUP and showed the final phase of the sand and gravel pit operation as leaving a lake that covered approximately 11 acres. The lake that remained would represent the volume of gravel that had been removed during operations. Because the parties referred to and relied upon the site plan in the agreement, we conclude that they agreed to the phases outlined in the site plan, including the 11-acre lake.

The 1998 CUP and the agreement set forth the core requirements for reclamation of the property and were sufficiently certain and definite to describe what was required of Four H and Western. The district court erred in concluding to the contrary.

Comparison of Benefits and Burdens of Specific Performance

The second reason given by the district court for not ordering specific performance was that the burdens on Four H and Western outweighed the benefits to the Tierneys. The Tierneys assert that such a comparison of the benefits and burdens of specific performance "finds no support in Nebraska law" and "ignores clear Nebraska law on the applicability of specific performance as a remedy in cases involving real estate." Brief for appellants at 21 and 27. We agree.

[5,6] Specific performance should be granted, "'as a matter of course, of a written contract cognizable in equity, which has been made in good faith, whose terms are certain, whose provisions are fair, and which is capable of being enforced without hardship, where the ends of justice will be subserved thereby.'" *Kucera v. Kavan*, 165 Neb. 131, 138, 84 N.W.2d 207, 211 (1957), quoting *Garsick v. Dehner*, 145 Neb. 73, 15 N.W.2d 235 (1944). A court's discretion to order specific performance is

> controlled by established principles of equity and depending upon the facts and circumstances of the particular case. It is not a discretion in the sense that it may be

> granted or denied at the will or pleasure of the judge. It is governed by the elements, conditions, and incidents that control the administration of all equitable remedies.

Mainelli v. Neuhaus, 157 Neb. 392, 395-96, 59 N.W.2d 607, 610 (1953).

[7] Because specific performance must be granted or denied according to general equitable principles, concepts of fairness and equity can be considered. See *id*. In particular, "[e]xoneration from specific performance may be available when specific performance would be inequitable or unjust due to hardship on the one from whom performance is sought." *Mohrlang v. Draper*, 219 Neb. 630, 633, 365 N.W.2d 443, 447 (1985).

[8] But to the extent hardship enters into the equation, it is not compared to the benefits accruing to the party seeking performance. In analyzing whether hardship is sufficient to excuse performance under a contract, the question is whether the hardship complained of was foreseeable at entry into the contract. Hardship arising from a "circumstance unforeseeable at entry into the contract" may excuse specific performance of a contract, provided that the hardship is not "self-inflicted or caused through inexcusable neglect on the part of the person seeking to be excused or exonerated from specific performance." *Id*. at 634, 365 N.W.2d at 447. It is inconsequential to this analysis how the hardship compares to the benefits that would be obtained by the party seeking performance.

We adopted the foregoing approach to hardship, because under a contrary rule, "one would derive a benefit from his or her own inexcusable neglect." *Id*. For the same reasons, we decline to depart from our precedent and adopt the cost-benefit analysis used by the district court—that is, comparing the cost of performance to the benefits that would accrue to the party seeking specific performance.

Under an approach that weighs burdens and benefits of performance without considering the origins of those burdens, a party could be excused from specific performance due to the exact burdens it willingly and legally assumed under the contract. Furthermore, if the only relevant factor were the degree

of hardship, a party could derive positive benefits from creating impediments to its own performance, such as by engaging in compounded breaches of the contract, and would thereby be encouraged to do so.

The instant case illustrates the potential problems of the district court's approach to hardship. The court excused Four H and Western from their contractual obligations, because performance would require them to "shove a huge amount of earth back into" the lake created by the sand and gravel pit operation in order to return the property to its original topography. The court explained that this requirement was burdensome, because it would be a project "massive in both scope and expense," would require "pushing approximately 25 acres of fill material into the lake," and might require Four H and Western to obtain permits and licenses. (Emphasis in original.) We find it significant that these burdens were required by the 1998 CUP and the agreement and were the result of Four H's and Western's own actions.

The parties contemplated that performance by Four H and Western would require filling in a lake created by the sand and gravel pit operation. Indeed, the 1998 CUP and the agreement specifically required the lake to be filled in according to the site plan after each phase of the operation. The 1998 CUP and the agreement contemplated that restoring the property to its original topography would be the responsibility of Four H and Western and that they would obtain all the required permits. Thus, Four H and Western entered into the 1998 CUP and the agreement with knowledge that they would be taking on such burdens. They received the benefits of removing gravel from the property for 10 years and cannot now be excused from fulfilling their contractual obligations to restore the property due to the very burdens they intended to assume under the CUP and the agreement.

The 1998 CUP and the agreement required Four H and Western to return the property to its original topography at the conclusion of each phase of the sand and gravel pit operation. However, Four H and Western did not engage in this incremental restoration. Instead, the district court found that Four H

and Western pumped sand into a "pile 10 to 12 feet high that was continuously extended as the operation made its clockwise circle of the property." By doing so, Four H and Western continually enlarged the lake until it covered 30 acres instead of 11 acres, which, in turn, created an increased burden of performance. They cannot claim that increased burden as justification for excusing specific performance. Four H and Western chose not to refill the sand after each stage of the operation. Having created the massive pile of sand, they cannot now claim that it is just too big to clean up.

[9,10] The approach of the district court rewarded Four H and Western for failing to perform their obligations under the 1998 CUP and the agreement. Such a result is neither just nor equitable. Generally speaking, contracts must be enforced even when performance works hardship. Parties "'"bind themselves by their lawful contracts, and courts cannot alter them because they work a hardship. . . . A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform."'" *Mohrlang v. Draper*, 219 Neb. 630, 634, 365 N.W.2d 443, 447 (1985), quoting *Wilson & Co., Inc. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950) (ellipsis in original). "'"If a party by his own contract creates a duty or imposes a charge on himself, he must under any and all conditions substantially comply with the undertaking."'" *Id.*

The district court erred in engaging in a comparison of the benefits and burdens of performance. Its consideration of burdens should have extended no further than a determination whether the burdens were foreseeable or self-inflicted. Such an analysis of hardship would have revealed that Four H's and Western's burdens were both foreseeable and self-inflicted, and therefore did not provide a reason to excuse Four H and Western from their obligation to restore the property to its original topography. See *Mohrlang v. Draper, supra*.

Specific performance was an appropriate remedy for Four H's and Western's breach, and the district court should have ordered it. We reverse the judgment of the district court

and remand the cause with direction to order Four H and Western to

> return the topography to its natural condition of a largely level field of approximately 2[,]770 feet elevation on the west side, gently sloping to an elevation of approximately 2[,]765 feet on the east side, leaving a kidney-shaped lake of approximately 11 acres of surface area in the middle of the property and then cover the areas, other than the 11-acre [lake], with a minimum of 4 inches of topsoil and plant native grasses.

Other Assignments of Error

[11] Because we have determined that the district court's decision not to order specific performance should be reversed, we need not address the remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Carey v. City of Hastings*, 287 Neb. 1, 840 N.W.2d 868 (2013).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court denying specific performance and remand the cause with direction to enter an order of specific performance.

Reversed and remanded with direction.

Cassel, J., not participating.

SKYLINE MANOR, INC., A NEBRASKA NONPROFIT CORPORATION, BY AND THROUGH THE FOLLOWING MEMBER OF THE BOARD OF DIRECTORS: EMERSON LINK, AS DIRECTOR AND ON BEHALF OF THE CORPORATION, APPELLANT, V. ROBERT L. RYNARD, SR., ET AL., AS MEMBERS OF THE BOARD OF DIRECTORS OF SKYLINE MANOR, INC., APPELLEES.

852 N.W.2d 303

Filed July 18, 2014. No. S-13-875.

1. **Standing: Jurisdiction.** The defect of standing is a defect of subject matter jurisdiction.
2. **Motions to Dismiss: Jurisdiction: Rules of the Supreme Court: Appeal and Error.** Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of subject matter jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(1) is subject to de novo review.
3. **Corporations.** A corporation's articles of incorporation and bylaws, together with State corporation law, regulate the manner in which a company's officials and directors must conduct the company's business.
4. ____. Unless waived, and until repealed, the bylaws of a corporation are the continuing rule for its government and affairs.

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

Keith I. Kosaki, Jeff C. Miller, and Duncan A. Young, of Young & White Law Offices, for appellant.

William F. Hargens and Ruth A. Horvatich, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees.

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

STEPHAN, J.

The district court for Douglas County determined that Emerson Link lacked standing to bring this derivative action on behalf of Skyline Manor, Inc. (Skyline), a Nebraska nonprofit corporation without members, and dismissed the action for lack of subject matter jurisdiction. We reverse, and remand for further proceedings.

FACTS

Skyline's mission is to provide housing, retirement, and nursing facilities for elderly persons in the Omaha, Nebraska, metropolitan area. As part of its mission, Skyline owns and operates the Skyline Retirement Community (SRC) in Omaha. SRC offers independent living, assisted living, rehabilitation services, and hospice care. Approximately 280 elderly persons reside at SRC.

Skyline's articles of incorporation provide that its management is vested in a board of directors. The articles further provide:

> The number of directors shall be as set forth in the Bylaws, consisting of not less than five directors. No less than one director shall be a resident of [SRC] and shall be democratically elected by the residents of [SRC] in accordance with the terms of the bylaws and applicable law.

Skyline's bylaws provide:

> Pursuant to Neb. Rev. Stat. §76-1313, one [resident] Director shall be elected annually by the residents of [SRC], pursuant to an election conducted by the residents, according to rules adopted by the residents in open session. A [resident] Director elected by the residents of [SRC] shall begin serving immediately after the annual election.

The bylaws further provide: "Each Resident Director shall serve for a term of one year, and shall continue to serve until a new Resident Director is elected by the residents of [SRC]." According to the bylaws, a resident director may be elected to more than one term and may be removed "only for cause and only upon the affirmative vote of a majority of the residents of [SRC] at a specially called election."

Link was elected as the resident director on December 19, 2011. Link participated in the annual meeting of the Skyline board of directors on March 29, 2012, at which he was welcomed as the new resident director. He also attended and participated in a board meeting on February 7, 2013. On that date, he filed a derivative action on behalf of Skyline. The complaint alleged that five of Skyline's directors—Robert

L. Rynard, Sr.; Rebecca J. Bartle; David L. Richey; Paige A. Harvey; and Dana Wadman-Huth (collectively the directors)—had engaged in financial mismanagement and sought an equitable accounting and injunctive relief. Link claimed standing to bring the action based on his capacity as the resident director.[1]

The directors entered a voluntary appearance and moved to dismiss the complaint pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(1). The directors claimed that the district court lacked subject matter jurisdiction, because Link was not a duly elected director of Skyline and, therefore, lacked standing to bring the derivative action. Following a hearing at which the court received documentary evidence offered by both sides,[2] the district court dismissed the complaint with prejudice. It reasoned that because at the time Link was elected as the resident director, Skyline was not operating SRC as a retirement community as that term is defined under Neb. Rev. Stat. §§ 76-1301 to 76-1315 (Reissue 2009), Link's election "pursuant to Neb. Rev. Stat. [§] 76-1313 was null and void." Link filed a timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

ASSIGNMENT OF ERROR

Link assigns, restated and summarized, that the district court erred in finding he lacked standing to bring the derivative action.

STANDARD OF REVIEW

[1,2] The defect of standing is a defect of subject matter jurisdiction.[4] Aside from factual findings, which are reviewed for clear error, the granting of a motion to dismiss for lack of

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[1] See Neb. Rev. Stat. § 21-1949 (Reissue 2012).

[2] See *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 830 N.W.2d 474 (2013) (noting receipt of evidence pertaining to § 6-1112(b)(1) motion is permitted).

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

[4] *In re Invol. Dissolution of Wiles Bros., supra* note 2; *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

subject matter jurisdiction under § 6-1112(b)(1) is subject to de novo review.[5]

ANALYSIS

Skyline is a Nebraska nonprofit corporation subject to the provisions of the Nebraska Nonprofit Corporation Act (the Act).[6] A derivative suit may be brought on behalf of a Nebraska nonprofit corporation by a member or director of the corporation.[7] The sole question before us is whether Link was a director of Skyline at the time he filed the derivative action.

The parties generally agree that Skyline originally operated SRC as a "retirement community" subject to the provisions of §§ 76-1301 to 76-1315. Section 76-1313 specifically provides that a corporation operating a retirement community must allow purchasers of units to select a representative to sit on the governing body of the corporation.

The record indicates that in 2009, Skyline changed the manner in which it operated SRC so that SRC was no longer a retirement community subject to § 76-1313. In 2010, an attorney representing Skyline advised the Nebraska Real Estate Commission of his opinion that because of this change, Skyline was not required to renew its license as a retirement community, and the executive director of the commission agreed. But following this structural change, Skyline did not amend the provisions of its articles and bylaws with respect to the requirement of a resident director.

The directors argue that because Skyline did not operate a retirement community subject to § 76-1313 at the time of Link's 2011 election, his election was "null and void."[8] This argument is based on the provision in the bylaws that the resident director shall be elected annually "[p]ursuant to Neb. Rev. Stat. §76-1313." The directors contend that based solely on this reference to § 76-1313, the articles of incorporation and the bylaws "clearly base[d] the position of a Resident

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[5] *Id.*

[6] See Neb. Rev. Stat. §§ 21-1901 to 21-19,777 (Reissue 2012).

[7] § 21-1949(a) and (b).

[8] Brief for appellees at 9.

Director"[9] on the applicability of § 76-1313, and that because § 76-1313 did not apply to SRC at the time of Link's election, he was "not a valid director of Skyline at the time of filing this lawsuit."[10] The district court agreed with this argument. We do not.

The Act requires a nonprofit corporation to have a board of directors[11] made up of individuals[12] and provides that "[t]he articles or bylaws may prescribe other qualifications for directors."[13] The Act defines bylaws to mean the code of rules adopted "for the regulation or management of the affairs of the corporation."[14] It provides that the articles of incorporation may set forth provisions relating to the board of directors and the management of corporate affairs which are "not inconsistent with law."[15] The Act also prescribes specific procedures for amending the articles of incorporation and bylaws of a nonprofit corporation.[16]

[3,4] Although there is one reference to § 76-1313 in Skyline's bylaws, neither the articles of incorporation nor the bylaws make election of the resident director dependent upon the existence of a legal obligation under § 76-1313. A corporation's articles of incorporation and bylaws, together with State corporation law, regulate the manner in which a company's officials and directors must conduct the company's business.[17] Unless waived, and until repealed, the bylaws of a corporation are the continuing rule for its government and affairs.[18] Here, neither the articles of incorporation nor the bylaws were

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[9] *Id.* at 8.

[10] *Id.* at 7.

[11] § 21-1968.

[12] § 21-1969.

[13] *Id.*

[14] § 21-1914(4).

[15] § 21-1921(b)(3).

[16] §§ 21-19,105 to 21-19,117.

[17] 18 C.J.S. *Corporations* § 164 (2007).

[18] *Id.*

amended after Skyline ceased to operate SRC as a retirement community subject to § 76-1313.

The fact that § 76-1313 does not presently obligate Skyline to provide for the election of a resident director by the residents of SRC does not change the fact that Skyline's bylaws and articles of incorporation continue to so provide. And no provision of law prevents Skyline from so providing. Link was duly elected as the resident director in 2011 and was serving in that capacity at the time he filed the derivative action. Link therefore has standing to bring the action.

CONCLUSION

For the foregoing reasons, Link has standing to bring this derivative action. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

IN RE INTEREST OF JUSTINE J. AND SYLISSA J., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLANT, V. SHAWNA R., APPELLEE.

849 N.W.2d 509

Filed July 18, 2014. No. S-13-993.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Rules of the Supreme Court: Appeal and Error.** Where the brief of a party fails to comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012), an appellate court may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error.
3. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
4. **Parental Rights: Abandonment: Words and Phrases.** For purposes of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child.

5. **Juvenile Courts: Parental Rights.** Termination of parental rights is permissible only in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code.
6. **Evidence: Words and Phrases.** Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved and, further, that it is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt.

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH CRNKOVICH, Judge. Affirmed.

Donald W. Kleine, Douglas County Attorney, Jennifer Crystal-Clark, and Patrick McGee, Senior Certified Law Student, for appellant.

Cassidy V. Chapman and Andrea M. Smith for appellee.

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

WRIGHT, J.

NATURE OF CASE

The State appeals from the order of the Douglas County Separate Juvenile Court which found that the minor children came within the meaning of Neb. Rev. Stat. § 43-292(1) and (9) (Cum. Supp. 2012), but that termination of the mother's parental rights was not in the children's best interests. The juvenile court specifically found that the State had not shown by clear and convincing evidence that such termination was in the children's best interests. We affirm.

SCOPE OF REVIEW

[1-3] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings. *In re Interest of Kendra M. et al.*, 283 Neb. 1014, 814 N.W.2d 747 (2012). However, where the brief of a party fails to comply with the mandate of Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2012), we may proceed as though the party failed to file a brief or, alternatively, may examine the proceedings for plain error. *In re Interest of Samantha L. & Jasmine L.*, 286 Neb. 778, 839 N.W.2d 265

(2013). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id*.

FACTS

This appeal involves Shawna R.'s parental rights to her biological daughters Sylissa J. and Justine J. The State did not seek to terminate the parental rights of the girls' father. Shawna has two other minor children; however, her parental rights to these two children are not the subject of this appeal.

On April 11, 2012, the State petitioned to remove Sylissa, age 14, and Justine, age 11, from Shawna's home. Both girls reported finding drug paraphernalia in the home, including pipes and needles. They reported that Shawna and her husband used drugs and alcohol regularly, left the girls alone in an unsecured house at night, did not provide food for the girls, and engaged in domestic violence. The juvenile court ordered that the girls be placed in the custody of the Nebraska Department of Health and Human Services (DHHS).

The next day, the State filed a petition alleging that Sylissa and Justine came within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2012) and lacked proper parental care by reason of the faults and habits of Shawna and her husband. Shawna did not contest the juvenile court's adjudication that Sylissa and Justine were at risk of harm under § 43-247(3)(a) due to her faults and habits. See *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013). Following the adjudication, the children were to remain in the temporary custody of DHHS for appropriate care and placement.

On July 24, 2013, the State moved to terminate Shawna's parental rights to Sylissa and Justine. It alleged that both girls came within the meaning of § 43-292(1) (abandonment) and (9) (aggravated circumstances). At the termination hearing, Cynthia Lee, a family permanency specialist at Nebraska Families Collaborative, testified that she had worked with Shawna's family since November 2012. At that time, Shawna informed Lee that she wanted to have visits with her children.

Shawna was required to undergo urinalysis testing to confirm her sobriety prior to commencing visits, and Lee arranged the testing. Three urinalyses during a 2-week period in November and December 2012 were "clean." Lee testified that she then contacted an agency to establish visitation, but at that time, Shawna could not be located. After December 2012, Lee had no physical address or telephone number for Shawna.

Shawna met with Justine one day after school between December 2012 and January 2013. Justine's former foster mother testified that Justine had stayed after school for a football game, that Shawna picked Justine up, and that Shawna later returned Justine to the school.

In February 2013, the children informed Lee that Shawna was in Florida. Lee testified that Sylissa and Justine had had unauthorized contact with Shawna via their "Facebook" accounts and that for a period of several months, Shawna and Justine communicated via Facebook approximately once every other week. Generally, Justine initiated contact with Shawna.

Shawna e-mailed Lee in July 2013 to inquire about the placement of her two younger children. Shawna briefly corresponded with Lee regarding that placement, but she did not respond to the 10 to 15 e-mails Lee sent to her thereafter.

Because Shawna did not maintain contact with Lee, she was never able to arrange visitation between Shawna and her children or provide services other than the urinalyses. At the time of trial, Lee did not know Shawna's whereabouts or if Shawna was in a position to resume the care and custody of her children.

Based on her education, training, and work with the family in this case, Lee believed it was in the best interests of the children to terminate Shawna's parental rights. It was Lee's opinion that the children had not had substantial contact with Shawna and that the children needed permanency.

At the time of trial, the permanency plan was for Justine to remain with her biological father. Sylissa had been placed with her aunt and uncle in Chadron, Nebraska, who were her guardians.

Lee testified that if Shawna's parental rights were terminated, Sylissa and Justine would no longer be eligible to receive potential survivor benefits, retirement benefits, life insurance benefits, or child support. She agreed that it would not be in the children's best interests to be ineligible for such benefits. But she denied knowing of any benefits for which the children were eligible.

The juvenile court found clear and convincing evidence that Sylissa and Justine came within the meaning of § 43-292(1) and (9) insofar as Shawna was concerned. But it also found that the State had not proved by clear and convincing evidence that termination of Shawna's parental rights to Sylissa and Justine was in the girls' best interests. It noted that the permanency plan for Sylissa and Justine was not one of adoption, but, rather, guardianship and/or family preservation. The State appeals.

ASSIGNMENT OF ERROR

The State's brief does not contain a separate section for assignments of error and does not set forth separately numbered assignments of error as required by § 2-109(D)(1)(e).

ANALYSIS

The State appeals from a dispositional order in which the juvenile court found grounds for termination under § 43-292(1) and (9) due to abandonment, but found that the State had not proved by clear and convincing evidence that termination of Shawna's parental rights was in Sylissa's and Justine's best interests. Because the State failed to include a separate section in its brief assigning error, we will review the court's refusal to terminate Shawna's parental rights for plain error.

[4] In relevant part, § 43-292 provides:

> The court may terminate all parental rights between the parents . . . and [a] 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:

> (1) The parents have abandoned the juvenile for six months or more immediately prior to the filing of the petition;
>
> . . . .
>
> (9) The parent of the juvenile has subjected the juvenile or another minor child to aggravated circumstances, including, but not limited to, abandonment . . . .

For purposes of § 43-292(1), "abandonment" is a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and the opportunity for the display of parental affection for the child. *In re Interest of Dustin H. et al.*, 259 Neb. 166, 608 N.W.2d 580 (2000).

Except for one unauthorized visit with Justine and occasional Facebook messages, Lee, the family permanency specialist, received no information concerning contact between Shawna and the girls from November 2012 to October 2013. Shawna did not maintain contact with Lee. As a result, Shawna did not avail herself of services which were available to her and which would have aided her in maintaining a loving relationship with the girls and in caring for their needs. We do not find plain error in the juvenile court's conclusion that Shawna abandoned Sylissa and Justine pursuant to § 43-292(1) and (9).

[5] Having found no plain error in the juvenile court's determination that the State had met its burden to show the requisite statutory grounds under § 43-292, we next consider whether it was plain error for the juvenile court to conclude that the State had failed to prove by clear and convincing evidence that termination of Shawna's parental rights was in Sylissa's and Justine's best interests. In so finding, the juvenile court expressly relied on Lee's testimony that the permanency plan for Sylissa and Justine is not one of adoption, but, rather, guardianship and/or family preservation with the father. Termination of parental rights is permissible only in the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code. See *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999).

In the present case, Lee, the family permanency specialist, testified that based on her education, training, and work with the family, she believed it was in the best interests of the children to terminate Shawna's parental rights. She stated that the children had not had substantial contact with Shawna and that the children needed permanency. But Lee also testified that Justine's permanency plan was to stay with her father, whose parental rights remained intact, and that Sylissa's permanency plan was for her aunt and uncle to achieve guardianship. These permanency plans could be carried out regardless of whether Shawna's parental rights were terminated.

This court has recognized guardianship as a "permanent resolution." See *In re Interest of Antonio S. & Priscilla S.*, 270 Neb. 792, 797, 708 N.W.2d 614, 618 (2005) (appointment of DHHS as guardian is intended as temporary arrangement which, insofar as possible, will be replaced by permanent resolution, such as returning child to his or her biological parent(s), termination of parental rights and adoption, or new guardianship).

In *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 717 N.W.2d 507 (2006), the Nebraska Court of Appeals concluded that the juvenile court erred in finding that the State had established, by clear and convincing evidence, that termination of the mother's parental rights was in the children's best interests. At the time of trial, the children were residing with relatives, with no possibility of adoption. The Court of Appeals observed, "There is nothing in the record to suggest that terminating [the mother's] parental rights would provide the children with any more permanency than they would have otherwise." *Id.* at 881, 717 N.W.2d at 517-18.

Here, the State presented very little evidence pertaining to the children's best interests. It called Lee to testify concerning her work with the family. The other witness was Justine's former foster mother, who testified briefly concerning Justine's after-school visit with Shawna. There was no evidence concerning the children's progress or their attitudes toward Shawna. No therapist or other expert testified how or why it would be in the children's best interests to terminate Shawna's parental rights.

Similarly, in *In re Interest of Aaron D.*, 269 Neb. 249, 691 N.W.2d 164 (2005), one caseworker testified concerning the child's best interests. That caseworker's testimony was based in large part on the records of family support workers, foster parents, and therapists. This court concluded that the State had not proved by clear and convincing evidence that terminating the mother's parental rights was in the child's best interests:

> Because the primary consideration in determining whether to terminate parental rights is the best interests of the child, a juvenile court should have at its disposal the information necessary to make the determination regarding the minor child's best interests regardless of whether the information is in reference to a time period before or after the filing of the termination petition. . . . Yet, the juvenile court in this case, and this court for its de novo review, was not provided with such evidence. [The child's] therapists did not testify. [DHHS'] family support workers, who actually observed [the child] and [the mother], did not testify, nor did [the child's] foster parents, nor [the child's] teachers. The State seems to have forgotten that the focus of this proceeding is not [the mother], but [the child], and the State thus did not present evidence directly adduced from many of the people most able to testify as to [the child's] condition, circumstances, and best interests, both before and after the filing of the termination petition. The standard for proving that termination of parental rights is in a juvenile's best interests is clear and convincing evidence, and the evidence in this record is, simply stated, neither clear nor convincing.

Id. at 263, 691 N.W.2d at 175 (citation omitted). See, also, *In re Interest of Eden K. & Allison L., supra* (finding no clear and convincing evidence that termination was in best interests of children because there was no evidence of needs or interests of children and because there was no evidence that termination would provide additional permanency). The instant case presented even less evidence relevant to best interests than the record in *In re Interest of Aaron D., supra*.

[6] Clear and convincing evidence means the amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved and, further, that it is more than a preponderance of the evidence, but less than proof beyond a reasonable doubt. *In re Interest of Eden K. & Allison L.*, 14 Neb. App. 867, 717 N.W.2d 507 (2006). We conclude that the juvenile court did not commit plain error in finding that there was not clear and convincing evidence that termination of Shawna's parental rights was in Sylissa's and Justine's best interests.

CONCLUSION

For the foregoing reasons, we affirm the juvenile court's order.

AFFIRMED.

MICHAEL L. JACOBSON, SPECIAL ADMINISTRATOR OF THE ESTATE OF VIRGINIA A. JACOBSON, DECEASED, AND MYRON J. JACOBSON, APPELLANTS, V. SHERRY K. SHRESTA, M.D., AND GASTON CORNU-LABAT, M.D., APPELLEES.

849 N.W.2d 515

Filed July 25, 2014. No. S-11-438.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
2. **Constitutional Law: Jury Trials.** The guaranty of a jury trial is part of Nebraska's fundamental law, but Neb. Const. art. I, § 6, preserves the right to a jury trial as it existed under the common law when the Nebraska Constitution was adopted in 1875.
3. **Negligence: Jury Trials.** Negligence and personal injury actions are actions at law that are tried by a jury under the common law.
4. **Constitutional Law: Jury Trials: Waiver.** A waiver of a jury trial in district court is statutorily governed by Neb. Rev. Stat. § 25-1126 (Reissue 2008), because it sets reasonable limits on a constitutional right.
5. **Jury Trials: Waiver.** In district court, a party's waiver of a jury trial occurs only if a court determines that one of three circumstances under Neb. Rev. Stat. § 25-1126 (Reissue 2008) applies.
6. **Immunity: Legislature: Waiver: Political Subdivisions: Torts.** The Legislature has the right to decide the terms under which it will waive its sovereign and governmental immunity for tort actions against the State or its political subdivisions.

7. **Immunity: Political Subdivisions: Public Officers and Employees.** The common-law doctrine of governmental immunity applies to a political subdivision's employees who are acting within the scope of their employment.
8. **Immunity: Legislature: Waiver: Appeal and Error.** Because the Legislature has determined when and how it will waive the State's sovereign and governmental immunity, an appellate court will find a waiver of such immunity only where stated by express language or clear implications.
9. **Political Subdivisions Tort Claims Act: Immunity: Jury Trials: Waiver.** Because a jury trial is not one of the terms of its waiver of governmental immunity under the Political Subdivisions Tort Claims Act, a party is not entitled to a jury trial on its claim that a defendant is not a political subdivision employee.

Petition for further review from the Court of Appeals, SIEVERS, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Sheridan County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals affirmed.

Christopher P. Welsh and James R. Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Mark A. Christensen, Tracy A. Oldemeyer, Cristin McGarry Berkhausen, and Elizabeth A. Tiarks, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees.

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

CONNOLLY, J.

SUMMARY

Virginia A. Jacobson (Virginia) was admitted to Gordon Memorial Hospital after she began coughing while eating a piece of meat. On March 29, 2003, Sherry K. Shresta, M.D., admitted her, and Gaston Cornu-Labat, M.D., performed an esophagogastroscopy. During the procedure, Virginia "coded." A piece of meat was found in her throat and suctioned out; a subsequent x ray showed aspiration pneumonia. After remaining under the care of Shresta and Cornu-Labat (collectively the defendants) for the next 3 days, Virginia died from complications. Virginia's husband and the special administrator for her estate (collectively the Jacobsons) filed a wrongful death action against the defendants in the district court for Sheridan County.

The defendants subsequently filed a motion to bifurcate. The threshold issue was whether the defendants were employees of the hospital. The parties stipulated that the hospital was a political subdivision and that the Jacobsons did not comply with the 1-year statute of limitations for presenting a claim under the Political Subdivisions Tort Claims Act (PSTCA).[1] So, if the defendants were hospital employees, the PSTCA barred the Jacobsons' action.

Before hearing the bifurcated employment issue, the court rejected the Jacobsons' claim that they were entitled to a jury trial. On the employment issue, the court found that the defendants were employees. It dismissed the Jacobsons' complaint. On appeal, the Nebraska Court of Appeals determined that the Jacobsons had waived their right to a jury trial and affirmed the trial court's decision.[2] The Jacobsons seek further review.

We conclude that the Jacobsons, by their silence, could not have waived their right to a jury trial. Nevertheless, because we conclude that the Jacobsons did not have a right to have a jury decide whether the defendants were political subdivision employees, we affirm.

BACKGROUND

The record shows that the trial court heard the defendants' motion for a bifurcated bench trial in a telephonic hearing. Although the Jacobsons argued that they objected to a bench trial at this hearing, a transcript of the hearing is not part of the record. The record does show, however, that the Jacobsons moved the court to reconsider its ruling and that the court overruled their request. And before the bench trial began, the Jacobsons renewed their objection. They argued that under Neb. Rev. Stat. § 25-221 (Reissue 2008), they were entitled to a jury trial on the employment issue. The district court overruled that objection without comment from the bench.

In rejecting the Jacobsons' assignment that the trial court erred in denying them their right to a jury trial, the Court of Appeals reasoned that the Jacobsons had waived that right:

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[1] See Neb. Rev. Stat. § 13-920(1) (Reissue 2012).

[2] *Jacobson v. Shresta*, 21 Neb. App. 102, 838 N.W.2d 19 (2013).

> Based on the record before us, we find no objection by the Jacobsons to the defendants' motion to bifurcate before the court ruled on it. . . . The record does not contain any objection by the Jacobsons until after the motion was sustained and the Jacobsons filed a motion to reconsider. Although the Jacobsons state in their brief that they objected to the motion, there is nothing in the record before us to support that contention. We recognize that the Jacobsons "renewed" their objection to the bench trial before trial began, but there is no original objection in the record. Therefore, we are unable to determine whether an original objection was made at all, whether it was timely made, and on what grounds it was made. It is incumbent upon the appellant to present a record supporting errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors. . . .
>
> The defendants' motion to bifurcate the employment issue specifically stated that they were requesting a bench trial on the issue. If the Jacobsons believed they were entitled to a jury trial on the issue, they had an opportunity to object and, based on the record before us, did not. Generally, failure to make a timely objection waives the right to assert prejudicial error on appeal. . . . By failing to object to the motion to bifurcate, the Jacobson cannot now challenge the court's ruling.[3]

ASSIGNMENT OF ERROR

The Jacobsons assign that the Court of Appeals erred in determining that they were not entitled to a jury trial on the bifurcated issue whether the PSTCA barred their medical malpractice claim against the defendants.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

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[3] *Jacobson, supra* note 2, 21 Neb. App. at 113, 838 N.W.2d at 30-31.

[4] *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

ANALYSIS

The Jacobsons argue that the trial court denied them their constitutional right to a jury trial and that the Court of Appeals erred in concluding that they had waived this right. They acknowledge that the issue whether the defendants were employees would have been statutorily required to be tried to a court if they had commenced an action against the hospital under the PSTCA.[5] But they argue that because they did not bring their action under the PSTCA, a jury should have decided the issue. They further argue that their conduct did not show a clear and unequivocal intent to waive their right to have a jury decide issues concerning whether the statutory time limitation applied.

The defendants argue that the Court of Appeals' reasoning was correct. Alternatively, they argue that even if the Court of Appeals had reached the merits of the assigned error, the district court did not abuse its discretion in granting a bifurcated bench trial on the employment issue. They contend that the PSTCA required the issue to be tried to the court.

Right to a Jury Trial and Waiver of the Right

Whether a party waives a right to a jury trial implicates a constitutional right. We now clarify when and how a party waives that constitutional right.

[2,3] Neb. Const. art. I, § 6, provides the constitutional right to a jury trial:

> The right of trial by jury shall remain inviolate, but the Legislature may authorize trial by a jury of a less number than twelve in courts inferior to the District Court, and may by general law authorize a verdict in civil cases in any court by not less than five-sixths of the jury.

We have held that the guaranty of a jury trial is part of Nebraska's fundamental law.[6] But we have also held that this constitutional provision preserves the right to a jury

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[5] See Neb. Rev. Stat. § 13-907 (Reissue 2012).

[6] See, *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986); *State ex rel. Simpson v. Vondrasek*, 203 Neb. 693, 279 N.W.2d 860 (1979).

trial as it existed under the common law when the Nebraska Constitution was adopted in 1875.[7] Negligence and personal injury actions are actions at law.[8] At common law, legal claims were tried by a jury and equitable claims were tried by a court.[9]

The issue is whether a plaintiff waives the right to a jury trial by failing to object to a defendant's motion for a bench trial before the court sustains the motion. Under the Court of Appeals' reasoning—despite the Jacobsons' objection to the bench trial before it began—they had already waived their right to a jury trial and could not cure their waiver by objecting before trial. We believe this rule is contrary to Nebraska's statutes related to jury trials. Neb. Rev. Stat. § 25-1104 (Reissue 2008) provides:

> Issues of law must be tried by the court, unless referred as provided in section 25-1129. Issues of fact arising in actions for the recovery of money or of specific real or personal property, *shall* be tried by a jury unless a jury trial is waived or a reference be ordered as hereinafter provided.

(Emphasis supplied.)

Neb. Rev. Stat. § 25-1129 (Reissue 2008) allows a court to refer a matter to a referee with written consent of the parties, and that statute is not at issue here. Section 25-1104 requires a jury trial on issues of fact unless waived.

Neb. Rev. Stat. § 25-1126 (Reissue 2008) governs the circumstances in which a court may find that a party has waived the right to a jury trial:

> The trial by jury may be waived by the parties in actions arising on contract, and with assent of the court in other actions (1) by the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney; (2) by written consent, in person or

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[7] See, e.g., *Eihusen v. Eihusen*, 272 Neb. 462, 723 N.W.2d 60 (2006).

[8] See, e.g., *Doe v. Golnick*, 251 Neb. 184, 556 N.W.2d 20 (1996); *Starlin v. Burlington Northern, Inc.*, 193 Neb. 619, 228 N.W.2d 597 (1975).

[9] *Eihusen, supra* note 7. See, also, *Storm v. Christenson*, 130 Neb. 86, 263 N.W. 896 (1936).

by attorney, filed with the clerk; and (3) by oral consent in open court entered on the journal.

The only statutory exceptions to this waiver list are limited to county court proceedings under Neb. Rev. Stat. § 25-2705 (Reissue 2008). In county court, § 25-2705 requires a demand for a jury trial. If a party makes a timely demand, the trial court has no discretion not to grant the request.[10] But unless a party makes a demand in county court, the statutory right to a jury trial is waived.[11] The only exception to the demand requirement in county court is for misdemeanor cases that carry the possibility of serious punishment.[12]

But there is no comparable statutory demand requirement for proceedings in district courts. Instead, § 25-1126, which was enacted in 1867, seems obviously intended to set reasonable limits on the constitutional guarantee of a jury trial. But despite § 25-1126's clear specification of the manners in which a waiver occurs, our case law is not always clear whether a party can waive a jury trial by failing to demand one. We consider the issue important because it is relevant to whether a party can waive a jury trial by silence. There are only a handful of cases deciding this issue, however, and those cases have not discussed § 25-1126 or its precursors.

We have held that when a party tries a case to the court and the record fails to show that either party protested or objected, we will presume that the parties have waived their right to a jury trial.[13] Similarly, if, during a jury trial, both parties ask the court for a directed verdict without reservation, they have waived the right to a jury trial.[14] Although these cases did not discuss the waiver statute, the facts arguably fell under what

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[10] See *State ex rel. Simpson, supra* note 6.

[11] See *State v. Miller*, 226 Neb. 576, 412 N.W.2d 849 (1987).

[12] See, *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), *overruled on other grounds, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999); *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987).

[13] See *MFA Ins. Companies v. Mendelhall*, 205 Neb. 430, 288 N.W.2d 270 (1980).

[14] See, *In re Estate of Bose*, 136 Neb. 156, 285 N.W. 319 (1939); *Segear v. Westcott*, 83 Neb. 515, 120 N.W. 170 (1909).

is now § 25-1126(3) (waiver "by oral consent in open court entered on the journal").

Some of the cases we decided in the early 1900's could be interpreted as finding a waiver if a party failed to demand a jury trial.[15] In those cases, however, the parties tried the issues to the court without objection and our statements about waiver seem to be dicta because it is not clear that the issue was raised.

Other early cases show that even if a party initially waived a jury trial, it may later reassert this right. For example, even when a party had stipulated to a bench trial, we held that such stipulations are not to be treated as contracts and that the court has discretion to permit an application to withdraw the waiver if it is timely made and has not been acted on to the prejudice of another party.[16] Also, following an appeal, a litigant's previous waiver of a jury trial does not preclude the litigant from demanding a jury trial on remand.[17]

Most important, at least one early case indicates that a waiver of a jury trial will not be inferred from failing to raise the issue before a pretrial ruling that was similar to the ruling in this case. In *Lett v. Hammond*,[18] we held that a plaintiff could demand a jury trial for its contract action even after a defendant had successfully moved the case to the trial court's equity docket, based on the defendant's equitable accounting claim. The trial court had ruled that the plaintiff's demand for a jury trial was decided at the pretrial hearing to docket the case as an equitable suit, but we reversed: "When the case was called for trial, or prior thereto, the plaintiffs, not having waived their rights to have the issues submitted to a jury, or

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[15] See, *Helming v. Forrester*, 87 Neb. 438, 127 N.W. 373 (1910), *overruled on other grounds, Criswell v. Criswell*, 101 Neb. 349, 163 N.W. 302 (1917); *Mavity v. Stover*, 68 Neb. 602, 94 N.W. 834 (1903); *Davis v. Snyder*, 45 Neb. 415, 63 N.W. 789 (1895).

[16] See *McKinney v. County of Cass*, 180 Neb. 685, 144 N.W.2d 416 (1966).

[17] See *Schumacher v. Crane-Churchill Co.*, 66 Neb. 440, 92 N.W. 609 (1902).

[18] *Lett v. Hammond*, 59 Neb. 339, 80 N.W. 1042 (1899).

been denied a jury trial, could demand it on whatever docket the case appeared."[19]

[4] Although we did not discuss § 25-1126 in deciding most of our waiver cases, a waiver of a jury trial in district court is statutorily governed by § 25-1126, because it sets reasonable limits on a constitutional right. And § 25-1126 provides an exclusive list of the manners in which a waiver occurs. The legal principle of expressio unius est exclusio alterius (the expression of one thing is the exclusion of the others) recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute.[20] Notably, California courts hold that a waiver of a jury trial should not be implied where a statute provides an exclusive list of recognized waivers.[21]

[5] Under a rule of exclusivity, unless a party's conduct falls into one of § 25-1126's three categories, we will not find a waiver of a constitutional right. Cases in which the parties tried issues of fact to the court without objection or asked for a directed verdict should be construed as falling into the "oral consent" category of waivers.[22] Such conduct is inconsistent with demanding a jury trial, and the trial court's judgment operates as its assent to the procedure. In contrast, merely failing to object, before trial, to a defendant's request for a bench trial on a bifurcated affirmative defense cannot be oral consent in open court to waive a jury trial. In sum, in district court, a party's waiver of a jury trial occurs only if a court determines that one of three circumstances under § 25-1126 applies. Because none of those circumstances apply here, the Court of Appeals erred in holding the Jacobsons had waived their right to a jury.

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[19] *Id.* at 342, 80 N.W. at 1043.

[20] *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000).

[21] See, e.g., *Cohill v. Nationwide Auto Service*, 16 Cal. App. 4th 696, 19 Cal. Rptr. 2d 924 (1993).

[22] See § 25-1126(3).

We next consider whether the Jacobsons had a right to have a jury decide if the defendants were governmental employees.

The Jacobsons Did Not Have a Right to a Jury Trial to Determine Whether the Defendants Were Employees of a Political Subdivision

In 1875, there was no right to a jury trial on any issue in a suit against the State or its political subdivisions because the common-law doctrine of sovereign immunity, and the related common-law doctrine of governmental immunity, operated to bar such suits at that time.[23] The same is true under the Seventh Amendment to the federal Constitution. The U.S. Supreme Court has held that the Seventh Amendment's right to a jury trial in civil cases does not apply to the federal government.[24] So "the plaintiff has a right to a trial by jury only where that right is one of 'the terms of [the Government's] consent to be sued,'" which term, like the waiver of immunity itself, must be "'unequivocally expressed.'"[25]

The Sixth Circuit has applied this rule in a case raising a similar issue to the one presented here. It determined that the plaintiffs were not entitled to a jury trial on the issue whether the defendants in a medical malpractice action were acting within the scope of their employment.[26] Under a federal statute, employees of specified private health care entities were deemed to be federal employees if the U.S. Attorney General certified to the court that they were acting within the scope of their employment. If the certification was made, the plaintiffs' action was governed by the Federal Tort Claims Act, which did not guarantee a right to a jury trial. The court rejected the plaintiffs' claim that they were entitled to jury trial on the employment issue because Congress had the power to

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[23] See, *Bronsen v. Dawes County*, 272 Neb. 320, 722 N.W.2d 17 (2006); *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001).

[24] See *Lehman v. Nakshian*, 453 U.S. 156, 101 S. Ct. 2698, 69 L. Ed. 2d 548 (1981).

[25] *Id.*, 453 U.S. at 160.

[26] See *Wilson v. Big Sandy Health Care, Inc.*, 576 F.3d 329 (6th Cir. 2009).

determine how suits could be prosecuted against entities doing the government's work.

[6-9] Similarly, the Legislature has the right to decide the terms under which it will waive its sovereign and governmental immunity for tort actions against the State or its political subdivisions.[27] The common-law doctrine of governmental immunity applies to a political subdivision's employees who are acting within the scope of their employment.[28] And because the Legislature has determined when and how it will waive the State's sovereign and governmental immunity, we will find a waiver of such immunity only where stated by express language or clear implications.[29] Because a jury trial is not one of the terms of its waiver of governmental immunity under the PSTCA, a party is not entitled to a jury trial on its claim that a defendant is not a political subdivision employee.

CONCLUSION

The Court of Appeals erred in determining the Jacobsons had waived their right to a jury trial. Nevertheless, the Jacobsons did not have a right to have a jury decide whether the defendants were employees of a political subdivision. We affirm the decision of the Court of Appeals.

AFFIRMED.

WRIGHT and CASSEL, JJ., not participating.

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[27] See *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[28] *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W.2d 805 (1968).

[29] Compare *Britton v. City of Crawford*, 282 Neb. 374, 803 N.W.2d 508 (2011).

Fred Breci et al., appellants and cross-appellees, v. St. Paul Mercury Insurance Company, appellee and cross-appellant, and Union Pacific Streamliner Federal Credit Union, intervenor-appellant and cross-appellee.

849 N.W.2d 523

Filed July 25, 2014. No. S-12-983.

1. **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.
2. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.
3. **Pleadings: Judgments: Appeal and Error.** A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
4. **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.
5. **Declaratory Judgments.** In Nebraska, a party may not simply move the court for a declaratory judgment.
6. **Declaratory Judgments: Trial.** Issues of fact in a declaratory judgment action may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.
7. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
8. **Pleadings: Appeal and Error.** Permission to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed.
9. **Pleadings.** Generally, leave to amend a party's pleading shall be freely given when justice so requires.
10. **Equity: Estoppel.** The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.
11. **Insurance: Estoppel.** The doctrine of mending one's hold generally has no application to matters relating to insurance coverage.
12. ____: ____. Estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present.

13. ____: ____. There is a widely recognized exception to the general rule that estoppel cannot be used to expand the scope of insurance coverage. Under the exception, when an insurance company assumes the defense of an action against its insured, without reservation of rights, and with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of noncoverage.
14. **Insurance: Estoppel: Proof.** The exception to the general estoppel rule applies when an insured is able to show (1) that the insurer had sufficient knowledge of facts or circumstances indicating noncoverage, (2) that the insurer assumed or continued defense of the insured without obtaining an effective reservation of rights agreement, and (3) that the insured suffered some type of harm or prejudice.
15. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
16. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
17. **Motions for Continuance: Appeal and Error.** A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
18. **Insurance: Contracts.** An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.
19. **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 Douglas County: W. Russell Bowie III, Judge. Affirmed.

Thomas M. White, C. Thomas White, and Amy S. Jorgensen, of White & Jorgensen, for appellants and intervenor-appellant.

Thomas A. Grennan and Abbie M. Schurman, of Gross & Welch, P.C., L.L.O., and J. Price Collins and Thomas M. Spitaletto, of Wilson, Elser, Moskowitz, Edelman & Dicker, L.L.P., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ.

Cassel, J.

I. INTRODUCTION

Former members of a credit union's board of directors, after having been sued by the credit union, sought a declaratory

judgment that an insurance policy covered the credit union's claims. The district court first held in favor of the former directors, but reconsidered and later granted summary judgment to the insurer. While reconsideration was pending, the former directors settled with the credit union. On appeal, we resolve two broad issues. First, because the former directors did not establish that they were entitled to summary or declaratory judgment, the court did not abuse its discretion in vacating its initial judgment. Second, because the settlement potentially gave rise to new policy-based defenses that were not barred by equitable estoppel, the court did not abuse its discretion in permitting an amended answer. We affirm the court's summary judgment for the insurer.

II. BACKGROUND

1. Factual Background

(a) Credit Union

On February 16, 2006, the National Credit Union Administration (NCUA) placed Union Pacific Streamliner Federal Credit Union (credit union), a federally chartered credit union, under conservatorship. The conservatorship revoked the authority of the credit union's board of directors, which then included Fred Breci, William Gallo, Henry Kammerer, Michael Kros, Carl Launer, Steven Slater, and S. Anthony Siahpush (collectively former directors).

NCUA had previously recommended conservatorship for a number of reasons, including "[i]nsider abuse and preferential treatment towards certain members of the . . . board of directors." According to the recommendation, specific instances of preferential treatment included leasing office space in a building owned by a director and obtaining engineering and construction assistance from the director's firm.

(b) Insurance Policy

On September 12, 2006, the credit union signed an application for an insurance policy. St. Paul Mercury Insurance Company (St. Paul) later issued a policy effective from November 18, 2006, through November 18, 2009 (Policy). The

management liability insuring agreement had a limit of liability of $2 million and provided directors and officers individual coverage. The Policy covered only claims first made during the policy period.

The Policy specifically defined several terms, which we set forth using the style of the Policy:

- "**Insured**" was defined to include both "the Insured Persons" and "the Company, except the Company shall not be an Insured with respect to the **Directors and Officers Individual Coverage**."
- "**Insured Persons**" was defined to include "Directors or Officers."
- "**Company**" was defined as "any entity named in the Declarations and its Subsidiaries." The credit union was the entity named in the declarations.
- "**Claim**" included "a civil proceeding against any Insured commenced by the service of a complaint or similar pleading" which was "on account of a Wrongful Act."
- "**Wrongful Act**" included a "Management Practices Act."
- "**Management Practices Act**" included any "breach of duty actually or allegedly committed or attempted by any Insured Person in their capacity as such."

(c) Credit Union's Lawsuit Against Directors

On June 15, 2007, the credit union sued the former directors and two businesses affiliated with one of the former directors. Its amended complaint alleged that the former directors failed to exercise the ordinary care and prudent judgment required of directors, thereby causing injury and financial loss. The complaint set forth the following acts by the former directors:

- commissioning, without competitive bidding, an engineering study by a company owned and controlled by one of the former directors;
- accepting, without seeking competitive bids, a proposal to name the company of one of the former directors as general contractor of an expansion project; and

- leasing space, without exploring options elsewhere, in a building owned by a company in which one of the former directors was a majority owner.

The credit union sought general and special damages resulting from the breaches of the former directors' fiduciary duty.

(d) Claim on Policy

In July 2007, the former directors submitted the credit union's lawsuit to St. Paul, seeking coverage under the Policy.

In a January 21, 2008, letter to the former directors, St. Paul acknowledged receipt of the lawsuit and described coverage under the Policy. The letter discussed the following:

- There was a retention per claim that must be exhausted before St. Paul advanced defense costs or contributed toward any loss.
- Certain definitions were contained in the Policy, pursuant to which the credit union was the "Company," the former directors were "Insured Persons," the complaint was a "Claim," and the allegations of breach of fiduciary duty may meet the definition of "Management Practices Act."
- The Policy remained controlling in regard to any determination of coverage, and any coverage analysis in the letter was subject to change as the claim developed and further information was obtained.
- St. Paul reserved all rights under the Policy to rely upon and enforce additional terms of the Policy and to disclaim coverage on alternative bases.

On February 16, 2009, St. Paul sent a letter to the former directors, stating that it would not defend or indemnify the former directors for the credit union's lawsuit against them. The letter stated that because the former directors were "Insured Persons" and the credit union was an "Insured" under the Policy, coverage was precluded under a subsection of the Policy designated "Exclusions Applicable to All Insuring Agreements and to All Loss," which stated in part that "[t]he Insurer shall not be liable for Loss on account of any Claim made against any Insured . . . brought or maintained by or on behalf of any Insured or Company in any capacity."

2. Procedural Background

(a) Complaint, Answer, and Intervention

On April 9, 2009, the former directors sued St. Paul. They sought a declaratory judgment that they were entitled to coverage under the Policy, that St. Paul was obligated to them for the cost of defending the action brought by the credit union, and that St. Paul was obligated to provide coverage for any damages that might be awarded by a court for the complaint brought by the credit union.

In St. Paul's answer, it alleged, among other things, that coverage for the credit union's lawsuit against the former directors was barred under an exclusion in the Policy, because the former directors were "Insureds" under the Policy and the lawsuit was brought by the credit union, which was also an "Insured" under the Policy.

The credit union later intervened in the former directors' lawsuit against St. Paul. It requested an order declaring that there was coverage under the Policy and that St. Paul would be required to pay the judgment up to the limits of coverage if a judgment in the credit union's lawsuit against the former directors was entered in favor of the credit union.

(b) Orders to Mediate

Shortly after the former directors sued St. Paul, the district court entered an order both in the credit union's lawsuit against the former directors and in the instant case, referring each case to mediation and stating that "all parties shall attend and participate in the mediation." After the initial mediation date, St. Paul did not participate in further negotiations.

(c) First Motion for Summary Judgment and Motion for Declaratory Judgment

St. Paul and the former directors each filed a motion seeking judgment. St. Paul moved for summary judgment, alleging that the Policy did not provide coverage for the claims in the credit union's lawsuit against the former directors and that St. Paul was not obligated to advance or reimburse the

defense costs incurred by the former directors in that lawsuit or to otherwise indemnify them. The former directors filed a "Motion for Declaratory Judgment" and asked for an order declaring their rights under the Policy.

On April 20, 2010, the district court entered judgment, styled as an order, denying St. Paul's motion for summary judgment and granting the former directors' motion for declaratory judgment. The court determined that the "Insured v. Insured" exclusion did not apply, because the credit union was not an "Insured" under the "Directors and Officers Individual Coverage" section of the management liability insuring agreement.

St. Paul timely filed a motion to alter or amend. It asserted several grounds in support of its motion and requested that the court alter or amend its order or, in the alternative, limit the order solely to the applicability of the "Insured v. Insured" exclusion and leave open for resolution the remaining issues relating to other defenses.

(d) Settlement and Amended Answer

After weeks of negotiations through the mediator, the former directors settled the credit union's lawsuit against them. The settlement agreement provided that the former directors would pay $155,000 to the credit union, that there would be a confession of judgment by certain former directors, and that there would be an assignment of interest.

On April 26, 2010—6 days after the filing of the court's judgment denying St. Paul's motion for summary judgment and granting the former directors' motion for declaratory judgment—the confession of judgment was filed. It provided that five of the former directors confessed that judgment of $2 million should be entered against them in favor of the credit union. Under the assignment of claims, the former directors transferred to the credit union their interests in the instant litigation against St. Paul. A covenant not to execute stated that the credit union "will not execute on, or otherwise seek to enforce, the Judgment entered against the [former directors] in this matter by confession, except and to the extent of any

right, title, claim or interest of any type or kind that the [former directors] have . . . against St. Paul."

On May 5, 2010—9 days after the confession of judgment was filed and while St. Paul's motion to alter or amend the April judgment was still pending—St. Paul moved for leave to file an amended answer. St. Paul alleged that the settlement of the credit union's lawsuit raised new issues and new defenses under the Policy that were not known to St. Paul or otherwise did not exist at the time the court considered the motion for summary judgment and motion for declaratory judgment. The court granted the motion.

St. Paul subsequently filed its amended answer. It alleged that the settlement between some of the former directors and the credit union constituted a fraudulent and collusive effort to obtain the Policy's limits of liability. St. Paul pointed to various provisions of the Policy and asserted numerous reasons why the Policy did not provide coverage under the circumstances. The additional defenses included the following:

- The former directors were not legally obligated to pay the confessed judgment.
- The confessed judgment was not on account of a "Claim" for a "Management Practices Act."
- The confessed judgment was not on account of "Wrongful Acts."
- The former directors violated the "Defense and Settlement" provision of the Policy.
- Some of the former directors violated the Policy's "Duty of the Insureds to Defend" provision.
- Misrepresentations or omissions were made in connection with the application for the Policy.
- The credit union's lawsuit against the former directors did not constitute a claim first made during the policy period.

(e) September 2011 Order

On September 15, 2011, the court ruled on St. Paul's motion to alter or amend. The court stated:

> I clearly erred in awarding the [former directors] a declaratory judgment, and even if it was to be considered as a motion for partial summary judgment, the other parties

did not have an opportunity to present evidence in opposition, and that portion of the April 20, 2010 order should be vacated.

The court granted in part St. Paul's motion to alter or amend and vacated that portion of the judgment granting declaratory judgment. The court denied St. Paul's motion with respect to the denial of St. Paul's motion for summary judgment.

(f) Second Motion for Summary Judgment, Amended Complaint, and Motion to Postpone

In April 2012, St. Paul filed a second motion for summary judgment. It alleged that the Policy did not provide coverage for the credit union's lawsuit against the former directors for the following reasons: (1) The credit union's lawsuit constituted a claim first made prior to the policy period and was therefore precluded from coverage; (2) the regulatory claims exclusion barred coverage; (3) the credit union's lawsuit arose out of facts and circumstances known to the credit union and the former directors prior to issuance of the Policy, and the application exclusion therefore precluded coverage; and (4) the former directors were not legally obligated to pay the judgment, but, rather, were absolved from payment such that the judgment did not satisfy the insuring agreement of the Policy, nor did it constitute a covered loss.

On May 11, 2012, the credit union filed a second amended complaint and cross-claim against St. Paul. It alleged that on or about October 1, 2009, the parties began to mediate the claims and that St. Paul "attended approximately the first half day of mediation but refused to make any additional offers from its initial and minimal offer. St. Paul . . . then refused to participate in any further mediation." The credit union alleged that as assignee of the rights of the former directors, St. Paul violated its duty of good faith to the former directors and to the credit union in a number of ways. The credit union sought damages of $2 million.

Also on May 11, 2012, the credit union filed a "motion for postponement of summary judgment hearing," seeking to

postpone the June 7 hearing date. In support of its motion, the credit union alleged that the motion for summary judgment was premature in light of its amended complaint and cross-claim and that if the court granted any part of a pending motion to compel, the credit union might want to submit such information at the summary judgment hearing. The court denied the motion to compel and the motion for postponement.

3. District Court's Decision

On September 28, 2012, the court entered its final judgment. The court granted St. Paul's second motion for summary judgment, dismissed the complaint of the former directors, and dismissed the credit union's complaint in intervention. The court made the following determinations:

- St. Paul was not estopped from raising additional defenses in its amended answer, because St. Paul's January 2008 letter gave the former directors notice that the terms, conditions, and exclusions of the Policy controlled; the coverage analysis was subject to change pending further information; and St. Paul reserved its rights under the Policy.
- The claim arose prior to the policy period, because the allegations in the credit union's lawsuit against the former directors were identical to those alleged in the NCUA proceeding, which was prior to the November 18, 2006, effective date of the Policy.
- Even if the credit union's lawsuit against the former directors fell within the policy period, coverage would be barred by the regulatory claims exclusion in the management liability insuring agreement, because the claim arose out of or was attributable to the NCUA proceeding, which was brought by the NCUA.

The former directors and the credit union (collectively credit union parties) timely appealed, and St. Paul filed a cross-appeal. We moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

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

III. ASSIGNMENTS OF ERROR

The credit union parties assign, restated and consolidated, that the district court erred in (1) vacating its order granting declaratory judgment to the former directors, (2) allowing St. Paul to amend its pleadings and assert new defenses, and (3) overruling the credit union parties' motion for further discovery and the credit union's motion for a postponement of the summary judgment hearing.

The credit union parties also assign that the court erred in granting St. Paul's second motion for summary judgment, but their brief does not specifically argue the issue. 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.[2] The credit union parties state in their brief, "As it is the [credit union parties'] primary contention that the District Court should not have permitted [St. Paul] to assert the new defenses in its Amended Answer after a determinative ruling by the District Court, this brief will not address the merits of those defenses."[3] Thus, we do not consider this assignment of error.

On cross-appeal, St. Paul assigns that the district court erred in denying its first motion for summary judgment and in denying its motion to alter or amend the April 2010 judgment when the "Company v. Insured" exclusion barred coverage for the credit union's lawsuit against the former directors.

IV. ANALYSIS

1. St. Paul's Jurisdictional Argument

[1] St. Paul asserts that the credit union parties' appeal "suffers from fatal jurisdictional deficiencies."[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

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[2] *Carlson v. Allianz Versicherungs-AG*, 287 Neb. 628, 844 N.W.2d 264 (2014).

[3] Brief for appellants at 12.

[4] Brief for appellee at 10.

before it.[5] St. Paul points out that the credit union parties do not challenge the coverage defenses upon which the final judgment was based. And St. Paul argues that the discretionary orders which the credit union parties challenge do not bear on the correctness of the district court's final judgment.

The credit union parties properly waited until entry of final judgment to appeal. The orders the credit union parties are challenging—the order vacating declaratory judgment, the order allowing St. Paul to file an amended answer, the order denying their motion to compel, and the order denying a continuance—were nonfinal and not immediately appealable at the time of entry.[6] Contrary to St. Paul's assertion, these orders all bear on the correctness of the court's entry of summary judgment, because a reversal on any of the nonfinal orders would require us to reverse, vacate, or modify the final judgment. Accordingly, we now have jurisdiction over the various interlocutory orders at issue.

2. Credit Union Parties' Jurisdictional Argument

[2] The credit union parties claim that we lack jurisdiction to consider the errors assigned on cross-appeal. The cross-appeal is directed to the district court's denial of St. Paul's first motion for summary judgment and the denial of St. Paul's motion to alter or amend that judgment. A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable.[7] And because the denial of St. Paul's first motion for summary judgment was not appealable at the time of entry, St. Paul properly waited until entry of final judgment to challenge the court's ruling on the earlier interlocutory order. Thus, we also have jurisdiction over the orders challenged on cross-appeal.

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[5] *Deleon v. Reinke Mfg. Co.*, 287 Neb. 419, 843 N.W.2d 601 (2014).

[6] See, e.g., *Connelly v. City of Omaha*, 278 Neb. 311, 769 N.W.2d 394 (2009) (to be final, order must ordinarily dispose of whole merits of case); *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989) (discovery order can be reviewed on appeal from final judgment).

[7] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007).

3. Vacating Prior Declaratory Judgment

(a) Claim

The credit union parties first argue that the district court abused its discretion by vacating its prior judgment granting the former directors declaratory judgment. In vacating that portion of the judgment, the court stated that it "clearly erred" in awarding a declaratory judgment and that "even if it was to be considered as a motion for partial summary judgment, the other parties did not have an opportunity to present evidence in opposition."

(b) Standard of Review

[3,4] A motion to alter or amend a judgment is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.[8] 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.[9]

(c) Discussion

The credit union parties focus on the second part of the court's statement and point out that St. Paul had the opportunity to—and did—present evidence in opposition to the motion. But the real problem for the credit union parties lies with the court's recognition that it erred in awarding a declaratory judgment under these circumstances.

[5] In Nebraska, a party may not simply move the court for a declaratory judgment. The former directors filed both a complaint for declaratory judgment and a "motion for declaratory judgment." The order at issue in this assignment of error vacated the portion of the April 2010 judgment purporting to grant the motion for declaratory judgment. Although a "motion

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[8] *Russell v. Clarke*, 15 Neb. App. 221, 724 N.W.2d 840 (2006).

[9] *Fox v. Whitbeck*, 286 Neb. 134, 835 N.W.2d 638 (2013).

for declaratory judgment" has been referenced in a few published opinions of this court[10] and one such opinion of the Nebraska Court of Appeals,[11] no such summary proceeding is recognized in Nebraska.

[6] Issues of fact in a declaratory judgment action may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.[12] When there is no genuine issue of material fact, a motion for summary judgment may be appropriate.[13] A party may also move for judgment on the pleadings, but if matters outside the pleadings are received by the court—as was the case here—the motion shall be treated as one for summary judgment.[14]

[7] To the extent the former directors may have been seeking summary judgment, they failed to prove entitlement to judgment as a matter of law. 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.[15] The district court's determination that the "Insured v. Insured" exclusion was inapplicable did not resolve other issues presented by the pleadings. The former directors were not entitled to summary judgment or declaratory judgment.

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[10] *Kubicek v. City of Lincoln*, 265 Neb. 521, 658 N.W.2d 291 (2003); *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993); *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), *overruled on other grounds, State v. Tingle*, 239 Neb. 558, 477 N.W.2d 544 (1991); *Stremmel v. Kinney*, 226 Neb. 555, 412 N.W.2d 834 (1987).

[11] *Countryside Developers v. Peterson*, 9 Neb. App. 798, 620 N.W.2d 124 (2000).

[12] Neb. Rev. Stat. § 25-21,157 (Reissue 2008).

[13] See *C.E. v. Prairie Fields Family Medicine*, 287 Neb. 667, 844 N.W.2d 56 (2014).

[14] See Neb. Ct. R. Pldg. § 6-1112(c).

[15] *Durre v. Wilkinson Development*, 285 Neb. 880, 830 N.W.2d 72 (2013).

(d) Resolution

We conclude that the district court did not abuse its discretion by granting St. Paul's motion to alter or amend in part to vacate the entry of declaratory judgment.

4. Allowing Amendment to Raise New Defenses

(a) Claim

The credit union parties' chief complaint on appeal concerns the district court's decision to permit St. Paul to assert new defenses in its amended answer. They argue that St. Paul should be estopped from raising new defenses.

(b) Standard of Review

[8,9] Permission to amend pleadings is addressed to the discretion of the trial court; absent an abuse of discretion, the trial court's decision will be affirmed.[16] Generally, leave to amend a party's pleading shall be freely given when justice so requires.[17]

(c) Discussion

[10] The doctrine of equitable estoppel applies where, as a result of conduct of a party upon which another person has in good faith relied to his detriment, the acting party is absolutely precluded, both at law and in equity, from asserting rights which might have otherwise existed.[18] The credit union parties argue that they detrimentally relied on St. Paul's defenses asserted in the initial answer when agreeing to a settlement of the credit union's lawsuit against the former directors.

[11,12] We first reject the credit union parties' argument that the equitable doctrine of mending one's hold has estopped St. Paul from asserting additional defenses. We have concluded that the doctrine of mending one's hold generally "'has

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[16] *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 829 N.W.2d 676 (2013).

[17] See Neb. Ct. R. Pldg. § 6-1115(a).

[18] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

no application to matters relating to coverage.'"[19] And we have stated that "'estoppel cannot be invoked to expand the scope of coverage of an insurance contract absent a showing of detrimental good faith reliance upon statements or conduct of the party against whom estoppel is invoked which reasonably led an insured to believe coverage was present.'"[20]

We have determined that the doctrines of mending one's hold and estoppel do not apply when an insured has notice that other defenses could be asserted by an insurer. In *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*,[21] an insurer initially denied a claim because of inconsistencies in the report of the loss compared with the physical evidence, but later denied the claim upon the basis that the insureds did not have an insurable interest in the vehicle. The insureds argued that the doctrine of mending one's hold prevented the insurer from raising the insurable interest defense, but we determined that the insurer was not estopped from asserting that defense. We reasoned that the insureds did not suffer detrimental reliance, because they had notice that the insurer could assert the defense: (1) The insurance policy addressed the insurable interest issue and provided no coverage if an insured did not have an insurable interest in the covered vehicle, and (2) the insurer expressly reserved the right to assert additional defenses in its denial letter.

Like the insureds in *Sayah*, the former directors did not suffer detrimental reliance, because they had notice that St. Paul could assert the additional defenses set forth in its amended answer. First, the additional defenses raised by St. Paul to support its denial of coverage were based on the terms, conditions, and exclusions of the Policy. Second, St. Paul explicitly reserved the right to assert additional defenses based on the Policy in its January 2008 letter to the former directors and in its original answer. Thus, like the insureds in *Sayah*, the former

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[19] *Sayah v. Metropolitan Prop. & Cas. Ins. Co.*, 273 Neb. 744, 749, 733 N.W.2d 192, 197 (2007), quoting *Design Data Corp. v. Maryland Cas. Co.*, 243 Neb. 945, 503 N.W.2d 552 (1993).

[20] *Id.*

[21] *Sayah, supra* note 19.

directors did not suffer detrimental reliance when St. Paul amended its answer to allege other exclusions from coverage set forth in the Policy.

[13,14] There is a widely recognized exception to the general rule that estoppel cannot be used to expand the scope of insurance coverage. Under the exception, when an insurance company assumes the defense of an action against its insured, without reservation of rights, and with knowledge, actual or presumed, of facts which would have permitted it to deny coverage, it may be estopped from subsequently raising the defense of noncoverage.[22] The exception to the general estoppel rule applies when an insured is able to show (1) that the insurer had sufficient knowledge of facts or circumstances indicating noncoverage, (2) that the insurer assumed or continued defense of the insured without obtaining an effective reservation of rights agreement, and (3) that the insured suffered some type of harm or prejudice.[23]

The exception to the general estoppel rule is not applicable. St. Paul's January 2008 letter did not explicitly state that there was coverage. It did, however, explicitly state that St. Paul's investigation and evaluation of coverage were continuing. The letter also stated:

> We expressly reserve all rights under the Policy and pursuant to applicable law to rely upon and enforce additional terms of the Policy and to disclaim coverage on alternative bases if facts become known to us which result in the application of other terms, conditions, exclusions, endorsements or other provisions of the Policy, including representations, statements, declarations and/or omissions in connection with the . . . application.

Further, St. Paul did not have the duty to defend under the express terms of the Policy, and St. Paul never assumed or controlled the defense of the credit union's lawsuit against the former directors. The January 2008 letter to the former directors noted that the former directors had the duty to defend any

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[22] See *First United Bank v. First Am. Title Ins. Co.*, 242 Neb. 640, 496 N.W.2d 474 (1993).

[23] *Id.*

claim covered under the Policy, that the former directors had selected an attorney to represent them, and that St. Paul had the right to be consulted in advance about defense strategies and settlement negotiations—all of which were consistent with the terms of the Policy. Thus, the exception to the general estoppel rule does not apply under the circumstances of this case.

The credit union parties next argue that allowing St. Paul "to amend its pleading subsequent to an adverse ruling on a determinative motion would violate the public policy of Nebraska" because it "will severely inhibit the ability to [sic] an insured to achieve finality in litigation."[24] But because St. Paul timely filed a motion to alter or amend—which stopped the time in which to file an appeal from running—the April 2010 judgment never became subject to appeal. To the extent the credit union parties relied upon a judgment which could still have been altered by the district court or appealed to a higher court, they did so at their peril. And it was while St. Paul's motion to alter or amend was pending that St. Paul filed its amended answer. Thus, there was no "finality in litigation" at the time St. Paul filed its amended answer.

The credit union parties rely on *Darrah v. Bryan Memorial Hosp.*[25] in support of their argument that St. Paul should not have been allowed to amend its answer. In that case, after the district court granted the defendant's motion for summary judgment, the plaintiff filed a motion for reconsideration and new trial or leave to amend in order to allege specific acts of negligence. The court overruled the motion, and we determined that it was not an abuse of discretion to deny a motion to amend pleadings absent some mitigating factor which justified a party's raising new issues after a motion for summary judgment had been heard and submitted.[26] We stated that unless evidence or testimony exists in the record indicating either that a proposed claim or defense was newly discovered or that

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[24] Brief for appellants at 30.

[25] *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998).

[26] See *id.*

counsel was unaware of the claim or defense prior to the pending action, the proposed amendment is merely a belated effort to inject issues of material fact into a proceeding where previously the pleadings revealed none.[27]

We distinguish *Darrah* from the situation at hand. Here, St. Paul promptly sought leave to amend its answer after a "newly discovered" development—the settlement of the credit union's lawsuit against the former directors. The settlement potentially raised new issues and new defenses under the Policy. Although not all of the new defenses asserted in the amended answer related to the settlement, many of them did. Thus, even though St. Paul did not seek to amend its answer until after a motion for summary judgment had been heard and submitted, the new development justified the late stage in the proceedings in which St. Paul sought to amend its answer.

(d) Resolution

We conclude that the doctrine of mending one's hold is not applicable and that the former directors did not suffer detrimental reliance, because they had notice that St. Paul could assert additional defenses based on the Policy. We also conclude that the exception to the general rule that estoppel cannot be used to expand the scope of insurance coverage is not applicable. Because the district court's April 2010 judgment did not become appealable due to St. Paul's motion to alter or amend and because the settlement of the credit union's lawsuit against the former directors made other exclusions from coverage under the Policy potentially applicable, the district court did not abuse its discretion in allowing St. Paul to amend its answer to assert new defenses.

5. Motions for Discovery and Continuance

(a) Claim

In connection with the district court's decision to allow St. Paul to file an amended answer, the credit union parties

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[27] See *id.*

assign that the court abused its discretion by denying their motion to compel discovery and denying the credit union's motion to postpone the summary judgment hearing.

(b) Standard of Review

[15,16] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[28] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[29]

[17] A motion for continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.[30]

(c) Discussion

[18] St. Paul's second motion for summary judgment was based on the terms of the Policy and presented a question of policy interpretation. An insurance policy is a contract, and when the facts are undisputed, whether or not a claimed coverage exclusion applies is a matter of law.[31] Because St. Paul's second motion for summary judgment could be—and was—resolved based on the language of the Policy, no additional discovery was necessary.

(d) Resolution

We conclude that the court did not abuse its discretion in denying the motion to compel or the motion for postponement of the hearing.

6. St. Paul's Cross-Appeal

[19] On cross-appeal, St. Paul argues that the district court erred in denying St. Paul's first motion for summary judgment by finding that the "Company v. Insured" exclusion did not

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[28] *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

[29] *Id.*

[30] *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

[31] *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 844 N.W.2d 806 (2014).

apply to the claim raised in the credit union's lawsuit against the former directors and in denying its motion to alter or amend the April 2010 judgment which challenged that finding. Both of St. Paul's motions for summary judgment were based on its belief that the terms of the Policy did not provide coverage for the claims alleged in the credit union's lawsuit against the former directors. Because the credit union parties do not argue on appeal that the court erred in granting St. Paul's second motion for summary judgment, we affirm the judgment. Thus, we need not further address the cross-appeal. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[32]

V. CONCLUSION

We conclude the district court properly vacated its earlier judgment granting the former directors' "motion for declaratory judgment," because the former directors had not demonstrated entitlement to summary judgment or declaratory judgment. Because the settlement between the credit union parties potentially gave rise to new defenses under the Policy and because estoppel and the general exception to estoppel do not apply, the court did not abuse its discretion in allowing St. Paul to amend its answer. We further conclude that the court did not abuse its discretion in denying the motion to compel or the motion for postponement of the summary judgment hearing, because St. Paul's second motion for summary judgment could be decided based upon the language of the Policy. We therefore affirm the court's judgment.

AFFIRMED.

STEPHAN, J., not participating.

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[32] *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014).

ARLAN D. SCHELLHORN AND DAWN L. SCHELLHORN, APPELLEES AND CROSS-APPELLANTS, V. JOSEPH L. SCHMIEDING AND CAROL L. SCHMIEDING, APPELLANTS AND CROSS-APPELLEES.

851 N.W.2d 67

Filed July 25, 2014. No. S-13-418.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for a statutory period of 10 years.
4. **Adverse Possession: Boundaries.** Proof of the adverse nature of the possession of land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description.
5. **Laches.** The defense of laches is not favored in Nebraska.
6. ____. Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.
7. **Laches: Equity.** Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
8. **Easements.** The law treats a claim of prescriptive right with disfavor.
9. **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.

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

Kent E. Rauert and Matthew R. Watson, of Svehla, Thomas, Rauert & Grafton, P.C., for appellants.

Timothy L. Moll, of Rembolt Ludtke, L.L.P., for appellees.

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

WRIGHT, J.

NATURE OF CASE

Arlan D. Schellhorn (Schellhorn) and Dawn L. Schellhorn sought to quiet title in their favor to a disputed parcel of land of which Joseph L. Schmieding (Schmieding) and Carol L. Schmieding were the record owners. The Schmiedings filed a cross-claim seeking a prescriptive easement in the event that title was quieted in the Schellhorns. The district court for Seward County quieted title in favor of the Schellhorns. The Schmiedings appeal, claiming the district court erred in quieting title in the Schellhorns and in not granting the Schmiedings a prescriptive easement. The Schellhorns cross-appeal, claiming that in the event that title should have been quieted in the Schmiedings, the Schellhorns should be granted a prescriptive easement. We affirm, and dismiss the cross-appeal as moot.

SCOPE OF REVIEW

[1,2] A quiet title action sounds in equity. *Ottaco Acceptance, Inc. v. Larkin*, 273 Neb. 765, 733 N.W.2d 539 (2007). On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations. *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 759 N.W.2d 464 (2009).

FACTS

The Schellhorns and the Schmiedings are each record owners of parcels of agricultural property in Seward County. The Schellhorns own the east half of the northwest quarter of "Section Five (5), Township Eleven (11), North, Range Two (2), East of the 6th P.M.," and the Schmiedings own the northwest quarter of the northwest quarter of the same section. The disputed parcel is a 17-foot strip of land on the east edge of the northwest quarter of the northwest quarter. The disputed parcel includes a driveway and a strip of land along the east side of the driveway. On the west side of the driveway is a waterway or ditch that runs north and south, somewhat parallel to the driveway.

On July 2, 2012, the Schellhorns filed their operative petition to quiet title to the disputed parcel. The Schellhorns alleged that since at least the 1940's, the west boundary of the disputed parcel, and not the boundary of record, had been observed as the boundary between the Schellhorn and Schmieding properties. The Schmiedings denied the Schellhorns' claim and counterclaimed for a prescriptive easement over the disputed parcel in the event that the district court quieted title in the Schellhorns.

Trial was held on October 23, 2012. Evidence showed that the Schellhorns had farmed their property and used the disputed parcel since 1989 and had purchased their property at auction in 2001. Prior to the Schellhorns' purchase, three successive generations of the Luethke family had owned the Schellhorn property. In 2001, Ralph Luethke (Schellhorn's stepfather) and two relatives sold the property at public auction, and the Schellhorns were the successful bidders.

The Schmiedings purchased their property in 1987, and prior to that purchase, they had no knowledge of or experience with the property. The Schmiedings first expressed uncertainty about the location of the property line to the Schellhorns when they purchased the east half of the northwest quarter at public auction in 2001. Schmieding announced at the auction that there was uncertainty regarding the location of the boundary line between his property and the property sold to the Schellhorns.

During the years after the auction, Schmieding and Schellhorn had numerous conversations about the boundary line, but failed to reach any agreement about the boundary. In those conversations, Schellhorn always maintained that the waterway belonged to the Schmiedings and that the driveway belonged to the Schellhorns.

Luethke testified that as a child in the early 1940's, he was present when a fence was constructed on what was then believed to be the boundary line between the Schellhorn and Schmieding properties. Luethke said that the fence had been located between the now-existing driveway and waterway. The fence ran north and south, and replaced an

existing broken-down fence. Luethke testified that the fence was removed in 1958 or 1959 in order to build up the driveway and that the waterway was created to prevent water from flowing over the west side of the driveway.

Another section of fence ran south from a cornerpost located at the southeast corner of the Schmieding property to the southern boundary of the northwest quarter section. There was testimony that both this southern fence and the Luethke fence, running north and south, connected to the cornerpost. Schellhorn testified that he thought the cornerpost was the boundary between the Schellhorn property, the Schmieding property, and a property referred to by the parties as "the Baack property," which was the southwest quarter of the northwest quarter. Schellhorn admitted that without a survey, he could not know if the cornerpost marked the boundary or was located on the Baack property.

In 2001, the Schellhorns removed the southern section of fence to allow a center pivot on the Baack property to cross onto the Schellhorn property. The Schellhorns left the cornerpost and two other posts intact to maintain a physical record of the fence's location. Edward Hladky (who helped remove the fence), Schellhorn, and Luethke testified that they could look down the southern fence line northward and see that the natural extension of the fence proceeded between the waterway and the driveway on the disputed parcel. Schellhorn also testified that the driveway varied in width and bowed slightly to the east. Luethke testified that the sight line was consistent with the location of the Luethke fence removed in 1958 or 1959.

In 2006, Schmieding found a marker from a 1982 survey, and in 2010, he informed Schellhorn that he was going to consider the marker to be the record boundary between their properties. Schellhorn determined that the marker found by Schmieding was located 17 feet east of the cornerpost that he had treated as the boundary. This 17-foot strip of land is the disputed parcel.

Luethke testified that neither he nor his parents ever asked or ever would have asked for permission to use the driveway on the disputed parcel. Schellhorn and Hladky, who had farmed

the Schellhorn property since 1989, stated that they had used the 10- to 12-foot driveway as part of the Schellhorn property for that entire period and had never asked for or received permission to use it.

Schmieding testified that after the boundary dispute arose, he told Schellhorn that he did not have a problem with the Schellhorns' using the disputed parcel. Schmieding used the disputed parcel to access his field for irrigating, cultivating, planting, spraying chemicals, and harvesting, and Schellhorn was aware of this use.

Schmieding denied asking permission to use the driveway. Schmieding also denied that Schellhorn's use of the disputed parcel interfered with his use of it. Both parties maintained the disputed parcel by shredding grass and hauling in dirt. Schmieding said that he shredded grass on the disputed parcel several times a year and that his wife sprayed weeds and checked irrigation on the disputed parcel approximately once a year. Schellhorn testified that after he purchased the Schellhorn property in 2001, Schmieding never did maintenance work on the driveway.

In late 2010 and early 2011, Schmieding made preparations to farm the disputed parcel by filling in the waterway and chiseling the driveway area. Subsequently, the Schellhorns initiated their action to quiet title.

On April 12, 2013, the district court quieted title to the disputed parcel, specifically, the "East 17 feet of the NW ¼ of the NW ¼ of Section 5, Township 11, North, Range 2 East of 6th P.M., Seward County, Nebraska," in the Schellhorns. It denied the Schmiedings' claim for a prescriptive easement over the disputed parcel, reasoning that the Schmiedings' use of the driveway was presumed to be permissive and that no prescriptive easement was acquired.

ASSIGNMENTS OF ERROR

On appeal, the Schmiedings assign that the district court erred in (1) quieting title of the disputed parcel in the Schellhorns, because they failed to produce evidence demonstrating the location of the actual recorded boundary line and therefore failed to provide an exact and definite description of the land

they claimed to have entered and possessed; (2) quieting title in the Schellhorns when their adverse possession claim was barred by the doctrine of laches; and (3) in the alternative, failing to find that the Schmiedings obtained a prescriptive easement for use of the driveway.

On cross-appeal, the Schellhorns assign that in the event they are not entitled to title of the disputed parcel by adverse possession, they are entitled to a prescriptive easement over the disputed parcel to continue to use it for a farm road and related farm purposes.

ANALYSIS

Adverse Possession

[3] A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for a statutory period of 10 years. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). The Schmiedings do not dispute that the Schellhorns met their burden of proof for each of these elements. Instead, the Schmiedings claim that the Schellhorns failed to produce any evidence demonstrating the physical location of the actual recorded boundary line. Without such evidence, the Schmiedings argue, the district court could not have known the distance between the recorded boundary line and the Luethke fence.

[4] Proof of the adverse nature of the possession of land is not sufficient to quiet title in the adverse possessor; the land itself must also be described with enough particularity to enable the court to exact the extent of the land adversely possessed and to enter a judgment upon the description. *Matzke v. Hackbart*, 224 Neb. 535, 399 N.W.2d 786 (1987). The court quieted title to the east 17 feet of the Schmiedings' property in the Schellhorns.

Evidence at trial established that the observed boundary between the Schellhorn and Schmieding properties was the still discernible Luethke fence line between the waterway and the driveway. Although the fence had been removed, the

cornerpost still existed. From that cornerpost, remnants of another fence ran south. That adjacent fence provided a sight line for the location of the Luethke fence line and, thereby, the observed boundary.

There was also evidence concerning the record boundary. Schmieding testified that he located a survey marker from 1982. Later, he informed Schellhorn that he intended to treat the marker as the record boundary. Although Schellhorn testified that he could not definitely identify the survey marker as the record boundary without another survey, the remainder of his testimony demonstrated his belief that the survey marker represented the record boundary.

Schellhorn measured the distance between the observed boundary line and the line corresponding with the survey marker, and he found the distance to be 17 feet. The 17-foot strip of land on the east side of the Schmieding property is the disputed parcel. The district court ruled in favor of the Schellhorns, quieting title to the "East 17 feet of the NW ¼ of the NW ¼ of Section 5, Township 11, North, Range 2 East of 6th P.M., Seward County, Nebraska." We conclude that the description of the disputed parcel set forth by the evidence is specific enough to support the district court's judgment.

The Schmiedings further contend that the disputed parcel could not be a regular shape, as claimed by the Schellhorns and awarded by the district court, because the driveway varies in size and bows to the east. The Schmiedings argue that the driveway forms the basis of Luethke's testimony regarding the western boundary of the disputed parcel. However, it is not the driveway that the Schellhorns presented as the observed boundary, but, rather, the historic Luethke fence line. There was no testimony that the fence line was not straight, and there was space in the disputed parcel for the 10- to 12-foot driveway to meander within it. In sum, evidence of a bowing driveway does not negate the evidence that the disputed parcel is regularly shaped. This argument lacks merit.

For the foregoing reasons, we reject the Schmiedings' first assignment of error.

Laches

The Schmiedings contend that the Schellhorns' claim is barred by the doctrine of laches, because the Schellhorns and their predecessors in interest committed inexcusable neglect in failing to bring this action in a reasonable time period after it became ripe, thereby directly prejudicing the Schmiedings. The Schmiedings claim that they have been prejudiced because any witness they could have called on their behalf is deceased. Nothing in the record established that the Schmiedings were prejudiced by any of the Schellhorns' actions.

[5-7] The defense of laches is not favored in Nebraska. *Farmington Woods Homeowners Assn. v. Wolf*, 284 Neb. 280, 817 N.W.2d 758 (2012). Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice. *Id.* Laches does not result from the mere passage of time, but from the fact that during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Id.*

The Schellhorns and their predecessors, the Luethke family, had always treated the disputed parcel as their own, based on their understanding of the boundary line. Schellhorn communicated this to Schmieding when the latter expressed doubt about the boundary line. The Schellhorns had no reason to file a claim to quiet title to the disputed parcel until the Schmiedings began treating the disputed parcel as their own by preparing to farm it.

We find no prejudice to the Schmiedings. They were uncertain about the location of the boundary as early as 2001. They were aware of the Schellhorns' position on the matter but took no legal action to settle the boundary dispute.

The doctrine of laches does not apply in the instant case, and the district court did not err in quieting title to the disputed parcel in the Schellhorns.

Prescriptive Easement

[8,9] We next consider whether the Schmiedings obtained a prescriptive easement for use of the disputed parcel. The law treats a claim of prescriptive right with disfavor. *Feloney v.*

Baye, 283 Neb. 972, 815 N.W.2d 160 (2012). 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. *Id*.

Schellhorn testified that he dealt with the Schmiedings as if the driveway on the disputed parcel belonged to the Schellhorns. Schellhorn was aware that the Schmiedings routinely used the driveway on the disputed parcel for various purposes and did not deny the Schmiedings access to it. The Schellhorns did not impede the Schmiedings' use of the disputed parcel until the Schmiedings prepared to farm the disputed parcel and the Schellhorns initiated the quiet title action. Until the Schmiedings prepared to farm the disputed parcel, their use was permissive, and they failed to prove that such use was adverse. See *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002) (permissive use is not adverse). The district court did not err in denying the Schmiedings' request for a prescriptive easement.

On cross-appeal, the Schellhorns request a prescriptive easement over the disputed parcel in the event that we conclude they have not acquired it by adverse possession. Because the district court did not err in quieting title to the disputed parcel in the Schellhorns, their cross-appeal is moot.

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court and dismiss the cross-appeal as moot.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT F. KUDLACZ, APPELLANT.
850 N.W.2d 755

Filed July 25, 2014. No. S-13-570.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
3. **Statutes: Appeal and Error.** Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Probation and Parole: Convictions.** Confinement in a county jail as a condition of probation does not bar a person from seeking to have a conviction set aside pursuant to Neb. Rev. Stat. § 29-2264 (Supp. 2013).
6. ____: ____. It is the province of the sentencing court to set aside a conviction pursuant to Neb. Rev. Stat. § 29-2264 (Supp. 2013).

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Reversed and remanded for further proceedings.

Joseph Kuehl, of Lefler & Kuehl Law Office, for appellant.

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

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

CASSEL, J.

INTRODUCTION

The question posed in this appeal is whether a condition requiring periodic confinement of the offender in the county jail, as part of a sentence of probation, prevents a court from setting aside the conviction pursuant to Neb. Rev. Stat. § 29-2264 (Supp. 2013). The district court stated that it did, relying on language in one of our cases. We disagree. Our prior

decision was not controlling on this point. And the plain language of the statute states otherwise. We reverse, and remand for further proceedings.

BACKGROUND

Robert F. Kudlacz pled guilty to one count of issuing a bad check, $100 to $500. The district court sentenced him to probation for a period of 15 months. As a condition of his probation, he was ordered to obtain suitable employment or to provide proof of his efforts to obtain suitable employment. He was further ordered to pay restitution.

Kudlacz failed to provide proof of seeking employment or being employed and to make payments in restitution. Consequently, the district court continued his probation for a period of 24 months and amended the conditions of his probation to include confinement in the county jail for a period of 90 days to be served on weekends.

Upon satisfactory completion of the conditions of his probation, the district court entered an order releasing Kudlacz from probation pursuant to § 29-2264(1). He then moved the court to set aside his conviction pursuant to § 29-2264(2). That subsection provides:

> Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.[1]

Section 29-2264(3) and (4) provide various factors for a sentencing court to consider in determining whether to set aside a conviction. These factors include (1) the behavior of the offender after sentencing, (2) the likelihood that the offender will not engage in further criminal activity, (3) any other information the court considers relevant, and (4) whether setting

[1] § 29-2264(2).

aside the conviction is in the best interests of the offender and consistent with the public welfare.[2]

After a hearing, the district court denied Kudlacz' motion. The court determined that he did not fall within the class of persons whose convictions may be set aside pursuant to § 29-2264. Specifically, the court relied upon language appearing in *McCray v. Nebraska State Patrol*.[3] In the background section of that opinion, this court stated that "[s]ection 29-2264(2) empowers a court to set aside certain criminal convictions in which the sentence does not include incarceration."[4] Because the conditions of Kudlacz' probation included county jail time, the district court reasoned that it was constrained by *McCray* to deny the requested relief.

Kudlacz filed a timely notice of appeal, and the case was assigned to the Nebraska Court of Appeals' docket. In response to Kudlacz' opening brief, the State filed a suggestion of remand and accompanying brief. In its accompanying brief, the State argued that the clear language of § 29-2264(2) did not deny relief to persons confined to the county jail as a condition of probation. However, the State did not cite any other decision of this court or the Court of Appeals in support of its suggestion of remand.

The Court of Appeals entered a show cause order granting the parties 10 days to file a stipulation indicating that the matter should be submitted on Kudlacz' opening brief and the brief accompanying the State's suggestion of remand. Otherwise, the Court of Appeals would overrule the suggestion of remand, and the matter would proceed with briefing.

In response to the show cause order, the parties filed a stipulation that the matter be submitted and an opinion issued without further briefing or oral argument. Specifically, the parties stipulated that "this matter should be remanded to the district court with instructions to consider the factors set forth in Neb. Rev. Stat. § 29-2264 and determine whether Kudlacz's

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[2] See § 29-2264(3) and (4).

[3] *McCray v. Nebraska State Patrol*, 271 Neb. 1, 710 N.W.2d 300 (2006).

[4] *Id.* at 4, 710 N.W.2d at 304.

conviction should be set aside based upon consideration of those factors."

We moved the case to our docket pursuant to statutory authority.[5] As this case presented an issue of statutory interpretation with no prior guidance other than our statement in *McCray*, we did not consider summary remand to be appropriate. We overruled the suggestion of remand, set aside the waiver of oral argument without prejudice, and ordered the State to file a brief. After briefing was completed, we heard oral arguments.

ASSIGNMENT OF ERROR

Kudlacz assigns that the district court erred in overruling the motion to set aside his conviction.

STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[6]

ANALYSIS

As noted above, this appeal presents the issue of whether a person whose sentence of probation included a condition of confinement in the county jail may have his or her conviction set aside pursuant to § 29-2264. In this case, Kudlacz was given jail time as a condition of probation. Neb. Rev. Stat. § 29-2262(2)(b) (Reissue 2008) specifically authorizes a court to require the offender, as a condition of probation, to be "confined periodically in the county jail" subject to certain specified maximum time limits. Relying upon *McCray*, the district court concluded that it was unable to consider whether Kudlacz' conviction should be set aside, because he had been imprisoned as a condition of probation. As noted above, in *McCray*, we stated that § 29-2264 empowers a court to set aside certain convictions in which the sentence does not include incarceration.[7]

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

[6] *Heckman v. Burlington Northern Santa Fe Ry. Co.*, 286 Neb. 453, 837 N.W.2d 532 (2013).

[7] See *McCray, supra* note 3.

[2] Our statement in *McCray* was not necessary to the decision in that case and carries no precedential weight on the point before us in the instant case. *McCray* was a sex offender registration case in which the defendant challenged the use of convictions that had been set aside in determining his risk of recidivism.[8] Our analysis with respect to § 29-2264 was focused solely on the use of convictions after they had previously been set aside; we were not presented with the issue of whether the defendant's convictions were eligible to be set aside. A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.[9] In *McCray*, it was not necessary to consider whether the defendant's convictions could be set aside under § 29-2264. Thus, the district erred in deeming our statement as controlling. We therefore examine Kudlacz' eligibility to have his conviction set aside, with no deference to *McCray*.

[3,4] Section 29-2264(2) is not ambiguous. Absent anything to the contrary, an appellate court will give statutory language its plain and ordinary meaning.[10] And in construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[11]

[5] The plain language does not support the reading derived by the district court from *McCray*. We have already quoted the words of the statute. It authorizes any person convicted of a misdemeanor or a felony and placed on probation or sentenced to a fine only to petition the sentencing court to set aside the conviction after satisfactory fulfillment of the conditions of probation for the entire period, or after early discharge, and payment of any fine. The plain language simply

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[8] See *id*.

[9] *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 687 N.W.2d 689 (2004).

[10] *SourceGas Distrib. v. City of Hastings*, 287 Neb. 595, 844 N.W.2d 256 (2014).

[11] *State v. Wester*, 269 Neb. 295, 691 N.W.2d 536 (2005).

does not address jail time as a condition of probation. Had the Legislature wished to disqualify those persons whose sentences of probation included a condition of confinement in the county jail, it easily could have done so. But it did not. We therefore hold that confinement in the county jail as a condition of probation does not bar a person from seeking to have a conviction set aside pursuant to § 29-2264.

[6] Thus, the district court erred in overruling Kudlacz' motion on the basis that his conviction could not be set aside pursuant to § 29-2264(2). Kudlacz was sentenced to probation and discharged after satisfactory fulfillment of the conditions of probation for the entire period. The condition of county jail confinement did not preclude setting aside the conviction under § 29-2264. But it is the province of the sentencing court to set aside a conviction.[12] The court should have considered whether Kudlacz' conviction should be set aside pursuant to the factors specified by § 29-2264(3) and (4).

CONCLUSION

Section 29-2264(2) permits specified criminal convictions to be set aside. But the statutory language does not disqualify relief merely because the person placed on probation was subjected to county jail confinement as a condition of probation. The district court erred in concluding that language in our case law instructed otherwise. However, it falls to the district court to determine, in the first instance, whether to set aside the conviction. And in doing so, the court is required to consider the factors specified in § 29-2264(3) and (4). We reverse the district court's order and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[12] *Id.*

GLORIA CORREA, APPELLANT, V. ESTATE OF E. DEAN HASCALL, DECEASED, AND NEOMI D. HASCALL, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF E. DEAN HASCALL, APPELLEES.

850 N.W.2d 770

Filed July 25, 2014. No. S-13-749.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Decedents' Estates: Executors and Administrators: Statutes.** Because a personal representative is not a natural person, but an entity created by statute through a court order of appointment, when an estate is closed and the personal representative discharged, there is no viable entity or person to sue.
3. **Limitations of Actions: Dismissal and Nonsuit.** Under Neb. Rev. Stat. § 25-217 (Reissue 2008), an action is commenced on the date the complaint is filed with the court, but is dismissed without prejudice as to any defendant not served within 6 months from the date the complaint was filed.
4. **Limitations of Actions.** Under certain situations as set forth in Neb. Rev. Stat. § 25-201.02 (Reissue 2008), an amended complaint may relate back to the commencement date of an earlier complaint.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Appeal dismissed.

Patrick E. McNamara and Ryan M. Hoffman, of Anderson, Bressman & Hoffman Law Firm, P.C., L.L.O., for appellant.

Karen Weinhold, of Engles, Ketcham, Olson & Keith, P.C., for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Gloria Correa filed this negligence action against the estate of the decedent, E. Dean Hascall (Hascall), and the estate's personal representative, Neomi D. Hascall. The district court granted the estate's motion for summary judgment and denied Correa's motion for leave to file an amended complaint. Correa appeals. We conclude that the district court lacked jurisdiction over these motions and that likewise, this court

lacks jurisdiction over Correa's appeal. Accordingly, we dismiss the appeal.

BACKGROUND

Correa and Hascall were involved in a motor vehicle accident in Sarpy County, Nebraska, on September 17, 2008. Hascall died on November 16, 2008, apparently of causes unrelated to the accident with Correa.

Hascall's death prompted the opening of his estate. On October 19, 2009, Hascall's widow, Neomi, was appointed personal representative of the estate. The estate was closed on September 24, 2010. Neomi was discharged as personal representative on September 1, 2011.

On September 14, 2012, Correa filed a complaint alleging Hascall's negligence in the September 17, 2008, accident. The complaint was served on the estate and Neomi on November 7, 2012. In their amended answer, filed April 5, 2013, the estate and Neomi alleged several affirmative defenses, including that Correa's suit failed to state a cause of action upon which relief could be granted, because an action could not be brought against an estate that had been closed or a personal representative that had been discharged.

On May 17, 2013, the estate and Neomi filed for summary judgment. On June 17, Correa's motion for an emergency order reopening the estate and appointing a special administrator was granted by the probate court. On that same day, Correa filed a motion for leave to file an amended complaint.

A hearing was held on July 1, 2013, on both the motion for summary judgment and the motion for leave to file an amended complaint. The hearing began with counsel for Correa presenting arguments on the motion for leave to file an amended complaint. Counsel for the estate and Neomi then presented their motion for summary judgment, arguing that dismissal would be appropriate because Correa filed suit against a closed estate and a discharged personal representative. The district court took the motion for leave to amend under advisement and indicated that it would "reset the Motion for Summary Judgment if necessary." On July 30, the district court granted

the estate and Neomi's motion for summary judgment and denied as moot Correa's motion for leave to amend.

ASSIGNMENTS OF ERROR

Correa assigns, renumbered, that the district court erred in (1) denying Correa's motion for leave to file an amended complaint because all parties had notice of the claim; (2) denying Correa's motion for leave to file an amended complaint because the occurrence alleged in the amended complaint arose out of the same occurrence as the original complaint; (3) granting summary judgment without allowing Correa the opportunity to oppose the motion for summary judgment; and (4) granting summary judgment because Hascall's insurer, State Farm, was equitably estopped from asserting the service of process issue.

STANDARD OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.[1]

ANALYSIS

Explanation of Underlying Law

We begin with an explanation of the underlying law governing this issue. Neb. Rev. Stat. § 30-2486 (Reissue 2008) sets forth the manner of presentation of a claim against a decedent's estate and states in part:

> Claims against a decedent's estate may be presented as follows:
>
> (1) The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly

[1] *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(2) The claimant may commence a proceeding against the personal representative in any court which has subject matter jurisdiction and the personal representative may be subjected to jurisdiction, to obtain payment of his or her claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his or her death.

Neb. Rev. Stat. § 30-2485 (Reissue 2008) sets forth time limitations on the presentation of claims:

(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, the personal representative, and the heirs and devisees of the decedent, 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, except that claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state. 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 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.
>
> . . . .
>
> (c) Nothing in this section affects or prevents:
>
> (1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or
>
> (2) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he or she is protected by liability insurance.

Under § 30-2485(a), Correa would, at most, be allowed 3 years, or by November 16, 2011, to file a claim against Dean's estate. No claim was filed during this time period; indeed, this lawsuit was not filed until September 14, 2012. For these reasons, any "claim" against the estate is untimely.

[2] Instead, Correa filed her negligence action in the district court. But she sued the estate, which had closed, and the personal representative, who had been discharged. The Nebraska Court of Appeals has held in a similar circumstance that a claimant could not institute proceedings against a discharged personal representative while an estate was closed. The Court of Appeals reasoned that

> a personal representative is not a natural person, but, rather, an entity created by statute through a court order of appointment. . . . Thus, it naturally follows that when the estate is closed and the personal representative is discharged, there is no viable entity or person to sue, because the tortfeasor is deceased, his or her estate is closed, and there is no longer a personal representative.[2]

We agree, and conclude that Correa failed to properly bring suit against the estate or the personal representative, because the estate had been closed and the personal representative had been discharged.

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[2] *Estate of Hansen v. Bergmeier*, 20 Neb. App. 458, 466, 825 N.W.2d 224, 231 (2013). Cf., *Babbit v. Hronik*, 261 Neb. 513, 623 N.W.2d 700 (2001); *Mach v. Schumer*, 4 Neb. App. 819, 550 N.W.2d 385 (1996).

No doubt understanding her legal position, Correa filed an emergency motion to reopen the estate and assign a special administrator for purposes of service, which was granted. The newly appointed special administrator was served with the complaint on June 28, 2013.

[3] But this was insufficient to save Correa's suit. Under Neb. Rev. Stat. § 25-217 (Reissue 2008), "[a]n action is commenced on the date the complaint is filed with the court," but "shall stand dismissed without prejudice as to any defendant not served within six months from the date the complaint was filed." In this case, Correa's suit was not served on the new special administrator within 6 months, or by March 14, 2013, and thus it stood dismissed without prejudice. The district court lacked jurisdiction over Correa's subsequent motions, and this court lacks jurisdiction over Correa's appeal. However, we read Correa as arguing that the district court, and now this court, had jurisdiction because her amended complaint related back to her original complaint. We therefore address Correa's specific assignments of error insofar as they speak to that contention.

Relation-Back Doctrine

In her first and second assignments of error, Correa argues that the district court erred in denying her motion for leave to file an amended complaint, because all parties had notice of the claim and because it was essentially the same claim as in the original complaint. Central to these arguments is Correa's contention that her amended complaint should "relate back" to the date of her original complaint.

[4] Neb. Rev. Stat. § 25-201.02 (Reissue 2008) addresses the amendment of pleadings and the effect of that amendment:

> (1) An amendment of a pleading that does not change the party or the name of the party against whom the claim is asserted relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

> (2) If the amendment changes the party or the name of the party against whom a claim is asserted, the amendment relates back to the date of the original pleading if (a) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, and (b) within the period provided for commencing an action the party against whom the claim is asserted by the amended pleading (i) received notice of the action such that the party will not be prejudiced in maintaining a defense on the merits and (ii) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Correa argues that because the allegations in the amended complaint arise from the same basic allegations from the complaint, and because the estate and Neomi received notice and knew or should have known of Correa's mistake concerning the identity of the proper party, her amended complaint relates back to her complaint and would be timely.

As an initial matter, we note that § 25-201.02(1) is inapplicable here. That subsection deals with the scenario wherein the amendment does not change the name of the party. But here, the newly appointed special administrator was substituted for Neomi in the proposed amended complaint, and thus the party name was changed.

Nor can § 25-201.02(2) save Correa's amended complaint. Section 25-201.02(2)(b) requires that notice of the original action must be received by the party against whom the claim is asserted within the period provided for commencing an action. At the time of the original complaint, Neomi, the discharged personal representative, was sued. But the newly appointed special administrator was not served at that time and received no notice until June 28, 2013, at a time when Correa's suit had already been dismissed by operation of law. Any notice to the new special administrator was not received within the "period provided for commencing an action."

Correa's argument simply overlooks the realities of the operation of § 25-217. This section is self-executing and acts

to dismiss without prejudice any action not served within 6 months of its filing. As of March 14, 2013, 6 months after its filing, Correa's suit was dismissed by operation of law. The newly appointed special administrator was not served until June 28, 2013. But that service was of the now-dismissed complaint. Any amended complaint would have nothing to relate back to.

Correa's arguments regarding the relation-back doctrine and notice are without merit, as are her first and second assignments of error. We need not reach Correa's third assignment error, as the district court lacked jurisdiction over the motion for summary judgment and motion for leave to file an amended petition.

State Farm's Actions

In her fourth and final assignment of error, Correa contends that State Farm, Dean's insurance carrier, was deceitful in engaging in settlement negotiations with her for nearly 6 months and that equitable estoppel bars them from raising the service issue after it was too late for Correa to correct it. Correa cites to *Olsen v. Olsen*[3] for the proposition that one cannot use the statute of limitations as a defense after his or her own promises and representations led to the delay in filing the action.

We first note that State Farm is not a party here. Further, we have no evidence regarding the nature of the negotiations between Correa and State Farm; instead, we have only Correa's allegations about those negotiations as made at the July 1, 2013, hearing and in her brief.

In any case, Correa's reliance on *Olsen* is not persuasive. The defendant in *Olsen*, the plaintiff's ex-husband, repeatedly and continuously over a period of years, indicated that he would sign the mineral deed at issue. We do not have any such pattern of deceit in the record in this case.

It appears that Correa allowed the estate and Neomi extra time to file an answer. While suit was filed on September 14, 2012, and "service" was completed on November 7, the estate

[3] *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003).

and Neomi did not file an answer until March 29, 2013, with an amended answer filed April 5. While Correa sees this action as deceitful, on these facts we cannot agree. There is no evidence that the estate, Neomi, or State Farm acted to prevent Correa from correcting the defect in service by reopening the estate and having a special administrator appointed.

Correa's fourth and final assignment of error is without merit.

CONCLUSION

Because the special administrator was not served within 6 months of the commencement of the action, the district court lacked jurisdiction over Correa's claims. Likewise, this court lacks jurisdiction over Correa's appeal. The appeal is therefore dismissed.

APPEAL DISMISSED.

McCORMACK, J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY A. HESSLER, APPELLANT.
850 N.W.2d 777

Filed July 25, 2014. No. S-13-850.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. However, if the motion alleges only conclusions of fact or law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.
3. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.

5. **Postconviction.** A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
6. ____. The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
7. **Postconviction: Effectiveness of Counsel: Appeal and Error.** If a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, this is a basis for relief that did not exist at the time of the prior proceeding.
8. **Postconviction: Appeal and Error.** If a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, this is a basis for relief that did not exist at the time of the prior proceeding because it was not available to the defendant.
9. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
10. **Postconviction: Effectiveness of Counsel.** Postconviction relief cannot be obtained on the basis of ineffective assistance of postconviction counsel.
11. **Postconviction: Constitutional Law: Effectiveness of Counsel.** There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.
12. **Postconviction: Constitutional Law: Effectiveness of Counsel: Habeas Corpus: States.** *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), did not recognize a constitutional right to effective assistance of postconviction counsel. Based upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding. Nothing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law.
13. **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.
14. **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.
15. **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.
16. **Judgments: Appeal and Error.** The writ of error coram nobis is not available to correct errors of law.

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

Alan G. Stoler and Jerry M. Hug, of Alan G. Stoler, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, J. Kirk Brown for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and INBODY, Chief Judge.

CASSEL, J.

I. INTRODUCTION

Jeffrey A. Hessler appeals the order of the district court denying his second action for postconviction relief and a writ of error coram nobis. All of his claims—relating to mental competency, errors or misconduct at trial, and ineffective assistance of counsel—were or could have been litigated on direct appeal or in his first postconviction action. Thus, they were procedurally barred. And his reference to two recent decisions of the U.S. Supreme Court provides no basis to deviate from our procedural rules. Finally, he failed to raise any basis warranting coram nobis relief. We affirm.

II. BACKGROUND

Hessler was convicted of first degree murder, kidnapping, first degree sexual assault on a child, and use of firearm to commit a felony for the sexual assault and killing of 15-year-old Heather Guerrero. He was sentenced to death on the murder conviction and various terms of imprisonment on the other convictions. The circumstances which led to Hessler's convictions and sentences may be found in *State v. Hessler*.[1]

We affirmed Hessler's convictions and sentences on direct appeal.[2] We summarized the assignments of error raised in his appellate brief, in pertinent part, as follows:

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[1] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

[2] *Id.*

> [T]he district court erred in . . . (3) failing to excuse for cause potential jurors who had formed opinions regarding Hessler's guilt; (4) overruling his motion to change venue; [and] (7) granting his request to waive counsel and appear pro se at sentencing and failing to make a determination regarding his competency to waive counsel.[3]

After we affirmed his convictions and sentences, Hessler filed his first action for postconviction relief. In his first postconviction motion, Hessler asserted claims related to ineffective assistance of trial and appellate counsel, errors at trial, and prosecutorial misconduct. He claimed that his trial counsel was ineffective for failing to take various actions regarding his mental competency, juror bias, and venue. And he alleged that his appellate counsel was ineffective for failing to raise and argue those issues. Finally, he asserted that the trial court erred by failing to order a competency evaluation and that the State committed prosecutorial misconduct by failing to suggest such an evaluation.

The district court ordered an evidentiary hearing on the sole issue of whether Hessler's trial counsel was ineffective for failing to raise the issue of competency after Hessler's convictions but prior to the determination of any mitigating factors and sentencing. Before the mitigation portion of the sentencing phase began, Hessler moved the court to proceed pro se. He had been represented by counsel up until that point. The court ultimately rejected Hessler's ineffective assistance claim, finding that the record affirmatively showed that he was competent. It therefore denied postconviction relief. We affirmed the denial of postconviction relief on appeal.[4]

Hessler then filed the present, second motion for postconviction relief. As noted above, the claims asserted in the present motion related to mental competency, errors or misconduct at trial, and ineffective assistance of counsel. The district court summarized Hessler's 17 claims as follows:

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[3] *Id.* at 488, 741 N.W.2d at 416.

[4] *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

1. Custodial statement made on February 11, 2003, and February 12, 2003[,] violated Hessler's constitutional rights. A mental disease prevented Hessler from knowingly and intelligently waiving his constitutional right to remain silent.

2. Hessler was denied a fair and impartial jury due to pretrial publicity and the trial court's denial of his motion to change venue.

3. Hessler's waiver of counsel violated his constitutional rights. Mental illness rendered Hessler incompetent to waive counsel.

4. Hessler's waiver of his right to be present in court was invalid. Hessler's mental illness rendered him incompetent to waive his presence during court proceedings.

5. Comments by the Court and prosecutor violated Hessler's right to a fair trial.

6. Trial counsel was ineffective during the guilt — innocence stage of Hessler's trial including, but not limited to, not aggressively pursuing suppression of Hessler's statements, not effectively pursuing a change of venue, not adequately investigating Hessler's competency, etc.

7. Trial counsel failed to adequately investigate and litigate Hessler's lack of mental capacity to waive his Fourth Amendment rights.

8. The trial court's "mental anguish" jury instruction was unconstitutional. Trial and appellate counsel were ineffective by not pursuing that issue.

9. Trial counsel was ineffective for failing to object to the State's use of testimonial hearsay evidence, specifically DNA reports and lab analysis.

10. Hessler was incompetent to stand trial due to debilitating mental disease or defect.

11. Trial counsel was ineffective because Hessler was innocent due to an incapacity to act with deliberate and premeditated malice.

12. Trial counsel was generally ineffective at the aggravation hearing.

13. Hessler was denied a fair trial due to juror bias and misconduct.

14. Appellate counsel and post conviction counsel were generally ineffective.

15. The prosecutor generally committed prosecutorial misconduct at all stages of the proceedings.

16. Witness [Mark] Bohaty was allowed to present "pseudo-scientific" evidence regarding firearms.

17. Cumulative error.

The district court found that Hessler's second postconviction motion failed to raise any ground for relief not previously available to him. It noted that the issues of mental competency and ineffective assistance of trial and appellate counsel were litigated on direct appeal or in his first postconviction action. And his various assertions of errors or misconduct at trial were previously litigated or were known and could have been raised in the prior proceedings. Finally, it observed that no constitutional basis existed for his claim of ineffective assistance of postconviction counsel. It therefore denied postconviction and coram nobis relief and dismissed the motion. Hessler timely appeals.

III. ASSIGNMENTS OF ERROR

We consolidate and restate Hessler's numerous assignments of error. Hessler assigns that the district court erred in failing to grant an evidentiary hearing on each of his 17 claims.

IV. STANDARD OF REVIEW

[1,2] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[5] An evidentiary hearing on a motion for postconviction relief must be granted when the motion contains factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.[6] However, if the motion alleges only conclusions of fact or

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

[6] *Id.*

law, or the records and files in the case affirmatively show that the movant is entitled to no relief, no evidentiary hearing is required.[7]

[3] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[8] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.[9]

V. ANALYSIS

[4] We first dispose of a preliminary issue. Hessler assigned as error the district court's denial of an evidentiary hearing on the claims raised in his second motion for postconviction relief. In his brief, he assigned 17 errors and argued the merits of each of his 17 claims. But he omitted claims 8 and 10 from his assignments of error by duplicating other claims. We recognize our precedent that an appellate court does not consider errors which are argued but not assigned.[10] But we do not treat claims 8 and 10 as being waived. The sentences imposed in this case are grave, and the duplications of the other claims make it clear that he intended to assign error to the district court's disposition of each of his claims but committed a typographical error.

1. Denial of Postconviction Relief

[5,6] This is Hessler's second motion for postconviction relief. A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.[11] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.[12]

[7,8] We have recognized two circumstances which provide a new ground for relief constituting an exception to

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[7] *Id.*

[8] *State v. Ortiz*, 266 Neb. 959, 670 N.W.2d 788 (2003).

[9] *Id.*

[10] See, e.g., *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[11] *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[12] *Id.*

the procedural bar in postconviction proceedings. First, if a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier, this is a basis for relief that did not exist at the time of the prior proceeding.[13] Second, if a defendant brings a successive motion for postconviction relief based on newly discovered evidence that was not available at the time the prior motion was filed, this is a basis for relief that did not exist at the time of the prior proceeding because it was not available to the defendant.[14]

None of the 17 claims asserted by Hessler raised a new ground for relief constituting an exception to the procedural bar. Thus, the district court correctly denied Hessler's motion. For the sake of brevity, we organize our analysis in accordance with the common themes shared among the 17 claims: mental competency, errors or misconduct at trial, and ineffective assistance of counsel.

(a) Mental Competency

Claims 1, 3, 4, and 10 pertain to Hessler's mental competency during the proceedings against him. Hessler asserted that due to mental illness, he was incompetent to stand trial and unable to waive his right to remain silent, his right to counsel, and his right to be present.

[9] But Hessler challenged his competency to waive the right to counsel on direct appeal.[15] He alleged that the trial court erred in granting his request to waive counsel and appear pro se at sentencing and in failing to make a determination regarding his competency to do so.[16] We rejected this claim because the trial court had no reason to doubt Hessler's competency to waive counsel.[17] Having already litigated this claim, Hessler was procedurally barred from raising it in the present motion. A motion for postconviction relief cannot be

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[13] *Id.*

[14] *Id.*

[15] See *Hessler, supra* note 1.

[16] See *id.*

[17] See *id.*

used to secure review of issues which were or could have been litigated on direct appeal.[18]

Hessler's three remaining claims regarding his mental competency were similarly barred. These claims were known and could have been litigated on direct appeal. Consequently, we find no error in the district court's denial of an evidentiary hearing on claims 1, 3, 4, and 10.

(b) Errors or Misconduct at Trial

Claims 2, 5, 13, 15, 16, and 17 relate to errors or misconduct at trial. Briefly, Hessler asserted that his convictions and sentences must be overturned because of a biased jury, comments made by the trial judge and prosecution that diminished the jury's role in sentencing, juror misconduct, prosecutorial misconduct, improperly admitted evidence, and cumulative error.

Hessler asserted that his jury was biased on direct appeal.[19] He alleged that the trial court erred in failing to excuse potential jurors who had formed opinions of his guilt and in overruling his motion to change venue because he could not receive a fair trial in Scotts Bluff County, Nebraska.[20] As this claim was previously asserted and rejected, Hessler was barred from asserting it again.

Hessler's remaining claims of errors or misconduct at trial were similarly barred. These claims were known to Hessler and could have been raised on direct appeal. But he did not do so. We therefore find no error in the district court's denial of an evidentiary hearing on claims 2, 5, 13, 15, 16, and 17.

(c) Ineffective Assistance of Counsel

Claims 6 through 9, 11, 12, and 14 pertain to ineffective assistance of counsel. Hessler asserted that his trial counsel was ineffective for failing to take various actions regarding competency, juror bias and misconduct, venue, cross-examination of witnesses, jury instructions, evidence, and prosecutorial

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[18] *State v. Suggs*, 259 Neb. 733, 613 N.W.2d 8 (2000).

[19] See *Hessler, supra* note 1.

[20] *Id.*

misconduct. He further alleged that his counsel on direct appeal and in his first postconviction action were ineffective for failing to raise and argue all meritorious issues.

As noted above, a new basis for relief may exist if a defendant brings a motion for postconviction relief based on ineffective assistance of trial or direct appeal counsel which could not have been raised earlier.[21] But Hessler was able to assert ineffective assistance of trial and appellate counsel in his first postconviction action and did so.[22] He was not entitled to do so again. Consequently, his present claims of ineffective assistance of trial and appellate counsel were procedurally barred.

[10,11] But Hessler also claimed that he received ineffective assistance of counsel in his first postconviction action. He argued that the ineffectiveness of his first postconviction counsel constituted a new basis for relief and rendered any claims not raised in the prior proceedings unavailable to him until the present action. This argument has no merit. Postconviction relief cannot be obtained on the basis of ineffective assistance of postconviction counsel.[23] There is no constitutional guarantee of effective assistance of counsel in a postconviction action and therefore no claim for ineffective assistance of postconviction counsel.[24]

In his brief, Hessler cites *Martinez v. Ryan*[25] as a basis for deviating from our procedural rules and granting an evidentiary hearing on his 17 claims. In *Martinez*, the U.S. Supreme Court held that a state procedural default does not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective. This holding was initially limited

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[21] See *Ryan, supra* note 11.

[22] See *Hessler, supra* note 4.

[23] See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[24] *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006).

[25] *Martinez v. Ryan*, ___ U.S. ___, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012).

to state procedural systems in which ineffective assistance of trial counsel claims were required to be litigated in the initial-review collateral proceeding.[26] But the Court later expanded its holding to include state systems in which ineffective assistance of trial counsel claims were highly unlikely to be given a meaningful opportunity for review on direct appeal.[27] We assume, without deciding, that Nebraska's postconviction review procedures fall within the purview of the Court's expanded holding.

[12] *Martinez* did not recognize a constitutional right to effective assistance of postconviction counsel. Based upon principles of equity, it expanded only the types of cause permitting a federal habeas court to excuse a procedural default in a federal habeas proceeding.[28] Nothing in *Martinez* prevents state courts from enforcing procedural defaults in accordance with state law.

Other state courts have reached similar conclusions regarding the effect of *Martinez*.[29] The Supreme Court of Pennsylvania made several observations worthy of note.[30] First, it described the *Martinez* holding as creating a "federal safety valve to allow for a third level of review—exclusively federal—if the subject claim involved a trial default, and initial collateral

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[26] See *id*.

[27] See *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911, 185 L. Ed. 2d 1044 (2013).

[28] See *Martinez, supra* note 25.

[29] See, *Gore v. State*, 91 So. 3d 769 (Fla. 2012) (*Martinez* directed toward federal habeas proceedings); *People v. Miller*, 2013 IL App (1st) 111147, 988 N.E.2d 1051, 370 Ill. Dec. 695 (2013) (*Martinez* applies to federal courts considering habeas petitions and expressly not constitutionally based decision); *Yarberry v. State*, 372 S.W.3d 568 (Mo. App. 2012) (holding in *Martinez* limited to determination that procedural default will not bar federal habeas court from hearing ineffective assistance of trial counsel claims); *Com. v. Holmes*, 79 A.3d 562 (Pa. 2013) (procedural default will not bar federal habeas court from hearing substantial claim of ineffective assistance at trial); *Kelly v. State*, 404 S.C. 365, 745 S.E.2d 377 (2013) (*Martinez* limited to federal habeas corpus review and not applicable to state postconviction relief actions).

[30] See *Holmes, supra* note 29.

review counsel did not recognize it."[31] Second, it recognized that the new federal habeas consequence jeopardizes both a state procedural default rule and the state's power and right to pass upon constitutional claims in the first instance. Third, it acknowledged that federal courts sitting in habeas corpus review of final Pennsylvania convictions may review claims of trial counsel ineffectiveness not raised by postconviction counsel on the merits, in the first instance, as an "'equitable'" matter.[32]

However, the Pennsylvania court declined to modify its framework for collateral review of criminal convictions. It recognized that the question of "whether to take measures to otherwise account for the concerns of *Martinez*" is one of policy.[33] It elected to await either the action of its state legislature or a case where the issue was properly joined.

Similarly, we conclude that such matters of policy should be addressed in the first instance to the Legislature. Our Legislature has enacted postconviction relief limited to a single proceeding. Neb. Rev. Stat. § 29-3001 (Cum. Supp. 2012) permits a prisoner to file a verified motion asking the sentencing court to vacate or set aside the sentence and stating the grounds entitling him or her to relief. It expressly authorizes a court to reject a second or successive motion for similar relief.[34] Whether Nebraska should provide a second round of collateral review as of right to capture claims of ineffective assistance of trial counsel which have been defaulted in the initial postconviction proceeding is a matter for the Legislature. It should make that decision in light of the consequences that follow from *Martinez* as accurately summarized by the Pennsylvania court. But until that time, this court continues to enforce our procedural rules in accordance with our well-settled postconviction jurisprudence. Accordingly, we reject Hessler's argument regarding *Martinez* and affirm the district

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[31] *Id.* at 583.

[32] See *id.* at 584.

[33] *Id.*

[34] See § 29-3001(3).

court's denial of an evidentiary hearing on claims 6 through 9, 11, 12, and 14.

2. Denial of Coram Nobis Relief

[13-15] Hessler also sought relief under the common-law writ of error coram nobis. 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.[35] 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.[36] 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.[37] 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.[38] It is not enough to show that it might have caused a different result.[39]

But Hessler's second motion for postconviction relief failed to allege any fact not presented in the prior proceedings which would have prevented his convictions. As previously noted, the claims raised in the present motion shared three common themes: mental competency, errors or misconduct at trial, and ineffective assistance of counsel. As to his mental competency, Hessler alleged that the trial court was not presented with information regarding his various mental illnesses and the medications he was taking at the time of trial. But in his first postconviction action, this information was adduced at an evidentiary hearing, and we concluded that the record

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[35] *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

affirmatively showed that Hessler had met the legal standard of competency.[40]

[16] As to his claims of errors or misconduct at trial and ineffective assistance of counsel, such claims were inappropriate for coram nobis relief. The writ of error coram nobis is not available to correct errors of law.[41] We find no error in the district court's denial of a writ of error coram nobis.

VI. CONCLUSION

Except for Hessler's argument citing to *Martinez,* the claims raised in Hessler's second motion for postconviction relief either were litigated in the prior proceedings or were known and could have been litigated. As such, they were procedurally barred. And Hessler's claim of ineffective assistance of postconviction counsel, relying upon *Martinez*, was without constitutional support. He similarly failed to raise any basis warranting coram nobis relief. We affirm the denial of Hessler's second motion for postconviction relief and writ of error coram nobis.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[40] See *Hessler, supra* note 4.

[41] *Diaz, supra* note 35.

MARK STAUFFER AND CINDI STAUFFER, HUSBAND AND WIFE, APPELLEES, V. BETTY JEAN BENSON, APPELLANT.

850 N.W.2d 759

Filed July 25, 2014. No. S-13-928.

1. **Breach of Contract: Damages.** A suit for damages arising from breach of a contract presents an action at law.
2. **Trial: Witnesses.** In a bench trial of an action at law, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony.
3. **Judgments: Appeal and Error.** The trial court's factual findings in a bench trial of an action at law have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. **Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.

5. **Contracts: Waiver.** A party to a contract may waive the provisions made for his or her benefit.
6. **Breach of Contract.** In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform.
7. ____. The question whether there has been repudiation or whether repudiation was justified is a question of fact.
8. **Contracts: Tender: Time: Waiver.** An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance.
9. **Breach of Contract.** A covenant by a purchaser to pay, and by the vendor to convey a good title, both to be performed at the same time, are mutually dependent, and neither party can claim a breach without a tender of performance and offer to perform upon due performance by the other, or, at least, proof of readiness and willingness to perform.

Appeal from the District Court for Phelps County: STEPHEN R. ILLINGWORTH, Judge. Affirmed.

Stephen G. Lowe for appellant.

Bradley D. Holbrook and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this breach of contract action, Mark Stauffer and Cindi Stauffer, husband and wife, the appellees, entered into an agreement (Purchase Agreement) with Betty Jean Benson under which the appellees were to purchase Benson's undivided one-third interest in certain real estate for $150,000. The contract was not performed, and the appellees filed an action against Benson in the district court for Phelps County. At the time of the bench trial, Benson no longer had title to the property. In an order filed August 2, 2013, the court determined that Benson had breached the Purchase Agreement by refusing to sell her interest in the property to the appellees. The district court found in favor of the appellees and

against Benson and awarded damages to the appellees. Benson appeals. We affirm.

STATEMENT OF FACTS

This case involves a parcel of real estate, a farm, located in Phelps County, Nebraska. Initially, Vern Johnson and Josie Johnson, husband and wife, owned the 160-acre parcel of real estate. Vern passed away in 1970, and after Vern's death, the property passed equally to the couple's three children, Gary Johnson, Nancy Ashcraft, and Benson, subject to a life estate in favor of Josie. Josie passed away in September 2010.

Cindi is the daughter of Gary. In 1987, the appellees moved onto the property and began a farming operation. At trial, the parties testified that there were numerous discussions regarding the execution of the "family plan" to sell the farm to the appellees in order to keep it in the family. These discussions occurred between the appellees and Benson prior to and after the execution of the Purchase Agreement which is at the center of this case.

Due to issues within the family, the farm became the subject of a partition sale, and ultimately, the property was sold at a partition sale. The appellees were named as parties in the partition action. Before the partition sale occurred, the appellees had entered into negotiations with Benson, Ashcraft, and Gary to purchase their interests in the property. The Purchase Agreement between the appellees and Benson was signed after the partition action had been filed but before sale.

With respect to the negotiations between the appellees and Benson, on January 18, 2011, an attorney, acting on behalf of and at the direction of Cindi, sent a draft purchase agreement to the appellees and to Benson. Under the Purchase Agreement, the appellees were to pay a deposit of $200 and to purchase Benson's undivided one-third interest in the farm for a total of $150,000. With respect to the $200, the Purchase Agreement stated: "$200 deposited herewith as evidenced by [Benson's] receipt attached below. Balance to be paid as shown in Paragraph(s) 1 following, which paragraph(s) numbered 1&2 inclusive as being applicable to this agreement." The

balance of $149,800 was specifically discussed in Paragraph 1. Paragraph 1 of the Purchase Agreement provided:

> 1. Conditional Upon Loan:
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> Balance of $149,800 to be paid in cash or by certified check at time of delivery of deed, conditional however, upon [the appellees'] ability to obtain a loan to be secured by deed of trust or mortgage on above described property [the farm], in the amount of $148,000. Said loan to be FSA (Farm Service Agency) with terms providing for interest not exceeding 5% per annum, and annual payments of approximately $N/A plus taxes and insurance. [The appellees] agree to make application for said loan within 30 days from the date of acceptance or this offer shall be null and void and the earnest money shall be forfeited.

The Purchase Agreement originally set the closing date for May 1, 2011.

On January 24, 2011, Benson appeared at the office of the appellees' attorney and signed the Purchase Agreement. The attorney did not discuss the terms and conditions of the draft purchase agreement with Benson. On January 25, the appellees' attorney sent a letter to them informing them that Benson had signed the Purchase Agreement. The appellees signed the Purchase Agreement approximately 1 week later.

After signing the Purchase Agreement, the appellees sought funding through the Farm Service Agency (FSA), which they ultimately did not obtain. However, the appellees' friends, Karen Kirby and Scott Kirby, agreed to loan $150,000 to the appellees, and they executed a promissory note on February 8, 2011. Per the promissory note, the appellees were to repay the note in full by February 8, 2012.

During this time, the appellees were also attempting to negotiate a price for Ashcraft's undivided one-third interest in the property. The appellees already had assurances from Gary, Cindi's father, to purchase his undivided one-third interest. Benson was aware of the appellees' negotiations with Ashcraft, and on April 28, 2011, Benson agreed to extend the closing date of the Purchase Agreement for her undivided one-third interest from May 1, 2011, to March 1, 2012.

The negotiations with Ashcraft were complicated due to matters involving Josie's estate in which questions had been raised regarding Ashcraft's handling of the estate. On June 14, 2011, Ashcraft's attorney sent a letter to the appellees' counsel and Benson's counsel offering to sell Ashcraft's one-third interest to the appellees for $185,000, conditioned on Ashcraft's being released from any liability on issues regarding Josie's estate.

On July 7, 2011, the appellees' attorney sent a letter to Ashcraft's attorney indicating that the appellees would purchase Ashcraft's interest for $185,000. The letter also stated that "[e]veryone is having a difficult time getting . . . Benson to sign the estate settlement agreement."

On July 18, 2011, Ashcraft's attorney sent a letter to the appellees' attorney recognizing that Benson was not going to be agreeable to signing the estate settlement agreement. He stated that he had spoken with Ashcraft and that it was their "plan to move forward with the partition action pending in Phelps County District Court unless all parties are willing to settle all matters in a manner consistent with the proposed agreements that accompanied my letter to you and [Benson's counsel] on June 14, 2011."

On August 3, 2011, Ashcraft's attorney sent a fax to the appellees' attorney. The fax offered to sell Ashcraft's undivided one-third interest in the property to the appellees with a release of liability on the estate issues.

Around that time, Benson decided that she was no longer willing to sell her undivided one-third interest in the property to the appellees. On August 9, 2011, the appellees' attorney sent a letter to Cindi stating that he had spoken to Benson's attorney and that Benson's attorney "indicated that [Benson] is not agreeable to the sale of $150,000." At the time of trial, Benson testified that her reasons for backing out of the Purchase Agreement were as follows: the failure of the appellees to obtain financing as outlined in the Purchase Agreement, the failure of everyone to agree on issues related to Josie's estate, the fact that Ashcraft was receiving $185,000 for her interest and was not cooperating on other issues relating to Josie's estate, and her position that she would sell her

interest for $150,000 if Ashcraft and Gary would also take that price for their interests.

The appellees filed their complaint on November 22, 2011. The appellees alleged two causes of action. In the first cause of action, the appellees sought specific performance of the Purchase Agreement for the conveyance of Benson's undivided one-third interest in the property. In the second cause of action, the appellees sought an injunction to enjoin the referee's sale of the property in the partition action.

The appellees were not granted a stay of the referee's sale, and the property was sold by referee's sale for $1,150,000 to unrelated individuals. The district court confirmed the sale by an order filed December 2, 2011. After expenses of the sale, each of the one-third interests was worth $353,937.88. On January 20, 2012, the district court filed an order directing the clerk of the court to hold $203,937.88 of Benson's share in an interest-bearing account until further ordered, and Benson was paid $150,000. Ashcraft and Gary were each paid their one-third interest of the proceeds.

On December 14, 2011, the appellees filed their amended complaint, which alleged the same two causes of action as the original complaint, along with a third cause of action for breach of contract. In the third cause of action, the appellees alleged that Benson breached the Purchase Agreement when she refused to perform the contract. The appellees sought damages constituting the sum of Benson's share of the proceeds from the referee's sale, minus the $150,000 purchase price set forth in the Purchase Agreement. On December 15, the appellees dismissed without prejudice the first and second causes of action in their amended complaint. Accordingly, the only remaining cause of action at trial and on appeal is the claim for breach of contract and resulting damages.

Benson filed her answer on December 30, 2011. In her answer, Benson generally denied the allegations of the amended complaint, and she affirmatively alleged that the Purchase Agreement had expired of its own accord; the appellees had not complied with their obligations under the Purchase Agreement; and her performance was excused, because the appellees had

failed to obtain financing pursuant to the Purchase Agreement in the timeframe set forth therein.

The parties filed cross-motions for summary judgment. The court denied the parties' cross-motions for summary judgment.

A bench trial was held on February 27, 2013. At the trial, the appellees called five witnesses, including Mark, Cindi, both of the Kirbys, and Benson. The appellees offered and the court received 17 exhibits, which included the Purchase Agreement, the promissory note, various communications between the parties' attorneys, the appellees' attorney's deposition, documents from the partition action, Benson's affidavit, answers to requests for admissions, and answers to interrogatories. Benson called one additional witness, the president of the Nebraska State Bank in Oshkosh, Nebraska, and she offered and the court received one multipage exhibit, composed of documents filed by the appellees in connection with their loan application.

On August 2, 2013, the district court filed its order in which it found in favor of the appellees and against Benson. This is the order on appeal. In making its determinations, the court rejected Benson's argument that the appellees were in breach of contract because they did not obtain financing pursuant to the terms of the Purchase Agreement. The court stated that "the financing clause was for the benefit of the [appellees] and was waived by them when they obtained alternate financing" from the Kirbys. The court determined that as of early August 2011, Benson "was in breach of the contract as the [appellees] were ready, willing and able to complete the terms of the contract." The court further determined that

> the reason [Benson] refused to complete the contract was because she was receiving less than what her sister received for a one third interest and she was upset about her sister's handling of her mother's finances. These reasons are extrinsic to the terms of the contract and are not valid reasons for non[-]performance under the contract.

Therefore, the court awarded the appellees the amount of $203,937.88 which had been deposited in the court, representing the amount of Benson's one-third of the proceeds of the

partition sale, i.e., $353,937.88, minus the $150,000 already distributed to Benson per the Purchase Agreement.

For completeness, we note that the Purchase Agreement recognizes that on the date the Purchase Agreement was signed, the appellees had paid a $200 deposit to Benson, receipt for which was acknowledged, and that the remaining balance due was $149,800. Therefore, when the district court ordered the $150,000 be paid to Benson after the partition sale, she received $200 greater than she had bargained for. The appellees have not filed a cross-appeal seeking the $200, and we make no order with respect thereto.

Benson appeals.

ASSIGNMENTS OF ERROR

Benson claims on appeal that the district court erred when it (1) determined that the appellees could waive the financing clause in the Purchase Agreement, (2) determined that it was not a contractual precondition that the appellees obtain specific financing, (3) determined that Benson had breached the contract, and (4) failed to find repudiation of the contract.

STANDARDS OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 810 N.W.2d 677 (2012).

[2] In a bench trial of an action at law, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony. *Liljestrand v. Dell Enters.*, 287 Neb. 242, 842 N.W.2d 575 (2014).

[3] 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. *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013).

[4] An appellate court independently reviews questions of law decided by a lower court. See *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

ANALYSIS

The essence of the district court's decision is that although the appellees stood ready, willing, and able to perform,

Benson unequivocally and without justification breached the Purchase Agreement, thus entitling the appellees to damages. On appeal, Benson asserts a variety of arguments. We consider Benson's arguments below and determine that none have merit.

Marketability and Time for Performance.

Before analyzing Benson's contentions, we consider some preliminary matters relevant to the Purchase Agreement in this case. In this regard, we examine the Purchase Agreement and determine that it is an enforceable contract and that the appellees and Benson were bound by the agreement and extension thereto. It is axiomatic that the title which is the subject of the Purchase Agreement should be marketable. See 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 81.03[6] (2014). We adhere to the modern view that "marketable" and "merchantable" title are practically synonymous and that such title need not be free from every technical defect. See *Holoubek v. Romshek*, 16 Neb. App. 677, 749 N.W.2d 901 (2008).

It is generally understood that the hazard of litigation concerning title is a circumstance rendering a title unmarketable. See, e.g., *Chafetz v. Price*, 385 So. 2d 104, 106 (Fla. App. 1980) (stating that circumstance of present litigation surrounding title "is the paradigm of unmarketability"). However, the marketable title standard can be met if the purchaser specifically agrees to accept the title subject to pending litigation. See 14 Powell & Wolf, *supra*, § 81.03[6][d][iv] (cases collected). In this case, paragraph 2 of the Purchase Agreement states that the appellees as purchasers are "purchasing the property subject to the pending Partition Action" to which, incidentally, they were named defendants. Therefore, the pending litigation does not preclude the transfer of the interest in the real property involved in the Purchase Agreement.

We also note that the property at issue is an undivided one-third interest rather than the entirety of the described real property. The transfer of undivided interests in real property has not met with disapproval. See, e.g., *Klapka v. Shrauger*, 135 Neb.

354, 281 N.W. 612 (1938). Benson's interest is the proper subject of a real estate contract.

We next observe that the Purchase Agreement initially set a closing date of May 1, 2011, but was extended to March 1, 2012, by agreement of the appellees and Benson. We have stated that a real estate contract which provides for a specific closing date requires closing within a reasonable time after that date unless the contract provides that time is of the essence. See *Pettit v. Paxton*, 255 Neb. 279, 583 N.W.2d 604 (1998). The Purchase Agreement did not literally provide that "time was of the essence." The closing as extended was set "on or before" March 1, 2012. The parties knew of the pending partition action and testified they were aware that the performance of the Purchase Agreement depended on Benson having title. As a treatise aptly states: "Seller cannot convey title that has been lost." 14 Powell & Wolf, *supra*, § 81.03[6][d][iv] at 81-140. Thus, performance would not be feasible after a certain date but before March 1, 2012, if Benson's interest was conveyed to an unrelated purchaser in the partition action. Therefore, time, while not of the essence, was relevant to the successful performance of the Purchase Agreement.

Breach of Contract.

Benson contends she did not breach the Purchase Agreement. She initially makes numerous arguments related to the 30-day provision by which the appellees were to apply for a FSA loan and the 90-day provision by which such financing was to be secured. Benson contends that because these deadlines were not met according to these terms, the Purchase Agreement became null and void. Benson claims the district court erred when it concluded that these conditions were for the benefit of the appellees as purchasers and further erred when it found that the conditions were waived by the appellees when they obtained alternate financing within the timeframe provided. We find no merit to Benson's claims of error.

[5] We have held that a party to a contract may waive the provisions made for his or her benefit. *Gesell v. Reeves*, 229 Neb. 842, 429 N.W.2d 363 (1988). It has been observed that

"[r]eal estate sales contracts often contain a mortgage or financing contingency clause, usually for the benefit and protection of the purchaser in the event that the purchaser is unable to secure necessary financing by the date set for closing." 60 Am. Jur. Proof of Facts 3d 445 *Waiver of Strict Compliance* § 17 at 496 (2001 & Supp. 2013). That is, such "contingencies . . . are ordinarily for the benefit of the purchaser." *Id.* at 496-97. See, also, *Wesley N. Taylor Co. v. Russell*, 194 Cal. App. 2d 816, 15 Cal. Rptr. 357 (1961) (cases collected).

Whether the condition is for the benefit of the purchaser, or the seller, or both, depends on the facts and circumstances of each case and the language of the agreement. *Fleischer v. McCarver*, 691 S.W.2d 930 (Mo. App. 1985) (cases collected). In cases where it is determined that the inclusion of a financing provision is for the sole benefit of the purchaser, the cases also state that the seller's "interest is in securing the purchase price [and] that the paramount obligation of the respective parties is the payment of the cash and the delivery of title to the property, and that the method of financing is incidental and not of the essence of the contract to convey." See *Wesley N. Taylor Co. v. Russell*, 194 Cal. App. 2d at 828-29, 15 Cal. Rptr. at 365 (cases collected). We agree with the foregoing analysis and find it applicable to the case at bar.

In its order, the district court determined that the financing conditions were for the benefit of the appellees as purchasers and found the facts showed that Benson, as seller, was "not concerned about where the money came from as much as she was concerned about other extrinsic matters." These matters included the higher price her sister, Ashcraft, might receive for her one-third interest and the ongoing dispute relating to their mother's estate. The district court found that Benson "conceded that prior to making the decision not to close, she never questioned the [appellees] about the status of their financing." The district court determined that under the facts and language of the Purchase Agreement, the financing terms were for the appellees' benefit and that the appellees could and did waive the terms. The district court determined that the Purchase Agreement was an enforceable contract and

that the waiver did not render the Purchase Agreement null and void.

Having reviewed the law and record, we conclude that the district court's recitation of the law to the effect that the appellees as purchasers could waive a condition for their benefit was correct and that its findings of fact were not clearly erroneous. We also observe that by agreeing to extend the closing date to March 1, 2012, Benson exhibited her willingness to waive the earlier financing deadlines, and that such fact lends further support to the district court's determination that lack of adherence to the FSA financing provisions was not fatal.

Benson next contends that the district court erred when it failed to make an explicit finding that Benson repudiated the Purchase Agreement and further erred when it determined that Benson breached the Purchase Agreement. We find no merit to these assignments of error.

[6,7] We have stated that "'[i]n order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform.'" *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 68, 654 N.W.2d 376, 382 (2002), quoting Restatement (Second) of Contracts § 250, comment *b*. (1981). The question whether there has been repudiation or whether repudiation was justified is a question of fact. *Id.*

The district court reviewed the evidence and found that prior to the partition sale when performance of the Purchase Agreement was still viable, "Benson communicated through her attorney on or about August 8, 2011, that she would not go through with the sale. (Exhibit 24) She testified at trial that she decided to go the partition route, because on August 8, 2011 'she was pissed that day.'" Exhibit 24 is an August 9, 2011, letter to Cindi from her attorney stating in part that the attorney had spoken to Benson's attorney on August 8, the latter of whom "indicated that [Benson] is not agreeable to the sale of $150,000" and indicating that the appellees should not talk directly to Benson "as it just upsets her to discuss all this." The district court found that at about this point in time, "Benson decided she was no longer willing to sell her one third interest to the [appellees]."

Although the district court did not use the word "repudiation" to characterize these facts, the substance of its order amounts to a finding of an unequivocal statement by Benson that she would not perform, and therefore, the district court effectively found a repudiation by Benson. No further findings are necessary.

Benson next contends that the appellees were not capable of purchasing the real estate and that as a consequence, she did not breach the Purchase Agreement. We understand Benson's arguments to generally include the suggestion that the appellees failed to tender a performance and specifically to challenge the district court's determinations in its August 2, 2013, order that Benson "was in breach of the contract as the [appellees] were ready, willing and able to complete the terms of the contract." We find no merit to Benson's assignments of error.

As we have noted, Benson repudiated the contract in August 2011, which was during the extended lifetime of the Purchase Agreement and before the November 2011 partition sale. The repudiation occurred during a period when the obligations of the Purchase Agreement could have been performed. We have summarized the legal consequences of such a state of affairs as follows:

> Where one party to an executory contract to sell and convey real estate, prior to breach by him and before time for performance by either party has arrived, unequivocally states that he cannot and will not perform, when the time of performance arrives, the other party may either treat such renunciation as an abandonment or breach of contract by affirmative election so to do, or he may treat such renunciation as inoperative, and await the time of performance and then hold the one party responsible for all consequences of nonperformance, including specific performance in a proper case, but in case he keeps the contract alive, it lives for the benefit of both parties, and he remains subject to all of his obligations under it, and enables the one party to complete the contract, notwithstanding his previous renunciation, with the same force and effect as if such prior renunciation had never

> been made. Frost v. Knight, L. R. 7 Exch. 111; Roehm v. Horst, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953; 13 C. J., Contracts, § 729, p. 655.

Lang v. Todd, 148 Neb. 726, 732, 28 N.W.2d 434, 437-38 (1947).

[8] The record shows that Benson did not withdraw her repudiation, and the appellees accepted her repudiation as evidenced by their filing the instant action. As to a tender by the appellees, we have previously considered the relevance of tender in a case where a party unequivocally stated it would not perform. We stated: "An unqualified renunciation of an executory contract before time for performance by one party excuses tender of performance by the other party at the time set for performance." *Friehe Farms, Inc. v. Haberman*, 191 Neb. 292, 299, 214 N.W.2d 916, 920 (1974). Similarly, in *Esplendido Apartments v. Olsson*, 144 Ariz. 355, 361, 697 P.2d 1105, 1111 (Ariz. App. 1984), it was observed that other courts have recognized that a buyer is relieved "of the obligation to tender performance where the seller has either refused to perform or is clearly unable to do so."

At trial, referring to the Kirby note, Cindi testified that she repeatedly advised Benson "we were ready to go with it" and that she told Benson "[w]e had our financing lined up, and it was just a matter of when we wanted to do it." Cindi also testified that she said nothing that could be construed as wanting to back out of purchasing Benson's one-third interest. The district court credited this testimony as it was entitled to do. See *Liljestrand v. Dell Enters.*, 287 Neb. 242, 249, 842 N.W.2d 575, 580 (2014) (stating that "in a bench trial of an action at law, the trial court is the sole judge of the witnesses' credibility and the weight to be given their testimony").

The district court heard the witnesses and reviewed the documentary evidence and determined that the note between the Kirbys and the appellees was valid, that the Kirbys had the $150,000 referred to in the note on hand, and that the appellees "had the financing in place." The district court determined that the appellees "were ready, willing and able to complete the terms of the contract." Benson suggests that, even if ready, willing, and able, the appellees were nevertheless required

to tender the balance of the amount due under the Purchase Agreement in order to put her in default and to recover damages for breach of the contract. Because the law regarding tender is not so rigid, we reject Benson's suggestion.

[9] In *Klapka v. Shrauger*, 135 Neb. 354, 361, 281 N.W. 612, 616 (1938), we observed:

> "A covenant by a purchaser to pay, and by the vendor to convey a good title, both to be performed at the same time, are mutually dependent, and neither party can claim a breach without a tender of performance and offer to perform upon due performance by the other, or, *at least, proof of readiness and willingness to perform*." *Nicolopoolos v. Hill*, 59 A. L. R. 185 (217 Ala. 589, 117 So. 185 [1928]).

(Emphasis supplied.)

As we indicated in *Klapka*, a complete tender of performance is not always indicated, and in some cases "'proof of readiness and willingness to perform'" is all that is required. *Klapka*, 135 Neb. at 361, 281 N.W. at 616. Other courts are in agreement. When faced with facts somewhat similar to the instant case, the Supreme Court of Arizona in *Kammert Bros. Enter., Inc. v. Tanque Verde Plaza Co.*, 102 Ariz. 301, 306, 428 P.2d 678, 683 (1967), stated:

> We must next consider whether the buyer was required to make a formal tender of the amounts due on the contract in order to recover damages for breach of the contract. Kammert Brothers [as seller] here had positively refused Tanque Verde's offer to perform its duties under the contract. Therefore tender of the purchase price by the buyer was excused, since an actual tender is unnecessary where it is clear that the other party will not accept it, rendering the act useless. Lee v. Nichols, 81 Ariz. 106, 301 P.2d 1022 (1956); Schmitt v. Sapp, 71 Ariz. 48, 223 P.2d 403 (1950). It was sufficient that the buyer was ready, willing, and offered to perform. Lee v. Nichols, supra. It was clearly established that such was the case here.

We agree with the reasoning in *Kammert Bros. Enter., Inc.*, and we apply it to this case. The district court found that

the appellees had financing in place and had expressed their ability and willingness to perform under the contract. In the face of Benson's repudiation, the appellees were not required to tender the money due under the Purchase Agreement. Such would have been a useless act. The district court determined that the appellees' efforts were sufficient and that thus, Benson was in breach at the time for performance. Based on the applicable law and the district court's findings, which are supported by the record, we see no error. We find no merit to Benson's assignments of error regarding repudiation and breach of contract.

CONCLUSION

The district court determined that Benson breached the Purchase Agreement by refusing to sell her interest in the property at issue and awarded damages to the appellees. For the reasons explained above, we find no merit to Benson's assignments of error and, accordingly, affirm.

AFFIRMED.

SFI LTD. PARTNERSHIP 8, A NEBRASKA LIMITED PARTNERSHIP, APPELLANT, V. MICHELLE CARROLL, APPELLEE.

851 N.W.2d 82

Filed August 1, 2014. No. S-13-192.

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. **Subrogation: Words and Phrases.** Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other.
3. **Contracts: Insurance: Subrogation.** Subrogation applies to an insurer's right to proceed against a third party responsible for a loss which the insurer has compensated pursuant to its contractual obligation under a policy, and which depends, inter alia, on the existence of the insured's right to proceed against that entity.

4. **Contracts: Insurance: Subrogation: Equity: Tort-feasors.** In the context of insurance, the right to equitable subrogation is generally based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.
5. **Contracts: Insurance: Subrogation**. Under the antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.
6. **Insurance: Subrogation**. The antisubrogation rule has been extended to implied coinsureds.
7. **Contracts: Insurance: Subrogation: Presumptions: Negligence.** Absent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord's fire insurance policy and that therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence.
8. **Rules of the Supreme Court: Pleadings: Waiver: Appeal and Error.** A question concerning the waiver of an affirmative defense involves the interpretation of Neb. Ct. R. Pldg. § 6-1108(c) and, as such, is a question of law reviewed de novo.
9. **Pleadings.** The issues in a given case will be limited to those which are pled.
10. **Rules of the Supreme Court: Pleadings.** Under Neb. Ct. R. Pldg. § 6-1108(c), a party pleading to a preceding pleading must set forth affirmatively matters constituting an avoidance or affirmative defense.
11. ____: ____. The federal rules of pleading, which Nebraska has generally adopted, were designed to liberalize pleading requirements.
12. **Leases: Contracts: Public Policy.** The interpretation of a lease, the unconscionability of a contract provision, and the determination of whether a contract violates public policy are questions of law.
13. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.
14. **Contracts: Insurance: Landlord and Tenant.** Renter's insurance is a contents policy which covers tenant's possessions, such as furniture, appliances, personal belongings, and household goods. However, renter's insurance does not typically cover the structure of the leased premises.
15. **Contracts: Public Policy.** Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy; to be void as against public policy, the contract should be quite clearly repugnant to the public conscience.
16. **Words and Phrases.** The term "unconscionable" means manifestly unfair or inequitable.
17. **Courts: Contracts: Leases.** Where a court finds that a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

18. **Landlord and Tenant: Negligence: Damages.** Notwithstanding the provisions of Neb. Rev. Stat. § 76-1429 (Reissue 2009), the tenant is responsible for damage caused by his or her negligence.
19. **Statutes.** To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.
20. **Landlord and Tenant: Leases: Negligence: Damages: Public Policy: Statutes.** Where a specific statute holds a tenant responsible for fire damages caused by his or her negligence, a court cannot hold a lease provision doing so as void against public policy or unconscionable.
21. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

Jeffrey A. Silver for appellant.

Todd R. McWha, Angela M. Franz, and Patrick Heng, of Waite, McWha & Heng, for appellee.

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

CASSEL, J.

I. INTRODUCTION

In previous cases, we have applied an antisubrogation rule to prohibit a landlord's insurer from seeking reimbursement from the tenant of fire losses paid by insurance. In this appeal, we decline to extend the antisubrogation rule to a landlord's uninsured losses allegedly caused by its tenant's negligence. We therefore reverse the district court's summary judgment in favor of the tenant. But because the tenant has not been determined to have been free from negligence, we decline to address whether specific provisions in the lease are unconscionable or void as against public policy. Accordingly, we remand the cause to the district court for further proceedings consistent with this opinion.

II. BACKGROUND

1. Lease

SFI Ltd. Partnership 8 (SFI) owns an apartment complex containing approximately 200 apartments. Through its agent, SFI leased an apartment to Michelle Carroll. SFI's agent and Carroll signed a residential lease agreement including various addendums. The lease employed a standard form used for all units in the complex. Tenants were not allowed to change any of the provisions of the lease or addendums.

The lease included provisions requiring Carroll to pay for repairs caused by her use of the unit and to maintain renter's insurance including "a personal liability coverage to a minimum of $100,000.00." We will recite the pertinent provisions of the lease only as it becomes necessary.

2. Fire and Insurance Policies

A fire occurred in the apartment rented to Carroll. Both the apartment and the surrounding building were damaged.

SFI had $10 million of total insurance coverage on the apartment complex. The policy provided for a deductible of $250,000 per occurrence unless a specific deductible applied. However, the forms schedule attached to the policy referred to two endorsements not included in the copies attached to the stipulation. Thus, we cannot discern whether the policy provided for a specific deductible attributable to the loss in this instance.

The parties stipulated that SFI sustained damages in excess of $100,000 resulting from the fire, which damages were not covered by its insurance policy. But neither the total amount of damages nor the amount of any insurance recovery by SFI was included in the evidence.

Carroll had renter's insurance in place at that time, and she submitted a claim to her insurer. Carroll's insurer paid her $1,500, representing only her damages under "Loss of Use Coverage."

3. Lawsuit

SFI sued Carroll and attached a copy of the lease to the complaint. SFI alleged that Carroll breached several provisions

of the lease. SFI further alleged that Carroll was negligent in failing to properly dispose of cigarettes being smoked in the apartment and that this negligence proximately caused the damage to the apartment and surrounding building.

Carroll filed an answer. She alleged that the fire was caused by someone else; that SFI's claims were barred because she and SFI were considered coinsureds under SFI's fire insurance policy, as set forth in *Tri-Par Investments v. Sousa*[1]; that several paragraphs of the lease were unconscionable and void as against public policy; and that SFI failed to mitigate any damages.

Carroll moved for summary judgment. SFI then moved for partial summary judgment on Carroll's claim that several paragraphs of the lease were unconscionable and void as against public policy.

The parties stipulated that SFI brought the claim in its own behalf. They also stipulated that it was not a subrogation claim.

4. District Court's Decision

Following a hearing, the district court granted Carroll's motion for summary judgment, denied SFI's motion for partial summary judgment, and dismissed the complaint. The court stated that the crux of the case revolved around paragraph 17 of the lease, which stated:

> Resident's personal property is not insured or covered by Landlord for loss of any kind, including without limitation, loss due to theft, fire, smoke, wind, rain, lightening [sic], seismic occurrence or water damage.
>
> Evidence of renter's insurance is required at the time of occupancy and Resident agrees to maintain such Renter's Insurance throughout its residency. The renter's insurance to be maintained by Resident shall include a personal liability coverage to a minimum of $100,000.00. Resident agrees to provide proof of such renter's insurance from time to time as requested by Landlord.

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[1] *Tri-Par Investments v. Sousa*, 268 Neb. 119, 680 N.W.2d 190 (2004).

The court agreed with Carroll's contention that the lease was "void for public policy because it is a gross economic waste to require every tenant to insure the entire rental complex." The court stated:

> In the instant case, this Court finds that Paragraph 17 of the Residential Lease is void for public policy and unconscionable because [SFI] cannot require each of its tenants to insure its building. [Carroll] lived in a multi-unit building, where each tenant was required to have renter's insurance in an amount equal to at least $100,000.00. Based on the views expressed in [*Tri-Par Investments*[2]], this Court finds that it is not in the public interest to require all tenants to insure the building in which they share. As the Nebraska Supreme Court noted in [*Tri-Par Investments*], the more sound approach would be for a landlord to carry a fire insurance policy on the complex and to pass that cost along to the tenants in the form of higher rent.

SFI filed a timely appeal, and we granted its petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

SFI assigns that the district court erred as a matter of law in (1) sustaining Carroll's motion for summary judgment after finding that paragraph 17 of the lease was void as against public policy when Carroll did not allege in her answer that paragraph 17 of the lease was unconscionable and void as against public policy; (2) determining that SFI's action was barred by *Tri-Par Investments*[3]; and (3) overruling SFI's motion for partial summary judgment that paragraphs 10q, 15, and 16 of the lease were not unconscionable or void as against public policy.

IV. STANDARD OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence

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[2] *Id.*

[3] *Id.*

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.[4]

We set forth other pertinent standards of review at appropriate points in the analysis.

V. ANALYSIS

1. Subrogation and *Tri-Par Investments* Rule

Carroll admits that "this is not a true subrogation claim, [but] is a claim by a landlord against a tenant for the uninsured portion that public policy still bars as a gross economic waste."[5] In order to understand the parties' arguments, we briefly recall the concept of subrogation and the antisubrogation rule.

(a) Subrogation

[2-4] Generally, subrogation is the right of one, who has paid the obligation which another should have paid, to be indemnified by the other.[6] Subrogation applies to an insurer's right to proceed against a third party responsible for a loss which the insurer has compensated pursuant to its contractual obligation under a policy, and which depends, inter alia, on the existence of the insured's right to proceed against that entity.[7] In the context of insurance, the right to equitable subrogation is generally based on two premises: (1) A wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed to recover twice from the insured's insurer and the tort-feasor.[8]

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[4] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[5] Brief for appellee at 13.

[6] *Buckeye State Mut. Ins. Co. v. Humlicek*, 284 Neb. 463, 822 N.W.2d 351 (2012).

[7] See 16 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 222:2 (2005).

[8] *Buckeye State Mut. Ins. Co., supra* note 6.

(b) Antisubrogation Rule

[5,6] Under the antisubrogation rule, no right of subrogation can arise in favor of an insurer against its own insured or coinsured for a risk covered by the policy, even if the insured is a negligent wrongdoer.[9] The antisubrogation rule has been extended to "implied coinsureds."[10] To allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchased.[11] In addition, the insurer should not be in a situation where there exists a potential conflict of interest which could affect the insurer's incentive to provide its insured with a vigorous defense.[12]

(c) *Tri-Par Investments*

[7] In *Tri-Par Investments*,[13] a fire damaged a house that was being rented. After the landlord made a claim for coverage, its insurer initiated a subrogation action in the name of the landlord against the tenant, alleging negligence and breach of the lease agreement. We formally adopted the rule from *Sutton v. Jondahl*[14]: "[A]bsent an agreement to the contrary, the law presumes that a tenant is coinsured under a landlord's fire insurance policy and that therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence."[15] The *Sutton* court explained that the law considers the tenant to be a coinsured of the landlord based upon "a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest."[16] The

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Tri-Par Investments, supra* note 1.

[14] *Sutton v. Jondahl*, 532 P.2d 478 (Okla. App. 1975).

[15] *Tri-Par Investments, supra* note 1, 268 Neb. at 124, 680 N.W.2d at 195.

[16] *Sutton, supra* note 14, 532 P.2d at 482.

district court in the instant case characterized *Sutton* as the "controlling case for liability of a tenant for a fire on the leased premises."

In *Tri-Par Investments*, we reasoned that the *Sutton* rule "represents the better public policy"[17] for several reasons. We stated that it "prevents landlords from engaging in gamesmanship when drafting leases by providing the necessary incentive for them, if they so desire, to place express subrogation provisions in their leases."[18] It also "comports with the reasonable expectations of tenants" and "accounts for modern commercial realities by preventing the economic waste that will undoubtedly occur if each tenant in a multiunit dwelling or multiunit rental complex is required to insure the entire building against his or her own negligence."[19]

2. Whether Issues Regarding Paragraph 17 Were Raised

(a) Issue

SFI first assigns that the district court erred in ruling upon paragraph 17 of the lease, because the issue was outside the pleadings. The district court determined that paragraph 17 of the lease was void as against public policy and unconscionable. Carroll responds that she specifically raised both defenses in her answer and that paragraph 17 was incidental to the paragraphs she specifically attacked.

(b) Standard of Review

[8] A question concerning the waiver of an affirmative defense involves the interpretation of Neb. Ct. R. Pldg. § 6-1108(c) and, as such, is a question of law reviewed de novo.[20]

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[17] *Tri-Par Investments, supra* note 1, 268 Neb. at 131, 680 N.W.2d at 199.

[18] *Id.*

[19] *Id.*

[20] See *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517 (9th Cir. 1984).

(c) Additional Facts

Carroll's answer included two allegations pertinent to our discussion of this issue. She alleged that SFI's claims were barred because SFI and Carroll were considered coinsureds under *Tri-Par Investments*. She also alleged that paragraphs 10q, 15, and 16 of the lease were unconscionable and void as against public policy.

Paragraph 10q of the lease provided, in relevant part, that Carroll agreed "[t]o hold [SFI] harmless for any loss or liability, including attorney fees, for any personal injury or accident sustained by [Carroll] or Others, except where said injury results from the active and actionable gross negligence of [SFI.]"

Paragraphs 15 and 16 of the lease addressed indemnification and liability. These provisions stated:

> 15. INDEMNIFICATION:
>
> Resident will indemnify and save Landlord harmless from and against any and all claims, action, damages, liability and expenses in connection with loss of life, personal injury, and/or damage to property, arising from any act or omission of Resident or Others.
>
> 16. LIABILITY:
>
> Resident agrees that all property kept in the Premises shall be at the risk of Resident. Resident further agrees to indemnify and hold Agent and Owner harmless from any loss, lawsuit, or damages incurred as a result of any loss or damage sustained by action of any third party; fire, water, theft, or the elements, or for loss of any articles from any cause from said Apartment or any other portion of the Premises. Resident also indemnifies and holds Agent and Owner harmless from any lawsuit or damages resulting from any injury to Resident or Others entering the Apartment building property of which the premises is a part. Resident shall be responsible for obtaining fire, extended coverage and liability insurance with respect to the contents of the Apartment.

(d) Discussion

[9-11] We acknowledge that the issues in a given case will be limited to those which are pled.[21] And we acknowledge that under the controlling rule, a party pleading to a preceding pleading must set forth affirmatively matters constituting an avoidance or affirmative defense.[22] But we have also recognized that the federal rules of pleading, which Nebraska has generally adopted, were designed to liberalize pleading requirements.[23] Thus, our inquiry becomes whether SFI was afforded fair notice of the nature of the defense.[24]

Read together, Carroll's allegations regarding *Tri-Par Investments* and the conscionability of the lease provisions placed SFI on fair notice that the lease provisions imposing liability on Carroll for damages resulting from fire were being challenged. Although paragraph 17 focused on Carroll's personal property and her obligation to provide renter's insurance, insurance covering Carroll's potential liability to SFI for fire damages caused by her negligence reasonably related to her allegations regarding *Tri-Par Investments*. SFI was placed on fair notice that paragraph 17 was material to the issues raised by Carroll's answer.

(e) Resolution

Paragraph 17 of the lease was fairly raised in the proceeding by the allegations of Carroll's answer. SFI's first assignment of error lacks merit.

3. Paragraph 17 in Relation to *Tri-Par Investments*

(a) Issue

SFI next assigns that the district court erred in determining that SFI's action was barred by *Tri-Par Investments*.[25]

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[21] See *Rickerl v. Farmers Ins. Exch.*, 277 Neb. 446, 763 N.W.2d 86 (2009).

[22] See § 6-1108(c).

[23] See *Weeder v. Central Comm. College*, 269 Neb. 114, 691 N.W.2d 508 (2005).

[24] See *id.*

[25] *Tri-Par Investments, supra* note 1.

(b) Standard of Review

[12] The interpretation of a lease,[26] the unconscionability of a contract provision,[27] and the determination of whether a contract violates public policy[28] are questions of law.

[13] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusions reached by the trial court.[29]

(c) Discussion

SFI argues that the rule announced in *Tri-Par Investments* is inapplicable to the instant case. We agree. SFI brought this action against Carroll to recover damages which were not covered by its insurance policy. This is not a subrogation action brought by SFI's insurer to recover sums the insurer paid to SFI. And because this is not a subrogation action, the antisubrogation rule adopted in *Tri-Par Investments* does not apply. Accordingly, the district court erred to the extent that it relied upon *Tri-Par Investments* and *Sutton* as controlling precedent.

But as we noted at the outset of the analysis, Carroll concedes that this is not a true subrogation claim. And she argues that the principles of *Tri-Par Investments* and *Sutton* should be extended to the landlord's uninsured loss. We examine paragraph 17 in that context.

Paragraph 17 notified Carroll that (1) her personal property was not insured or covered by SFI for loss of any kind, (2) renter's insurance was required, and (3) the renter's insurance needed to include personal liability coverage to a minimum of $100,000. The district court stated that paragraph 17 was "[t]he crux of the instant case" and that it was "void for public policy and unconscionable because [SFI] cannot require each of its tenants to insure its building."

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[26] See *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013).

[27] See *Myers v. Nebraska Invest. Council*, 272 Neb. 669, 724 N.W.2d 776 (2006).

[28] See *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008).

[29] *Id.*

SFI does not dispute that it is not in the public interest to require all tenants to insure the building in which they share. But SFI asserts that paragraph 17 does not require tenants to insure the building. We agree. Paragraph 17 provides that the tenant's *personal property* is not insured or covered by SFI's insurance coverage and that the resident must obtain renter's insurance to include personal liability coverage to a minimum of $100,000.

[14] We discussed a similar lease provision regarding insurance in *Beveridge v. Savage*.[30] In that case, a provision of the lease stated that "'[t]he Tenant shall provide a liability and renter[']s insurance [policy] ($100,000) at Tenant's expense.'"[31] We explained: "'Renter's insurance is a "contents" policy which covers tenant's possessions, such as furniture, appliances, personal belongings, and household goods.' . . . 'However, renter's insurance does not typically cover the structure of the leased premises.'"[32] We reasoned that "[t]he lease provision requiring the tenant to obtain renter's insurance did not require the tenant to insure the building against loss by fire."[33] Similarly, although paragraph 17 required Carroll to obtain renter's insurance, it did not require her to insure the entire building. The district court's concern that paragraph 17 would require each tenant to insure the entire rental complex is unfounded.

[15,16] Courts should be cautious in holding contracts void on the ground that the contract is contrary to public policy; to be void as against public policy, the contract should be quite clearly repugnant to the public conscience.[34] We find no such repugnancy. Further, the term "unconscionable" means manifestly unfair or inequitable.[35] Nothing in paragraph 17 strikes us as manifestly unfair or inequitable.

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[30] *Beveridge, supra* note 26.

[31] *Id.* at 993, 830 N.W.2d at 485.

[32] *Id.* at 997, 830 N.W.2d at 487.

[33] *Id.*

[34] *Bedrosky v. Hiner*, 230 Neb. 200, 430 N.W.2d 535 (1988).

[35] *Myers, supra* note 27.

[17-20] Moreover, the Uniform Residential Landlord and Tenant Act[36] contemplates that a court may determine a lease provision to be unconscionable, but expressly upholds tenants' liability for negligent fire damage. Where a court finds that a rental agreement or any provision thereof was unconscionable when made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.[37] But the act treats fire damage caused by a tenant's negligence differently. Section 76-1429 regulates the landlord-tenant relationship where the property is damaged by fire. "Notwithstanding the provisions of this section, the tenant is responsible for damage caused by his [or her] negligence."[38] To the extent there is conflict between two statutes on the same subject, the specific statute controls over the general statute.[39] Where a specific statute holds a tenant responsible for fire damages caused by his or her negligence, we cannot hold a lease provision doing so void as against public policy or unconscionable.

Carroll relies on a New Hampshire decision extending the *Sutton* rule to uninsured fire losses. In *Cambridge Mut. Fire Ins. Co. v. Crete*,[40] the landlords' insurer brought a subrogation action against the tenant of a building that sustained extensive fire damage for the amount paid to the landlords under a fire insurance policy. The landlords also sought reimbursement from the tenant for their uninsured losses. In addition to following the *Sutton* rule regarding the subrogation claim, the New Hampshire court held that a landlord may not hold a tenant liable for any uninsured losses as a result of fire damage where the landlord did not have adequate insurance.

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[36] Neb. Rev. Stat. §§ 76-1401 to 76-1449 (Reissue 2009).

[37] § 76-1412(1).

[38] § 76-1429(2).

[39] *Jeffrey B. v. Amy L.*, 283 Neb. 940, 814 N.W.2d 737 (2012).

[40] *Cambridge Mut. Fire Ins. Co. v. Crete*, 150 N.H. 673, 846 A.2d 521 (2004).

Carroll's reliance on the New Hampshire decision is misplaced. The *Sutton* decision did not address uninsured losses, particularly those allegedly caused by a tenant's negligence. Thus, the New Hampshire court extended the rule beyond the rationale of the *Sutton* decision. And the court provided no other support for that part of its decision. At least where a tenant negligently causes the fire damage, we cannot extend the *Sutton* rule to uninsured losses where a statute expressly declares the tenant to be responsible.[41] Moreover, the *Sutton* rule is premised on the idea that to allow subrogation under such circumstances would permit an insurer, in effect, to avoid the very coverage which its insured purchased. Where the damages are not covered by the landlord's insurance, this rationale disappears.

Of course, we are mindful that the district court's decision was made on summary judgment focusing on an issue of law. The question of whether the fire damage was caused by any negligence on Carroll's part has not been determined by the district court, and accordingly, we express no opinion on that issue.

(d) Resolution

Because we conclude that paragraph 17 is not void as against public policy or unconscionable, the district court erred in entering summary judgment for Carroll upon that basis. The summary judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion.

4. Denial of Motion for Partial Summary Judgment

(a) Issue

Finally, SFI assigns that the district court erred in denying its motion for partial summary judgment seeking a ruling that paragraphs 10q, 15, and 16 of the lease were not unconscionable or void as against public policy, as Carroll had alleged in her answer. The district court denied the motion without discussion.

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[41] See § 76-1429(2).

(b) Standard of Review

As we explained above, questions regarding whether the lease was unconscionable or was void as against public policy are questions of law, which we review de novo.

(c) Discussion

[21] We first note that we have jurisdiction of this issue. Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.[42] Because the court sustained Carroll's motion for summary judgment, we have jurisdiction over the denial of SFI's motion.

And to the extent that Carroll's arguments regarding conscionability and public policy rest upon extending the *Tri-Par Investments* rule to a landlord's uninsured fire losses allegedly caused by a tenant's negligence, we have already rejected them in discussing paragraph 17. The same rationale would apply to the other paragraphs.

But the unresolved issues of fact regarding Carroll's negligence, if any, prevent us from going any further. The litigation below has not focused on whether any of the challenged paragraphs of the lease would impose liability upon Carroll for damage to SFI's property that was not attributable in any way to Carroll's negligence.

We encountered an analogous situation in *Kuhn v. Wells Fargo Bank of Neb*.[43] We agreed with a landlord that the district court erred in sustaining a tenant's motion for summary judgment and concluding as a matter of law that an indemnity clause in the lease was ambiguous and unenforceable. But we declined to direct that the landlord's motion for summary

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[42] *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

[43] *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009).

judgment against the tenant be granted. There was no evidence establishing that the landlord was liable to the injured party, who fell into an elevator car stationed "'about a foot'" below floor level.[44] We directed that the cause be remanded for further proceedings consistent with our opinion. Although the facts in *Kuhn* were considerably different, the same principle applies to the instant case. The focus has been on the *Tri-Par Investments* rule. The circumstances dictate that we likewise remand the cause for further proceedings consistent with this opinion.

(d) Resolution

Under the circumstances of this case, we decline to direct entry of partial summary judgment in favor of SFI. Rather, we remand the cause for further proceedings.

VI. CONCLUSION

The judgment of the district court granting Carroll's motion for summary judgment and dismissing SFI's complaint is reversed, and the cause is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[44] *Id*. at 432, 771 N.W.2d at 110.

STATE OF NEBRASKA, APPELLEE, V.
FRANCISCO C. RODRIGUEZ, APPELLANT.
850 N.W.2d 788

Filed August 1, 2014. No. S-13-325.

1. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.
2. **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.** An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
4. ____: ____. It is not within an appellate court's province to read a meaning into a statute that is not there.
5. **Pleas: Judgments: Collateral Attack.** A motion to withdraw a plea is a collateral attack, because it seeks modification of a judgment in a manner other than by a proceeding in the original action.
6. **Statutes: Legislature: Presumptions.** The Legislature is presumed to know the general condition surrounding the subject matter of a legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.
7. **Statutes: Legislature: Intent.** The intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute.
8. **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 Sarpy County: DAVID K. ARTERBURN, Judge. Reversed and remanded for further proceedings.

Bilal A. Khaleeq and Daniel S. Reeker, of Khaleeq Law Firm, L.L.C., for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

In 2013, Francisco C. Rodriguez moved to withdraw his guilty plea and to vacate his 2004 conviction for attempted possession of a controlled substance, a Class I misdemeanor. He alleged that before entering a guilty plea in the 2004 proceedings, he did not receive the proper advisement under Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008), and that he currently faced immigration consequences from the resulting conviction.

Because Rodriguez moved to withdraw his plea after he had completed his sentence of 2 years' probation, the district

court concluded that it did not have subject matter jurisdiction. We conclude that the court did have jurisdiction, and we reverse the judgment and remand the cause for further proceedings.

SCOPE OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision. *State v. Clark*, 278 Neb. 557, 772 N.W.2d 559 (2009).

FACTS

In January 2004, Rodriguez was charged by information with possession of a controlled substance. As a result of a plea agreement, the charge was reduced to attempted possession of a controlled substance, a Class I misdemeanor under Neb. Rev. Stat. §§ 28-201(4)(e) (Cum. Supp. 2004) and 28-416(3) (Supp. 2003), and Rodriguez agreed to enter a plea of guilty.

On March 23, 2004, Rodriguez appeared before the district court and received the following advisement about the immigration consequences of a guilty plea:

> But in addition to that, if a plea . . . is entered to a felony, besides the maximum sentence, there are indirect consequences that will follow you the rest of your life. . . . If you are not a United States citizen, a plea of guilty may subject you — to a felony may subject you to deportation. There are any other number of those indirect consequences that may occur if you plead guilty to a felony.

After the advisement, Rodriguez entered a plea of guilty. The court accepted the plea, adjudged Rodriguez guilty, and sentenced him to 2 years' probation.

In February 2013, Rodriguez moved to withdraw his guilty plea and to vacate his conviction for attempted possession of a controlled substance. He alleged that he had not been properly advised of the immigration consequences of a guilty plea, as required by § 29-1819.02(1), and that he had "recently

discovered the immigration consequences of his plea when [i]mmigration authorities took him into custody." The record does not reflect that the State raised any affirmative defenses in answer to Rodriguez' motion.

The district court concluded it did not have jurisdiction, because Rodriguez filed his motion after his sentence had been completed. It distinguished the case at bar from *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009), and instead relied upon *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008). The court explained:

> [T]he Supreme Court in Yos-Chiguil did not overrule the holding of Rodriguez-Torres. The Court is, therefore, left with strong language from Rodriguez-Torres which states that Sec. 29-1819.02 "does not convey upon a court jurisdiction" to vacate a judgment or withdraw a plea "where a party has already completed his or her sentence." Therefore, the Court can only conclude that the language of Rodriguez-Torres controls the present case. Consequently, the Court must find that [Rodriguez'] motion fails and must be overruled for lack of jurisdiction. It appears to this Court that had the Supreme Court in Yos-Chiguil found that the language of the statute clearly authorized relief beyond the end of a defendant's sentence, it would have said so. The Court declined to do so. Therefore, while there is an apparent discrepancy between the two cases, this Court must follow the clear precedent that exists and leave it to the appellate courts to resolve the inconsistency.

Rodriguez timely appeals. We moved the case to our docket pursuant to our statutory authority to regulate the dockets of the appellate courts of this state and ordered oral argument. See, Neb. Rev. Stat. § 24-1106(3) (Reissue 2008); Neb. Ct. R. App. P. § 2-111(E)(5)(a) (rev. 2008).

ASSIGNMENT OF ERROR

Rodriguez assigns, restated, that the district court erred in dismissing for lack of jurisdiction his motion to withdraw his guilty plea and vacate his conviction.

ANALYSIS

Jurisdiction Under § 29-1819.02

Rodriguez argues that the district court had jurisdiction under § 29-1819.02 to consider the motion to withdraw his guilty plea and to vacate his conviction. We set forth the relevant provisions of § 29-1819.02:

> (1) Prior to acceptance of a plea of guilty . . . to any offense punishable as a crime under state law, except . . . infractions . . . the court shall administer the following advisement on the record to the defendant:
>
> IF YOU ARE NOT A UNITED STATES CITIZEN, YOU ARE HEREBY ADVISED THAT CONVICTION OF THE OFFENSE FOR WHICH YOU HAVE BEEN CHARGED MAY HAVE THE CONSEQUENCES OF REMOVAL FROM THE UNITED STATES, OR DENIAL OF NATURALIZATION PURSUANT TO THE LAWS OF THE UNITED STATES.
>
> (2) . . . If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the defendant pleaded guilty . . . may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty . . . and enter a plea of not guilty. . . .
>
> (3) With respect to pleas accepted prior to July 20, 2002, it is not the intent of the Legislature that a court's failure to provide the advisement required by subsection (1) of this section should require the vacation of judgment and withdrawal of the plea or constitute grounds for finding a prior conviction invalid. Nothing in this section, however, shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea.

[2-4] The question is whether a court lacks jurisdiction to consider a motion filed pursuant to § 29-1819.02(2) if the

defendant completed his or her sentence prior to filing the motion. In interpreting § 29-1819.02(2), we are guided by the following principles of statutory interpretation. In construing a statute, our objective is to determine and give effect to the legislative intent of the enactment. *State v. Hernandez*, 283 Neb. 423, 809 N.W.2d 279 (2012). An appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Magallanes*, 284 Neb. 871, 824 N.W.2d 696 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 2359, 185 L. Ed. 2d 1082 (2013). "[I]t is not within an appellate court's province to read a meaning into a statute that is not there." *State v. Nelson*, 276 Neb. 997, 1003, 759 N.W.2d 260, 266 (2009).

We addressed the application of § 29-1819.02(2) in *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). There, we considered the scope of the relief provided in that subsection and rejected the argument that the relief was available only on direct review. We explained that "there is no language in the statute which would support such a limited construction, and indeed, the language permitting the procedure to be initiated by motion would suggest otherwise." *Id.* at 596, 772 N.W.2d at 579. Because the defendant in *Yos-Chiguil* had not completed his sentence at the time he moved to withdraw his plea, we declined to address "whether the remedy created by that subsection would extend to a defendant who had completed his or her sentence." 278 Neb. at 597, 772 N.W.2d at 579.

The district court in the instant case concluded that if § 29-1819.02(2) authorized relief after completion of a sentence, we would have addressed this fact in *Yos-Chiguil*. But in *Yos-Chiguil*, we did not reach this issue, because it was not before us. Our failure to address whether jurisdiction existed after completion of a sentence did not mean that we decided the question in a manner that would be adverse to Rodriguez in the case at bar.

But now we are presented with the precise question whether the procedure in § 29-1819.02(2) may be utilized by a defendant who has completed his or her sentence. Rodriguez

had completed his sentence of probation when he moved to withdraw his plea and vacate his conviction. The immigration consequences of his guilty plea did not arise until several years after he had completed his sentence. Based on the fact that Rodriguez had completed his sentence and in reliance on *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008), the district court concluded it lacked jurisdiction under § 29-1819.02 to consider Rodriguez' motion. The State similarly argues that *Rodriguez-Torres* mandates a finding that jurisdiction under § 29-1819.02 is limited to motions filed before completion of a defendant's sentence. We disagree.

In *Rodriguez-Torres*, this court considered whether Daniel T. Rodriguez-Torres was allowed to bring a motion to withdraw his 1997 plea after his sentence was completed. We discussed whether § 29-1819.02 established a procedure by which he could withdraw his plea under those specific facts. We held that § 29-1819.02 failed to provide such a procedure and that there was "no legislatively authorized procedure" allowing Rodriguez-Torres to bring a motion to withdraw his plea, because it was entered and accepted before July 20, 2002. See *Rodriguez-Torres*, 275 Neb. at 368, 746 N.W.2d at 690. We concluded that as a result, the lower court lacked jurisdiction to address Rodriguez-Torres' motion.

The State relies upon *Rodriguez-Torres*, as did the district court, for the proposition that jurisdiction under § 29-1819.02 extends only to motions filed before a defendant has completed his or her sentence. This argument is based on our statement that

> [i]n § 29-1819.02, the Legislature gives a court discretion to vacate a judgment or withdraw a plea where a court has failed to provide the advisement required for pleas made on or after July 20, 2002. It does not, however, convey upon a court jurisdiction to do so where a party has already completed his or her sentence.

See *Rodriguez-Torres*, 275 Neb. at 367, 746 N.W.2d at 689.

This is not the first time that the State has argued, based solely on *Rodriguez-Torres*, that the relief provided in § 29-1819.02(2) must be limited. In *State v. Yos-Chiguil*,

278 Neb. 591, 772 N.W.2d 574 (2009), the State alleged that this same statement in *Rodriguez-Torres* supported a finding that the relief provided in § 29-1819.02(2) was available only on direct review. We rejected this argument, because it "overstate[d] our holding in *Rodriguez-Torres* and overlook[ed] a critical difference" between the facts in *Rodriguez-Torres* and in the case then before us. See *Yos-Chiguil*, 278 Neb. at 595, 772 N.W.2d at 578. In *Rodriguez-Torres*, the plea sought to be withdrawn was accepted in 1997, long before the enactment of § 29-1819.02. The same was not true of the plea sought to be withdrawn in *Yos-Chiguil*. Because of this distinction, we held that the discussion of jurisdiction in *Rodriguez-Torres* must be limited to pleas entered before July 20, 2002. See *Yos-Chiguil, supra*.

But our focus on the fact that Rodriguez-Torres had completed his sentence was dicta. As we will explain below, whether his sentence was completed was not crucial to our decision that the court lacked jurisdiction to consider the motion to withdraw his plea entered before July 20, 2002. And to the extent *Rodriguez-Torres* stated that § 29-1819.02 does not apply to a defendant who has already completed his or her sentence, we conclude such statement is inconsistent with the statutory language.

Section 29-1819.02(2) creates a statutory remedy for a court's failure to give the appropriate immigration advisement before accepting a plea of guilty. The Legislature, however, has limited this remedy to a defendant who seeks to withdraw a plea which was accepted on or after July 20, 2002. See *id*. As to such pleas, the plain language of § 29-1819.02(2) provides that where a defendant has shown that he or she did not receive the proper advisement and that he or she may face immigration consequences as a result of the plea, a court must permit withdrawal of the plea. Where these requirements are met, a court is required to grant relief. See *id*.

However, a defendant whose plea was accepted prior to July 20, 2002, is not entitled to this statutory relief. Section 29-1819.02(3) does not create a procedure for withdrawal of a plea accepted before July 20, 2002. Section 29-1819.02(3) is a statement of the Legislature's intent to impose a time-based

limitation on the pleas that may be withdrawn due to the lack of immigration advisement. "With respect to pleas accepted prior to July 20, 2002, it is not the intent of the Legislature that a court's failure to provide the advisement required . . . should require the vacation of judgment and withdrawal of the plea . . . ." § 29-1819.02(3). This language clearly establishes a legislative intent to limit this remedy to pleas accepted on or after July 20, 2002. For a defendant whose plea was accepted before July 20, 2002, the statute provides neither relief in the form of withdrawal of a plea entered without the proper immigration advisement nor a procedure for obtaining such relief. See § 29-1819.02(3).

[5] A court's jurisdiction under § 29-1819.02 to consider motions seeking the statutory relief provided therein is also limited to pleas accepted on or after July 20, 2002. When a collateral attack is not raised in a recognized proceeding, a district court lacks jurisdiction over the claim. See *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005). A motion to withdraw a plea is a collateral attack, because it seeks modification of a judgment "in a manner other than by a proceeding in the original action." See *State v. Keen*, 272 Neb. 123, 127, 718 N.W.2d 494, 498 (2006). The only recognized procedure for seeking withdrawal of a plea under § 29-1819.02 is limited to pleas accepted on or after July 20, 2002. See § 29-1819.02(2).

Given this limitation, whether Rodriguez-Torres had completed his sentence was not relevant to our decision that we lacked jurisdiction. Even if Rodriguez-Torres had moved to withdraw his plea before completing his sentence, the court would have lacked jurisdiction over his motion filed pursuant to § 29-1819.02 and could not have granted him any relief under the statute. Therefore, our statement in *State v. Rodriguez-Torres*, 275 Neb. 363, 746 N.W.2d 686 (2008), that a court's jurisdiction to withdraw a plea under § 29-1819.02 is limited to a defendant whose sentence has not been completed was dicta.

Unlike the situation in *Rodriguez-Torres*, the plea sought to be withdrawn in the instant case was accepted after July 20, 2002, and the district court was not deprived of jurisdiction

based on the date of the plea. Therefore, it is now necessary for us to determine whether a court lacks jurisdiction to consider a motion filed pursuant to § 29-1819.02(2) if the defendant completed his or her sentence prior to filing the motion. We conclude that it does not. To the extent that our statement in *Rodriguez-Torres* can be interpreted to limit the relief provided in § 29-1819.02(2) to a defendant whose sentence has not been completed, such interpretation is expressly disapproved.

We have previously held that all a defendant must show to withdraw a plea under § 29-1819.02 is (1) that the court failed to give all or part of the advisement and (2) that the defendant faces an immigration consequence which was not included in the advisement given. *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013). See, also, *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010). We have also rejected the argument that a defendant seeking to withdraw a plea pursuant to § 29-1819.02 is required to show prejudice, because "our case law 'has made clear that only two elements must be met before a defendant can withdraw his or her plea [pursuant to § 29-1819.02]; and prejudice is not one of them.'" *Medina-Liborio*, 285 Neb. at 630, 829 N.W.2d at 99, quoting *Mena-Rivera, supra* (alteration in original). For the same reasons, we now conclude that it is not a required element of § 29-1819.02(2) that a defendant file such motion before his or her sentence is completed.

Section 29-1819.02 imposes no requirement that a motion to withdraw a plea must be filed before a defendant completes his or her sentence. Statutory language is to be given its plain and ordinary meaning. And it is well established that it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Medina-Liborio, supra*.

[6,7] Had the Legislature intended to limit the relief prescribed in § 29-1819.02(2) to those defendants who have not completed their sentences, it would have included such a limitation in the statute. We find it significant that the Legislature did not do so. "[T]he 'Legislature is presumed to know the general condition surrounding the subject matter

of the legislative enactment, and it is presumed to know and contemplate the legal effect that accompanies the language it employs to make effective the legislation.'" *In re Invol. Dissolution of Wiles Bros.*, 285 Neb. 920, 928, 830 N.W.2d 474, 481 (2013), quoting *State ex rel. Wagner v. Gilbane Bldg. Co.*, 276 Neb. 686, 757 N.W.2d 194 (2008). Furthermore, "the intent of the Legislature may be found through its omission of words from a statute as well as its inclusion of words in a statute." See *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 714, 829 N.W.2d 652, 660 (2013).

The lack of any requirement in § 29-1819.02 that a defendant must not have completed his or her sentence is in stark contrast to the requirements under the Nebraska Postconviction Act, Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008 & Cum. Supp. 2012). Only "[a] prisoner in custody under sentence" may file a motion under its provisions. See § 29-3001(1). The fact that § 29-1819.02 does not include a similar requirement or use the term "prisoner" is indicative of the Legislature's intent.

Notably, Neb. Rev. Stat. § 29-1819.03 (Reissue 2008), the Legislature's statement of its intent in enacting § 29-1819.02, includes no language that would suggest the statutory relief was meant to be available only to a defendant whose sentence has not been completed. Because § 29-1819.03 pertains to the same subject matter as § 29-1819.02, the two statutes "should be conjunctively considered and construed to determine the intent of the Legislature." See *State v. Hernandez*, 283 Neb. 423, 427, 809 N.W.2d 279, 283 (2012).

As explained by the Legislature in § 29-1819.03, the problem sought to be remedied by § 29-1819.02 was a broad problem that existed "in many instances involving an individual who is not a citizen of the United States and who is charged with an offense punishable as a crime under state law." The Legislature created the immigration advisement as a specific remedy to this problem. See § 29-1819.03. The broad objective of the immigration advisement was "to promote fairness." See *id.* This objective would not be achieved by limiting the application of § 29-1819.02 to those defendants whose sentences

have not been completed and excluding those who had completed their sentences. Section 29-1819.02 was enacted to address immigration consequences that could arise subsequent to a plea of guilty regardless of whether the sentence imposed as a result of the plea has been completed.

The dissent determines that the plain language of § 29-1819.02(2) limits its application to those individuals whose sentences have not been completed, because the statute uses the word "defendant." But if the Legislature had meant to limit the relief in § 29-1819.02(2) to only those individuals still serving a sentence, it would have done so by a plain statement to that effect and not by inclusion of a single word that has no relationship to the completion of a sentence. As commonly understood, the term "defendant" refers to an individual "accused in a criminal proceeding" and does not indicate whether that person has completed his or her sentence. See Black's Law Dictionary 508 (10th ed. 2014). A more appropriate word to highlight whether or not an individual has served his or her sentence would have been "prisoner," which the Legislature did not use. We note that the Legislature did use "prisoner" in the Nebraska Postconviction Act. See § 29-3001(1).

Far from clearly indicating a limitation on relief, we interpret the term "defendant" in § 29-1819.02(2) as identifying to whom this subsection applies. Section 29-1819.02(2) does not make generic reference to "defendants" or "a defendant." It refers to "the defendant." See *id*. When used in such a context, "the" modifies "defendant" to indicate that it "refers to someone or something previously mentioned or clearly understood from the context or the situation." See Webster's Third New International Dictionary of the English Language, Unabridged 2368 (1993). As such, in § 29-1819.02(2), "the defendant" is a reference to a particular individual either "previously mentioned" in the statute or "clearly understood from the context" and not an allusion to the current status of being accused. There is only one person identifiable from the context of § 29-1819.02(2)—the one moving to vacate his or her plea in the criminal proceeding in which he or she was accused.

For purposes of that criminal proceeding, the individual who was accused is always "the defendant." Therefore, we do not agree that the Legislature's use of "defendant" demonstrates an intent to limit the application of § 29-1819.02(2).

We find nothing in § 29-1819.02 that requires a motion to withdraw to be brought prior to completion of a sentence. The only time-based limitation imposed by the statute is that the plea sought to be withdrawn must have been accepted on or after July 20, 2002. See § 29-1819.02(2). Thus, we conclude that as to pleas entered on or after July 20, 2002, § 29-1819.02 gives a court jurisdiction to consider a motion to withdraw such plea or vacate the judgment regardless of whether a defendant has completed his or her sentence. The district court erred in dismissing Rodriguez' motion for lack of jurisdiction.

Common-Law Procedure

[8] Rodriguez argues that the district court had jurisdiction over his motion under the common-law procedure for withdrawing a plea, as set forth in *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013). Because we conclude that the court had jurisdiction to consider Rodriguez' motion under § 29-1819.02, we do not consider whether there was jurisdiction under a common-law procedure for withdrawing a plea. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

CONCLUSION

For the foregoing reasons, we reverse the judgment of the district court dismissing Rodriguez' motion and remand the cause for further proceedings.

Reversed and remanded for further proceedings.

Cassel, J., concurring.

I write separately only to make plain an important matter inherent in the court's opinion. There is no excuse for failing to

administer the statutory advisement.[1] It takes only a moment. The wording is succinct. The statute specifies the precise language. Judges have no reason to improvise or summarize. The "cost" of timely giving advisements is miniscule compared to the "benefit" of avoiding plea withdrawals years after the resulting judgments have been fully executed. Judges should fully and timely comply with the statutory mandate. And the practicing bar should ensure that judges do so.

[1] See Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008).

CONNOLLY, J., dissenting.

I disagree with the majority's conclusion that under Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), a person who has served his sentence can obtain an order permitting him to withdraw a plea and plead not guilty. Regardless of when the person entered the plea of guilty or no contest, § 29-1819.02 does not provide a remedy after the sentence is served. At that point, it's over.

To recap the provisions of § 29-1819.02, subsection (1) sets out the immigration advisement that a trial court must give to defendants before accepting a plea of guilty or no contest. The advisement must inform a defendant that if he or she is not a U.S. citizen, a conviction for the charged offense could have the immigration consequence of removal from the country or denial of naturalization.

Subsection (2) provides a remedy for persons who entered an unadvised plea on or after July 20, 2002, if the person shows that he or she faces one of the unadvised immigration consequences.[1] In that circumstance, "the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty."[2]

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

[2] § 29-1819.02(2).

Subsection (3) provides that this statutory remedy is unavailable for persons who entered a plea before July 20, 2002. But it also provides that "[n]othing in this section . . . shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea."[3]

The first case we decided under § 29-1819.02 was *State v. Rodriguez-Torres*.[4] I agree that we later clarified its holding, but I disagree that our statements were dicta. There, the movant entered his pleas before July 2002, but he had completely served his sentence. We quoted the language of subsection (3) and recognized that § 29-1819.02 gives a court discretion "to vacate a judgment or withdraw a plea."[5] But we held that neither § 29-1819.02 nor any other statute creates a procedure for vacating a judgment and withdrawing a plea after a person has already served a sentence for a criminal conviction. Later, in *State v. Yos-Chiguil*,[6] we clarified that *Rodriguez-Torres* is limited to subsection (3), for unadvised pleas entered before July 20, 2002. But we reaffirmed our holding in *Rodriguez-Torres*, as clarified, in *State v. Chiroy Osorio*.[7] So those statements are not dicta, even if they do not apply to persons who entered unadvised pleas on or after July 20, 2002.

In *Yos-Chiguil*, we also clarified that *Rodriguez-Torres* did not decide whether a common-law remedy exists to withdraw a plea after a person has already served a sentence, because the issue was not presented.[8] We rejected the State's argument that the remedy under § 29-1819.02(2) was not available because the Court of Appeals had dismissed the defendant's direct appeal. We stated that "it is the failure to give the required advisement *and* the occurrence of an immigration consequence of which the defendant was not advised which trigger the

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[3] § 29-1819.02(3).

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

[5] *Id.* at 367, 746 N.W.2d at 689.

[6] *Yos-Chiguil, supra* note 1.

[7] *State v. Chiroy Osorio*, 286 Neb. 384, 837 N.W.2d 66 (2013).

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

statutory remedy in § 29-1819.02(2).”[9] And by holding that the defendant could seek the remedy, we implicitly determined that § 29-1819.02(2) authorizes a collateral attack on a final judgment—at least for petitioners still serving a sentence.[10] But in *Yos-Chiguil*, we specifically declined to decide the issue presented here: “In this case, [the defendant] was serving his sentence at the time he filed his motion to withdraw his plea pursuant to § 29-1819.02(2). We therefore need not decide whether the remedy created by that subsection would extend to a defendant who had completed his or her sentence.”[11]

In *State v. Gonzalez*,[12] we recognized a limited common-law remedy for collaterally attacking a final judgment and withdrawing a plea. But the trial court had given the immigration advisement to the petitioner, so she was not entitled to relief under § 29-1819.02(2). Moreover, she was still serving a sentence of probation when she filed her motion. So we were not presented with the issue whether the remedy under subsection (2) is available to a petitioner who did not receive the advisement but has served his or her sentence.

But the majority’s conclusion that the remedy under § 29-1819.02(2) applies to a person who has served a sentence is contrary to the statute’s plain language. To repeat, under § 29-1819.02(2), if a defendant shows that he or she entered an unadvised plea on or after July 20, 2002, and that he or she faces one of the unadvised immigration consequences, “the court, on the defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.” The statute unambiguously limits the procedure to a criminal “defendant.”

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[9] *Id.* at 596, 772 N.W.2d at 579. See, also, *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013) (citing *Yos-Chiguil, supra* note 1, and *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010)).

[10] But see *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013) (citing our decisions in *Yos-Chiguil, supra* note 1, and *State v. Kluge*, 198 Neb. 115, 251 N.W.2d 737 (1977), *disapproved on other grounds, State v. Minshall*, 227 Neb. 210, 416 N.W.2d 585 (1987)).

[11] *Yos-Chiguil, supra* note 1, 278 Neb. at 596-97, 772 N.W.2d at 579.

[12] See *Gonzalez, supra* note 10.

It is true that by permitting collateral attacks under § 29-1819.02(2), we have not strictly construed the term "defendant," and we have probably been generous in the statute's application. A person convicted of a crime under a final judgment is obviously no longer a "defendant" in the literal sense of being a person accused of a crime.[13] But our expanded use of the term to include incarcerated persons who are collaterally attacking a final judgment is consistent with the way that we have used the term "defendant" in postconviction cases to include those serving sentences. It is also consistent with the Legislature's intent to provide fairness to individuals who entered unadvised pleas.

But even under the most generous interpretation of the term "defendant," Rodriguez has served his time and is no longer a defendant. Moreover, the remedy under § 29-1819.02(2) has three conjunctive parts. If a movant proves a claim for relief, a court must (1) vacate the judgment, (2) permit the defendant to withdraw the plea of guilty or no contest, and (3) permit the defendant to enter a plea of not guilty. But how can a court permit a person to enter a plea of not guilty when he or she has already served his or her entire sentence? The underlying criminal proceeding is done. It's over. Obviously, double jeopardy prevents the State from recharging the person with a crime for which he or she has already been punished.[14] In contrast, the double jeopardy issue does not arise if the movant is still serving his or her sentence. Even if a conviction is challenged in a collateral attack, double jeopardy does not preclude a retrial if the defendant's conviction was set aside because of an error in the proceedings leading to the conviction.[15] But because the statute contemplates the availability of a new trial, it makes no sense to conclude that the Legislature intended the statutory remedy to apply to a person who has completely served his or her sentence.

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[13] See Black's Law Dictionary 508 (10th ed. 2014).

[14] See, e.g., *State v. Huff*, 282 Neb. 78, 802 N.W.2d 77 (2011).

[15] See *United States v. Tateo*, 377 U.S. 463, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964).

Nor do I believe the common-law remedy that we recognized in *Gonzalez*[16] is available here. There, we recognized a limited common-law procedure for collaterally attacking a final judgment and withdrawing a plea if two conditions are met:

> (1) [T]he [Nebraska Postconviction] Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea and (2) a constitutional right is at issue. In sum, this common-law procedure exists to safeguard a defendant's rights in the very rare circumstance where due process principles require a forum for the vindication of a constitutional right and no other forum is provided by Nebraska law.[17]

We have permitted a person who has served his sentence to seek relief under the common-law procedure.[18] But here, Rodriguez has not shown that a constitutional right is at stake. He claims that the court's incorrect advisement under § 29-1819.02(1) prevented him from knowingly, intelligently, and voluntarily waiving his rights (presumably, his trial rights). The State, however, correctly argues that we have stated a trial court's failure to warn a defendant of immigration consequences does not implicate a constitutional right.[19] Rodriguez cites no authority to support his bare assertion to the contrary. I conclude that because Rodriguez has no remedy available under § 29-1819.02(2) and has failed to show that a constitutional right is at stake under the common-law procedure, the judgment of the district court should be affirmed.

HEAVICAN, C.J., joins in this dissent.

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[16] See *Gonzalez, supra* note 10.

[17] *Id.* at 949-50, 830 N.W.2d at 511. Accord *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013).

[18] See *Yuma, supra* note 17.

[19] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011) (citing *Smith v. State*, 287 Ga. 391, 697 S.E.2d 177 (2010)). See, also, *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010).

STATE OF NEBRASKA, APPELLEE, V. ANGELO TOLBERT, APPELLANT.

851 N.W.2d 74

Filed August 1, 2014. No. S-13-847.

1. **Criminal Law: 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. **Sentences.** Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.
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. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
5. **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.
6. **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.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Scott C. Sladek, and Brenda J. Leuck for appellant.

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

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

HEAVICAN, C.J.

INTRODUCTION

Angelo Tolbert was convicted of first degree murder, first degree assault, and two counts of use of a deadly weapon to commit a felony. He was sentenced to life imprisonment on the murder count and 40 to 50 years' imprisonment on each of the other three counts, to be served consecutively. Tolbert appeals. We affirm.

FACTUAL BACKGROUND

In the early morning hours of October 21, 2012, a group of teenagers—Montrell Wiseman, Desjuha Wilkinson, Shamika Parks, and Onticha Gresham—were all gathered in front of the Gresham residence near 21st and Binney Streets in Omaha, Nebraska. The group noticed a van drive past slowly on two occasions. After the van's second pass, the group became nervous and decided to go into the house. As the group made its way into the house, two shots were fired. One shot struck and injured Wilkinson. Another struck and killed Wiseman. It was later determined that due to their red-colored clothing, the group of teenagers was mistakenly targeted by the shooter as being members of a rival gang.

A neighbor, Vincent Anderson, witnessed the shooting. Anderson testified that he heard a vehicle coming up the alley behind his house, so he looked out the window and saw a van. Anderson testified that he went outside because he was concerned that the van was there to dump trash at a nearby condemned house. As Anderson exited his house and headed into the alley, he heard a "boom," saw a flash, and witnessed an individual located behind the van's driver, holding a shotgun. In addition, Parks testified that she also saw a flash coming from the driver's side of the vehicle and that she thought the sliding door to the van might have been open.

After the shooting, the van crashed into a nearby pole. Witnesses reported seeing four individuals flee the van following the crash, but one returned. A fifth individual never left the scene. Parks also testified that she witnessed some of the individuals in the van flee following the shooting and that she thought one might have been carrying "a long gun."

Anderson also testified that he saw one of the individuals, though not the driver, leave the van with "something long" that might have been a gun. And another neighbor testified that the fourth individual to leave the van was "carrying something."

The van was registered to Constance Brown. Brown testified that on October 21, 2012, she lived near 42d and Ohio Streets in Omaha. Besides her children, Brown testified that she lived with her sister and several nephews, including Matthew Saunsoci; her brother Francis Cayou; and Joshua VanAckeren. Brown testified that in the early morning hours of October 21, she loaned her van to VanAckeren and Cayou, so they could go buy alcohol. Brown testified that in addition to VanAckeren and Cayou, Tolbert and Adam Gamble were at her home, but that she was not aware of who was with VanAckeren and Cayou when they left in her van.

The State's two primary witnesses at trial were Cayou and Gamble. Gamble testified first. He testified that he was with VanAckeren, Tolbert, and Saunsoci on October 21, 2012. He indicated that after spending some time at the 42d and Ohio residence, the group went "riding around" in Brown's van. According to Gamble, VanAckeren was driving; Cayou was in the front passenger seat; Tolbert was seated behind the driver in the middle row; he, Gamble, was seated in the middle row behind the passenger; and Saunsoci was in the back seat. Gamble testified that Cayou had a shotgun.

Gamble testified that after the group had driven around for approximately 20 minutes, they pulled up beside two people standing next to a car. At this point, Cayou handed Tolbert the gun, VanAckeren stopped the van, and Tolbert got out and shot at the people. The shooting was unsuccessful, however, because the shotgun still had the safety on. According to Gamble, upon returning to the van, Tolbert handed the shotgun back to Cayou, who took it off safety. VanAckeren then drove off.

Gamble then testified that VanAckeren stated they were headed "down to the Bottom area," which was rival gang territory. Upon arriving in that area, VanAckeren and Cayou

spotted some individuals wearing red shirts. Cayou again handed Tolbert the gun. According to Gamble, Tolbert stepped out of the van on the driver's side of the vehicle and discharged the shotgun twice. Tolbert then got back into the van, and VanAckeren began to drive away before crashing the van.

After the crash, Gamble testified that he, Cayou, and Tolbert exited the van and began running, leaving the shotgun in the van. According to Gamble, after about 20 minutes, he and Tolbert headed off together and Cayou went separately.

Cayou also testified that he, VanAckeren, Gamble, Saunsoci, and Tolbert were together on October 21, 2012. According to Cayou, at some point, the five left to get more alcohol. Consistent with Gamble's testimony, Cayou stated that Saunsoci was sitting in the back seat of the van, while Tolbert and Gamble were in the middle seat on the driver's and passenger sides, respectively. Cayou testified that he was in the front passenger seat and that VanAckeren drove. Cayou testified that VanAckeren had brought a shotgun with him into the van.

Cayou testified that rather than going to get more alcohol, he and VanAckeren discussed "going down to the Bottoms and shootin' somebody." According to Cayou, the van first came upon a parked car. Cayou testified that he handed Tolbert the gun to "bust on that car," but that the gun was on safety. Cayou testified that he reached back and switched off the safety, but that Tolbert kept the gun.

After this first, unsuccessful, shooting attempt, the van left the scene. According to Cayou, the group then came upon a group of people standing on a porch. These individuals were wearing red, a color worn by members of a rival gang. Cayou testified they drove by slowly, then stopped and turned off the van lights. After the lights were off, the van began moving again. Tolbert then opened the sliding door of the van and shot at the individuals.

After Tolbert shot at the group, VanAckeren drove off, but crashed the van into a pole. Cayou testified that after the crash, everyone got out of the van except Saunsoci. Cayou testified that he, Gamble, and Tolbert ran off down the alley,

with VanAckeren right behind them, carrying the shotgun. VanAckeren disposed of the shotgun in the alley and then returned to the van for Saunsoci.

When law enforcement arrived at the scene, they found a van parked near a utility pole with front-end damage on the passenger side. Two individuals were found in or near the van: VanAckeren and Saunsoci. A shotgun was found in the alley, and two large-caliber rifle rounds were found nearby. At the Gresham home, Wiseman's body was in front of the door to the residence and inside was an injured Wilkinson.

Following the State's case in chief, Tolbert filed a motion to dismiss, which was denied. Following the presentation of his defense, Tolbert renewed his motion. The motion was again denied. The jury then deliberated, and on June 5, 2013, returned verdicts of guilty of first degree murder, first degree assault, and two counts of use of a deadly weapon to commit a felony.

On August 23, 2013, Tolbert filed a motion for new trial based upon newly discovered evidence. In his motion, Tolbert alleged that Cayou had recanted his trial testimony; he included with his motion Cayou's affidavit to that effect.

In response, the State offered two affidavits. The first affidavit was from the admissions manager at the Douglas County Correctional Center explaining the housing of Cayou, Tolbert, and a third inmate. The affidavit explained that Cayou and this inmate were housed in the same unit; that Tolbert was housed in a separate unit; and that it was possible for prisoners to communicate between the two units.

The second affidavit was another affidavit from Cayou. In this second affidavit, Cayou averred that he had signed the earlier affidavit only after another inmate, who identified himself as Tolbert's cousin, threatened Cayou that he would be "'jumped'" if he did not recant his testimony. Cayou averred that he signed the first affidavit and then informed his counsel of his action, including the reasons behind it. Cayou's second affidavit is at least partially corroborated by the affidavit from the admissions manager. The district court denied Tolbert's motion for new trial. Tolbert appeals.

ASSIGNMENTS OF ERROR

Tolbert assigns as error that (1) there was insufficient evidence to support his convictions, (2) the sentences imposed were excessive, and (3) the district court erred in denying his motion for new trial.

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. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1]

[2] Imposing a sentence within statutory limits is a matter entrusted to the discretion of the trial court.[2]

[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.[3]

ANALYSIS

Sufficiency of Evidence

In his first assignment of error, Tolbert argues that the district court erred in concluding there was sufficient evidence to support his convictions. Tolbert contends that the testimonies of Gamble and Cayou were inconsistent, both with each other and with the testimony of the other witness to the shooting, Anderson, so as to make their testimonies not believable. Tolbert also argues that Gamble's and Cayou's levels of intoxication created reasonable doubt as to their ability to remember and further alludes to the veracity of Gamble's and Cayou's

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[1] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[2] *State v. Burton*, 282 Neb. 135, 802 N.W.2d 127 (2011).

[3] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

testimonies due to the agreements each reached with the State for a reduction in charges.

These arguments are without merit. As we noted above, the principles of law are clear: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[4] But this is exactly what Tolbert asks us to do.

Tolbert argues that the testimonies of Anderson, Gamble, and Cayou were in conflict. However, this court does not resolve such conflicts—a jury does. Tolbert argues that Gamble and Cayou were so drunk as to be untrustworthy. But this goes to the credibility of these witnesses, and this court does not assess credibility. Nor does the fact that both Gamble and Cayou had entered into agreements with the State involve a determination made by this court. That also goes to credibility, which is the province of the jury.

Both Gamble and Cayou testified that Tolbert was the shooter. This testimony, which was corroborated by other evidence, was sufficient to support Tolbert's convictions. Tolbert's first assignment of error is without merit.

Excessive Sentences

Tolbert next assigns that the district court erred in imposing upon him excessive sentences.

[4,5] The relevant principles of law are well known. Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[5] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[6]

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[4] See *Filholm, supra* note 1.

[5] *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013).

[6] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[6] 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.[7]

First degree murder is a Class IA felony[8] for which the only allowable sentence is life imprisonment.[9] First degree assault is a Class II felony[10] punishable by 1 to 50 years' imprisonment.[11] And use of a weapon to commit a felony is a Class IC felony when that weapon is a firearm.[12] The mandatory punishment for a Class IC felony is 5 to 50 years' imprisonment.[13]

Tolbert was sentenced to life imprisonment for first degree murder; this was the only sentence available to the district court and, as Tolbert seems to agree, was not an abuse of discretion. Rather, Tolbert argues that the other sentences of 40 to 50 years' imprisonment for each remaining count, to be served consecutively, are excessive, because such sentences are essentially another life sentence for Tolbert, who was a young man of 20 years of age when sentenced.

Tolbert's sentences, while at the high end of the statutory limits, are within those limits. We also note that under § 28-1205(3), Tolbert's sentences for use of a deadly weapon to commit a felony must be served consecutively to any other sentence imposed. Nor do we find the sentences to be excessive. Tolbert had a prior criminal history involving weapons. During the testing conducted at his presentence investigation, he scored as a high risk or very high risk in every category.

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[7] *Id.*

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

[9] Neb. Rev. Stat. § 28-105 (Cum. Supp. 2012).

[10] Neb. Rev. Stat. § 28-308 (Cum. Supp. 2012).

[11] § 28-105.

[12] Neb. Rev. Stat. § 28-1205(1) (Cum. Supp. 2012).

[13] § 28-105.

Despite having three children, Tolbert has apparently never held a job or graduated from high school. He denies being in a gang, but acknowledges that many of his friends are in gangs. Tolbert freely admits to drinking alcohol, but denies using drugs.

The facts surrounding Tolbert's convictions are chilling. He was found guilty of one count of first degree murder and one count of first degree assault, as well as two counts of use of a deadly weapon to commit a felony. But Wilkinson could have just as easily been killed as injured in this incident.

Wilkinson and Wiseman were each approximately 16 years old. The group was shot at, and Wiseman killed, simply because they were wearing red clothing.

And even before Tolbert and his associates targeted Wiseman and his friends, Tolbert also attempted to shoot at two other individuals. It was pure luck that the safety of the shotgun was still on and that those people escaped unharmed.

We find nothing in this record to show that Tolbert has, at any point, expressed remorse over these shootings or the fact that a group of teenagers unrelated to any gang were shot at, with one killed and another injured. The record shows that the district court appropriately considered the relevant factors when it sentenced Tolbert as it did. Those sentences were not excessive, and Tolbert's assignment of error is without merit.

Motion for New Trial

In his final assignment of error, Tolbert argues that the district court erred in denying his motion for new trial. Tolbert's motion was filed more than 10 days after the entry of the jury's verdicts, but was nevertheless timely because it alleged that a new trial was warranted on the basis of newly discovered evidence,[14] specifically, an affidavit from Cayou recanting his trial testimony.

In addition to Cayou's affidavit recanting his testimony, the district court was also presented with evidence that Cayou was threatened in order to obtain that recantation. In a second affidavit, Cayou averred that someone who identified himself as

[14] See Neb. Rev. Stat. §§ 29-2101(5) and 29-2103(4) (Reissue 2008).

Tolbert's cousin approached him and threatened to have Cayou "'jumped'" unless Cayou said that Tolbert was not the shooter. There was further evidence to show that the scenario as explained by Cayou was possible, given the housing arrangement at the Douglas County Correctional Center.

We review the denial of a motion for new trial for an abuse of discretion. The district court did not abuse its discretion in denying the motion for new trial in light of Cayou's second affidavit and explanation.

Tolbert's third assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

BARBARA L. POTTER, APPELLEE, V. PATRICK S. McCULLA AND HARTFORD UNDERWRITERS INSURANCE COMPANY, APPELLEES, AND TRACY N. GARCIA, D.D.S., L.L.C., AND FIRSTCOMP INSURANCE COMPANY, APPELLANTS.

851 N.W.2d 94

Filed August 1, 2014. No. S-13-944.

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. ____: ____. 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. **Workers' Compensation: Proof.** To recover under the Nebraska Workers' Compensation Act, a claimant must prove by a preponderance of the evidence that an accident or occupational disease arising out of and occurring in the course of employment caused an injury which resulted in disability compensable under the act.
4. **Workers' Compensation: Expert Witnesses.** Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert

opinion to establish the causal relationship between the employment and the injury or disability.

5. **Workers' Compensation.** The issue of causation of an injury or disability is one for determination by the trier of fact.
6. **Workers' Compensation: Appeal and Error.** An employee is entitled to compensation in Nebraska for personal injury caused by an accident arising out of and in the course of his or her employment. The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job.
7. **Workers' Compensation: Time: Proof: Words and Phrases.** The phrase "suddenly and violently" as used in Neb. Rev. Stat. § 48-151(2) (Reissue 2004) does not mean "instantaneously and with force," but, rather, requires only that the injury manifest at an identifiable point in time.
8. **Workers' Compensation: Time: Proof.** The identifiable point in time at which a repetitive trauma injury manifests is when there is a sudden result, characterized by an employee's discontinuing employment and seeking medical treatment, or when there is a sudden cause, such as a brief exposure to toxic fumes.
9. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.
10. **Courts: Public Policy.** The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Affirmed.

Brynne E. Holsten and L. Tyler Laflin, of Engles, Ketcham, Olson & Keith, P.C., for appellants.

Joel D. Nelson, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellee Barbara L. Potter.

Julie A. Jorgensen, of Morrow, Willnauer, Klosterman & Church, L.L.C., for appellees Patrick S. McCulla and Hartford Underwriters Insurance Company.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

Barbara L. Potter suffered a repetitive trauma injury as a result of her employment as a dental hygienist over a period

of more than 30 years. We conclude the Nebraska Workers' Compensation Court properly determined that her injury manifested itself on February 11, 2009, during Potter's employment with Dr. Tracy Garcia, and that Garcia and Garcia's workers' compensation carrier are liable for all of Potter's medical expenses and compensation benefits.

FACTS

Potter began working as a dental hygienist in 1981. She has worked 3 to 4 days per week throughout her career. In late 2007 or early 2008, while working in a dental clinic for Dr. Patrick McCulla, Potter began experiencing pain in her neck. The pain was more intense toward the end of her workday, and Potter thought it was caused by the manner in which she positioned herself over patients while working. Potter saw 8 to 12 patients a day and spent the majority of her worktime with her head tilted and her arms raised.

On October 17, 2008, while still employed by McCulla, Potter sought medical treatment for her neck pain from Dr. Donald Walla. Walla prescribed oral steroids and physical therapy but did not assign any work restrictions. On October 22, Potter told McCulla about her symptoms and that she had sought medical treatment. She also told McCulla that Walla thought her neck problems were related to her work. On November 5, McCulla submitted a first report of injury to the workers' compensation court. Hartford Underwriters Insurance Company, McCulla's insurance carrier, accepted the injury claim and paid the medical expenses Potter incurred as a result of her neck pain.

Potter received medical treatment for her pain 12 times between October 17, 2008, and January 20, 2009. She sought this treatment during her off hours and days and did not miss any work during this time. On February 11, 2009, Potter's pain level became "excruciating" and she left work early to see Walla. This was the first time she missed work due to the pain. By this time, McCulla had sold the dental practice to Garcia. Potter's duties and hours remained the same during and after the ownership change. As Potter described it: "'I didn't switch. The dentists switched.'"

After February 11, 2009, Potter continued to receive medical treatment for her neck pain. In September 2010, she was examined by Dr. D.M. Gammel at the request of Garcia's insurance carrier, FirstComp Insurance Company (FirstComp). Gammel opined that the cause of her pain was a "pre-existing and progressive degenerative cervical disc condition" and that her awkward positions at work were not the cause of her condition. He expressly opined that her condition was "unrelated to a work related injury" and explained that continued work as a dental hygienist might "intensify her awareness of the symptoms" of her condition but was "not the cause of such." After receiving this report, FirstComp refused to pay for any additional medical care for Potter.

Potter left her employment with Garcia in June 2011 to accept a position as a dental hygienist with another clinic, where she worked 3 days a week. She continued to feel pain in her neck, and in June 12, 2012, she sought treatment with Dr. Phillip Essay of the Spine and Pain Center of Nebraska. In July 2012, Essay imposed permanent work restrictions of working only 3 days per week. Essay opined that Potter had "degenerative spondylosis in her cervical spine" that was "aggravated by the repetitive work duties and postures required in her work as a dental hygienist," although he acknowledged it was "impossible to state to any reasonable degree of medical certainty which of her positions as a dental hygienist caused what and/or when."

On June 4, 2012, Potter filed a petition in the Nebraska Workers' Compensation Court seeking benefits. That court found Potter had preexisting conditions in her neck which were aggravated by her duties as a dental hygienist and awarded benefits based on a 40-percent loss of earning capacity. It determined that the date of the injury was February 11, 2009, as that was the date she first missed work to be treated for her injury. Because Garcia was Potter's employer on the date of the injury, the court held Garcia and FirstComp liable for all of Potter's medical expenses and compensation benefits.

Garcia and FirstComp filed this timely appeal. We granted their petition to bypass the Nebraska Court of Appeals and moved the case to our docket.

ASSIGNMENTS OF ERROR

Garcia and FirstComp assign that the compensation court erred in (1) finding Potter proved a causal connection between her injuries and her employment with Garcia and (2) determining the date of injury was February 11, 2009. With respect to the second assignment of error, Garcia and FirstComp ask this court to reconsider the test we apply when determining whether the statutory requirement of "suddenly and violently" in Neb. Rev. Stat. § 48-151(2) (Reissue 2010) is met as to repetitive trauma injuries.

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]

[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.[2]

ANALYSIS

CAUSATION

[3-5] To recover under the Nebraska Workers' Compensation Act,[3] a claimant must prove by a preponderance of the evidence that an accident or occupational disease arising out of

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[1] *Hynes v. Good Samaritan Hosp.*, 285 Neb. 985, 830 N.W.2d 499 (2013); *Smith v. Mark Chrisman Trucking*, 285 Neb. 826, 829 N.W.2d 717 (2013).

[2] *Hynes, supra* note 1; *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013).

[3] See Neb. Rev. Stat. §§ 48-101 to 48-1,117 (Reissue 2010, Cum. Supp. 2012 & Supp. 2013).

and occurring in the course of employment caused an injury which resulted in disability compensable under the act.[4] Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish the causal relationship between the employment and the injury or disability.[5] The issue of causation of an injury or disability is one for determination by the trier of fact.[6]

Garcia and FirstComp allege that Potter failed in her burden of proof because although she "establish[ed] that she suffered from an aggravation of a pre-existing condition and that the same was related to her work as a dental hygienist over her 32 year career," she did not present sufficient evidence "linking her alleged injury and disability to her employment with . . . Garcia."[7]

[6] But Potter did not have to specifically prove that her injury arose out of her employment with Garcia. An employee is entitled to compensation in Nebraska for personal injury caused by an accident arising out of and in the course of his or her employment.[8] The phrase "arising out of" describes the accident and its origin, cause, and character, i.e., whether it resulted from the risks arising within the scope or sphere of the employee's job.[9] In *Tomlin v. Densberger Drywall*,[10] the

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[4] § 48-101; *Risor v. Nebraska Boiler*, 277 Neb. 679, 765 N.W.2d 170 (2009).

[5] See *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991). See, also, *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008); *Owen v. American Hydraulics*, 254 Neb. 685, 578 N.W.2d 57 (1998).

[6] See, *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Liberty v. Colonial Acres Nsg. Home*, 240 Neb. 189, 481 N.W.2d 189 (1992).

[7] Brief for appellants at 17.

[8] § 48-101.

[9] See, *Zoucha v. Touch of Class Lounge*, 269 Neb. 89, 690 N.W.2d 610 (2005); *Tomlin v. Densberger Drywall*, 14 Neb. App. 288, 706 N.W.2d 595 (2005).

[10] *Tomlin, supra* note 9.

Court of Appeals addressed a similar situation. There, the employee had worked for his current employer for 2 years, but had worked as a drywaller for 30 years. The medical evidence established that the cumulative repetitive task of drywalling was the cause of the injury. The Court of Appeals held:

> Because [the medical doctors] opined that overhead work and heavy lifting contributed . . . to [the] shoulder injury, and because [the employee] testified that he performed lots of overhead work and heaving lifting at [his current employer], the trial court did not err in determining that [the] injury resulted from the risks arising within the scope or sphere of his [current] employment . . . , i.e., overhead work and heaving lifting.[11]

A similar analysis applies here. Essay's opinion established a causal relationship between Potter's work as a dental hygienist and her injury. It is undisputed that she worked as a dental hygienist for Garcia. Thus, Potter presented competent evidence that her injury arose from the risks arising within the scope or sphere of her employment, even if she cannot pinpoint that it arose directly as a result of her employment with Garcia. The compensation court did not err in finding there was a causal relationship between the injury and Potter's employment as a dental hygienist.

Date of Injury

Potter's injury was caused by repetitive trauma. In Nebraska, the compensability of repetitive trauma injuries is tested under the statutory definition of accident.[12] An accident is "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury."[13] Here, both parties agree that the injury to Potter was "unexpected or unforeseen" and that it

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[11] *Id.* at 297, 706 N.W.2d at 605.

[12] E.g., *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W.2d 166 (2004).

[13] § 48-151(2).

produced "objective symptoms of an injury." They also agree that it happened "suddenly and violently." However, they dispute *when* it happened "suddenly and violently." Resolution of this issue is important, for the date on which the accident happens "suddenly and violently" is relevant to many issues in a workers' compensation case, including when the statute of limitations begins to run, at what rate the employee's average weekly wage should be calculated, and which employer or insurer is liable to the employee.[14] The latter is particularly relevant to the instant case.

[7] Years ago, we recognized that while the language of our statute requiring an accident to happen "'suddenly and violently'" was "quite precise and clear," "the realities of life do not always provide us with such clear-cut recorded events from which we may decide whether an accident . . . has occurred."[15] We further recognized that this is particularly so when the injury is caused by repetitive trauma. We explained:

> [T]he nature of the human body being such that it is, not all injuries to the body are caused instantaneously and with force, but may indeed be nevertheless suddenly and violently, even though they have been building up for a considerable period of time and do not manifest until they cause the employee to be unable to continue his or her employment.[16]

We have thus reasoned that the phrase "'suddenly and violently'" as used in § 48-151(2) does not mean "'instantaneously and with force,'" but, rather, requires only that the injury manifest at an identifiable point in time.[17]

[8] Since at least 1999, we have reasoned that the identifiable point in time at which a repetitive trauma injury manifests is when there is a sudden result, characterized by

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[14] See 3 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 50.05 (2014).

[15] *Sandel v. Packaging Co. of America*, 211 Neb. 149, 156, 317 N.W.2d 910, 915 (1982).

[16] *Id.* at 160, 317 N.W.2d at 917.

[17] *Id.* at 158, 317 N.W.2d at 916. See, e.g., *Risor, supra* note 4.

an employee's discontinuing employment and seeking medical treatment.[18] We later clarified that the identifiable point in time can also be when there is a sudden cause, such as a brief exposure to toxic fumes.[19] Only the test used to identify the point in time when a sudden result occurs is at issue in this case.

Garcia and FirstComp argue that our interpretation of "suddenly and violently" as requiring an employee to both seek medical attention and discontinue employment has "morphed" the "plain, ordinary, and popular meaning of the phrase 'suddenly and violently' and no longer accomplishes the purpose and intent of the Nebraska Workers' Compensation Act."[20] We do not understand this argument to be that we should read "suddenly and violently" as meaning only "instantaneously and with force."[21] Instead, Garcia and FirstComp are simply asking that we apply a different test when undertaking the difficult task of determining the identifiable point in time that a repetitive trauma injury suddenly results or manifests. They argue that the part of our current test which requires discontinuation of employment "causes harm"[22] to part-time workers or night-shift workers who, realizing they have suffered a work-related injury and need medical treatment, seek that treatment during nonwork hours. They also argue it is "unjust"[23] to subsequent employers to fix the date of injury based on the date employment is discontinued when the symptoms of the injury surfaced and the

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[18] See *Jordan v. Morrill County*, 258 Neb. 380, 603 N.W.2d 411 (1999); *Fay v. Dowding, Dowding*, 261 Neb. 216, 623 N.W.2d 287 (2001); *Vonderschmidt v. Sur-Gro*, 262 Neb. 551, 635 N.W.2d 405 (2001); *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds, Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005); *Swoboda, supra* note 12; and *Risor, supra* note 4.

[19] *Swoboda, supra* note 12.

[20] Brief for appellants at 24-25.

[21] See *Sandel, supra* note 15, 211 Neb. at 156, 317 N.W.2d at 915.

[22] Brief for appellants at 27.

[23] *Id.* at 22.

employee sought medical treatment during his or her tenure with a previous employer.

We acknowledge that other jurisdictions apply different tests when determining the identifiable point in time at which a repetitive trauma injury suddenly results or manifests. Garcia and FirstComp urge us to adopt the test applied by Iowa. That jurisdiction finds that a repetitive trauma injury manifests when both the fact of the injury and the causal relationship of the injury to the claimant's employment are plainly apparent to a reasonable person.[24] In *Meyer v. IBP, Inc.*,[25] the court explained that the test was employed in an effort to determine "'the date on which disability manifests itself.'" It explained that in its view, "'"[m]anifestation"'" was "'best characterized'" based on the articulated test.[26] It noted, however, that factors to be considered in determining when a repetitive trauma injury manifests itself under that test included "'absence from work because of inability to perform'" and "'the point at which medical care is received.'"[27] Because these are precisely the factors considered by this court, the test is not entirely different from ours. And we note that Iowa's workers' compensation statute does not include the "suddenly and violently" language from which our test was derived.[28]

Oklahoma applies a test very similar to Iowa's and finds that a repetitive trauma injury manifests when the worker becomes aware of the injury and its job relatedness.[29] So does Kentucky, which finds a gradual injury becomes manifest when the worker has knowledge of the harmful change

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[24] *Herrera v. IBP, Inc.*, 633 N.W.2d 284 (Iowa 2001).

[25] *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 221 (Iowa 2006), quoting 3 Larson & Larson, *supra* note 14.

[26] *Id.*, quoting *Oscar Mayer Foods Corp. v. Tasler*, 483 N.W.2d 824 (Iowa 1992).

[27] *Id.*

[28] See Iowa Code Ann. § 85.3(1) (West 2009).

[29] *Centrilift v. Evans*, 915 P.2d 391 (Okla. App. 1995).

and knows it is caused by the work.[30] Pennsylvania holds that the date of diagnosis of an injury caused by repetitive trauma is the date of the accident.[31] All of these jurisdictions are attempting to answer the same difficult question—at what point does an injury caused by repetitive trauma manifest itself?

The test we have adopted, that a repetitive trauma injury manifests on the date that the employee has both sought medical treatment and missed work due to the injury,[32] has certain advantages. First, it is based on objective criteria—the date the employee seeks medical treatment and the date the employee has to discontinue or miss work. Under this test, we need not engage in a subjective analysis of when an injury or its relation to the employment would be "plainly apparent" to a "reasonable person."[33] But perhaps more important, the requirement in our test that the employee miss or discontinue employment is reasonably related to a determination of the time when the injury manifests itself in disability. Both before and after an employee's maximum medical improvement, an employee's disability is determined by the employee's diminution of employability or impairment of earning power or earning capacity.[34] Thus, even if an employee is experiencing pain associated with his or her employment and seeks medical treatment for that pain, no disability is manifested until there is a diminution of employability—and that reasonably can only occur when an employee's injury interferes with his or her ability to perform the requirements of the job. The point at which an employee has to miss or discontinue work because of the injury is thus a reasonable standard of disability manifestation.

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[30] *Brummitt v. Southeastern Ky. Rehabilitation*, 156 S.W.3d 276 (Ky. 2005).

[31] *Piad Corp. v. W.C.A.B. (Moskyok)*, 761 A.2d 640 (Pa. Commw. 2000).

[32] See cases cited *supra* note 18.

[33] Compare, *Meyer, supra* note 25; *Herrera, supra* note 24.

[34] *Visoso v. Cargill Meat Solutions*, 285 Neb. 272, 826 N.W.2d 845 (2013).

In addition, the bright-line rule we apply has the dual advantage of simplicity and consistency. It is fair to employees, because a date of injury is conclusively established once symptoms become so severe that work is missed. In this respect, we note that at least two jurisdictions have questioned the wisdom and fairness of the Iowa test, or tests similar to it, from the perspective of the injured employee. As noted, Iowa holds that the date of injury is the date when both the injury and its relation to the employment are "plainly apparent" to a "reasonable person."[35] But this can be unfair to employees because

> [b]y their very nature, repetitive-trauma injuries may take years to develop to a point of severity precluding the employee from performing in the workplace. An employee who discovers the onset of symptoms and their relationship to the employment, but continues to work faithfully for a number of years without significant medical complications or lost working time, may well be prejudiced if the actual breakdown of the physical structure occurs beyond the period of limitation set by statute.[36]

These same jurisdictions also reason that fixing the date of injury for a repetitive trauma injury prior to the date the employee has to miss work is illogical, as "it cannot be presumed the initial condition will necessarily degenerate to a point at which it impairs the employee's ability to perform the duties to which he is assigned."[37]

We acknowledge that the rule we apply may seem unfair to some employers (or, more aptly, their insurance carriers) under circumstances similar to the instant case, where symptoms and medical treatment occur while work is being performed for one employer but no work is missed until work is being performed for another employer. But due to

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[35] See, *Meyer, supra* note 25; *Herrera, supra* note 24.

[36] *Oscar Mayer & Co. v. Industrial Comm.*, 176 Ill. App. 3d 607, 611, 531 N.E.2d 174, 176, 126 Ill. Dec. 41, 43 (1988). See *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[37] *Id.*

the progressive nature of repetitive trauma injuries, the test employs a "necessary legal artifice . . . in order for repetitive trauma cases to be manageable within the statutory framework of an accident."[38]

[9] In 1991, four members of this court noted that modification of the Nebraska Workers' Compensation Act to better address the issues involved in repetitive trauma cases is a legislative function, not a judicial one.[39] And as we noted in a 2003 case in which we declined to overrule the same line of precedent challenged here:

> When judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. . . . The Legislature has not only acquiesced in our interpretation of Neb. Rev. Stat. § 48-151 . . . regarding repetitive trauma injuries, but has declined the express invitation of a majority of this court to consider and amend our interpretation.[40]

Eleven years later, that statement is still true.

[10] In sum, the test we apply to determine when a repetitive trauma injury occurs "suddenly and violently" is neither inconsistent with the statutory language nor is it unfair or unjust. While the test may not be perfect, we are not persuaded that the more subjective approach taken by Iowa and other jurisdictions is better. The doctrine of stare decisis is grounded on public policy and, as such, is entitled to great weight and must be adhered to unless the reasons therefor have ceased to exist, are clearly erroneous, or are manifestly wrong and mischievous or unless more harm than good will result from doing so.[41] We therefore decline Garcia and FirstComp's invitation to overrule our precedent. The compensation court

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[38] *Tomlin, supra* note 9, 14 Neb. App. at 301, 706 N.W.2d at 608.

[39] *Vencil v. Valmont Indus.*, 239 Neb. 31, 473 N.W.2d 409 (1991) (Caporale, J., concurring; Boslaugh, White, and Fahrnbruch, JJ., join), *disapproved on other grounds, Jordan, supra* note 18.

[40] *Dawes, supra* note 18, 266 Neb. at 539-40, 667 N.W.2d at 182 (citation omitted).

[41] *Dawes, supra* note 18.

did not err in determining that the date of injury was February 11, 2009, as that was the date on which Potter first missed work due to her pain, even though she had previously sought medical treatment.

CONCLUSION

For the foregoing reasons, the decision of the compensation court is affirmed.

AFFIRMED.

HEAVICAN, C.J., not participating.

STATE OF NEBRASKA, APPELLEE, V.
JOSE LUIS SANDOVAL, APPELLANT.
851 N.W.2d 656

Filed August 8, 2014. No. S-11-872.

1. **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.
2. **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.
3. **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.
4. ____: ____: ____. The 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.
5. **Judgments: Appeal and Error.** The writ of error coram nobis is not available to correct errors of law.
6. **Judgments: Pleas: Convictions: Proof.** The failure of a district court to give the advisement required by Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008) does not prevent acceptance of a plea and entry of a judgment of conviction. Rather, it provides a basis for the defendant to subsequently move to vacate the judgment and withdraw the plea upon a showing that the advisement was not given and the defendant faces an immigration consequence as a result of the plea and subsequent conviction.

7. **Judgments: Pleas: Convictions.** A writ of error coram nobis cannot be utilized to set aside a plea-based conviction on the ground that the court failed to properly advise the defendant of the immigration consequences of the plea.

Appeal from the District Court for Dakota County: PAUL J. VAUGHAN, Judge. Affirmed.

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

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

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

STEPHAN, J.

The issue presented in this appeal is whether the failure of the court to advise a defendant of the immigration consequences of a plea of guilty or nolo contendere prior to acceptance of the plea can serve as the basis for a writ of error coram nobis. We conclude that it cannot and, therefore, affirm the judgment of the district court for Dakota County denying the writ.

BACKGROUND

On October 28, 2003, Jose Luis Sandoval was charged in Dakota County District Court with possession of methamphetamine. He pled not guilty. In January 2004, Sandoval changed his plea to guilty as part of a plea agreement with the State. The record of the plea hearing reflects that the district court did not advise Sandoval of the immigration consequences of his guilty plea, even though such an advisement is required by Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008).

After Sandoval had served the sentence for his offense, he filed a "Petition for Writ of Error Coram Nobis" seeking an order "vacating the judgment and allowing [him] to withdraw his previously entered plea of guilty and allow him to enter a plea of not guilty." The petition stated that it was "filed pursuant to the common law writ of error coram nobis which exists in this state pursuant to Neb. Rev. Stat. § 49-101 [Reissue 2010]." It also referenced § 29-1819.02(2), which

permits a defendant to withdraw a guilty plea if he or she is not advised of the immigration consequences required by § 29-1819.02(1) and the defendant faces such immigration consequences. The petition asserted that neither the district court nor defense counsel advised Sandoval of the immigration consequences of his guilty plea and argued he should be allowed to withdraw his guilty plea based on the violation of § 29-1819.02, because he received ineffective assistance of counsel, and because his plea was not entered freely, intelligently, and voluntarily.

The district court denied relief. It concluded that Sandoval's claims were not based upon an error of fact that could be addressed via a petition for writ of error coram nobis. Sandoval timely appealed. We overruled the State's motion for summary affirmance but ordered supplemental briefing.

ASSIGNMENT OF ERROR

Sandoval assigns, restated, that a writ of error coram nobis should be issued, allowing him to withdraw his guilty plea, because the district court failed to advise him of the immigration consequences of his guilty plea prior to accepting it.

STANDARD OF REVIEW

[1] 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.[1]

ANALYSIS

Sandoval alleged in his operative petition that the court failed to give him the advisement required by § 29-1819.02(1) but that he was precluded by our holding in *State v. Rodriguez-Torres*[2] from asserting a right to withdraw his plea pursuant to § 29-1819.02(2) because he had served his sentence. He then alleged that the district court had "common law jurisdiction to vacate [his] conviction" through a writ of error coram nobis.

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[1] *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013); *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012), *cert. denied* ___ U.S. ___, 133 S. Ct. 244, 184 L. Ed. 2d 129.

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

Thus, the narrow issue presented to the district court was whether this common-law remedy could be utilized to afford relief for Sandoval's claims. The district court determined that "a writ [of] error coram nobis [was] not an appropriate remedy." Our analysis is limited to whether this was error.

[2-5] 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.[3] 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.[4] The writ 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.[5] The writ is not available to correct errors of law.[6]

In this appeal, Sandoval argues that a writ of error coram nobis should issue, allowing him to withdraw his guilty plea, because the district court failed to advise him of the immigration consequences of his plea prior to accepting it. He contends the district court's failure to give the advisement violated both the statutory right encompassed in § 29-1819.02(2) and his right to due process of law. We conclude that neither of these claims supports the issuance of a writ of error coram nobis.

In *State v. Diaz*,[7] we held a writ of error coram nobis was not an appropriate method for a defendant to challenge a plea-based conviction on the basis that he received ineffective assistance of counsel when his counsel failed to advise him of the immigration consequences of a guilty plea and subsequent

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[3] *State v. Diaz*, 283 Neb. 414, 808 N.W.2d 891 (2012).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

conviction. We reasoned that an ineffective assistance of counsel claim presents a mixed question of fact and law and that because the claim rested in part on questions of law, it could not be resolved via a writ of error coram nobis. We also reasoned that a writ of error coram nobis was inappropriate for the additional reason that, whether the defendant had been advised of the immigration consequences of his plea or not, the district court was not prevented from rendering judgment against him.

[6] Sandoval's claim that he is entitled to coram nobis relief, based upon the failure of the court to give an immigration consequences advisement before accepting his plea, is likewise without merit. As in *Diaz*, whether the court gave Sandoval the immigration consequences advisement or not, it was not prevented from rendering judgment against him. The failure of a district court to give the advisement required by § 29-1819.02(1) does not prevent acceptance of a plea and entry of a judgment of conviction. Rather, it provides a basis for the defendant to subsequently move to vacate the judgment and withdraw the plea upon a showing that the advisement was not given and the defendant faces an immigration consequence as a result of the plea and subsequent conviction.[8] Unless and until the defendant successfully exercises that right, the judgment of conviction remains in full force.

Sandoval's claim based on due process fails for the same reason. In *State v. Wilson*,[9] a convicted defendant who had completed his sentence and was facing deportation sought a writ of error coram nobis, contending that he was denied due process of law by the court's failure to advise him of the immigration consequences of his nolo contendere plea. Noting that the writ was intended to "remedy errors of fact, not errors of law," we reasoned that because "any alleged failure of the District Court to properly inform the appellant of his constitutional rights would clearly be an error of law, a writ of

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[8] See, § 29-1819.02(2); *State v. Mena-Rivera*, 280 Neb. 948, 791 N.W.2d 613 (2010); *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009).

[9] *State v. Wilson*, 194 Neb. 587, 234 N.W.2d 208 (1975).

error coram nobis is not the appropriate remedy."[10] Moreover, the substance of Sandoval's due process claim depends upon retroactive application of the rule announced by the U.S. Supreme Court in *Padilla v. Kentucky*,[11] and the Court held in *Chaidez v. U.S.*[12] that the rule announced in *Padilla* does not so apply.

[7] For the sake of completeness, we note that Sandoval pursued the common-law coram nobis remedy at least in part based on an understanding that he was precluded from exercising the remedy under § 29-1819.02(2) by the fact that he had completed his sentence. His understanding was based upon a reading of *State v. Rodriguez-Torres*,[13] which we recently held in *State v. Rodriguez*[14] was incorrect. Because Sandoval sought relief in this action solely in the form of a writ of error coram nobis, we do not comment upon whether he has grounds for relief under § 29-1819.02(2) in light of our holding in *Rodriguez*.[15] Rather, limiting our review to the issue presented to and decided by the district court, we hold that a writ of error coram nobis cannot be utilized to set aside a plea-based conviction on the ground that the court failed to properly advise the defendant of the immigration consequences of the plea.

CONCLUSION

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

AFFIRMED.

HEAVICAN, C.J. not participating.

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[10] *Id.* at 589, 234 N.W.2d at 210.

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

[12] *Chaidez v. U.S.*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

[13] *State v. Rodriguez-Torres, supra* note 2.

[14] *State v. Rodriguez, ante* p. 714, 850 N.W.2d 788 (2014).

[15] *Id.*

STATE OF NEBRASKA, APPELLEE, V.
JULIO CHOJOLAN, APPELLANT.
851 N.W.2d 661

Filed August 8, 2014. No. S-12-1113.

1. **Jurisdiction: Appeal and Error.** Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Affirmed in part, and in part reversed and remanded.

Bilal A. Khaleeq and Daniel S. Reeker, of Khaleeq Law Firm, L.L.C., for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

The issues presented in this appeal surround the failures of defense counsel and the court to advise a defendant of the immigration consequences of a plea of guilty or nolo contendere prior to the acceptance of the plea.

Julio Chojolan appeals the October 24, 2012, order of the district court for Douglas County in which the court dismissed his motion to withdraw his guilty plea in a 2006 conviction for attempted possession of a controlled substance. With respect to defense counsel's failure to advise, the district court concluded that the principles recognized in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), did not apply retroactively to Chojolan. This ruling was not error with respect to the court's failure to advise. The district court reasoned that it lacked jurisdiction to consider the motion under the immigration advisement statute, Neb. Rev.

Stat. § 29-1819.02(2) (Reissue 2008), because Chojolan had already completed his sentence. We conclude that the motion is authorized under § 29-1819.02(2) even though Chojolan had completed his sentence. We therefore affirm the district court's ruling regarding defense counsel's advisements, but we reverse the district court's dismissal of Chojolan's motion brought under § 29-1819.02(2) and remand the cause for further proceedings.

STATEMENT OF FACTS

In November 2006, Chojolan pled guilty to attempted possession of a controlled substance, a Class I misdemeanor. He was sentenced to imprisonment for 30 days and was given credit for time served of 30 days. The record of the plea hearing shows that Chojolan was not informed by the court of any potential immigration consequences stemming from his plea and conviction.

On August 7, 2012, Chojolan filed a "Motion to Withdraw Plea of Guilty and Vacate Conviction," in which he sought to withdraw his 2006 plea. He alleged that neither his counsel nor the court had advised him of the immigration consequences of his plea prior to entry of the plea. He also alleged that he was subject to removal proceedings and denial of naturalization under federal immigration law. Chojolan asserted that the court had jurisdiction based on common-law remedies that allow withdrawal of a plea and vacation of a conviction when trial counsel has failed to advise a defendant of immigration consequences. Chojolan also asserted that the district court had jurisdiction to hear his motion "based on Neb. Rev. Stat. [§] 29-1819.02 and the fact that the Court did not advise him of the immigration consequences of his plea prior to accepting his plea." Section 29-1819.02(2) provides:

> Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, on or after July 20, 2002, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which the

> defendant pleaded guilty or nolo contendere may have the consequences for the defendant of removal from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on the defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

On October 2, 2012, the court held a hearing on Chojolan's motion and the State's motion to dismiss the motion. The State asserted in its motion, inter alia, that the court lacked jurisdiction to hear Chojolan's motion because Chojolan had completed his sentence and was no longer in the State's custody. At the hearing, Chojolan offered two exhibits—a transcript of the proceedings in the 2006 plea-based conviction and a "Notice of Hearing in Removal Proceedings" issued by the immigration court in Omaha, Nebraska. The court admitted both exhibits with the understanding that the State objected based on its belief that the court did not have jurisdiction of this matter.

In an order filed October 24, 2012, the district court dismissed Chojolan's motion for lack of jurisdiction. The court found that the decision in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), holding that defense counsel has a duty to advise clients of potential immigration consequences of a guilty plea and conviction, did not apply retroactively to Chojolan's 2006 plea and conviction. The court further concluded that it did not have jurisdiction under § 29-1819.02(2) "as a result of [Chojolan's] not currently being in custody, on parole or on probation."

Chojolan appeals.

ASSIGNMENT OF ERROR

Chojolan claims that the court erred when it determined that it lacked jurisdiction to consider his motion to withdraw his guilty plea. He argues both that *Padilla* should be applied

retroactively and that § 29-1819.02 gave the court jurisdiction to hear his motion.

STANDARD OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court, which requires an appellate court to reach a conclusion independent of the lower court's decision. *State v. Rodriguez, ante* p. 714, 850 N.W.2d 788 (2014).

ANALYSIS

Padilla *Does Not Apply Retroactively to Chojolan's 2006 Plea and Conviction.*

Chojolan asserts that *Padilla* should apply retroactively to his claim that he received ineffective assistance when counsel failed to advise him of the potential immigration consequences of his plea and conviction in 2006. We conclude that the district court did not err when it determined that *Padilla* did not apply.

In prior cases, we have noted that in *Chaidez v. U.S.*, ___ U.S. ___, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), the U.S. Supreme Court held that because *Padilla*, which was decided in 2010, announced a new rule, those defendants whose convictions became final prior to *Padilla* could not benefit from its holding. *State v. Osorio*, 286 Neb. 384, 837 N.W.2d 66 (2013); *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013). In *Yuma*, we concluded that because the defendant's conviction was not final until approximately 1 week after *Padilla* was decided, the new rule announced in *Padilla* applied to the defendant. But in *Osorio*, we concluded that because the defendant's conviction had become final nearly a decade before *Padilla* was decided, the rule announced in *Padilla* did not apply retroactively to the defendant's conviction.

In the present case, Chojolan was convicted and sentenced in 2006, and therefore the rule announced in *Padilla* in 2010 does not apply retroactively to his conviction. We conclude that the district court did not err when it determined that *Padilla* did not apply retroactively to Chojolan's 2006 plea and conviction.

The District Court Has Jurisdiction Under § 29-1819.02(2) to Consider Chojolan's Motion to Withdraw His 2006 Plea.

Chojolan asserts that the trial court in 2006 failed to give him statutorily required advisements regarding immigration consequences prior to acceptance of his plea. He claims in this appeal that the district court erred when it concluded that because he had completed his sentence, the court did not have jurisdiction to consider his motion to withdraw his plea. We conclude that under § 29-1819.02(2), the court had jurisdiction to consider Chojolan's motion to withdraw his plea and that the district court erred when it concluded to the contrary.

In *Rodriguez, supra*, we stated that § 29-1819.02(2) creates a statutory remedy for a court's failure to give the appropriate immigration advisement before accepting a plea of guilty and we noted that the remedy was limited to defendants who seek to withdraw pleas that were accepted on or after July 20, 2002. We further stated that with regard to such pleas, all a defendant must show to withdraw a plea under § 29-1819.02 is that (1) the court failed to give all or part of the advisement and (2) the defendant faces an immigration consequence which was not included in the advisement given. *Rodriguez, supra*.

The defendant in *Rodriguez* filed a motion in 2013 seeking to withdraw a guilty plea he had entered in 2004. The district court in *Rodriguez* concluded that it did not have jurisdiction to consider the defendant's motion because at the time he filed the motion in 2013, the defendant had already completed the probation sentence related to his 2004 conviction. We noted on appeal in *Rodriguez* that the language of § 29-1819.02(2) imposes no requirement that a motion to withdraw a plea must be filed before the defendant completes his or her sentence. We determined that we could not read such a limitation into the statute, and we disagreed with the dissent's conclusion that the use of the word "defendant" in the statute demonstrated an intent to impose such limitation. We therefore concluded that as to pleas entered on or after

July 20, 2002, § 29-1819.02(2) gives a court jurisdiction to consider a motion to withdraw such plea or vacate the judgment regardless of whether a defendant has completed his or her sentence.

In the present case, the plea Chojolan seeks to withdraw was entered in 2006, after the July 20, 2002, date set forth in § 29-1819.02(2). Therefore, the district court had jurisdiction to consider Chojolan's motion even though he had completed his sentence prior to the time he filed the motion. We conclude that the district court erred when it determined that it did not have jurisdiction to consider Chojolan's motion. We therefore reverse the district court's dismissal of the motion, and we remand the cause to the district court for further proceedings.

The District Court Made No Findings Regarding the Merits of Chojolan's Motion, and We Therefore Do Not Address the State's Argument That Chojolan's Evidence Regarding Immigration Consequences Was Insufficient.

We finally note that the State argues on appeal that whether or not the district court had jurisdiction to consider Chojolan's motion, Chojolan should not be permitted to withdraw his plea, because he failed to show that the conviction may have immigration consequences as required under § 29-1819.02(2) and our case law. The State specifically contends that although Chojolan presented evidence that immigration proceedings had been brought against him, the evidence did not show that such proceedings were a consequence of the 2006 plea and conviction.

The district court in this case determined that it lacked jurisdiction to consider Chojolan's motion, and the court therefore made no findings with respect to the merits of the motion, including whether Chojolan made the showings with respect to immigration consequences that under § 29-1819.02(2) and our cases would require the court to grant the motion to withdraw his plea. Because the district court made no such findings, we have nothing to review and we make no comment whether

there is sufficient evidence to establish the necessary showings to require the court to allow Chojolan to withdraw his 2006 plea.

CONCLUSION

With respect to Chojolan's assertion that his counsel was ineffective for failing to advise him of the immigration consequences of his plea, we agree with the district court that *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), does not apply retroactively to Chojolan's 2006 plea-based conviction. The district court did not err when it denied relief on this basis, and we affirm this aspect of the district court's order. With respect to Chojolan's assertion that the court in 2006 failed to advise him as required by § 29-1819.02, we conclude that because the plea was accepted after July 20, 2002, § 29-1819.02(2) provides a remedy without regard to whether Chojolan has completed his sentence and that the district court erred when it concluded it lacked subject matter jurisdiction based on the fact that Chojolan had completed his sentence. The district court has jurisdiction to consider Chojolan's motion to withdraw his plea under the remedy provided in § 29-1819.02(2). We reverse the district court's dismissal of Chojolan's motion and remand the cause for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

CONNOLLY, J., dissenting.

I dissent. For the reasons stated in my dissent to *State v. Rodriguez*,[1] I disagree that Neb. Rev. Stat. § 29-1819.02(2) (Reissue 2008) provides a remedy for a court's failure to give the required immigration advisement after a person has completed their sentence. As set out in the *Rodriguez* dissent, I also conclude that the common-law procedure for collaterally attacking a final judgment and withdrawing a plea was unavailable because Chojolan has not raised a constitutional claim.

HEAVICAN, C.J., joins in this dissent.

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[1] *State v. Rodriguez, ante* p. 714, 850 N.W.2d 788 (2014).

STATE OF NEBRASKA, APPELLEE, V. THYLUN M. HILL, APPELLANT.

851 N.W.2d 670

Filed August 8, 2014. No. S-13-698.

1. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
2. ____: ____. Abuse of discretion is the proper standard of review of a district court's evidentiary ruling on the admission of expert testimony under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **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.
5. **Search and Seizure.** Application of the good faith exception to the exclusionary rule is a question of law.
6. **Evidence: Proof: Appeal and Error.** An appellate court's standard of review with respect to a sufficiency of the evidence claim is very narrow, in that the court must find the evidence to be sufficient if there is any evidence, when viewed in a light favorable to the prosecution, upon which a rational finder of fact could conclude that the State has met its burden of proof beyond a reasonable doubt.
7. **Police Officers and Sheriffs: Arrests: Search and Seizure.** When a police officer makes an arrest, in the absence of physical contact, the fact that a reasonable person would have believed he or she was not free to leave is a necessary, but not a sufficient, condition for seizure; the subject must also yield to that show of authority.
8. **Constitutional Law: Search and Seizure: Search Warrants: Probable Cause.** The Fourth Amendment to the U.S. Constitution guarantees the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable 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.
9. **Search Warrants: Affidavits: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause.
10. **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.

11. **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 which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
12. **Search Warrants.** Even when a search warrant is invalid, the exclusionary rule applies only in those cases in which exclusion will further its remedial purposes.
13. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Probable Cause.** The good faith exception to the exclusionary rule provides that in the absence of an allegation that the magistrate issuing a warrant abandoned his or her detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause.
14. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence.** Evidence obtained through the execution of an invalid warrant may appropriately be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit 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.
15. **Search Warrants: Affidavits: Probable Cause: Police Officers and Sheriffs: 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.
16. **Search Warrants: Affidavits: Police Officers and Sheriffs: Appeal and Error.** In assessing the good faith of an officer's conducting a search pursuant to a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information possessed by the officers but not contained within the four corners of the affidavit.
17. **Courts: Expert Witnesses.** Under the *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
18. **Homicide: Intent: Time.** To commit first degree murder, 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.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

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

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

MCCORMACK, J.

I. NATURE OF CASE

Thylun M. Hill appeals from his conviction of first degree murder. Hill argues that evidence found on his person the night of the murder should have been suppressed because he was seized the moment officers encountered Hill in the street, even though he fled. Hill argues that evidence found where he lived should have been suppressed because the affidavit in support of the search warrant was so lacking in indicia of probable cause that it was wholly unreasonable for the executing officer to presume it to be valid. Hill argues that the court should have suppressed expert testimony and exhibits relating to Omaha's "ShotSpotter" system and its detection of the gunshots that killed the victim, because the testing of the accuracy of the system was inadequate. Finally, Hill alleges that the evidence presented at trial was insufficient to support his conviction. We affirm.

II. BACKGROUND

Hill was convicted, among other crimes, of first degree murder in connection with the shooting death of an acquaintance of Hill's on the night of February 18, 2012. Hill made three pretrial motions to suppress evidence, all of which were denied.

1. MOTION TO SUPPRESS RESULTS OF SEARCH OF PERSON

First, Hill moved to suppress all evidence gained as a result of the alleged illegal search of his person on the night of the

shooting. The motion alleged that the officers who apprehended Hill lacked reasonable suspicion sufficient to justify a stop and frisk under *Terry v. Ohio*[1] and that the search was not incident to a lawful arrest.

At the hearing on the motion, Officers Mickey Larson and Jeff Wasmund described the circumstances surrounding their encounter with Hill on the night in question. Larson and Wasmund testified that at approximately 10:41 p.m. on February 18, 2012, they were in their police cruiser and Larson was pulling the cruiser out of the lot of the northeast police station, located between North 30th Street and North 31st Avenue. They were traveling in an all-black gang unit cruiser. The cruiser did not have emergency lights on top, but was marked in large print as Omaha Police on the sides. The officers were wearing tactical vests also marked "POLICE," but otherwise were not wearing uniforms.

Almost immediately, both officers heard what sounded like gunshots. They explained that it was clear to them that the shots had been fired nearby. Wasmund was "very confident" that the gunshots had come from the west; he was less certain that they also came from the south. The officers headed one-half block west to 31st Avenue and then turned south.

The officers radioed the precinct to determine if the ShotSpotter detection system was able to pinpoint a more precise location for gunfire. As will be described in more detail below, the ShotSpotter system uses microphones and a global positioning system (GPS) to pinpoint the time and location of sounds consistent with gunshots in the area covered by the system. The ShotSpotter soon gave the officers an address on North 31st Avenue about 2½ blocks north of the police station. Thus, while the officers had been correct that the gunfire originated west of their original location, the ShotSpotter indicated the shots originated from the northwest, not the southwest. The officers had traveled only about two blocks south on North 31st Avenue when they turned around and headed north.

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

The officers arrived at the address indicated by the ShotSpotter and parked their cruiser in the middle of the street. Only 1 minute had passed since the shots had been heard.

About the same time the officers were stopping in front of the house identified by the ShotSpotter as the source of the gunfire, the officers observed a male rounding the corner at the end of the block and heading down the middle of North 31st Avenue directly toward them. This man was later identified as Hill. The officers noted that Hill was the only civilian the officers had seen in the area since they heard the gunshots. They sought to determine whether Hill was the shooter, a victim, or a witness to the gunshots.

Both officers testified that they stepped out of their vehicle and shined the vehicle spotlight in Hill's direction. They then announced, "'Omaha police.'" During cross-examination, Larson was asked whether they had yelled, "'Omaha police, stop,'" when they exited the vehicle. Larson answered "[u]h-huh," but almost immediately thereafter, when defense counsel asked Larson to clarify whether they had ordered Hill to "stop" during their initial encounter with Hill, Larson indicated that they did not; they "just announced 'Omaha police.'" Later at trial, Larson clarified that he announced only "Omaha police" and that he used a "normal tone of voice."

The officers did not have the emergency lights on. Hill paused. The officers did not observe a weapon on Hill, and they began to walk in Hill's direction. The officers did not have their weapons drawn at that time.

Hill immediately turned around and fled, running northbound. The officers ran in pursuit, drew their weapons, and advised Hill that "we were police officers and you need to stop running."

Hill attempted to hurdle the white picket fence of a nearby house and tripped. Hill broke the top of a few of the pickets and hit the ground. The officers, trailing close behind, observed at that time a black revolver fall out from somewhere on Hill's person. Hill picked up the gun and began running again before the officers could catch up to him. The officers thereafter fired at Hill, and he was apprehended.

Numerous additional officers arrived at the scene almost immediately, and Hill was placed under arrest. Several of these officers also testified at the hearing on Hill's motion to suppress. The officers described that they began searching Hill to determine if he had a weapon and whether he had been shot. The officers conducting the search emptied Hill's pockets. The items in Hill's pockets included paper, a wallet, and some latex gloves. A short while thereafter, officers discovered the discarded firearm in the path of Hill's flight from the police. They also discovered the victim, whose body was located behind the house identified by the ShotSpotter as the source of the gunshots heard by Larson and Wasmund.

The court denied the motion to suppress. The court found that the officers had yelled for Hill to stop only after he began running away. The court reasoned that Hill was not "seized" until he was physically apprehended and subdued by the pursuing officers. Therefore, the court did not analyze whether the officers had reasonable suspicion prior to that time. The court found that by the time Hill was apprehended, which was when he was placed under arrest, the officers knew that Hill was in the area of the shooting at the time of the shooting and also that he had a gun and had fled from police. The court concluded that such information not only provided reasonable suspicion, but also probable cause for Hill's arrest. The court concluded that the search of Hill's person was proper incident to Hill's arrest. Furthermore, the court noted that the firearm had not been seized from Hill, since he had discarded it before any seizure of his person.

2. Motion to Suppress Results of Search of Home

Hill moved to suppress the evidence found in the apartment where he was living at the time of the shooting. In particular, he sought to suppress bullets found in the bedroom where he slept, which a ballistics expert connected at trial to the bullets used in the shooting of the victim. Hill alleged that the affidavit in support of the search warrant, made by Officer Thomas Queen, lacked probable cause.

Queen, of the homicide unit of the Omaha Police Department, completed the affidavit for a warrant to search the apartment where Hill was receiving his Department of Labor benefits. In the affidavit, Queen averred that he had reason to believe ammunition, companion equipment, venue items, and other items of evidentiary value "to the homicide that occurred on the 18th day of February 2012 at 2240 Hours at [the address]" would be found at the apartment. The affidavit then explicitly set forth as grounds for the issuance of the warrant:

> On Saturday, February 18th, 2012 at about 2240 Hours officers of the Omaha Police Department were in the area of 31 Avenue and Meredith Avenue Omaha, Douglas County, Nebraska, when they heard several gunshots close by.
>
> Shortly after the shots Officers observed a party in the same area and attempted to make contact with him. The party ran from officers and dropped a R.G. Industries .38 caliber revolver. The party was apprehended and identified as Thylun M. HILL.
>
> Shot Spotter was checked and it indicated that the shots were fired in the back yard of [address]. Officers went to that location and found a party deceased from apparent gunshot wounds.
>
> A data check showed that Thylun M. HILL was convicted of 1st Degree Manslaughter in Hennipin, Minnesota on April 16th, 1998[.]
>
> A check of Department of Labor records showed that Thylun M. HILL was receiving benefits at [address] and was scheduled to receive those benefits up through October 27th, 2012 at that address.
>
> It is the belief of Officer Thomas QUEEN #1182 of the Omaha Police Department that, should this warrant be issued, the listed items would be recovered from the listed address.

The county court judge signed the warrant, and Queen testified that he executed the warrant in good faith, believing it to be valid. At the apartment, officers seized 37 live rounds

of .38-caliber ammunition inside a knit glove located inside a gray bag in the bedroom where Hill slept.

The trial court denied the motion to suppress. The court agreed with Hill that certain information was missing from the search warrant affidavit. Most notably, the court found that the affidavit did not specify the time of death of the victim or that the death from apparent gunshot wounds was a homicide. The court also found missing from the affidavit the explicit allegations that (1) the officers responded to an area within several houses of where the shots were fired and the victim was located, (2) the officers arrived in the area within a minute of the gunshots, and (3) Hill was the only person in the area. The court said that it could not fill in this necessary factual information with commonsense inferences, and, thus, the affidavit lacked probable cause.

Nevertheless, the court found that the officers acted in good faith when relying on the warrant and that therefore, the motion to suppress should be denied. The court noted, among other things, that Queen had knowledge of all the facts missing from the affidavit that would support probable cause. Because it was objectively reasonable for Queen to rely on the warrant, the court found no basis for suppression of the evidence.

3. *Daubert* Motion in Limine

Finally, Hill filed a pretrial motion in limine under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[2] stating that he questioned whether proposed witness Paul Greene qualified as an expert; "whether the reasoning and methodology used by the State's witness to draw conclusions, inferences, and locations regarding the ability to triangulate noises using a so-called 'shot spotter' is valid"; and whether the proposed testimony was relevant and more probative than prejudicial.

At the hearing on the motion, Greene testified he is an ex-Marine and the lead customer support engineer at SST, Inc. SST sells a product called the ShotSpotter to cities across the country. Greene stated he has experience in hearing and

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[2] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

recognizing gunshot sounds and in the information technology system design and operation of the ShotSpotter. The ShotSpotter is an acoustic gunfire detection and location system of GPS-enabled microphones placed in various locations of a municipal area. SST has been in existence since 1995 and has been selling and maintaining ShotSpotter systems since 1996. In the summer of 2011, SST installed a ShotSpotter system in northeast Omaha.

On February 18, 2012, the ShotSpotter system in Omaha consisted of approximately 80 sensors, spaced roughly 400 to 500 meters apart. Each sensor has four GPS-enabled microphones. The digital signal processors of the sensors measure sound input to determine if the sound meets 28 different audio characteristics of "impulsive audio pulses," or a "bang, boom, or pop," and could thus be categorized as a possible gunshot.

If the sound meets the preprogrammed criteria for a possible gunshot, the system transmits the information to a central location server, which uses triangulation to pinpoint the latitude and longitude of the sound and uses a process called "geolocation" to place that location on a map.

Incident review staff in California then quickly look at the audio waveform and listen to a recording of the event to discern if it is a false positive for a possible gunshot. Once the incident review staff rule out a false positive, they send an alert to the police dispatchers.

Greene testified that the incident review staff are specially trained in recognizing the audio waveform characteristics of gunfire and in recognizing the sound of gunfire. SST requires the staff to be able to correctly identify 80 percent of 500 audioclips during performance testing.

Greene explained that the science behind the ShotSpotter system has been recognized for decades:

> The principles — the mathematical principles used for the triangulation, the location of the event or object we would call trying to locate an unknown point using two or more known points, the mathematics behind that are actually very old. The practical application of it, you know, in the use of technology is a little more recent,

> but still fairly old. Came about with the advent of World War I and sonar. Since then, seismologists use the same mathematics, the same techniques to determine the epicenter of earthquakes. It's still used by the Navy in sonar applications. It's used in space as well.

Greene described that the ShotSpotter system has "multiple redundancy" of the sensors, such that losing power on an individual basis does not detract from the accuracy of the array. Greene testified that in order to triangulate a gunshot, only three sensors are required to actually hear and participate in the incident. A fourth sensor is used for confirmation information in the event of a single gunshot. When there are multiple shots, the repetition of the pulse data serves as its own confirmation. The GPS satellites are synchronized down to a thousandth of a second from the atomic clock at the National Institute of Standards and Technology in Boulder, Colorado.

Greene testified that the official margin of error for the location of detected gunfire is a 150-foot radius, but that they regularly achieve accuracy of a radius of 10 or 20 feet or better. The ShotSpotter guarantees that it will give a correct location, within this margin of error, for 80 percent of detectible outdoor gunfire in the system area. Gunfire that is silenced or masked by other sounds is not considered detectible.

When the system was installed in 2011, SST performed a live fire test that verified the accuracy of the system. Greene stated that an SST project manager was present during this testing. SST has not performed such a test since that time. Greene explained, however, that SST "monitor[s] for sensor health constantly." The sensors self-calibrate every 48 hours, and if a sensor does not self-calibrate, SST is automatically notified. In addition, each sensor sends a "heartbeat pulse" once every 30 seconds. In fact, each GPS sensor, as well as each of the four microphones attached to it, independently communicates with the ShotSpotter server about its health.

When enough sensors lose network communication with the system, SST dispatches a technician to replace all of the inactive sensors. At the hearing on the motion in limine, Greene testified that SST generally dispatches a technician when the active sensor count is 90 percent or less. At trial, Greene

elaborated that SST's written policy guarantees that SST will dispatch technicians to replace sensors when SST detects that the system reaches a "20 percent or better" reduction in sensor capacity. Greene testified that the system is designed so that it can lose up to 20 percent of its capacity and still make accurate detections.

Greene created a "ShotSpotter Detailed Forensic Report" for the shooting on February 18, 2012. He testified that in his experience, he believed to a reasonable degree of certainty that the sounds detected by the ShotSpotter were consistent with gunfire. The report reflects that the alert containing the precise location of the shots detected on February 18 was given to Omaha police dispatch 48 seconds after the time the sound was detected by the ShotSpotter sensors.

Three of the shots were detected by 11 sensors. The last shot was detected by four sensors. Greene explained that while there are a multitude of environmental reasons why the number of sensors detecting an incident might be higher or lower, changing the direction of fire can have a significant impact on the number of detecting sensors. At trial, Greene further explained that if a shot were fired at the ground, fewer sensors would detect it, because the ground tends to absorb some of the acoustic energy.

Greene testified that he did not specifically note the number of sensors in Omaha that were not working at the time of the incident, because the data in the report was based on the sensors' actually detecting the gunshots; a compromised sensor would not produce location detection data. Greene explained further at trial that even if there had been sensors in the area not working, that fact would not affect the conclusions drawn in the ShotSpotter report.

Based on the testimony at the hearing and the arguments made by counsel, the court characterized the *Daubert* analysis in terms of two basic questions: (1) the detection and location of sound and (2) the classification of that sound as a gunshot. The court noted that Hill did not challenge the underlying mathematical and physics principles of triangulation utilized by the ShotSpotter, but instead challenged the "ShotSpotter's testing, positioning, and maintenance of the sensors and the

process of classification of an individual impulsive sound as a gunshot."

In a 15-page order denying the motion in limine, the court found that Greene was qualified as an expert in the design, installation, and function of the ShotSpotter system and in gunshot sound recognition. The court also found that the ShotSpotter system was sufficiently reliable. The court noted Hill's argument that because an SST project manager was present during the original testing of the system, there was no "blind" testing conducted. But the court reasoned that blind studies are not necessary when determining if electronic equipment operates properly and that there was no evidence that the SST project manager somehow influenced the testing results. The court also found that despite the lack of regularly scheduled maintenance, there were sufficient safeguards in the protocol, which provided for constant monitoring and maintenance when necessary, to support the reliability of the technology. Finally, the court found that there was a sufficient factual basis to support the classification of the sounds as being consistent with gunfire.

At trial, Hill renewed his objection under *Daubert* to Greene's testimony and to various exhibits concerning the ShotSpotter detection of the shots fired on February 18, 2012. Hill did not object, however, to the testimony of Larson, Wasmund, and other officers concerning their understanding of the ShotSpotter technology and their responses to the ShotSpotter alerts on February 18.

4. Evidence at Trial

(a) Chase

During the trial, Larson and Wasmund reiterated their testimony from the suppression hearing. They testified that at the time of the incident, they were assigned to the north gang suppression unit. They primarily worked in the area of the northeast precinct, which was characterized as a "high crime area."

Larson and Wasmund testified that as they were leaving the precinct parking lot, with the vehicle windows rolled partway

down, they heard "loud" and "distinct" multiple gunshots nearby. They headed in the direction they thought the shots came from. They corrected their course about 30 to 40 seconds later when the ShotSpotter gave them an address.

As they approached the residential address given by the ShotSpotter, approximately in the middle of the block, Larson and Wasmund observed Hill as the only civilian in the area. Hill was rounding the far corner from where the alley ran behind the residence specified by the ShotSpotter. Hill was heading in their direction.

The officers parked their vehicle in front of the house. The officers then shone a spotlight toward Hill, exited their vehicle, and identified themselves in a normal tone of voice as Omaha police. The officers did not yet know a homicide had been committed, and they did not see a gun on Hill. They sought only to inquire whether Hill was a witness, victim, or the perpetrator of the shots they heard and which were identified by the ShotSpotter. Hill paused for a moment, turned, and fled.

The officers ran after Hill, yelling "Omaha police." In his flight, Hill tripped over a picket fence and a gun fell from his person. At that moment, Wasmund was about 8 feet from Hill, and Larson was about 5 feet away, and both clearly saw the weapon.

Hill picked up the gun and resumed his flight. The officers split up to try to catch him. Wasmund fired a shot at Hill when he saw Hill change direction and appear to have an open line of fire at both Larson and Wasmund. Larson heard two shots and, not knowing if Hill had fired at Wasmund or the other way around, fired one shot at Hill. Shortly thereafter, Hill was apprehended.

At least seven other officers arrived almost immediately on the scene. It was revealed during the defense that one of those officers was a sergeant who was later under investigation by the Douglas County Attorney's office for an unrelated incident of an indefinite nature and which incident resulted in a recommendation that the sergeant be terminated from the Omaha Police Department. However, no officers reported observing

the sergeant doing anything out of keeping with standard Omaha Police Department protocols on the night of February 18, 2012.

Officers who arrived at the scene shortly after Hill was apprehended emptied Hill's pockets. The officers discovered a pair of latex gloves and a camouflage ski mask, as well as other miscellaneous personal items.

When it was discovered from the search of his person that Hill no longer carried the gun he had previously dropped and picked up, the officers searched the area. They found a revolver lying on the ground in the path of Hill's previous flight. Both Larson and Wasmund identified that revolver as the same one they saw fall from Hill's person during his flight.

The officers also went to the backyard of the address identified by the ShotSpotter. There they found the body of the victim, lying face down in the backyard. The victim's pants were pulled down to his thighs. Near the scene, officers found a pack of cigarettes, a lighter, two cell phones, a beer can, and other miscellaneous items eventually identified by nonforensic means as likely belonging to the victim.

(b) Victim's Cell Phones

The cell phones, in particular, were identified as belonging to either the victim or the victim's mother. The victim's mother testified that because the victim's cell phone did not make telephone calls, the victim often borrowed her cell phone.

Over 6 months had passed before the police were asked by the Douglas County Attorney's office to attempt to discover the telephone records for those cell phones.

By the time the police investigated the telephone logs for the cell phones carried by the victim, the telephone company connected with the victim's mother's cell phone no longer maintained the call records for the time of the shooting.

What the mother had identified as the victim's cell phone was actually registered to an unrelated party who did not know the victim. Call records for that cell phone were able to be obtained. The records showed several calls and text messages

to the victim on the day of the shooting from a prepaid cell phone registered to "John Doe" with the address of a U.S. Cellular store, as well as several telephone calls from the victim to "John Doe."

The records obtained closest to the time of the shooting reflected that at 8:50 p.m. the night of February 18, 2012, the victim and "John Doe" had a 64-second telephone conversation. At 10:19 p.m., the victim sent a text to "John Doe." At 10:26 p.m., the victim called "John Doe" and reached his voice mail. At 10:27 p.m., the victim again called "John Doe" and reached his voice mail. "John Doe" thereafter attempted to call the victim three times in an 11-minute period shortly after midnight and subsequent to the shooting. There were no attempted telephone calls from "John Doe" to the victim after the victim's death was announced the following day on the news.

(c) Cause of Death

A pathologist determined that the victim had suffered three gunshot wounds. One wound entered the right cheek and exited the left cheek at a straight angle through the sinuses, causing little damage. The other two shots had entered the victim's back and lodged in his body. One entrance wound was located in the left lateral chest. The bullet had entered at an upward angle and had punctured the victim's diaphragm and stomach. The other entrance wound was located in the middle of the victim's lower back. That bullet had also entered at an upward angle and it punctured the victim's heart.

The wounds in the victim's face and chest would not have been fatal unless left unattended. But the wound to his lower back rendered the heart nonfunctional as soon as it was hit, leaving the victim only about 15 to 20 seconds of consciousness thereafter.

The pathologist did not observe any lacerations or trauma, other than the bullet wounds, to the victim's body. The bullet wounds, because there was no evidence of soot or stippling, were made by a firearm held at a distance at least 12 inches away.

(d) ShotSpotter Report

At trial, Greene reiterated his testimony from the hearing on the motion in limine. In addition, the detailed forensic report prepared by Greene to document the incident was entered into evidence. The report indicated that beginning at approximately 10:40 p.m. on February 18, 2012, four shots were fired in fairly rapid succession. The shots began either in the alley or on the side of the alley opposite where the victim's body was found. The last shot was located approximately where the body was found. That last shot occurred after a slightly longer pause of 3.8 seconds from the preceding shot. From the first shot to the last, a total of 6½ seconds passed. The last shot occurred approximately 10 feet from the first three. The report also identified the correct location of the officers' shots in pursuit of Hill, which were time stamped as occurring at 10:43 p.m.

(e) Ballistics Evidence From Gun

The gun that Larson and Wasmund identified as being carried by Hill and discarded during his flight had four spent casings inside the cylinder. The gun was discovered to have been registered in 1982 to a woman unrelated to Hill and who had been deceased since 2000. An expert working in the area of firearm and toolmark examination for the Omaha Police Department testified that the bullets found in the victim's body were fired from the weapon found in the path of Hill's flight and identified by Larson and Wasmund as the gun that Hill had dropped during that flight. The expert testified that test-fired bullets from the gun were consistent with the bullets found in the victim's body, in both general and class characteristics and individual and specific characteristics.

(f) Relationship Between Hill and Victim and Events on Night of Shooting

Testimony at trial established that Hill lived in the same apartment building as the victim. Hill lived with his girlfriend, her infant child, and his girlfriend's brother. According to the brother, Hill and the victim knew each other. They "hung out sometimes, drank together, you know, normal neighbor stuff." He often heard Hill and the victim in the hallway engaging in

"casual daily arguments." The brother described such arguments as common amongst most of the people in the building and "[n]othing out of the ordinary."

About 6 weeks before the shooting, the brother had told Hill he thought the victim was an informant for the Omaha Police Department. The brother had come to this conclusion because often he saw the victim with brand-new $100 bills and the victim acted like he was a "big deal."

On the day of the shooting, the brother and Hill had been drinking continuously since the early hours of the morning. Sometime in the evening, Hill and the brother ran into the victim in the hall of the apartment building. The brother testified that Hill and the victim began "[d]runk shit talking." The brother did not know what Hill and the victim were arguing about, but they were yelling at each other.

The brother went back into the apartment. But he continued to hear loud talking in the hallway. The next thing the brother remembered, Hill was in the apartment, seemingly upset. Hill was in the bathroom with the light off either whispering to himself or breathing heavily. The brother then passed out and did not wake up until the following morning.

The victim's mother recalled that at some point in the evening, there had been a knock on their apartment door and the victim left. She did not see or hear from the victim after that.

(g) Bullets Found Where Hill Lived

Officers testified that the day after the shooting, they conducted a search of the apartment where Hill lived. In the bedroom where Hill slept with his girlfriend and the infant, they found a gray bag. Inside the bag were latex gloves and also a knit glove with 37 live rounds of ammunition inside it. The ammunition was head stamped "R-P 38 SPL." It was the same as the ammunition used in the shooting.

(h) Telephone Call Made by Hill in Jail

The State presented evidence that while Hill was incarcerated awaiting charges against him, he made a telephone call in which he told an unidentified person to have his girlfriend "'get rid of that bag, that gray bag.'"

(i) No DNA Evidence

There was no DNA or fingerprint evidence found either connecting Hill to the shooting or excluding him.

III. ASSIGNMENTS OF ERROR

Hill assigns that the trial court erred when (1) it overruled his motion to suppress and exclude from use against him at trial any statements he made and any evidence obtained by Omaha police officers as a result of the illegal search and seizure of his person conducted by Omaha police officers on February 18, 2012; (2) it overruled Hill's motion to suppress evidence obtained from the search of the residence where he lived, because it erroneously concluded that the search was conducted pursuant to the good faith exception to the warrant requirement; (3) it overruled Hill's motion in limine challenging the admissibility of the State's expert testimony regarding the ShotSpotter technology; and (4) it found the evidence sufficient to support the guilty verdict for first degree murder.

IV. STANDARD OF REVIEW

[1] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[3]

[2] Abuse of discretion is the proper standard of review of a district court's evidentiary ruling on the admission of expert testimony under *Daubert*.[4]

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from acting, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.[5]

[4] 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

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[3] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

[4] See *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003).

[5] *Id.*

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.[6]

[5] Application of the good faith exception to the exclusionary rule is a question of law.[7]

[6] Our standard of review with respect to a sufficiency of the evidence claim is very narrow, in that we must find the evidence to be sufficient if there is any evidence, when viewed in a light favorable to the prosecution, upon which a rational finder of fact could conclude that the State has met its burden of proof beyond a reasonable doubt.[8]

V. ANALYSIS

Hill challenges four rulings of the trial court. First, Hill argues that the court should have suppressed the evidence of the gloves and mask found on his person, because he had allegedly been stopped without probable cause. Second, Hill argues that there was no good faith exception to the lack of probable cause in the affidavit supporting the search warrant of the apartment where he lived and that the court should have suppressed the ammunition found there pursuant to the search warrant. Third, Hill argues that expert testimony and exhibits concerning the ShotSpotter system, which detected the location of the shots fired the night of the murder, should have been excluded under *Daubert*.[9] Finally, Hill argues that the evidence at trial was insufficient to support his conviction of first degree murder.

1. Motion to Suppress Results of Search of Person

We first address Hill's motion to suppress the search of his person. According to Hill, he was subjected to a *Terry* stop

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[6] *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

[7] *Id.*

[8] See *State v. Matit*, *ante* p. 163, 846 N.W.2d 232 (2014).

[9] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra* note 2.

"the very moment [the] encounter between [Hill] and the officers was initiated."[10] Hill describes that he was walking down the sidewalk when the officers commanded him to stop. Hill argues that merely walking down the sidewalk in an area where sounds consistent with gunfire were detected is insufficient to support reasonable suspicion of criminal activity. Therefore, all evidence later seized on Hill's person and statements made by Hill should have been suppressed.

Hill's descriptions of the relevant events are not entirely consistent with the testimony presented at the suppression hearing, nor with the trial court's findings in its order denying the motion to suppress. In any event, we agree with the trial court that Hill was not seized until he was subdued by police subsequent to his flight. By that time, there was probable cause for his arrest.

[7] In *California v. Hodari D.*,[11] the U.S. Supreme Court held that the defendant who fled from police was not seized by the officers' show of authority until he was tackled subsequent to his flight. The Court said that in the absence of physical contact, the fact that a reasonable person would have believed he or she was not free to leave is a "*necessary*, but not a *sufficient*, condition for seizure."[12] The subject must also yield to that show of authority. Thus, the Court held in *Hodari D.* that the cocaine the defendant abandoned while he was running from the police, who were at that time pursuing him and ordering him to stop, was not the fruit of a seizure. The defendant's motion to exclude that evidence was accordingly properly denied. The Court further explained that if the officers saw the defendant discard the cocaine and recognized it as such, the cocaine would provide reasonable suspicion for

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[10] Brief for appellant at 19.

[11] *California v. Hodari D.*, 499 U.S. 621, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991). See, also, e.g., *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993); *State v. Cronin*, 2 Neb. App. 368, 509 N.W.2d 673 (1993).

[12] *California v. Hodari D., supra* note 11, 499 U.S. at 628 (emphasis in original).

the unquestioned seizure that occurred when the defendant was eventually tackled.[13]

We reject Hill's argument that he was seized before his flight. Hill did not yield to Larson and Wasmund until after his flight and the officers discovered Hill was carrying a gun.

Hill does not appear to argue that there was insufficient cause to seize him after his flight. In any event, we affirm the trial court's conclusion that the officers had probable cause to arrest Hill by the time he was seized. The U.S. Supreme Court, in *Illinois v. Wardlow*,[14] said: "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." Headlong flight while carrying a gun in a high-crime area where shots were heard within the last 3 minutes is sufficiently suggestive of wrongdoing to support probable cause. We affirm the judgment of the trial court denying Hill's motion to suppress the evidence found on Hill's person.

2. Motion to Suppress Results of Search of Home

We next address Hill's argument that the trial court erred in failing to suppress evidence found at his residence pursuant to the search warrant. Hill agrees with the trial court's assessment of the affidavit in support of the search warrant as lacking in probable cause. But Hill disagrees with the trial court's determination that the officers carrying out the warrant acted in good faith, such that the evidence found during the search was admissible. The State argues the trial court was incorrect in finding that no probable cause was stated in the affidavit but that, in any case, the trial court was correct in finding applicable the good faith exception to the exclusionary rule.

[8] The Fourth Amendment to the U.S. Constitution guarantees "[t]he right of the people to be secure in their persons,

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[13] *California v. Hodari D., supra* note 11.

[14] *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

houses, papers, and effects, against unreasonable 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 Nebraska Constitution provides similar protection.[15]

[9,10] The execution of a search warrant without probable cause is unreasonable and violates these constitutional guarantees.[16] Accordingly, a search warrant, to be valid, must be supported by an affidavit which establishes probable cause.[17] Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.[18]

[11] 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.[19] 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. 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 which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.[20]

[12] But even when a search warrant is invalid under this test, the exclusionary rule applies only in those cases in which exclusion will further its remedial purposes.[21] The exclusionary rule is a judicially created remedy designed to

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[15] See Neb. Const. art. I, § 7.

[16] *State v. Nuss*, 279 Neb. 648, 781 N.W.2d 60 (2010).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] See, e.g., *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984); *State v. Davidson*, 260 Neb. 417, 618 N.W.2d 418 (2000).

deter police misconduct.[22] It is an "extreme sanction"[23] of "'last resort.'"[24]

In *Herring v. United States*,[25] the Court said, "[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Otherwise, application of the exclusionary rule, as the Court explained in *United States v. Leon*,[26] would offend "basic concepts of the criminal justice system" and "'generat[e] disrespect for the law and administration of justice.'"

[13] The good faith exception to the exclusionary rule accordingly provides that "[i]n the absence of an allegation that the magistrate abandoned his detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[27] It is, after all, "the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment."[28] And, ordinarily, "an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient."[29] Penalizing the officer for the magistrate's error does not "logically contribute to the deterrence of Fourth Amendment violations."[30]

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[22] *Id.*

[23] *United States v. Leon, supra* note 21, 468 U.S. at 926.

[24] *Herring v. United States*, 555 U.S. 135, 140, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009).

[25] *Id.*, 555 U.S. at 144.

[26] *United States v. Leon, supra* note 21, 468 U.S. at 908.

[27] *Id.*, 468 U.S. at 926.

[28] *Id.*, 468 U.S. at 921.

[29] *Id.*

[30] *Id.*

[14] In sum, evidence obtained through the execution of an invalid warrant may appropriately be suppressed only if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth, (2) the issuing magistrate wholly abandoned his or her judicial role, (3) the warrant is based on an affidavit 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.[31]

[15,16] Hill asserts that the search warrant affidavit was so lacking in indicia of probable cause that it was entirely unreasonable for Queen to have relied upon it. 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, 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.[32] In assessing the good faith of an officer's conducting a search pursuant to a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information possessed by the officers but not contained within the four corners of the affidavit.[33]

Hill asserts that "Officer Queen's omission from the affidavit that [the victim's] death was an apparent homicide and that the police assumed [Hill] was involved because he was in the same area shortly after the apparent homicide was a glaring mistake."[34] Our review of the affidavit reveals that, in fact, contrary to Hill's assertion and some of the trial court's

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[31] See *State v. Nuss, supra* note 16.

[32] *State v. Davidson, supra* note 21.

[33] See, *United States v. Leon, supra* note 21; *State v. Davidson, supra* note 21; *State v. Holguin*, 14 Neb. App. 417, 708 N.W.2d 295 (2006).

[34] Brief for appellant at 22.

findings, the affidavit referred in its introductory statements to a "homicide" at approximately 10:40 p.m. on February 18, 2012, at a stated address. The affidavit further referred to the fact that Hill was found in that area near the time of the homicide.

Considering those allegations, as well as the other allegation in the affidavit, we are certainly not presented here with a case of a "bare bones" affidavit—one which relies only on uncorroborated tips or mere suspicion.[35] The affidavit described how the officers had heard gunshots near their location at approximately 10:40 p.m. and how they arrived shortly thereafter at the address identified by the ShotSpotter as the location of the gunshots. The affidavit described Hill's flight from the officers and the fact that he was carrying a gun. Finally, the affidavit described that the victim had died from apparent gunshot wounds and was found at the address identified by the ShotSpotter and near where Hill was seen when officers arrived.

Courts are free to reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers' good faith.[36] We affirm the trial court's decision that the evidence obtained during the search of Hill's residence should not have been suppressed, because the good faith exception applied. Like the affidavit presented in *Leon*, Queen's affidavit certainly provided at least "evidence sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause."[37] Thus, as in *Leon*, the officers' reliance on the magistrate's determination of probable cause was, by definition, objectively reasonable.[38] Therefore, the district court was correct that application of the extreme sanction of exclusion was inappropriate.

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[35] See, *State v. Sprunger, supra* note 6; *State v. Holguin, supra* note 33.

[36] See *United States v. Leon, supra* note 21.

[37] *Id.*, 468 U.S. at 926.

[38] See *id.*

3. Motion in Limine Challenging ShotSpotter Technology

[17] We turn now to Hill's argument that the trial court should have excluded Greene's testimony that the ShotSpotter detected gunshots at the specified address near North 31st Avenue on February 18, 2012. Under our *Daubert*[39]/*Schafersman*[40] jurisprudence, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[41] The purpose of the gatekeeping function is to ensure that the courtroom door remains closed to "'junk science'" that might unduly influence the jury, while admitting reliable expert testimony that will assist the trier of fact.[42] This gatekeeping function entails a preliminary assessment whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue.[43]

In determining the admissibility of an expert's testimony, a trial judge may consider several more specific factors that might bear on a judge's gatekeeping determination.[44] These factors include whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; whether, in respect to a particular technique, there is a high known or potential rate of error; whether there are standards controlling the technique's operation; and whether the theory or technique enjoys general acceptance within a relevant scientific community.[45] 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.[46]

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[39] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *supra* note 2.

[40] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

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

[42] *State v. Casillas*, 279 Neb. 820, 834, 782 N.W.2d 882, 896 (2010).

[43] *State v. Daly*, *supra* note 41.

[44] *Id.*

[45] *Id.*

[46] *Id.*

In support of his assertion that the ShotSpotter technology was not established as reliable under our *Daubert*/*Schafersman* jurisprudence, Hill makes only three arguments: (1) that "blind" tests of the system have never been performed; (2) that Greene did not know what percent capacity the Omaha ShotSpotter system was operating at on February 18, 2012; and (3) that the SST employees at the incident review center "are ultimately just people using their own subjective opinions about whether particular sound files are consistent with gunfire."[47]

Hill does not challenge the underlying GPS triangulation methodology upon which the ShotSpotter location is based. Thus, insofar as these challenges present *Daubert*/*Schafersman* issues at all, they focus on whether that methodology properly can be applied to the facts in issue in this case.

We first observe that Hill's arguments challenging the ShotSpotter detection in this case are somewhat dubious given that the sounds of gunshots in the general area identified by ShotSpotter were simultaneously heard by Larson and Wasmund, and given that the victim was confirmed shot in almost the exact location identified by the ShotSpotter as the source of the shots Larson and Wasmund heard. Indeed, the principal import of the ShotSpotter evidence in this case apparently was the precise measurement of the timing between the four shots fired at the victim, and Hill does not challenge the ShotSpotter's time stamps.

In any event, we find no merit to Hill's arguments that the trial court abused its discretion in denying his motion in limine. A court performing a *Daubert*/*Schafersman* inquiry should not require absolute certainty.[48] Instead, a trial court should admit expert testimony if there are good grounds for the expert's conclusion, even if there could possibly be better grounds for some alternative conclusion.[49] An abuse of discretion in the trial court's *Daubert*/*Schafersman* determination occurs when a trial court's decision is based upon reasons that are untenable

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[47] Brief for appellant at 25.

[48] *State v. Daly, supra* note 41.

[49] *Id.*

or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[50]

It was neither untenable nor unreasonable for the trial court to conclude that the absence of blind testing did not seriously undermine the reliability of the ShotSpotter system in northeast Omaha. The court noted that there was no evidence that the presence of the SST project manager influenced the results of the electronic equipment, which accurately located the source of the test gunshots fired by police officers in the project manager's presence.

Likewise, the reliability of the ShotSpotter technology was not seriously undermined by Greene's failure to identify the percent capacity of the Omaha ShotSpotter system at the time of the shooting. Greene's testimony indicated that the system would have been running at least at an 80-percent capacity, according to their maintenance protocols. Furthermore, Greene testified that incapacitated sensors would not report data for the triangulation of the gunshots and that there were sufficient sensors reporting data for the shots in question to accurately triangulate their location.

Finally, the court did not err in admitting the ShotSpotter evidence over Hill's objection that SST employees were unqualified to characterize sounds as being consistent with gunshots. Greene testified that SST employees were extensively trained in the recognition of sounds consistent with gunshots. Greene testified as to his experience in identifying sounds consistent with gunshots, as well as the visual wavelength consistent with gunshots, and he testified to a reasonable degree of certainty that the sounds detected by the ShotSpotter at approximately 10:40 p.m. on February 18, 2012, were consistent with gunshots. We also note that the system itself first identifies the wavelength of the sound as consistent with gunshots before sending data to the incident review staff.

None of Hill's arguments regarding the ShotSpotter system demonstrate that the trial court abused its discretion in admitting Greene's testimony or the ShotSpotter report.

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[50] *Id.*

4. Sufficiency of Evidence

Lastly, we address Hill's argument that the evidence was insufficient to support the verdict of first degree murder. Hill argues that the evidence supports, at most, second degree murder upon a sudden quarrel.

Hill points out that there were no witnesses to the shooting; that there was no blood, mudstains, or gunshot residue on Hill; and that the angle of the gunshot to the victim's cheek indicates a taller shooter than Hill. He also argues that the State failed to establish any motive for the crime. He generally asserts the police conducted a deficient investigation, pointing out that one involved officer was under investigation and that the State failed to pursue DNA testing on certain items or to timely pursue telephone records of the cell phones found on the victim. Thus, Hill argues that the State failed to discover other possible suspects. He asserts that the "John Doe" who was calling the victim the night of the murder may have been the real killer. Finally, Hill alleges there was evidence of a physical altercation precluding premeditation: the victim's pants were pulled down and he had scrape marks on his body.

All these arguments were made to and rejected by the jury, which was given a step instruction on second degree murder. These arguments do not demonstrate that the evidence was insufficient to support the jury's verdict. Our standard of review with respect to a sufficiency of the evidence claim is very narrow, in that we must find the evidence to be sufficient if there is any evidence, when viewed in a light favorable to the prosecution, upon which a rational finder of fact could conclude that the State had met its burden of proof beyond a reasonable doubt.[51]

[18] Hill concedes the evidence at trial established that Hill was near the crime scene shortly after the officers heard gunshots and that Hill carried the gun that was used to shoot the victim. He further concedes that officers subsequently found ammunition for that weapon in Hill's residence. The evidence at trial also demonstrated that several shots were fired at the victim and that at least two shots were fired at the

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[51] See *State v. Matit*, *supra* note 8.

victim's back. And, as demonstrated by the ShotSpotter time stamps, there was more than sufficient time between shots for Hill to form premeditation. To commit first degree murder, 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.[52]

Further, viewing the evidence in a light most favorable to the prosecution, we find there are explanations consistent with a finding of first degree murder for the physical state of the victim and his clothing, the cell phone conversations, and the angles of the shots. The condition of the victim could have been the result of running or falling. It is mere speculation that the unknown "John Doe" was the killer, and any inadequacies in the investigation of another possible killer were a matter for the jury to consider. The angle of the shots, as the State argued at trial, could have been the result of the victim's either being hunched over or on the ground when the shots were fired. In fact, Greene explained at trial without objection that the later shots were detected by fewer ShotSpotter sensors, which was consistent with the shots being fired toward the ground.

Hill assigns that the trial court erred when it found the evidence was sufficient to support the guilty verdict for first degree murder. It was conceded at oral argument that the gun in Hill's possession was the weapon that killed the victim. The victim was shot three times, twice in the back and once in the face. The victim was killed in a dark, secluded alley. The brother of Hill's girlfriend testified that earlier in the evening of the shooting, Hill and the victim engaged in an argument and were yelling at each other, and that afterward, he remembered Hill was in the apartment seemingly upset. The brother testified that he had told Hill he thought the victim was an informant for the Omaha Police Department. If the trier of fact believed this evidence, these facts would be sufficient for a conviction of premeditated first degree murder.

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[52] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

VI. CONCLUSION

We hold that the trial court properly denied Hill's motions to suppress and motion in limine, and we find the evidence sufficient to support the jury's verdict of first degree murder. We affirm the judgment below.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
BRIAN D. SMITH, APPELLANT.
851 N.W.2d 665

Filed August 8, 2014. No. S-13-891.

1. **Jurisdiction: Appeal and Error.** An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.
2. **Judgments: Appeal and Error.** When issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
3. **Constitutional Law: Postconviction: Collateral Attack: Final Orders.** The Nebraska Postconviction Act is the primary procedure for bringing collateral attacks on final judgments in criminal cases based upon constitutional principles.
4. **Postconviction: Collateral Attack.** If a defendant has a collateral attack that could be asserted under the Nebraska Postconviction Act, that act is his or her sole remedy.

Appeal from the District Court for Washington County: JOHN E. SAMSON, Judge. Appeal dismissed.

Jeffery A. Pickens, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and James D. Smith and appellee.

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

STEPHAN, J.

In 1983, when he was 16 years old, Brian D. Smith was convicted of burglary and kidnapping. He was sentenced to

life in prison for the kidnapping and to a term of 5 to 20 years' imprisonment for the burglary. In 2013, Smith filed a motion seeking to have his life sentence declared void and set aside pursuant to the decision of the U.S. Supreme Court in *Graham v. Florida*.[1] The district court for Washington County dismissed the motion after concluding it lacked jurisdiction to consider it. Smith appeals from that dismissal.

BACKGROUND

In February 1983, Smith was charged in Washington County with burglary, robbery, kidnapping, and first degree sexual assault. Each offense was allegedly committed on or about January 11. Following plea negotiations, Smith pled guilty to burglary and kidnapping, and the remaining charges and a felony murder charge pending in a separate proceeding were dismissed. The factual basis of the charges was that Smith broke into a doughnut shop and abducted an employee of the shop. At the time of the plea hearing on March 21, the victim had not been found. But both the prosecutor and Smith acknowledged that there was no reasonable probability that she was still alive.

At the sentencing hearing on May 2, 1983, the prosecutor advised the court that the victim's body had been recovered. Because then, as now, kidnapping was a Class IA felony in the absence of statutory mitigating factors not present in this case, the court imposed the mandatory sentence of life imprisonment.[2] The court also imposed a concurrent sentence of 5 to 20 years' imprisonment on the burglary conviction. Smith was 16 years old when he committed his crimes and 17 years old at the time of his sentencing.

Although Smith remains in the custody of the Nebraska Department of Correctional Services, he is incarcerated in Missouri pursuant to an inmate transfer. On January 3, 2013, he filed a pro se "Motion to Correct Illegal, Unconstitutional

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[1] *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010).

[2] See Neb. Rev. Stat. §§ 28-105 and 28-313 (Reissue 1979 & Cum. Supp. 2012).

and Void Sentence" in the district court for Washington County. In that motion, he alleged that his life sentence was "illegal, unconstitutional, and void" under the decision of the U.S. Supreme Court in *Graham v. Florida*.[3] In that case, decided in 2010, the Court held that "the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."[4]

After conducting an evidentiary hearing at which Smith was represented by counsel, the district court concluded that it lacked jurisdiction over Smith's motion because "(1) it has not been brought under a recognized procedure under Nebraska law; and, (2) the sentence is currently valid and cannot be modified, amended, or revised in any way." Smith perfected this timely appeal.

ASSIGNMENTS OF ERROR

Smith assigns, restated, that the district court erred in (1) failing to find that the decision in *Graham v. Florida* applies retroactively to invalidate his life sentence and (2) dismissing his motion seeking to correct his sentence.

STANDARD OF REVIEW

[1,2] An appellate court determines a jurisdictional question that does not involve a factual dispute as a matter of law.[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.[6]

ANALYSIS

Before it could pass on the substantive legal issue of whether the holding in *Graham v. Florida* is retroactive and therefore applicable to Smith, the district court was required to determine whether it had jurisdiction to do so. We therefore

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[3] *Graham v. Florida, supra* note 1.

[4] *Id.*, 560 U.S. at 82.

[5] *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014); *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[6] *State v. Landera*, 285 Neb. 243, 826 N.W.2d 570 (2013).

focus on that issue, which is embodied in Smith's second assignment of error.

[3,4] Smith's convictions and sentences have been final for more than 30 years. He now seeks to collaterally attack the final judgment on the ground that his life sentence is unconstitutional and therefore void under *Graham v. Florida* because of his age at the time of the kidnapping. As we have recently noted, the Nebraska Postconviction Act[7] is the primary procedure for bringing collateral attacks on final judgments in criminal cases based upon constitutional principles.[8] If a defendant has a collateral attack that could be asserted under the act, that act is his or her sole remedy.[9]

Smith has not brought this action under the Nebraska Postconviction Act. He acknowledges that such a claim would be time barred under § 29-3001(4). It is precisely because of this fact that he seeks relief under a purported common-law remedy. He relies upon our statement in *State v. Ryan*[10] that "a void judgment may be attacked at any time in any proceeding."

But that reliance is misplaced. We addressed and rejected a similar argument in *State v. Dunster*.[11] There, the defendant moved to vacate his death sentence as void based upon changes in Nebraska's capital sentencing statutes enacted after his conviction and sentence became final. The defendant acknowledged that he did not bring the action under the Nebraska Postconviction Act and argued that this court should recognize a new procedure for the challenge of a purportedly void sentence. Like Smith, he relied on the language in *Ryan* stating that a void judgment may be attacked at any time in any proceeding. We rejected this argument and declined to recognize a new common-law procedure, explaining that

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[7] Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Reissue 2008 & Cum. Supp. 2012).

[8] *State v. Gonzalez*, 285 Neb. 940, 830 N.W.2d 504 (2013).

[9] *Id.*

[10] *State v. Ryan*, 249 Neb. 218, 230, 543 N.W.2d 128, 138 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[11] *State v. Dunster*, 270 Neb. 773, 707 N.W.2d 412 (2005).

Ryan and other cases stating the proposition on which he relied were distinguishable because they "involved the use of a legislatively authorized procedure such as a postconviction action and did not seek the recognition of a new special proceeding."[12] We specifically declined "to extend [the language used in *Ryan*] to allow the creation of new procedures, especially when at least one existing procedure is available in which to raise the issue."[13]

Smith argues that *Dunster* is not controlling because at the time it was decided, the Nebraska Postconviction Act did not include a statute of limitations. That is factually correct; the 1-year statute of limitations codified at § 29-3001(4) was enacted in 2011.[14] But § 29-3001(4) became effective more than a year after the decision in *Graham v. Florida*, upon which Smith bases his claim that his sentence is void. Thus, when the basis for Smith's current claim arose, there was no statute of limitations for postconviction motions, as was the case in *Dunster*. And in any event, Smith had considerable time to file a postconviction motion after the enactment of the limitation provision. Section 29-3001 provides:

> (4) A one-year period of limitation shall apply to the filing of a verified motion for postconviction relief. The one-year limitation period shall run from the later of:
>
> (a) The date the judgment of conviction became final by the conclusion of a direct appeal or the expiration of the time for filing a direct appeal;
>
> (b) The date on which the factual predicate of the constitutional claim or claims alleged could have been discovered through the exercise of due diligence;
>
> (c) The date on which an impediment created by state action, in violation of the Constitution of the United States or the Constitution of Nebraska or any law of this state, is removed, if the prisoner was prevented from filing a verified motion by such state action;

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[12] *Id.* at 786, 707 N.W.2d at 422.

[13] *Id.*

[14] See 2011 Neb. Laws, L.B. 137, § 1 (effective Aug. 27, 2011).

> (d) The date on which a constitutional claim asserted was initially recognized by the Supreme Court of the United States or the Nebraska Supreme Court, if the newly recognized right has been made applicable retroactively to cases on postconviction collateral review; or
>
> (e) August 27, 2011.

Smith acknowledges that he "had until August 27, 2012 to file a postconviction motion raising his *Graham v. Florida* claim" and that he "missed that deadline."[15] Thus, as in *Dunster*, Smith had a remedy under the Nebraska Postconviction Act.

In two cases, we have recognized a common-law remedy to set aside a plea-based conviction where the defendant had no remedy under the Nebraska Postconviction Act. In *State v. Ewert*,[16] the defendant was convicted of a drug offense and fined but not incarcerated. He subsequently moved to set aside the conviction on the ground that the statute which defined the offense did not become effective until after the alleged violation which formed the basis of the conviction. No appeal had been filed, and a remedy under the Nebraska Postconviction Act was unavailable, because the defendant was not sentenced to imprisonment and thus was never "in custody under sentence."[17] On these facts, we held that the district court had jurisdiction to set aside the facially void conviction.

More recently, in *State v. Yuma*,[18] we held that a defendant who was immediately released upon sentencing, because of credit for time served, was never "'in custody under sentence'"[19] and therefore could file a common-law motion to withdraw his guilty plea on the ground that his attorney was constitutionally ineffective in failing to advise him of the immigration consequences of his plea as required by *Padilla*

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[15] Brief for appellant at 12.

[16] *State v. Ewert*, 194 Neb. 203, 230 N.W.2d 609 (1975).

[17] § 29-3001(1).

[18] *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013).

[19] *Id.* at 248, 835 N.W.2d at 683.

v. Kentucky.[20] *Yuma* was an application of the common-law remedy we recognized in *State v. Gonzalez*,[21] which requires a showing that the Nebraska Postconviction Act "is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea." As we noted in *Yuma* and *Gonzalez*, "'this common-law procedure exists to safeguard a defendant's rights in the very rare circumstance where due process principles require a forum for the vindication of a constitutional right and no other forum is provided by Nebraska law.'"[22]

Such circumstances are not present here. Smith could have asserted his *Graham v. Florida* claim under the Nebraska Postconviction Act, but failed to do so within the time limits prescribed by the Legislature. Were we to recognize a common-law remedy for the purpose of asserting time-barred postconviction claims, we would be undermining the purpose of the Legislature in enacting § 29-3001(4).

We note that a claim that a criminal sentence is void may be a ground for relief in the form of a writ of habeas corpus.[23] Smith did not seek a writ of habeas corpus in this case, and we therefore make no comment on his entitlement to such relief.

We conclude that the district court did not err in determining that it lacked jurisdiction to consider Smith's motion and in dismissing it without reaching its merit. Because the district court lacked jurisdiction, we similarly lack jurisdiction and therefore dismiss the appeal.

APPEAL DISMISSED.

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

[21] *State v. Gonzalez, supra* note 8, 285 Neb. at 949-50, 830 N.W.2d at 511.

[22] *State v. Yuma, supra* note 18, 286 Neb. at 247, 835 N.W.2d at 682, quoting *State v. Gonzalez, supra* note 8.

[23] See, e.g., *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLANT, V. ROLLAND SKINNER, APPELLEE, AND NORTHWEST RURAL PUBLIC POWER DISTRICT AND GARY FUCHSER, INTERVENORS-APPELLEES.

NEBRASKA ACCOUNTABILITY AND DISCLOSURE COMMISSION, APPELLANT, V. LES TLUSTOS, APPELLEE, AND NORTHWEST RURAL PUBLIC POWER DISTRICT AND GARY FUCHSER, INTERVENORS-APPELLEES.

853 N.W.2d 1

Filed August 15, 2014. Nos. S-13-389, S-13-390.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law: Appeal and Error.** 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.
4. **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.
5. **Criminal Law: Statutes.** Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served.
6. ____: ____. Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
7. ____: ____. The rule requiring strict construction of penal statutes is not violated by giving words of the statute their full meaning in the connection in which they are employed.
8. **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, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.

9. ____: ____: ____. The intent of the Legislature may be derived from both the words that it used in a statute and those that it did not.
10. **Statutes: Appeal and Error.** In the absence of a statutory indication to the contrary, an appellate court gives words in a statute their ordinary meaning.
11. **Judgments: Appeal and Error.** An appellate court reviewing for errors appearing on the record does not make factual determinations that should be made by the finder of fact.
12. **Administrative Law: Judgments: Appeal and Error.** Although a district court in its de novo review of agency determinations is not required to give deference to the findings of fact by the agency hearing officer, it may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility.
13. **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.
14. **Constitutional Law: Statutes: Proof.** It is firmly established as the universal rule that a person may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question, he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and, of course, it is prerequisite that he establish in himself the claimed right which is alleged to be infringed.

Appeals from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Reversed and remanded for further proceedings.

Neil B. Danberg, Special Assistant Attorney General, for appellant.

Terry Curtiss, of Curtiss, Moravek & Curtiss, P.C., L.L.O., for appellees.

David A. Jarecke and Vanessa A. Silke, of Blankenau, Wilmoth & Jarecke, L.L.P., for intervenors-appellees.

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

WRIGHT, J.

I. NATURE OF CASE

The Nebraska Accountability and Disclosure Commission (Commission) appeals the order of the district court which

reversed the Commission's finding that two employees of Northwest Rural Public Power District (NRPPD) violated the Nebraska Political Accountability and Disclosure Act (Act), Neb. Rev. Stat. §§ 49-1401 to 49-14,141 (Reissue 2010) (subsequent amendments to Act are not applicable to instant case).

The question presented is whether the employees used public resources for the purpose of campaigning against a candidate for NRPPD's board of directors (Board). The employees purchased short radio advertisements on the subjects of wind energy, "generation duplication," and electricity rates that were broadcast before the November 2, 2010, general election. We reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

II. SCOPE OF REVIEW

[1,2] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *J.P., supra*.

[3,4] 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. *AT&T Communications v. Nebraska Public Serv. Comm.*, 283 Neb. 204, 811 N.W.2d 666 (2012). But "[t]o 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." *Liddell-Toney v. Department of Health & Human Servs.*, 281 Neb. 532, 536, 797 N.W.2d 28, 31 (2011).

III. FACTS

NRPPD is a political subdivision created under Neb. Rev. Stat. § 70-602 (Reissue 2009). At all times relevant to this case, Rolland Skinner was the general manager of NRPPD and Les Tlustos was the consumer services director. Both were considered public employees subject to the Act.

Skinner and Tlustos were responsible for NRPPD's radio advertisements, including public service announcements. Tlustos wrote the advertisements and determined how they should be distributed. Skinner provided general supervision and approved some of the advertisements before they were distributed, but not all.

The focus of NRPPD's radio advertisements was to "make [NRPPD's] consumers aware of what things were happening within the electric industry" and to assist consumers "in utilizing their resources productively." Throughout 2010, there were advertisements on the efficient use of energy, how to choose high efficiency equipment, energy efficiency credits, energy consumption from appliances and lights, "TogetherWeSave.com," and "[g]etting the most value from your energy dollar." Some advertisements discussed the benefits of using surge protectors, electric heat pumps and water heaters, electric grills, space heaters, and programmable thermostats. In 2010, other advertisements explained services provided by NRPPD, such as the "Youth Energy Camp" and the "Diggers Hotline."

In April 2010, Michael Van Buskirk announced his candidacy for a seat on the Board. The incumbent was the only other candidate for that seat. Between April 12 and 16, Van Buskirk spoke at a public meeting of the Sheridan County commissioners, appeared on a local radio station, and was the subject of an article in the county newspaper. Through these mediums, Van Buskirk touted wind energy as a viable method of containing energy costs and encouraging economic development. He criticized the existing Board for being unsupportive of local attempts to use wind power and for enacting policies that would "basically eliminate our potential to explore wind power within Sheridan County." He also opposed the existing Board's decision to join a lawsuit

against Tri-State Generation and Transmission Association (Tri-State) in an attempt to reduce energy costs.

Skinner and Tlustos were present at a meeting at which Van Buskirk talked about his campaign and his position on wind energy. Tlustos recorded Van Buskirk's radio program. Skinner listened to Van Buskirk's radio program and read the newspaper article outlining Van Buskirk's campaign platform.

In October 2010, Tlustos purchased and Skinner approved three 30-second radio advertisements. The first advertisement, titled "Wind Energy," aired 73 times between October 5 and 26. It stated:

> Northwest Rural, a not-for-profit, supports renewable energy. However, we are concerned about how the subsidies are funded. Presently, it is very difficult to make wind energy cost effective even with the subsidies that now exits [sic]. When much of the subsidies come through the rural electric utility, a disproportionate amount of the subsidies will be on the backs of the rural customers where the lowest quantities of the population live. Northwest Rural cares about the consumer.

The second advertisement, titled "Rates," was broadcast 73 times between October 6 and 26, 2010. It stated:

> As you may know, Northwest Rural Public Power District has joined with four other Nebraska power systems to form the Nebraska Power Supply Issues Group (NPSIG). As part of this effort, Northwest Rural has been engaged in numerous discussions with Tri-State . . . regarding a dispute over the rates that Tri-State charges to its Nebraska-based members. On behalf of our customers, Northwest Rural continues to work toward finding a fair and equitable solution to this problem. Northwest Rural "cares about the consumer."

The third advertisement, titled "Generation Duplication," aired 98 times between October 27 and November 23, 2010. It stated:

> Due to the fact that most renewable generating resources are intermittent, the generation equipment becomes a duplication of existing electric generation costs. Thus increasing the cost of providing electricity to all since

> full capacity of existing resources must be in place and available at all times. Also, renewable generation is most often not on at our peak requirement time and reduces the efficiency of lightly loaded non-intermittent generation resources. Presently, it is very difficult to make wind energy cost effective. Northwest Rural Public Power District cares about the consumer.

Hereinafter, we refer to these three advertisements collectively as "the radio advertisements."

Sometime between October 11 and 28, 2010, Van Buskirk sent out a campaign letter regarding the radio advertisements. He stated:

> "I find it interesting that [NRPPD] has been running radio advertisements which discredit wind power as a possibility for the district because of subsidies and the subsequent burden will fall on rural residents[.]" . . .
>
> . . . .
>
> [NRPPD's] power supplier is Tri-State . . . so by definition we . . . are subsidizing Tri-State . . . and the State of Colorado's Wind Power Development at the expense of doing nothing at home in Sheridan County. . . .
>
> Wind Power is being subsidized everywhere around us. So, let's start subsidizing our own wind development rather than Colorado's. . . .
>
> . . . .
>
> "Misleading [NRPPD] radio advertisements regarding local subsidies for wind energy is [sic] a poor use of [NRPPD] resources . . . . This stinks."

Van Buskirk requested that Tlustos stop airing the radio advertisements. He did not do so.

On October 21, 2010, Van Buskirk filed complaints with the Commission against Skinner and Tlustos for airing the radio advertisements. Van Buskirk objected to the radio advertisements because they "directly contradict[ed]" his pro-wind-energy platform. Skinner and Tlustos denied the allegations. After conducting a preliminary investigation, the Commission determined that there was probable cause for the complaints.

On November 7, 2011, the parties appeared before a hearing officer and adduced evidence. They agreed that NRPPD

was a governmental entity and that Skinner and Tlustos were public employees subject to the Act. The disputed question was whether the radio advertisements were "campaigning" for purposes of § 49-14,101.02(2).

Van Buskirk conceded that the radio advertisements did not specifically mention his campaign, his pro-wind-energy platform, his name, or the November 2010 election. But he claimed the radio advertisements were directed at his campaign, because they were "directly attacking issues that [he] was the only one in the county raising," such as wind energy, economic development through wind energy, and cost containment.

Skinner testified that he knew Van Buskirk was "promoting wind" during the campaign and that wind energy and rate containment were the issues on which Van Buskirk was running in the election. But Skinner and Tlustos testified that the radio advertisements were intended for a purpose other than to respond to Van Buskirk's campaign. Tlustos testified that he created the radio advertisements because the Board instructed him to "do a better job of informing [NRPPD's] consumers" on wind energy. Tlustos explained, as did Skinner, that the radio advertisements were meant to correct "inaccuracies" and "misconceptions" in the information that the public had received about wind energy, generation duplication, and rates. Skinner testified that Van Buskirk was responsible for disseminating "[p]art" of the information the radio advertisements were intended to correct. But Skinner did not state whether anyone other than Van Buskirk was providing the public with "misconceptions" about wind energy.

The hearing officer presented recommended findings of fact and conclusions of law to the Commission. He determined that the radio advertisements were "politically motivated and for the purpose of campaigning against Van Buskirk's election as a candidate for the [B]oard." He based this conclusion on the following facts: (1) The radio advertisements were discontinued shortly after the November 2010 election; (2) the radio advertisements were more specific and more expensive than previous "infomercials"; (3) during the month prior to the election, the radio advertisements were aired

a large number of times; (4) Skinner and Tlustos refused Van Buskirk's request to stop airing the radio advertisements; (5) the radio advertisements were close in proximity to the election; (6) the radio advertisements contradicted Van Buskirk's campaign platform; and (7) Van Buskirk was the only candidate raising the issues addressed by the radio advertisements. The hearing officer ultimately concluded that Skinner and Tlustos expended public funds "for the purpose of campaigning," in violation of § 49-14,101.02(2).

The full Commission adopted the hearing officer's recommended findings of fact and conclusions of law. It ordered Skinner and Tlustos to each pay a civil penalty of $2,000.

Skinner and Tlustos appealed to the district court, assigning error to the Commission's interpretation and application of § 49-14,101.02(2). They argued that the Commission's order was (1) "[a]n unconstitutional application" of § 49-14,101.02(2), (2) "an erroneous determination of what action may be regulated as 'campaigning'" under the statute, (3) "inconsistent" with the strict interpretation of penal statutes, and (4) "contrary to the evidence." NRPPD and the president of the Board requested leave to intervene, which the court granted.

After a consolidated hearing, the district court reversed and set aside the Commission's order and vacated the imposition of fines. The court adopted the following definition of "campaigning" from a Webster's dictionary: "'to lead or take part in a campaign to support or oppose someone or something or to achieve something.'" Using this definition, the court found that the radio advertisements were "informational only." It emphasized that the radio advertisements did not identify Van Buskirk "by name, office, or unambiguous reference" and that NRPPD had an "extensive history of communicating to its rate payers . . . on the issues of wind power, rate containment and economic development." The court concluded that the radio advertisements were "genuine issue advertisements that focus on a particular issue" and that the use of NRPPD funds to purchase such advertisements did not constitute "campaigning" within the definition of § 49-14,101.02(2).

The Commission timely appeals. Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the case to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

IV. ASSIGNMENTS OF ERROR

The Commission assigns, restated and consolidated, that the district court erred in (1) determining that Skinner's and Tlustos' use of public resources did not violate § 49-14,101.02(2) and, consequently, reversing and setting aside the decision of the Commission; (2) concluding that Skinner and Tlustos, as public employees spending public funds, had First Amendment rights to expend those funds; and (3) its interpretation of § 49-14,101.02(2) that only explicit references to a candidate were impermissible under the statute.

V. ANALYSIS

1. § 49-14,101.02(2)

The issue is whether, by purchasing the radio advertisements, Skinner and Tlustos used public resources "for the purpose of campaigning." Section 49-14,101.02(2) states:

> Except as otherwise provided in this section, a public official or public employee shall not use or authorize the use of public resources for the purpose of campaigning for or against the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.

None of the exceptions in § 49-14,101.02 apply in this case.

(a) Public Resources

We first dispose of Skinner's and Tlustos' argument that they did not use public resources to purchase the radio advertisements. "[U]se of public resources" is a basic element of § 49-14,101.02(2). "[P]ublic resources" are defined as "personnel, property, resources, or funds under the official care and control of a public official or public employee." § 49-14,101.02(1).

Given their roles at NRPPD, Skinner and Tlustos were in charge of the funds available for radio advertisements. As general manager, Skinner was responsible for the "day-to-day affairs" of NRPPD and was authorized by the Board to "operate all of the operations of [NRPPD]." Tlustos was "in charge of advertising" and handled the placement of advertisements on the radio, a matter over which the Board gave him "a lot of discretion." Tlustos testified that cost was a major consideration in the placement of advertisements and that he tried to "watch [his] pennies, dollars spent, budget items."

The NRPPD funds used to purchase the radio advertisements were in the "care and control" of public employees and, thus, were "public resources" for purposes of the Act. See § 49-14,101.02(1). Skinner and Tlustos used public resources when they used NRPPD funds to purchase the radio advertisements.

(b) "For the Purpose of Campaigning"

(i) Statutory Meaning

[5-7] The next question is whether the radio advertisements were purchased "for the purpose of campaigning," as prohibited by § 49-14,101.02(2). To determine the meaning of the phrase "for the purpose of campaigning," we use well-established principles of statutory interpretation. Section 49-14,101.02 is penal in nature and must be strictly construed. See *Vokal v. Nebraska Acct. & Disclosure Comm.*, 276 Neb. 988, 759 N.W.2d 75 (2009). Penal statutes are considered in the context of the object sought to be accomplished, the evils and mischiefs sought to be remedied, and the purpose sought to be served. *Id.* Effect must be given, if possible, to all parts of a penal statute; no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999). "'The rule requiring strict construction of penal statutes is not violated by giving words of the statute their full meaning in the connection in which they are employed.'" *State ex rel. Grams v. Beach*, 243 Neb. 126, 129, 498 N.W.2d 83, 85-86 (1993), quoting *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985).

[8-10] As with any statute, "we 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, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself." *Vokal*, 276 Neb. at 992, 759 N.W.2d at 79. "[T]he intent of the Legislature may be derived from both the words that it used in a statute and those that it did not." *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 960, 831 N.W.2d 696, 702 (2013). In the absence of a statutory indication to the contrary, this court gives words in a statute their ordinary meaning. *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

In previous cases interpreting the Act, we have relied on the dictionary to define terms not explicitly defined in the Act. See *Vokal, supra*. Because neither the phrase "for the purpose of campaigning" nor its component words are specifically defined in the Act, we employ dictionary definitions to interpret § 49-14,101.02(2), as did the district court.

"Campaign" is defined as "a series of operations or efforts designed to influence the public to support a particular political candidate, ticket, or measure." Webster's Third New International Dictionary of the English Language, Unabridged 322 (1993). Although this definition does not recognize that a campaign can be positively or negatively oriented toward a candidate or issue, § 49-14,101.02(2) does so by using the language "for or against." As a verb, "campaign" means "to go on, engage in, or conduct a campaign." Webster's, *supra* at 322. Accordingly, "campaigning" is the act of engaging in a series of operations or efforts designed to influence public support for or against a particular political candidate, ticket, or measure.

"[F]or the purpose of campaigning" emphasizes the intent with which public resources are used. "Purpose" is "something that one sets before himself as an object to be attained" or "an object, effect, or result aimed at, intended, or attained." *Id.* at 1847. Thus, public resources are used "for the purpose of campaigning" when their use is intended to influence public support for or against a particular political candidate, ticket, or measure.

So construed, § 49-14,101.02(2) prohibits the expenditure of public resources for activities intended to have the effect of influencing public support for or against a particular political candidate, ticket, or measure. This interpretation gives effect to the Legislature's intent to prohibit the use of public resources "for the purpose of campaigning," see § 49-14,101.02(2), and is consistent with the Legislature's stated intent of making state and local elections "free of corruption *and the appearance of corruption*," see § 49-1402(2) (emphasis supplied).

We note, as we did earlier, that the use of public resources is necessary for there to be a violation of § 49-14,101.02(2). Consequently, where public resources are not used, this statute does not prohibit public officials and public employees from engaging in activities that are intended to have the effect of influencing public support for or against a particular political candidate, ticket, or measure. It is the "use of public resources for the purpose of campaigning," not the campaigning by public officials or public employees, that is prohibited by § 49-14,101.02(2).

The district court limited the scope of § 49-14,101.02(2) to only those activities that expressly identify a candidate, election, or political party. To determine whether the radio advertisements were campaigning, the court looked for the characteristics of "express advocacy" identified in federal case law. See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (advertisements lacked "indicia of express advocacy" because they did not "mention an election, candidacy, political party, or challenger" or "take a position on a candidate's character, qualifications, or fitness for office").

Similarly, Skinner and Tlustos argue that § 49-14,101.02(2) must be interpreted in a manner consistent with federal law governing the financing of federal election campaigns. They claim that § 49-14,101.02(2) makes a distinction between express advocacy and "issue advocacy." These concepts have been extensively discussed by federal courts addressing First Amendment issues related to campaign finance. See, e.g., *Federal Election Comm'n, supra*. Skinner and Tlustos suggest that we adopt the definitions of

"electioneering communication" and "expressly advocating" provided in federal campaign finance law and apply them to § 49-14,101.02(2).

But the plain language of § 49-14,101.02(2) does not support the application or use of either of those proposed definitions. The concepts of an electioneering communication and express advocacy were specifically developed and defined for the purpose of federal campaign finance regulation. Such definitions are inapposite to the language of the Act, which does not address federal campaign finance regulation or the expenditure of private funds. Section 49-14,101.02(2) refers explicitly to the term "campaigning" and does not use the terms "electioneering communication," "express advocacy," or "expressly advocating." We cannot add such language to the statute, nor can we ignore the distinction between the terms "electioneering communication," "express advocacy," and "expressly advocating" in federal law and "campaigning" in the state statute. The legislative intent is derived from the fact that the Legislature used only the term "campaigning." See *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013).

The definitions of "electioneering communication" and "expressly advocating" are specific to communications that refer to a "clearly identified" candidate. See, 2 U.S.C. § 434(f)(3)(A) (2012); 11 C.F.R. § 100.22 (2014). Indeed, federal case law distinguishes express advocacy from issue advocacy, because express advocacy explicitly refers to a candidate, whereas a "genuine issue ad" does not. See *Federal Election Comm'n*, 551 U.S. at 470. But § 49-14,101.02(2) does not use the terms "express advocacy," "expressly advocating," "genuine issue ad," or "issue advocacy" and is not limited to campaigning only for or against a candidate. Section 49-14,101.02(2) also prohibits "campaigning for or against . . . the qualification, passage, or defeat of a ballot question," which relates to noncandidate elections. As a consequence, the fact that an activity refers to an issue and thus does not fit within the definitions of "electioneering communication" and "expressly advocating" does not mean that the activity is permitted by the statute. The language of § 49-14,101.02(2)

does not make a distinction between express advocacy and issue advocacy.

The Supreme Court of California rejected the express advocacy standard as a means of determining when public funds have been expended for improper campaign activities. See *Vargas v. City of Salinas*, 46 Cal. 4th 1, 205 P.3d 207, 92 Cal. Rptr. 3d 286 (2009). We find its reasoning instructive.

In California, public funds may not be used for "campaign" purposes but can be used for "informational" purposes. See *Stanson v. Mott*, 17 Cal. 3d 206, 221, 551 P.2d 1, 11, 130 Cal. Rptr. 697, 707 (1976). Certain activities "unquestionably constitute[] improper campaign activity." *Id.* When it is unclear whether a particular expenditure is a campaign activity or simply informational, the court engages in a "careful consideration of such factors as the style, tenor and timing of the publication; no hard and fast rule governs every case." *Id.* at 222, 551 P.2d at 12, 130 Cal. Rptr. at 708.

In *Vargas, supra*, the Supreme Court of California declined to replace the aforementioned approach from *Stanson, supra*, with one that relied on the concept of express advocacy:

> Whatever virtue the "express advocacy" standard might have in the context of the regulation of campaign contributions to and expenditures by candidates for public office, this standard does not meaningfully address the potential constitutional problems arising from the use of *public funds* for *campaign activities* . . . . If a public entity could expend public funds for *any* type of election-related communication so long as the communication avoided "express words of advocacy" and did not "unambiguously urge[ ] a particular result" . . . , the public entity easily could overwhelm the voters by using the public treasury to finance bumper stickers, posters, television and radio advertisements, and other campaign material containing messages that, while eschewing the use of express advocacy, nonetheless as a realistic manner effectively promote one side of an election. . . .
>
> Thus, when viewed from a realistic perspective, the "express advocacy" standard does not provide a suitable means for distinguishing the type of *campaign* activities

> that . . . presumptively may not be paid for with public funds, from the type of *informational* material that presumptively may be compiled and made available to the public through the expenditure of such funds.

Vargas, 46 Cal. 4th at 31-33, 205 P.3d at 226-27, 92 Cal. Rptr. 3d at 309-10 (emphasis and alteration in original).

We agree with the Supreme Court of California that the express advocacy standard does not provide a suitable means for identifying the type of campaign activities that may not be paid for with public funds. See *Vargas, supra*. Whether the use of public resources for a particular activity constitutes a violation of § 49-14,101.02(2) does not hinge upon the existence or absence of express advocacy. Rather, the relevant question is whether public resources were used with the intent to influence public support for or against a particular candidate, ticket, or measure.

(ii) Application to Radio Advertisements

To ascertain whether the radio advertisements were "for the purpose of campaigning," the district court considered only whether they possessed the characteristics of express advocacy or issue advocacy. It found that the radio advertisements were "genuine issue advertisements," because they "focus[ed] on a particular issue, [took] a position on that issue, urge[d] the public to adopt that position, and urge[d] the public to contact public officials if they [had] any question with respect to the matter." The court concluded that the radio advertisements lacked "any indicia of campaigning," because they did not "mention the general election of November 2, 2010, the candidacy of Van Buskirk or any of his challengers, or any political party" and did not "take a position on the character, qualifications, or fitness for office of Van Buskirk." Based on these findings of fact, the court concluded that the radio advertisements were not a violation of § 49-14,101.02(2).

The district court's analysis reveals that it used express advocacy as the standard by which to determine whether the radio advertisements were "campaigning" under § 49-14,101.02(2). It equated campaigning with express advocacy and thus

considered the characteristics of express advocacy identified in federal case law to be the sole "indicia of campaigning." See *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007). Because the court found the radio advertisements were not express advocacy but issue advocacy, it concluded they did not violate the prohibition against using public resources for campaigning.

But express advocacy is not the standard to be applied to § 49-14,101.02(2). As we have explained, § 49-14,101.02(2) does not make a distinction between express advocacy and issue advocacy. It prohibits the "use of public resources for the purpose of campaigning for or against" candidates or issues in an upcoming election. See *id*. It does not distinguish between activities based on the characteristics of express advocacy or issue advocacy.

A violation of § 49-14,101.02(2) does not depend upon the identification of a candidate, an election date, or a political party or a discussion of a candidate's qualifications and fitness for office. Indeed, the statute may be violated when such characteristics are absent. Rather, a violation occurs when public resources are used with the intent to influence public support for or against a candidate or ballot issue. Given this fact, in order to determine whether there has been a violation of § 49-14,101.02(2), a court must consider the intent behind the expenditure of public resources.

The district court concluded, without considering this factor, that Skinner's and Tlustos' purchase of the radio advertisements did not violate § 49-14,101.02(2). It erroneously viewed the radio advertisements under the lens of express advocacy and made findings of fact based only on whether the radio advertisements mentioned the general election, the candidacy of Van Buskirk, his qualifications and fitness for office, or a political party. The court failed to consider whether the radio advertisements were purchased with the intent to influence public support for or against Van Buskirk. Without consideration of intent, the court's conclusion that Skinner and Tlustos did not violate § 49-14,101.02(2) did not conform to the law and must be reversed.

[11,12] Before it can be ascertained whether Skinner and Tlustos violated § 49-14,101.02(2), a factual determination must be made whether the radio advertisements were purchased with the intent to influence public support for or against Van Buskirk. As explained above, the district court did not make a factual determination as to Skinner's and Tlustos' intent. An appellate court reviewing for errors appearing on the record does not make factual determinations that should be made by the finder of fact. See *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013). Intent is a question for the trier of fact. See, *McKinney v. Okoye*, 287 Neb. 261, 842 N.W.2d 581 (2014); *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010); *Lone Cedar Ranches v. Jandebeur*, 246 Neb. 769, 523 N.W.2d 364 (1994). Although a district court in its de novo review of agency determinations is not required to give deference to the findings of fact by the agency hearing officer, it may consider the fact that the hearing officer, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and may give weight to the hearing officer's judgment as to credibility. *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

Therefore, we remand the cause for further proceedings to consider whether the radio advertisements were purchased "for the purpose of campaigning"—that is, with the intent to influence public support against Van Buskirk. On remand, consideration of only the content of the radio advertisements is not sufficient to determine Skinner's and Tlustos' intent. In addition to the content of the advertisements, the court should consider all other relevant factors, including, but not limited to the following: the platform of or issues raised by Van Buskirk, whether Van Buskirk was the only candidate campaigning on those issues, whether the radio advertisements took a position for or against the issues central to Van Buskirk's campaign, the timing and frequency of the radio advertisements, and how the radio advertisements compared to prior public service announcements or advertisements. The court is not limited to these considerations, but clearly, the court cannot base its determination solely upon

the characteristics of express advocacy. Both the content of the communication and all of the surrounding circumstances should be considered. The weight to be given to each piece of evidence depends upon the specific facts in a given situation and is a matter for the trier of fact. Ultimately, the court must determine whether the radio advertisements were purchased "for the purpose of campaigning," in violation of § 49-14,101.02(2).

2. Freedom of Speech

The Commission assigns that the district court erred in concluding that Skinner's and Tlustos' actions were protected by the First Amendment. While the court mentioned the First Amendment, we do not ascertain that it relied on the First Amendment in reaching its decision.

[13] However, because the issue is likely to recur on remand, we briefly explain why the district court should not consider the First Amendment rights of Skinner and Tlustos or NRPPD. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal where those issues are likely to recur during further proceedings. *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

The First Amendment was implicated in this case only to the extent that Skinner and Tlustos raised an "as applied" challenge to the constitutionality of § 49-14,101.02(2) in their appeal from the Commission's decision. They claim to have raised such a challenge. But in purportedly doing so, they did not argue that § 49-14,101.02(2) limited their individual political speech in an unconstitutional manner. Rather, they "have steadfastly contended throughout this proceeding that the speech at issue is by [NRPPD]." Brief for appellees Skinner and Tlustos at 15. Thus, Skinner's and Tlustos' initial appeal to the district court did not present a challenge to the constitutionality of § 49-14,101.02(2) as applied to their speech. As their appeal was framed, the court was presented with a challenge to the constitutionality of the statute as applied only to the speech of NRPPD.

[14] Skinner and Tlustos did not have standing to challenge the constitutionality of § 49-14,101.02(2) as applied to

NRPPD, and as a result, the district court lacked jurisdiction to address such a challenge.

> It is firmly established as the universal rule that a person "may attack the constitutionality of a statute only when and so far as it is being or is about to be applied to his disadvantage; and to raise the question he must show that the alleged unconstitutional feature of the statute injures him and so operates as to deprive him of a constitutional right, and, of course, it is prerequisite that he establish in himself the claimed right which is alleged to be infringed."

State ex rel. Nelson v. Butler, 145 Neb. 638, 651, 17 N.W.2d 683, 691-92 (1945), quoting 16 C.J.S. *Constitutional Law* § 76 (1939). Skinner and Tlustos did not meet those requirements for bringing an "as applied" challenge to § 49-14,101.02(2) on behalf of NRPPD. Indeed, they remain quite adamant that "the ads in question constitute protected corporate political speech." Brief for appellees Skinner and Tlustos at 14. Skinner and Tlustos sought to vindicate the rights of NRPPD, which they did not have the standing to do.

When NRPPD intervened in these proceedings, it did not allege that § 49-14,101.02(2) had been applied by the Commission in a manner that unconstitutionally limited NRPPD's speech. On appeal, NRPPD does not allege any such violation, and at oral argument, NRPPD argued that the First Amendment was not relevant to this appeal. At each of these stages in the proceeding, NRPPD did not assert a constitutional challenge to § 49-14,101.02(2).

Skinner and Tlustos did not assert that their personal rights were implicated, and they did not have standing to assert the rights of NRPPD. Therefore, the district court did not have jurisdiction to consider the constitutionality of the statute as applied in the instant case.

VI. CONCLUSION

The district court's conclusion that Skinner and Tlustos had not violated § 49-14,101.02(2) was based on an interpretation of the statute that was contrary to the law. The constitutionality of § 49-14,101.02(2) is not before the court

and should not be considered on remand. For the reasons stated herein, we reverse the judgment of the district court and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
SHAD M. KNUTSON, APPELLANT.
852 N.W.2d 307

Filed August 15, 2014. No. S-13-558.

1. **Criminal Law: Trial.** A motion for separate trial is addressed to the sound discretion of the trial court, and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion.
2. **Constitutional Law: Trial: Joinder.** A defendant has no constitutional right to a separate trial on different charges. Neb. Rev. Stat. § 29-2002 (Reissue 2008) controls the joinder or separation of charges for trial.
3. **Trial: Joinder: Appeal and Error.** Under Neb. Rev. Stat. § 29-2002 (Reissue 2008), whether offenses were properly joined involves a two-stage analysis in which an appellate court first determines whether the offenses were related and joinable and then determines whether an otherwise proper joinder was prejudicial to the defendant.
4. ____: ____: ____. To determine whether the charges joined for trial are of the same or similar character, an appellate court looks at the underlying factual allegations.
5. **Trial: Joinder: Proof.** A defendant opposing joinder of charges has the burden of proving prejudice.
6. **Trial: Joinder: Evidence: Jury Instructions.** No prejudice from joined charges usually occurs if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations. This is particularly true when the trial court specifically instructed the jury to separately consider the evidence for each offense.
7. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress evidence 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.
8. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.

9. **Constitutional Law: Search and Seizure: States.** The Fourth Amendment's protections are implicated whenever state action intrudes on a citizen's reasonable expectation of privacy.
10. **Constitutional Law: Search and Seizure.** Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.
11. **Constitutional Law: Search and Seizure: Search Warrants.** Under the Fourth Amendment, a warrant is not required to obtain telephone billing and toll records because obtaining them by subpoena does not constitute a search.
12. **Constitutional Law: Search and Seizure: States.** The violation of a state law restricting searches is insufficient to show a Fourth Amendment violation. The analysis turns on whether society recognizes an expectation of privacy deserving of the most scrupulous protection from government invasion.
13. **Constitutional Law: Statutes: Evidence.** Absent a constitutional violation, a court will normally suppress evidence obtained in violation of a rule or statute only if the governing law provides that remedy.
14. **Criminal Law: Convictions: 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 is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
15. **Statutes: Appeal and Error.** An appellate court decides questions of statutory interpretation as a matter of law.
16. **Criminal Law: Statutes: Legislature: Intent.** A court gives penal statutes a sensible construction, considering the Legislature's objective and the evils and mischiefs it sought to remedy.
17. **Statutes.** Absent a statutory indication to the contrary, a court gives words in a statute their ordinary meaning.
18. **Criminal Law: Statutes: Words and Phrases: Appeal and Error.** An appellate court strictly construes penal statutes and does not supply missing words or sentences to make clear that which is indefinite or not there.
19. **Criminal Law: Statutes: Appeal and Error.** An appellate court will not apply a penal statute to situations or parties not fairly or clearly within its provisions.
20. **Criminal Law: Statutes.** Ambiguities in a penal statute are resolved in the defendant's favor.
21. **Trial: Presumptions.** Triers of fact may apply to the subject before them that general knowledge which any person must be presumed to have.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

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

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

CONNOLLY, J.

I. SUMMARY

The State charged Shad M. Knutson with five counts of sexual assault and child abuse involving four minor girls: T.P., M.K., E.M., and E.A. A jury found Knutson guilty of the charges involving E.A., but acquitted him of the charges involving the other three girls. The issues are whether (1) a joint trial on the offenses was proper, (2) Knutson's cell phone records should have been suppressed because the State obtained them by subpoena, and (3) the evidence was sufficient to support Knutson's convictions. We conclude that the court properly joined the offenses and correctly denied Knutson's motion to suppress his cell phone records. And we conclude that the evidence was sufficient to support Knutson's convictions for child abuse and child enticement for an illegal sexual purpose under Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2012). We affirm.

II. BACKGROUND

Knutson taught at a public middle school in Omaha, Nebraska. T.P., M.K., and E.M. were students of Knutson when the alleged misconduct occurred. E.A. was not one of Knutson's students at the school, though she had attended school there and knew him. When E.A. moved on to high school, Knutson tutored her during her freshman and sophomore years, the period during which the alleged misconduct occurred.

1. COMPLAINING WITNESSES' REPORTS AND SUBSEQUENT INVESTIGATION

In November 2009, T.P. reported Knutson to school officials for sexually inappropriate conduct. Following an internal investigation, school officials determined that there was no substance to T.P.'s allegations and she was moved to a

different school. In December, M.K. reported Knutson to school officials for sexually inappropriate conduct. While conducting an investigation, Knutson was put on leave, but once school officials concluded there was no criminal conduct, they allowed him to return to teach. School officials did not forward either T.P.'s or M.K.'s allegations to the police.

In October 2010, E.M. reported Knutson to school officials for sexually inappropriate conduct. Soon after, E.M.'s mother reported Knutson to Child Protective Services, which led to a police investigation. During the investigation, E.A.'s name came up and police interviewed her. She initially denied any relationship or anything inappropriate happening between her and Knutson. But investigators obtained Knutson's cell phone records, which revealed that he had thousands of telephone contacts with E.A. When confronted with the cell phone records, and after seeing Knutson on the news, E.A. admitted to prosecutors that she and Knutson had been in a relationship.

2. Charges and Pretrial Motions

The State charged Knutson with sexual assault and child abuse involving the four girls. Before trial, Knutson moved to sever the charges. In his motion, Knutson argued that the charges were not joinable under Neb. Rev. Stat. § 29-2002(1) (Reissue 2008) and that, even if they were, joinder would prejudice him. But the court determined that the charges were of the same or similar character and that evidence of the alleged acts would be admissible against Knutson in separate trials. The court denied Knutson's motion to sever.

Before trial, Knutson also moved to suppress his cell phone records, which the State had obtained by subpoena. In his motion, Knutson argued that the State's use of subpoenas was improper because it violated both his constitutional right to be free from unreasonable searches and seizures and Nebraska statutory law. The court concluded, however, that because Knutson had no expectation of privacy in the records, the State's subpoenaing them did not violate Knutson's Fourth Amendment rights. And the court concluded that the State's

use of subpoenas to obtain the records complied with state statutes. It overruled Knutson's motion to suppress.

3. Trial Testimony, Jury Verdicts, and Sentencing

Although the jury found Knutson guilty only of the charges involving E.A., it is necessary to summarize the testimony related to the other charges because it is relevant to the joinder issue. T.P. testified that Knutson would tell her she was pretty and beautiful, that he would ask her about her breasts and whether he could feel them, and that he later threatened to lower her grades if she did not show him her breasts. T.P. also testified about incidents when she participated on the football team and when she was a manager for the basketball team. Knutson coached both teams. T.P. testified that Knutson had asked her for oral sex and that he had "put his gym shorts, like, right up to [her] face." T.P. eventually told her stepmother and reported Knutson to school officials. Initially, however, T.P. did not report all the facts that she later stated at trial.

M.K. testified that during class, Knutson took her cell phone, looked through her cell phone pictures, and pointed to one and said, "'I like this one'" or "'I like these,'" which M.K. took to mean her breasts. M.K. also testified that she asked Knutson for help while struggling with a test after school. M.K. testified that Knutson told her that "'[a] picture of you will get you a B.'" And M.K. testified that the next day, Knutson asked for her cell phone again and that she refused. This led to her being referred to the administrator's office, where M.K. eventually reported Knutson.

E.M. testified that she and Knutson were close and that he called her "sexy," beautiful, and pretty. E.M. testified that Knutson had brushed her breasts with his hand, that he had patted her hip, and that he had made sexually inappropriate comments and gestures. For example, E.M. testified that one day she whispered to Knutson that his zipper was down and that he told her if she ever wanted to see "it," all she had to do was ask. E.M. did not report Knutson immediately because she was

scared, but she did end up reporting him to school officials, though she did not provide the same level of detail as she did at trial. Her mother called Child Protective Services, which led the police to become involved.

E.A. testified that although she was never a student in Knutson's class, she knew him from her time at the middle school. She testified that the summer before her freshman year in high school, she worked at the middle school teaching swimming and that she grew close to Knutson. She explained that during the second semester of her freshman year, she approached Knutson about tutoring her, which he agreed to do. Knutson tutored her after school in his classroom, several times a week. This arrangement continued into E.A.'s sophomore year. E.A. testified that their relationship was much more than that of a tutor and student.

At some point during this period, E.A. told Knutson that she had feelings for him, and she testified that he told her he also had feelings for her. She testified that their relationship turned physical and that it involved touching, hugging, and kissing. She explained that as the relationship became more serious, he would touch her chest and genital area and she would do the same to him. The physical interactions apparently always occurred in Knutson's classroom, after school. E.A. testified that she and Knutson would talk or text every day, all day, and that she told him she loved him and that he also told her he loved her. They agreed several times, over the telephone and in person, that they were both ready to "take it to the next level," which she testified meant having sex, although they never actually had sexual intercourse. E.A. also testified that Knutson asked her for "sexy" pictures of herself and that she sent to him a picture of her breasts covered with a bra.

Other witnesses also testified, including teachers and administrators from the middle school and the Omaha Public School District. The testimony covered the school's physical layout, including classroom configurations, the school's investigation policy at the time (internal investigations by the human resources department are not always reported to police), and the school's actual investigations of the girls' allegations. The testimony covered teaching methods, coaching responsibilities,

and rules and practices regarding cell phone use at school. A crime analyst also testified regarding the cell phone records and contacts between E.A. and Knutson. In short, the analyst explained that there were over 26,000 telephone contacts between the two in about a year's time and that the contacts occurred nearly every day and at all hours of the day, including early morning and late at night.

The jury acquitted Knutson of the charges involving T.P., M.K., and E.M. But the jury convicted Knutson of the charges involving E.A., which included child abuse and child enticement for an illegal sexual purpose through the use of an electronic communication device. The court sentenced Knutson to 8 to 12 years in prison for the child enticement conviction and 1 to 2 years in prison on the child abuse conviction, with the sentences to run consecutively. The court also ordered Knutson to register as a sex offender.

III. ASSIGNMENTS OF ERROR

Knutson assigns, restated and consolidated, that the district court erred in (1) denying Knutson's motion to sever the charges and joining them all in a single trial and (2) denying Knutson's motion to suppress the cell phone records because the State violated his Fourth Amendment rights and because the State's subpoenas did not comply with Nebraska statutory law. Knutson also argues that the evidence was insufficient to support his convictions.

IV. ANALYSIS

1. Joinder

Knutson argues the charges involving E.A. should have been tried separately from the charges involving the other three girls. According to Knutson, the charges were not joinable under § 29-2002(1) and, even if they were, severance was necessary under § 29-2002(3) because the joinder was prejudicial to him. We disagree. We conclude that the charges were joinable under § 29-2002(1) because they were "of the same or similar character." And our review of the record convinces us that no prejudice arose from the joinder. We find no error in the court's conducting a single trial on the charges.

(a) Standard of Review

[1] A motion for a separate trial is addressed to the sound discretion of the trial court, and its ruling on such motion will not be disturbed in the absence of a showing of an abuse of discretion.[1]

(b) Analysis

[2] A defendant has no constitutional right to a separate trial on different charges.[2] Instead, § 29-2002 controls the joinder or separation of charges for trial. That section states, in relevant part:

> (1) Two or more offenses may be charged in the same indictment, information, or complaint . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> . . . .
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> (3) If it appears that a defendant or the state would be prejudiced by a joinder of offenses . . . for trial together, the court may order an election for separate trials of counts, indictments, informations, or complaints, grant a severance of defendants, or provide whatever other relief justice requires.

[3] Under § 29-2002, whether offenses were properly joined involves a two-stage analysis in which we first determine whether the offenses were related and joinable and then determine whether an otherwise proper joinder was prejudicial to the defendant.[3]

We first set out the relevant charges. For E.A., the State charged Knutson with violating § 28-320.02 and child abuse.[4] Section 28-320.02 is Nebraska's prohibition of child enticement

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[1] *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[2] See *id*.

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

[4] Neb. Rev. Stat. § 28-707 (Reissue 2008).

through an electronic communication device. For T.P. and E.M., the State charged Knutson with third degree sexual assault of a child.[5] And for M.K., the State charged Knutson with child abuse.[6]

[4] The first question is whether the charges were properly joined under § 29-2002(1). We agree with the State that the charges were "of the same or similar character." It is true they do not all fall under the same statute, but that is only one factor to be considered.[7] Under our case law, to determine whether the charges joined for trial are of the same or similar character, we look at the underlying factual allegations.[8] Here, as the district court found, significant similarities exist between the facts underlying the charges. For example, each of the girls attended the middle school at some point, they were similar in age when the alleged misconduct occurred, and Knutson occupied positions of trust (teacher, tutor, coach) with each of the girls, which positions he allegedly abused. And the allegations all involved illegal sexual conduct. We conclude that the charges were "of the same or similar character" and joinable under § 29-2002(1).

But Knutson argues that our decision in *State v. Rocha*[9] commands a different conclusion. In *Rocha*, we addressed whether joinder of a sexual assault charge was proper with child abuse charges and, as relevant here, whether the charges were of the same or similar character. In concluding that they were not, we emphasized that "sexual assault, on its face, is sexual in nature, whereas child abuse is not."[10] That statement

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[5] Neb. Rev. Stat. § 28-320.01 (Reissue 2008).

[6] § 28-707.

[7] See, *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013); Wayne R. LaFave et al., Criminal Procedure § 17.1(b) (5th ed. 2009).

[8] See, e.g., *State v. Freeman*, 253 Neb. 385, 571 N.W.2d 276 (1997); *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992); *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989). See, also, *State v. Sanders*, 15 Neb. App. 554, 733 N.W.2d 197 (2007).

[9] *Rocha, supra* note 7.

[10] *Id.* at 267, 836 N.W.2d at 782.

may have been imprecise; of course, the crime of child abuse may encompass factual situations which are sexual in nature. For example, "[a] person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be . . . (e) Placed in a situation to be sexually abused . . . ."[11] Our point in *Rocha*, however, was that the child abuse charges there (outside of the charge involving the alleged victim of the sexual assault charge) all involved purely physical conduct, with no sexual purpose.[12] But here, each charge, whether sexual assault or child abuse, was sexual in nature. And that is a critical distinction.

[5] The next question is whether the otherwise proper joinder prejudiced Knutson.[13] A defendant opposing joinder of charges has the burden of proving prejudice.[14]

We recently pointed out in *State v. Foster*[15] that Fed. R. Crim. P. 14(a) is the federal equivalent of § 29-2002(3). Like § 29-2002(3), rule 14(a) permits a federal court to order separate trials for charged offenses or codefendants if it appears that joinder will prejudice either party. We concluded that because of the similarities between rule 14(a) and § 29-2002(3), we will look to federal case law for guidance in determining when severance should be granted.[16]

In *Foster*, the defendant argued that he was prejudiced by the court's refusal to order a separate trial for his codefendant. We stated that under rule 14(a), to prevail on a severance argument, a defendant "'must show "compelling, specific, and actual prejudice from [the] court's refusal to grant the motion to sever."'"[17] That is, "'a defendant must show that the

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[11] § 28-707(1).

[12] See *Rocha, supra* note 7.

[13] See *Schroeder, supra* note 1.

[14] See *State v. Garza*, 256 Neb. 752, 592 N.W.2d 485 (1999).

[15] *State v. Foster*, 286 Neb. 826, 839 N.W.2d 783 (2013).

[16] See *id.*

[17] *Id.* at 837, 839 N.W.2d at 795, quoting *U.S. v. Driver*, 535 F.3d 424 (6th Cir. 2008).

joint trial caused him such compelling prejudice that he was deprived of a fair trial.'"[18] Finally, we stated that even when the risk of prejudice is high, a court's limiting instructions "'often will suffice to cure any risk of prejudice.'"[19]

Federal courts apply the same standards to review a court's order overruling a request to sever charged offenses. Generally, the defendant must show that the court's refusal to sever the offenses caused severe and specified prejudice in his or her trial, not merely a better chance of acquittal in separate trials.[20] Moreover, "'absent a showing of substantial prejudice, spillover of evidence from one [count] to another does not require severance.'"[21]

[6] The Eighth Circuit has stated that "'[s]evere prejudice occurs when a defendant is deprived of an *appreciable* chance for an acquittal, a chance that [the defendant] would have had in a severed trial.'"[22] But it also applies a "'strong presumption against severing properly joined counts.'"[23] As we have previously held, prejudice is not shown if evidence of one charge would have been admissible in a separate trial of another charge.[24] Additionally, federal courts hold that prejudice usually does not occur from joined charges if the evidence is sufficiently simple and distinct for the jury to easily separate evidence of the charges during deliberations. This is particularly true when the trial court specifically instructed the jury to separately consider the evidence for

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[18] *Id.*, quoting *U.S. v. Hill*, 643 F.3d 807 (11th Cir. 2011).

[19] *Id.* at 838, 839 N.W.2d at 796, quoting *Zafiro v. United States*, 506 U.S. 534, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993).

[20] See, *U.S. v. Davis*, 724 F.3d 949 (7th Cir. 2013); *U.S. v. Riley*, 621 F.3d 312 (3d Cir. 2010); *U.S. v. Saadey*, 393 F.3d 669 (6th Cir. 2005). See, also, *United States v. Lane*, 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986).

[21] *U.S. v. Hang Le-Thy Tran*, 433 F.3d 472, 478 (6th Cir. 2006).

[22] *U.S. v. Garrett*, 648 F.3d 618, 625-26 (8th Cir. 2011) (emphasis supplied).

[23] *Id.* at 626.

[24] See, e.g., *Schroeder, supra* note 1.

each offense.[25] We agree with this reasoning and have previously applied it.[26]

Here, we need not consider whether the evidence of each charge would have been admissible in separate trials. The evidence supporting each charge was simple and distinct from the evidence of other offenses. In other words, the jury could separate the charges and associated evidence, without combining evidence of other charges to find guilt on a charge that it would not have found if the court had ordered separate trials. Moreover, the judge specifically instructed the jury that it was to keep the charges separate and come to a separate decision regarding each charge. Absent evidence to the contrary, a jury is presumed to follow its instructions.[27] But most important, here there is more than simply a presumption that the jury followed its instructions; the record shows that it actually did do so. The jury found Knutson guilty of the charges involving E.A., but acquitted him of the charges involving the other three girls. Because the jury's verdicts show that it actually separated the evidence and offenses, Knutson has not shown prejudice from the joinder.[28]

2. Motion to Suppress

Knutson argues that the court erred in denying his motion to suppress his cell phone records. Knutson argues that he had a reasonable expectation of privacy in the records and that the State violated his constitutional rights by obtaining the records by subpoena. Knutson also argues that the State's use of subpoenas violated Nebraska statutory law. We conclude, however, that Knutson had no reasonable expectation of privacy in the

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[25] See, *U.S. v. Jimenez*, 513 F.3d 62 (3d Cir. 2008); *Closs v. Leapley*, 18 F.3d 574 (8th Cir. 1994); *Unites States v. Halper*, 590 F.2d 422 (2d Cir. 1978); *Robinson v. United States*, 459 F.2d 847 (D.C. Cir. 1972).

[26] See *Lewis, supra* note 8 (citing *State v. Nance*, 197 Neb. 95, 246 N.W.2d 868 (1976), *disapproved on other grounds, State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990)).

[27] See *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[28] See, *Jimenez, supra* note 25; *United States v. Hastings*, 577 F.2d 38 (8th Cir. 1978).

records and therefore no Fourth Amendment claim. We also conclude that regardless whether the State violated statutory law, suppression was not an available remedy because there was no constitutional interest at stake and the statutes themselves did not provide for it.

(a) Standard of Review

[7] In reviewing a trial court's ruling on a motion to suppress evidence based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review.[29] 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.[30]

(b) Analysis

[8] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.[31] But Knutson has not raised the Nebraska Constitution here. His claim is that the county attorney's subpoena of his cell phone calls and text messages violated the Fourth Amendment to the U.S. Constitution.

[9,10] The Fourth Amendment's protections are implicated whenever state action intrudes on a citizen's reasonable expectation of privacy.[32] "'Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'"[33]

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[29] *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014).

[30] *Id.*

[31] *State v. Matit, ante* p. 163, 846 N.W.2d 232 (2014).

[32] See, e.g., *California v. Ciraolo*, 476 U.S. 207, 106 S. Ct. 1809, 90 L. Ed. 2d 210 (1986); *In re Interest of Corey P. et al.*, 269 Neb. 925, 697 N.W.2d 647 (2005).

[33] *United States v. Jacobsen*, 466 U.S. 109, 123 n.22, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

We first clarify that the cell phone records in evidence comprise billing information and toll records,[34] detailing the destination number and times for calls or text messages that Knutson sent or the source number and times for calls and text messages that he received. We acknowledge that the subpoenas were broad enough to obtain the contents of Knutson's communications, but the record does not include such evidence or show that the State received this information.

So, in arguing that the county attorney could not obtain these records through a subpoena, Knutson relies on cases that are distinguishable. We disagree that this issue is controlled by cases involving a warrantless search of a person's cell phone itself to obtain call logs or content information,[35] or cases in which the prosecution subpoenaed the contents of a suspect's communications.[36]

[11] Instead, the issue is governed by *Smith v. Maryland*.[37] There, the U.S. Supreme Court held that law enforcement officers do not need a warrant to have a telephone company install a pen register to record the numbers dialed from a person's telephone because it is not a search under the Fourth Amendment. That is, because pen registers disclose only the telephone numbers dialed and customers largely know that the telephone company keeps these records, a person has no subjective expectation of privacy in the records of the numbers dialed—as distinguished from the content of the communications. So, under the Fourth Amendment, a warrant is not required to obtain telephone billing and toll records because obtaining them by subpoena does not constitute a search.[38]

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[34] See *U.S. v. Green*, 698 F.3d 48 (1st Cir. 2012).

[35] See, *U.S. v. Gomez*, 807 F. Supp. 2d 1134 (S.D. Fla. 2011); *U.S. v. Quintana*, 594 F. Supp. 2d 1291 (M.D. Fla. 2009); *State v. Smith*, 124 Ohio St. 3d 163, 920 N.E.2d 949 (2009).

[36] See *State v. Clampitt*, 364 S.W.3d 605 (Mo. App. 2012).

[37] *Smith v. Maryland*, 442 U.S. 735, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

[38] See, e.g., *U.S. v. Moody*, 664 F.3d 164 (7th Cir. 2011); *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010); *State v. Marinello*, 49 So. 3d 488 (La. App. 2010); *State v. Johnson*, 340 Or. 319, 131 P.3d 173 (2006).

Alternatively, Knutson argues that the county attorney did not comply with Neb. Rev. Stat. § 86-2,106 (Reissue 2008) in subpoenaing his cell phone records. Section 86-2,106 is one of several statutes under the heading "Intercepted Communications."[39] Section 86-2,106 sets out the requirements for obtaining from a service provider the stored contents of electronic communications or its noncontent records.

Under § 86-2,106, subsection (1) requires a government entity to present a warrant to obtain the contents of electronic communications that the provider has stored for 180 days or less. Subsection (3)(a)(ii) provides that absent a subscriber's consent, a service provider may disclose noncontent records to a government entity only when presented with a court order, warrant, or administrative subpoena. Knutson argues that a county attorney is not a state agency and cannot issue an administrative subpoena.

Knutson notes that in 2008, the Legislature amended Neb. Rev. Stat. § 81-119 (Reissue 2008) to provide that state agencies cannot use their subpoena power for criminal investigations.[40] He recognizes that in the same bill, the Legislature amended § 86-2,112, as a compromise, to permit the attorney general or a county attorney to "require the production" of the following items: "books, papers, documents, and tangible things which constitute or contain evidence relevant or material to the investigation or enforcement of the laws of this state when it reasonably appears that such action is necessary and proper." But he argues that the Legislature did not amend § 86-2,106. Because § 86-2,106 is more specific to the production of electronic communication records than § 86-2,112, he contends that § 86-2,112 does not permit a county attorney to issue an investigative subpoena to require the production of these records. He contends that through § 86-2,106, the Legislature created an expectation of privacy in these records.

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[39] See Neb. Rev. Stat. §§ 86-271 to 86-2,115 (Reissue 2008 & Cum. Supp. 2012).

[40] See 2008 Neb. Laws, L.B. 952.

[12] But even if Knutson were correct, the violation of a state law restricting searches is insufficient to show a Fourth Amendment violation.[41] The analysis turns on whether society recognizes an expectation of privacy deserving of "'the most scrupulous protection from government invasion.'"[42] Notably, § 86-2,106(3)(a)(i) permits a service provider to disclose non-content records to any person except a governmental entity. This provision seriously undercuts Knutson's claim that the statute creates an expectation of privacy in such records. More important, under *Smith*, Knutson cannot show a societal expectation of privacy in the records.

[13] Absent a constitutional violation, a court will normally suppress evidence obtained in violation of a rule or statute only if the governing law provides that remedy.[43] It is true that § 86-2,115 provides for the suppression of the "contents of any intercepted wire or oral communication," and any evidence derived therefrom, "if the disclosure of that information would be in violation of [the intercepted communications statutes]." But we are not dealing with intercepted communications[44] or the *contents* of any communications. No other intercepted communications statute suppresses evidence for a violation of its provision. So, even if Knutson correctly argues that a county attorney must comply with § 86-2,106, the Legislature provided no remedy for a violation. In keeping with the general principle that courts do not lightly impose a judicial exclusionary remedy,[45] we decline to find suppression appropriate in these circumstances.

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[41] See *California v. Greenwood*, 486 U.S. 35, 108 S. Ct. 1625, 100 L. Ed. 2d 30 (1988).

[42] *Id.*, 486 U.S. at 43.

[43] See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 126 S. Ct. 2669, 165 L. Ed. 2d 557 (2006); *U.S. v. Abdi*, 463 F.3d 547 (6th Cir. 2006); *U.S. v. Thompson*, 936 F.2d 1249 (11th Cir. 1991); *Upshur v. State*, 208 Md. App. 383, 56 A.3d 620 (2012).

[44] See § 86-280.

[45] See *Sanchez-Llamas, supra* note 43.

3. Sufficiency of the Evidence

Knutson argues that the evidence was insufficient to convict him of child abuse and child enticement for an illegal sexual purpose through the use of an electronic communication device. We disagree.

(a) Standard of Review

[14] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: We do not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[46]

(b) Analysis

(i) Child Enticement Conviction

Regarding the child enticement conviction, § 28-320.02(1), in relevant part, provides the following:

> No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of an electronic communication device as that term is defined in section 28-833, to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320.

The State's operative information alleged that between January 1 and November 19, 2010, Knutson used an electronic communication device to solicit, coax, lure, or entice E.A., a child under the age of 16 years, to engage in an act which would constitute a violation of Neb. Rev. Stat. §§ 28-319, 28-319.01, 28-320.01, or 28-320(1) and (2) (Reissue 2008 & Cum. Supp. 2012). But the jury was instructed to find

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[46] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

whether Knutson had enticed E.A. to engage in acts that would constitute the crime of first degree sexual assault. The crime of first degree sexual assault, as relevant here, is codified in § 28-319.01(1)(b):

> (1) A person commits sexual assault of a child in the first degree:
>
> . . . .
>
> (b) When he or she subjects another person who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older.

Knutson agrees the State is not required to show he sexually penetrated a child under the age of 16 years to prove a violation of § 28-320.02, the child enticement statute. But he argues that the State cannot prove he violated § 28-320.02 unless it shows that he had a specific plan to sexually penetrate E.A. before she turned 16 years of age in December 2010:

> [I]f the plan was to make love after she turned 16 then there is no violation of 28-319 and therefore no violation of 28-320.02. Merely discussing, in vague terms, the desire to "make love" at some unspecified time in the future does not rise to the level of conduct necessary to prove an intent to violate 28-319[.01].[47]

[15] The State counters that the evidence showed Knutson had explicit conversations with E.A. about acts which constituted sexual penetration and that E.A. had agreed they should "take it to the next level," meaning that they should engage in sexual penetration. These conflicting arguments present a question of statutory interpretation, which we decide as a matter of law.[48]

[16-20] We give penal statutes a sensible construction, considering the Legislature's objective and the evils and mischiefs it sought to remedy.[49] Absent a statutory indication to the contrary, we give words in a statute their ordinary

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[47] Brief for appellant at 48-49.

[48] See *State v. Thacker*, 286 Neb. 16, 834 N.W.2d 597 (2013).

[49] *Id.*

meaning.[50] But we strictly construe penal statutes and do not supply missing words or sentences to make clear that which is indefinite or not there.[51] We will not apply a penal statute to situations or parties not fairly or clearly within its provisions.[52] Ambiguities in a penal statute are resolved in the defendant's favor.[53]

As relevant here, the conduct prohibited by § 28-320.02(1) is using an electronic communication device to knowingly "solicit, coax, entice, or lure" a child 16 years of age or younger "to engage in an act which would be in violation of" § 28-319.01. The verbs in this sentence all deal with the act of persuading—in this context, persuading someone 16 years of age or younger to perform a sexual act that is illegal under the specified statutes.

It is true that in two of our cases dealing with undercover officers posing as girls under the age of 16 years, the officers waited to arrest the defendant until he had arranged a meeting and attempted to meet the minor for illegal sexual activity.[54] But those cases do not show that a crime does not occur unless the defendant arranges a meeting with a minor and the contemplated sexual activity is illegal at that time. Knutson misinterprets our decision in *State v. Rung*[55] to support his position that the defendant must have specifically planned to sexually penetrate a minor before he or she turned 16 years of age.

In *Rung*, the defendant argued that § 28-320.02 was unconstitutionally overbroad because it criminalized enticing a child 16 years of age or younger to engage in sexual conduct, even if it would not be illegal for the person to engage in such conduct with the child. For example, he claimed that under

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[50] See *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[51] See *Thacker, supra* note 48.

[52] *Id.*

[53] *Id.*

[54] See, *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. Pischel*, 277 Neb. 412, 762 N.W.2d 595 (2009).

[55] See *Rung, supra* note 54.

§ 28-320.02, a 19-year-old could be prosecuted for enticing a 16-year-old to engage in sexual penetration, even though the conduct would only be illegal if the child were under the age of 16 years. We rejected this argument:

> By its terms, § 28-320.02 specifically refers to enticing a child "to engage in an act which would be in violation of section 28-319, 28-319.01, or 28-320.01 or subsection (1) or (2) of section 28-320." Therefore, one can violate § 28-320.02 only if the contemplated sexual conduct would be in violation of one of the specified statutes. If one uses a computer to entice a person 16 years of age or younger to engage in an act that would not be in violation of any of the specified statutes, then that person has not violated § 28-320.02.[56]

But the defendant in *Rung* did not raise the argument presented here. And nothing in this passage implies that we will look to the legality of the defendant's contemplated sexual act at the time that he or she arranged a meeting with the child. More important, nothing in § 28-320.02 requires the State to prove that the defendant took a substantial step toward committing an illegal sexual act. It is not an attempt statute.[57] Instead, the statute unambiguously criminalizes the persuasion itself. Because the statute is focused on persuading a child to engage in an illegal sexual act, the relevant time for determining whether the encouraged sexual act is illegal will generally be when the defendant was engaged in the persuasion. But depending upon the substance of the persuasion, this may not always be true. Here, the facts do not warrant requiring further proof of the defendant's intent to commit an illegal sexual act.

Viewing the evidence in the light most favorable to the State, the record shows that Knutson discussed sex multiple times with E.A. and asked her about her sexual preferences. She further stated that they both agreed, in person and over the telephone, they wanted "to take it to the next level." E.A. testified that the "next level" meant to "make love."

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[56] *Id.* at 861-62, 774 N.W.2d at 629.

[57] Compare Neb. Rev. Stat. § 28-201 (Reissue 2008).

E.A. stated that her conversations with Knutson about taking it to the next level occurred near the end of her contacts with him. She testified that her "phone contact" with Knutson ended sometime before she was interviewed by police officers, which occurred on November 19, 2010. When asked whether Knutson had explained why he stopped his telephone contacts, E.A. said Knutson told her many things, including that he had brain cancer. An exhibit documenting her telephone contacts with Knutson shows that the calls dropped off dramatically in October 2010.

This evidence was sufficient to support a finding that Knutson had ended his relationship with E.A. by the time she was interviewed by police officers. Because E.A. testified that their conversations about taking it to the next level occurred before the relationship ended, the jurors could rationally infer that while E.A. was 15 years of age, Knutson encouraged her to engage in sexual penetration with him and that she agreed to do so. We conclude that the evidence was sufficient to support Knutson's conviction under § 28-320.02.

(ii) Child Abuse Conviction

The jury instruction for the child abuse charge permitted the jury to find Knutson guilty of child abuse if it found that he had knowingly and intentionally caused or permitted E.A. to be placed in a situation (1) that endangered her mental health; (2) to be sexually exploited by allowing, encouraging, or forcing her to solicit for or engage in obscene or pornographic photography, films, or depictions; or (3) to be sexually abused.

The jury instruction reflects the State's alternative theories of child abuse, which correspond, respectively, to subsections (a), (d), and (e) of § 28-707(1). Knutson did not object to this instruction at trial. The jury could convict if it found Knutson had committed any of the three acts prohibited by § 28-707. So the judgment must be affirmed if it was sufficient to support any of the State's three theories of guilt.[58]

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[58] See *State v. Eagle Bull*, 285 Neb. 369, 827 N.W.2d 466 (2013).

[21] We conclude that the evidence was sufficient to support a finding under § 28-707(1)(a) that Knutson placed E.A. in a situation that endangered her mental health. We disagree the State "presented absolutely no evidence" in that regard, or that the State's claim "demonstrates the lengths to which [it] will stretch logic and credulity to somehow turn [Knutson's] actions into criminal behavior."[59] In interpreting a different subsection of § 28-707(1), we recently stated that "[t]riers of fact may apply to the subject before them that general knowledge which any person must be presumed to have."[60] We believe that it is within the general knowledge of triers of fact that a sexually charged relationship between a young, 15-year-old girl and a man in his 30's, who holds a position of trust in the girl's life, puts that girl's mental health at risk. Because the evidence was sufficient to show a violation of § 28-707(1)(a), we do not consider whether it was sufficient to support the State's alternative theories of guilt.

V. CONCLUSION

We find no merit to Knutson's assigned errors regarding the court's joining the offenses for a single trial and refusing to suppress his cell phone records. And we conclude that the evidence was sufficient to support his convictions for child enticement and child abuse.

AFFIRMED.

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[59] Brief for appellant at 46.

[60] *Eagle Bull, supra* note 58, 285 Neb. at 376-77, 827 N.W.2d at 472.

MILLER-LERMAN, J., concurring.

I concur in the result in this case, but I respectfully disagree with the majority's reading of Neb. Rev. Stat. § 28-320.02 (Cum. Supp. 2012). Under that statute, there are at least two timing issues, but in my view, the majority conflates them into one.

The most obvious timing question is: When did the enticing occur? I agree with the majority that to be guilty under

§ 28-320.02, the enticing occurs when the enticement to participate in a contemplated illegal act is communicated.

Another timing question is: When is the contemplated act that is the subject of the enticing to be performed? This timing question has obvious relevance in the present case because after E.A. turned 16 years of age, the performance of the act Knutson was proposing would not have been an illegal act under Neb. Rev. Stat. § 28-319.01(1)(b) (Cum. Supp. 2012) as charged.

As I read it, to be guilty of a violation of § 28-320.02, the act that is the subject of the enticing communication must be illegal on the day of its contemplated performance, not on the day of the communication of the desire to perform an act. It is an element of § 28-320.02 that the enticing be of an illegal sexual act, not merely a sexual act. By its terms, § 28-320.02 criminalizes enticing an illegal act to be performed in futuro.

The majority states that "the relevant time for determining whether the encouraged sexual act is illegal will generally be when the defendant was engaged in the persuasion." As I understand it, the majority interprets § 28-320.02 to mean that in determining whether the encouraged sexual act is an illegal act, the presumption will be made that the act would be performed on the date of the communication. I do not believe the presumption created by the majority is warranted by the plain language of the statute, and I am not inclined to create such presumption. Instead, I suggest that the proper analysis is as follows:

Consistent with *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009), the contemplated act must be illegal on the day the act will have been performed, but the enticing or persuading offense under § 28-320.02 occurs and is completed on the day the enticing or persuading is communicated. Whether the contemplated act will be illegal when performed depends on all the evidence, direct and indirect, relevant to the timing of the act. The act's illegality is as of the day of contemplated performance, not the day of its communication. In the present case, the evidence was sufficient to submit the case to

the jury, and more particularly, there was sufficient evidence from which a reasonable jury could find that the contemplated act would be illegal on the day upon which it would have been performed.

For the foregoing reasons, although my analysis of the interpretation of § 28-320.02 differs from the majority, I concur.

JAMES E. ROBERTSON ET AL., APPELLANTS, V.
JACOBS CATTLE COMPANY, A PARTNERSHIP,
ET AL., APPELLEES.
852 N.W.2d 325

Filed August 15, 2014. No. S-13-860.

1. **Partnerships: Accounting: Appeal and Error.** An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Partnerships.** The interpretation of a partnership agreement presents a question of law.
5. **Appeal and Error.** An appellate court reviews questions of law independently of the trial court's decision.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Reversed and remanded with direction.

Patrick J. Nelson, of Law Office of Patrick J. Nelson, L.L.C., for appellants.

David A. Domina and Megan N. Mikolajczyk, of Domina Law Group, P.C., L.L.O., and Gregory G. Jensen for appellees.

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

HEAVICAN, C.J.

INTRODUCTION

Four of the partners in the Jacobs Cattle Company partnership sought dissolution and liquidation of the partnership. The remaining partners filed a cross-claim seeking judicial dissociation of the four partners instead of dissolution. The distinction between dissolution and dissociation is discussed later in this opinion. The district court dissociated the four partners and ordered the partnership to buy out their interests.

In a previous appeal,[1] we held that judicial dissociation was proper, but determined that the district court erred in calculating the proper distributions to buy out the dissociated partners. On remand, after an evidentiary hearing, the district court determined that the profit from the hypothetical capital gain should be credited to the partners' capital accounts, rather than their income accounts. Due to the account distributions required under the partnership agreement, crediting the capital gain to the dissociated partners' capital accounts results in a lower buyout amount than crediting the capital gain to the partners' income accounts. The dissociated partners now appeal the judgment on remand, arguing that the district court again erred in determining what they are owed by the partnership. We reverse, and remand with direction.

FACTUAL BACKGROUND

Jacobs Cattle Company is a family-owned partnership in the farming and livestock business. The partnership was formally organized on January 1, 1979. Seven partners of the Jacobs Cattle Company—Dennis Jacobs, Duane Jacobs, Carolyn Sue Jacobs, James E. Robertson, Patricia Robertson, Ardith Jacobs as trustee of the Leonard Jacobs Family Trust, and Ardith Jacobs as trustee of the Ardith Jacobs Living Revocable Trust—entered into the operative partnership agreement on June 19, 1997.

The partnership agreement provides that each partner shall have an individual capital account and an individual income account. The capital accounts are to be proportional to the

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[1] *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

partners' contributions. Net profits and net losses are to be distributed to the partners' income accounts in proportion to the partners' managing votes. As per the partnership agreement, Ardith and Dennis are each entitled to two votes, while the other partners each have one vote. The partnership agreement provides that the meaning of "net profits" and "net losses" shall be determined by generally accepted accounting principles.

Underlying Lawsuit

In July 2007, appellants—James, Patricia, Duane, and Carolyn Sue—sought dissolution and liquidation of the partnership. Appellees—the partnership, Ardith, and Dennis—filed an answer and counterclaim seeking dissociation of the four partners/appellants. After a bench trial, the district court dissociated the four partners and ordered the partnership to buy out their interests. The court determined the liquidated value of the partnership as of September 20, 2011, to be $5,212,015. Appellees filed a buyout proposal suggesting that each of the appellants be paid according to his or her capital account ownership, or 5.33 percent of the partnership's liquidated value. Appellants objected to appellees' buyout proposal and submitted an alternative buyout proposal requesting that each of the appellants be paid according to his or her income accounts, or 12.5 percent of the partnership's liquidated value. The district court refused to hear evidence on appellants' objections and ordered appellants to be paid 5.33 percent of the liquidated value.

First Appeal

As discussed in our previous opinion in this case,[2] prior to adoption of the Uniform Partnership Act of 1998,[3] dissolution and winding up of an at-will partnership was required upon any partner's expressed will to dissolve the partnership.[4]

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[2] See *Robertson, supra* note 1.

[3] Neb. Rev. Stat. §§ 67-401 to 67-467 (Reissue 2009).

[4] See, Neb. Rev. Stat. § 67-331 (Reissue 2003); *Shoemaker v. Shoemaker*, 275 Neb. 112, 745 N.W.2d 299 (2008).

The Uniform Partnership Act of 1998, however, sought to avoid mandatory dissolution, because the partnership was to be viewed as an entity distinct from its partners.[5] Under our Uniform Partnership Act of 1998, a partner who ceases to do business with the partnership may be dissociated while the partnership continues.[6]

In our previous opinion, we held that the district court did not err in determining that dissociation of appellants, rather than dissolution of the partnership, was the appropriate remedy in this case. We concluded, however, that the district court erred in its calculation of the buyout distributions in connection with the dissociation. We determined that because this was a dissociation, and not a dissolution, the buyout of the dissociated partners was governed by §§ 67-434(2) and 67-445(2).

In our previous opinion, we stated that under § 67-434(2), the buyout distributions were to be determined "based upon the assumption that the partnership assets, here the land, were sold on the date of dissociation, even though no actual sale occurs."[7] We further determined that "the capital gain which would be realized upon a hypothetical liquidation of the partnership's land on the date of dissociation, (as required by § 67-434(2)) would constitute 'profits' within the meaning of the phrase in § 67-445(2)."[8] Section 67-445(2) requires that "profits . . . that result from the liquidation of the partnership assets must be credited . . . to the partners' accounts."

We noted that there remained a question as to how such "profits" should be credited to the partners' accounts under the partnership agreement. Appellants contended that the profits should be distributed pursuant to paragraph 11 of the partnership agreement, which states that "net profits . . . as determined by generally accepted accounting principles" are to be distributed to the partners in certain percentages. We

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[5] *Shoemaker, supra* note 4.

[6] See §§ 67-431 to 67-433.

[7] *Robertson, supra* note 1, 285 Neb. at 877, 830 N.W.2d at 205.

[8] *Id.* at 877, 830 N.W.2d at 206.

concluded that the district court erred in refusing to consider evidence regarding whether capital gains from the hypothetical sale of the land were "net profits . . . as determined by generally accepted accounting principles" and therefore distributable to the partners based on paragraph 11 of the partnership agreement. We therefore remanded the cause "with directions for the court to reconsider the buyout calculations after receiving appellants' evidence on this issue."[9]

Hearing on Remand

On remand, the district court received evidence, including expert testimony offered by both appellants and appellees. The district court determined that the capital gain did not constitute "net profits" under the partnership agreement and held that the gain should therefore be credited to the partners' accounts in accordance with their capital percentages, rather than the income percentages pursuant to paragraph 11 of the partnership agreement. Because the dissociated partners' capital percentages were less than their income percentages—5.33 percent as opposed to 12.5 percent—this resulted in a lower buyout distribution to the dissociated partners.

The district court based its decision on the testimony of appellees' experts, which the court stated it found to be more rational. On direct examination, appellees' first expert testified that under generally accepted accounting principles, one "would not recognize any gain or income until an actual event of a sale [of property]," and that therefore, the buyout distributions should be determined based on the dissociated partners' capital percentages. On cross-examination, the expert reiterated that his analysis was based on the fact that no actual sale of partnership property had occurred, and it was his opinion that "until and unless there is an actual sale there is no profit." Appellees' second expert testified that he had listened to the testimony of the first expert and that his answers to the questions would have been substantially the same.

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[9] *Id.* at 878, 830 N.W.2d at 206.

ASSIGNMENTS OF ERROR

Appellants assert, restated and summarized, that the district court erred in determining that the capital gain profit from a hypothetical sale of the partnership's land should be credited to the partners' capital accounts.

STANDARD OF REVIEW

[1,2] An action for a partnership dissolution and accounting between partners is one in equity and is reviewed de novo on the record.[10] On appeal from an equity action, an appellate court resolves questions of law and fact independently of the trial court's determinations.[11] But when credible evidence is in conflict on material issues of fact, we consider and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.[12]

[3-5] Statutory interpretation presents a question of law.[13] The interpretation of a partnership agreement presents a question of law.[14] An appellate court reviews questions of law independently of the trial court's decision.[15]

ANALYSIS

Appellants assign eight errors of the district court, but they can be summarized as asserting that the district court erred in calculating the distributions required for the buyout.

We conclude that the district court erred in finding that the hypothetical capital gain did not constitute "net profits" under the partnership agreement. The district court erred when it relied on appellees' experts' testimony, because that testimony was based on the fact that there was not an actual sale of the partnership property. As set forth in our prior opinion, under § 67-434, the buyout amount was to be calculated by assuming

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[10] *Robertson, supra* note 1; *Shoemaker, supra* note 4.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *McKinney v. Okoye*, 282 Neb. 880, 806 N.W.2d 571 (2011).

that the partnership assets were liquidated on the date of dissociation and that the profits from such liquidation were credited to the partners' accounts.

The question on remand in this case was whether, assuming the land was sold on the date of dissociation, the capital gain that would have resulted from such a sale was "net profit" as determined by generally accepted accounting principles and therefore would have been distributed in accordance with paragraph 11 of the partnership agreement. Appellees' experts' testimony rejected this premise by stating that no gain or income would have been recognized, because no actual sale took place. Appellees' experts reasoned that because there was no actual sale, and therefore no income, the distribution should be based on capital percentages rather than income percentages. However, this conclusion was based on the erroneous premise that no actual sale occurred. Appellees' experts' analysis ignored the statutory requirement that the buyout distributions be calculated based on the assumption that the assets had been sold and the resulting profits distributed to the partners.

Because we conclude that the district court erred when it relied on appellees' experts' testimony, we consider whether appellants' expert's testimony provided a proper basis to calculate the buyout distributions on remand. We conclude that it does.

Appellants' expert witness testified that under generally accepted accounting principles, the term "net profits" as used in paragraph 11 of the partnership agreement would include capital gain from the sale of land. Based on this evidence, we find that capital gain from the hypothetical sale of land should be distributed to the partners in accordance with paragraph 11 governing the distribution of "net profits."

We note that appellants' expert also testified regarding concepts such as "derecognition" and "full accrual" as they relate to whether and when profit is recognized in full when real estate is sold. Appellees and their experts criticized such testimony in various respects, particularly on the basis that this partnership uses the cash method of accounting rather than the accrual method of accounting. However, the testimony

regarding whether and when profit from the sale of land was to be recognized was not necessary to the determination of the issue for which we remanded this cause.

Based on our prior opinion and the governing partnership statutes cited therein, the buyout distributions were to be calculated based on the assumption that the partnership assets had been liquidated and the profits from such liquidation were credited to the partners. "Liquidated" in this sense generally means converted into cash.[16] Therefore, the premise upon which the buyout amount was to be calculated assumed that the sale had been completed and that the capital gain was to be recognized and distributed on the date of dissociation. Thus, for purposes of calculating the buyout distributions, there was not a question as to whether the sale had been completed and whether a capital gain was to be recognized.

The only question on remand was how the capital gain was to be distributed among the partners. Specifically, the question was whether the capital gain was to be included in "net profits" and distributed pursuant to paragraph 11. The testimony regarding derecognition and full accrual was not necessary to deciding that question and does not affect our determination that appellants' expert's testimony supported appellants' contention that capital gain from the sale of land should have been included in "net profits" distributable pursuant to paragraph 11.

CONCLUSION

For the foregoing reasons, we reverse the decision of the district court and remand the cause with direction to enter an order which calculates a buyout distribution by adding 12.5 percent of the profit received from a hypothetical sale of the partnership's assets on September 20, 2011, to the value of each dissociated partner's capital account.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

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[16] Black's Law Dictionary 1072 (10th ed. 2014).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE
OF THE NEBRASKA SUPREME COURT, RELATOR, V.
JOHN BLAKE EDWARDS, RESPONDENT.
852 N.W.2d 703

Filed August 22, 2014. No. S-12-609.

Original action. Judgment of suspension. Order of reinstatement.

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

PER CURIAM.

INTRODUCTION

This case is before the court on the conditional admission filed by John Blake Edwards, respondent, on March 11, 2014. The court accepts respondent's conditional admission and enters an order of an 18-month suspension retroactive to the date of respondent's temporary suspension, September 13, 2012, and a further order that respondent be automatically reinstated without further application to the court.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska in 1991. On September 19, 2011, a "Second Amended Information" was filed in the district court for Keith County, charging respondent with three counts of theft by unlawful taking in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 2008), a Class III felony, related to the operation of a pretrial diversion program for Keith County. Counts I and II of the "Second Amended Information" concerned payments from the pretrial diversion program's funds to respondent's spouse for work performed and other expenditures. Count III stated that "'[o]n or about the 20th day of January, 2009, [respondent] did take or exercise control over movable property of another with the intent to deprive him or her thereof, to-wit: money belonging to Keith County, Nebraska, with a value of more than $1,500.00.'" Count III involved a payment that

respondent had made to a nonprofit youth organization from the pretrial diversion program's funds.

Respondent was tried on the three counts, and on June 22, 2012, he was found guilty of Count III. On August 15, respondent was sentenced to 36 months' community-based probation, which included 9 months' house arrest. Respondent was ordered to complete 1,200 hours of community service, to make restitution in the amount of $3,691.09, to obtain psychological counseling, and to complete such cognitive behavior modification programs as directed by the probation office. As a result of his conviction, respondent was temporarily suspended by this court on September 13 and complied with Neb. Ct. R. § 3-316 (rev. 2014) on October 12. Respondent has not been reinstated.

Respondent appealed his conviction, and on August 2, 2013, this court reversed his conviction and remanded the cause for a new trial. See *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013). On December 12, as a result of a plea agreement, the State filed its "Fourth Amended Information" containing one count against respondent. Count I of the "Fourth Amended Information" stated that respondent had violated Neb. Rev. Stat. § 28-924 (Reissue 2008), official misconduct, a Class II misdemeanor.

Pursuant to the plea agreement, respondent pled guilty to Count I contained in the "Fourth Amended Information." In support of respondent's plea, the State and respondent agreed to submit to the court a written "Factual Basis" for the plea. The district court accepted respondent's plea, and on February 14, 2014, respondent was sentenced to a fine of $500 and 30 days in jail with work release. He was ordered to pay the costs related to the proceeding.

On March 11, 2014, with the agreement of the Counsel for Discipline, respondent filed a conditional admission with this court, pursuant to Neb. Ct. R. § 3-313 (rev. 2014) of the disciplinary rules, in which he conditionally admitted that he violated Neb. Ct. R. of Prof. Cond. § 3-508.4(b) (misconduct). Respondent knowingly chose not to challenge or contest the truth of the matters conditionally admitted and

waived all proceedings against him in connection therewith in exchange for an 18-month suspension, retroactive to the date of his temporary suspension, September 13, 2012, and that he be automatically reinstated without further application to this court.

The proposed conditional admission was approved and was accompanied by a declaration stating that respondent's proposed discipline is appropriate under the circumstances.

Upon due consideration, we approve the conditional admission and order an 18-month suspension retroactive to the date of respondent's temporary suspension, September 13, 2012. We further order that respondent be automatically reinstated without further application to the court.

ANALYSIS

Section 3-313, which is a component of our rules governing procedures regarding attorney discipline, provides in pertinent part:

> (A) At any time prior to the Clerk's entering a Formal Charge against a Respondent on the docket of the Court, the Respondent may file with the Clerk a conditional admission of a Grievance or of a Complaint in exchange for a stated form of consent judgment of discipline as to all or a part of the Grievance or Complaint pending against him or her as determined to be appropriate by the Counsel for Discipline and the appropriate Committee on Inquiry; 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 conditionally admitted. We further determine that by his conduct, respondent violated conduct rule

§ 3-508.4(b). Respondent has waived all additional proceedings against him in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is ordered suspended for a period of 18 months retroactive to the date of his temporary suspension, September 13, 2012, and respondent is ordered automatically reinstated without further application to the court. Respondent is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323(B) of the disciplinary rules within 60 days after the order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF SUSPENSION.
ORDER OF REINSTATEMENT.

DANIEL HOPPENS, APPELLANT, V. NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

852 N.W.2d 331

Filed August 22, 2014. No. S-13-755.

1. **Administrative Law: Judgments: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. ____: ____: ____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments.** Whether a decision conforms to law is by definition a question of law.
4. **Judgments: Appeal and Error.** An appellate court determines questions of law independently of the lower court.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Revocation: Police Officers and Sheriffs: Jurisdiction.** An arresting officer's sworn report under Neb. Rev. Stat. § 60-498.01(2) (Cum. Supp. 2012) serves two functions essential to the administrative license revocation process: (1) It establishes a prima facie basis for revocation, and (2) it confers jurisdiction on the Department of Motor Vehicles.

6. **Drunk Driving: Arrests: Proof.** There are two components to the reasons for arrest which must be included in a sworn report: (1) driving or actual physical control of a motor vehicle and (2) doing so while under the influence of alcohol or drugs.
7. **Administrative Law: Jurisdiction: Drunk Driving: Proof.** Sworn reports which do not include factual reasons supporting the officer's suspicion that a person is driving or in actual physical control of a motor vehicle and doing so while under the influence are not sufficient to confer jurisdiction on the Department of Motor Vehicles.
8. **Drunk Driving: Statutes.** Nebraska's driving under the influence statutes do not apply to the operation or control of a motor vehicle on private property not open to public access.
9. **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.
10. ____: ____. An appellate court gives statutory language its plain and ordinary meaning, and the court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
11. ____: ____. An appellate court gives effect to all parts of a statute and avoids rejecting as superfluous or meaningless any word, clause, or sentence.
12. **Statutes.** A court will not read a meaning into a statute that is not warranted by the legislative language.
13. **Drunk Driving.** A sworn report under Neb. Rev. Stat. § 60-498.01(2) (Cum. Supp. 2012) does not need to state or support an inference that the individual arrested drove or controlled a motor vehicle on property open to public access.

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

Thomas Petersen, of Petersen Law Office, for appellant.

Jon Bruning, Attorney General, and Milissa Johnson-Wiles for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

A police officer arrested Daniel Hoppens after he was found in a motor vehicle parked in an Omaha Police Department parking lot. The arresting officer observed signs of intoxication and asked Hoppens to perform a chemical test. Hoppens refused, and following an administrative license revocation

(ALR) hearing, the Nebraska Department of Motor Vehicles (DMV) revoked his driving privileges for 1 year and the district court for Douglas County affirmed the revocation. On appeal, Hoppens argues that the DMV did not have jurisdiction to revoke his license because the sworn report submitted by the arresting officer did not state that the motor vehicle was on property open to public access. Finding no error, we affirm.

BACKGROUND

Omaha police officer Scott Shymkewicz was "working a DUI mini grant" on March 10, 2013. As he was fueling his cruiser at an Omaha Police Department parking lot in downtown Omaha, he noticed a vehicle without police markings in the lot. Shymkewicz approached the vehicle and found Hoppens in the driver's seat. Shymkewicz observed that Hoppens had bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath. Hoppens told Shymkewicz that "he had just driven into the lot" and was waiting for a friend to exit a nearby bar. Shymkewicz testified that the parking lot is private property and that signs posted on the lot warned it was for police use only. Although Shymkewicz did not observe the vehicle in motion, he concluded that Hoppens had driven the vehicle, because the engine was running and Hoppens said that he drove to the lot.

After Hoppens failed several field sobriety tests and an "aqua breath sensor test," Shymkewicz placed him under arrest and took him inside police headquarters. Shymkewicz testified that he then read the postarrest chemical test advisement form to Hoppens. In addition to a signature field for the "Advising Officer," the form contains a space for the signature of a "Witnessing Officer." Hoppens told Shymkewicz that there needed to be a witnessing officer and refused to sign the form without one. Shymkewicz told Hoppens that it was not necessary for a witnessing officer, or even Hoppens himself, to sign the form, but Hoppens nevertheless declined to take a chemical test.

Shymkewicz drafted a "Sworn Report," which stated that Hoppens had been directed to take a chemical test and refused.

The report further stated that Shymkewicz arrested Hoppens as described in Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2012) and provided the following reasons for the arrest:

> HOPPENS was sitting in the driver's seat of his car with the keys in the ignition, engine running, and headlights on in the Omaha Police Dept. headquarters parking lot where a sign is posted prohibiting it. He admitted drinking a few sips of beer and showed signs of intoxication: bloodshot eyes, slurred speech, strong odor of alcoholic beverage on his breath. He showed impairment on field tests and failed an alco test.

On March 19, 2013, Hoppens filed a petition for an ALR hearing.

On April 5, 2013, an ALR hearing was held before the DMV. The hearing officer acknowledged that Hoppens, Shymkewicz, and the attorney representing the DMV all agreed that the parking lot was private property. However, the hearing officer found that she did not need to address the issue, "because the totality of the circumstances leading to [Hoppens'] arrest convinces her that [Hoppens] had to have been intoxicated and operating a motor vehicle prior to and at the time he drove into the lot." Because there was no evidence that anyone other than Hoppens operated the vehicle and he had to have traveled on public streets to reach the parking lot, the hearing officer found that "it must be assumed that [Hoppens] operated his vehicle on a public roadway while intoxicated prior to entering the lot." The hearing officer recommended that the director of the DMV revoke Hoppens' driver's license. The director adopted the findings and conclusions of the hearing officer and revoked Hoppens' driver's license for 1 year.

Hoppens filed a petition for review in the district court, arguing that he was on private property not open to public access and therefore not required to submit to a chemical test. The district court dismissed Hoppens' petition. The court found that "[w]hether the parking lot is private property not open to public access is a question of fact to be determined at trial" and that Shymkewicz' sworn report was "clearly sufficient" to confer jurisdiction on the DMV. The court also rejected

Hoppens' argument that, because the vehicle was on property not open to public access, the arresting officer lacked probable cause to arrest.

ASSIGNMENT OF ERROR

Hoppens assigns, restated, that the DMV erred in concluding it had jurisdiction to revoke his driving privileges, because the sworn report did not state or support an inference that he had operated a motor vehicle on property open to public access.

STANDARD OF REVIEW

[1-4] 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.[1] When reviewing an order of a district court under the act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2] Whether a decision conforms to law is by definition a question of law.[3] An appellate court determines questions of law independently of the lower court.[4]

ANALYSIS

Hoppens argues that the sworn report was insufficient to confer jurisdiction on the DMV. Specifically, Hoppens contends that a sworn report must at least support an inference that he was driving or in actual physical control of a motor vehicle on property open to public access. The DMV argues that its jurisdiction is not dependent on a statement of the vehicle's location in the sworn report. The following statutes guide our analysis.

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[1] *Underwood v. Nebraska State Patrol*, 287 Neb. 204, 842 N.W.2d 57 (2014).

[2] *Id.*

[3] See *id.*

[4] See *State v. Patton*, 287 Neb. 899, 845 N.W.2d 572 (2014).

Any person who operates a motor vehicle in Nebraska is deemed to have consented to submit to chemical tests to determine the concentration of alcohol in the blood, breath, or urine. Peace officers may direct any person arrested for suspicion of driving under the influence of alcohol to submit to a chemical test.[5] A driver who refuses to submit is subject to the ALR procedures found in Neb. Rev. Stat. §§ 60-498.01 to 60-498.04 (Cum. Supp. 2012).

The ALR process begins with a sworn report authored by the arresting officer. If the driver refuses to submit to a chemical test, § 60-498.01(2) provides:

> The arresting peace officer shall within ten days forward to the director a sworn report stating (a) that the person was arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest, (b) that the person was requested to submit to the required test, and (c) that the person refused to submit to the required test.

Section 60-6,197(2) applies to "any person arrested for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs." Unless the driver submits a petition to the director, revocation is automatic 15 days after the date of arrest.[6]

[5] An arresting officer's sworn report serves two functions essential to the ALR process. First, it establishes a prima facie basis for revocation.[7] Second, given the substantial role which the sworn report plays, it must, at a minimum, contain the information specified in the applicable statute to confer jurisdiction on the DMV.[8] Here, our focus is on the "reasons for such arrest" that must be included in the sworn report under § 60-498.01(2).

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[5] *Snyder v. Department of Motor Vehicles*, 274 Neb. 168, 736 N.W.2d 731 (2007).

[6] § 60-498.01(4).

[7] *Snyder, supra* note 5.

[8] *Murray v. Neth*, 279 Neb. 947, 783 N.W.2d 424 (2010); *Hahn v. Neth*, 270 Neb. 164, 699 N.W.2d 32 (2005).

We addressed the sufficiency of the reasons for arrest in a sworn report in *Betterman v. Department of Motor Vehicles*.[9] The sworn report in *Betterman* stated the following reasons for the driver's arrest: "'[R]eckless driving. Driver displayed signs of alcohol intoxication. Refused SFST and later breath test.'"[10] We explained that "[a]n arrest described in § 60-6,197(2) is an arrest 'for any offense arising out of acts alleged to have been committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic liquor or drugs.'"[11] Examining the information conveyed in the report, we held that "'reckless driving'" and "'"displayed signs of alcohol intoxication"'" were sufficient reasons for an arrest under § 60-6,197(2).[12]

[6,7] Under *Betterman*, there are two components to the reasons for arrest which must be included in a sworn report: (1) driving or actual physical control of a motor vehicle and (2) doing so while under the influence of alcohol or drugs. Both components are derived from the language on the face of § 60-6,197(2). The statutory requirements are not onerous,[13] and sworn reports which do not include factual reasons supporting the officer's suspicion that a person is both driving or in actual physical control of a motor vehicle and doing so while under the influence are not sufficient to confer jurisdiction on the DMV. For example, we held in *Snyder v. Department of Motor Vehicles*[14] that "'[s]peeding (20 OVER)/D.U.I.'" was insufficient because it failed to state the officer's factual reasons for believing that the driver was intoxicated. The Nebraska Court of Appeals has held that sworn reports failed to include the factual reasons for suspecting that the individual arrested was driving or in actual physical control of

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[9] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

[10] *Id*. at 182, 728 N.W.2d at 578.

[11] *Id*. at 186, 728 N.W.2d at 581, quoting § 60-6,197(2).

[12] *Id*.

[13] See *Johnson v. Neth*, 276 Neb. 886, 758 N.W.2d 395 (2008).

[14] *Snyder, supra* note 5, 274 Neb. at 168, 736 N.W.2d at 732.

a motor vehicle where the reasons for arrest were as follows: "'[P]assed out in front of [the gas] Station, near front doors. Signs of alcohol intoxication,'"[15] and "'1 vehicle accident, odor of Alcoholic beverage Bloodshot watery eyes, Slurred Speech, Refused Field Sobriety. Refused PBT Refused Legal Blood, Refused Urine sample test.'"[16]

[8] Hoppens does not dispute that Shymkewicz' sworn report includes sufficient factual reasons for suspecting that he was in actual physical control of a motor vehicle while under the influence of alcohol. Instead, Hoppens argues that the "reasons for such arrest" in § 60-498.01(2) must also include a statement of the arresting officer's factual reasons for believing that the vehicle was driven or controlled while on property open to public access. Hoppens relies on the Nebraska Rules of the Road,[17] in which § 60-6,197 is codified. Section 60-6,108 provides that § 60-6,197 "appl[ies] upon highways and anywhere throughout the state except private property which is not open to public access." We have recognized that our driving under the influence statutes, including criminal liability for the refusal of a chemical test, do not apply to the operation or control of a motor vehicle on private property not open to public access.[18] Hoppens argues, in essence, that the phrase "arrested as described in subsection (2) of section 60-6,197 and the reasons for such arrest" found in § 60-498.01(2) incorporates a requirement that the sworn report include the facts necessary to sustain a criminal conviction.

[9-12] Hoppens' assignment of error calls upon us to interpret § 60-498.01. 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

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[15] *Yenney v. Nebraska Dept. of Motor Vehicles*, 15 Neb. App. 446, 451, 729 N.W.2d 95, 99 (2007).

[16] *Barnett v. Department of Motor Vehicles*, 17 Neb. App. 795, 797, 770 N.W.2d 672, 674 (2009).

[17] See Neb. Rev. Stat. §§ 60-601 to 60-6,382 (Reissue 2010, Cum. Supp. 2012 & Supp. 2013).

[18] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

they are consistent, harmonious, and sensible.[19] We give statutory language its plain and ordinary meaning, and we will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[20] We will give effect to all parts of a statute and avoid rejecting as superfluous or meaningless any word, clause, or sentence.[21] And we will not read a meaning into a statute that is not warranted by the legislative language.[22]

[13] We conclude that the reasons for an arrest as described in § 60-6,197(2) include those reasons described in the text of that section. Namely, the sworn report must state the arresting officer's reasons for believing that the individual arrested was driving or in actual physical control of a motor vehicle while under the influence of alcohol or drugs. We do not read the disputed clause of § 60-498.01(2) to incorporate the Nebraska Rules of the Road and any other factual predicates for a criminal conviction under our driving under the influence laws. Furthermore, there is no requirement in § 60-498.01(2) that the sworn report describe the requisites of a valid arrest. In fact, the Legislature amended the predecessor to § 60-498.01(2) in 2003 to remove the requirement that the arresting officer aver that the driver was "validly" arrested under § 60-6,197(2).[23] We hold that the sworn report under § 60-498.01(2) does not need to state or support an inference that the individual arrested drove or controlled a motor vehicle on property open to public access.

CONCLUSION

We conclude that the arresting officer's sworn report under § 60-498.01(2) does not need to state or support an inference that the motor vehicle was driven or operated on property open to public access to confer jurisdiction on the DMV. The

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[19] *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[20] *Id.*

[21] See *id.*

[22] See *id.*

[23] 2003 Neb. Laws, L.B. 209, § 4.

reasons for arrest that must be included in a sworn report are those facts supporting the officer's suspicion that the individual arrested drove or physically controlled a motor vehicle while under the influence of alcohol or drugs. Hoppens does not dispute that Shymkewicz' sworn report included these factual reasons or argue that the sworn report was otherwise deficient. Accordingly, we affirm the judgment of the district court.

We note that in *Sherman v. Neth*,[24] the Court of Appeals held that a 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. Although we reversed the Court of Appeals' decision on other grounds in *Sherman v. Neth*[25] and remanded the cause to the Court of Appeals with orders to vacate its decision, we take this opportunity to disapprove the above-stated holding in the Court of Appeals' decision.

AFFIRMED.

HEAVICAN, C.J., participating on briefs.

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[24] *Sherman v. Neth*, 19 Neb. App. 435, 808 N.W.2d 365 (2011).

[25] *Sherman v. Neth*, 283 Neb. 895, 813 N.W.2d 501 (2012).

TELRITE CORPORATION, DOING BUSINESS AS LIFE WIRELESS, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE.

852 N.W.2d 910

Filed August 22, 2014. No. S-13-870.

1. **Public Service Commission: Appeal and Error.** Under Neb. Rev. Stat. § 75-136(2) (Supp. 2013), an appellate court reviews an order of the Nebraska Public Service Commission de novo on the record.
2. **Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
3. **Public Service Commission: Appeal and Error.** Under Neb. Rev. Stat. § 75-136 (Supp. 2013), an appellate court must reappraise the evidence on the record as

it relates to the penalty issued by the Nebraska Public Service Commission and reach an independent conclusion.

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 Public Service Commission. Reversed and remanded for further proceedings.

Stephen M. Bruckner, Russell A. Westerhold, and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellant.

Jon Bruning, Attorney General, and L. Jay Bartel for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ.

CONNOLLY, J.

SUMMARY

Telrite Corporation, doing business as Life Wireless (Telrite), was designated as an eligible telecommunications carrier (ETC) and a Nebraska eligible telecommunications carrier (NETC) by the Nebraska Public Service Commission (PSC). These designations permitted Telrite to participate in the "Lifeline" program and receive subsidies from federal and state funds for the provision of telecommunications service to low-income households. Six weeks after receiving its designations, Telrite held a 1-day outdoor enrollment event in Omaha, Nebraska. At the event, Telrite used the wrong enrollment form, and the PSC later received inquiries and complaints from consumers who had attended.

The PSC issued a show cause order to Telrite and thereafter revoked Telrite's ETC designation and ordered it to cease and desist from offering Lifeline service in Nebraska. Telrite appeals from the PSC order, arguing that the PSC imposed an excessive penalty, exceeded its statutory authority, and failed to comply with its regulations. We agree that the penalty was excessive. Therefore, we reverse the order and remand the cause for further proceedings before the PSC.

BACKGROUND

Statutory Background

The Telecommunications Act of 1996 (Telecommunications Act)[1] established the principle of "universal service," which is broadly defined as the goal of "ensuring that all Americans have access to affordable phone service."[2] The Telecommunications Act created the federal Universal Service Fund (Federal Fund) by requiring telecommunications carriers providing interstate services to contribute to "mechanisms established by the [Federal Communications] Commission to preserve and advance universal service."[3] Telecommunications companies participating in universal service programs are eligible to receive support from the Federal Fund if they are designated as an ETC.[4] The Telecommunications Act provides that state commissions are primarily responsible for making ETC designations.[5] In Nebraska, the PSC makes ETC designations.[6]

Among the mechanisms established by the Federal Communications Commission (hereinafter FCC) and supported by the Federal Fund is the Lifeline program, under which qualified low-income consumers pay reduced charges for voice telephone services.[7] ETC's participating in the Lifeline program receive a monthly disbursement of $9.25 from the Federal Fund for each qualified consumer.[8] Lifeline support is limited to a single subscriber per household, and eligibility is determined by the subscriber's income or participation in government programs directly related to income.[9]

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[1] Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at scattered sections in title 47 of U.S. Code).

[2] *WWC Holding Co. v. Public Service Com'n*, 44 P.3d 714, 717 (Utah 2002).

[3] 47 U.S.C. § 254(d) (2006).

[4] 47 U.S.C. § 254(e).

[5] 47 U.S.C. § 214(e)(2) (2006).

[6] *Schumacher v. Johanns*, 272 Neb. 346, 722 N.W.2d 37 (2006).

[7] 47 C.F.R. §§ 54.101 and 54.401(a)(1) (2013).

[8] 47 C.F.R. § 54.403(a)(1) (2013).

[9] See, 47 C.F.R. § 54.409(a) (2013); 291 Neb. Admin. Code, ch. 10, § 006.04A (2012).

The Telecommunications Act also authorized states to create their own universal service funds and maintain them with mandatory contributions from providers of intrastate telecommunications services.[10] The Nebraska Legislature exercised this power by enacting the Nebraska Telecommunications Universal Service Fund Act (NTUSFA).[11] The NTUSFA created the Nebraska Telecommunications Universal Service Fund (Nebraska Fund) in order to advance the state universal service effort.[12] The Nebraska Fund receives contributions from surcharges collected on all "end-user telecommunications" provided in Nebraska commerce.[13] The NTUSFA also charged the PSC with the creation of the Nebraska Telephone Assistance Program to promote universal service for low-income households and to determine eligibility guidelines and standards for the federal and Nebraska support mechanisms.[14]

In addition to making ETC designations as provided by the Telecommunications Act, the PSC determines the telecommunications providers that are eligible for support from the Nebraska Fund. The PSC denominates a provider eligible to receive support from the Nebraska Fund as a "Nebraska Eligible Telecommunications Carrier" (NETC).[15] The PSC's regulations require ETC's receiving federal support to participate in Nebraska's universal service program,[16] in effect requiring an ETC to receive an NETC designation. An NETC providing services under the Lifeline program is entitled to $3.50 per month for each qualified consumer from the Nebraska Fund.

Factual and Procedural Background

Telrite is a Georgia corporation with a certificate of authority to do business in Nebraska. Telrite received its first ETC

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[10] 47 U.S.C. § 254(f).

[11] Neb. Rev. Stat. §§ 86-316 to 86-329 (Reissue 2008).

[12] § 86-324(1).

[13] 291 Neb. Admin. Code, ch. 10, § 002.01 (2012).

[14] § 86-329(1).

[15] 291 Neb. Admin. Code, ch. 10, § 001.01R (2012).

[16] 291 Neb. Admin. Code, ch. 10, § 004.04A (2012).

designation in 2010 and has rapidly become "one of the largest Lifeline ETCs in the country," with designations in approximately half of the states. Telrite often attracts customers by holding outdoor tent events at which it gives qualified applicants a "free" cell phone. If an applicant is qualified for the Lifeline program, the cell phone is activated onsite. In February 2013, Telrite filed an amended application with the PSC seeking designation to participate in the Lifeline program in Nebraska as a prepaid wireless service.

On May 29, 2013, the PSC issued an order designating Telrite as both an ETC and NETC. The order stated that Telrite had committed to comply with all of the Nebraska-specific requirements for ETC's and NETC's, including the requirement to use the form approved by the PSC. The order did not direct Telrite to comply with any specific requirements other than the use of a particular form.

On July 12, 2013, Telrite held its first enrollment event in Nebraska at an outdoor tent in Omaha. Consumer interest was heavy, and the PSC was later notified that applicants had to "wait[] in line for extended periods of time in over ninety (90) degree heat with no shelter or water." As reported by a local media outlet, the police were called to the event when "tempers flared on a hot day." The PSC fielded a number of inquiries from consumers in the days following the event. The questions included: "When was the free phone they received going to be hooked up?"; "When were the tents going to be open again and where?"; "Were there any phones left and could they pick it up at the office?"; "Why was the media coverage not better as to when and where this event was taking place?"; "Why were there only tents in Omaha and not in Lincoln?"; "Why wasn't more information provided in the [PSC's] office about where there are free phones being handed out?"; and "Why was the information about the free phone give away not made more public?" The PSC also received a report that Telrite's representatives had run out of cell phones and told prospective applicants to return on Sunday, July 14, but that when the consumers did so, Telrite representatives were not present. After the PSC contacted Telrite, it voluntarily ceased enrolling additional customers in Nebraska on July 15.

The PSC issued an order on July 30, 2013, demanding that Telrite show cause why its ETC designation should not be revoked or administrative penalties levied against it. The order alleged that Telrite had not contacted the PSC before beginning operations in Nebraska, failed to use the form approved by the PSC, and handed out flyers that failed to state that the PSC made the final eligibility determination. In its answer, Telrite "apologize[d] for the errors made during the launch of its Lifeline service in Nebraska" and "humbly ask[ed] the [PSC] to afford it the opportunity to correct its mistakes." Telrite admitted that it had "failed to implement state-specific customization of [Telrite's] FCC-default standard forms" and control "unruly behavior in the queue." Explaining that turnout had exceeded expectations, Telrite promised to hire security for future events and make water available if the temperature exceeded 85 degrees.

The PSC held a hearing on the show cause order on August 27, 2013. Telrite's counsel began by stating that the PSC had the power to order "revocation, fine, some other remedy, whatever you deem appropriate," but that its decision should be "guided by . . . the public interest." Brian Lisle, Telrite's president, admitted that Telrite had used the form applicable in states where the FCC is responsible for ETC designations instead of the form approved by the PSC. Lisle testified that he had sent an e-mail to Telrite's compliance department about the Nebraska-specific requirements, but that there had been "a lack of follow-up on communication there." Lisle testified that the independent contractor who administered the Omaha event had received "FCC training" but not "[Nebraska Telephone Assistance Program] training."

Lisle also testified about the status of persons who had received cell phones at the Omaha event and Telrite's plan to "re-enroll" those individuals. Lisle stated that about 944 people had applied at the event and that Telrite approved 796 of the applications onsite. Unless they had contacted Telrite to cancel, the approved applicants were receiving service as of the hearing. Telrite, however, had not received any disbursements from either the Federal Fund or Nebraska Fund. Lisle testified that Telrite intended to contact its Nebraska

customers and ask them to complete and return the Nebraska application. Lisle promised that, in the future, Telrite would use "employee teams" in Nebraska and abstain from giving away free cell phones onsite. Instead, Telrite would take applications and later mail cell phones to the applicants approved by the PSC.

One of the concerns expressed by commissioners was the potential for households receiving multiple Lifeline subsidies. One commissioner noted that the FCC was trying to combat a "run on the fund" by ineligible persons and had removed "millions of people" from the Lifeline rolls, which suggested to the PSC that "there is a lot of waste and a lot of abuse there." At the Omaha event, Telrite's representatives validated applicants' information onsite by comparing the information given by applicants to a database of current Lifeline enrollees. Lisle testified about Telrite's enrollment process, including the steps intended to flag "duplicate[s]." Lisle admitted that Telrite's representatives at the Omaha event did not have access to the database of Nebraska enrollees maintained by the PSC.

Telrite cited statistics suggesting that low-income Nebraskans are underserved by Lifeline providers. Telrite's counsel stated that the "penetration rate"—the percentage of eligible households that are enrolled in the Lifeline program—is 40 percent nationally but only 6 percent in Nebraska. He further stated that several of Nebraska's neighboring states were outperforming it, noting that the penetration rate was 42 percent in Kansas, 29 percent in Missouri, and 28 percent in Iowa.

On September 17, 2013, the PSC entered an order revoking Telrite's ETC designation and directing Telrite to cease and desist from offering services as a Lifeline provider in Nebraska. In its order, the PSC identified three main areas of concern that supported its decision. First, Telrite had failed to comply with Nebraska Telephone Assistance Program requirements a mere 6 weeks after it had promised to do so during the application process. Second, Telrite had substantial experience with the Lifeline program and was therefore less deserving of leniency. The third factor identified by the PSC was a lack of oversight. The PSC found Telrite's failures "even more

disturbing" given the heightened scrutiny that the Lifeline program had borne in recent years. The order generally referred to violations of the PSC's "rules, regulations and orders" but did not identify any specific rules, regulations, or orders that Telrite had violated.

ASSIGNMENTS OF ERROR

Telrite assigns, restated and reordered, that the PSC erred by (1) ordering an excessive penalty; (2) determining that it possessed the authority to revoke an ETC designation; (3) concluding that Telrite had violated the PSC's rules and regulations; and (4) failing to follow its rules and regulations governing ETC's and NETC's.

STANDARD OF REVIEW

[1,2] Under Neb. Rev. Stat. § 75-136(2) (Supp. 2013), an appellate court reviews an order of the PSC de novo on the record. In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.[17]

ANALYSIS

Excessive Penalty

Telrite argues that the penalty meted out by the PSC in its order—revocation of Telrite's ETC designation and an order to cease and desist from providing Lifeline services—was excessive. Telrite emphasizes that it accepted responsibility for its mistakes, has a "rigorous application and review process," and proposed corrective measures.[18] Furthermore, Telrite notes that the underlying violation "amount[ed] to little more than *using the wrong form*."[19] The PSC argues that Telrite has understated the significance of its conduct, especially in light of the concern for fraud in the Lifeline program,

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[17] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011).

[18] Brief for appellant at 22.

[19] *Id.* at 11 (emphasis in original).

and that the Omaha event occurred a mere 6 weeks after Telrite received its designations. Although we do not express an opinion whether lesser penalties are justified, we agree with Telrite that revocation and a cease-and-desist order were not warranted on the facts before us.

[3] As an initial matter, the parties disagree whether we should defer to the PSC's penalty determination. Telrite asserts that, because § 75-136 authorizes de novo review, we do not owe any deference to the PSC's determination. The PSC maintains that our previous decisions require us to affirm the sanction ordered by the PSC absent "'arbitrar[iness]' or an 'abuse of discretion.'"[20] In those cases, we stated that determinations by the PSC are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that an appellate court should not disturb in the absence of a showing that the PSC's action was arbitrary or unreasonable.[21] But we made these statements before 2013, when the Legislature amended § 75-136 to provide a "de novo on the record" standard of review.[22] Before 2013, a party appealed from the PSC under the Administrative Procedure Act and an appellate court reviewed the PSC's order for errors appearing on the record.[23] Under this standard of review, our inquiry was limited to whether the decision conformed to the law, was supported by competent evidence, and was neither arbitrary, capricious, nor unreasonable.[24] Our review of pre-2013 cases shows that the deference accorded to the PSC was tied to the deferential standard of review applied by an appellate court under the Administrative Procedure Act. We therefore reject the PSC's contention that it is due the same degree of deference

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[20] Brief for appellee at 32, citing *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002).

[21] *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004); *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

[22] 2013 Neb. Laws, L.B. 545, § 5.

[23] See, e.g., *Chase 3000, Inc. v. Nebraska Pub. Serv. Comm.*, 273 Neb. 133, 728 N.W.2d 560 (2007).

[24] *Id.*

it enjoyed before the Legislature amended § 75-136. Under the amended § 75-136, an appellate court must reappraise the evidence on the record as it relates to the penalty issued by the PSC and reach an independent conclusion.[25]

Our de novo review of the record leads us to conclude that the revocation and cease-and-desist order was not warranted. In reaching this conclusion, we consider the purposes and goals of the Telecommunications Act and the NTUSFA. In 47 U.S.C. § 254(b), the Telecommunications Act identifies the following "[u]niversal service principles": (1) "Quality services . . . at just, reasonable, and affordable rates"; (2) access to advanced telecommunications to all regions of the United States; (3) telecommunications access to "low-income consumers and those in rural, insular, and high cost areas"; (4) "an equitable and nondiscriminatory contribution to the preservation and advancement of universal service" by telecommunications providers; (5) "specific, predictable and sufficient" federal and state support mechanisms; and (6) the provision of access to advanced telecommunications services for schools, health care providers, and libraries. The NTUSFA similarly includes these "principles" as undergirding the state's policy of preserving and advancing universal service. In addition to these six principles, the NTUSFA includes the principle of keeping the costs of administering the Nebraska Fund to a minimum.[26] But the Legislature has identified the purpose of the NTUSFA as "ensur[ing] that all Nebraskans, without regard to their location, have comparable accessibility to telecommunications services at affordable prices."[27]

The PSC's termination of Telrite's participation as a Lifeline provider in Nebraska does not further the principles of universal service. High among the goals of the federal and state universal service effort is the provision of telecommunications service to low-income households. Lisle testified that about 6 percent of eligible households in Nebraska participate

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[25] See *In re Margaret Mastny Revocable Trust*, *supra* note 17.

[26] § 86-323.

[27] § 86-317.

in the Lifeline program, compared to 40 percent nationally. Furthermore, while the problems that occurred at the Omaha event were due in part to Telrite's poor planning, they were exacerbated by a larger-than-expected turnout indicative of an unmet demand for Lifeline service in Nebraska. Additionally, the complaints fielded by the PSC in the wake of the Omaha event show that consumers were largely concerned about having greater access to Telrite's offerings. Taken as a whole, the record suggests that there are a substantial number of low-income households in Telrite's intended service area that would benefit from its presence in the marketplace.

Moreover, the PSC's concern for fraud in the Lifeline program does not justify the penalty. During the hearing held on the show cause order, the commissioners noted that the FCC was currently combatting a "run on the fund" by ineligible applicants and had removed "millions of people" from the Lifeline rolls. But there is no indication in the record that Telrite facilitated applications by ineligible persons, and as the PSC admits, Telrite has not received any support from either the Federal Fund or Nebraska Fund for the individuals it approved.

Telrite, using a "pool[ed]" database of current Lifeline subscribers created from the records of 20 to 24 ETC's, rejected more than 15 percent of the applications it received due to ineligibility concerns. Lisle testified that Telrite would continue to run applicants' information through this database before transmitting the application to the PSC as an extra precaution against duplicates. Furthermore, we note that there is substantial overlap between the FCC's eligibility criteria, which were incorporated into the forms used by Telrite, and the PSC's eligibility criteria.[28]

Telrite admitted that it made mistakes, but these initial administrative missteps occurred over the course of a single day and were immediately curtailed. Furthermore, these errors are easily remedied. Telrite submitted to the PSC a proposed

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[28] Compare 47 C.F.R. § 54.409(a) with 291 Neb. Admin. Code, ch. 10, § 006.04A.

process to "re-enroll" its Nebraska subscribers using the correct form and flyers to be handed out at future events stating that the PSC would make the final eligibility determination. The PSC did not object to either of these proposals.

We need not express an opinion regarding the appropriateness of lesser sanctions. The NTUSFA provides that the PSC has the power to withhold funds if a telecommunications company fails to comply with the PSC's orders or regulations and, under Neb. Rev. Stat. § 75-156 (Supp. 2013), administratively fine any person who violates the NTUSFA.[29] We note in passing that noncompliance with the PSC's orders violates the NTUSFA[30] and may subject a telecommunications provider to fines under § 75-156. But the only order in the record that Telrite violated was the May 29, 2013, order, which stated that Telrite must use a Nebraska-specific form. Under § 75-156(1), the PSC has the discretion to issue fines of up to $10,000 per day if it finds, by clear and convincing evidence, that "any term, condition, or limitation of any certificate, permit, or authority issued by the [PSC]" or "any rule, regulation, or order of the [PSC]" was violated. Should the PSC consider the imposition of an administrative fine on remand, § 75-156(5) directs it to consider the gravity of Telrite's violation and its good faith efforts to achieve compliance after being notified of the violation. And, of course, Telrite's conduct at the Omaha event may be considered should future compliance problems occur.

Remaining Assignments of Error

[4] Because we conclude that the penalty ordered by the PSC was excessive, we do not reach Telrite's remaining assignments of error. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[31]

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[29] § 86-324(2)(c) and (f).

[30] See § 86-324(2)(b).

[31] *Lang v. Howard County*, 287 Neb. 66, 840 N.W.2d 876 (2013).

CONCLUSION

From our de novo review of the record, we conclude that the revocation and cease-and-desist order imposed by the PSC was excessive. We do not make light of Telrite's failure to use the correct form a mere 6 weeks after the PSC ordered it to do so. Nor do we express an opinion whether lesser sanctions are justified. But, considering the low participation rate of Nebraska households in the Lifeline program and the purposes of both the Telecommunications Act and the NTUSFA, revocation and a cease-and-desist order were not warranted by Telrite's failure to use the correct form during a 1-day event. Accordingly, we reverse, and remand to the PSC for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HEAVICAN, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V.
LUCIO A. RODRIGUEZ III, APPELLANT.
852 N.W.2d 705

Filed August 29, 2014. No. S-13-062.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures.
3. **Constitutional Law: Investigative Stops: Search and Seizure: Probable Cause.** The Fourth Amendment guarantee of the right to be free of unreasonable searches and seizures requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity.
4. **Police Officers and Sheriffs: Investigative Stops: Probable Cause.** In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account.

5. **Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clause does not forbid a retrial so long as the sum of all the evidence admitted by a trial court, whether erroneously or not, would have been sufficient to sustain a guilty verdict.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and RIEDMANN, Judges, on appeal thereto from the District Court for Scotts Bluff County, LEO DOBROVOLNY, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Bell Island, of Island & Huff, P.C., L.L.O., for appellant.

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

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Lucio A. Rodriguez III appealed his conviction in the district court for Scotts Bluff County for driving under the influence (DUI) with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath, third offense, to the Nebraska Court of Appeals. He claimed that the district court erred when it (1) overruled his motion to suppress evidence obtained from a traffic stop that he asserted was based on an anonymous tip without corroboration and (2) overruled his motion for a mistrial based on the State's failure to dismiss another pending charge which the State knew prior to trial it could not prove. The Court of Appeals affirmed Rodriguez' conviction and sentence. We granted his petition for further review. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse Rodriguez' DUI conviction and remand the cause to the district court for a new trial.

II. STATEMENT OF FACTS

In its memorandum opinion, the Court of Appeals described the facts of this case for which we find support in the record as follows:

On April 28, 2012, the Scotts Bluff County 911 emergency dispatch center received notification of a possible disturbance near a rental car business. When the dispatch center communicated this information to Officer Aaron Kleensang, the dispatcher noted that the caller stated that he had been pushed out of a moving vehicle. The dispatcher also stated that the caller identified the vehicle as a green GMC Envoy and stated that this vehicle left the area heading westbound on Highway 26.

At the time Kleensang received the dispatch, he was near the vicinity of the reported activity. [He did not see the caller at the rental car business, however, he soon] observed a vehicle matching the description he received from the dispatch center traveling westbound on Highway 26. Kleensang made two turns, followed the vehicle onto 17th Avenue and 20th Street, and observed it stop on its own. The vehicle moved to the side of the road and parked before Kleensang activated his patrol car's emergency lights. Kleensang testified that he activated the lights to signal the driver that Kleensang wanted to talk with him.

Kleensang approached the driver and began to question him about the reported disturbance. Rodriguez was identified as the driver. Kleensang had other officers in the area make contact with the caller, and the caller was eventually brought to a nearby location. No other evidence was adduced about the caller, and there was apparently no further action taken in regard to the disturbance. While discussing the reported disturbance with Rodriguez, Kleensang made several initial observations. He detected a strong odor of alcohol and noticed that Rodriguez had a flushed face, slurred speech, and bloodshot, watery eyes. After administering three field sobriety tests, Kleensang believed Rodriguez was heavily intoxicated. Kleensang arrested Rodriguez following a preliminary breath test and transported him to the detention center in Scotts[b]luff, Nebraska. Rodriguez then submitted to a "DataMaster" test at the detention center, and his breath tested at .226 grams of alcohol per 210 liters of breath.

During the booking process, Rodriguez' wallet was taken from him and inventoried. Kleensang testified this is standard procedure whenever he takes someone to jail. When the wallet was opened, two clear plastic baggies containing apparent controlled substances were discovered at the bottom. Preliminary tests were conducted on these substances at the jail. Subsequent tests at the Nebraska State Patrol crime laboratory revealed that one substance was cocaine and that the other substance was not a controlled substance.

On May 10, 2012, the State filed an information charging Rodriguez with DUI with a blood alcohol level greater than .15, third offense; possession of methamphetamine; and possession of cocaine. Rodriguez moved to suppress any evidence gathered from the stop and subsequent search, contending that the stop was not based on reasonable and articulable suspicion that a crime had been committed or was about to be committed.

The district court overruled the motion to suppress. In its order, the court noted that the stop was justified under two separate analyses. First, the court concluded that the stop could be considered to be a "'first-tier' contact" for which no Fourth Amendment protections apply. The court found Kleensang had not used emergency lights or a siren to cause Rodriguez to stop. Thus, the court determined that a reasonable person would not have believed he was required to stop or that his movement was impeded in any way before Kleensang activated his patrol car's emergency lights. Second, analyzing the stop as a "'tier-two'" encounter, the court determined reasonable suspicion existed for the stop because Kleensang had corroborated the information from the dispatch center.

On December 18, 2012, the case proceeded to a jury trial. Despite having received laboratory reports demonstrating that Rodriguez did not possess methamphetamine on the night he was arrested, the State did not dismiss the charge in advance of trial. Rodriguez' motions for mistrial based on this failure to dismiss were denied, but the court

> entered a directed verdict in his favor on the possession of methamphetamine charge at the close of the State's evidence. The jury convicted Rodriguez of DUI, but acquitted him of the possession of cocaine charge. The court sentenced Rodriguez to 60 days in jail and a term of probation, suspended his license for 5 years, and ordered him to pay court costs.

State v. Rodriguez, No. A-13-062, 2013 WL 6246792, *1-2 (Neb. App. Dec. 3, 2013) (selected for posting to court Web site).

Rodriguez appealed his DUI conviction to the Court of Appeals. He claimed that the district court erred when it (1) analyzed the traffic stop as a first-tier police contact; (2) overruled his motion to suppress, despite a lack of corroboration of the anonymous tip; and (3) overruled his motion for a mistrial based on the State's failure to dismiss the methamphetamine charge.

The Court of Appeals affirmed Rodriguez' conviction and sentence. With regard to the assignment of error related to a first-tier police contact, the Court of Appeals noted that the State did little to challenge Rodriguez' argument that he was seized when Kleensang activated his patrol car's lights and that the contact was therefore a second-tier traffic stop requiring reasonable suspicion. The Court of Appeals determined that the State had conceded that the contact was a traffic stop and concluded that because the district court had alternatively concluded that there was reasonable suspicion to support a traffic stop, it was unnecessary for the Court of Appeals to address the first assignment of error related to a first-tier stop.

With regard to whether there was reasonable suspicion for a traffic stop, the Court of Appeals cited Nebraska precedent and concluded that the content of the dispatch and Kleensang's observations consistent with the dispatch gave Kleensang a reasonable suspicion to justify the traffic stop.

With regard to Rodriguez' motion for a mistrial, the Court of Appeals disapproved of the county attorney's failure to dismiss the methamphetamine charge prior to trial and stated that such conduct was "improper in the course of conducting a fair trial because it may tend to expose a jury to irrelevant and

prejudicial matters." *State v. Rodriguez*, 2013 WL 6246792 at *5. Although it disapproved of the prosecution's conduct, the Court of Appeals determined that such conduct did not reach a level requiring the declaration of a mistrial. The Court of Appeals concluded that the district court did not abuse its discretion when it overruled Rodriguez' motion for a mistrial. The Court of Appeals affirmed. *Id*.

We granted Rodriguez' petition for further review.

III. ASSIGNMENTS OF ERROR

On further review, Rodriguez claims, restated, that the Court of Appeals erred when it (1) determined that the district court did not err when it overruled Rodriguez' motion to suppress and (2) determined that the district court did not err when it overruled his motion for a mistrial based on the State's pursuit of the methamphetamine charge after it knew it could not prove the charge.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination. *State v. Schuller*, 287 Neb. 500, 843 N.W.2d 626 (2014).

V. ANALYSIS

1. Court of Appeals Erred When It Affirmed Overruling of Rodriguez' Motion to Suppress

Rodriguez first claims that the Court of Appeals erred when it determined that the traffic stop was justified and that the motion to suppress was properly overruled. We conclude on the record of admitted evidence before us that the anonymous tip in this case did not justify the stop. Therefore, the district court erred when it overruled Rodriguez' motion to suppress and the Court of Appeals erred when it affirmed this ruling.

[2-4] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution guarantee against unreasonable searches and seizures. *State v. Dalland*, 287 Neb. 231, 842 N.W.2d 92 (2014). The Fourth Amendment guarantee of the right to be free of unreasonable searches and seizures requires that an arrest be based upon probable cause and limits investigatory stops to those made upon an articulable suspicion of criminal activity. *State v. Wollam*, 280 Neb. 43, 783 N.W.2d 612 (2010). In determining whether there is reasonable suspicion for an officer to make an investigatory stop, the totality of the circumstances must be taken into account. See *id*.

In the present case, the Court of Appeals first addressed Rodriguez' claim that the district court erred when it determined that the contact between Kleensang and Rodriguez was a "first-tier" contact that did not trigger Fourth Amendment protections. Because the State conceded on appeal that the contact was a "second-tier" traffic stop, the Court of Appeals reviewed the district court's alternative determination that there was reasonable suspicion to support a traffic stop. Because neither party complains of this determination on further review, we accept that the contact was a traffic stop. Thus, we review the lower courts' determinations that the content of the dispatch plus Kleensang's observation of Rodriguez' vehicle in the location indicated in the dispatch provided reasonable suspicion to justify the traffic stop.

Because the stop was based on information supplied by a caller, the reliability of such information is key to determining whether there was reasonable suspicion. As discussed below, Fourth Amendment case law indicates that an important factor in assessing the reliability of such information is the distinction between whether the person supplying the information is known to law enforcement or the information comes from an anonymous source.

Both the district court and the Court of Appeals treated the call in this case as an anonymous tip. Upon our review of the record, we note that there was no evidence received in the district court that indicates the name of the caller was known

to law enforcement at the time Kleensang initiated the traffic stop. The State acknowledges in its appellate briefs that no evidence was received by the district court establishing the identity of the caller prior to the stop, and the State suggests that the call be treated as an anonymous tip for purposes of Fourth Amendment analysis. We agree.

Although the district court and the Court of Appeals both treated the caller as anonymous, neither court relied on certain relevant precedent from the U.S. Supreme Court regarding anonymous tips in the context of Fourth Amendment analysis. Both relied on this court's opinion in *State v. Bowley*, 232 Neb. 771, 442 N.W.2d 215 (1989). In *Bowley*, we noted that the factual basis for a traffic stop need not arise from the officer's personal observation, but may be supplied by information acquired from another person. We further noted that when the factual basis is supplied by another, the information must contain sufficient indicia of reliability, and we stated that a citizen informant who has personally observed the commission of a crime is presumptively reliable. We concluded that the investigatory stop in *Bowley* was reasonable, and in making this determination, we noted that "[w]hile the informants were unidentified until after [the defendant] was stopped, they did remain and identify themselves to police." 232 Neb. at 773, 442 N.W.2d at 217.

Based on its reading of *Bowley*, the Court of Appeals rejected Rodriguez' argument to the effect that, in the absence of identification of the caller, there was not sufficient indicia of the caller's reliability to support the stop. The Court of Appeals recited that the caller reported having been pushed from a moving vehicle, and it therefore reasoned that the caller should be treated as a citizen informant whose personal observation of the commission of a crime was presumptively reliable under *Bowley*. The Court of Appeals appeared to determine that the caller's reliability was enhanced through corroboration when "Kleensang personally observed a vehicle which matched the description in the dispatch and was heading in the direction indicated by the caller to dispatch." *State v. Rodriguez*, No. A-13-062,

2013 WL 6246792, *4 (Neb. App. Dec. 3, 2013) (selected for posting to court Web site).

Since our decision in *Bowley* in 1989, the U.S. Supreme Court has decided key Fourth Amendment cases involving anonymous tips but we have not had occasion to discuss these cases. We therefore review the development of relevant Fourth Amendment law regarding anonymous tips since we decided *Bowley* before applying such law to this case.

(a) U.S. Supreme Court Precedent Regarding Anonymous Tips in Fourth Amendment Cases

Although the caller in the instant case did not supply predictive behavior of the defendant, the district court cited the case of *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), as support of its conclusion that "the anonymous tip was sufficiently corroborated to furnish reasonable suspicion." In *White*, the U.S. Supreme Court determined that an anonymous tip from a telephone caller provided justification for a traffic stop when certain details provided by the caller were corroborated by police observation. The caller stated that the defendant would leave a particular location at a particular time in a particular vehicle, that she would go to another particular location, and that she would be in possession of cocaine. Officers' personal observations corroborated that the defendant left the general location during the general timeframe indicated by the caller, that she got into the particular vehicle identified by the caller, and that she proceeded on the most direct route toward the location indicated by the caller. The officers stopped the defendant's vehicle prior to reaching that location.

In considering whether the stop in *White* was justified, the U.S. Supreme Court noted that the caller's ability to predict the defendant's future behavior demonstrated inside information and a special familiarity with her affairs which, the Court determined, gave the police reason to believe that the caller was also likely to have access to information about her illegal activity. The Court described the decision in *White* as "a close case" but concluded that "under the totality of the

circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop." 496 U.S. at 332.

Neither the district court nor the Court of Appeals in this case cited *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), in which the Court held that an anonymous tip lacked sufficient indicia of reliability to establish reasonable suspicion for an investigatory stop. The anonymous caller in *J. L.* reported that "a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." 529 U.S. at 268. Officers were instructed to respond to the tip, and when they arrived at the indicated location, they saw three black males, one of whom was wearing a plaid shirt. They made no other observation that would indicate illegal activity; nevertheless, one of the officers approached the man, told him to put his hands up on the bus stop, frisked him, and seized a gun from his pocket.

The Court in *J. L.* compared the facts of the case to those in *White* and determined that "[t]he tip in [*J. L.*] lacked the moderate indicia of reliability present in *White* and essential to the Court's decision in that case." 529 U.S. at 271. The Court noted that the call in *J. L.* "provided no predictive information" as was present in *White*. 529 U.S. at 271. The Court in *J. L.* rejected Florida's argument that the tip was reliable because the defendant met the anonymous informant's description of a particular person at a particular location; the Court stated that "[s]uch a tip . . . does not show that the tipster has knowledge of concealed criminal activity" and that "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." 529 U.S. at 272. The Court in *J. L.* described its decision in *White* as "borderline" and stated that "[i]f *White* was a close case on the reliability of anonymous tips, this one surely falls on the other side of the line." 529 U.S. at 271.

After the Court of Appeals' decision in this case, and after oral argument on further review to this court, the U.S. Supreme Court filed another opinion involving the Fourth Amendment and anonymous tips, *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). At this court's

direction, the parties filed supplemental briefs. In *Navarette*, the U.S. Supreme Court concluded that under the totality of the circumstances in that case, an anonymous tip regarding reckless driving gave police reasonable suspicion that justified a traffic stop. In *Navarette*, an unidentified 911 emergency dispatch caller reported that another vehicle had run her vehicle off the road. The caller gave her location and a description of the other vehicle, including the license plate number. A police officer in the reported area saw a vehicle meeting the description and, without personally observing reckless driving or other violation of law, pulled the defendant's vehicle over. A second officer, who had separately responded to the report, also arrived on the scene. As a result of the stop, the officers found 30 pounds of marijuana in the vehicle, which evidence the defendant sought to suppress on the basis that it had been obtained as the result of a traffic stop that was not supported by reasonable suspicion.

Referring to its decisions in *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990), and *Florida v. J. L., supra*, the U.S. Supreme Court stated that the initial question in its Fourth Amendment analysis was whether the anonymous tip was reliable. Under the facts in *Navarette*, the immediate focus was whether the call was sufficiently reliable to credit the allegation that the defendant's vehicle had run the caller off the road. The majority in *Navarette* determined that due to certain factors, the call did bear adequate indicia of reliability. The factors on which the majority in *Navarette* relied were: (1) eyewitness knowledge, i.e., the caller necessarily claimed to have personally observed the alleged dangerous driving; (2) contemporaneous reporting, i.e., the caller reported the incident soon after it occurred; and (3) the caller's use of the 911 emergency dispatch system, which system allows for identifying and tracing callers, thus providing some safeguard against false reports.

After determining that the anonymous tip was a reliable report of having been run off the road, the majority in *Navarette* stated that "[e]ven a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" 134 S. Ct. at 1690. The

majority therefore found it necessary to determine whether the anonymous caller's tip created a "reasonable suspicion of an ongoing crime such as drunk driving as opposed to an isolated episode of past recklessness." *Id*. The majority concluded that the reported behavior of the defendant driver, viewed from an objective standpoint, amounted to a reasonable suspicion of drunk driving. The majority in *Navarette* stated that rather than a conclusory allegation of drunk or reckless driving, the caller alleged a specific and dangerous result of the driver's conduct which resembled "paradigmatic manifestations of drunk driving." 134 S. Ct. at 1691. In concluding that there was reasonable suspicion to justify the traffic stop in *Navarette*, the majority acknowledged that, like the decision in *White*, the decision was a "'close case.'" 134 S. Ct. at 1692.

Justice Scalia, joined by three other justices, dissented in *Navarette*. The dissent found fault with the factors relied on by the majority as indicia of reliability. With regard to the caller's report that the defendant's vehicle had run her vehicle off the road, the dissent stated that "the police had no reason to credit that charge and many reasons to doubt it, beginning with the peculiar fact that the accusation was anonymous." *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 1692, 188 L. Ed. 2d 680 (2014) (Scalia, J., dissenting; Ginsburg, Sotomayor, and Kagan, JJ., join).

The dissent in *Navarette* did agree with the majority that the traffic stop "required suspicion of an ongoing crime, not merely suspicion of having run someone off the road earlier." 134 S. Ct. at 1695. However, the dissent maintained that the caller's report, at best, indicated careless or reckless driving rather than drunk driving and that "driving while being a careless or reckless person, unlike driving while being a drunk person, is not an ongoing crime." *Id*.

(b) Application of U.S. Supreme Court Precedent to This Case

We apply the above-discussed U.S. Supreme Court precedent to the facts of this case. We note first that the district court relied on *White* to conclude that the anonymous tip in

this case was sufficiently corroborated to supply reasonable suspicion for the traffic stop. This reliance was misplaced. The information supplied by the caller in this case is more similar to the corroborated information that the Court concluded in *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), did not supply reasonable suspicion. The information provided by the caller and corroborated by Kleensang in this case was merely a description of the vehicle and its general location. There was no prediction of future behavior as was present in *Alabama v. White*, 496 U.S. 325, 110 S. Ct. 2412, 110 L. Ed. 2d 301 (1990). Under *J. L.*, corroboration of a description of the defendant and the defendant's general location did not supply reasonable suspicion; instead, the Court stated that the caller's information regarding illegal activity needed to be reliable.

In *Navarette* and *White*, the investigatory stops were approved, but both were seen as "close cases" by the U.S. Supreme Court. Because there are important differences in the totality of the circumstances between the present case and relevant precedent, we reach a different outcome. In particular, although the indicia of reliability in this case bear a similarity to those noted in *Navarette*, we believe there are two important factors explored below that lead to a different result: (1) Kleensang had reason to doubt the reliability of the anonymous caller's report of illegal activity and (2) the anonymous caller in this case did not report an ongoing crime.

(i) Reliability of Caller

The majority in *Navarette* noted the following as indicia of reliability: (1) eyewitness knowledge, (2) contemporaneous reporting, and (3) the caller's use of the 911 emergency dispatch system. In the present case, the caller claimed eyewitness knowledge of the event and made the call soon after it occurred. The record also indicates that the call was made to law enforcement through 911 or a similar emergency dispatch system.

Unlike the facts of *Navarette*, the officer in the present case made observations that raised doubts regarding the reliability of the caller's report. Kleensang testified at the suppression

hearing that before he saw Rodriguez' vehicle, he drove past the location where the person reported having been pushed out of the vehicle. Upon inspection, Kleensang did not see anyone at that location. The fact that Kleensang did not see anyone at the location claimed by the caller was a contraindication of reliability and weakened the value of the anonymous tip in establishing reasonable suspicion to stop Rodriguez' vehicle. The anonymous tip in this case bore weaker indicia of reliability than the tip in *Navarette*.

(ii) Ongoing Crime

As we have explained above, the fact that the reported crime was seen as ongoing was critical to the outcome in *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). Even though the majority and the dissent disagreed on whether the report of driving another vehicle off the road indicated ongoing drunk driving, the majority and the dissent agreed that the officer needed reasonable suspicion of an ongoing crime to justify an investigatory stop. In this regard, it has been stated that "an anonymous 911 call reporting an ongoing emergency is entitled to a higher degree of reliability and requires a lesser showing of corroboration than a tip that alleges general criminality." *U.S. v. Simmons*, 560 F.3d 98, 105 (2d Cir. 2009).

In the present case, the caller indicated only that he had been pushed from the described vehicle. There was nothing in the content of the call that indicated that the driver was driving drunk or that the driver posed a threat of public harm by driving recklessly. The caller did not report an ongoing crime and instead indicated an isolated past episode. The majority in *Navarette* found that the anonymous caller reported an ongoing crime, which finding was key to its decision. Such factor is not present in this case.

(iii) Resolution

Keeping in mind that the decision in *Navarette* that the stop was justified was, in the words of the Court, a "close case," we determine that the important differences present in the instant case as compared to *Navarette* are sufficient to tip the

reasonable suspicion analysis in the other direction. The fact that Kleensang saw no one at the location where the caller reported having been thrown from a vehicle created doubt as to the anonymous caller's reliability. Furthermore, the caller did not report an ongoing crime, which under *Navarette* and other case law is necessary to support the finding of reasonable suspicion justifying a traffic stop.

We conclude that on the record presented to the district court in this case, the court erred when it determined that there was reasonable suspicion to justify the traffic stop and overruled Rodriguez' motion to suppress. Therefore, the Court of Appeals committed reversible error when it affirmed the overruling of the motion to suppress and affirmed Rodriguez' conviction of DUI.

(iv) Double Jeopardy Analysis

[5] Having concluded that the denial of the motion to suppress was reversible error, we must determine whether the totality of the evidence admitted by the district court was sufficient to sustain Rodriguez' conviction for DUI. If it was not, then double jeopardy forbids a remand for a new trial. *State v. Ash*, 286 Neb. 681, 838 N.W.2d 273 (2013). 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. *Id.*

After reviewing the record, we conclude that the evidence presented at trial, including the evidence that should have been suppressed, was sufficient to support the DUI conviction. As such, we conclude that double jeopardy does not preclude a remand for a new trial of the DUI charge. We note that there will not be a new trial on either the possession of methamphetamine charge or the possession of cocaine charge, because the methamphetamine charge was dismissed and the jury acquitted Rodriguez of the cocaine charge.

We conclude that the Court of Appeals' decision must be reversed and the cause remanded to the Court of Appeals with directions to reverse the DUI conviction and remand the cause to the district court for a new trial.

2. Court of Appeals Properly Disapproved of State's Failure to Dismiss Methamphetamine Charge Prior to Trial But We Need Not Determine Whether State's Misconduct Warranted Mistrial

For his second assignment of error, Rodriguez claims the district court erred when it overruled his motions for mistrial based on the State's having failed to dismiss the methamphetamine charge prior to trial knowing it lacked evidence and nevertheless proceeded to comment on the charge to the jury. We agree with the Court of Appeals' disapproval of the State's conduct. However, because we have concluded above that Rodriguez' DUI conviction should be reversed based on the suppression issue, we need not decide whether the State's misconduct warranted declaration of a mistrial.

During voir dire, it was made clear to the jury that three counts were involved in the case and that one count of possession of methamphetamine would be at issue. One juror volunteered that he had "a family member that's on meth and it's destroyed his life totally." After further inquiry by the district court, the juror was excused.

Notwithstanding the methamphetamine-related colloquy during the voir dire of the jury, in his opening statement, the prosecutor admitted that the State would not be able to prove the charge of possession of methamphetamine. Rodriguez moved for a mistrial at the end of the State's opening statement. In a conference outside the jury's presence, the county attorney stated that months prior to trial, he had received the report showing that neither substance was methamphetamine. He indicated that he had shared the report with defense counsel. The county attorney stated that his failure to dismiss the charge was "an oversight," but he did not adequately explain why he nevertheless commented on the methamphetamine charge to the jury.

The district court overruled Rodriguez' motion for a mistrial. The charge remained in the case during the receipt of the State's evidence. Thereafter, the court granted Rodriguez' "motion for a directed verdict" on the charge of possession of methamphetamine at the close of the State's evidence and

dismissed the count. We agree with the Court of Appeals that the State's inaction prior to trial and its action during the preliminary stages of the trial were improper because they exposed the jury to irrelevant and prejudicial matters. The State should have dismissed the charge promptly after it knew it could not prove the charge, and the State had ample opportunity prior to and on the eve of trial to do so.

In the Court of Appeals' opinion, it concluded that the district court did not abuse its discretion when it overruled Rodriguez' motions for a mistrial based on the State's improper conduct. Because we have determined that Rodriguez' DUI conviction should be reversed on other grounds and because there is no reason for the State to engage in the same conduct on remand, it is not necessary to our disposition of this appeal to decide whether the district court abused its discretion and should have declared a mistrial at the first opportunity on the basis of the State's conduct in this trial. Notwithstanding our disapproval of the State's conduct on this issue, we are not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before us. See *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

VI. CONCLUSION

We conclude that the district court erred when it overruled Rodriguez' motion to suppress evidence obtained as a result of the traffic stop and that the Court of Appeals erred when it affirmed this ruling and Rodriguez' DUI conviction. We reverse the decision of the Court of Appeals and remand the cause to the Court of Appeals with directions to reverse the DUI conviction and remand the cause to the district court for a new trial. With regard to the State's failure to dismiss the possession of methamphetamine count prior to the trial, we share the Court of Appeals' disapproval of the State's conduct. We conclude, however, that it is not necessary for us to decide the correctness of the lower courts' decisions to the effect that a mistrial was not warranted for the misconduct, because it will not be repeated upon remand for a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., dissenting.

I respectfully dissent from the majority's determination that the district court erred in overruling Rodriguez' motion to suppress. I would conclude that the stop of Rodriguez' vehicle was supported by reasonable suspicion.

The principles of law are well established. As the U.S. Supreme Court noted in *Navarette v. California*[1]:

> The Fourth Amendment permits brief investigative stops—such as the traffic stop in this case—when a law enforcement officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . . The "reasonable suspicion" necessary to justify such a stop "is dependent upon both the content of information possessed by police and its degree of reliability." . . . The standard takes into account "the totality of the circumstances—the whole picture." . . . Although a mere "'hunch'" does not create reasonable suspicion . . . , the level of suspicion the standard requires is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less" than is necessary for probable cause.

And these principles "apply with full force to investigative stops based on information from anonymous tips."[2] While an anonymous tip, standing alone, "'seldom demonstrates the informant's basis of knowledge or veracity,'" in the right circumstances, "an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.'"[3]

In my view, and considered in light of *Navarette*, the anonymous tip received by law enforcement was sufficiently reliable to provide law enforcement with reasonable suspicion to stop Rodriguez.

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[1] *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683, 1687, 188 L. Ed. 2d 680 (2014) (citations omitted).

[2] *Id.*, 134 S. Ct. at 1688.

[3] *Id.* (citations omitted).

First, the caller in this case reported that he had been pushed out of a moving vehicle. The Court in *Navaratte* noted that the caller in that case, who had reported her vehicle's being run off the road by a particular vehicle, "claimed eyewitness knowledge" of the incident and that such lends "significant support to the tip's reliability."[4]

In addition, the caller was able to describe the vehicle in which he had been riding as a dark-colored GMC Envoy, and to further report that the vehicle was heading westbound on Highway 26. Kleensang testified that he was about 1 to 1½ miles away from the location of the incident at the time of the dispatch and that he proceeded directly to Highway 26. Kleensang testified that about a quarter of a mile away from the site of the incident, he observed a green GMC Envoy westbound on Highway 26 getting ready to exit the highway. Thus, the distances and time involved suggest that the caller's report of the incident was relatively contemporaneous with the incident. The Court in *Navarette* noted that such a report "has long been treated as especially reliable."[5]

Furthermore, the caller here, like the caller in *Navarette*, used the 911 system, or a similar dispatch system. Such lends further reliability to the caller's tip, because the safeguards and identification features of the system are such that "a reasonable officer could conclude that a false tipster would think twice before using" it.[6]

I am not concerned, as the majority is, that no one was at the place of the incident when Kleensang originally drove past it. In my view, in this circumstance, the fact that a person who had just been pushed out of a moving vehicle did not stay at the scene of the incident does not affect the reliability of that person's report.

Nor am I concerned about any lack of additional suspicious conduct by Rodriguez following this anonymous report. The Court in *Navarette* noted that

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[4] *Id.*, 134 S. Ct. at 1689.

[5] *Id.*

[6] *Id.*, 134 S. Ct. at 1690.

> the absence of additional suspicious conduct [did not] dispel the reasonable suspicion of drunk driving. . . . Once reasonable suspicion of drunk driving arises, "[t]he reasonableness of the officer's decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques." . . . This would be a particularly inappropriate context to depart from that settled rule, because allowing a drunk driver a second chance for dangerous conduct could have disastrous consequences.[7]

In the same way, once Kleensang had a report that an individual had been pushed out of a moving vehicle, the failure to follow up on that report, especially when faced with a vehicle that matched the report's description, defies reason and "could have disastrous consequences."[8]

I do acknowledge, of course, that this case is slightly different from *Navarette*. There, the Court noted that the caller's "claim that another vehicle ran her off the road . . . necessarily implies that the informant knows the other car was driven dangerously,"[9] while in this case, whatever crime that occurred as of the time Rodriguez allegedly pushed the caller out of the vehicle was arguably over. And I would agree that the act here is perhaps less predictive of drunk driving than the reckless driving in *Navarette*.

Still, on these facts, I ultimately see no reasonable distinction between hitting another vehicle or object and pushing an individual out of a moving vehicle. In my view, using the common sense we all hope law enforcement uses, it was reasonable for Kleensang to conclude that a driver who had been accused of pushing a passenger out of a moving vehicle might pose other threats while driving.

In sum, the caller in this case used the 911 emergency dispatch system to report that he had been pushed out of a moving vehicle. He described that vehicle and indicated the direction that vehicle had been traveling. Law enforcement found a

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[7] *Id.*, 134 S. Ct. at 1691 (citations omitted).

[8] *Id.*

[9] *Id.*, 134 S. Ct. at 1689.

vehicle matching that description in the area where the caller said the vehicle was headed. Taken together, this is sufficient to create a reasonable suspicion to support Kleensang's stop of Rodriguez' vehicle. I would affirm.

CASSEL, J., joins in this dissent.

MICHAEL E. KELLIHER, APPELLANT, V.
TRAVIS SOUNDY ET AL., APPELLEES.
852 N.W.2d 718

Filed August 29, 2014. No. S-13-538.

1. **Judgments: Jurisdiction.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law.
2. **Judgments: Appeal and Error.** An appellate court reviews questions of law independently of the lower court's conclusion.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
4. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction over the matter before it.
5. **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.
6. **Final Orders: Appeal and Error.** 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.
7. ____: ____. The requirement that a court order must resolve an important issue completely separate from the merits of the action prevents piecemeal review.
8. ____: ____. Court orders which involve considerations that are enmeshed in the factual and legal issues of the cause of action are not immediately reviewable.
9. **Property: Sales: Intent.** The scope of the lis pendens statute is determined by its end and purpose. The purpose of the lis pendens statute is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting the relief sought.
10. **Actions: Property: Notice.** Cancellation of a notice of lis pendens is completely separate from the merits of the underlying action.

11. **Actions: Property: Notice: Time: Appeal and Error.** "Good cause" to cancel a notice of lis pendens under Neb. Rev. Stat. § 25-531 (Cum. Supp. 2012) does not include a consideration of the merits of the underlying action.
12. **Property: Title: Notice.** A court may cancel a notice of lis pendens if the face of the complaint shows that the underlying action does not involve title to real property.
13. **Property: Sales: Notice.** The existence of a prospective purchaser who wants to buy the property free of the pending litigation is not good cause to cancel a notice of lis pendens.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed.

Justin R. Herrmann and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Brian R. Symington, of Parker, Grossart, Bahensky, Beucke & Bowman, L.L.P., for appellee Schijohn, L.L.C.

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

CONNOLLY, J.

SUMMARY

Michael E. Kelliher appeals from the district court's order canceling a notice of lis pendens he filed against property in which he claimed title. His business partner, Travis Soundy, sold the property to Schijohn, L.L.C. Kelliher then filed suit, alleging that Soundy did not have authority to sell the property without Kelliher's consent and that the owners of Schijohn knew that he claimed an interest in it.

The first issue is jurisdictional. Kelliher concedes the district court's June 2013 order canceling the notice of lis pendens is not a final order. But he contends that review is proper under the collateral order doctrine. The second issue is whether the court erred in canceling the notice of lis pendens before Kelliher has had an opportunity to appeal the summary judgment order denying him relief. We conclude that we have jurisdiction under the collateral order doctrine and that the district court erred by canceling the notice of lis pendens.

BACKGROUND

Factual History

In 2006, Kelliher and Soundy filed articles of organization for Clover Investments, L.L.C. (Clover), in which they made equal contributions and had equal membership rights. About 3 months later, Clover purchased a bar in Kearney, which was its sole asset. In March 2007, Soundy purchased Kelliher's interest in Clover.

In July 2008, Soundy and Kelliher negotiated an oral agreement for Kelliher to earn back his 50-percent interest in Clover. According to Kelliher, he agreed to manage the bar and inject his own funds into the operations, which duties he fulfilled. According to Soundy, the oral agreement required Kelliher to successfully manage the bar, including "restoring and maintaining the amortization of loans" to Clover and keeping current all of Clover's obligations. In November 2009, Soundy terminated the management agreement. He contends that he was the sole owner of Clover. In March 2010, Clover sold the bar to Schijohn.

Procedural History

Kelliher sued Soundy, Clover, and Schijohn. He alleged that in July 2008, after Soundy had unsuccessfully tried to sell Clover's property, Soundy contacted Kelliher to see if he would be interested in repurchasing an interest. Kelliher alleged that he agreed to do this by making capital improvements and had fulfilled that duty. Kelliher's general allegations asserted four claims for relief. First, he claimed that he had unsuccessfully demanded access to Clover's records, which were in Soundy's sole possession, and sought an accounting. Second, he sought a judicial dissolution of Clover. Third, he alleged that Soundy had breached a duty of care and loyalty to Clover and himself, and sought damages. Fourth, he claimed that Soundy lacked authority to sell Clover's property and asked the court to quiet title in him.

Schijohn moved for summary judgment on Kelliher's quiet title claim. The court granted the motion, concluding, as a

matter of law, that Schijohn was entitled to rely on the apparent authority of Soundy to convey the property.

Kelliher moved to vacate or modify the judgment and, alternatively, to certify the order as appealable under Neb. Rev. Stat. § 25-1315(1) (Reissue 2008). The court denied the motion to vacate its order but granted the certification request. In case No. A-11-612, the Nebraska Court of Appeals dismissed the appeal without opinion on September 9, 2011.

Kelliher did not seek further review. On remand, Schijohn moved to cancel Kelliher's notice of lis pendens against the property. Its attorney stated that Schijohn was trying to sell the building and needed clear title. Kelliher argued that he had not yet had an opportunity to appeal and that the majority of courts in other jurisdictions have held it is improper to release a notice of lis pendens until after an appeal or after the time to seek review has passed.

In a June 2013 order, the court ruled on various motions and noted that a trial was scheduled for August. Nonetheless, the court canceled the notice of lis pendens, based on its earlier dismissal of the claim against Schijohn.

ASSIGNMENT OF ERROR

Kelliher assigns, restated, that the district court erred by granting Schijohn's motion to cancel the notice of lis pendens.

STANDARD OF REVIEW

[1,2] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law.[1] An appellate court reviews questions of law independently of the lower court's conclusion.[2]

[3] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[3]

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[1] *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013).

[2] *Id.*

[3] *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

ANALYSIS

JURISDICTION

[4,5] Before reaching the legal issues presented for review, an appellate court must determine whether it has jurisdiction over the matter before it.[4] For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.[5]

[6] Kelliher concedes that the June 2013 order canceling the notice of lis pendens was not a final order. But Kelliher argues that this court has jurisdiction under the collateral order doctrine. 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.[6]

The June 2013 order satisfied the first and third elements of the collateral order doctrine. The order conclusively determined the validity of the notice.[7] Furthermore, the order will be effectively unreviewable on appeal from a final judgment because, if review is so delayed, the property might be sold in the interim to a third party whose rights are not affected by the judgment.[8]

[7,8] The jurisdictional dispute centers on the second element of the collateral order doctrine: Whether the release of the notice was completely separate from the merits of the underlying action. The requirement that a court order must resolve an important issue completely separate from the merits of the action prevents piecemeal review.[9] Orders which involve considerations that are enmeshed in the factual and legal

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[4] *Hallie Mgmt. Co. v. Perry*, 272 Neb. 81, 718 N.W.2d 531 (2006).

[5] *Id.*

[6] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[7] See *Suess v. Stapp*, 407 F.2d 662 (7th Cir. 1969).

[8] See *Keith v. Bratton*, 738 F.2d 314 (8th Cir. 1984).

[9] 4 Am. Jur. 2d *Appellate Review* § 105 (2007).

issues of the cause of action are not immediately reviewable.[10] Because our collateral order doctrine has its source in decisions of the U.S. Supreme Court,[11] we review cases decided by the federal courts for guidance.

Federal courts hold that whether the cancellation of a notice of lis pendens is completely separate from the merits depends on the language of the relevant statute. When the lis pendens statute is silent as to the grounds for release or includes grounds other than the merits of the underlying suit, an order canceling a notice of lis pendens is independent of the merits of the underlying suit.[12] But the cancellation of a notice of lis pendens is not independent of the merits where the statute directs courts to consider the probability of the plaintiff's success in the underlying action.[13] Thus, whether the district court's order canceling Kelliher's notice of lis pendens is within the collateral order doctrine depends on whether Nebraska's lis pendens statute makes the probable merits of the underlying action relevant to the cancellation of a notice.

Neb. Rev. Stat. § 25-531 (Cum. Supp. 2012), the lis pendens statute, allows a court to cancel a notice of lis pendens any time after the complaint is filed "on good cause shown." Section 25-531, in relevant part, provides:

> The court in which such action was commenced or any judge thereof may at any time thereafter on the application of any person aggrieved, on good cause shown, and on such notice as the court or judge may determine, order the notice to be canceled by the clerk or register of deeds

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[10] *Id.*

[11] See *Hallie Mgmt. Co. v. Perry, supra* note 4.

[12] See, *U.S. v. Parrett*, 530 F.3d 422 (6th Cir. 2008); *Keith v. Bratton, supra* note 8; *Chrysler Corp. v. Fedders Corp.*, 670 F.2d 1316 (3d Cir. 1982); *Beefy King International, Inc. v. Veigle*, 464 F.2d 1102 (5th Cir. 1972); *Suess v. Stapp, supra* note 7; *Preston v. United States*, 284 F.2d 514 (9th Cir. 1960). See, also, *Hill v. Department of Air Force*, 884 F.2d 1321 (10th Cir. 1989).

[13] See, *Orange Cty. v. Hongkong & Shanghai Banking Corp.*, 52 F.3d 821 (9th Cir. 1995); *Demenus v. Tinton 35 Inc.*, 873 F.2d 50 (3d Cir. 1989).

> of any county in which the notice may have been filed or recorded by filing a notice of release.

Although § 25-531 does not expressly make the merits of the underlying action relevant to a motion to cancel a notice of lis pendens, the phrase "good cause" is potentially broad enough to include this consideration. So, we consider whether the "good cause" requirement includes the perceived merits (or lack thereof) of the pending litigation.

Under the common-law doctrine of lis pendens (literally "[a] pending lawsuit"[14]), the mere pendency of a suit affecting title to real property was constructive notice to the world of the disputed claim.[15] Before 1887, Nebraska's lis pendens statute "was a legislative adoption of the equity rule of *lis pendens* that had existed from time immemorial."[16] Under the rule then in effect that a suit was not commenced until the service of summons, the traditional application of the doctrine proved problematic.[17] Persons aware of the filing of a complaint but not yet served with a summons could freely alienate the property and preclude a court from awarding the relief requested in the complaint.[18] To address this problem, the Legislature amended the lis pendens statute in 1887 to permit a plaintiff to record a notice of lis pendens with the register of deeds and thereby bind any subsequent purchaser to the outcome of the proceedings.[19] The 1887 act also permitted any aggrieved person to petition for the cancellation of the notice "in good cause shown."[20]

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[14] Black's Law Dictionary 1073 (10th ed. 2014).

[15] *White v. Wensauer*, 702 P.2d 15 (Okla. 1985).

[16] *Sheasley v. Keens*, 48 Neb. 57, 63, 66 N.W. 1010, 1012 (1896), *overruled on other grounds, Munger v. Beard & Bro.*, 79 Neb. 764, 113 N.W. 214 (1907).

[17] See, *Munger v. Beard & Bro.*, *supra* note 16; *Sheasley v. Keens*, *supra* note 16.

[18] See *id.*

[19] *Id.*

[20] 1887 Neb. Laws, ch. 92, § 1, p. 645.

The development of Nebraska's lis pendens statute is instructive. As one court has noted, statutes did not create the lis pendens doctrine, but instead limit its application by requiring the plaintiff to record a notice that complies with statutory requirements.[21] Although lis pendens statutes are designed to provide a better form of notice to third parties, they generally do so without conferring any additional substantive rights.[22] Traditionally, the application of the lis pendens doctrine does not depend on the merits of the underlying action.[23] We find no express or implied legislative intent to alter this aspect of the rule.

We decided a similar issue concerning the lis pendens statute in *Merrill v. Wright*.[24] In that case, an action was brought in 1892 to foreclose a tax lien but the sale did not occur until 1902. In the interim, the appellant received a tax deed for the same property for taxes assessed after those on which the foreclosure suit was based. The purchaser from the foreclosure sale sought to eject the appellant, arguing that the appellant had taken title subject to the outcome of the foreclosure action. The issue presented was whether the lis pendens statute applied to a deed that was not derived from or dependent on the titles of any parties to the pending litigation. To answer this question, we interpreted the lis pendens statute in the context of the preexisting common-law doctrine:

> Counsel contends that [the lis pendens statute] is broader than the general rule, and must constrain us to extend it so as to include all interests acquired by third persons

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[21] *White v. Wensauer, supra* note 15.

[22] See *id*.

[23] See 54 C.J.S. *Lis Pendens* § 40 (2010). See, also, *Richard J. Zitz, Inc. v. Pereira*, 965 F. Supp. 350 (E.D.N.Y. 1997); *Boca Petroco, Inc. v. Petroleum Realty II*, 292 Ga. App. 833, 666 S.E.2d 12 (2008); *Bonded Concrete Inc. v. Johnson*, 280 A.D.2d 758, 720 N.Y.S.2d 227 (2001); *Utsunomiya v. Moomuku Country Club*, 75 Haw. 480, 866 P.2d 951 (1994); *Jay Jenkins Co. v. Financial Planning &c., Inc.*, 256 Ga. 39, 343 S.E.2d 487 (1986).

[24] *Merrill v. Wright*, 65 Neb. 794, 91 N.W. 697 (1902).

> pending suit, whatever their nature or source. While the language of that section, "no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title," is very broad, we are satisfied that it should be construed with reference to the pre-existing equity rule, which it evidently intended to adopt, and the obvious reason and principle behind it.[25]

Because "the scope of the *lis pendens* rule must be confined to the interests and estates sought to be subjected," we held that it did not extend to "independent and adverse titles."[26]

[9] Interpreting "good cause" to include a perceived weakness in the merits of the pending action would also be contrary to the purpose of the lis pendens statute. We have recognized that "[t]he scope of the [lis pendens] rule is determined by its end and purpose."[27] The lis pendens statute serves to hold the property within the court's jurisdiction until the parties' rights are finally determined: "'The purpose of the rule as to *lis pendens* is to prevent third persons, during the pendency of the litigation, from acquiring interests in the land which would preclude the court from granting the relief sought.'"[28] Here, the district court canceled Kelliher's notice of lis pendens "[b]ased upon the prior rulings of the court finding that defendant Schijohn was an innocent purchaser of property and dismissing it from these proceedings . . . ." Kelliher, however, has not had the opportunity to appeal the dismissal of his quiet title claim. If the court cancels the notice of lis pendens and Schijohn conveys the property to a third party, any subsequent appeals by Kelliher would "prove mere idle ceremonies."[29]

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[25] *Id.* at 798, 91 N.W. at 699.

[26] *Id.*

[27] *Id.* at 797, 91 N.W. at 699.

[28] *Coffin v. Old Line Life Ins. Co.*, 138 Neb. 857, 865, 295 N.W. 884, 889 (1941). See, *Hadley v. Corey*, 137 Neb. 204, 288 N.W. 826 (1939); *Lincoln Rapid Transit Co. v. Rundle*, 34 Neb. 559, 52 N.W. 563 (1892).

[29] See *Lincoln Rapid Transit Co. v. Rundle, supra* note 28, 34 Neb. at 566, 52 N.W. at 566.

[10,11] We conclude that we have jurisdiction over the appeal under the collateral order doctrine. The court's order canceling the notice of lis pendens conclusively determined the validity of the notice and would be effectively unreviewable on appeal from a final judgment. We also determine that the cancellation of the notice is completely separate from the merits of the underlying action. "Good cause" to cancel a notice of lis pendens under § 25-531 does not include a consideration of the merits of the underlying action.

Cancellation of Notice

The substantive issue raised by this appeal is whether good cause existed for the court to cancel the notice of lis pendens. Kelliher argues that the court's order was contrary to the purpose of the lis pendens statute and, more broadly, that a court may never cancel a notice of lis pendens if time for appeal remains. Schijohn contends that § 25-531 confers on courts a wide discretion and that the order was justified by the dismissal of Kelliher's quiet title action and the existence of a prospective buyer. We conclude that there was not good cause to cancel the notice of lis pendens.

As an initial matter, we reject Kelliher's argument that a court may never cancel a notice of lis pendens unless the time for appeal has expired. We reach this decision for two reasons. First, the plain language of § 25-531 permits an aggrieved person to move to cancel a notice "any time" after the commencement of the action. The lis pendens statute, as amended by the 1887 act, permitted a person to petition for cancellation only after the action was "settled, discontinued or abated."[30] In 1959, the Legislature removed this language.[31]

[12] Second, a bright-line rule that a court could never cancel a notice of lis pendens if time for appeal remains would extend the lis pendens statute beyond its legislative purpose. Although it is true that the right to appeal usually extends the time for which property is subject to the lis pendens

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[30] 1887 Neb. Laws, ch. 92, § 1, p. 645.

[31] 1959 Neb. Laws, ch. 140, § 1, p. 545.

doctrine,[32] a court may cancel a notice of lis pendens if the face of the complaint shows that the underlying action does not involve title to real property.[33] Section 25-531 allows a plaintiff to file a notice of lis pendens only if the action is "brought to affect the title to real property." This requirement would not be met if, for example, a plaintiff files an action for breach of a land sale contract but the only relief requested in the complaint is damages.[34] In such a case, a notice of lis pendens would not be necessary to permit courts to grant the relief sought and would needlessly burden the record owner's title.

[13] Here, Kelliher's quiet title claim clearly sought to affect title to real property and we hold that good cause to cancel the notice of lis pendens did not exist. In its June 2013 order, the court stated that the notice should be canceled because it had dismissed Kelliher's quiet title action against Schijohn. As we explained above, however, the perceived merits of the underlying action are not good cause to cancel a notice while time for appeal remains. In its motion to cancel the notice, Schijohn also stated that it had a buyer who wanted to purchase the property. But neither is the existence of a prospective purchaser who wants to buy the property free of the pending litigation good cause to cancel a notice. The very purpose of the lis pendens statute is to prevent third parties from acquiring interest in the property that would preclude a court from granting the relief sought.[35]

CONCLUSION

We conclude that we have jurisdiction over the appeal under the collateral order doctrine and that it was error to

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[32] 51 Am. Jur. 2d *Lis Pendens* § 67 (2011). See, *State ex rel. Bannister v. Goldman*, 265 S.W.3d 280 (Mo. App. 2008); *Zweber v. Melar Ltd., Inc.*, 276 Wis. 2d 156, 687 N.W.2d 818 (Wis. App. 2004); *Group Purchases, Inc. v. Lance Investments*, 685 S.W.2d 729 (Tex. App. 1985). But see, *UFG, LLC v. Southwest Corp.*, 784 N.E.2d 536 (Ind. App. 2003); *Kirkley v. Jones*, 250 Ga. App. 113, 550 S.E.2d 686 (2001).

[33] See, e.g., 54 C.J.S., *supra* note 23, § 32.

[34] See, e.g., *id.*, § 11.

[35] See *Coffin v. Old Line Life Ins. Co., supra* note 28.

cancel the notice of lis pendens. If time for appeal remains, the merits of the underlying action affecting the title to real property are not relevant to whether good cause to cancel a notice of lis pendens exists. Nor does the existence of a prospective purchaser of the subject property amount to good cause. Accordingly, we reverse the district court's order canceling Kelliher's notice of lis pendens.

REVERSED.

CASSEL, J., not participating.

DAVID BROCK, APPELLANT, V. TIM DUNNING, SHERIFF, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, AND DOUGLAS COUNTY, A POLITICAL SUBDIVISION, APPELLEES.

854 N.W.2d 275

Filed August 29, 2014. No. S-13-647.

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 was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
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. **Summary Judgment.** In the summary judgment context, a fact is material only if it would affect the outcome of the case.
6. ____. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.

7. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
8. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
9. **Constitutional Law: Actions.** In any 42 U.S.C. § 1983 (2012) action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.
10. **Constitutional Law: Property.** The 14th Amendment's protection of property extends to benefits for which, under state law or practice, a person has a claim or entitlement.
11. **Constitutional Law: Public Officers and Employees.** The content, form, and context of a given statement must be considered in determining whether an employee's speech addresses a matter of public concern.
12. ____: ____. To fall within the realm of public concern, an employee's speech must relate to a matter of political, social, or other concern to the community.
13. ____: ____. The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community.
14. ____: ____. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
15. ____: ____. Factors relevant in determining whether an employee's speech undermines the effective functioning of the public employer's enterprise are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his or her duties, or impairs working relationships with other employees.
16. **Constitutional Law: Due Process.** The Due Process Clause of the 14th Amendment contains a substantive component that provides some protection to a person's right of privacy.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

Bruce G. Mason, of Mason Law Office, for appellant.

Donald W. Kleine, Douglas County Attorney, and Bernard J. Monbouquette for appellees.

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

MILLER-LERMAN, J.

NATURE OF CASE

David Brock, the appellant, was employed as a deputy sheriff with the Douglas County sheriff's office (Sheriff's Office). In March 2007, Brock was injured while on duty, and he filed a workers' compensation claim. While receiving workers' compensation benefits, Brock periodically was placed under surveillance. Eventually, the Sheriff's Office determined that Brock had been untruthful regarding the extent of his injuries with medical personnel, workers' compensation personnel, and personnel within the Sheriff's Office. Accordingly, Brock's employment was terminated on June 10, 2009. By a letter dated August 23, 2010, the Douglas County Sheriff's Merit Commission (Merit Commission) stated that it affirmed the termination. The district court for Douglas County affirmed the Merit Commission's decision on December 30. This previous action is not the case before us.

On December 23, 2010, Brock filed his petition in the district court for Douglas County against Tim Dunning, individually and in his official capacity as Douglas County Sheriff, and Douglas County, the appellees, alleging two causes of action. This case gives rise to the instant appeal. The first cause of action was a claim of wrongful discharge in retaliation for having filed and pursued a workers' compensation claim. The second cause of action was brought under 42 U.S.C. § 1983 (2012), and alleged three theories. The appellees filed their answer on January 27, 2011, generally denying Brock's allegations. On August 31, 2012, the appellees filed a motion for summary judgment. After a hearing, the district court filed an order on July 5, 2013, in which it determined there were no issues of material fact and granted the appellees' motion for summary judgment. Brock appeals. We find no merit to Brock's assignments of error on appeal, and we therefore affirm the district court's order.

STATEMENT OF FACTS

Brock began his employment as a deputy sheriff with the Sheriff's Office in 1995. From 2001 to 2004, Brock was assigned to the K-9 unit involved in drug interdiction along

Interstate 80. The Sheriff's Office received significant income from the property seizures by the K-9 unit's drug interdiction along the interstate. Brock believed that he had observed racial profiling of drivers by Edward Van Buren, the sergeant in charge of the K-9 unit. On two occasions between October 2001 and April 2004, Brock and three other deputies reported their concerns of racial profiling to Chief Deputy Marty Bilek and other command officers of the Sheriff's Office. In April 2004, Brock was reassigned to road patrol for disciplinary reasons; two of the other reporting deputies were asked to leave the K-9 unit due to "burn out."

On March 18, 2007, Brock sustained injuries to his neck and shoulder when struggling with a suspect while on duty. Brock filed a claim for workers' compensation benefits. Brock asserts that the Sheriff's Office consistently delayed or refused his needed medical care. Once authorized, MRI's revealed disk herniation and a rotator cuff tear. Brock eventually underwent five surgeries and attended physical therapy due to his injuries.

As early as May 2007, Janice Johnson, who was employed by Douglas County and was responsible for administering the workers' compensation claims of Douglas County employees, hired private investigators to periodically place Brock under surveillance and to report on Brock's physical abilities. Between May 2007 and June 2008, Brock was under surveillance on approximately 10 different days for approximately 73 hours.

By February 13, 2009, Brock was released by his doctor to return to light duty for 4 hours per day at the Sheriff's Office. From February 13 through 16, Brock was again placed under surveillance. Including the most recent surveillance, Brock was under surveillance for a total of approximately 100 hours from May 2007 through February 2009. On February 13, an investigator videotaped Brock while he was operating his pickup truck with a snowplow attached to it for 5 hours. During that time, Brock was clearing snow from business parking lots for his father's lawn maintenance and snow removal business.

On March 17, 2009, Brock met with Dr. Kirk S. Hutton, one of his treating physicians. Prior to that appointment, Dr. Hutton had viewed the surveillance film from February 13. Dr. Hutton characterized the film as showing Brock's rotating the steering wheel and twisting his neck to see behind him. During the examination on March 17, Dr. Hutton asked Brock about the range of activities that Brock could perform and specifically asked Brock whether he could operate a snowplow. Brock responded that there was "no way" he could drive a truck or operate a snowplow. Dr. Hutton's notes from the March 17 examination state:

> I should also mention that I reviewed a surveillance video taken of [Brock] in February operating a snow plow and a pick-up truck. He was driving using his left hand extensively rotating the wheel, turning around watching behind him, twisting his neck with no apparent problems using his left arm. I did question him about activities that he has been able to do. We got on the topic of scooping snow and running a snow plow. When I asked him if he could do this he said there was no way that he could even drive a truck or work a snow plow.

On March 26, 2009, Brock completed a functional capacity evaluation (FCE). The physical therapist who conducted the FCE sent a letter to Johnson regarding the results. The physical therapist indicated that Brock had "self-limited several of the lifting tasks." The physical therapist defined self-limiting behavior as "stopp[ing] the activity prior to objective signs consistent with maximal effort being demonstrated." The physical therapist stated that he could not complete an accurate assessment of Brock's physical abilities due to this self-limiting behavior.

After these reports, in April 2009, an internal investigation regarding Brock's activities commenced. A lieutenant from the Sheriff's Office conducted the internal investigation, which included an interview with Brock. During the interview, Brock at first denied any involvement with his father's business, but once he was shown documentation of his involvement and work for the business, he admitted that he owned stock and

participated in the business. Brock thereafter admitted to the lieutenant that he had operated the pickup truck with the snowplow attached to it on February 13.

After the internal investigation, on May 29, 2009, Brock was provided notice of a predisciplinary hearing. The notice for the predisciplinary hearing contained three instances where the Sheriff's Office believed that Brock had been untruthful and referenced various General Orders of the Sheriff's Office that the Sheriff's Office believed Brock had violated. The predisciplinary hearing was held on June 8, and Brock appeared with his union representative.

Following the hearing, Brock's employment was terminated on June 10, 2009. He was provided written notice of the termination, which indicated that the termination was due to his being "untruthful and deceptive when interacting with doctors, Workers Comp [sic] personnel and a Sheriff's Internal Affairs investigator."

After Brock's employment was terminated, he exercised his statutory right to appeal the termination to the Merit Commission. A hearing was held before the Merit Commission, and by a letter dated August 23, 2010, the Merit Commission stated that it had unanimously voted, 5 to 0, to affirm Brock's termination of employment.

Brock then appealed the decision of the Merit Commission to the district court for Douglas County in case No. CI 10-9391145. The district court filed an order on December 30, 2010, affirming the decision of the Merit Commission. The district court determined, inter alia, that the record of the Merit Commission's proceeding included sufficient evidence to support the termination and that there was no evidence to support Brock's allegation that his due process rights were violated. Brock did not appeal the December 30 order of the district court in the prior action.

On December 23, 2010, Brock filed his petition in this case, in which he alleged two causes of action. Dunning was sued as a defendant in his official and individual capacities. Douglas County was also sued as a defendant. These defendants are the appellees. With respect to his first cause of action, Brock alleged that the appellees wrongfully terminated

his employment in retaliation for having filed and pursued a workers' compensation claim. Brock's second cause of action, based on § 1983, alleged three theories of liability. First, Brock alleged that the appellees had a policy or custom of obstructing, delaying, and denying receipt of workers' compensation benefits in violation of his protected property interests. Second, Brock alleged that the appellees retaliated against him by terminating his employment for exercising his right of free speech under the First Amendment when he reported racial profiling. Third, Brock alleged that the appellees violated his right to privacy when he was placed under surveillance.

On January 27, 2011, the appellees filed their answer generally denying Brock's allegations. The appellees raised as a defense that Brock "has failed to state a claim against the [appellees] upon which relief can be granted for his First and Second Causes of Action." No affirmative defense of immunity was pled.

On August 31, 2012, the appellees filed a motion for summary judgment. A hearing was held on the motion on January 22, 2013. At the hearing, the appellees offered and the court received 15 exhibits, including documents and the transcript of the proceedings before the Merit Commission, the district court's order affirming the decision of the Merit Commission in the previous case, the depositions of Brock and Johnson, the affidavits of Dunning and Johnson, medical reports, investigation reports, internal communications, the notice and transcript of the predisciplinary hearing, and the notification of Brock's termination of employment. Brock offered and the court received three exhibits, including the depositions of Brock, Dunning, and a former deputy, Matthew L. Murphy, the latter of whom testified about having reported witnessing racial profiling by Van Buren, the sergeant in charge of the K-9 unit, to Bilek.

On July 5, 2013, the district court filed its order granting the appellees' motion for summary judgment and dismissing Brock's petition. With respect to the first cause of action regarding retaliatory discharge due to Brock's having filed a claim for workers' compensation, the district court determined,

inter alia, that Brock's wrongful termination action, a tort, was barred for failure to make a claim. The court noted that both the appellees, Dunning and Douglas County, are political subdivisions of the State of Nebraska, or an elected official of the same, and that they are therefore subject to the provisions of Nebraska's Political Subdivisions Tort Claims Act. Because Brock's termination of employment occurred on June 10, 2009, the court stated that Brock was required to file a notice of claim of an action arising in a tort by June 10, 2010. The court determined that Brock had failed to plead and prove that he had complied with the 1-year notice of claim requirement under Neb. Rev. Stat. § 13-919(1) (Reissue 2012) of the Political Subdivisions Tort Claims Act. Therefore, the district court granted summary judgment in favor of the appellees on the first cause of action.

With respect to Brock's second cause of action, the district court stated that it "is based in . . . § 1983, and has three separate and distinct theories of liability." Brock's first theory was that the appellees "had an official custom, practice and officially adopted policy to delay, hinder, obstruct, and deny [Brock] his federally protected property entitlement in obstructing, delaying, denying and finally terminating [Brock's employment] for exercising his right to receive the Nebraska statutory program of workers' compensation benefits." The district court stated that a plaintiff must prove the following in order for there to be liability under § 1983: "1. a constitutional violation, or a federal law violation, 2. which was committed by a person acting under the color of state law, and 3. with proximate causation between the actor and the constitutional/legal deprivation." The district court determined that there was "no official policy, and no continuing widespread, persistent custom or practice by the [appellees] to terminate the employment of injured employees including [Brock] who claim and/or receive workers' compensation benefits," and that therefore, Brock failed to prove a constitutional or law violation.

Brock's second theory under § 1983 alleged that the appellees retaliated against him for exercising his First Amendment

right to freedom of speech when he reported racial profiling by the K-9 unit staff. The court determined that Brock's speech was not protected because he had spoken in his official capacity as an employee about official practices, not as a private citizen. Additionally, the court determined that Brock's 2009 termination of employment was not in retaliation for speech made in 2004 or 2005 because the alleged retaliatory action was too remote in time as a matter of law.

Brock's third theory under § 1983 alleged that the appellees violated his right to privacy based on the surveillance by investigators authorized by Johnson. The court analyzed this issue under the 4th Amendment, not the 14th Amendment, and determined that the use of private investigators was routine "in the industry" and that Brock had no expectation of privacy in the business parking lots where he was recorded plowing snow.

Based on the foregoing reasons, the district court determined that there were no genuine issues as to any material facts presented by the parties and that the appellees were entitled to judgment as a matter of law. The court granted the appellees' motion for summary judgment and dismissed Brock's petition.

Brock appeals.

ASSIGNMENTS OF ERROR

Brock claims that the district court erred when it granted summary judgment in favor of the appellees and dismissed Brock's petition. Brock's numerous contentions regarding each cause of action and each theory under § 1983 are addressed individually in our analysis below.

STANDARDS OF REVIEW

[1] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law. *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[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. *Id.*

ANALYSIS

In this case, Brock appeals from the district court's order granting summary judgment in favor of the appellees. Thus, as a preliminary matter, we set forth the legal principles applicable to a motion for summary judgment.

[3-7] 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. *Latzel v. Bartek, ante* p. 1, 846 N.W.2d 153 (2014). After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In the summary judgment context, a fact is material only if it would affect the outcome of the case. *Id.* Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Id.* If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.*

First Cause of Action: Tort of Wrongful Discharge in Retaliation for Filing a Workers' Compensation Claim.

At the core of his first cause of action, Brock alleged that he was wrongfully discharged by the appellees in retaliation for filing a workers' compensation claim. The district court determined that Brock had failed to plead and the evidence did not suggest that he had filed written notice of his claim within 1 year of the alleged tortious act, as required by § 13-919(1) of the Political Subdivisions Tort Claims Act, and

entered summary judgment in favor of the appellees on this cause of action for this reason. Brock claims that the district court erred when it so ruled. We find no merit to this assignment of error.

In *Jackson v. Morris Communications Corp.*, 265 Neb. 423, 657 N.W.2d 634 (2003), we determined that an employee may bring a common-law tort action when an employer wrongfully discharges the employee in retaliation for filing a workers' compensation claim. See, also, *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007); *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). Thus, Brock's first cause of action is a tort claim.

[8] Brock brought his cause of action for wrongful discharge in retaliation for filing a workers' compensation claim against Douglas County and Dunning, an elected official of Douglas County, the appellees. Both of the appellees are subject to the provisions of the Political Subdivisions Tort Claims Act. The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Keller v. Tavarone*, 265 Neb. 236, 655 N.W.2d 899 (2003). Section 13-919(1) of the Political Subdivisions Tort Claims Act provides in relevant part that "[e]very claim against a political subdivision permitted under the Political Subdivisions Tort Claims Act shall be forever barred unless within one year after such claim accrued the claim is made in writing to the governing body."

Brock was terminated from his employment on June 10, 2009. Brock's claim of retaliatory discharge accrued on this date. Thus, under § 13-919(1), Brock was required to make his claim in writing within 1 year after June 10, 2009, otherwise his claim was barred. As demonstrated by the appellees, Brock did not allege in his petition or otherwise assert that he made the claim within the 1-year period. Brock did not present evidence which would indicate that he made such a claim. Because Brock failed to show that he provided written notice of his tort action for wrongful discharge in retaliation for filing a workers' compensation claim within 1 year of his termination of employment, the appellees were entitled to

summary judgment on this issue. The district court did not err when it determined that the claim is barred under § 13-919(1) and entered summary judgment in favor of the appellees on the first cause of action.

Second Cause of Action: § 1983.

[9] In the "Second Cause of Action" in his petition, Brock alleged three theories, each of which he alleges were violations of the provisions of § 1983. Thus, we set forth some basic principles concerning § 1983 applicable to each theory.

Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress . . . .

Section 1983 provides "a civil remedy for 'deprivations of federally protected rights,' statutory or constitutional, 'caused by persons acting under color of state law.'" *Amanda C. v. Case*, 275 Neb. 757, 765, 749 N.W.2d 429, 437 (2008), quoting *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

We have previously stated that

> "[i]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States."

Amanda C. v. Case, 275 Neb. at 765-66, 749 N.W.2d at 437, quoting *Parratt v. Taylor, supra*. The second element requires a plaintiff to prove not only a deprivation of a right, but also that the defendant's conduct was a cause in fact of the alleged deprivation. *Soto v. Flores*, 103 F.3d 1056 (1st Cir.

1997), *cert. denied* 522 U.S. 819, 118 S. Ct. 71, 139 L. Ed. 32 (1997).

In this case, it is not disputed that the appellees were acting under color of state law, and Brock makes no argument that Dunning should be individually liable. We treat the allegations against Dunning individually as abandoned. Given the foregoing, as to each of the theories, we focus on the second element regarding whether the appellees' conduct deprived Brock of his rights, privileges, or immunities secured by law and whether the appellees' conduct was a cause in fact of the alleged deprivation.

Second Cause of Action Under § 1983, First Theory: Deprivation of Property Rights.

In his first theory under § 1983, Brock alleged a deprivation of property rights under the 14th Amendment. As to this theory, Brock claims that the district court erred when it determined that the evidence failed to show and there was no inference that the appellees had an official policy, practice, or custom of obstructing, delaying, and denying workers' compensation benefits and entered summary judgment in favor of the appellees on this theory. We find no merit to this assignment of error.

[10] We have stated that the 14th Amendment's protection of property extends to benefits for which, under state law or practice, a person has a claim or entitlement. *Braesch v. DePasquale*, 200 Neb. 726, 265 N.W.2d 842 (1978). The U.S. Supreme Court has stated that

> [p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

Pursuant to the Nebraska Workers' Compensation Act, Brock was entitled to workers' compensation benefits and,

therefore, he had a property interest in his workers' compensation benefits. Given this entitlement, the 14th Amendment is implicated.

Referring to the U.S. Supreme Court's interpretation of § 1983, we have observed that a municipality is not liable for the acts of its employees when those acts do not represent the official policy or custom of the municipality. See *Manning v. Dakota Cty. Sch. Dist.*, 279 Neb. 740, 782 N.W.2d 1 (2010). See, also, *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In *Manning*, we stated:

> A rigorous standard of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees. The U.S. Supreme Court elaborated that Congress did not intend municipalities to be held liable unless action pursuant to "official municipal policy of some nature caused a constitutional tort." In other words, a municipality is liable only when the execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts injury.

Manning v. Dakota Cty. Sch. Dist., 279 Neb. at 748-49, 782 N.W.2d at 9, quoting *Monell v. New York City Dept. of Social Services, supra*. Because Brock has alleged a deprivation pursuant to a "policy" or "custom," we explain those terms.

Policy is made when a decisionmaker, possessing final authority to establish municipal policy with respect to the action, issues an official proclamation, policy, or edict. *Manning v. Dakota Cty. Sch. Dist., supra*. "The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." *Pembaur v. Cincinnati*, 475 U.S. at 481-82. Rather, "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or

officials responsible for establishing final policy with respect to the subject matter in question." *Id.*, 475 U.S. at 483-84.

A custom is proved by demonstrating that a given course of conduct, although not specifically endorsed or authorized by state or local law, is so well settled and permanent as virtually to constitute law. *Manning v. Dakota Cty. Sch. Dist., supra.*

In support of the appellees' motion for summary judgment on this theory, they presented evidence, including the deposition of Johnson, demonstrating how workers' compensation claims made by Douglas County employees are processed. The evidence showed the processing of claims in a conventional manner, and nothing in the evidence suggested a deliberate policy or custom designed to deprive Brock or others of workers' compensation benefits.

Brock presented no evidence to indicate that there have been instances of the obstruction, delay, or denial of other Douglas County employees' workers' compensation benefits, so as to constitute or infer a policy or custom. As to his own claim, Brock points to the delay in having an MRI and seeing an orthopedic specialist and the delay in receiving a second opinion regarding his pain and injuries as evidence of a policy or custom of the appellees. While the medical personnel may have been slow to correctly diagnose Brock's injuries, this does not constitute a showing or inference that the appellees had a policy or custom fostering delay so as to frustrate benefits. Further, although the record shows that while Johnson, an employee and agent of Douglas County, had some discretion regarding the handling of workers' compensation claims and benefits for Douglas County employees, she did not have the authority to establish final policy for Douglas County. Thus, Johnson's case-by-case decisions regarding administering the workers' compensation claims of injured Douglas County employees and approving medical treatment does not demonstrate a § 1983 violation.

For completeness, we note that to the extent that Brock contends the appellees had a policy or custom to terminate the employment of employees of Douglas County in retaliation for seeking workers' compensation claims, the evidence

fails to support inferences of this claim. The evidence presented by the appellees showed that Johnson has discretion in handling workers' compensation claims and that there is no policy or custom of terminating the employment of employees in retaliation for seeking such benefits. Brock did not present any evidence showing or inferring the existence of a policy or custom of terminating the employment of employees for filing workers' compensation claims, and he has not presented evidence of any other Douglas County employees whose employment has been terminated due to filing workers' compensation claims.

Even viewing the evidence in the light most favorable to Brock, there is no evidence of an official policy or custom to obstruct, delay, or deny Douglas County employees' workers' compensation benefits to which they were entitled or a policy or custom of terminating employees' employment in retaliation for seeking workers' compensation benefits. The appellees demonstrated that they were entitled to judgment as a matter of law, and Brock did not present evidence precluding judgment. The district court did not err when it entered summary judgment in favor of the appellees on this theory.

Second Cause of Action Under § 1983, Second Theory: Protected Speech Retaliation.

In his second theory under § 1983, Brock alleged his employment was terminated in retaliation for exercising his First Amendment right to freedom of speech. As to this theory, Brock claims the district court erred when it determined that his reports of racial profiling by Van Buren, the supervisor of the K-9 unit, were not protected speech and that therefore, the appellees did not violate his First Amendment right to freedom of speech. Although our analysis differs from that of the district court, we find no merit to Brock's assignment of error in which he claims that the district court erred when it entered summary judgment in favor of the appellees on this theory.

As to the procedural posture of this case, the appellees moved for summary judgment. As set forth in greater detail

at the beginning of our analysis, ordinarily, the moving party must establish its entitlement to judgment and then the burden shifts to the nonmoving party to produce evidence showing the existence of a material issue of fact that prevents judgment. See *Latzel v. Bartek, ante* p. 1, 846 N.W.2d 153 (2014). On appeal, we view the evidence in the light most favorable to Brock as the nonmoving party and give him the benefit of all reasonable inferences deducible from the evidence. See *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

As to the substantive law applicable to this theory, we have stated that in order for a plaintiff to make a substantive prima facie case of protected speech retaliation, the plaintiff must prove two elements: first, that the statements are protected speech and, second, that the speech was a substantial or motivating factor in the employment decision. See *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000). As to the first element, protected speech, the identification of such speech is itself a two-step process requiring proof: first, that the speech was made as a citizen addressing a matter of public concern, *Lane v. Franks*, ___ U.S. ___, 134 S. Ct. 2369, 189 L. Ed. 2d 312 (2014), and, second, that the interest of the plaintiff in so speaking, balanced against the interest of the public employer in promoting the efficiency of the public services it performs through its employees, favors the plaintiff, *Cox v. Civil Serv. Comm. of Douglas Cty., supra*.

If the plaintiff proves the first element, i.e., the speech is constitutionally protected, the plaintiff must then establish the second element, i.e., the protected speech was a substantial or motivating factor in the employment decision. *Id.*

If the plaintiff makes a prima facie case of protected speech retaliation as just described, the burden then shifts to the employer to show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity. *Id.*

As the foregoing descriptions show, "burden-shifting" is present in this case in two separate respects: first, as to the summary judgment procedure and, second, as to the protected

speech retaliation substantive claim. Other courts have taken note of this phenomenon and described the path accommodating both burden-shifting principles.

In a First Amendment retaliation case where the defendant public employers moved for summary judgment, the U.S. Court of Appeals for the Sixth Circuit stated that the plaintiff must first make a prima facie case of retaliation, and

> [i]f the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate "by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct." *Eckerman v. Tenn. Dep't of Safety*, 636 F.3d 202, 208 (6th Cir.2010) . . . . "Once this shift has occurred, summary judgment is warranted if, in light of the evidence viewed in the light most favorable to the plaintiff, no reasonable juror could fail to return a verdict for the defendant." *Id.* Unlike in the *McDonnell Douglas* [*Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973),] burden-shifting framework [pertaining to employment discrimination], the burden does not shift back to a plaintiff to show pretext in First Amendment retaliation claims.

Dye v. Office of the Racing Com'n, 702 F.3d 286, 294-95 (6th Cir. 2012).

Similar to the Sixth Circuit, we have sometimes referred to a hypothetical jury when discussing the summary judgment process. As to whether to enter summary judgment, we have stated in part that where the facts "are such that reasonable minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination." *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 319, 739 N.W.2d 442, 447 (2007). This does not mean that the standards for granting motions for summary judgment and motions for directed verdict are the same. The former focuses on individual facts or inferences, while the latter addresses the evidence as a whole at the time of the motion. With that caveat, we agree with the process mentioned by the Sixth Circuit, including the statement that the burden does not shift back to a plaintiff

in First Amendment retaliation claims. See *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977). With the foregoing process in mind, we review the evidence.

[11-14] As stated above, to establish the first element, the plaintiff must show that he or she engaged in constitutionally protected speech or conduct, the first component of which is a showing that the speech addressed a matter of public concern. As to public concern, we recently stated:

> The content, form, and context of a given statement must be considered in determining whether an employee's speech addresses a matter of public concern. To fall within the realm of public concern, an employee's speech must relate to a matter of political, social, or other concern to the community. The public concern test functions to prevent every employee's grievance from becoming a constitutional case and to protect a public employee's right as a citizen to speak on issues of concern to the community. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

Carney v. Miller, 287 Neb. 400, 414, 842 N.W.2d 782, 795 (2014).

In this case, on two occasions between October 2001 and April 2004, Brock, along with three other deputies, met with commanding officers of the Sheriff's Office, including Bilek. At these meetings, Brock reported that he believed he had observed racial profiling by Van Buren, the sergeant in charge of the K-9 unit, while patrolling I-80. It has recently been observed that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, ___ U.S. ___, 134 S. Ct. 2369, 2379, 189 L. Ed. 2d 312 (2014). Nothing in the record indicates that it was part of Brock's duties to advise the agency of his concerns. It has also been observed that "[t]he inquiry into

whether a public employee is speaking pursuant to [his] official duties is not susceptible to a brightline rule." *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012). "Courts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Id.* Looking at the summary judgment record, Brock's reports were not part of his duties and can be fairly considered as citizen speech relating to a matter of concern to the community.

We have recognized that courts have consistently stated that employee statements alleging racial discrimination within a public agency are inherently matters of public concern and that allegations of racism in a public agency are of concern to the community at large. See *Cox v. Civil Serv. Comm. of Douglas Cty.*, 259 Neb. 1013, 614 N.W.2d 273 (2000) (collecting cases). We have also identified matters of public concern involving an agency's treatment of the public. Thus, in *Carney v. Miller, supra*, we recently determined that a public employee's complaints about allegedly wrongful cancellation of services to aid recipients was of interest to the community at large, not a matter of interest to the employee alone, and therefore a matter of public concern.

Racially discriminatory conduct by an agency toward the public, as distinguished from racially discriminatory conduct within the agency, has been considered by other courts and found to be a matter of public concern. More specifically, racial profiling of the public by a public law enforcement agency has been identified as a matter of public concern. E.g., *Smith v. County of Suffolk*, No. CV 10-1397(ARL), 2013 WL 752635 (E.D.N.Y. Feb. 27, 2013) (unpublished memorandum and order) (involving racial profiling concerning arrests for unlicensed drivers); *Nonnenmann v. City of New York*, No. 02 Civ. 10131 JSR AJP, 2004 WL 1119648 (S.D.N.Y. May 20, 2004) (unpublished report and recommendation) (involving racial profiling during stop and frisk). See, similarly, *Daniels v. City of New York*, 138 F. Supp. 2d 562, 565 (S.D.N.Y. 2001) (stating in non-First Amendment case that "[p]laintiffs are litigating a controversial matter of serious public concern, namely racial profiling"). As the U.S. Court of Appeals for the Second Circuit has noted:

> The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. . . . If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired.

Pappas v. Giuliani, 290 F.3d 143, 146-47 (2d Cir. 2002). Consistent with our analysis in *Cox*, *Carney*, and other authorities, we believe Brock's reports of his observations of racial profiling by his agency are of public concern.

[15] Because Brock's reports of racial profiling involved matters of public concern, in order to determine if the statements were protected speech, we must next balance Brock's First Amendment interest in making the statements against the interest of the public employer in "promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). In *Carney v. Miller*, 287 Neb. 400, 416, 842 N.W.2d 782, 796 (2014), we stated: "Factors relevant in determining whether an employee's speech undermines the effective functioning of the public employer's enterprise are whether the speech creates disharmony in the workplace, impedes the speaker's ability to perform his or her duties, or impairs working relationships with other employees."

We have reviewed the record for purposes of applying the balancing factors. There is no evidence in the record of disharmony in the workplace. There is no evidence that Brock's statements impaired his ability to perform his duties or impaired working relationships with other employees. In balancing the interests of the parties, we believe that Brock's First Amendment interest in making the statements outweighs the appellees' interest as employers where there is no evidence that the effective functioning of the public employer's enterprise

was affected. Thus, we determine that Brock's speech was protected by the First Amendment.

Because Brock's statements were protected speech, and because the appellees took an adverse employment action against Brock by terminating his employment, the next consideration is the second element: whether Brock's protected speech was a substantial or motivating factor in the decision to terminate his employment.

As noted, Brock reported racial profiling on two occasions between October 2001 and April 2004. In a protected speech retaliation case, it has been observed that "temporal proximity between protected activity and an adverse employment action can contribute to establishing" a case of retaliation. *Davison v. City of Minneapolis, Minn*, 490 F.3d 648, 657 (8th Cir. 2007). However, the lack of temporal proximity tends to disprove causation. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close.'" *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S. Ct. 1508, 149 L. Ed. 2d 509 (2001), quoting *O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248 (10th Cir. 2001).

Brock's termination of employment occurred on June 10, 2009, which was at least 5 years after Brock had reported that he believed he had observed racial profiling in the K-9 unit. Without other evidence, 5 years is not close enough in time to raise an inference of causation. See *Recio v. Creighton University*, 521 F.3d 934, 941 (8th Cir. 2008) (determining that 6 months between plaintiff's discrimination complaint and reduction of her assigned courses to teach was "not close enough to raise an inference of causation"); *Kipp v. Missouri Highway and Transp. Com'n*, 280 F.3d 893 (8th Cir. 2002) (determining that 2 months between plaintiff's complaint and her termination of employment did not establish causal link).

The lack of temporal proximity suggests that Brock's protected speech was not a substantial or motivating factor in the decision to terminate his employment. However, we are aware of other evidence in the record relating to a racial

profiling case, Omair v. Douglas County, Douglas County District Court, docket 1110, page 291, the pendency of which, taking the inferences favorable to Brock, favor the conclusion that Brock's evidence established a prima facie case of First Amendment retaliation. The Omair case involved an allegation of racial profiling of a driver, Michael Omair, on I-80 by Van Buren, filed against the appellees herein and other defendants. Brock's theory is that the claims in the Omair matter motivated the appellees to investigate and terminate Brock's employment in order to destroy his credibility as a potential witness on behalf of Omair.

The deposition testimonies of Brock and Murphy, a former sheriff's deputy, in the Omair case were received as evidence at the hearing on summary judgment in the instant case. On the whole, the testimony is anecdotal and, in particular, lacks specificity as to dates which would be helpful to establish causation. At one point, Murphy testified that he read a newspaper article shortly after the Omair case was filed in which Bilek stated that he had never heard of racial profiling by the agency. Murphy testified that in view of the meeting with Dunning and Bilek, "I don't believe it is a correct statement, no."

Elsewhere in the record, the deposition testimony of appellee Dunning, taken in this case, indicates that Dunning was aware of a lawsuit alleging racial profiling, that one of the individuals accused of racial profiling is Van Buren, and that he became aware of the matter "[s]ome time ago . . . ." Dunning explained that his counsel asked him to provide some documents and to prepare a document, exhibit 12, entitled "Internal Affairs Cases of Alleged Violations Against Deputies While Making a Traffic Stop." Exhibit 12 lists internal affairs investigations from "5/30/2003" through "1/5/2010," the last investigation of which involved Van Buren.

The Omair lawsuit, Omair v. Douglas County, Douglas County District Court, docket 1110, page 291, was filed in 2010. The defendants listed in the caption of the depositions from the Omair case are as follows: Douglas County; the Sheriff's Office; Dunning, in his official and individual capacities; and Van Buren, in his official and individual capacities. Because the defendants are subject to the Political Subdivisions

Tort Claims Act, the suit was necessarily preceded by the making of a claim within 1 year of the accrual of the action. See § 13-919(1). We can infer from the record that Omair made a claim sometime in 2009 and that it was rejected or withdrawn after 6 months, thus resulting in the lawsuit. See *id*. The record shows that the internal investigation of Brock commenced in April 2009.

Brock asserts that the Omair allegations were a matter of concern at the Sheriff's Office in 2009 and that they were troublingly reminiscent of Brock's allegations of racial profiling. Brock contends that because of his earlier racial profiling allegations, the appellees focused on the facts surrounding Brock's current workers' compensation matter in order to terminate his employment. An inference can be made on the record before us that allegations of racial profiling in the Omair case reignited the racial profiling allegations by Brock and that thus, Brock's protected speech allegations motivated the employment action against him. Given the summary judgment context in which we are reviewing the evidence, we determine that notwithstanding the passage of time, there is an inference Brock's earlier racial profiling comments were a substantial motivating factor in the decision to terminate Brock's employment, and that thus, the evidence shows a prima facie case of First Amendment retaliation.

Having established a prima facie case of First Amendment retaliation, the burden shifted to the appellees to show by a preponderance of evidence that the same decision would have been reached in the absence of protected activity. Having reviewed the record, we conclude that the evidence relating to the appellees' same-decision defense was such that no reasonable jury could fail to return a verdict for the appellees. That is, a review of the evidence shows that the appellees have demonstrated that the same employment action would have been taken in the absence of the protected activity.

The appellees presented evidence and the record indicates without dispute that Brock was untruthful or deceptive on three occasions, in violation of various General Orders of the Sheriff's Office, and that it was this untruthfulness that

resulted in Brock's termination of employment. For completeness, we note that there was other testimony regarding Brock's reputation for lack of candor or veracity in addition to these three discrete events. First, Brock was untruthful with one of his treating physicians, Dr. Hutton. Brock met with Dr. Hutton on March 17, 2009, and prior to their meeting, Dr. Hutton had reviewed surveillance video of Brock's operating a pickup truck with a snowplow attached. At their meeting, Dr. Hutton asked Brock about the range of activities Brock could perform, and specifically asked whether Brock could operate a snowplow. Dr. Hutton stated in his notes after the meeting that Brock stated "there was no way that he could even drive a truck or work a snow plow."

Second, Brock was not forthcoming with the physical therapist who conducted Brock's FCE on March 26, 2009. During the FCE, Brock failed to give a valid indication of his physical abilities because, according to the evidence, Brock had "self-limited several of the lifting tasks." The physical therapist was unable to complete an accurate assessment of Brock's physical abilities due to this self-limiting behavior.

Third, Brock was untruthful with the lieutenant who conducted the internal investigation regarding Brock. During an interview with Brock, the lieutenant asked Brock about his involvement with his father's business. At first, Brock denied any involvement, but after he was shown several documents indicating Brock's involvement, Brock admitted that he owned stock and participated in the lawn maintenance and snow removal business.

A letter from Bilek dated May 29, 2009, was sent to Brock notifying him of a predisciplinary hearing, and the letter outlined these three instances when Brock was untruthful. The May 29 letter alleged that based on his conduct, Brock had violated various General Orders of the Sheriff's Office. After the predisciplinary hearing was held, a letter from Bilek dated June 10, 2009, was sent to Brock notifying him of his termination of employment. The June 10 letter stated that Brock was "untruthful and deceptive when interacting with doctors, Workers Comp [sic] personnel and a Sheriff's Internal Affairs

investigator. After careful consideration of this matter, it has been determined that these violations are sufficiently serious to require termination of employment."

Even giving Brock the benefit of favorable inferences, the evidence presented by the appellees demonstrates as a matter of law that the same decision to terminate Brock's employment in June 2009 would have been reached in the absence of his protected speech. The district court's entry of summary judgment in favor of the appellees on this theory was not error.

Second Cause of Action Under § 1983, Third Theory: Surveillance Video and Right to Privacy.

In his third theory under § 1983, Brock alleged that his right to privacy had been violated when he was placed under surveillance in order to assess his physical capabilities. As to this theory, Brock claims that the district court erred when it determined that the surveillance conducted by the investigators on behalf of Douglas County was not a violation of his right to privacy. Although our analysis differs from that of the district court, we affirm the entry of summary judgment in favor of the appellees on this claim.

The district court analyzed Brock's violation of privacy claim under the Fourth Amendment, which provides individuals the right to be free from unreasonable searches and seizures. As a general matter, the Fourth Amendment applies to persons, houses, papers, and effects. See *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013). The district court determined that the use of private investigators was routine "in the industry" and that Brock had no expectation of privacy in the business parking lots where he was recorded plowing snow.

Brock claims that the district court erred when it analyzed his claim of violation of his right to privacy because the court did not apply the two-prong test from *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), a Fourth Amendment case. Brock refers us to *Katz*, which has been summarized as follows: "Since *Katz* . . . the touchstone of

[Fourth] Amendment analysis has been the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Oliver v. United States*, 466 U.S. 170, 177, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984), quoting *Katz v. United States, supra* (Harlan, J., concurring). The U.S. Supreme Court has stated that

> in order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has "a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Minnesota v. Carter, 525 U.S. 83, 88, 119 S. Ct. 469, 142 L. Ed. 2d 373 (1998), quoting *Rakas v. Illinois*, 439 U.S. 128, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978). We are not persuaded by Brock's Fourth Amendment analysis.

[16] Despite the parties' urging and the district court's analysis, we believe that Brock's right to privacy claim may better be analyzed under the framework provided by the Due Process Clause of the 14th Amendment. We have indicated that the Due Process Clause of the 14th Amendment contains a substantive component that provides some protection to a person's right of privacy. *State v. Wiedeman, supra*. Compare *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965) (suggesting that right to privacy is rooted in penumbra of specific guarantees in Bill of Rights rather than Due Process Clause of 14th Amendment). The U.S. Supreme Court has said that privacy entails at least two kinds of interests: (1) the individual interest in avoiding disclosure of personal matters and (2) the interest of independence in making certain kinds of important decisions. *State v. Wiedeman, supra*. See, also, *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). The first type of interest is the "'right to be let alone,'" which has been characterized as "'the right most valued by civilized men.'" *Whalen v. Roe*, 429 U.S. at 599 n.25. The second type of interest protects individual autonomy in making decisions and engaging in conduct relating primarily to personal relationships. See *Whalen v. Roe, supra*. The first

privacy interest focuses on government action that is intrusive or invasive; the second concerns decisions or conduct by individuals. *Id*. The first privacy interest is implicated in the instant case.

Brock argues that his right to privacy was violated when Douglas County, through Johnson's office, hired private investigators and placed Brock under surveillance as a means to determine Brock's level of physical activity outside the workplace. Brock asserts that he was placed under surveillance from May 2007 to February 2009. He contends that such conduct, done at the direction of a Douglas County employee, was intrusive and offends societal standards.

Challenges to surveillance in workers' compensation cases are not uncommon. In *Tagouma v. Investigative Consultant Servs*., 4 A.3d 170 (Pa. Super. 2010), an employee who had been videotaped sued a surveillance company hired by the employer's workers' compensation carrier and the investigator for the company. The Superior Court of Pennsylvania determined that videotape surveillance of the injured employee did not violate the worker's privacy. In making its decision, the court stated:

> "It is not uncommon for defendants in accident cases to employ investigators to check on the validity of claims against them. Thus, by making a claim for personal injuries appellant must expect reasonable inquiry and investigation to be made of her claim and to this extent her interest in privacy is circumscribed. It should be noted that all of the surveillances took place in the open on public thoroughfares where appellant's activities could be observed by passers-by. To this extent appellant has exposed herself to public observation and therefore is not entitled to the same degree of privacy that she would enjoy within the confines of her own home.
>
> "Moving to the question of whether [the investigator's] conduct is reasonable, we feel that there is much social utility to be gained from these investigations. It is in the best interests of society that the valid claims be ascertained and fabricated claims be exposed."

Id. at 175, quoting *Forster v. Manchester*, 410 Pa. 192, 189 A.2d 147 (1963). See, also, 7 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 127.10 (2011) (discussing admissibility of video and photographic evidence of employee and privacy issues). We have long approved the admission of surveillance videotapes in workers' compensation cases. See, e.g., *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989).

The appellees presented evidence which showed that the surveillance was not unique to Brock, that it served a valid purpose, and that it was not intrusive. Johnson testified that she authorizes surveillance in approximately 5 to 10 cases per year. She stated that these observations help verify "the level of physical activity of the [claimants] outside the work environment, and then to correlate that activity with the medical treatment records." Until a task force meeting was held in April 2009, where Johnson showed Dunning and others the videotape of Brock's plowing snow in February 2009, the undisputed evidence showed that Dunning was unaware of the surveillance. In this case, the record shows that when Brock was under surveillance, he was in places that were open to the public, and he was not videotaped regarding personal matters. In particular, Brock exposed himself to public observation when he plowed snow in a business parking lot. By the introduction of this evidence, the appellees demonstrated that Brock's privacy interest had not been violated and that they were entitled to judgment on this theory.

In response, Brock referred the district court to evidence showing that the surveillance had been conducted for 100 hours from May 2007 to February 2009. He claimed that this amount of surveillance was intrusive and offends societal norms. He did not dispute the fact that the surveillance was entirely in public places. We determine that the district court did not err when it determined that Brock has not shown that the appellees' conduct violated his constitutional right to privacy. The appellees' evidence showed they were entitled to judgment as a matter of law on this theory, and Brock's evidence did not show there was a genuine issue of material fact preventing

summary judgment in their favor. The district court's entry of summary judgment in favor of the appellees on this theory was not error.

CONCLUSION

With respect to Brock's first cause of action, the district court determined that because Brock failed to show that he made a written claim for the tort of wrongful discharge in retaliation for filing his workers' compensation claim, his claim was barred under § 13-919(1) and entered summary judgment in favor of the appellees on this cause of action. With respect to Brock's second cause of action under § 1983, the district court determined that the appellees did not violate Brock's constitutional right to property, right to freedom of speech, or right to privacy and entered summary judgment in favor of the appellees on each of these three theories. Although our reasoning differs somewhat from that of the district court, we find no error in the entry of summary judgment in favor of the appellees on both causes of action, and, therefore, we affirm.

AFFIRMED.

BIG JOHN'S BILLIARDS, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLANT, V. STATE OF NEBRASKA ET AL., APPELLANTS AND CROSS-APPELLEES, AND DOUGLAS COUNTY HEALTH DEPARTMENT, APPELLEE.

852 N.W.2d 727

Filed August 29, 2014. No. S-13-803.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional presents a question of law, which the Nebraska Supreme Court resolves independently of the lower court's determination.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
3. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
4. ____: ____: ____. The unconstitutionality of a statute must be clearly established before it will be declared void.

5. **Constitutional Law: Statutes: Legislature: Presumptions.** The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.
6. **Special Legislation.** The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.
7. ____. 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.
8. **Constitutional Law: Statutes: Special Legislation.** When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted in the kind of improper discrimination prohibited by the Nebraska Constitution.
9. **Special Legislation.** Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.
10. ____. A legislative body's distinctive treatment of a class is proper if the class has some reasonable distinction from other subjects of a like general character. And that distinction must bear some reasonable relation to the legitimate objectives and purposes of the legislative act.
11. ____. In order to determine if there is a "substantial difference of circumstances to suggest the expediency of diverse legislation" between the general class governed by a statute and the exempted class, it is necessary to examine both the purpose of the statute and the purpose behind the exemptions. The question is whether there is a difference in circumstances between the general class and the exempted class so as to justify treating one differently than the other, in light of the purpose of the act.
12. **Constitutional Law: Statutes.** The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.
13. **Statutes: Constitutional Law: Legislature: Intent: Appeal and Error.** To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.
14. **Constitutional Law: Contracts.** A three-part test is applied to determine whether a contract has been unconstitutionally interfered with. Pursuant to that test, a court must examine (1) whether there has been an impairment of the contract; (2) whether the governmental action, in fact, operated as a substantial impairment of the contractual relationship; and (3) whether the impairment

was nonetheless a permissible, legitimate exercise of the government's sovereign powers.

15. **Constitutional Law: Property.** Payment of just compensation pursuant to article I, § 21, of the Nebraska Constitution applies only to vested property rights.
16. **Constitutional Law: Property: Legislature.** The Legislature is free to create and abolish rights so long as no vested right is disturbed. The type of right that vests can be described generally as an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice.
17. **Constitutional Law: Words and Phrases.** To be considered a vested right, the right must be fixed, settled, absolute, and not contingent upon anything.
18. **Constitutional Law: Property.** With respect to property, a right is considered to be vested if it involves an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.
19. ____: ____. A vested right must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property.
20. **Constitutional Law: Statutes: Intent: Presumptions.** A vested right can be created by statute. But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.

Appeal from the District Court for Lancaster County: JODI NELSON, Judge. Affirmed in part, and in part reversed.

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 Big John's Billiards, Inc.

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

STEPHAN, J.

The Nebraska Clean Indoor Air Act (the Act)[1] prohibits smoking in public places and places of employment but exempts certain facilities from that prohibition. In this action, we are asked to determine the constitutionality of three of these exemptions. We conclude that one exemption

[1] Neb. Rev. Stat. §§ 71-5716 to 71-5734 (Reissue 2009 & Cum. Supp. 2012).

is constitutional, but the remaining two are unconstitutional special legislation which are severable from the Act.

I. BACKGROUND

In 2008,[2] the Nebraska Legislature amended the Act to make it "unlawful for any person to smoke in a place of employment or a public place."[3] The Act defines "[p]ublic place" as "an indoor area to which the public is invited or in which the public is permitted."[4] The Act specifically provides that "[a] private residence is not a public place."[5]

Three indoor areas were exempted from the smoking prohibition in the 2008 legislation:

> (1) Guestrooms and suites that are rented to guests and are designated as smoking rooms, except that not more than twenty percent of rooms rented to guests in an establishment may be designated as smoking rooms. All smoking rooms on the same floor shall be contiguous, and smoke from such rooms shall not infiltrate into areas where smoking is prohibited under the [Act];
>
> (2) Indoor areas used in connection with a research study on the health effects of smoking conducted in a scientific or analytical laboratory under state or federal law or at a college or university approved by the Coordinating Commission for Postsecondary Education; [and]
>
> (3) Tobacco retail outlets.[6]

As defined by the Act, a "[t]obacco retail outlet" is "a store that sells only tobacco and products directly related to tobacco. Products directly related to tobacco do not include alcohol, coffee, soft drinks, candy, groceries, or gasoline."[7]

In 2009,[8] the Legislature added a fourth exemption for "[c]igar bars," which are defined in the Act via reference to

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[2] 2008 Neb. Laws, L.B. 395.

[3] § 71-5729.

[4] § 71-5726.

[5] *Id.*

[6] See, § 71-5730 (Cum. Supp. 2008); L.B. 395.

[7] § 71-5728.

[8] 2009 Neb. Laws, L.B. 355.

the Nebraska Liquor Control Act[9] as "an establishment operated by a holder of a Class C liquor license" which "[d]oes not sell food," "annually receives ten percent or more of its gross revenue from the sale of cigars" and related tobacco products other than cigarettes, "[h]as a walk-in humidor on the premises," and "[d]oes not permit the smoking of cigarettes."[10] A cigar bar may serve alcohol.[11]

Big John's Billiards, Inc. (Big John's), is a corporation which operates a billiards hall in Omaha, Nebraska. On May 20, 2009, Big John's filed an action in the district court for Lancaster County seeking a declaratory judgment that the Act was unconstitutional. As relevant here, Big John's asserted the Act was unconstitutional because it was special legislation, because it constituted a regulatory taking, and because it impaired its right to contract. The operative complaint named the State of Nebraska, two state agencies, two state officials, and the Douglas County Health Department as defendants. We refer to these parties collectively as "the State."

In September 2010, the district court held a hearing on summary judgment motions filed by both sides. The hearing was limited to Big John's claim that three exemptions from the Act violated the prohibition against special legislation set forth in Neb. Const. art. III, § 18. The district court concluded that the exemptions for guestrooms, tobacco retail outlets, and cigars bars were unconstitutional special legislation. In doing so, it reasoned that the record failed to show that there was a substantial difference in circumstances between those three exemptions and all public places and places of employment when considered in light of the purpose of the Act. However, it found that the exemptions were severable from the remaining provisions of the Act and that the Act therefore remained valid and enforceable.

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[9] See Neb. Rev. Stat. §§ 53-101 to 53-1,122 (Reissue 2010, Cum. Supp. 2012 & Supp. 2013).

[10] §§ 71-5730(4) (Reissue 2009) and 53-103.08.

[11] See *id*.

The State appealed to this court.[12] We determined we lacked jurisdiction because not all of the claims asserted below had been resolved.[13] On September 12, 2013, the district court resolved the remaining claims in favor of the State. The State then filed this timely appeal, and Big John's cross-appealed.

II. ASSIGNMENTS OF ERROR

The State assigns that the district court erred in (1) misapplying the special legislation test and (2) determining the statutory exemptions for hotel guestrooms, tobacco retail outlets, and cigar bars were unconstitutional special legislation.

In its cross-appeal, Big John's assigns that the district court erred in (1) concluding the Act should not be invalidated but merely should be subject to a severing of the unconstitutional exemptions; (2) concluding the Act did not constitute an impairment of its contractual rights, in violation of article I, § 16, of the Nebraska Constitution; and (3) concluding the Act did not constitute an unconstitutional regulatory taking in violation of article I, § 21, of the Nebraska Constitution.

III. STANDARD OF REVIEW

[1] Whether a statute is constitutional presents a question of law, which we resolve independently of the lower court's determination.[14]

IV. ANALYSIS

[2-5] Our independent resolution of the issues presented by this appeal is governed by familiar principles applicable to constitutional challenges to state statutes. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[15] The burden of

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[12] *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[13] *Id.*

[14] *In re Interest of A.M.*, 281 Neb. 482, 797 N.W.2d 233 (2011).

[15] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012).

establishing the unconstitutionality of a statute is on the one attacking its validity.[16] The unconstitutionality of a statute must be clearly established before it will be declared void.[17] The Nebraska Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.[18]

1. Special Legislation

[6,7] The enactment of special legislation is prohibited by Neb. Const. art. III, § 18, which provides in relevant part:

> The Legislature shall not pass local or special laws in any of the following cases, that is to say:
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> . . . .
>
> Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever . . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

The focus of the prohibition against special legislation is the prevention of legislation which arbitrarily benefits or grants "special favors" to a specific class.[19] A legislative act constitutes special legislation if (1) it creates an arbitrary and unreasonable method of classification or (2) it creates a permanently closed class.[20] It is undisputed that there is not a permanently closed class at issue in this case, and thus our focus is on whether there is an arbitrary and unreasonable classification.

[8-10] When the Legislature confers privileges on a class arbitrarily selected from many who are standing in the same relation to the privileges, without reasonable distinction or substantial difference, then the statute in question has resulted

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[16] *Id.*

[17] *Id.*

[18] *Connelly, supra* note 15; *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

[19] *In re Interest of A.M., supra* note 14.

[20] *D-CO, Inc. v. City of La Vista*, 285 Neb. 676, 829 N.W.2d 105 (2013); *In re Interest of A.M., supra* note 14; *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

in the kind of improper discrimination prohibited by the Nebraska Constitution.[21] Classifications for the purpose of legislation must be real and not illusive; they cannot be based on distinctions without a substantial difference.[22] The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class concerning the purpose of the act.[23] A legislative body's distinctive treatment of a class is proper if the class has some reasonable distinction from other subjects of a like general character.[24] And that distinction must bear some reasonable relation to the legitimate objectives and purposes of the legislative act.[25]

We have addressed special legislation issues on numerous occasions. In one case, *Hug v. City of Omaha*,[26] we examined an issue very similar to that presented here. *Hug* involved a challenge to exemptions to an Omaha ordinance imposing a smoking ban throughout the city. In analyzing the special legislation claim with respect to these exemptions, we focused on the city council's purpose in creating the class and examined whether there was a substantial difference of circumstances to suggest the expediency of diverse legislation. We noted that in determining whether the exemptions to a city ordinance prohibiting smoking in most public places and places of employment constituted special legislation, it was necessary to focus "on the City's purpose behind exempting certain entities and decide whether there is a substantial difference of circumstances between exempted and nonexempted facilities which would suggest the expediency of diverse legislation."[27]

Hug noted that in comparing exempted and nonexempted facilities, it was necessary to examine the stated purpose of the ordinance, which was "the prohibition of smoking in

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[21] *In re Interest of A.M., supra* note 14; *Hug, supra* note 20.

[22] *Id.*

[23] *D-CO, Inc., supra* note 20.

[24] *Id.*; *In re Interest of A.M., supra* note 14.

[25] *Id.*

[26] *Hug, supra* note 20.

[27] *Id.* at 827, 749 N.W.2d at 890.

public gathering places and in places of employment in order to protect the public health and welfare and to guarantee the right to breathe smoke-free air."[28] In finding exemptions for stand-alone bars, keno establishments, and horseracing simulcast locations were invalid special legislation, we reasoned: "Nothing in the ordinance's stated purpose would explain why employees of the exempted facilities or members of the public who wish to patronize those establishments are not entitled to breathe smoke-free air or to have their health and welfare protected."[29] We also noted that the city had not offered any evidence to support making such a distinction. Thus, we determined that on the record, there was no "'substantial difference of circumstances to suggest the expediency of diverse legislation.'"[30] We specifically noted, however, that we were not holding that "similar exemptions could not be constitutionally justified."[31]

(a) Special Legislation Test

The parties disagree as to how the special legislation analysis is to be applied when exemptions to a statute are alleged to constitute special legislation. The district court found, and Big John's agrees, that whether the exemptions are special legislation should be examined in light of the purpose of the entire Act. The State, on the other hand, argues that whether the exemptions are special legislation should be determined solely from the purpose of the exemptions themselves.

[11] Both sides are partially correct. In order to determine if there is a "substantial difference of circumstances to suggest the expediency of diverse legislation"[32] between the general class governed by a statute and the exempted class, it is necessary to examine *both* the purpose of the statute and

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[28] *Id*.

[29] *Id*.

[30] *Id*. at 827, 749 N.W.2d at 890-91, quoting *Le v. Lautrup*, 271 Neb. 931, 716 N.W.2d 713 (2006).

[31] *Id*. at 827, 749 N.W.2d at 891.

[32] *Id*. at 826, 749 N.W.2d at 890.

the purpose behind the exemptions. The question is whether there is a difference in circumstances between the general class and the exempted class so as to justify treating one differently than the other, in light of the purpose of the Act. We explained this premise in *Gourley v. Nebraska Methodist Health Sys.*[33]:

> "'Classification is proper if the special class has some reasonable distinction from other subjects of a like general character, which distinction bears some reasonable relation to the legitimate objectives and purposes of the legislation. The question is always whether the things or persons classified by the act form by themselves a proper and legitimate class with reference to the purpose of the act.'"

(i) Purpose of the Act

According to § 71-5717, the purpose of the Act is "to protect the public health and welfare by prohibiting smoking in public places and places of employment." The Legislative history makes it clear that the impetus for the Act was the Legislature's concern about the negative health effects of secondhand smoke.[34]

The district court concluded that the Act's purpose was "to protect the public health and welfare by prohibiting smoking in public places and places of employment and thereby protect employees and the public from the hazards of secondhand smoke." We view the purpose as slightly broader. Based on the language of § 71-5717 and the legislative history, the purpose of the Act is to protect the public health and welfare by protecting employees and the public from the hazards of secondhand smoke. The means the Legislature chose to accomplish this purpose was by prohibiting smoking in all "public places and places of employment."[35] Thus, the purpose was not to

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[33] *Gourley v. Nebraska Methodist Health Sys.*, 265 Neb. 918, 938-39, 663 N.W.2d 43, 65 (2003).

[34] See, e.g., Introducer's Statement of Intent, L.B. 395, Health and Human Services Committee, 100th Leg., 1st Sess. (Feb. 1, 2007).

[35] § 71-5717.

prohibit smoking, but, rather, to provide protection from the hazards of secondhand smoke.

(ii) Guestrooms

Guestrooms and suites that are rented to guests and designated as smoking rooms are exempt from the smoking ban.[36] This exemption was part of the bill when it was originally introduced and was the subject of almost no legislative debate. The legislative history indicates, however, that the exemption was included in the bill because hotels are similar to apartments or private residences[37] in which the Act does not prohibit smoking.[38]

The district court essentially reasoned that even if guestrooms are akin to private residences and thus there is a reason to classify them as something other than "public places," they remain "places of employment" and there is no substantial difference in circumstances between them and other places of employment regulated by the Act. But the legislative history shows that the issue of employees being exposed to secondhand smoke in private residences was considered by the Legislature,[39] and ultimately it concluded that a private residence is a place of employment only when it is being used "as a licensed child care program and one or more children who are not occupants of such residence are present."[40]

We have noted that "when the Legislature seeks to inaugurate reforms in the area of economics or social welfare, it need not choose between attacking every aspect of the problem or not attacking the problem at all."[41] Arguably, secondhand smoke is equally harmful whether it is encountered in a private

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[36] § 71-5730(1).

[37] See Health and Human Services Committee Hearing, L.B. 395, 100th Leg., 1st Sess. 73 (Feb. 1, 2007).

[38] § 71-5726.

[39] See Floor Debate, L.B. 395, 100th Leg., 1st Sess. 6, 15, 28-29 (Feb. 13, 2007).

[40] § 71-5724.

[41] *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 856, 620 N.W.2d 339, 347 (2000).

residence or a public place, but the Legislature chose not to prohibit smoking in private residences except those used for conducting a licensed childcare program. That was a legitimate policy decision. Likewise, there is a logical basis for the Legislature to conclude that guestrooms are akin to private residences, and thus there is a substantial difference in circumstances between guestrooms and other public places and places of employment. Based upon our independent review of the record, we conclude that the evidence does not overcome the presumption of constitutionality with respect to the exemption for guestrooms and suites. This exemption does not constitute special legislation.

(iii) Tobacco Retail Outlets

The exemption for tobacco retail outlets was not part of the bill when it was originally introduced. Instead, it was proposed by committee amendment.[42] One senator stated the exemption was added because it was "reasonable that a business that deals in nothing but tobacco products be able to allow smoking within their facility"[43] and that it made "sense to let people try out the wares in the smoke shop."[44] In addition, the owner of a tobacco shop testified during the committee hearing that ideally, customers would be able to sample his products before purchasing, "like going to the supermarket to sample various foods that [it] offer[s]."[45] There was no testimony or discussion about whether such sampling is necessary to the operation of a tobacco retail outlet or why any such sampling had to occur indoors, as opposed to outdoors.

We conclude that there is no difference in circumstances between tobacco retail outlets and all other public places and places of employment so as to justify the expediency of diverse legislation and that the exemption in § 71-5730(3) is

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[42] See Floor Debate, Amend. 276, L.B. 395, 100th Leg., 1st Sess. 20-22 (Mar. 5, 2007).

[43] *Id.* at 20.

[44] *Id.* at 23.

[45] Health and Human Services Committee Hearing, L.B. 395, 100th Leg., 1st Sess. 66 (Feb. 1, 2007).

therefore unconstitutional special legislation. The mere fact that tobacco retail outlets sell only tobacco products does not distinguish them in any substantial way from other public places or places of employment. And allowing patrons of such shops to smoke simply because it is convenient does not comport with the purpose of the Act, which is to protect the public and employees from the dangers of secondhand smoke.

(iv) Cigar Bars

The exemption for cigar bars was not part of the Act as it was originally enacted. Instead, it was enacted by subsequent legislation in 2009.[46] The Introducer's Statement of Intent on the proposed bill specifically stated that the purpose of the exemption was "to provide protection for businesses currently operating in the state as 'cigar bars.'"[47] During debate, the senator who introduced the bill argued that cigar bars should be exempt from the Act because they existed for the purpose of allowing smoking.[48]

There is no substantial difference in circumstances between cigar bars and other public places or places of employment that justifies treating cigars bars differently. Indeed, the exemption is directly contrary to the purpose of the Act, which is to protect the public health by limiting exposure to secondhand smoke. The exemption in § 71-5730(4) for cigar bars is unconstitutional special legislation.

(b) Severability

The district court found that the unconstitutional exemptions were severable from the other provisions of the Act and that the Act separated from these exemptions was valid and enforceable. Big John's challenges this finding in its cross-appeal.

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[46] See L.B. 355.

[47] Introducer's Statement of Intent, L.B. 355, General Affairs Committee, 101st Leg., 1st Sess. (Feb. 9, 2009).

[48] General Affairs Committee Hearing, L.B. 355, 101st Leg., 1st Sess. 50-51 (Feb. 9, 2009), and Floor Debate, 101st Leg., 1st Sess. 20-21 (Mar. 20, 2009).

At the outset, we note that the cigar bar exemption was enacted after the other exemptions, and in legislation that was separate from the rest of the Act. Because that exemption was not part of the original enactment, we need not engage in a severability analysis as to it. Our analysis is therefore limited to whether the Act remains valid and enforceable if the tobacco retail outlet exemption is severed from it.

[12,13] The general rule is that when part of an act is held unconstitutional, the remainder must likewise fail, unless the unconstitutional portion is severable from the remaining portions.[49] To determine whether an unconstitutional portion of a statute may be severed, an appellate court considers (1) whether a workable statutory scheme remains without the unconstitutional portion, (2) whether valid portions of the statute can be enforced independently, (3) whether the invalid portion was the inducement to passage of the statute, (4) whether severing the invalid portion will do violence to the intent of the Legislature, and (5) whether the statute contains a declaration of severability indicating that the Legislature would have enacted the bill without the invalid portion.[50]

Big John's contests only the district court's finding that the exemptions were not the inducement to passage of the entire Act. It relies on language from a 1935 decision of this court, stating:

> "One of the tests used to determine whether a statute is or is not severable so that a portion may be rejected is that it ought not to be held wholly void unless the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part so held to be unconstitutional; but where the valid and the invalid parts are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid. This test is merely a means of ascertaining

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[49] *State ex rel. Bruning v. Gale*, 284 Neb. 257, 817 N.W.2d 768 (2012).

[50] *Id.*; *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002).

> and carrying out the presumed intention of the legislature. If it appears that the invalid portion was designed as an inducement to pass the valid, the inference is that the legislature would not have passed the valid portion alone."[51]

Essentially, Big John's argues that the legislative history shows the introducer did not have the votes to pass the Act without the exemptions and that therefore, the exemptions were an inducement to the passage of the Act.

The legislative history certainly shows that some compromise was necessary to pass L.B. 395. But compromise is an inherent part of the lawmaking process. Nothing in the legislative history demonstrates or even implies that the tobacco retail outlet exemption was critical to passage of the entire bill. And in any event, the inducement test, properly understood, asks, "Did the Legislature intend to pass the bill only as it existed with the unconstitutional exemptions?" and not "Was the Legislature able to pass the bill only because it contained the unconstitutional exemptions?" As the district court reasoned, to hold otherwise would mean that any time Legislative compromise was necessary, that compromise was an inducement that prevents unconstitutional portions of an act from being severed. And the Legislative history certainly does not demonstrate that the Legislature intended to enact the Act if, and only if, the exemption for tobacco retail outlets was included.

Further, we consider all five factors when determining whether unconstitutional provisions of a statute can be severed from it. Here, the Act is workable and its valid portions can be enforced without the exemption for tobacco retail outlets. Severing the exemption would not do violence to the Legislature's intent of protecting the public health and welfare by limiting exposure to secondhand smoke. And, finally, the Legislature expressly declared its willingness to enact the bill absent the invalid portion, as L.B. 395, § 21, contained a severability provision stating, "If any section in this act or

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[51] *State, ex rel. Taylor, v. Hall*, 129 Neb. 669, 691-92, 262 N.W. 835, 846 (1935), quoting 6 R.C.L. *Constitutional Law* § 123 (1915).

any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions." We agree with the district court that the Act is valid and enforceable without the unconstitutional exemptions.

2. Impairment of Contract

Big John's also argues the Act violates article I, § 16, of the Nebraska Constitution because it impairs the obligations of the lease agreement Big John's entered into with its landlord. The lease was entered into prior to the smoking ban imposed by the Act.

[14] Article I, § 16, provides, "No . . . law impairing the obligation of contracts . . . shall be passed." A three-part test is applied to determine whether a contract has been unconstitutionally interfered with.[52] Pursuant to that test, a court must examine (1) whether there has been an impairment of the contract; (2) whether the governmental action, in fact, operated as a substantial impairment of the contractual relationship; and (3) whether the impairment was nonetheless a permissible, legitimate exercise of the government's sovereign powers.[53]

The district court found Big John's allegations failed all three prongs of this test. Because failure to meet the first prong necessarily means that the test fails, we need go no further than that if we find the contract was not impaired as a matter of law.[54]

Big John's asserts that it relied on revenues generated from smoking customers when it entered into the lease agreement, that its revenues decreased due to the smoking ban imposed by the Act, and that this decrease in revenue impaired its ability to make payments on its lease and continue its operations. Even assuming these facts are true, the Act did not impair Big John's obligations on its contract. The Act did not alter the terms of Big John's lease in any way or make any term

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[52] See, *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009); *Miller v. City of Omaha*, 253 Neb. 798, 573 N.W.2d 121 (1998).

[53] See *id.*

[54] See *id.*

of that lease invalid or unenforceable.[55] Instead, any effect the Act has on Big John's revenue is completely incidental and not related to the lease agreement between Big John's and the landlord. There is no unconstitutional impairment of the contract as a matter of law.

3. Regulatory Taking

Big John's also argues that the Act amounts to a regulatory taking because it damages its property rights without granting compensation. Article I, § 21, of the Nebraska Constitution provides: "The property of no person shall be taken or damaged for public use without just compensation therefor."

[15] Payment of just compensation pursuant to article I, § 21, applies only to vested property rights.[56] Big John's claims that its vested right was "its ability to operate a premises that allowed smoking"[57] and that the Act took away this vested right without compensating it.

[16-20] The Legislature is free to create and abolish rights so long as no vested right is disturbed.[58] The type of right that "'vests'" can be described generally as "'an interest which it is proper for the state to recognize and protect and of which the individual may not be deprived arbitrarily without injustice.'"[59] To be considered a vested right, the right must be "'fixed, settled, absolute, and not contingent upon anything.'"[60] With respect to property, a right is considered to be "'vested'" if it involves "'an immediate fixed right of present or future enjoyment and an immediate right of present enjoyment, or a present fixed right of future enjoyment.'"[61] A vested right "'must be

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[55] See *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 149 Neb. 507, 31 N.W. 2d 477 (1948).

[56] *Tracy v. City of Deshler*, 253 Neb. 170, 568 N.W.2d 903 (1997).

[57] Brief for appellee on cross-appeal at 45.

[58] *United States Cold Storage v. City of La Vista*, 285 Neb. 579, 831 N.W.2d 23 (2013).

[59] *Id.* at 592, 831 N.W.2d at 33, quoting 16B Am. Jur. 2d *Constitutional Law* § 746 (2009).

[60] *Id.*

[61] *Id.*

something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property.'"[62] A vested right can be created by statute.[63] But it is presumed that a statutory scheme is not intended to create vested rights, and a party claiming otherwise must overcome that presumption.[64]

Simply stated, there is no vested right at issue here. The only "right" Big John's had to allow its customers to smoke was created by statute—the prior version of the Act, under which smoking in billiards parlors was regulated but not prohibited. That Act created nothing more than a mere expectation based upon continuance of the existing law and did not create a vested right. There was no regulatory taking here as a matter of law.

V. CONCLUSION

There is a difference in circumstances between guestrooms and other public places which justified diverse legislation, because guestrooms are akin to private residences. We therefore conclude that the exemption for guestrooms is not special legislation. We agree with the district court, albeit for somewhat different reasons, that the exemptions for tobacco retail outlets and cigar bars are unconstitutional special legislation. The Act is valid and enforceable when the unconstitutional exemptions are severed from it. The Act is not an unconstitutional impairment of contract or an unconstitutional regulatory taking.

AFFIRMED IN PART, AND IN PART REVERSED.

WRIGHT, J., not participating.

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[62] *Id.*, quoting 16B Am. Jur. 2d, *supra* note 59, § 748.

[63] *United States Cold Storage*, *supra* note 58.

[64] *Id.*

CASSEL, J., dissenting in part.

I respectfully dissent from the part of the majority opinion holding the exemption for tobacco retail outlets to be unconstitutional as special legislation. Although the majority recites

the correct standard of review, the court fails to heed it. A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[1] As to the tobacco retail outlets exemption, the majority fails to discern the reasonable doubt that seems so plain to me.

In every other respect, the majority opinion strikes the right note. It recites the correct law. It correctly resolves the parties' dispute over how the court should examine the legislation. And it reaches the correct results regarding the exemptions for guestrooms and cigar bars. Thus, I focus on the single issue where I part company with the majority—the exemption for tobacco retail outlets.

If, in the light of common sense, the statutory text reveals a reasonable doubt whether there is a substantial difference in circumstances between a tobacco retail outlet and other public places and places of employment, our precedent mandates that we defer to the Legislature. Because that reasonable doubt clearly exists, I would uphold the exemption.

The majority articulates the purpose of the Nebraska Clean Indoor Air Act (the Act)[2] as "to protect the public health and welfare by protecting employees and the public from the hazards of secondhand smoke." And I agree with this articulation.

But tobacco retail outlets, as defined by the Act, have several unique and substantial circumstances which inherently distinguish these outlets from other public places and places of employment. First, the product being sold necessarily produces the smoke that the Act is generally attempting to eliminate. Second, a tobacco retail outlet's purpose is to promote "firsthand" exposure to tobacco smoke. Finally, the exemption's prohibition on sales of other products demonstrates the Legislature's intent to limit the size and number of businesses qualifying for the exemption.

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[1] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012); *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012).

[2] Neb. Rev. Stat. §§ 71-5716 to 71-5734 (Reissue 2009 & Cum. Supp. 2012).

As the majority observes, under the Act, a tobacco retail outlet sells only tobacco and products directly related to tobacco.[3] And such products do not include alcohol, coffee, soft drinks, candy, groceries, or gasoline.[4] Thus, members of the public who enter tobacco retail outlets necessarily do so for the sole purpose of purchasing tobacco or products directly related to tobacco.

These patrons have already chosen to expose themselves to the risks of firsthand smoke. The Legislature could rationally determine that the dangers of secondhand smoke are insignificant in comparison to the risk these patrons already encounter firsthand. The exemption for tobacco retail outlets is distinguishable from the exemptions this court found to be unconstitutional special legislation in *Hug v. City of Omaha*.[5] Unlike stand-alone bars, keno establishments, and horseracing simulcast locations (and cigar bars in the present case), there is no rationale for a patron to enter a tobacco retail outlet other than to facilitate his or her access to firsthand smoke. Such public places do not sell alcohol or offer other forms of entertainment. They exist solely to facilitate patrons' access to tobacco and its related risks. Thus, the purpose of the Act in protecting the public from secondhand smoke is contradicted by the nature of the product sold by tobacco retail outlets.

Additionally, the Legislature could rationally conclude that the narrow scope of the exemption makes it less likely that nonsmokers, including potential nonsmoking employees, would be exposed to secondhand smoke. By limiting the definition of tobacco retail outlets to establishments that sell only tobacco and products directly related to tobacco, the text demonstrates that the Legislature intended this as a very limited exemption.

The Legislature was not required to "choose between attacking every aspect of the problem or not attacking the problem

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[3] See § 71-5728.

[4] See *id*.

[5] *Hug v. City of Omaha*, 275 Neb. 820, 749 N.W.2d 884 (2008).

at all."[6] This principle, which the majority quotes in upholding the guestrooms exemption, also applies to the tobacco retail outlets exemption. As to guestrooms, the majority concedes that secondhand smoke is equally harmful in public and private places. The majority also concedes that this was a legitimate policy decision. And the majority recognizes a "logical basis . . . to conclude that guestrooms are akin to private residences." In enacting the tobacco retail outlets exemption, the Legislature merely limited the otherwise broad reach of the Act from locations already dominated by the much greater risk of firsthand smoke. Given the mandate to resolve reasonable doubts in favor of the legislation, I would conclude that this was an equally legitimate policy decision.

I recognize that the exemption may not be perfect, in that some nonsmokers may be exposed to secondhand smoke. But the Legislature is presumed to have acted within its constitutional power despite that, in practice, its laws may result in some inequality.[7] When I apply the principles of law articulated by the majority, I conclude that there is at least a reasonable doubt whether the exemption is unconstitutional. Thus, those principles require that I uphold the exemption despite my personal distaste for or objection to firsthand or secondhand tobacco smoke. I therefore respectfully dissent from the portion of the court's opinion finding the tobacco retail outlets exemption unconstitutional.

PIRTLE, Judge, joins in this dissent.

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[6] See *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 856, 620 N.W.2d 339, 347 (2000).

[7] See *Connelly, supra* note 1.

William Weber and Dixie Weber, husband and wife, appellants, v. North Loup River Public Power and Irrigation District, appellee.

854 N.W.2d 263

Filed August 29, 2014. No. S-13-808.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
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. **Contracts: Judgments: Appeal and Error.** The meaning of an unambiguous 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.
4. **Breach of Contract: Words and Phrases.** A breach of contract is the nonperformance of a duty, and performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.
5. **Contracts: Words and Phrases.** A condition precedent includes a condition which must be fulfilled before a duty to perform an existing contract arises.
6. **Contracts: Intent: Words and Phrases.** Whether language in a contract is a condition precedent depends on the parties' intent as gathered from the language of the contract. Where the parties' intent is not clear, the language is generally interpreted as promissory rather than conditional.
7. ____: ____: ____. Terms such as "if," "provided that," "when," "after," "as soon as," "subject to," "on condition that," or some similar phrase are evidence that performance of a contractual provision is a condition.
8. ____: ____: ____. No particular form of language is necessary to make an event a condition, although such words as "on condition that," "provided that," and "if" are often used for this purpose. An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language. Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation.
9. **Waiver: Words and Phrases.** Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
10. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.
11. **Contracts: Waiver: Proof: Intent.** A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by

express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.

12. **Contracts: Waiver.** Conditions precedent in a contract may be waived.
13. **Breach of Contract: Intent: Words and Phrases.** An anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future.
14. **Breach of Contract.** The words or acts that form the basis of an anticipatory breach must amount to an unequivocal repudiation of the contract.
15. ____. Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to perform discharges the other party's remaining duties to perform.
16. ____. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.
17. ____. A material breach will excuse the nonbreaching party from performing its obligations under the contract.
18. **Contracts: Words and Phrases.** A term can be both the duty to be performed under a contract and a condition precedent to a contractual counterparty's duty.
19. **Contracts: Liability: Damages.** In general, the result of the nonfulfillment of a condition is that the other party's liability is discharged, whereas the nonperformance of a promise gives the other party a damages remedy.
20. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and interpretation will not be used to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

Appeal from the District Court for Loup County: KARIN L. NOAKES, Judge. Affirmed.

Rodney J. Palmer, of Palmer Law Group, L.L.C., for appellants.

Adam J. Prochaska, of Harding & Shultz, P.C., L.L.O., for appellee.

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

STEPHAN, J.

William Weber and Dixie Weber entered into contracts for irrigation water with North Loup River Public Power and Irrigation District (North Loup). The Webers did not make payments due under the contracts prior to the 2010 irrigation season. In June 2010, heavy rains destroyed a diversion dam

which North Loup had utilized to deliver water to the Webers and other irrigators. As a result, North Loup did not deliver any water to the Webers during 2010. The Webers brought this action against North Loup, alleging it breached its contracts to provide irrigation water and was negligent in the performance of those contracts. They claimed damages resulting from decreased crop yields due to the absence of water. The district court for Loup County sustained North Loup's motion for summary judgment, reasoning that the Webers had not fulfilled a condition precedent to North Loup's obligations on the contracts, because the Webers failed to timely pay charges due under the contracts for the 2010 crop year. The Webers perfected this timely appeal. We affirm the judgment of the district court.

I. BACKGROUND

1. Facts

North Loup was organized in 1933. It manages an irrigation system that includes several diversion dams and canals in Loup, Custer, Garfield, Valley, and Greeley Counties, serving approximately 21,986 acres of farmland. Charges assessed to users of the irrigation system generate all of the revenue collected by North Loup.

The Taylor-Ord Canal (Canal) originates approximately 5½ miles from Taylor, Nebraska, with the Taylor Diversion Dam (Dam). The Dam redirects part of the streamflow of the North Loup River into the Canal, which runs 34 miles to its termination near Ord, Nebraska. At mile 20.05, the Canal merges with the Mirdan Canal, which draws water from the Calamus Reservoir. The portion of the Canal above mile 20.05 is referred to by the parties as the "upper" Taylor-Ord Canal. Farmland along the Canal's path is supplied with water through "turnouts" and underground pipelines.

The Webers have farmed in central Nebraska since 1967. They irrigate eight tracts with water from the upper Canal under contracts with North Loup. The Webers are parties to the contracts for five of the tracts. The contracts for the other three tracts are in the name of Marlene Fuller. The Webers lease these tracts from Fuller on a "share crop" basis, under

which the crop is divided each fall and both parties pay half the irrigation charges.

The terms of each of the contracts are identical except for the description of the land. The following are the portions most relevant to the Webers' claims:

> 1. [North Loup], upon completion of the Project and the availability of sufficient water, shall furnish water to the Landowner from its system of canals for the purpose of irrigating the irrigable portion or portions of the following described lands . . . during the irrigating season beginning April 1st and ending October 31st in each year . . . . [North Loup] agrees that the amount of water it will make available and deliver to said lands at any one time shall be the proportionate share the irrigable portions of said lands shall be entitled to of all the water demanded and available to [North Loup]. The distribution of such proportionate shares to the Landowner during such year shall constitute a complete performance in said year of the obligations of [North Loup].
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> 2. . . . [T]he Landowner shall pay annually to [North Loup] the sum of $2.50 per acre for each irrigable acre covered by this contract, which sum shall include all charges to the Landowner of every nature, including operating costs for the irrigation of the said lands and for purchase of water rights . . . .
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> 3. The Landowner shall pay to [North Loup] said annual charge on the first day of December of each year . . . . Such annual payment shall be made for the availability of water during the irrigation season immediately succeeding the date of payment . . . .
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> 4. . . . Every installment or other sum of money required to be paid hereunder, which shall remain unpaid for a period of 45 days after the same becomes due, shall bear interest at the rate of six per cent per annum from the date of the expiration of such period of grace.
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> . . . .
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> 9. [North Loup] shall withhold and stop the delivery of water to the Landowner in the event a default of payments herein required occurs and such default continues

> for a period of four months following the due date. Such refusal and withholding of delivery of water shall not affect the Landowner's liability for such overdue payments and all subsequent payments required to be made by him hereunder.

The contracts create the only right the Webers have to water from the Canal.

Irrigators pay an annual charge to North Loup in return for access to water from the Canal. In 2010, the irrigation charge was $32 per acre. This figure is the sum of the $2.50-per-acre rate stated in the contracts and a "Special Emergency Assessment charge" of $29.50 per acre.

The Webers' dispute with North Loup arises from flooding that occurred during June 2010. Beginning on June 7, the area near the Dam began to experience heavy rains that continued throughout the week. By June 12, parts of Loup and Garfield Counties had reported 6 to 10 inches of rainfall. North Loup characterized the resulting deluge down the North Loup River as "catastrophic," "unprecedented," and "a hundred year flood." Measurements approximately 4½ miles downstream from the Dam showed a volume of water more than 4 times the previous high and nearly 30 times the median. Statistical analysis performed by North Loup suggested that, based on the previous 75 years of data, the probability of a similar event occurring again was "much less than one tenth of one percent." On June 11, the flood destroyed the Dam and inflicted significant damage on inlet structures to the Canal.

Due to the extent of the damage, North Loup quickly concluded that water would not be provided to irrigators on the upper Canal during 2010. At a special meeting held on June 15, 2010, North Loup found that it was "obvious the . . . Dam structure is beyond repair or salvage" and that, as a result, it would "not be able to provide service in 2010 to users above the section of the . . . Canal which is combined with the . . . Mirdan Canal." North Loup determined that it would forgo any temporary measures and focus on rebuilding a permanent dam.

At the time of the flood, the Webers had not yet paid their 2010 irrigation charges. The Webers paid their 2010 bill

"under protest" on April 13, 2011. As to why they had not paid earlier, William Weber explained that "I've never wrote [sic] a check for $10,000 in my life that I didn't get something for."

The record indicates that North Loup considered mitigating the burden of 2010 irrigation charges for users on the Canal. Ultimately, however, it refused to waive 2010 charges except for a single tract that had come under contract with North Loup for the first time in April 2010.

2. Proceedings Below

The Webers commenced this action on December 29, 2011. In the first count of their complaint, they alleged that North Loup had breached its contracts with them and Fuller. The second count alleged that North Loup had negligently failed to supply water during the 2010 irrigation season. Specifically, the Webers alleged that North Loup negligently failed to "provide irrigation water in any form," "have a contingency plan for irrigating and complying with the irrigation needs . . . in the event of a loss of water at the . . . Dam," "sufficiently block the North Loup River at the . . . Dam in time to supply irrigation water . . . for 2010," and "provide either supplemental well irrigation or pumping stations out of the North Loup River flows for the [Webers]." The complaint alleged that the Webers had suffered $117,626.96 in damages, the bulk of which consisted of reduced yields on their 2010 corn and soybean crops. In its amended answer, North Loup denied wrongdoing or breaching the relevant contracts. It also asserted a number of affirmative defenses, including nonfulfillment of a condition precedent in the contracts.

After conducting an evidentiary hearing on cross-motions for summary judgment, the district court granted North Loup judgment as a matter of law. The court determined that section 3 of the contracts—which states that irrigation charges must be paid by December 1 of the year preceding the irrigation season—created "a condition that must be fulfilled prior to the delivery of water." In addition, the court found that "[s]ection 9 makes it completely clear that [North Loup] was under no duty to deliver water to [the Webers]" and

that, "[i]n fact, the contract[s] require[] [North Loup] [to] stop delivery upon nonpayment." The court concluded that because it was undisputed that the Webers had not paid the 2010 irrigation charges until April 13, 2011, North Loup had no duty under the contracts to deliver water to the Webers during 2010. The court also decided that nonfulfillment of the condition precedent was fatal to the Webers' negligence claim, because "[t]he only argument presented by [the Webers] in support of their 'right' to the delivery of water is based on the contract[s]." The Webers filed this timely appeal, which we moved to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

II. ASSIGNMENTS OF ERROR

The Webers assign, restated and consolidated, that the district court erred in granting summary judgment in favor of North Loup, because genuine issues of material fact exist regarding (1) their obligation to make advance payment for irrigation water for the 2010 growing season and (2) anticipatory breach by North Loup.

III. STANDARD OF REVIEW

[1,2] 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.[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]

[3] The meaning of an unambiguous contract is a question of law, in connection with which an appellate court has an

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

[2] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

[3] *Id.*

obligation to reach its conclusions independently of the determinations made by the court below.[4]

IV. ANALYSIS

1. Breach of Contract

North Loup's obligations to the Webers arose from the contracts. When irrigators obtain their water rights by contract, "'[s]uch agreements, generally speaking, are governed by the same rules that pertain to other contracts . . . .'"[5]

(a) Condition Precedent Not Met

[4,5] The district court determined that North Loup did not breach the contracts, because it had no duty to perform. A breach is the nonperformance of a duty,[6] and performance of a duty subject to a condition cannot become due unless the condition occurs or its nonoccurrence is excused.[7] A "'"condition precedent"'" includes "'a condition which must be fulfilled before a duty to perform an existing contract arises.'"[8]

[6-8] Whether language in a contract is a condition precedent depends on the parties' intent as gathered from the language of the contract.[9] Where the parties' intent is not clear, the language is generally interpreted as promissory rather than conditional.[10] Terms such as "if," "provided that," "when," "after," "as soon as," "subject to," "on condition that," or some

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[4] See *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013).

[5] *Faught v. Platte Valley Public Power & Irrigation Dist.*, 155 Neb. 141, 149, 51 N.W.2d 253, 258 (1952). See, also, 45 Am. Jur. 2d *Irrigation* § 37 (2007).

[6] *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002).

[7] *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 825 N.W.2d 767 (2013).

[8] *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 145, 440 N.W.2d 187, 190 (1989), quoting *Schmidt v. J. C. Robinson Seed Co.*, 220 Neb. 344, 370 N.W.2d 103 (1985).

[9] See *Estate of Stine v. Chambanco, Inc.*, 251 Neb. 867, 560 N.W.2d 424 (1997).

[10] See *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

similar phrase are evidence that performance of a contractual provision is a condition.[11] However, the presence or absence of these terms is not determinative:

> No particular form of language is necessary to make an event a condition, although such words as "on condition that," "provided that" and "if" are often used for this purpose. An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language. Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation.[12]

It is evident from the unambiguous language of the contracts that the parties intended to condition North Loup's obligation to supply water in 2010 on the Webers' payment of irrigation charges by the start of the 2010 irrigation season. Section 3 of the contracts provides: "The Landowner shall pay to [North Loup] said annual charge on the first day of December of each year . . . . Such annual payment shall be made for the availability of water during the irrigation season immediately succeeding the date of payment . . . ." The contracts further state that "[North Loup] shall withhold and stop the delivery of water to the Landowner in the event a default of payments herein required occurs and such default continues for a period of four months following the due date." Four months from December 1 is April 1, which the contracts define as the beginning of the irrigation season and the commencement of North Loup's performance. Thus, the contracts required the Webers to perform first and conditioned North Loup's obligations on that prior performance.

The Webers admit that they made no payment to North Loup in 2010. They did not pay the 2010 irrigation charges until April 13, 2011. Payment by April 1, 2010, was a condition precedent to North Loup's contractual duty to supply water to the Webers during the 2010 irrigation season. Because no such payment was made, North Loup's duty under the contracts

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[11] *Id.*

[12] Restatement (Second) of Contracts § 226, comment *a*. at 170 (1981).

never came to fruition during the 2010 season and, without a duty to perform, it did not breach the contracts as a matter of law.[13]

(b) Condition Precedent Was Not Waived

The Webers argue that summary judgment was inappropriate because there are genuine issues of material fact as to whether North Loup waived the condition precedent. They argue that North Loup never decided "whether the [2010] assessments or interest would be waived" for all irrigators affected by the 2010 flood and that, therefore, it "was a question of fact to be determined if the assessments were due where no irrigation water was received."[14]

[9-12] Waiver is a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.[15] In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such purpose, or acts amounting to estoppel on his or her part.[16] A written contract may be waived in whole or in part, either directly or inferentially, and the waiver may be proved by express declarations manifesting the intent not to claim the advantage, or by so neglecting and failing to act as to induce the belief that it was the intention to waive.[17] Conditions precedent in a contract may be waived.[18]

The record reflects that during 2010 and 2011, North Loup considered various requests and proposals to relieve irrigators of 2010 irrigation charges and interest. But North

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[13] See, generally, *Empfield v. Ainsworth Irr. Dist.*, 204 Neb. 827, 286 N.W.2d 94 (1979).

[14] Brief for appellants at 19.

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

[16] *Id.*

[17] *Id.*

[18] *Pearce v. ELIC Corp.*, 213 Neb. 193, 329 N.W.2d 74 (1982).

Loup waived the 2010 irrigation charges for only one irrigator. That irrigator had signed a contract in April 2010 for a tract that had not previously been under contract with North Loup. The irrigator had paid a $15-per-acre "Debt Retirement Assessment" and had spent $10,000 laying underground irrigation pipe in anticipation of drawing water from the Canal. Apparently in light of these circumstances, North Loup agreed to waive this irrigator's 2010 irrigation charges. Even this irrigator, however, paid 2010 irrigation charges for his other tracts of land that had previously been under contract with North Loup.

Here, the contracts required the Webers and all water users to pay before they received irrigation water. Section 3 of the contracts makes payment of irrigation charges due December 1, and section 9 provides that North Loup will withhold delivery of water if a user has not paid by the start of the irrigation season. William Weber admitted that even if rainfall was plentiful and he did not draw any water from the Canal, he was still obligated to pay the irrigation charges. North Loup consistently referred to unpaid irrigation charges as "delinquent." The isolated waiver of irrigation charges for the single tract which was newly brought under contract does not create a question of fact as to whether North Loup waived the condition precedent in its contract with the Webers.

(c) No Anticipatory Breach

[13-15] The Webers argue that North Loup anticipatorily breached the contracts, "making the need for payment a question of fact." An anticipatory breach of a contract is one committed before the time has come when there is a present duty of performance and is the outcome of words or acts evidencing an intention to refuse performance in the future.[19] The words or acts that form the basis of an anticipatory breach must amount to an unequivocal repudiation of the contract.[20] Where performances are to be exchanged under an exchange

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[19] *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006).

[20] See *id.*

of promises, one party's repudiation of a duty to perform discharges the other party's remaining duties to perform.[21]

The Webers premise their claim of anticipatory breach upon North Loup's decision to rebuild a permanent diversion dam without endeavoring to supply water to users on the upper portion of the Canal during the 2010 season. They argue that the district court "overlooked the fact that [North Loup] committed an anticipatory breach of contract on June 15, 2010 when it decided not to provide water to the irrigators but to pursue building a new dam instead of a temporary one, even though[] they had no assessment of the damages yet."[22] Thus, the actions by North Loup which are alleged to constitute an anticipatory breach occurred more than 2 months after the start of the irrigation season. As noted, payment of 2010 irrigation charges by April 1, 2010, was a condition precedent to North Loup's duty to deliver water.

[16,17] North Loup did not anticipatorily breach the contracts because, by failing to pay the 2010 irrigation charges, the Webers themselves breached the contracts prior to North Loup's purported anticipatory breach. Generally, a party who has failed or refused to perform the terms and conditions imposed upon him by a contract, or has not been ready, willing, and able to perform the same, cannot recover for a breach thereof by the other party.[23] A material breach will excuse the nonbreaching party from performing its obligations under the contract.[24]

[18,19] A term can be both the duty to be performed under a contract and a condition precedent to a contractual counterparty's duty. We have in the past distinguished "conditions" from "promises."[25] In general, the result of the nonfulfillment

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[21] *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002).

[22] Brief for appellants at 20.

[23] *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987).

[24] *Gary's Implement v. Bridgeport Tractor Parts*, 270 Neb. 286, 702 N.W.2d 355 (2005).

[25] *Harmon Cable Communications v. Scope Cable Television, supra* note 10.

of a condition is that the other party's liability is discharged, whereas the nonperformance of a promise gives the other party a damages remedy.[26] Section 225 of the Restatement (Second) of Contracts, however, recognizes that a particular clause can have a dual capacity: "Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur."[27] The commentary explains that "[t]he same term may . . . be interpreted not only to make an event a condition of the obligor's duty, but also to impose a duty on the obligee that it occur."[28]

Payment of the 2010 irrigation charges by April 1 was both the contractual performance required of the Webers and a condition precedent to North Loup's duty to perform. Nonpayment cannot be considered an immaterial breach, because there was little else the Webers were obligated to do. The contracts required that the Webers perform first and conditioned North Loup's performance on the Webers' payment. The Webers' failure to pay was therefore both a nonfulfillment of a condition relieving North Loup of its duty to perform and a material breach of contract that occurred prior to North Loup's alleged anticipatory breach and independently relieved North Loup of any duty to perform. The Webers' claim of anticipatory breach is without merit as a matter of law.

2. Negligence

The contracts were the sole source of any duty on the part of North Loup to supply water to the Webers. Assuming without deciding that a negligence claim was ever viable under the circumstances of this case,[29] we agree that it failed as a matter of law because North Loup owed no duty to the Webers. As noted, the contractual duty to supply water never arose in 2010, because the Webers failed to pay the 2010 irrigation charges

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[26] *Id.*

[27] Restatement, *supra* note 12, § 225(3) at 165.

[28] *Id.*, § 225, comment *d.* at 168.

[29] See *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012) (explaining doctrine of economic loss).

prior to the growing season. If no duty existed, no duty could have been breached.

The Webers argue that North Loup violated a criminal statute, Neb. Rev. Stat. § 46-263 (Reissue 2010), which provides:

> Any person having charge of a ditch or canal used for irrigation purposes, who shall neglect or refuse to deliver water as herein provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a Class III misdemeanor.

North Loup argues that § 46-263 is inapplicable, because it is a criminal statute imposing a criminal penalty and it applies to "'persons'" rather than "public entities."[30] We have recognized that a violation of a statute which imposes a criminal penalty can be evidence of negligence,[31] and although this court has not addressed the question, other jurisdictions have held that the term "person" in a criminal statute may be applied to corporations.[32]

[20] But there could be no violation of § 46-263 by North Loup here, because the statute does not apply to persons who neglect or refuse to deliver water to those having no right to the water. Statutory language is to be given its plain and ordinary meaning, and interpretation will not be used to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[33] Because North Loup had no duty to deliver water to the Webers during the 2010 irrigation season, it did not "prevent or interfere with the proper delivery of water to the person or persons having the right thereto." Similarly, North Loup did not "neglect or refuse to deliver water" within the meaning of § 46-263. We have recognized that the existence of a statute may be relevant to duty in addition to breach,[34] but the construction urged upon this court by the Webers would

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[30] Brief for appellee at 43.

[31] See, e.g., *Schaefer v. McCreary*, 216 Neb. 739, 345 N.W.2d 821 (1984).

[32] See 18B Am. Jur. 2d *Corporations* § 1839 (2004).

[33] See *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

[34] See *Kozicki v. Dragon*, 255 Neb. 248, 583 N.W.2d 336 (1998).

lead to absurd results. Due to their failure to fulfill a condition precedent, the Webers were effectively in no different position during the 2010 season than the area farmers who had no contract at all with North Loup. It cannot be assumed that the Legislature intended to impose criminal liability on persons who refuse to deliver water to those who have no right to receive it.

We conclude that the district court did not err in determining that North Loup was entitled to judgment as a matter of law with respect to the Webers' claims.

V. CONCLUSION

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

AFFIRMED.

STATE OF NEBRASKA EX REL. PATRICIA A. LOONTJER, RELATOR, v. HONORABLE JOHN A. GALE, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

853 N.W.2d 494

Filed September 5, 2014. No. S-14-684.

1. **Courts: Justiciable Issues.** Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.
2. **Courts.** The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.
3. **Constitutional Law: Initiative and Referendum: Justiciable Issues.** Because the outcome of an election is a contingent future event, a challenge that a proposed ballot measure will violate the substantive provisions of the U.S. or Nebraska Constitution does not present a justiciable controversy. It is not ripe for judicial determination because the voters might vote to reject the measure.
4. **Constitutional Law: Initiative and Referendum.** A claim that a proposed ballot measure violates a constitutional or statutory rule that governs the form of the measure or the procedural requirements for its placement on the ballot is a challenge to the legal sufficiency of a ballot measure. Such challenges are ripe for resolution before an election.
5. **Constitutional Law: Initiative and Referendum: Justiciable Issues.** An alleged separate-vote violation under Neb. Const. art. XVI, § 1, challenges a

ballot measure's legal sufficiency and presents a justiciable controversy before an election.

6. **Constitutional Law: Initiative and Referendum: Public Officers and Employees.** The Secretary of State's statutory duties to provide the ballot form for the Legislature's proposed constitutional amendments and to certify its contents, coupled with his duties to supervise elections and decide disputed points of election laws, clearly require the Secretary to consider whether a proposed amendment complies with the separate-vote provision of Neb. Const. art. XVI, § 1.
7. **Public Officers and Employees: Statutes.** Power vested in a governmental body or officer carries with it the implied power to do what is necessary to accomplish an express statutory duty, absent any other law that restrains the implied power.
8. **Constitutional Law: Initiative and Referendum: Legislature: Public Officers and Employees.** The Secretary of State cannot determine the substantive merits of the Legislature's proposed constitutional amendment. But in a legal sufficiency challenge, he has a duty to reject a proposed amendment as legally defective for failing to satisfy form and procedural requirements. There is no requirement that the proposed amendment be "patently unconstitutional on its face" before the Secretary must act.
9. **Constitutional Law: Initiative and Referendum: Legislature.** The Legislature's independent proposals to amend the constitution must be presented to the voters for a separate vote even if they are proposed in a single resolution.
10. **Constitutional Law: Legislature.** The constitutional requirements for legislative bills do not apply to the Legislature's proposed amendments.
11. **Constitutional Law: Initiative and Referendum.** The "single subject" rule that applies to legislative bills under Neb. Const. art. III, § 14, does not apply to ballot measures for constitutional amendments.
12. **Constitutional Law.** It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.
13. **Constitutional Law: Initiative and Referendum: Legislature.** The single subject rule for voter initiatives and the separate-vote provision for the Legislature's proposed amendments should be construed as imposing the same ballot requirements: A voter initiative or a legislatively proposed constitutional amendment may not contain two or more distinct subjects for voter approval in a single vote.
14. **Constitutional Law: Administrative Law: Initiative and Referendum.** The natural and necessary connection test that applies to proposed amendments for city charters and municipal ballot measures also applies to the single subject requirement for voter initiatives under Neb. Const. art. III, § 2, and the separate-vote provision of Neb. Const. art. XVI, § 1.
15. **Initiative and Referendum.** Under a single subject ballot requirement, the general subject of a proposed ballot measure is defined by its primary purpose.
16. ____. Without a unifying purpose, separate proposals in a ballot measure necessarily present independent and distinct proposals that require a separate vote.

17. **Constitutional Law: Jurisdiction: Declaratory Judgments: Appeal and Error.** When a party has invoked the Nebraska Supreme Court's original jurisdiction under one of the causes of action specified in Neb. Const. art. V, § 2, the court may exercise its authority to grant requested declaratory relief under the Uniform Declaratory Judgments Act or injunctive relief.
18. **Mandamus.** A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.

Original action. Writ of mandamus granted.

L. Steven Grasz and Mark D. Hill, of Husch Blackwell, L.L.P., for relator.

Jon Bruning, Attorney General, L. Jay Bartel, and Lynn A. Melson for respondent.

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

CONNOLLY, J.

I. SUMMARY

In April 2014, the Legislature passed L.R. 41CA,[1] a resolution to amend the Nebraska Constitution. Neb. Const. art. III, § 24, generally prohibits the Legislature from authorizing games of chance, but it contains an exception for live horseracing under specified conditions. L.R. 41CA would amend article III, § 24(4)(a), in two ways. First, it would permit wagering on "replayed" horseraces in addition to wagering on live horseraces. Second, it would specify how the Legislature must appropriate the proceeds from a tax placed on wagering for both live and replayed horseraces.

Secretary of State John A. Gale, respondent, denied a request to withhold the proposed amendment from the November 2014 general election ballot. The Secretary determined that the amendment was not facially invalid under the "separate-vote" provision of Neb. Const. art. XVI, § 1. After that, Patricia A. Loontjer, relator, applied for leave to

[1] See 2014 Neb. Laws, L.R. 41CA.

commence an original action in this court to keep the proposed amendment off the ballot. We granted the petition and expedited the proceeding.

We exercise original jurisdiction under Neb. Const. art. V, § 2, because this is a cause of action relating to revenue, in which the State has a direct interest, and because Loontjer has requested a writ of mandamus.[2] We hold as follows:

- We conclude that an alleged violation of the separate-vote provision of Neb. Const. art. XVI, § 1, presents a preelection justiciable issue for a proposed constitutional amendment.
- We also conclude that the separate-vote provision requires the Legislature to present constitutional amendments to voters in a manner that allows them to vote separately on distinct and independent subjects.
- Finally, because L.R. 41CA violates the separate-vote provision, we conclude that article XVI, § 1, bars its placement on the November 2014 general election ballot.

II. BACKGROUND

1. Legislative Efforts to Authorize Wagering on Replayed Horseraces

Neb. Const. art. III, § 24(1), states that "[e]xcept as provided in this section, the Legislature shall not authorize any game of chance . . . ." Section 24(2) specifically authorizes the state lottery. And § 24(4) provides that the games-of-chance prohibition does not apply to wagering on live horseraces and specified bingo games. Subsection (4)(a) relates to horseracing. It currently authorizes the Legislature to enact "laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure."

Article III, § 24, does not define "parimutuel" betting. Generally, it is a gambling system in which the bettor has

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[2] See, *State ex rel. Stenberg v. Moore*, 253 Neb. 535, 571 N.W.2d 317 (1997); *State ex rel. Douglas v. Gradwohl*, 194 Neb. 745, 235 N.W.2d 854 (1975); *Anderson v. Herrington*, 169 Neb. 391, 99 N.W.2d 621 (1959).

a stake in all wagers placed on a race in proportion to the money that the bettor waged.[3] Section 2-1207 allows a licensee to deduct a percentage from all wagers placed on a race and divide the remaining pool among those holding winning tickets. The Legislature has authorized parimutuel betting on live horseraces at enclosed, licensed racetracks. The race can be conducted at that track or simulcast from another licensed track.[4] In 1988, the voters adopted an amendment to article III, § 24, to permit wagering on "horseraces, wherever run, either within or outside of the state, . . . when such wagering is conducted by licensees within a licensed racetrack enclosure."[5]

In 2010, three senators introduced a bill to authorize the State Racing Commission to "license and regulate parimutuel wagering on historic horseraces."[6] In the bill's statement of intent, the introducer stated that the bill would provide "an additional mode of horse race wagering inside the premises of a licensed horse racetrack" by allowing the operators to "install and operate Instant Racing Terminals."[7] But the Attorney General's office issued an opinion that this court would likely determine the bill was unconstitutional under article III, § 24.[8]

The Attorney General's office concluded that historical horseracing referred to a patented wagering system that was discussed by the Wyoming Supreme Court in a 2006 decision. That court held that instant racing parimutuel wagering terminals were illegal gambling devices and that the Wyoming Pari-mutuel Commission had no power to authorize them.[9] The

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[3] See, Neb. Rev. Stat. § 2-1207 (Reissue 2012); *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002).

[4] See Neb. Rev. Stat. §§ 2-1224(2) and 2-1225(7) (Reissue 2012).

[5] See 1988 Neb. Laws, L.R. 15.

[6] See L.B. 1102, Judiciary Committee, 101st Leg., 2d Sess. (Jan. 21, 2010).

[7] See Introducer's Statement of Intent, L.B. 1102, Judiciary Committee, 101st Leg., 2d Sess. (Feb. 10, 2010).

[8] Att'y Gen. Op. No. 10009 (Mar. 29, 2010).

[9] See *Wyoming Downs Rodeo Events, LLC v. State*, 134 P.3d 1223 (Wyo. 2006).

Nebraska Attorney General's office explained the new wagering system:

> The "Instant Racing" system allows bettors to wager on the results of previously run or "historic" races through electronic "Instant Racing Terminals" ["IRTs"]. The machines reportedly can access over 200,000 historic races. Wagers are made by coin or currency. Players can utilize [a] limited Daily Racing Form [for] past performance data (i.e. winning percentages, average earnings per start, trainer and jockey success, etc.) provided in graphic form before making their selections. The data is provided in such a way that bettors cannot identify the exact race. The machines contain a video screen which allows bettors to view the entire race after placing their wagers, or only a short clip of the stretch run of the race.
>
> . . . Unlike most parimutuel wagering, where many wagers are made on a single race, Instant Racing involves wagers on many different races. Winners receive graduated payoffs based on their correct selection of the order of finish. Payoffs are also determined by timing - the bettor who hits first receives the highest payoff.
>
> In appearance and operation, IRTs resemble slot machines or video lottery devices. The "bells and whistles" associated with slot machines or video lottery devices are all present (except for the pull-handle).[10]

The Attorney General's office concluded that wagering through instant racing terminals (IRT's) was inconsistent with the type of wagering allowed under article III, § 24. The opinion pointed out that § 24 allows bettors to wager on simulcast horseraces from another state, but not on races conducted at another time. Ultimately, the office concluded that because of the similarity between IRT's and slot machines, this court would probably agree with the Wyoming Supreme Court that IRT's were impermissible gambling devices. After this opinion

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[10] Att'y Gen. Op. No. 10009, *supra* note 8.

was issued, the historic horseracing bill was indefinitely postponed in April 2010.[11]

In January 2013, Senator Scott Lautenbaugh introduced L.R. 41CA, the current proposed constitutional amendment to article III, § 24(4).[12] In his statement of intent, Senator Lautenbaugh stated that the proposed measure, together with a bill he was also introducing, would ensure the use of IRT's at horseracing facilities in Nebraska. The IRT's, as an additional mode of wagering on horseracing, would provide revenue to the state and its licensed racetracks.[13] L.R. 41CA would expand the type of wagering the Legislature can authorize to include "live or replayed" horseraces. Originally, the resolution did not appropriate any new or existing tax revenues.[14] Instead, the taxes and appropriations of tax revenues were set out in L.B. 590,[15] the bill that accompanied L.R. 41CA.

Currently, the Legislature places a tax on parimutuel wagering. Neb. Rev. Stat. § 2-1209 (Reissue 2012) authorizes the State Racing Commission to pay its own expenses and staff compensation out of these revenues first. It also requires the Commission to maintain a reserve fund that does not exceed 10 percent of the funds used for the commission's expenses. And any excess funds must be credited to the state's general fund.[16]

If it had passed, L.B. 590 would have immediately authorized the installation of IRT's. It would not have changed the existing tax scheme, but it would have imposed a separate and new tax on historical horseracing wagers. After paying administrative expenses, one-half of the new tax revenues would

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[11] See Legislative Journal, 101st Leg., 2d Sess. 1229, 1467 (2010).

[12] See Legislative Journal, 103d Leg., 1st Sess. 280-81 (2013).

[13] See Introducer's Statement of Intent, L.R. 41CA, General Affairs Committee, 103d Leg., 1st Sess. (Feb. 11, 2013).

[14] See Legislative Journal, *supra* note 12.

[15] See L.B. 590, General Affairs Committee, 103d Leg., 1st Sess. (Jan. 23, 2013).

[16] See § 2-1209.

have been paid to the State Racing Commission's cash fund for equine therapy programs (for veterans and youths). The other half would have been credited to the Compulsive Gamblers Assistance Fund.[17]

After contentious floor debates, L.B. 590 was indefinitely postponed at Senator Lautenbaugh's request.[18] But the Legislature advanced L.R. 41CA to the select file[19] and carried it over to the next session.[20] In March 2014, Senator Lautenbaugh filed an amendment to L.R. 41CA.[21] Amendment 1910 included appropriations for all proceeds from taxes on "wagering by the parimutuel method."[22] Similar to the appropriation schemes under the current statutes and the unsuccessful L.B. 590, the proposed new appropriations under the amendment would require "regulatory expenses" to be paid first from the tax revenues.[23] But unlike the proposed new tax and appropriations under L.B. 590, amendment 1910 does not limit its proposed new appropriations to tax revenues from only historical horseracing wagers. Instead, amendment 1910 would also change the way that existing tax revenues from live horseracing wagers must be appropriated. That is, those revenues would not be used to maintain a reserve fund, and excess funds would not be credited to the state's general fund.

In April 2014, L.R. 41CA, as modified by amendment 1910, passed by the required three-fifths majority of the Legislature.[24] The final version would amend article III, § 24, as follows:

> (4)(a) Nothing in this section shall be construed to prohibit ~~(a)~~ the enactment of laws providing for the licensing and regulation of wagering on the results of live or

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[17] See L.B. 590, General Affairs Committee, 103d Leg., 1st Sess. (Jan. 23, 2013).

[18] See Legislative Journal, *supra* note 12, 1st Sess. 652, 684.

[19] See *id.* at 683-84, 716-18.

[20] See Legislative Journal, 103d Leg., 2d Sess. 2, 69 (2014).

[21] See *id.* at 757.

[22] *Id.*

[23] *Id.*

[24] See *id.* at 1428-29.

> replayed horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure. The state's proceeds from a tax placed on wagering by the parimutuel method shall be appropriated by the Legislature for the costs of regulating wagering by the parimutuel method and for the following purposes:
>
> (i) Forty-nine percent of the money remaining after the payment of regulatory expenses shall be used for elementary and secondary education statewide;
>
> (ii) Forty-nine percent of the money remaining after the payment of regulatory expenses shall be used to reduce property taxes statewide; and
>
> (iii) Two percent of the money remaining after the payment of regulatory expenses shall be transferred to the Compulsive Gamblers Assistance Fund.[25]

Section 2 of L.R. 41CA requires the resolution to be submitted to the electors with the following ballot language:

> A constitutional amendment to provide for enactment of laws providing for licensing and regulation of wagering on live or replayed horseraces, wherever run, either within or outside of the state, by the parimutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure, and to require appropriation of certain parimutuel taxes for regulation of parimutuel wagering, for education, for property tax relief, and for the Compulsive Gamblers Assistance Fund.
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> For
>
> Against[26]

2. Laws and Facts Relevant to Relator's Challenge to Proposed Amendment

Neb. Const. art. XVI, § 1, governs the procedure by which the Legislature may propose amendments to the constitution. Generally, a proposed amendment must be published and

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[25] 2014 Neb. Laws, L.R. 41CA.

[26] See *id.*, § 2.

submitted to the electorate on a separate ballot for approval or rejection at the next general election or at a special election if called for by a four-fifths vote of the Legislature. And under the separate-vote provision, "[w]hen two or more amendments are submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately."[27]

In addition, except for special elections, Neb. Rev. Stat. § 49-202.01(1) (Reissue 2010) imposes a statutory requirement: The Executive Board of the Legislative Counsel must submit to the Secretary a clear, concise statement explaining the effect of a vote for or against a proposed constitutional amendment. The board must submit this statement 4 months before the general election at which the voters will decide whether to amend the constitution, and the statement must precede the proposed amendment on the ballot. Under Neb. Rev. Stat. § 32-801 (Reissue 2008), the Secretary must certify the contents of a statewide ballot 50 days before a primary or general election. Here, the parties stipulated that the general election takes place on November 4, 2014, and that the certification date falls on September 12, 2014.

They also stipulated that the Executive Board of the Legislative Council submitted the following statement to precede the proposed amendment:

> A vote FOR this constitutional amendment would authorize the Legislature to enact laws providing for licensing and regulation of wagering on live or replayed horseraces, wherever run, either within or outside of the state, by the pari-mutuel method, when such wagering is conducted by licensees within a licensed racetrack enclosure and require appropriation of certain parimutuel taxes for regulation of parimutuel wagering, for education, for property tax relief, and for the Compulsive Gamblers Assistance Fund.
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> A vote AGAINST this constitutional amendment would not change existing provisions on wagering on the results of horseraces.

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[27] See Neb. Const. art. XVI, § 1.

3. Secretary Rejects Challenge

In July 2014, Loontjer's counsel in this action asked the Secretary to exercise his authority to review the legal sufficiency of the proposed amendment. He contended in part that the measure violated the separate-vote provision of article XVI, § 1. He argued that L.R. 41CA presented at least two amendments: one that authorizes a new type of gambling on replayed horseraces, and one that directs tax revenues from new and currently authorized wagering to be used for property tax relief and education funding. He argued that some voters who strongly opposed the new form of gambling might strongly support redirecting existing tax revenues on parimutuel wagering to property tax relief. He argued that the Legislature was unconstitutionally presenting two separate and independent changes to the constitution for voters to approve or reject in a single vote. And he contended that the Secretary could decide a challenge to the legal sufficiency or facial constitutionality of a proposed amendment before submitting it to the electorate.

In a memorandum dated July 22, 2014, the Secretary denied Loontjer's counsel's request. He stated that this court's decisions have held that challenges to the substantive constitutionality of a proposed ballot issue are not ripe for deciding before an election. But he recognized that the Secretary can decide, before an election, whether a ballot measure is legally sufficient. He concluded that the challenge of whether the proposed amendment violated the separate-vote provision was a challenge to the legal sufficiency of the ballot measure.

But the Secretary noted that unlike Nebraska's statutes governing voter-initiated ballot measures, no statutes gave him the authority to address, before an election, the legal sufficiency of the Legislature's proposed constitutional amendments. Relying on a 1996 opinion from the Attorney General's office,[28] the Secretary concluded that this lack of statutory authority meant he could address constitutional defects in the Legislature's proposed amendments only if they were patently clear from the face of the petition.

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[28] See Att'y Gen. Op. No. 96005 (Jan. 8, 1996).

The Secretary agreed that article XVI, § 1, is intended to prevent logrolling, which he described as the practice of enticing voters to vote for a proposition by combining a popular measure with a dissimilar measure and requiring voters to vote for or against the entire package. And the Secretary recognized that to constitute a single subject matter, the provisions of a proposed law must have a natural and necessary connection. But he concluded that our case law provided no clear answer as to whether L.R. 41CA satisfied the natural and necessary test. Because he believed our case law supported reasonable pro and con arguments to that question, he concluded that L.R. 41CA was not "patently unconstitutional on its face." The Secretary stated that he would place the proposed amendment on the November 2014 general election ballot "'unless restrained from doing so by the Courts.'"

III. ANALYSIS

1. Justiciability

[1,2] Challenges to proposed ballot measures present an initial issue of ripeness, and we have not previously decided whether a separate-vote challenge can be decided before an election. Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.[29] The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.[30]

[3,4] Because the outcome of an election is a contingent future event, a challenge that a proposed ballot measure will violate the substantive provisions of the U.S. or Nebraska Constitution does not present a justiciable controversy. It is not ripe for judicial determination because the voters might vote to reject the measure.[31] In contrast, a claim that a

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

[30] *Id.*

[31] See *Duggan v. Beermann*, 249 Neb. 411, 544 N.W.2d 68 (1996).

proposed ballot measure violates a constitutional or statutory rule that governs the form of the measure or the procedural requirements for its placement on the ballot is a challenge to the legal sufficiency of a ballot measure.[32] Such challenges are ripe for resolution before an election.[33]

For example, in *State ex rel. Lemon v. Gale*,[34] we decided a preelection challenge that two voter-initiated ballot measures to amend the constitution violated the resubmission clause of article III, § 2. The resubmission clause is a constitutional limitation on voter-initiated ballot measures, which clause prohibits the electorate from resubmitting the "same measure, either in form or in essential substance" more than once in 3 years. In *State ex rel. Lemon*, one ballot measure would have authorized casino gambling; the other would have required the Legislature to appropriate tax revenues from casino gambling for kindergarten through 12th grade education. The Secretary concluded that the measures were so similar to voter-initiated measures submitted to the electorate 2 years earlier that they violated the resubmission clause. He refused to place them on the ballot. In a mandamus action, the district court concluded that the casino measure was not barred by the constitution. On appeal, we held that the resubmission clause barred both measures.

In deciding that the controversy was justiciable, we explained that we were not deciding whether the measure would "violate one or more substantive provisions of the state or federal Constitution."[35] Instead, the issue was "whether the measure is legally sufficient to be submitted to the voters" under the resubmission clause.[36] And we relied, in part, on two concurring opinions in an earlier decision that had

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[32] See, *State ex rel. Lemon v. Gale*, 272 Neb. 295, 721 N.W.2d 347 (2006); *Lootnjer v. Robinson*, 266 Neb. 902, 670 N.W.2d 301 (2003); *Duggan, supra* note 31.

[33] See *id.*

[34] *State ex rel. Lemon, supra* note 32.

[35] *Id.* at 302, 721 N.W.2d at 355.

[36] *Id.*

concluded an alleged violation of the single subject requirement for voter-initiated measures presents a preelection justiciable issue.[37] We implicitly concluded that the rules were similar in their restrictions of content or form. That is, under these rules, a ballot measure's contents are considered only to determine whether it complies with the separate-vote requirement, regardless of the measure's subject matter. The issue is not whether the proposed measure's provisions violate substantive constitutional law.[38]

[5] Contrary to the Secretary's position, *State ex rel. Lemon* is not distinguishable because it governs voter-initiated ballot measures. Like the resubmission clause of article III, § 2, the separate-vote provision of article XVI, § 1, is not focused on whether a proposed constitutional amendment would violate substantive constitutional laws—such as the Equal Protection Clause or a prohibition against the impairment of contracts. Instead, regardless of the measure's subject matter, the separate-vote provision prohibits a ballot measure from being presented to the voters unless its form requirements are satisfied. The provision is directed at the manner of holding the election itself. We conclude that an alleged separate-vote violation challenges a ballot measure's legal sufficiency and presents a justiciable controversy before an election.

2. Secretary Has Authority to Review the Legal Sufficiency of the Legislature's Proposed Constitutional Amendments Even for Defects That Are Not Obvious

The Secretary contends that unlike his statutory duty to determine the legal sufficiency of voter-initiated ballot measures, he has no clear statutory authority to review the legal sufficiency of the Legislature's proposed constitutional amendments. So he contends that the invalidity or

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[37] See *Lootnjer, supra* note 32 (Hendry, C.J., concurring in result) (Wright, J., concurring; Gerrard, J., joins).

[38] See *Stewart v. Advanced Gaming Tech.*, 272 Neb. 471, 723 N.W.2d 65 (2006).

unconstitutionality of the Legislature's proposed constitutional amendments must be "'patently' clear." We disagree that a heightened standard for legal defects applies.

First, the Secretary relies on our 1984 decision *State ex rel. Brant v. Beermann*[39] to support his argument that the invalidity of a proposed ballot measure must be patently clear on its face before he can review its validity. In that case, we considered a voter-initiated ballot measure. We set out a rule of facial invalidity and provided an example of a facially invalid proposal:

> Unless the subject of the proposed petition on its face is invalid or unconstitutional, [the Secretary] cannot pass upon the validity or construction of any proposed law, when the proposed petition is presented for filing pursuant to § 32-704. An example of the Secretary of State's determining the validity of an initiative measure would be found in an initiative petition proposing a statutory abolition of a constitutional office.[40]

Relying on this language, the Attorney General's office determined in 1996 that the Secretary had authority to reject a ballot measure only for obvious constitutional defects.[41]

But the example we cited in *State ex rel. Brant* shows that we assumed the Secretary could reject a proposed ballot measure for its substantive constitutional defects. To limit the substantive challenges that the Secretary could address, we set out narrowing principles, including the one above. In 1996, however, we held in *Duggan v. Beerman*[42] that a substantive challenge to a proposed ballot measure was not ripe for judicial decision before an election. So our implicit conclusion in *State ex rel. Brant* that the Secretary could only reject a proposed ballot measure for an obvious, *substantive* constitutional defect was abrogated by our later decision in *Duggan*.

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[39] *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984).

[40] *Id.* at 637, 350 N.W.2d at 21.

[41] See Att'y Gen. Op. No. 96005, *supra* note 28.

[42] *Duggan, supra* note 31.

Although in a couple of our cases we have repeated the "facial invalidity" requirement,[43] we have never held that the Secretary cannot address a challenge to a ballot measure's legal sufficiency unless the defect is obvious on the face of the measure. Such a requirement would be contrary to our reasoning in *State ex rel. Wieland v. Beermann*.[44] There, we held that the Secretary had a ministerial duty to review his own records to determine whether explanatory statements describing the proposed amendments were timely filed, to withhold proposals that did not meet the filing deadline, and to supervise the conduct of general elections. We explained that the Secretary's duty to act was not discretionary just because he needed to make factual determinations to carry out his statutory duties. We noted that the Secretary also must make inquiries to determine the sufficiency of signatures collected on initiative petitions.

Our analysis in *State ex rel. Wieland* illustrates that a legal defect in a proposed ballot measure will frequently not be obvious. But if the Secretary has a duty to determine the legal sufficiency of a proposed ballot measure, the necessity of "[l]egal or factual determinations made at the outset of the inquiry" do not affect the nature of his duty.[45] We conclude that *State ex rel. Brant* has no application to a challenge that a ballot measure is legally defective in its failure to comply with rules governing its form or procedural requirements.

Next, the Secretary argues that chapter 32, article 14, of the Nebraska Revised Statutes more specifically authorizes him to review the legal sufficiency of voter-initiated ballot measures than does chapter 49, article 2, which governs constitutional amendments proposed by the Legislature. For example, the Secretary points to Neb. Rev. Stat. § 32-1409(3) (Reissue 2008), which gives him authority to "total the valid signatures and determine if constitutional and statutory requirements have been met." While § 32-1409(3) supports the Secretary's

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[43] See, *Loontjer, supra* note 32 (Wright, J., concurring; Gerrard, J., joins); *Duggan, supra* note 31.

[44] *State ex rel. Wieland v. Beermann*, 246 Neb. 808, 523 N.W.2d 518 (1994).

[45] *Id.* at 815, 523 N.W.2d at 524.

position that he has statutory authority to review voter initiatives, that section is primarily aimed at rules governing the required signatures for voter-initiated ballot measures. And we have concluded that the Secretary's authority to determine the legal sufficiency of ballot measures exceeds these types of defects.[46]

Moreover, the Secretary's statutory authority to review voter-initiated ballot measures for their legal sufficiency is not as explicit as it was before 1995. As we noted in *Duggan*, the Legislature overhauled the election laws in January 1995.[47] Before then, Neb. Rev. Stat. §§ 32-703.01 and 32-704(3) (Reissue 1993) explicitly required the Secretary to determine if an initiative was valid and sufficient. And no corresponding statute exists under the current voter initiative statutes at chapter 32, article 14.

Instead, under Neb. Rev. Stat. § 32-1411 (Reissue 2008), the Secretary must place a measure on the ballot when it is "regularly and legally filed." Under Neb. Rev. Stat. § 32-1412 (Reissue 2008), if the Secretary refuses to place the measure on the ballot, then any resident may apply for a writ of mandamus from the district court for Lancaster County. This statute assumes that the Secretary can reject an initiative for failing to satisfy rules governing its presentation to the voters, but it imposes no explicit duty to make this determination. Nonetheless, we held in *State ex rel. Lemon* that the Secretary had authority to determine whether a voter-initiated ballot measure violated the resubmission clause under the Constitution. It is true that we noted the Secretary's authority to reject a proposed measure under § 32-1409(3). But more broadly, the Secretary's authority is consistent with the Secretary's duties under Neb. Rev. Stat. § 32-201 (Reissue 2008).

Chapter 32, article 2, of the Nebraska Revised Statutes deals with the Secretary's duties for the conduct of *all* statewide elections, and § 32-201 sets out his primary duty in that regard: "The Secretary of State shall decide disputed points of election

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[46] See *State ex rel. Lemon, supra* note 32.

[47] See *Duggan, supra* note 31.

law. The decisions shall have the force of law until changed by the courts." And in *State ex rel. Wieland*, we stated that under Neb. Rev. Stat. §§ 32-1051 and 32-1052 (Reissue 1993), the Secretary had a clear statutory duty to "'decide disputed points of election law,'" and to "'supervise the conduct of primary and general elections in this state.'"[48]

Section 32-1051 is now § 32-201, and the Secretary's duty to supervise elections is now found at Neb. Rev. Stat. § 32-202(1) (Reissue 2008). Although the statutes governing the Legislature's proposed constitutional amendments are in chapter 49, article 2, of the Nebraska Revised Statutes, these provisions were also separate from the general election laws when we decided *State ex rel. Wieland*.[49] And contrary to the Secretary's argument, we find no reason to distinguish between his duties dealing with statutory deadlines and compliance with the separate-vote provision. Moreover, § 49-207 (Reissue 2010) requires the Secretary to provide the form for the ballot:

> Whenever at a session of the Legislature more than one amendment to the Constitution or proposition is submitted to a vote of the people, *it shall be the duty of the Secretary of State to provide the form of the ballots containing such propositions or proposed amendments, which are to be submitted to a vote of the people*. . . . If more than one amendment to the Constitution or proposition is received at the same time, they shall be submitted in the order they were approved by the Legislature.

It is true that part of § 49-207 clearly pertains to separate resolutions to amend the constitution. But the consecutive numbering required for separate proposals to amend the constitution does not negate the Secretary's statutory duty to provide the form for all the Legislature's proposed amendments.

Additionally, § 32-801 requires the Secretary to certify the contents of all statewide ballots. His certification of proposed ballot measures would be meaningless if this duty carried no

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[48] *State ex rel. Wieland, supra* note 44, 246 Neb. at 816, 523 N.W.2d at 525.

[49] See Neb. Rev. Stat. ch. 49, art. 2 (Reissue 1993).

responsibility to ensure that they satisfied legal requirements for their presentation to the voters.

[6,7] Summed up, we conclude that the Secretary's statutory duties to provide the ballot form for the Legislature's proposed constitutional amendments and to certify its contents, coupled with his duties to supervise elections and decide disputed points of election laws, clearly require him to consider whether a proposed amendment complies with the separate-vote provision. Power vested in a governmental body or officer carries with it the implied power to do what is necessary to accomplish an express statutory duty, absent any other law that restrains the implied power.[50]

So, the Secretary incorrectly argues that he lacks clear statutory authority to address the legal sufficiency of the Legislature's proposed constitutional amendments before an election. He has authority to determine whether they meet form and procedural requirements. Accordingly, the Secretary also incorrectly concluded that because he lacked this authority, he can address such defects only if they are "'patently' clear" from the face of the petition. Instead, the standard that a challenger must satisfy to keep a voter-initiated amendment off the ballot should also be the standard that applies to the Legislature's proposed amendments. Applying the same standard to all proposed ballot measures is consistent with our holdings that under the Nebraska Constitution, the Legislature and electorate are coequal sources of legislation.[51]

[8] We hold that the Secretary cannot determine the substantive merits of the Legislature's proposed constitutional amendment. But in a legal sufficiency challenge, he has a duty to reject a proposed amendment as legally defective for failing to satisfy form and procedural requirements. There is no

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[50] See, e.g., *Wetovick v. County of Nance*, 279 Neb. 773, 782 N.W.2d 298 (2010); *L. J. Vontz Constr. Co. v. City of Alliance*, 243 Neb. 334, 500 N.W.2d 173 (1993); 73 C.J.S. *Public Administrative Law and Procedure* § 109 (2004).

[51] See, e.g., *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011); *Stewart, supra* note 38.

requirement that the proposed amendment be "patently unconstitutional on its face" before the Secretary must act.

Having determined the justiciability of the issue and the Secretary's authority to determine whether a legislatively proposed amendment violates the separate-vote requirement, we turn to the meaning of that requirement.

3. Separate-Vote Provision Imposes a Single Subject Requirement for the Legislature's Proposed Amendments

The separate-vote provision requires that "[w]hen two or more amendments are submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately."[52] Lootnjer contends that L.R. 41CA violates this requirement because voters cannot separately vote on its separate provisions, i.e., its proposed amendment to permit a new form of gambling and its proposed amendment to restrict the Legislature's appropriation authority. By dissecting its appropriation requirements, Loontjer argues that L.R. 41CA presents several different proposals for the voters to decide and about which they could disagree. She contends that the separate-vote provision is akin to a single subject rule, which is intended to prohibit logrolling, and that L.R. 41CA fails to meet the "'natural and necessary connection'" test for determining whether a proposed measure presents a single subject for a single vote.

The Secretary does not dispute that the separate-vote provision constitutes a single subject rule for the Legislature's proposed constitutional amendments. But he contends that L.R. 41CA pertains to only one general subject: parimutuel wagering on replayed horseraces. He contends that both provisions of L.R. 41CA—authorizing wagering on replayed horseraces and requiring parimutuel tax proceeds from wagering on horseraces to be used for property tax relief and kindergarten through 12th grade education—have a natural and necessary connection to the same subject matter.

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[52] See Neb. Const. art. XVI, § 1.

We agree with the parties that the separate-vote provision under article XVI, § 1, imposes the same requirements as the single subject provision under article III, § 2. But because we have not previously decided this issue, we take the time to explain our decision.

(a) Independent Subjects Must Be Separately Presented to Voters

Under separate-vote provisions in state constitutions, courts have almost invariably characterized unrelated subject matters within a single proposition as separate amendments that must be submitted to the voters separately.[53] An early Wisconsin case influenced many other state courts. In *State ex rel. Hudd v. Timme*,[54] the Wisconsin Supreme Court rejected an argument that any change to an existing constitutional provision and any new provision must be considered a separate amendment to be voted on separately in a ballot. It reasoned that if each provision of a single plan had to be separately submitted to the voters and a crucial provision failed, the provisions that passed might be effectively defeated. It pointed out that in amendments under consideration, the proposals to change the legislative session from annual to biennial meetings was intimately connected to the provision to change a legislator's tenure from 1 to 2 years. Otherwise, some legislators would have no duties. Voter approval of only one provision would be absurd, so the provisions should stand or fall together. Similarly, the proposed increase in legislators' salaries, while not intimately connected to the session change, was sufficiently connected because the legislators' duties would be enlarged. The court set forth the following rule:

> We think amendments to the constitution, which the [separate-vote provision] requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to

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[53] See Annot., 94 A.L.R. 1510 (1935).

[54] *State ex rel. Hudd v. Timme*, 54 Wis. 318, 11 N.W. 785 (1882).

> constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. . . . [Legislators] are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose.[55]

And the Arizona Supreme Court pointed out in 1934 that numerous early state court decisions cited the Wisconsin case with approval.[56] Agreeing with the Wisconsin court, it held that "'to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other.'"[57]

[9-11] This court has decided only one case under the separate-vote provision of article XVI, § 1. That decision was issued in 1889 when the separate-vote provision was found at Neb. Const. art. XV, § 1 (1875), and the Legislature had two houses. But *In re Senate File No. 31*[58] established two important points that are relevant here. First, it illustrates that the Legislature's independent proposals to amend the constitution must be presented to the voters for a separate vote even if they are proposed in a single resolution. However, the proposals under consideration were obviously contrary to each other, so the case does not give much guidance for determining independent subjects. Second, the court held that the constitutional requirements for legislative bills do not apply to the Legislature's proposed amendments. Thus, the "single subject" rule that applies to legislative bills under article III, § 14, does not apply to ballot measures for constitutional amendments.

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[55] *Id.* at 336-37, 11 N.W. at 791.

[56] See *Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (1934). See, also, 94 A.L.R., *supra* note 53.

[57] *Kerby, supra* note 56, 44 Ariz. at 217, 36 P.2d at 553.

[58] *In re Senate File No. 31*, 25 Neb. 864, 41 N.W. 981 (1889).

(b) Single Subject Rule for Legislative Bills Does Not Apply to Proposed Amendments

Other courts have held that the same standard that governs single subject rules for ballot measures also applies to separate-vote rules for constitutional amendments.[59] Like single subject rules, a separate-vote provision is often said to be aimed at the practice of logrolling.[60] We have said logrolling is the practice of combining dissimilar propositions into one proposed amendment so that voters must vote for or against the whole package even though they would have voted differently had the propositions been submitted separately.[61] It is sometimes described as including favored but unrelated propositions in a proposed amendment to ensure passage of a provision that might otherwise fail.[62]

As explained below, we conclude that under the Nebraska Constitution, the single subject rule for proposed voter initiatives should be the same as the separate-vote rule for the Legislature's proposed amendments. But consistent with our decision in *In re Senate File No. 31*, we conclude that the single subject rule for legislative enactments has no application here. That provision is found in article III, § 14, which provides that "[n]o bill shall contain more than one subject . . . ." We construe this requirement quite liberally: "If an act has but one general object, no matter how broad that object may be, and contains no matter not germaine thereto, and the

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[59] See, *Andrews v. Governor of Maryland*, 294 Md. 285, 449 A.2d 1144 (1982); *Missourians to Protect Init. Proc. v. Blunt*, 799 S.W.2d 824 (Mo. 1990); *In re Initiative Petition No. 314*, 625 P.2d 595 (Okla. 1980).

[60] See, e.g., *Kerby, supra* note 56; *Andrews, supra* note 59; *State ex rel. Clark v. State Canvassing Bd.*, 119 N.M. 12, 888 P.2d 458 (1995).

[61] *City of North Platte, supra* note 51; *City of Fremont v. Kotas*, 279 Neb. 720, 781 N.W.2d 456 (2010), *abrogated in part on other grounds, City of North Platte, supra* note 51.

[62] See, *Advisory Opinion re Use of Marijuana*, 132 So. 3d 786 (Fla. 2014); *Carter v. Burson*, 230 Ga. 511, 198 S.E.2d 151 (1973).

title fairly expresses the subject of the bill, it does not violate Article III, section 14, of the Constitution."[63]

But as Chief Justice Hendry pointed out in 2003, this court has previously recognized that a stricter standard should apply when considering the validity of a constitutional amendment, as distinguished from a legislative bill to enact or amend a statute.[64] In *State, ex rel. Hall, v. Cline*,[65] we held that the Legislature's proposed amendment was not validly adopted when the Legislature followed a statute for publishing notice of the vote to amend, but the statutory requirements did not comply with the constitutional requirements for notice. In considering whether the Legislature had substantially complied with constitutional requirements, we stated that a court should "consider the seriousness of the business in which we are engaged. A legislative act may be amended or repealed at any succeeding session of the Legislature. A constitutional provision is intended to be a much more fixed and permanent thing."[66]

Similarly, in *Omaha Nat. Bank v. Spire*,[67] we stated that the significant difference between labeling an initiative petition as a proposed statute or constitutional amendment would obviously affect whether a petition signer or voter would support the initiative:

> The differences between a law enacted by the initiative procedure and an amendment are obvious and great. While a law enacted by the initiative process may not be vetoed by the Governor of the state (article III, § 4), any law may later be repealed by the Legislature. An amendment to the Constitution, on the other hand, may not be repealed by the Legislature, but only by the people in a subsequent amendment to the Constitution.

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[63] *Anderson v. Tiemann*, 182 Neb. 393, 408-09, 155 N.W.2d 322, 332 (1967).

[64] See *Loontjer, supra* note 32 (Hendry, C.J., concurring in result), quoting *State, ex rel. Hall, v. Cline*, 118 Neb. 150, 224 N.W. 6 (1929).

[65] See *State, ex rel. Hall, supra* note 64.

[66] *Id.* at 155, 224 N.W. at 8.

[67] *Omaha Nat. Bank v. Spire*, 223 Neb. 209, 218-19, 389 N.W.2d 269, 276 (1986).

Like the labeling of an initiative petition, the separate-vote provision of article XVI, § 1, is a rule intended to avoid voter confusion when deciding whether to support a proposed change in the constitution. But more important, it is intended to prevent the practice of logrolling in amending the State's fundamental law. Because constitutional amendments are difficult to change once enacted, we hold that the liberal single subject standard that applies to legislative bills under article III, § 14, does not apply to proposed constitutional amendments. We now turn to what that standard should be.

4. Natural and Necessary Test Applies to Separate-Vote Provision

(a) History of Constitutional Amendments Shows Single Subject Requirements for Voter Initiatives Should Govern Legislature's Proposed Amendments

Article III, § 2, governs voter-initiated proposals for laws and constitutional amendments and imposes two form requirements that are relevant here: "The constitutional limitations as to the scope and subject matter of statutes enacted by the Legislature shall apply to those enacted by the initiative. Initiative measures shall contain only one subject." In contrast, the separate-vote requirement of article XVI, § 1, for the Legislature's proposals provides that "[w]hen two or more amendments are submitted at the same election, they shall be so submitted as to enable the electors to vote on each amendment separately." But as explained, despite the different language of these provisions, single subject and separate-vote ballot rules are aimed at the same logrolling problem. This conclusion is supported by a 1998 amendment to article III, § 2.

The requirement in article III, § 2, that voter-initiated statutes shall be governed by the same constitutional limitations on their scope and subject matter as statutes enacted by the Legislature has been part of the Constitution since 1912.[68] So the single subject requirement that applies to legislative bills also applies to voter-initiated statutes.

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[68] See 1911 Neb. Laws, ch. 223, § 1A, p. 671.

[12] But the second sentence of the quoted requirements for initiatives—i.e., that initiative measures shall contain only one subject—was adopted by the voters in 1998.[69] Because it was added later, it necessarily implies a requirement that exceeds the requirement that the subject matter of initiatives shall be subject to the same requirements as legislative enactments. It is a fundamental principle of constitutional interpretation that each and every clause within a constitution has been inserted for a useful purpose.[70] And the legislative history of the resolution proposing the amendment shows that it was intended to equalize the requirements for ballot measures proposed by the voters and constitutional amendments proposed by the Legislature.

The amendment was apparently a response to two opinions from the Attorney General in 1995 and 1996.[71] In short, the Attorney General concluded that we would probably apply the same test to all constitutional amendments—whether proposed by the Legislature or the voters—and that we would require a separate vote on its provisions unless they met the test for a single subject. But at that time, article III, § 2, did not explicitly include a separate-vote provision or a single subject provision. The committee hearing shows that senators were concerned about the potential for voter confusion and fraud in the initiative process. The amendment was intended to clarify that all ballot measures to enact or change laws or constitutional provisions, whether voter initiatives or legislatively proposed constitutional amendments, were subject to the same requirement of presenting only one subject to the electorate for a single vote.[72]

[13] In sum, our constitutional history and the opinions of other state courts support our conclusion that the single

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[69] See 1997 Neb. Laws, L.R. 32CA.

[70] *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013).

[71] See Att'y Gen. Ops. Nos. 95089 (Nov. 13, 1995) and 96005, *supra* note 28.

[72] See Government, Military and Veterans Affairs Committee Hearing, L.R. 32CA, 95th Leg., 1st Sess. (Jan. 24, 1997).

subject rule for voter initiatives and the separate-vote provision for the Legislature's proposed amendments should be construed as imposing the same ballot requirements: A voter initiative or a legislatively proposed constitutional amendment may not contain two or more distinct subjects for voter approval in a single vote.

(b) Natural and Necessary Connection Test Applies to All Single Subject Ballot Requirements

Our conclusion that all ballot measures for laws or constitutional amendments are limited by the requirement that they present only one subject matter to the voters does not end our analysis. We have never decided what test should apply for the single subject requirement under article III, § 2 (for voter-initiated proposals), or article XVI, § 1 (for the Legislature's proposed amendments). But in *Loontjer v. Robinson*,[73] three concurring justices opined that our decision in *Munch v. Tusa*[74] should govern the single subject requirement.

In *Munch*, we considered the validity of a proposed amendment to a city charter. We adopted a rule that courts have applied to state constitutional amendments. We cited a general rule providing that if the separate provisions of a proposed amendment are all "'germane'" to the general subject matter, they may be submitted to the voters in a single vote.[75] And we cited a case concluding that the controlling consideration is an amendment's singleness of purpose and the relationship of the details to its general subject. We adopted the following test for the single subject requirement: "[W]here the limits of a proposed law, having natural and necessary connection with each other, and, together, are a part of one general subject, the proposal is a single and not a dual proposition."[76]

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[73] See *Loontjer, supra* note 32 (Hendry, C.J., concurring in result) (Wright, J., concurring; Gerrard, J., joins).

[74] *Munch v. Tusa*, 140 Neb. 457, 300 N.W. 385 (1941).

[75] *Id.* at 463, 300 N.W. at 389.

[76] *Id.*

We have also applied a common-law single subject test to municipal voter initiatives: "The common-law single subject rule of form that we adopted in *Drummond* [*v. City of Columbus*[77]] preserves the integrity of the municipal electoral process by invalidating proposed ordinances that require voters to approve distinct and independent propositions . . . ."[78] We reasoned that "if a proposed ballot measure combines two distinct proposals so that voters are compelled to vote for or against both when they might not do so if separate questions were submitted, then they cannot express a clear preference on both proposals."[79] We held that

> a proposed municipal ballot measure is invalid if it would (1) compel voters to vote for or against distinct propositions in a single vote—when they might not do so if presented separately; (2) confuse voters on the issues they are asked to decide; or (3) create doubt as to what action they have authorized after the election.[80]

The first component of the test for municipal ballot measures reflects the prohibition against logrolling that is the primary purpose of the separate-vote provision. And we specifically stated that "a municipal ballot measure with separate provisions does not violate the single subject rule if the provisions have *a natural and necessary connection with each other and together are part of one general subject*."[81]

[14] It would be a strange result if we were more concerned about the integrity of municipal elections than state-wide votes to amend the fundamental law of Nebraska. And other courts agree that separate provisions in proposed constitutional amendments must be closely related in purpose to be presented

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[77] *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109 (1939).

[78] *City of North Platte, supra* note 51, 282 Neb. at 348, 803 N.W.2d at 486-87.

[79] *Id*. at 349, 803 N.W.2d at 487.

[80] *Id*.

[81] *Id*. at 350, 803 N.W.2d at 487 (emphasis supplied), citing *City of Fremont, supra* note 61.

to the electorate for a single vote.[82] We conclude that the natural and necessary connection test that applies to proposed amendments for city charters and municipal ballot measures also applies to the single subject requirement for voter initiatives under article III, § 2, and the separate-vote provision of article XVI, § 1. We turn to its application here.

5. Application of Natural and Necessary Connection Test

To recap, Loontjer contends that L.R. 41CA violates the natural and necessary connection test because voters cannot separately vote on its separate provisions to permit a new form of gambling and to change the appropriation of taxes collected from parimutuel wagering.

The Secretary contends that L.R. 41CA does not violate the natural and necessary connection test because its "broad, general subject matter" is parimutuel wagering on horseracing and all aspects of the amendment have a natural and necessary connection to this general subject matter.[83]

[15] Of course, whether a proposed amendment's provisions deal with a single subject matter depends on how narrowly or broadly the subject matter is defined. But we reject the Secretary's argument that the subject matter of L.R. 41CA is broad enough to encompass any topic connected to parimutuel wagering related to horseracing. Under this reasoning, the Legislature could propose in a single amendment to change any law dealing with a subject as broad as gambling, or the organization of government or schools. Instead, as we said in *Munch*, "the controlling consideration in determining the singleness of an amendment is its singleness of purpose and the relationship of the details to the general subject."[84] Clearly,

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[82] See, e.g., *McLaughlin v. Bennett*, 225 Ariz. 351, 238 P.3d 619 (2010); *Moore v. Shanahan*, 207 Kan. 645, 486 P.2d 506 (1971); *Cambria v. Soaries*, 169 N.J. 1, 776 A.2d 754 (2001); *Pennsylvania Prison Soc. v. Com.*, 565 Pa. 526, 776 A.2d 971 (2001).

[83] Reply brief for respondent at 2.

[84] *Munch, supra* note 74, 140 Neb. at 463, 300 N.W. at 389.

the intent of this rule was to clarify that under a single subject ballot requirement, the general subject of a proposed ballot measure is defined by its primary purpose, and the facts of *Munch* support that conclusion.

In *Munch*, a city council proposed an amendment to the city's charter to create a uniform system of pensions for firefighters and police officers. The employees' pensions were set out in different articles of the charter, and the firefighters had previously received better pension benefits. So to equalize the plans, the amendment necessarily proposed several changes. But all the amendment's provisions were closely related to the amendment's single purpose "to place the firemen and policemen of the city on the same pension basis."[85] We rejected the plaintiff's argument that the amendment presented a dual proposition and that voters should be able to decide whether to change each plan separately. We concluded that voters were asked to decide a single proposition, i.e., whether to adopt a unified pension fund plan.

In contrast, we held that a municipal ballot measure in *City of North Platte v. Tilgner*[86] violated the common-law single subject rule because the voters were asked to approve of distinct and independent propositions in a single vote. There, the city had previously approved an occupation tax to pay for a visitor center and indefinitely fund its operation. It then entered into an option contract to purchase a visitor center from a private group, and the private group obtained a loan to fund the project. The initiative's proponents sought to amend the occupation tax ordinance so that tax revenues could only be used to pay off the loan to fund the project. After the debt was retired, the initiative would have prohibited the city from using the revenues to operate the center. Instead, it would have required the city to use the revenues for property tax relief.

We concluded that the two proposals—prohibiting the use of an occupation tax for a visitor center's operating expenses and

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[85] *Id.* at 459, 300 N.W. at 387.

[86] *City of North Platte, supra* note 51.

requiring the city to use the revenues for property tax relief—did not have a natural and necessary connection:

> These amendments were not separate provisions of the same law. But even if they could be construed as such, we conclude that they presented independent and distinct proposals instead of having a natural and necessary connection. . . . Because the petition presented distinct but dual propositions for a single vote, voters could not express a preference on either without approving or rejecting both. Because the appellants' referendum petition would not permit voters to express a clear preference on dual propositions, it violated the single subject rule and was invalid.[87]

[16] Our conclusion in *City of North Platte* that the initiative's proposals were not separate provisions of the same law under the single subject requirement was clearly tied to their lack of any unifying purpose. Without a unifying purpose, separate proposals in a ballot measure necessarily present independent and distinct proposals that require a separate vote.

Here, the Legislature's primary purpose in L.R. 41CA is to legalize a new form of wagering under Neb. Const. art. III, § 24. That purpose is apparent from the text of the proposed amendment and its legislative history. Senator Lautenbaugh and other proponents argued at the committee hearing that the proposed amendment would save jobs in the struggling horseracing industry by allowing yearlong wagering at racetracks. Neither the amendment's text, the statement of intent,[88] nor the legislative history showed that a primary purpose for the amendment was to create new funding for property tax relief and education by requiring that all tax revenues from parimutuel wagering be used for such purposes. The possibility of using existing parimutuel tax revenues for property tax relief and education was not even proposed until the resolution faced

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[87] See *id.* at 351, 803 N.W.2d at 488.

[88] See Introducer's Statement of Intent, L.R. 41CA, General Affairs Committee, 103d Leg., 1st Sess. (Feb. 11, 2013).

substantial opposition from some members of the Legislature. So the question is whether the proposal to use tax revenues from parimutuel wagering for property tax relief and education had a natural and necessary connection to legalizing a new form of wagering.

The answer is no. The appropriation proposal's only connection to the wagering proposal was to enhance the odds that voters would approve the new form of wagering. Many voters who might oppose proposals for new forms of wagering, standing alone, might nonetheless want new funding for property tax relief and kindergarten through 12th grade education. But they would be presented with a take-it-or-leave-it proposition. And this type of proposition is at the heart of the prohibition against logrolling. Conversely, even voters who would support the new type of wagering might prefer that the parimutuel tax revenues continue to be credited to the state's general fund, instead of devoted exclusively to property tax relief and education.

That voters might reasonably diverge on these separate proposals was amply illustrated in 1991, when the Legislature presented two *separate* ballot issues for the 1992 general election. The first ballot measure asked voters to authorize a state lottery. The second one asked voters to approve a specified distribution of the funds, if the lottery were approved.[89] The voters approved the first proposal, but not the second. Later, in 2004, the Legislature successfully passed a proposal to amend the constitution to appropriate lottery funds under the current method.[90]

The 1992 election illustrates that even if a majority of voters want to authorize a new form of wagering, they would not necessarily agree on the appropriations of tax revenues from it. That election also shows that the Legislature had previous experience with the proper means of presenting voters with distinct and independent proposals. We hold that because L.R. 41CA's provisions did not have a natural and necessary

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[89] See 1991 Neb. Laws, L.R. 24CA.

[90] See, Neb. Const. art. III, § 24(3); 2004 Neb. Laws, L.R. 209CA.

connection, the Legislature was required to present the proposals to the voters for separate votes.

6. Secretary Must Withhold L.R. 41CA From the Ballot

In Loontjer's petition, she sought a writ of mandamus requiring the Secretary to deny certification and withhold the proposed amendment from the ballot. Under the Uniform Declaratory Judgments Act,[91] she also sought a declaration that the ballot language was invalid for three reasons: (1) the ballot language violates the separate-vote provision under Neb. Const. art. XVI, § 1; (2) the explanatory statement and ballot title violates the statutory requirements under § 49-202.01(1); and (3) the ballot language violates the free election clause under Neb. Const. art. I, § 22. Finally, she sought attorney fees and costs under Neb. Rev. Stat. §§ 25-2165 (Reissue 2008) and 25-21,158.

[17] We granted jurisdiction for an original cause of action involving revenue, in which the State has a direct interest, and a request for a writ of mandamus. When a party has invoked our original jurisdiction under one of the causes of action specified in Neb. Const. art. V, § 2, we may exercise our authority to grant requested declaratory relief under the Uniform Declaratory Judgments Act or injunctive relief.[92]

[18] Although the appropriate relief might be characterized in part as declaratory or injunctive, Loontjer argues that the Secretary was required by law to refuse to certify the Legislative proposal for placement on the November 2014 ballot, that he refused, and that this court should compel him to do so. Thus, she seeks a writ of mandamus. A court issues a writ of mandamus only when (1) the relator has a clear right to the relief sought, (2) a corresponding clear duty

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[91] See Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 2008).

[92] See, e.g., *Omaha Expo. & Racing, supra* note 3; *State ex rel. Wieland v. Moore*, 252 Neb. 253, 561 N.W.2d 230 (1997); *State ex rel. Stenberg v. Douglas Racing Corp.*, 246 Neb. 901, 524 N.W.2d 61 (1994); *Henry v. Rockey*, 246 Neb. 398, 518 N.W.2d 658 (1994); *State, ex rel. Smrha, v. General American Life Ins. Co.*, 132 Neb. 520, 272 N.W. 555 (1937).

exists for the respondent to perform the act, and (3) no other plain and adequate remedy is available in the ordinary course of law.[93]

Because we have held that the Secretary had the duty to determine whether a legislatively proposed amendment violates the separate-vote requirement, that the Legislature was required to present L.R. 41CA's proposals to the voters for separate votes, and that the resolution does not satisfy that requirement, we have recognized that Loontjer had a clear right to the relief she sought and that the Secretary had a corresponding clear duty to perform the act—that is, to refuse to certify the proposal for submission to the voters at the November 2014 election. The Secretary does not contend that Loontjer had any other plain and adequate remedy available to her in the ordinary course of law, and we also conclude that she did not. Thus, she has established all of the elements of mandamus and is entitled to a writ of mandamus requiring the Secretary to deny certification and withhold the proposed amendment from the ballot. Because we conclude that the resolution is unconstitutional under the separate-vote provision, we do not address Loontjer's additional claims that it was invalid because it violated the free election clause and because the accompanying explanatory statement was legally insufficient.[94]

IV. CONCLUSION

We conclude that L.R. 41CA violates the separate-vote provision of Neb. Const. art. XVI, § 1. We express no opinion on the substantive merits of either provision of the proposal. We issue a writ of mandamus directing the Secretary to not certify the proposal presented by L.R. 41CA for placement on the ballot for the November 2014 general election and to withhold the proposed amendment from the ballot.

WRIT OF MANDAMUS GRANTED.

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[93] *Mid America Agri Products v. Rowlands*, 286 Neb. 305, 835 N.W.2d 720 (2013).

[94] See *J.M. v. Hobbs, ante* p. 546, 849 N.W.2d 480 (2014).

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