THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 12, 2014 and FEBRUARY 5, 2015

IN THE

# Supreme Court of Nebraska

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## NEBRASKA REPORTS

## VOLUME CCLXXXIX

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PEGGY POLACEK
OFFICIAL REPORTER

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2016

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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MICHAEL M. MCCORMACK, Associate Justice
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WILLIAM B. CASSEL, Associate Justice

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RIKO E. BISHOP, Associate Judge

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PEGGY POLACEK . . . . . Reporter
TERESA A. BROWN . . . . . Clerk
COREY STEEL . . . . . State Court Administrator

[1]Until September 12, 2014
[2]As of September 13, 2014
[3]As of September 13, 2014
[4]Until September 12, 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 |
| | | Mark J. Young | Grand Island |
| 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 |
| | | Steven B. Timm | Beatrice |
| | | Linda A. Bauer | Fairbury |
| 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 |
| | | Laurie Yardley | Lincoln |
| | | Susan I. Strong | Lincoln |
| | | Timothy C. Phillips | Lincoln |
| | | Thomas W. Fox | Lincoln |
| | | Matthew L. Acton | Lincoln |
| | | Holly J. Parsley | 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 |
| Julie A. Martin | Lincoln |

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BRANDON JONATHON BOETEL
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MARK RUSSELL BOSWORTH
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WENDY MARIE BROWN
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ZACKARY EDWARD CARLSON
JORDAN RHEA CARLTON
CAITLIN CLAIRE CEDFELDT
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DANIELLE DRING
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Zachary Dennis Petersen
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Kane Michael Ramsey
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Jose Luis Rodriguez
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JOSHUA STEVEN WEINER
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MARA ELIZABETH WILDE
MEGHAN ELIZABETH WOLF
RYAN P. WOLFE
TROY WOOLLEN
AMANDA H. WRIGHT
JUSTIN MICHAEL YATES
CLARK RUSSELL YOUNGMAN

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No. S-13-977: **Navarrette v. Navarrette**. Reversed and remanded with directions. Connolly, J.

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No. S-13-1128: **Pazderka v. Brown**. Reversed and remanded for further proceedings. Per Curiam. Heavican, C.J., participating on briefs. Stephan and McCormack, JJ., not participating.

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No. S-14-419: **In re Interest of Charles W**. Reversed and remanded for further proceedings. Heavican, C.J.

No. S-14-424: **In re Interest of Eric H**. Appeal dismissed. Per Curiam. Heavican, C.J., participating on briefs.

No. S-14-681: **Martinez v. Excel Corp**. Reversed and remanded. McCormack, J. Cassel, J., not participating.

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No. S-14-056: **State v. Rice**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2). Appellant's petition for postconviction relief is time barred. See, Neb. Rev. Stat. § 29-3001(4)(e) (Reissue 2008); *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

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No. A-13-038: **In re Louise V. Steinhoefel Trust**, 22 Neb. App. 293 (2014). Petition of appellants for further review denied on January 22, 2015.

No. A-13-038: **In re Louise V. Steinhoefel Trust**, 22 Neb. App. 293 (2014). Petition of appellee Steffensmeier for further review denied on January 22, 2015.

No. A-13-038: **In re Louise V. Steinhoefel Trust**, 22 Neb. App. 293 (2014). Petition of appellees Addison and Wetherelt for further review denied on January 22, 2015.

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No. A-13-344: **In re Interest of Angel P**. Petition of appellant for further review denied on October 29, 2014.

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No. A-13-494: **NRS Properties, LLC v. Resilent, LLC**. Petition of appellant for further review denied on November 26, 2014.

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No. A-13-605: **In re Interest of Natasha N. et al**. Petition of appellant for further review denied on January 14, 2015.

No. A-13-611: **Sullivan v. Sarpy County Jail**. Petition of appellant for further review denied on September 10, 2014.

No. A-13-635: **Sutton v. Killham**, 22 Neb. App. 257 (2014). Petition of appellant for further review denied on December 17, 2014.

No. A-13-655: **State v. Gomez**. Petition of appellant for further review denied on October 22, 2014.

No. A-13-675: **Breit v. Breit**. Petition of appellant for further review dismissed on December 5, 2014, as premature without prejudice to filing a timely petition for further review. See § 2-102(F)(1).

No. A-13-683: **Haworth v. Douglas County**. Petition of appellant for further review denied on December 10, 2014.

No. A-13-711: **State v. Kibbee**. Petition of appellant for further review denied on October 15, 2014.

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No. A-13-762: **Malchow v. Michaelsen**. Petition of appellant for further review denied on January 14, 2015.

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No. A-13-771: **Pratt v. Houston**. Petition of appellant for further review denied on November 12, 2014.

No. S-13-775: **Johnson v. Johnson**. Petition of appellee for further review sustained on December 10, 2014.

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No. A-13-809: **Payne v. Payne**. Petition of appellant for further review denied on November 26, 2014.

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No. A-13-828: **Battle Sports Science v. Circo**. Petition of appellant for further review denied on December 17, 2014.

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No. A-13-884: **In re Interest of Josiah R**. Petition of appellant for further review denied on November 26, 2014.

No. A-13-885: **In re Interest of Nathaniel R**. Petition of appellant for further review denied on November 26, 2014.

No. A-13-886: **State v. Fay**. Petition of appellant for further review denied on September 10, 2014.

No. A-13-912: **Bird v. Bird**, 22 Neb. App. 334 (2014). Petition of appellant for further review denied on October 3, 2014, as premature.

No. A-13-912: **Bird v. Bird**, 22 Neb. App. 334 (2014). Petition of appellant for further review denied on December 17, 2014.

No. A-13-922: **State v. Nguot**. Petition of appellant for further review denied on November 12, 2014.

Nos. A-13-960, A-13-1044: **Kelly v. Housing Auth. of City of Omaha**. Petitions of appellant for further review denied on September 10, 2014.

No. A-13-968: **State v. Sheldon**. Petition of appellant for further review denied on September 17, 2014.

No. A-13-972: **Dillenburg v. LeCrone**. Petition of appellant for further review denied on December 10, 2014.

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No. A-13-1099: **State v. Chilen**. Petition of appellant for further review denied on January 22, 2015.

No. A-13-1104: **State v. Eddy**. Petition of appellant for further review denied on October 15, 2014.

No. A-13-1114: **State v. Fitzgerald**. Petition of appellant for further review denied on October 22, 2014.

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No. A-14-002: **In re Interest of Seth K. & Dinah K.**, 22 Neb. App. 349 (2014). Petition of appellee for further review denied on December 17, 2014.

No. A-14-017: **State v. Jackson**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-025: **King v. Houston**. Petition of appellant for further review denied on October 3, 2014.

No. A-14-062: **State v. Guerra**. Petition of appellant for further review denied on September 29, 2014, as premature.

No. A-14-096: **State v. Meints**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-108: **Fletcher v. Gage**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-132: **Estate of Hue v. Mengedoht**. Petition of appellants for further review denied on November 12, 2014.

No. A-14-137: **Cole v. Houston**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-168: **Hendrix v. Sivick**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-177: **State v. Jones**. Petition of appellant for further review denied on September 10, 2014.

No. A-14-191: **In re Interest of Marcus C. et al**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-194: **State v. Cayou**. Petition of appellant for further review denied on September 24, 2014.

No. A-14-198: **State v. Klaassen**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-206: **Old Republic Nat. Title Ins. Co. v. Kornegay**. Petition of appellant for further review denied on January 9, 2015.

No. A-14-220: **Moore v. Wynner**. Petition of appellant for further review denied on December 31, 2014. See § 2-102(F).

No. A-14-276: **State v. Hauf**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-280: **State v. McWilliams**. Petition of appellant for further review denied on January 14, 2015.

No. A-14-282: **State v. Kelly**. Petition of appellant for further review denied on September 17, 2014.

No. A-14-284: **State v. Larabee**. Petition of appellant for further review denied on September 24, 2014.

No. A-14-300: **In re Interest of Eyllan J**. Petition of appellant for further review denied on January 9, 2015.

No. A-14-307: **State v. Sherrod**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-310: **In re Interest of Nemiah F**. Petition of appellant for further review denied on January 14, 2015.

No. A-14-411: **State on behalf of Michael A. v. Samar A**. Petition of appellant pro se for further review denied on October 15, 2014.

No. A-14-449: **State v. Cheatams**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-474: **State v. Ohrt**. Petition of appellant for further review denied on November 12, 2014.

No. A-14-496: **State v. Cavanaugh**. Petition of appellant for further review denied on November 19, 2014.

No. A-14-518: **State v. Drappeaux**. Petition of appellant for further review denied on October 31, 2014, as untimely filed.

No. A-14-524: **Klingelhoefer v. Monif**. Petition of appellant for further review denied on September 24, 2014.

No. A-14-533: **State v. Romero**. Petition of appellant for further review denied on January 9, 2015, as untimely. See § 2-102(F)(1).

No. A-14-556: **State v. Campbell**. Petition of appellant for further review denied on November 21, 2014, as untimely filed. See § 2-102(F)(1).

No. A-14-604: **State v. Amerson**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-606: **State v. Friend**. Petition of appellant for further review denied on November 12, 2014.

No. A-14-631: **State v. Eskridge**. Petition of appellant for further review denied on January 9, 2015, as untimely. See § 2-102(F)(1).

No. A-14-647: **In re Estate of Bray**. Petition of appellant for further review denied on November 19, 2014.

No. A-14-688: **In re Interest of Natesia P. & Michael P**. Petition of appellant for further review denied on October 15, 2014.

No. A-14-716: **State v. Newman**. Petition of appellant for further review denied on November 19, 2014. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-14-717: **State v. Newman**. Petition of appellant for further review denied on November 19, 2014. See *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

No. A-14-791: **State v. Williams**. Petition of appellant for further review denied on December 17, 2014.

No. A-14-826: **State v. Castonguay**. Petition of appellant for further review denied on December 10, 2014.

No. A-14-858: **In re Estate of Forster**. Petition of appellant for further review denied on December 23, 2014.

No. A-14-907: **In re Interest of Nathaniel P**. Petition of appellant for further review denied on January 22, 2015.

No. A-14-951: **Wells v. Kenney**. Petition of appellant for further review denied on January 22, 2015.

CASES DETERMINED

IN THE

# SUPREME COURT OF NEBRASKA

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STATE FARM FIRE & CASUALTY COMPANY, APPELLEE, V. JERRY DANTZLER, APPELLANT, AND DAVID CHUOL, INDIVIDUALLY AND AS FATHER AND NEXT FRIEND TO CHUOL GEIT, AND CHUOL GEIT, APPELLEES.

852 N.W.2d 918

Filed September 12, 2014. No. S-12-1042.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.
2. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
3. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered.
4. ____. Not all issues of fact preclude summary judgment, but only those that are material.
5. ____. In the summary judgment context, a fact is material only if it would affect the outcome of the case.

Petition for further review from the Court of Appeals, MOORE, PIRTLE, and BISHOP, Judges, on appeal thereto from the District Court for Douglas County, KIMBERLY MILLER PANKONIN, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Michael A. Nelsen, of Marks, Clare & Richards, L.L.C., for appellant.

Patrick S. Cooper and David J. Stubstad, of Fraser Stryker, P.C., L.L.O., for appellee State Farm Fire & Casualty Company.

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

WRIGHT, J.

## NATURE OF CASE

State Farm Fire & Casualty Company (State Farm) brought an action for declaratory judgment, claiming its rental dwelling policy issued to Jerry Dantzler excluded coverage for personal injuries allegedly sustained by Dantzler's tenant as a result of exposure to lead-based paint. In cross-motions for summary judgment, State Farm and Dantzler requested a determination whether a policy exclusion precluded coverage for the tenant's personal injury claim. The district court sustained State Farm's motion for summary judgment and concluded as a matter of law that the pollution exclusion barred coverage under State Farm's policy.

In *State Farm Fire & Cas. Co. v. Dantzler*,[1] the Nebraska Court of Appeals reversed the entry of summary judgment, concluding that in the absence of proof how the tenant was allegedly exposed to lead-based paint, it could not determine as a matter of law whether the pollution exclusion barred coverage. It reasoned that whether the alleged exposure to lead-based paint occurred through a "discharge, dispersal, spill, release or escape," as specified in the exclusion, was a factual determination that depended upon the manner of exposure.[2] We granted State Farm's petition for further review.

## SCOPE 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

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[1] *State Farm Fire & Cas. Co. v. Dantzler*, 21 Neb. App. 564, 842 N.W.2d 117 (2013).

[2] See *id.*

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]

[2] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.[4]

## FACTS

Dantzler owned a rental property in Omaha, Nebraska. He maintained insurance on the rental property with a rental dwelling policy issued by State Farm. The relevant provisions of the policy stated:

> **COVERAGE L - BUSINESS LIABILITY**
>
> If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury, personal injury,** or **property damage** to which this coverage applies, caused by an **occurrence**, and which arises from the ownership, maintenance, or use of the **insured premises**, we will:
>
> 1. pay up to our limit of liability for the damages for which the **insured** is legally liable; and
>
> 2. provide a defense at our expense by counsel of our choice. . . .
>
> . . . .
>
> **SECTION II - EXCLUSIONS**
>
> 1. **Coverage L - Business Liability** [does] not apply to:
>
> . . . .
>
> i. **bodily injury** or **property damage** arising out of the actual, alleged or threatened discharge, dispersal, spill, release or escape of pollutants:
>
> (1) at or from premises owned, rented or occupied by the **named insured**;
>
> . . . .
>
> As used in this exclusion:
>
> . . . .

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[3] *Potter v. Board of Regents*, 287 Neb. 732, 844 N.W.2d 741 (2014).

[4] *Braunger Foods v. Sears*, 286 Neb. 29, 834 N.W.2d 779 (2013).

> "[P]ollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.

(Emphasis in original.) Hereinafter, we refer to the exclusion relating to pollutants as the "pollution exclusion."

David Chuol (David) and his minor child, Chuol Geit (Geit), were tenants of Dantzler's rental property. In March 2011, David and Geit sued Dantzler in the Douglas County District Court, alleging that Geit was exposed to high levels of lead poisoning due to lead paint contamination within the rental property. Dantzler tendered the claim to State Farm. It retained counsel to represent Dantzler but reserved its right to deny coverage.

State Farm filed an action for declaratory judgment against Dantzler, David, and Geit. It asked the district court to determine whether its policy excluded coverage for the lead-based-paint claim being brought against Dantzler. State Farm and Dantzler filed cross-motions for summary judgment.

State Farm's affidavit from a chemical toxicologist set forth common manners of exposure to lead-based paint. The toxicologist did not opine specifically how Geit was allegedly exposed to lead. Dantzler adduced evidence that he had not applied the lead-based paint found in the rental property. He asserted there was no genuine issue of material fact regarding the insurance coverage, because lead-based paint was not a "pollutant" under the terms of the policy and State Farm could not prove that Geit's alleged injuries were the result of a "discharge, dispersal, spill, release or escape of pollutants," as described in the pollution exclusion.

The district court sustained State Farm's motion for summary judgment and overruled Dantzler's motion for summary judgment. Relying on our decision in *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*,[5] the court determined that lead was a pollutant as defined in the pollution exclusion and that such exclusion was not ambiguous. It concluded that Geit

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[5] *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001).

could have been exposed to lead only if it was discharged, dispersed, or released or had escaped from its location. The court found that the pollution exclusion barred coverage for Geit's personal injury claim and that State Farm had no duty to indemnify Dantzler.

Dantzler timely appealed. He assigned that the district court erred in concluding that the pollution exclusion barred coverage of his liability arising from the lead-based-paint claim.

The Court of Appeals concluded that lead found in paint was a pollutant within the meaning of the pollution exclusion but that there was a genuine issue of material fact whether there was a "discharge, dispersal, spill, release or escape," which therefore prevented the entry of summary judgment in favor of State Farm.[6] It reversed the district court's entry of summary judgment and remanded the cause for further proceedings.[7] We granted further review.

## ASSIGNMENTS OF ERROR

On further review, State Farm assigns, restated, that the Court of Appeals erred in (1) deciding that the pollution exclusion was ambiguous; (2) concluding that there was more than one reasonable interpretation of the pollution exclusion; (3) relying upon *Danbury Ins. Co. v. Novella*,[8] instead of *Cincinnati Ins. Co.*[9]; and (4) concluding that there was a question of fact whether Geit was exposed to lead-based paint through a "discharge, dispersal, spill, release or escape," which prevented the entry of summary judgment in favor of State Farm.

## ANALYSIS

[3-5] We are presented with the question whether the manner in which Geit was allegedly exposed to lead-based paint is an issue of material fact that prevents summary judgment

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

[7] See *id.*

[8] *Danbury Ins. Co. v. Novella*, 45 Conn. Supp. 551, 727 A.2d 279 (1998).

[9] *Cincinnati Ins. Co., supra* note 5.

in favor of State Farm. If a genuine issue of fact exists, summary judgment may not properly be entered.[10] "[N]ot all issues of fact preclude summary judgment, but only those that are material."[11] In the summary judgment context, a fact is material only if it would affect the outcome of the case.[12]

The outcome of this case depends upon whether Geit's alleged injuries were caused by a "discharge, dispersal, spill, release or escape" of lead-based paint such that the pollution exclusion bars coverage. Dantzler's policy excluded coverage for "**bodily injury** or **property damage** arising out of the actual, alleged or threatened discharge, dispersal, spill, release or escape of pollutants . . . at or from premises owned, rented or occupied by [Dantzler]." (Emphasis in original.) The parties do not dispute the Court of Appeals' determination that "lead found in paint"[13] is a pollutant as defined in the pollution exclusion. And there is no dispute that Geit's exposure to lead-based paint was alleged to have occurred on Dantzler's rental property. The application of the pollution exclusion to Geit's lead-based-paint claim thus depends upon whether his alleged injuries were caused by a "discharge, dispersal, spill, release or escape" of lead-based paint.

The Court of Appeals concluded that there was a genuine issue of material fact whether there was a "discharge, dispersal, spill, release or escape," which prevented summary judgment.[14] It adopted the reasoning in *Danbury Ins. Co.*[15] that an individual could be exposed to lead-based paint without lead being discharged, dispersed, or released.[16] Under that rationale, whether the pollution exclusion barred coverage of a particular claim of lead paint poisoning would hinge on the manner

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[10] *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013).

[11] *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 792, 826 N.W.2d 225, 236 (2012).

[12] *Id.*

[13] See *Dantzler, supra* note 1, 21 Neb. App. at 570, 842 N.W.2d at 122.

[14] See *Dantzler, supra* note 1.

[15] *Danbury Ins. Co., supra* note 8.

[16] See *Dantzler, supra* note 1.

of exposure. Thus, because David and Geit had not alleged whether the lead-based paint was inhaled as dust or fumes and/or ingested as chips or flakes, the Court of Appeals held that there was a genuine issue of fact and that the district court erred in entering summary judgment.[17]

As we explain below, we decline to adopt the reasoning in *Danbury Ins. Co.*[18] that only certain manners of exposure to lead-based paint constitute a "discharge, dispersal, spill, release or escape." We find persuasive the reasoning of other courts that the terms "discharge," "dispersal," "spill," "release," and "escape" encompass all possible movements by which harmful exposure to lead-based paint occurs.[19] Accordingly, we conclude that the manner of exposure to lead-based paint is not a material fact that prevents summary judgment, because the manner of exposure does not affect whether there was a "discharge, dispersal, spill, release or escape" for purposes of the pollution exclusion.

### Reliance on *Danbury Ins. Co.*

Relying upon *Danbury Ins. Co.*,[20] the Court of Appeals concluded that the phrase "discharge, dispersal, spill, release or escape" was ambiguous as applied to lead-based paint and that where the manner of exposure could not be determined, there was a genuine issue of material fact as to application of the pollution exclusion.[21] We conclude that such reliance on *Danbury Ins. Co.*[22] was error, because the reasoning of that case is not compatible with our case law.

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[17] See *id.*

[18] *Danbury Ins. Co., supra* note 8.

[19] See, *Auto Owners Ins. v. City of Tampa Housing Auth.*, 231 F.3d 1298 (11th Cir. 2000) (applying Florida law); *Auto-Owners Ins. Co. v. Hanson*, 588 N.W.2d 777 (Minn. App. 1999); *Peace v. Northwestern Nat. Ins. Co.*, 228 Wis. 2d 106, 596 N.W.2d 429 (1999); *Farm Family Casualty Company v. Cumberland Insurance Company, Inc.*, No. K11C-07-006 JTV, 2013 WL 5496780 (Del. Super. Oct. 2, 2013) (unpublished opinion).

[20] *Danbury Ins. Co., supra* note 8.

[21] See *Dantzler, supra* note 1.

[22] *Danbury Ins. Co., supra* note 8.

Among state and federal courts, there are two general approaches to the application of pollution exclusions. Some courts interpret pollution exclusions as barring coverage for only those injuries allegedly caused by traditional environmental pollution, as understood historically.[23] Other courts interpret pollution exclusions as excluding coverage for all injuries allegedly caused by pollutants, because the exclusions are unambiguous as a matter of law.[24]

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[23] See, e.g., *Nautilus Ins. Co. v. Jabar*, 188 F.3d 27 (1st Cir. 1999) (applying Maine law); *Keggi v. Northbrook Property and Cas. Ins.*, 199 Ariz. 43, 13 P.3d 785 (Ariz. App. 2000); *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 73 P.3d 1205, 3 Cal. Rptr. 3d 228 (2003); *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 687 N.E.2d 72, 227 Ill. Dec. 149 (1997); *Motorists Mut. Ins. Co. v. RSJ, Inc.*, 926 S.W.2d 679 (Ky. App. 1996); *Doerr v. Mobil Oil Corp.*, 774 So. 2d 119 (La. 2000), *corrected on other grounds on rehearing* 782 So. 2d 573 (La. 2001); *Clendenin v. U.S. Fire*, 390 Md. 449, 889 A.2d 387 (2006); *Western Alliance Insurance Company v. Gill*, 426 Mass. 115, 686 N.E.2d 997 (1997); *Century Sur. Co. v. Casino W., Inc.*, No. 60622, 2014 WL 2396085 (Nev. May 29, 2014); *Nav-Its, Inc. v. Selective Ins. Co.*, 183 N.J. 110, 869 A.2d 929 (2005); *Andersen v. Highland House Co.*, 93 Ohio St. 3d 547, 757 N.E.2d 329 (2001); *Gainsco Ins. Co. v. Amoco Production Co.*, 53 P.3d 1051 (Wyo. 2002); *Auto-Owners Ins. Co. v. Potter*, 105 Fed. Appx. 484 (4th Cir. 2004) (applying North Carolina law); *Barney Greengrass, Inc. v. Lumbermans Mut. Cas. Co.*, No. 09 Civ. 7697 (NRB), 2010 WL 3069560 (S.D.N.Y. July 27, 2010) (memorandum opinion).

[24] See, e.g., *Devcon Intern. Corp. v. Reliance Ins. Co.*, 609 F.3d 214 (3d Cir. 2010) (applying Virgin Island law); *Nat'l Elect. Mfrs. v. Gulf Underwriters Ins.*, 162 F.3d 821 (4th Cir. 1998) (applying District of Columbia law); *Certain Underwriters at Lloyd's v. C.A. Turner Const.*, 112 F.3d 184 (5th Cir. 1997) (applying Texas law); *American States Ins. Co. v. Nethery*, 79 F.3d 473 (5th Cir. 1996) (applying Mississippi law); *Gerdes v. American Family Mut. Ins. Co.*, 713 F. Supp. 2d 1290 (D. Kan. 2010); *Mountain States Mut. Cas. Co. v. Roinestad*, 296 P.3d 1020 (Colo. 2013); *Heyman Assoc. v. Ins. Co. of State of Pa.*, 231 Conn. 756, 653 A.2d 122 (1995); *Deni Associates v. State Farm Ins.*, 711 So. 2d 1135 (Fla. 1998); *Reed v. Auto-Owners Ins. Co.*, 284 Ga. 286, 667 S.E.2d 90 (2008); *Bituminous Cas. v. Sand Livestock Systems*, 728 N.W.2d 216 (Iowa 2007); *McKusick v. Travelers Indem.*, 246 Mich. App. 329, 632 N.W.2d 525 (2001); *Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628 (Minn. 2013); *Heringer v. American Family Mut. Ins. Co.*, 140 S.W.3d 100 (Mo. App. 2004); *Cincinnati Ins. Co., supra* note 5; *Bituminous Cas. Corp. v. Cowen Const.,*

In *Danbury Ins. Co.*,[25] the Connecticut court adopted the former, environmental approach to pollution exclusions. It rejected the claim that lead-based paint was unambiguously a pollutant within the meaning of the pollution exclusion.[26] Instead, it found support for and explicitly applied "an 'environmental' or 'industrial pollution' reading" of the pollution exclusion.[27] Under that interpretation, the court determined that "it would be reasonable to conclude that the [pollution exclusion] excludes coverage for injury caused by environmental or industrial pollution, but does not exclude coverage for injury alleged to be caused by exposure to lead paint."[28]

This adoption of a limited, environmental approach cannot be dismissed as inconsequential to the specific reasoning of *Danbury Ins. Co.*,[29] upon which the Court of Appeals relied. Without adopting a limited, environmental approach to pollution exclusions, the manner of exposure to lead-based paint would not be material to the application of the pollution exclusion. The court in *Danbury Ins. Co.*[30] determined that the manner of exposure was material, because it was persuaded by the reasoning in *Sphere Drake Ins. Co. P.L.C. v. Y.L. Realty Co.*[31]

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*Inc.*, 55 P.3d 1030 (Okla. 2002); *Madison Const. v. Harleysville Mut. Ins.*, 557 Pa. 595, 735 A.2d 100 (1999); *PBM Nutritionals, LLC v. Lexington Ins. Co.*, 283 Va. 624, 724 S.E.2d 707 (2012); *Quadrant Corp. v. American States Ins. Co.*, 154 Wash. 2d 165, 110 P.3d 733 (2005); *Peace, supra* note 19; *Clipper Mill Federal, LLC v. Cincinnati Ins. Co.*, No. JFM-10-1647, 2010 WL 4117273 (D. Md. Oct. 20, 2010) (memorandum opinion); *CBL & Associates Management, Inc. v. Lumbermens Mut. Cas. Co.*, No. 1:05-CV-210, 2006 WL 2087625 (E.D. Tenn. July 25, 2006) (memorandum opinion); *Farm Family Casualty Company, supra* note 19.

[25] *Danbury Ins. Co., supra* note 8.

[26] See *id.*

[27] See *id.* at 559, 727 A.2d at 283.

[28] See *id.* at 560, 727 A.2d at 283.

[29] *Danbury Ins. Co., supra* note 8.

[30] *Id.*

[31] *Sphere Drake Ins. Co. P.L.C. v. Y.L. Realty Co.*, 990 F. Supp. 240 (S.D.N.Y. 1997).

that the terms "discharge," "dispersal," "release," and "escape" did not describe the movement typically found in lead paint poisoning.[32] But the court in *Sphere Drake Ins. Co. P.L.C.*[33] reached that conclusion by interpreting the pollution exclusion according to terms of art specific to traditional environmental pollution. It found that the terms "discharge," "dispersal," "release," and "escape" "do not ordinarily encompass the type of 'movement' associated with lead paint poisoning," because they are "terms of art in environmental law, generally used to describe the improper disposal or containment of hazardous waste."[34] Consequently, it was necessary for the reasoning of *Sphere Drake Ins. Co. P.L.C.*[35] and, in turn, *Danbury Ins. Co.*[36] to interpret the terms "discharge," "dispersal," "release," and "escape" as terms of art specific to traditional environmental pollution.

This court has specifically considered and rejected the limited, environmental approach underlying the reasoning of *Danbury Ins. Co.*[37] In *Cincinnati Ins. Co.*,[38] we were faced with the task of interpreting an exclusion which was identical in all significant respects to the one in the instant case. Both barred coverage of injuries caused by the "discharge," "dispersal," "release," or "escape" of "pollutants." The insured argued that the exclusion applied to only traditional environmental pollution claims. However, we rejected such an interpretation, because it was not based on a "plain reading of the exclusion."[39] We focused on the language of the exclusion and found as a matter of law that it unambiguously supported a broader interpretation:

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[32] See *Danbury Ins. Co., supra* note 8.

[33] *Sphere Drake Ins. Co. P.L.C., supra* note 31.

[34] *Id.* at 243.

[35] *Sphere Drake Ins. Co. P.L.C., supra* note 31.

[36] *Danbury Ins. Co., supra* note 8.

[37] *Id.*

[38] *Cincinnati Ins. Co., supra* note 5.

[39] *Id.* at 754, 635 N.W.2d at 119.

> The language of the policy does not specifically limit excluded claims to traditional environmental damage; nor does the pollution exclusion purport to limit materials that qualify as pollutants to those that cause traditional environmental damage. The definition of "pollutant" in Cincinnati's [commercial general liability] policy includes substances that are "harmful or toxic to persons, property or the environment." By including "the environment" as a separate entity that could suffer harm from a pollutant, the pollution exclusion does not limit its scope of application to environmental pollution.[40]

We reached this conclusion in *Cincinnati Ins. Co.*[41] as a matter of law and without reference to the type of pollution that was allegedly involved (xylene fumes). Consequently, the principles established therein control the interpretation of similar pollution exclusions. In *Ferrell v. State Farm Ins. Co.*,[42] the Court of Appeals recognized the general applicability of *Cincinnati Ins. Co.*[43] to pollution exclusions. It applied the principles of *Cincinnati Ins. Co.*[44] to its interpretation of a pollution exclusion within the context of alleged mercury poisoning and concluded that the exclusion was unambiguous and should be interpreted according to its plain and ordinary meaning, "as a reasonable person might read the exclusion."[45] The pollution exclusion in *Ferrell*[46] was identical to the one in the instant case.

The broad interpretation given pollution exclusions in *Cincinnati Ins. Co.*[47] and *Ferrell*[48] is not compatible with the

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[40] *Id.* at 755-56, 635 N.W.2d at 120.

[41] *Cincinnati Ins. Co., supra* note 5.

[42] *Ferrell v. State Farm Ins. Co.*, No. A-01-637, 2003 WL 21058165 (Neb. App. May 13, 2003) (not designated for permanent publication).

[43] *Cincinnati Ins. Co., supra* note 5.

[44] *Id.*

[45] *Ferrell, supra* note 42, 2003 WL 21058165 at *6.

[46] *Ferrell, supra* note 42.

[47] *Cincinnati Ins. Co., supra* note 5.

[48] *Ferrell, supra* note 42.

limited, environmental approach employed by the court in *Danbury Ins. Co.*[49] The two approaches cannot be reconciled. Therefore, in light of our case law, the Court of Appeals erred by adopting the reasoning of *Danbury Ins. Co.*[50]

### All Manners of Exposure to Lead-Based Paint Involve Discharge, Dispersal, Spill, Release, or Escape

Courts in other states have held that pollution exclusions should not be limited to traditional environmental pollution claims.[51] Within the states that have adopted this interpretation, several courts have concluded that all manners of exposure to lead-based paint involve the type of movement described in the pollution exclusion.[52]

In *Peace*,[53] the Wisconsin Supreme Court considered whether a pollution exclusion barred coverage of injuries allegedly arising from lead paint poisoning. The exclusion was identical in all significant respects to the one in the instant case.[54] As we did in *Cincinnati Ins. Co.*,[55] the Wisconsin court rejected the claims that the pollution exclusion was ambiguous and was limited to industrial pollution.[56] Interpreting the pollution exclusion according to the ordinary meaning of its words as derived from a nonlegal dictionary, the court

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[49] *Danbury Ins. Co., supra* note 8.

[50] *Id.*

[51] See, e.g., *Mountain States Mut. Cas. Co., supra* note 24; *Deni Associates, supra* note 24; *Reed, supra* note 24; *McKusick, supra* note 24; *Board of Regents v. Royal Ins. Co.*, 517 N.W.2d 888 (Minn. 1994); *Cowen Const., Inc., supra* note 24; *PBM Nutritionals, LLC, supra* note 24; *Quadrant Corp., supra* note 24; *Peace, supra* note 19; *Farm Family Casualty Company, supra* note 19.

[52] See, *City of Tampa Housing Auth., supra* note 19; *Hanson, supra* note 19; *Peace, supra* note 19; *Farm Family Casualty Company, supra* note 19.

[53] *Peace, supra* note 19.

[54] See *id.*

[55] *Cincinnati Ins. Co., supra* note 5.

[56] See *Peace, supra* note 19.

determined that lead-based paint was a pollutant as defined in the exclusion.[57]

The Wisconsin court directly addressed whether lead paint poisoning involved a "discharge," "dispersal," "release," or "escape." The court's understanding of the movement accompanying lead paint poisoning was crucial to its analysis. It explained how lead paint poisoning occurs as follows:

> "Lead paint" . . . starts out as a liquid and becomes a solid after it is applied and dries. Over time, lead paint may chip and flake[,] becoming solid "waste." When it begins to deteriorate, it may give off "fumes." When it begins to disintegrate, it becomes dust—fine, dry particles of matter which, like smoke and soot, can float in the air affecting human respiration until it eventually settles on the ground.[58]

Based on this understanding of the movement in lead paint poisoning, the court did not view lead-based paint as always being a contaminant, but, rather, as having the "potential to contaminate air, water, and the human body when it disperses."[59] It concluded that "'lead paint that never leaves a wall or ceiling does not cause harm.'"[60] "Lead-based paint is an inchoate contaminant before it breaks down (unless it is directly discharged, say, into water); it becomes both an irritant and a contaminant after it breaks down into chips, flakes, dust, or fumes."[61]

The Wisconsin court concluded that the movement of lead-based paint during this process of deterioration constituted a dispersal, discharge, or escape "from the containment of the painted surface."[62] The court determined that the terms "discharge," "dispersal," "release," and "escape" "describe[d] the

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[57] See *id.*

[58] *Id.* at 123, 596 N.W.2d at 436-37.

[59] See *id.* at 126, 596 N.W.2d at 438.

[60] *Id.* at 128, 596 N.W.2d at 439.

[61] *Id.* at 126, 596 N.W.2d at 438.

[62] See *id.* at 130, 596 N.W.2d at 440.

entire range of actions by which something moves from a contained condition to an uncontained condition."[63] And because "discharge," "disperse," and "escape" could be either transitive or intransitive verbs, the court determined that the pollution exclusion encompassed movement that was "intentional and purposeful or accidental and involuntary."[64] It concluded that when so understood, the plain language of the pollution exclusion barred coverage for injuries from alleged exposure to "lead in paint that chips, flakes, or breaks down into dust or fumes."[65]

In *Auto-Owners Ins. Co. v. Hanson*,[66] the Minnesota Court of Appeals reached the same conclusions. It applied a "nontechnical approach" to a pollution exclusion and examined its "ordinary meaning."[67] It concluded that "the chipping and flaking of lead paint qualifies as a 'discharge,' 'dispersal,' or 'release.'"[68] Similar to the Wisconsin Supreme Court in *Peace*,[69] the Minnesota court focused on the realities of lead poisoning and, in particular, the fact that lead-based paint is not "harmful until dispersed and ingested."[70] The court concluded that "[b]odily injury caused by ingestion of lead from paint applied in a residence falls within . . . 'absolute pollution exclusions.'"[71] It found no distinction between "ingestion of dispersed lead paint by way of eating, as opposed to other forms of ingestion," such as inhalation.[72]

We find the approach taken by these courts to be persuasive. Lead-based paint is not toxic to a person until it

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[63] See *id.* at 126, 596 N.W.2d at 438.

[64] See *id.*

[65] See *id.* at 130, 596 N.W.2d at 440.

[66] *Hanson, supra* note 19.

[67] See *id.* at 779.

[68] *Id.* at 781.

[69] *Peace, supra* note 19.

[70] See *Hanson, supra* note 19, 588 N.W.2d at 782.

[71] *Id.*

[72] See *id.* at 781.

breaks down into a form that can be taken into the body and absorbed.[73] Even courts that narrowly interpret pollution exclusions agree with this fact:

> [T]he language used to describe the movement of lead-based paint is instructive. . . . [L]ead-based paint deteriorates and degrades (slowly or rapidly, depending upon condition and use), and . . . the painted surface sheds microscopic dust through the process of exfoliation. . . . [T]his process of surface degradation occurs continuously at a slow rate. . . . [L]ead-based paint abrades and . . . it "chips, peels, chalks, or otherwise breaks down into dust." . . . [L]ead-based paint deteriorates or abrades, producing . . . dust, chips, and flakes. . . . Indeed, the United States Congress used similar language when, in the Residential Lead Based Paint Hazard Reduction Act, it identified the ingestion of household dust containing lead from "deteriorating or abraded" lead-based paint as the most common cause of lead poisoning in children. *See* 42 U.S.C. § 4851(a).[74]

Simply put, lead-based paint must separate from a painted surface before it can cause lead poisoning.

The separation of lead-based paint from a painted surface is inherent in every manner of exposure to lead-based paint. This separation is obvious in the case of exposure by ingesting or inhaling paint chips, flakes, dust, or fumes. The Court of Appeals quoted with approval a passage in *Danbury Ins. Co.*[75] that singled out exposure by chewing on an intact painted surface as a manner of exposure that might not involve a separation.[76] But we are not persuaded that ingestion by chewing on an intact painted surface is any different than exposure to already-detached paint chips or flakes. When a person is exposed to lead-based paint by chewing on an intact, painted

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[73] See, *Hanson, supra* note 19; *Peace, supra* note 19.

[74] *Lititz Mut. Ins. Co. v. Steely*, 567 Pa. 98, 108-09, 785 A.2d 975, 981 (2001).

[75] *Danbury Ins. Co., supra* note 8.

[76] See *Dantzler, supra* note 1.

surface, the lead-based paint separates into chips or flakes before it is taken into the mouth and swallowed, just as with any other manner of ingestion.

The separation of lead-based paint from the painted surface unambiguously falls within the pollution exclusion. "'Discharge is a release, emission or issuance. . . . Dispersal is a scattering, spreading or distribution. . . . Release is a liberation, freeing, or permitting to escape. . . . Escape is a leaking or overflow.'"[77] "Spill" is "an act or instance of spilling."[78] Whether the separation of lead-based paint from the painted surface occurs due to the passage of time or as the result of human action, it can be described as a spreading or distribution (definition of dispersal).[79] Where the lead-based paint separates as dust or fumes, there has been a freeing (definition of release) or an emission (definition of discharge).[80] Thus, as commonly understood, the terms "discharge," "dispersal," "spill," "release," and "escape" unambiguously encompass the process by which lead-based paint moves from a painted surface into a form that can be absorbed by a person's body and cause lead poisoning.[81]

Because the above terms encompass the separation of lead-based paint that is inherent in every case of lead paint poisoning, the pollution exclusion is not ambiguous as applied to lead-based paint and a determination of the specific process of exposure in any particular case is not material to application of the exclusion. Regardless of how the lead-based paint is separated from the painted surface or what form it takes once it is separated, an individual's exposure to and absorption of

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[77] *Peace, supra* note 19, 228 Wis. 2d at 127, 596 N.W.2d at 438 (citations omitted), quoting *Employers Casualty Co. v. St. Paul Fire & Marine Ins. Co.*, 44 Cal. App. 4th 545, 52 Cal. Rptr. 2d 17 (1996) (unpublished opinion).

[78] Webster's Third New International Dictionary of the English Language, Unabridged 2195 (1993).

[79] See *Peace, supra* note 19.

[80] See *id.*

[81] See *id.*

that lead-based paint results from the "discharge, dispersal, spill, release or escape" of a pollutant. Thus, it is not necessary to differentiate between the processes by which exposure occurs. It is not material to application of the pollution exclusion to determine the manner in which the injured party was allegedly exposed to lead-based paint.

The foregoing interpretation of pollution exclusions takes into account the realities of lead paint poisoning and is consistent with the broad interpretation we have given these exclusions.[82] It avoids the practical difficulties of compelling the court hearing the declaratory judgment to make a finding as to the causation of the alleged injuries in the underlying personal injury case in order to determine whether a "discharge, dispersal, spill, release or escape" had occurred. From a practical perspective, this would be problematic. The court's ultimate finding as to the cause of the alleged injuries might be contrary to the findings of causation in the underlying personal injury case. For these reasons, we conclude that the manner of exposure was not a material fact that prevented summary judgment.

### Application to Instant Case

We now consider whether the district court erred in entering summary judgment in favor of State Farm. 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.[83]

State Farm was entitled to judgment as a matter of law that coverage of the lead-based-paint claim against Dantzler was barred by the pollution exclusion in the policy. It demonstrated the existence of a claim against Dantzler for injuries allegedly caused by lead paint poisoning. State Farm offered into evidence Geit's complaint against Dantzler in

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[82] See *Cincinnati Ins. Co., supra* note 5.

[83] *Potter, supra* note 3.

the underlying personal injury case, which included allegations that Geit had been injured due to high levels of lead paint contamination in the rental property and that Dantzler had failed to prevent the lead-based paint from "chipping or peeling." Dantzler's evidence did not contradict the existence of a claim alleging injury from lead-based paint, but, rather, acknowledged the claim.

Once State Farm demonstrated the existence of a claim that alleged injury from lead-based paint, it could be concluded as a matter of law that the claim for which Dantzler sought coverage was one that involved an "alleged . . . discharge, dispersal, spill, release or escape" of a pollutant. Lead-based paint cannot cause injury unless it has separated from the painted surface. Consequently, regardless of the specific manner of exposure, an allegation that exposure to lead-based paint has caused injury necessarily contains an implicit claim that the paint separated from the original surface.[84] Such a separation falls within the meaning of the terms "discharge," "dispersal," "spill," "release," and "escape."[85] Thus, where there is an allegation of exposure to lead-based paint, for purposes of the exclusion, there is an allegation of a "discharge, dispersal, spill, release or escape" of lead-based paint.

The pollution exclusion in Dantzler's policy barred coverage of injury arising from an "alleged . . . discharge, dispersal, spill, release or escape" of a pollutant, such as lead-based paint. Therefore, because there was no factual question as to the existence of a claim that alleged injury from lead-based paint, the district court did not err in concluding as a matter of law that the pollution exclusion barred coverage of that claim.

The district court correctly entered summary judgment in favor of State Farm. Therefore, we reverse the decision of the Court of Appeals and remand the cause with direction to enter an order affirming the entry of summary judgment in favor of State Farm.

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[84] See, *Peace, supra* note 19; *Farm Family Casualty Company, supra* note 19.

[85] See, *Hanson, supra* note 19; *Peace, supra* note 19.

## CONCLUSION

For the foregoing reasons, we reverse the decision of the Court of Appeals. We remand the cause with direction to enter an order affirming the district court's entry of summary judgment in favor of State Farm.

REVERSED AND REMANDED WITH DIRECTION.

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# ERIC McDOUGLE, LMHP, PLADC, APPELLANT, V. STATE OF NEBRASKA EX REL. JON BRUNING, ATTORNEY GENERAL, APPELLEE.

853 N.W.2d 159

Filed September 12, 2014. No. S-12-1186.

1. **Jurisdiction.** Subject matter jurisdiction is a question of law for the court.
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. **Administrative Law: Jurisdiction: Appeal and Error.** Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.
4. **Jurisdiction: Appeal and Error.** If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.
5. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
6. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral factfinding body.
7. ____: ____. An agency that is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is more than a neutral factfinding body.
8. ____: ____. The Attorney General's involvement as the plaintiff in a petition for discipline does not negate the role of the Division of Public Health of the Department of Health and Human Services in disciplining a credential holder as something more than only a neutral factfinding body.
9. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
10. **Statutes: Appeal and Error.** While statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, an appellate court must do so by giving effect to every provision.
11. **Administrative Law: Parties: Appeal and Error.** There is no inherent inconsistency between Neb. Rev. Stat. §§ 38-186 (Cum. Supp. 2012) and 38-187

(Reissue 2008) and the plain mandate of Neb. Rev. Stat. § 84-917(2)(a)(i) (Cum. Supp. 2012) that an agency that acted as more than just a neutral factfinding body be classified as a "party of record" for purposes of determining what entities shall be parties to the proceedings for review.

Appeal from the District Court for Lancaster County: ANDREW R. JACOBSEN, Judge. Reversed and remanded for further proceedings.

Denise M. Destache, of Lamson, Dugan & Murray, L.L.P., for appellant.

Jon Bruning, Attorney General, and Julie L. Agena for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

Eric McDougle's licenses to practice as a mental health practitioner and as a provisional alcohol and drug counselor were revoked in a decision by the director of the Division of Public Health of the Department of Health and Human Services (Department). McDougle petitioned the district court for review of the decision, naming the Department and the State as parties to the petition for review and timely serving process upon them. The issue in this case is whether the Department was properly a "party of record" under the Administrative Procedure Act, such that the petitioner was not required to separately serve the Department with a copy of the petition and a request for preparation of the official record as a prerequisite to the district court's jurisdiction over the petition for review.

## BACKGROUND

McDougle held a mental health license and a provisional alcohol and drug counseling license issued by the Department. The Department is the agency of the State of Nebraska authorized to enforce the provisions of the Uniform Credentialing

Act[1] regulating the practice of mental health and alcohol and drug counseling.

Subsections (2) and (23) of § 38-178 state that a professional licensee may be disciplined for dishonorable conduct evidencing unfitness to meet the standards of practice of the profession or for unprofessional conduct. Unprofessional conduct includes "any departure from or failure to conform to the standards of acceptable and prevailing practice of a profession."[2]

The regulations relating to mental health practitioners provide that "[s]exual intimacy with a former client for 2 years following termination of therapy is prohibited."[3] It is undisputed that McDougle had a sexual relationship with a client approximately 1 month after terminating their professional relationship. McDougle self-reported the incident to the Department. He asserted that at the time of the relationship, he did not know it was in violation of applicable regulations.

The Department conducted an investigation, which was considered by the Board of Mental Health Practice. The board recommended that the State file a petition, pursuant to § 38-186, for disciplinary action seeking revocation of McDougle's licenses.

Under § 38-186(1), "[a] petition shall be filed by the Attorney General in order for the director [of the Department[4]] to discipline a credential obtained under the Uniform Credentialing Act." Under § 38-187 of the Uniform Credentialing Act:

> The following rules shall govern the form of the petition in cases brought pursuant to section 38-186:
>
> (1) The state shall be named as plaintiff and the credential holder as defendant;
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> (2) The charges against the credential holder shall be stated with reasonable definiteness;

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[1] See Neb. Rev. Stat. § 38-101 to 38-1,140 (Reissue 2008 & Cum. Supp. 2012).

[2] See § 38-179.

[3] 172 Neb. Admin. Code, ch. 94, § 016.05 (2004).

[4] § 38-116.

(3) Amendments may be made as in ordinary actions in the district court; and

(4) All allegations shall be deemed denied, but the credential holder may plead thereto if he or she desires.

A petition for disciplinary action accordingly was filed with the Department naming the "STATE OF NEBRASKA ex rel. JON BRUNING, Attorney General," as plaintiff and McDougle as defendant.

A hearing upon the petition was held before the chief medical officer and director of the Department (Director). On May 18, 2012, the Director issued an order revoking McDougle's licenses to practice as a mental health practitioner and provisional alcohol and drug counselor in the State of Nebraska. The Director found clear and convincing evidence that McDougle's conduct was unprofessional and was grounds for discipline. The Director then concluded that revocation was the appropriate disciplinary sanction for such conduct.

On June 13, 2012, McDougle filed in the district court a petition for judicial review of the Director's decision. The Uniform Credentialing Act states that "[b]oth parties to disciplinary proceedings under the Uniform Credentialing Act shall have the right of appeal, and the appeal shall be in accordance with the Administrative Procedure Act."[5] Neb. Rev. Stat. § 84-917(2)(a)(i) (Cum. Supp. 2012) of the Administrative Procedure Act states in turn:

> All parties of record shall be made parties to the proceedings for review. *If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record. Summons shall be served within thirty days of the filing of the petition in the manner provided for service of the summons in section 25-510.02. If the agency whose decision is appealed from is not a party of record, the petitioner shall serve a copy of the petition and a request for preparation of the official record upon the agency within thirty days of the filing of*

[5] § 38-1,102.

> *the petition*. The court, in its discretion, may permit other interested persons to intervene.

(Emphasis supplied.)

In his petition for review, McDougle named the Department and the State as the defendants. Summons was served within 30 days of the filing of the petition for review.[6] McDougle did not separately request within 30 days of the petition for review that the Department prepare an official record. The parties agree that McDougle made such a request later, on August 1, 2012, although that request is not in the appellate record.

On July 5, 2012, McDougle moved for leave to file an amended petition changing the designation of the defendant "to appropriately reflect State of Nebraska, ex rel. Jon Bruning, Attorney General." But the motion was apparently never ruled upon. Although there is an amended petition in the transcript, it is not dated, signed, or file stamped.

On July 19, 2012, the State filed a motion to dismiss McDougle's petition for review on the ground that he failed to request preparation of the official record upon the agency within 30 days of the filing of the petition. The State noted that in *Payne v. Nebraska Dept. of Corr. Servs.*,[7] we held that when the agency is not a party of record, a timely request for the preparation of the official record under § 84-917(2)(a)(i) is a prerequisite to the district court's jurisdiction over the petition for review. The State argued that the Department could not be a "party of record" because § 38-186 states that the Attorney General shall file the underlying petition for discipline and § 38-187 provides that "[t]he state shall be named as plaintiff and the credential holder as defendant" in the underlying petition for discipline. The State further argued that McDougle had effectively admitted that the agency was not a proper party of record by moving to amend his petition for review. McDougle objected to the State's motion to

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[6] See § 84-917(2)(a)(i).

[7] *Payne v. Nebraska Dept. of Corr. Servs.*, 249 Neb. 150, 542 N.W.2d 694 (1996).

dismiss, arguing that the Department was not simply a neutral factfinding body and was therefore a proper "party of record" under § 84-917(2)(a)(i).

The district court granted the motion to dismiss for lack of jurisdiction. McDougle appeals.

## ASSIGNMENT OF ERROR

McDougle assigns that "[t]he district court erred when it failed to consider the Agency's regulations and [McDougle's] reliance on those regulations which do not require request for preparation of the record, in order for the district court to obtain jurisdiction."

## STANDARD OF REVIEW

[1] Subject matter jurisdiction is a question of law for the court.[8]

[2] The meaning and interpretation of a statute are questions of law, which an appellate court reviews independently of the lower court.[9]

## ANALYSIS

[3,4] Where a district court has statutory authority to review an action of an administrative agency, the district court may acquire jurisdiction only if the review is sought in the mode and manner and within the time provided by statute.[10] If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.[11]

The jurisdictional question before us hinges on whether the Department is a "party of record" under § 84-917(2)(a)(i). We find no need to delve into McDougle's argument concerning the Department's regulations for the preparation of records in the case of petitions for review of its decisions. If the Department is a "party of record," then McDougle satisfied the requisite statutory mode and manner of obtaining judicial

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[8] *Ptak v. Swanson*, 271 Neb. 57, 709 N.W.2d 337 (2006).

[9] *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

[10] *Nebraska Dept. of Health & Human Servs. v. Weekley*, 274 Neb. 516, 741 N.W.2d 658 (2007).

[11] *Anderson v. Houston*, 274 Neb. 916, 744 N.W.2d 410 (2008).

review by naming the Department as a party to the proceedings for review and serving summons upon the Department within 30 days of the filing of the petition in the manner provided for service of summons in Neb. Rev. Stat. § 25-510.02 (Cum. Supp. 2012). If the Department is not a proper "party of record," then, pursuant to our decision in *Payne*, McDougle failed to satisfy the mandatory requirement of § 84-917(2)(a)(i) that "[i]f the agency whose decision is appealed from is not a party of record," he "shall" serve upon the agency "a request for preparation of the official record" within 30 days of filing the petition. Departmental regulations cannot change the unambiguous jurisdictional mandates of § 84-917.

[5-7] Again, § 84-917(2)(a)(i) states:

> All parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.

We have repeatedly explained that an administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.[12] In contrast, when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral factfinding body.[13] Also, an agency that is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is more than a neutral factfinding body.[14]

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[12] *In re 2007 Appropriations of Niobrara River Waters*, 283 Neb. 629, 820 N.W.2d 44 (2012); *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006); *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *City of Omaha v. C.A. Howell, Inc.*, 20 Neb. App. 711, 832 N.W.2d 30 (2013).

[13] *In re Application of Metropolitan Util. Dist., supra* note 12. See, also, *In re 2007 Appropriations of Niobrara River Waters, supra* note 12; *Metropolitan Util. Dist. v. Aquila, Inc., supra* note 12; *City of Omaha v. C.A. Howell, Inc., supra* note 12.

[14] See, *City of Omaha v. C.A. Howell, Inc., supra* note 12; *Tlamka v. Parry*, 16 Neb. App. 793, 751 N.W.2d 664 (2008).

Several cases illustrate the circumstances under which an agency acts as more than "only . . . a neutral factfinding body," as defined by § 84-917(2)(a)(i).

In *In re 2007 Appropriations of Niobrara River Waters*,[15] we held that in a petition for review from hearings on junior appropriators' challenges to senior water appropriation rights, the Department of Natural Resources was more than a neutral factfinding body. Thus, in that case, it was a "party of record" under § 84-917(2). We explained that the Department of Natural Resources is the primary civil enforcement agency charged with the administration and enforcement of water rights. Under applicable statutes, it has the authority to resolve disputes, investigate the validity of water rights, engage in water administration, and issue and enforce orders.

Similarly, in *Becker v. Nebraska Acct. & Disclosure Comm.*,[16] we held that the Nebraska Accountability and Disclosure Commission was more than only a neutral factfinding body in proceedings determining the proper response to a taxpayer complaint before the commission alleging expenditures by members of the University of Nebraska Board of Regents violated the Nebraska Political Accountability and Disclosure Act. We looked no further than the language of the statutes governing the commission's powers, which stated that the commission "'shall . . . [a]ct as the primary civil and criminal enforcement agency for violations of the Nebraska Political Accountability and Disclosure Act and the rules or regulations promulgated thereunder.'"[17]

In *Leach v. Dept. of Motor Vehicles*,[18] we also held that the Department of Motor Vehicles was more than a neutral factfinding body and, thus, was a necessary party in a petition for review of a driver's license revocation. We explained that the department is charged with the responsibility of protecting the public interest as distinguished from determining

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[15] *In re 2007 Appropriations of Niobrara River Waters, supra* note 12.

[16] *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

[17] *Id.* at 34, 541 N.W.2d at 40.

[18] *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982).

the rights of two or more individuals in a dispute before such agency.

In *In re Application of Metropolitan Util. Dist.*,[19] we held that the Public Service Commission was more than only a neutral factfinding body in connection with the commission's denial of the Metropolitan Utilities District of Omaha's application to be certified as a competitive natural gas provider outside its service area. Again, we examined the statutory powers of the commission. We summarized that the commission was more than a neutral factfinding body, because it has the authority to set conditions on certifications, resolve disputes, investigate complaints, issue orders, and enforce orders.

And in *Beatrice Manor v. Department of Health*,[20] we held that the former Department of Health, not the state, was the necessary party in the proceedings to review the Department of Health's determination, through the Nebraska Health Care Certificate of Need Appeal Panel, which denied a health care facility permission to add more beds. We explained that an agency that is charged with the responsibility of the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is more than a neutral factfinding body.

In *Tlamka v. Parry*,[21] the Nebraska Court of Appeals held that the Department of Correctional Services was more than a neutral factfinding body and therefore was a necessary "party of record," in an inmate's petition for review of the denial of his request for reclassification. The Court of Appeals reasoned that the department is charged with protecting the public interest from persons convicted of crime, and, as part of this responsibility, it classifies offenders.

In *City of Omaha v. C.A. Howell, Inc.*,[22] the Court of Appeals held that the Nebraska Liquor Control Commission

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[19] *In re Application of Metropolitan Util. Dist., supra* note 12.

[20] *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985).

[21] *Tlamka v. Parry, supra* note 14.

[22] *City of Omaha v. C.A. Howell, Inc., supra* note 12.

was more than a neutral factfinding body and thus was a necessary party to the city's petition for review of the commission's order granting an applicant a liquor license. In so holding, the Court of Appeals examined the commission's broad statutory authority to regulate all phases of the control of the manufacture, distribution, sale, and traffic of alcoholic liquor; to receive, issue, suspend, cancel, and revoke liquor licenses; to inspect premises where liquor is located; and to hear and determine appeals. The Court of Appeals summarized that the commission is charged with the responsibility of protecting the public interest through its regulation of all phases of alcoholic liquor. In addition, the commission's decision to grant the applicant a license against the city council's recommendation made the commission an "adversarial party."[23]

In only two cases have our courts determined that the agency's "only role" in the underlying contested case was "to act as a neutral factfinding body.[24]

First, in *Metropolitan Util. Dist. v. Aquila, Inc.*,[25] we held that the same agency that was more than a neutral factfinding body in *In re Application of Metropolitan Util. Dist.*[26] was only a neutral factfinding body in the proceedings under review, because of its uniquely limited statutory powers relating to the proceedings below. *Aquila, Inc.* involved a complaint before the Public Service Commission that a proposed gasline extension agreement violated the former Neb. Rev. Stat. §§ 57-1301 to 57-1307 (Reissue 2004).[27] We observed that although the commission's jurisdiction did extend to §§ 57-1301 to 57-1307, the commission's statutory powers in that role are limited. Section 57-1306 stated in relevant part: "The commission shall have no jurisdiction over a metropolitan utilities district or natural gas utility beyond the

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[23] *Id.* at 722, 832 N.W.2d at 40.

[24] See § 84-917(2)(a)(i).

[25] *Metropolitan Util. Dist. v. Aquila, Inc.*, *supra* note 12.

[26] *In re Application of Metropolitan Util. Dist.*, *supra* note 12.

[27] See, Neb. Rev. Stat. §§ 66-1858 to 66-1864 (Reissue 2009); 2006 Neb. Laws, L.B. 669.

determination of disputes brought before it under sections 57-1301 to 57-1307." Thus, we reasoned, the commission was not acting in the underlying contested case as a certifying agency or the primary civil enforcement agency. Nor was it acting in the role of an adversarial party or enforcing a previous order. The commission was only acting, and only could act, as a factfinding body to determine the validity of the complaint between the two parties before it.

Second, in *Payne v. Nebraska Dept. of Corr. Servs.*,[28] we held that the Equal Opportunity Commission was only a neutral factfinding body. We did not elaborate on our reasoning, but noted in the facts that the commission's only role in the underlying case was to determine whether the Department of Correctional Services, as employer of the plaintiff, had violated the Nebraska Fair Employment Practice Act.

We hold in this case that the Department acted as more than "only . . . a neutral factfinding body," as defined by § 84-917(2)(a)(i). As in other cases wherein we have found the agency to be more than a neutral factfinding body, the Department is given broad statutory powers to protect the public interest. The Uniform Credentialing Act sets forth that the Board of Mental Health Practice,[29] which is under the Department,[30] has numerous powers relating to credentialing the profession, including the power to adopt rules and regulations to specify the standards for continuing competency and the power to define additional unprofessional conduct not specified by statute.[31] Under § 38-161(1), the purpose of the board is "to protect the health, safety, and welfare of the public." The Department has the broad power to promulgate and enforce such rules and regulations.[32]

The Department's role under the Uniform Credentialing Act is similar to other licensing agencies having the power to

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[28] *Payne v. Nebraska Dept. of Corr. Servs.*, *supra* note 7.

[29] § 38-167(p).

[30] See § 38-174.

[31] § 38-126(1)(a).

[32] § 38-126.

revoke or grant licenses. In *Leach*[33] and *C.A. Howell, Inc.*,[34] we held that the agencies in those cases were more than neutral factfinding bodies. The Department is also obviously similar to the Department of Health, the predecessor to the Department's parent entity, which we found to be more than a neutral factfinding body in *Beatrice Manor*.[35] The Department is charged with the responsibility of protecting the public interest by creating and enforcing standards for practice of the health care professions.

[8] The Attorney General's involvement as the "plaintiff" in a petition for discipline does not negate the role of the Department as something more than "only . . . a neutral factfinding body." Under § 38-161(2)(c), it is the Board of Mental Health Practice that first provides recommendations for the disciplinary action. That recommendation is sent to the Attorney General's office, which determines whether to file a petition for discipline. The petition is filed by the Attorney General's office, ensuring proper notice and form.[36] But the petition is filed "in order for *the director to discipline* a credential obtained under the Uniform Credentialing Act."[37] After a hearing conducted by the Director,[38] pursuant to § 38-192, the Director determines not just the factual question of whether a violation has occurred; rather, the Director "shall have the authority through entry of an order to exercise in his or her discretion any or all of the sanctions authorized under section 38-196." The Department is thus the primary civil enforcement agency for credentialing violations pertaining to the health care professions. In that sense, no matter what entity brought the petition before the Department as the "plaintiff," the Department is like the agencies in *In re 2007 Appropriations of Niobrara River*

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[33] *Leach v. Dept. of Motor Vehicles, supra* note 18.

[34] *City of Omaha v. C.A. Howell, Inc., supra* note 12.

[35] *Beatrice Manor v. Department of Health, supra* note 20.

[36] See § 38-187.

[37] § 38-186(1) (emphasis supplied).

[38] See 38-186(3).

*Waters*[39] and *Becker*,[40] which we held were more than neutral factfinding bodies.

The State does not actually present an argument that under the case law presented above, the Department acted as only a neutral factfinding body. Instead, the State argues we must interpret § 84-917(2)(a)(i) together with §§ 38-186 and 38-187 such that the Department cannot be a "party of record," regardless of whether it acted as more than a neutral factfinding body in the proceedings below. The State also argues that McDougle effectively conceded lack of jurisdiction by moving to amend his petition.

The State points to no legal authority for its theory that McDougle's motion to amend his petition for review operates as a waiver of the argument on appeal that the Department was properly a party to the petition for review. The motion to amend was apparently never ruled upon, thus leaving the Department as the named party. And McDougle consistently objected below to the motion to dismiss, arguing that the Department was a party of record, because it acted as more than a neutral factfinding body. We find no merit to the State's waiver argument.

We also find no merit to the State's argument that §§ 38-186 and 38-187 require that the State, which, under § 38-187, was the designated "plaintiff" below, be the only "party of record" for purposes of determining under § 84-917(2)(a)(i) who must be a party to the proceedings for review of decisions under the Uniform Credentialing Act. The State's argument ignores the plain language of § 84-917(2)(a)(i) that "[i]n all . . . cases [where the agency's role was more than a neutral factfinding body], the agency *shall* be a party of record."[41]

[9,10] As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.[42] While statutes relating to the same subject matter

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[39] *In re 2007 Appropriations of Niobrara River Waters, supra* note 12.

[40] *Becker v. Nebraska Acct. & Disclosure Comm., supra* note 16.

[41] § 84-917(2)(a)(i) (emphasis supplied).

[42] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

will be construed so as to maintain a sensible and consistent scheme, we must do so by giving effect to every provision.[43] We cannot ignore the plain mandatory provision of § 84-917(2)(a)(i) that the agency "shall" be a party of record to the petition for review if the agency acted as more than only a neutral factfinding body.

[11] Moreover, we disagree with the State's contention that the statutes are somehow inconsistent if we fail to adopt the State's interpretation of a "party of record." The State apparently understands the term "party of record" as being limited to those entities named as parties in the administrative proceedings below. But nowhere in the relevant statutes does the Legislature define "parties of record" for purposes of determining necessary parties to a petition for review as being limited to those parties who were named in the underlying proceedings. The State, as the plaintiff below, may also be a "party of record" under § 84-917(2)(a)(i), an issue not squarely before us here, but there is no inherent inconsistency between §§ 38-186 and 38-187 and the plain mandate of § 84-917(2)(a)(i) that an agency that acted as more than just a neutral factfinding body be classified as a "party of record" for purposes of determining what entities shall be parties to the proceedings for review.

Because the Department acted as more than a neutral factfinding body when it revoked McDougle's licenses, the Department was properly named as a party to McDougle's petition for review of that decision. Because the Department was properly a party to the petition for review and was properly served with a copy of that petition within 30 days as required by § 84-917, McDougle was not required to separately serve the Department with a copy of the petition and a request to prepare the official record. Therefore, the district court's determination under *Payne*[44] that it lacked jurisdiction was in error.

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[43] See *In re Interest of Katrina R.*, 281 Neb. 907, 799 N.W.2d 673 (2011).

[44] *Payne v. Nebraska Dept. of Corr. Servs.*, *supra* note 7.

## CONCLUSION

We reverse the district court's dismissal of McDougle's petition for review and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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# STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. BRENDA J. COUNCIL, RESPONDENT.

853 N.W.2d 844

Filed September 12, 2014. No. S-13-379.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether the Nebraska Supreme Court should impose discipline and, if so, the appropriate discipline under the circumstances.
3. **Disciplinary Proceedings: Appeal and Error.** When no exceptions to the referee's findings of fact are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive.
4. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
5. ____. 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.
6. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
7. ____. Multiple acts of attorney misconduct are deserving of more serious sanctions and are distinguishable from isolated incidents.
8. **Disciplinary Proceedings: Presumptions.** In an attorney discipline case, mitigating factors may overcome the presumption of disbarment in misappropriation and commingling cases where such factors are extraordinary and substantially outweigh any aggravating circumstances. Absent such mitigating circumstances, the appropriate sanction is disbarment.

Original action. Judgment of disbarment.

John W. Steele, Assistant Counsel for Discipline, for relator.

Vince Powers, of Vince Powers & Associates, for respondent.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Cassel, JJ.

Per Curiam.

## I. NATURE OF CASE

The Counsel for Discipline of the Nebraska Supreme Court, relator, brought formal charges against Brenda J. Council, respondent, based on the conduct underlying her convictions for abuse of public records and wire fraud. A court-appointed referee found that respondent had violated her oath of office as an attorney and Neb. Ct. R. of Prof. Cond. § 3-508.4 (misconduct) and recommended that she be suspended from the practice of law for 1 year, followed by 2 years' probation. Relator takes exception to the recommended sanction as being too lenient. We find that because respondent's misconduct involved misappropriation, misrepresentation, the violation of Nebraska law, and abuse of public office, she should be disbarred.

## II. FACTS

In 1977, respondent was admitted to practice law in Nebraska. Between 1982 and 2005, she was elected or appointed to various public offices, including the Omaha Board of Education, the Omaha City Council, and the Commission of Industrial Relations. In 2005, respondent went into private practice in Omaha, Nebraska. She maintained this practice at all times relevant to these disciplinary proceedings.

Between 2009 and 2013, respondent served as a state senator for the 11th legislative district. After her initial election, her campaign committee, designated the "Committee to Elect Brenda Council" (campaign committee), remained in existence. The campaign committee had a separate bank account for which respondent held a debit card.

Between January 2010 and July 2012, respondent took out more than $63,000 in cash advances using the campaign

committee's debit card and spent those funds for gambling. She also made various deposits into the campaign committee's account in an attempt to "repay those campaign funds." Respondent did not report the withdrawals or the subsequent deposits on her campaign statements filed with the Nebraska Accountability and Disclosure Commission (NADC).

For failing to report the cash advances and deposits and for filing false reports with the NADC, respondent was charged with two counts of abuse of public records (Class II misdemeanor), pursuant to Neb. Rev. Stat. § 28-911(1)(d) (Reissue 2008). She pled guilty to these charges. The county court found her guilty and ordered her to pay a fine of $500.

In April 2013, relator brought formal charges against respondent. Relator alleged that respondent's conduct surrounding the misuse of campaign funds violated respondent's oath of office as an attorney and § 3-508.4 (misconduct). Respondent admitted to the charges, but she affirmatively alleged that she had repaid "the majority of the funds" and was "undergoing Counseling for her gambling addictions."

While the disciplinary proceedings were pending, respondent was charged in federal district court with wire fraud, a felony, under 18 U.S.C. § 1343 (2012) for her misuse of campaign funds. Pursuant to a plea agreement, she entered a plea of guilty and was sentenced to 3 years' probation, a $500 fine, and a $100 "felony assessment."

After learning of respondent's conviction for wire fraud, the Committee on Inquiry for the Second Disciplinary District requested that we temporarily suspend respondent from the practice of law in Nebraska pending resolution of the disciplinary proceedings. Respondent voluntarily consented to the entry of an order imposing a temporary suspension, which we entered on September 25, 2013.

Respondent consented to and relator filed additional formal charges that made reference to respondent's conviction for wire fraud. As before, relator alleged that respondent's conduct surrounding the misuse of campaign funds violated respondent's oath of office as an attorney and § 3-508.4 (misconduct). Respondent again admitted the allegations.

On December 18, 2013, a hearing was held before a court-appointed referee. Based on the evidence adduced at the hearing, the referee found that respondent had violated her oath of office as an attorney and § 3-508.4 (misconduct). The referee recommended that respondent be suspended for 1 year, with credit for the length of her temporary suspension. He also recommended that following the period of suspension, respondent should complete 2 years' probation, the terms of which would include yearly audits of her trust account.

The referee explicitly considered and dismissed disbarment as an appropriate sanction for respondent's violations, because (1) her acts of misconduct "have had no impact upon the Respondent's service to the legal profession," (2) she had no prior violations, (3) her actions following the misconduct "mitigate[d] the seriousness of the misconduct," (4) "[s]ociety is addressing the moral grounds of the misconduct," and (5) she is fit to continue practicing law. The referee opined that "we all lose if our sanction prevents the Respondent from serving her clients in her community as an attorney."

## III. STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record.[1]

## IV. EXCEPTIONS

Neither party takes exception to the referee's factual findings. However, relator takes exception to the referee's recommended sanction.

## V. ANALYSIS

[2] The basic issues in a disciplinary proceeding against an attorney are whether we should impose discipline and, if so, the appropriate discipline under the circumstances.[2] We address each issue in turn.

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[1] *State ex rel. Counsel for Dis. v. Cording*, 285 Neb. 146, 825 N.W.2d 792 (2013).

[2] *State ex rel. Counsel for Dis. v. Palik*, 284 Neb. 353, 820 N.W.2d 862 (2012).

### 1. Grounds for Discipline

[3] The referee determined that respondent had violated her oath of office as an attorney and § 3-508.4 (misconduct). As noted previously, neither party took exception to that finding or any other factual finding in the referee's report. When no exceptions to the referee's findings of fact are filed, we may consider the referee's findings final and conclusive.[3] We do so in the instant case.

Based upon the undisputed findings of fact in the referee's report, we conclude that the formal charges and the additional formal charges against respondent are supported by clear and convincing evidence. We specifically conclude that by her conduct, respondent violated her oath of office as an attorney and § 3-508.4 (misconduct). We limit the remainder of our discussion to the appropriate discipline.

### 2. Appropriate Discipline

The referee recommended that respondent be suspended from the practice of law in Nebraska for 1 year, with credit for the length of her temporary suspension, and that following the period of suspension, respondent should complete 2 years' probation. Respondent argues that relator waived any objection to this recommendation, because at the hearing before the referee, relator did not object to respondent's arguments for a 1-year suspension. We do not agree that relator waived the right to object.

Relator did not waive the right to object to the referee's recommendation, because relator did not have the opportunity to object to that recommendation at the hearing. At the time of the hearing, the referee had not made a recommendation as to what sanction respondent should receive. Relator could not, by his failure to object to *respondent's* arguments for a 1-year suspension, waive the right to take exception to the referee's recommendation, which at that time, had not yet been made. And we point out that this court is not required to accept the recommendations of the referee as to the discipline to be

[3] *Cording, supra* note 1.

imposed.[4] Our consideration of the discipline to be imposed is de novo.[5]

Having settled this preliminary matter regarding relator's exception, we now proceed to determine the appropriate sanction for respondent's misconduct. 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."

[4,5] To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[6] 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.[7]

[6] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[8] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[9]

(a) Respondent's Conduct

Respondent's actions are not disputed. Over the course of approximately 2½ years, she intentionally and repeatedly

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[4] See *State ex rel. Counsel for Dis. v. Switzer*, 275 Neb. 881, 750 N.W.2d 681 (2008).

[5] See *id.*

[6] *Palik, supra* note 2.

[7] See *id.* at 359, 820 N.W.2d at 867.

[8] *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

[9] *Id.*

used the debit card linked to her campaign committee's bank account to take out cash advances for the purpose of gambling. After using the funds to gamble, she would "replace" the money that she had withdrawn by depositing money back into the campaign committee's bank account. Respondent did not report the withdrawals or the subsequent deposits to her campaign treasurer or the NADC. These are criminal actions, for which respondent was prosecuted in both state court and federal court.

Three particular aspects of respondent's actions are troublesome: (1) She misappropriated funds that others had entrusted to her for a specific purpose; (2) to conceal her actions, she engaged in misrepresentation and violated Nebraska law; and (3) her misconduct was intentional and recurring.

*(i) Misappropriation and Conversion of Funds*

Respondent's unauthorized use of campaign funds for her own purpose constituted misappropriation and conversion. For purposes of attorney discipline proceedings, "misappropriation" is defined as "any unauthorized use" of funds "entrusted to an attorney, including not only stealing, but also unauthorized temporary use for the attorney's own purpose, whether or not the attorney derives any personal gain or benefit therefrom."[10] It is a "serious offense involving moral turpitude" and "'violates basic notions of honesty and endangers public confidence in the legal profession.'"[11] "[C]onversion" is the "misappropriation" of another's property "to the attorney's own use *or some other improper use*."[12]

Respondent withdrew more than $63,000 from the campaign committee's bank account for an unauthorized and improper use—gambling. The funds which respondent withdrew for gambling were legally held by her campaign committee and

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[10] See *State ex rel. Counsel for Dis. v. Carter*, 282 Neb. 596, 606, 808 N.W.2d 342, 351 (2011).

[11] See *State ex rel. NSBA v. Veith*, 238 Neb. 239, 247, 470 N.W.2d 549, 555 (1991).

[12] See *id.* at 245, 470 N.W.2d at 554 (emphasis in original).

had been contributed to the committee for the explicit purpose of supporting her candidacy. The evidence shows that respondent withdrew and used those funds with the knowledge that she was using "campaign funds" for a purpose other than that for which they were intended. This constituted misappropriation and conversion.

Respondent's later repayment of the campaign funds does not excuse her misappropriation and conversion of those funds. "A restitution of funds wrongfully converted by a lawyer, after he [or she] is faced with legal accountability, is not an exoneration of his [or her] professional misconduct."[13] And the fact that the campaign committee ultimately did not suffer a financial loss is not a "reason for imposing a less severe sanction."[14] We cannot overlook respondent's misappropriation and conversion of campaign funds simply because she later repaid those funds.

Respondent emphasizes that "the money that was gambled was not clients' money but rather campaign contributions."[15] But we do not see the significance of this fact. In the case of both campaign contributions and client trust funds, individuals entrust their money to another for a specific, mutually understood purpose. In either case, using the funds for other than the specified purpose is a misuse and misappropriation of those funds. Given these similarities, we see no meaningful distinction between respondent's misappropriation of campaign funds and the misappropriation of client trust funds. Indeed, we have previously rejected the distinction between client and nonclient funds in cases of misappropriation.[16]

Neither is it significant that respondent's misconduct occurred outside of her representation of clients. "[A] lawyer

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[13] *State ex rel. Nebraska State Bar Assn. v. Bremers*, 200 Neb. 481, 484, 264 N.W.2d 194, 197 (1978).

[14] See *Carter, supra* note 10, 282 Neb. at 607, 808 N.W.2d at 351.

[15] Brief for respondent at 24.

[16] See, *State ex rel. Counsel for Dis. v. Bouda*, 282 Neb. 902, 806 N.W.2d 879 (2011); *State ex rel. NSBA v. Rosno*, 245 Neb. 365, 513 N.W.2d 302 (1994); *State ex rel. Nebraska State Bar Assn. v. McConnell*, 210 Neb. 98, 313 N.W.2d 241 (1981).

is bound by the [rules governing the legal profession] in every capacity in which the lawyer acts, whether he [or she] is acting as an attorney or not."[17]

*(ii) Misrepresentation and Violation of State Law*

Respondent actively concealed her misappropriation and conversion of campaign funds. Under Neb. Rev. Stat. § 49-1455(1)(b) (Reissue 2010), the campaign statement of a committee must disclose "the total amount of expenditures made during the period covered by the campaign statement." In repeated violation of this statute, when preparing and filing campaign statements, respondent did not report her personal use of funds from the campaign committee's bank account.

Respondent testified that she knew it was "wrong" not to report the expenditures for gambling but that she feared compliance with the reporting requirements "would reveal . . . that [she] was gambling." Because of this fear, respondent deliberately remained silent as to the cash advances, despite her legal duty to disclose all campaign expenditures.[18] Under such circumstances, her silence was equivalent to false representation.[19] "'[A] partial and fragmentary disclosure, accompanied with the wil[l]ful concealment of material and qualifying facts, is not a true statement, and is as much a fraud as an actual misrepresentation, which, in effect, it is.'"[20]

In addition to being fraudulent in their omissions, the campaign reports filed by respondent also contained affirmative misrepresentations. Respondent admitted that when she filed the campaign reports with the NADC, she knew they "didn't reflect deposits and withdrawals that were made." Nonetheless, when she submitted the campaign reports, she gave her assurance that, to the best of her knowledge, the information represented therein was true. By doing so, respondent deliberately

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[17] *State ex rel. Nebraska State Bar Assn. v. Michaelis*, 210 Neb. 545, 560, 316 N.W.2d 46, 54 (1982).

[18] See § 49-1455(1)(b).

[19] See *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987).

[20] *Id.* at 25, 416 N.W.2d at 530.

misrepresented that she had no knowledge of unreported expenditures when she actually did and, effectively, engaged in fraud. "'[O]ne who responds to an inquiry is guilty of fraud if he [or she] denies all knowledge of a fact which he [or she] knows to exist.'"[21]

*(iii) Intentional and Recurring Conduct*

The evidence shows that respondent's misconduct was intentional and recurring. By respondent's own admission, her use of the debit card linked to her campaign committee's bank account was intentional and part of a routine. Indeed, she used the debit card to obtain cash advances for gambling over 100 times. She testified that she intended "to use campaign funds" when she made the cash advances and that she knew the money should not have been used for gambling.

As for respondent's misrepresentations to the NADC, she testified that she made a conscious decision not to disclose the cash advances. She filed three separate reports with the NADC, none of which disclosed her withdrawal of campaign funds or the subsequent deposits.

*(iv) Conclusion as to Respondent's Conduct*

Respondent's misconduct was intentional and repeated and occurred over the course of 2½ years. She misappropriated and converted funds entrusted to her by others for a specific purpose and then attempted to conceal her actions through misrepresentation and in violation of Nebraska law.

(b) Aggravating and Mitigating Circumstances

*(i) Aggravators*

The fact that respondent engaged in the aforementioned misconduct while holding elected public office greatly aggravates her misconduct. Like any public officer, respondent was

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[21] *Id*. at 26, 416 N.W.2d at 531.

a "'fiduciary toward the public.'"[22] She was "charged with a public trust."[23] And as a lawyer holding public office, she "assume[d] legal responsibilities going beyond those of other citizens."[24] By misappropriating the funds entrusted to her as a public officer and covering up that misappropriation with misrepresentations, respondent violated the public trust and abused her office. Such abuse of public office by an attorney "can suggest an inability to fulfill the professional role of lawyers."[25]

Respondent's active concealment of her misappropriation of campaign funds is an additional aggravating factor.[26] One of the "essential eligibility requirements for admission to the practice of law in Nebraska" is "'[t]he ability to conduct oneself with a high degree of honesty, integrity, and trustworthiness in all professional relationships and with respect to all legal obligations.'"[27] As such, this court "does not look kindly upon acts which call into question an attorney's honesty and trustworthiness."[28]

[7] The number of individual acts of misconduct committed by respondent aggravates her behavior. Multiple acts of attorney misconduct are deserving of more serious sanctions and are distinguishable from isolated incidents.[29] Respondent used the debit card linked to her campaign committee's bank account over 100 times to obtain funds for gambling. Each of these withdrawals was a distinct misappropriation and conversion of campaign funds. Respondent also filed three separate campaign reports with the NADC, each of which was an act of misrepresentation.

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[22] See *id.*

[23] See *id.* at 27, 416 N.W.2d at 531.

[24] See § 3-508.4, comment 5.

[25] See *id.*

[26] See *Carter, supra* note 10.

[27] *State ex rel. Counsel for Dis. v. Crawford*, 285 Neb. 321, 367, 827 N.W.2d 214, 246 (2013) (alteration in original).

[28] See *id.*

[29] *State ex rel. NSBA v. Malcom*, 252 Neb. 263, 561 N.W.2d 237 (1997).

*(ii) Mitigators*

Respondent admitted to her misconduct and took responsibility for her actions. She pleaded guilty to the criminal charges in both state court and federal court, and admitted the allegations in the formal charges and additional formal charges. She was cooperative throughout these proceedings and demonstrated remorse. All of these are relevant mitigating factors.[30]

Respondent has an extensive history of political, community, and volunteer service. At the referee hearing, several individuals attested to respondent's service to the community, including a member of the Public Service Commission, a former mayor of Omaha, a former president of the Omaha School Board, and the executive director of the Peter Kiewit Foundation. Respondent characterized her legal practice as providing legal services in an area where "[t]here are not a lot of others doing it." She testified that she wants to "continue to be of service, particularly to the residents of North Omaha." "Continuing commitment to the legal profession and the community" is a mitigating factor in an attorney discipline case.[31]

The fact that respondent is actively seeking help for her gambling addiction is a mitigating factor.[32] Respondent testified that through continued participation in Gamblers Anonymous, she was "confident" that she would "refrain from gambling" in the future.

(c) Sanctions Imposed in Similar Cases

This court has frequently imposed the sanction of disbarment "in cases of embezzlement or like defalcation by lawyers, and that sanction has not depended upon whether the funds

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[30] See, *State ex rel. Counsel for Dis. v. Pierson*, 281 Neb. 673, 798 N.W.2d 580 (2011); *State ex rel. Counsel for Dis. v. Petersen*, 271 Neb. 262, 710 N.W.2d 646 (2006).

[31] See *State ex rel. Counsel for Dis. v. Swan*, 277 Neb. 728, 737, 764 N.W.2d 641, 647 (2009).

[32] See *State ex rel. Counsel for Dis. v. Downey*, 276 Neb. 749, 757 N.W.2d 381 (2008).

taken were those of a client."[33] We have disbarred numerous attorneys for the misappropriation and conversion of client funds as well as nonclient funds.[34]

[8] However, we have not "adopted a 'bright line rule' that misappropriation of funds will always result in disbarment."[35] Mitigating factors may "overcome the presumption of disbarment in misappropriation and commingling cases" where they are "extraordinary" and "substantially outweigh" any aggravating circumstances.[36] Absent such mitigating circumstances, the appropriate sanction is disbarment.[37]

Of the cases in which misappropriation and conversion did not result in disbarment, a majority of those were from the 1980's.[38] In 1991, however, we recognized and moved away from a "trend in recent years toward lighter sanctions" for misappropriation.[39]

Since 1991, we have ordered disbarment in all cases involving the misappropriation of client funds except two.[40] In *State*

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[33] See *McConnell, supra* note 16, 210 Neb. at 100, 313 N.W.2d at 242.

[34] See, *Bouda, supra* note 16 (funds of employer); *Carter, supra* note 10 (client funds); *State ex rel. Counsel for Dis. v. Reilly*, 271 Neb. 465, 712 N.W.2d 278 (2006) (client funds); *Malcom, supra* note 29 (client funds); *Rosno, supra* note 16 (funds of association for which attorney was treasurer); *State ex rel. NSBA v. Radosevich*, 243 Neb. 625, 501 N.W.2d 308 (1993) (client funds); *Veith, supra* note 11 (client funds); *McConnell, supra* note 16 (local bar association funds); *Bremers, supra* note 13 (client funds); *State ex rel. Nebraska State Bar Assn. v. Ledwith*, 197 Neb. 572, 250 N.W.2d 230 (1977) (funds of estate held by attorney as executor).

[35] See *State ex rel. Counsel for Dis. v. Achola*, 266 Neb. 808, 816, 669 N.W.2d 649, 656 (2003).

[36] See *Malcom, supra* note 29, 252 Neb. at 272, 561 N.W.2d at 243.

[37] See *id.*

[38] See, *State ex rel. NSBA v. Fitzgerald*, 227 Neb. 90, 416 N.W.2d 28 (1987); *State ex rel. NSBA v. Miller*, 225 Neb. 261, 404 N.W.2d 40 (1987); *State ex rel. NSBA v. Tomek*, 214 Neb. 220, 333 N.W.2d 409 (1983).

[39] See *Veith, supra* note 11, 238 Neb. at 251, 470 N.W.2d at 558.

[40] See, *Beltzer, supra* note 8 (suspension); *Carter, supra* note 10 (disbarment); *Reilly, supra* note 34 (disbarment); *Malcom, supra* note 29 (disbarment); *State ex rel. NSBA v. Gleason*, 248 Neb. 1003, 540 N.W.2d 359 (1995) (suspension); *Radosevich, supra* note 34 (disbarment); *Veith, supra* note 11 (disbarment).

*ex rel. NSBA v. Gleason*,[41] an attorney misappropriated an unspecified amount of client funds for his personal use. We concluded that an indefinite suspension was appropriate, because the attorney suffered from "dual psychological illnesses" and had self-reported his misappropriations to the relator.[42] In *State ex rel. Counsel for Dis. v. Beltzer*,[43] we ordered a 1-year suspension where the attorney's misappropriation of client trust funds involved no concealment and was an isolated event, he had no disciplinary record, and the record included multiple letters of support.

The instant case is distinguishable from both of these cases in which we ordered suspension for the misappropriation of client funds. Neither *Gleason*[44] nor *Beltzer*[45] involved the abuse of public office. Respondent did not self-report, as in *Gleason*. And, far from being an isolated event as in *Beltzer*, respondent's misconduct spanned 2½ years and involved numerous, distinct acts of misappropriation. Respondent also engaged in misrepresentation to conceal her misconduct, unlike the attorney in *Beltzer*.

Respondent's misconduct involved the filing of false campaign reports with the NADC so as to avoid disclosing her misappropriation of campaign funds. In prior discipline cases, comparable actions have been considered only in combination with other acts of misconduct.[46]

In *State ex rel. Counsel for Dis. v. Wintroub*,[47] we disbarred an attorney for evading government reporting requirements and committing ethical violations related to the representation of clients. In particular, he (1) was involved in "illegally structuring transactions to avoid federal bank reporting laws,"

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[41] *Gleason, supra* note 40.

[42] See *id.* at 1008, 540 N.W.2d at 363.

[43] *Beltzer, supra* note 8.

[44] *Gleason, supra* note 40.

[45] *Beltzer, supra* note 8.

[46] See, *State ex rel. Counsel for Dis. v. Wintroub*, 277 Neb. 787, 765 N.W.2d 482 (2009); *Douglas, supra* note 19.

[47] *Wintroub, supra* note 46.

for which he had been convicted of a federal felony; (2) failed to diligently represent a client; (3) mishandled client trust funds; (4) accepted fees from a client during suspension; and (5) acted as a collection agent during suspension.[48] In ordering disbarment, we explained that the attorney had an "obligation to uphold the laws of the United States" and that his felony conviction thus "violate[d] basic notions of honesty and endanger[ed] public confidence in the legal profession."[49] We also stated that his other acts of misconduct demonstrated a "continued indifference to the rule of law" and a "consistent pattern of ethical violations."[50]

In *State ex rel. NSBA v. Douglas*,[51] we suspended a former attorney general for 4 years for multiple acts of misconduct, including the filing of a false statement of financial interest with the NADC. The other acts of misconduct included (1) engaging in business activities involving deceit and misrepresentation, (2) failing to fully disclose his compensation from those business activities to a special assistant attorney general, (3) failing to disclose conflicts of interest arising from those business activities, and (4) failing to disqualify himself from investigations in which he had a conflict of interest.[52]

The instant case is more comparable to *Wintroub*[53] than to *Douglas*.[54] Although both *Wintroub* and *Douglas* involved the failure to comply with reporting requirements, only *Wintroub* also involved the misuse of client funds.

(d) Conclusion as to Discipline

Respondent engaged in the intentional and repeated misappropriation of campaign funds for her personal use and then employed deception and misrepresentation to conceal her

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[48] See *id.* at 788, 765 N.W.2d at 485.

[49] *Id.* at 804, 765 N.W.2d at 495.

[50] *Id.*

[51] *Douglas, supra* note 19.

[52] See *id.*

[53] *Wintroub, supra* note 46.

[54] *Douglas, supra* note 19.

misconduct. On three separate campaign reports, she failed to report her personal use of funds from the campaign committee's bank account, in violation of § 49-1455(1)(b). She prepared and filed reports which were fraudulent in their omission and affirmatively misrepresented that, to the best of her knowledge, the information represented in the reports was true. For these actions, respondent was convicted of two misdemeanors and a federal felony.

The referee determined that "Respondent's remorse and acknowledging her responsibility and attacking her addiction substantially mitigate[d] the seriousness of the misconduct." He also placed great emphasis on respondent's repayment of the campaign funds and "her commitment to service, her passion and her dedication to address the most difficult issues which face our country today." Consequently, the referee recommended a 1-year suspension instead of disbarment.

But mitigating factors can "overcome the presumption of disbarment" in cases involving misappropriation only when they are "extraordinary" and also "substantially outweigh" the aggravating circumstances.[55] After considering all the circumstances of respondent's misconduct, we cannot conclude that there are mitigating circumstances which would overcome the presumption of disbarment for misappropriation. Respondent's repayment of the campaign funds, commitment to Gamblers Anonymous, and service to the community are commendable. Nonetheless, those facts do not "substantially outweigh" the aggravating factors—that she engaged in multiple acts of misappropriation, not merely one, and did so while holding elective public office.

Given the nature of respondent's actions, which involved misappropriation, misrepresentation, violation of state law, and abuse of public office, disbarment is the appropriate sanction. A 1-year suspension would not adequately reflect the severity of respondent's misconduct, deter others from engaging in similar conduct, or reinforce the high standards[56] to which attorneys and public officers are held.

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[55] See *Malcom, supra* note 29, 252 Neb. at 272, 561 N.W.2d at 243.

[56] See, § 3-508.4, comment 5; *Douglas, supra* note 19.

## VI. CONCLUSION

It is the judgment of this court that respondent be disbarred from the practice of law in the State of Nebraska, effective from the date of her temporary suspension on September 25, 2013. Respondent shall comply with Neb. Ct. R. § 3-316 (rev. 2014), and upon failure to do so, she shall be subject to punishment for contempt of this court. Respondent is 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 within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF DISBARMENT.

MILLER-LERMAN, J., not participating.

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# GUADALUPE GAYTAN, SPECIAL ADMINISTRATOR OF THE ESTATE OF JOSE SANCHEZ DOMINGUEZ, DECEASED, APPELLANT, V. WAL-MART ET AL., APPELLEES.

853 N.W.2d 181

Filed September 19, 2014. No. S-13-039.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Affidavits.** The purpose of Neb. Rev. Stat. § 25-1335 (Reissue 2008) is to provide a safeguard against an improvident or premature grant of summary judgment.
4. **Summary Judgment: Motions for Continuance: Affidavits.** As a prerequisite for a continuance, or additional time or other relief under Neb. Rev. Stat. § 25-1335 (Reissue 2008), a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to oppose a summary judgment motion.
5. ____: ____: ____. A Neb. Rev. Stat. § 25-1335 (Reissue 2008) affidavit that a party submits in support of a continuance need not contain evidence

going to the merits of the case, but must explain why the party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.

6. **Summary Judgment: Motions for Continuance: Pretrial Procedure.** In ruling on a request for a continuance or additional time in which to respond to a motion for summary judgment, a court may consider the complexity of the lawsuit, the complications encountered in litigation, and the availability of evidence justifying opposition to the motion. The court may also consider whether the party has been dilatory in completing discovery and preparing for trial.
7. **Motions for Continuance: Appeal and Error.** A trial court's grant or denial of a continuance will be reviewed for an abuse of discretion.
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 duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent risk.
10. ____. The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
11. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or its servants.
12. ____: ____: ____. An employer of an independent contractor can be liable for physical harm caused to another if (1) the employer retains control over the contractor's work, (2) the employer is in possession and control of premises, (3) a statute or rule imposes a specific duty on the employer, or (4) the contractor's work involves special risks or dangers.
13. **Negligence: Liability: Contractors and Subcontractors: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.
14. **Negligence: Contractors and Subcontractors.** If an owner of premises retains control over an independent contractor's work, the owner has a duty to use reasonable care in taking measures to prevent injury to those who are working on the premises.
15. ____: ____. When a general contractor retains control over an independent contractor's work, the general contractor has a duty to use reasonable care in taking measures to prevent injuries to workers.
16. **Contractors and Subcontractors: Employer and Employee: Liability.** To impose liability on a property owner or general contractor for injury to an independent contractor's employee based upon the owner's retained control over the work, the owner or general contractor must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger which ultimately caused the injury, and (3) the opportunity to prevent the injury. While this necessarily means that the control exerted by the owner or general contractor must be substantial, it also necessarily means that the control must directly relate to the work that caused the injury.

17. **Contractors and Subcontractors.** Control over the work sufficient to impose liability on a general contractor or owner must manifest in an ability to dictate the way the work is performed, and not merely include powers such as a general right to start and stop work, inspect progress, or make suggestions which need not be followed.
18. **Contracts: Contractors and Subcontractors.** In examining whether an owner or a general contractor exercises control over the work, both the language of any applicable contract and the actual practice of the parties should be examined.
19. **Negligence: Words and Phrases.** Constructive knowledge is generally defined as knowledge that one using reasonable care or diligence should have.
20. **Negligence: Property.** One in possession and control of premises has a duty to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance. This duty relates to the physical condition of the premises, not the manner in which the work is done.
21. **Negligence: Employer and Employee.** The duty to provide specified safeguards or precautions for the safety of others that is imposed by a statute or administrative regulation is nondelegable, in that the one upon whom the duty is imposed cannot escape liability by delegating responsibility for the safeguards to another. But the duty arises only if the statute or regulation specifically imposes the obligation on only the employer and at least implicitly prohibits delegation. It is the nature of the regulation itself that determines whether the duties it creates are nondelegable.
22. **Negligence: Liability: Contractors and Subcontractors: Case Disapproved.** The vicarious liability principle as articulated in Restatement (Second) of Torts § 416 (1965) does not apply to personal injury claims by employees of subcontractors against general contractors or owners. To the extent that *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993), and subsequent cases hold to the contrary, they are disapproved.

Appeal from the District Court for Douglas County: LEIGH ANN RETELSDORF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Ronald J. Palagi and Joseph B. Muller, of Law Offices of Ronald J. Palagi, P.C., L.L.O., for appellant.

Jerald L. Rauterkus and Adam R. White, of Erickson & Sederstrom, P.C., for appellees.

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

STEPHAN, J.

Jose Sanchez Dominguez was killed in an accident at a construction site. At the time of the accident, he was working

for a subcontractor on the roof of a building being constructed for Wal-Mart Stores, Inc. (Wal-Mart). The general contractor on the project was Graham Construction, Inc. (Graham). Guadalupe Gaytan, the special administrator of Dominguez' estate, brought this negligence action against Wal-Mart, Graham, D & BR Building Systems, Inc. (D&BR), and another party not pertinent to this appeal. The district court sustained a motion for summary judgment filed by Wal-Mart and Graham. In this appeal from that order, we affirm the judgment of the district court with respect to Wal-Mart, but reverse, and remand for further proceedings as to Graham.

## I. BACKGROUND

In 2007, Wal-Mart retained Graham to be the general contractor in charge of constructing a new Wal-Mart store in Omaha, Nebraska. In 2008, Graham subcontracted with D&BR to install the steelwork necessary for the building. Dominguez was working for D&BR at the Wal-Mart jobsite.

Part of D&BR's job was to install steel decking sheets on the roof. The sheets were first laid out roughly in place and then permanently aligned and installed. For the permanent installation, D&BR accessed a small number of the sheets through the use of a controlled decking zone (CDZ). Only trained and qualified steelworkers worked inside the CDZ. Any person who was on the roof but outside the CDZ was required to wear personal protection equipment (PPE), such as a harness with an attached rope or cable, at all times.

On January 27, 2008, at approximately 11:45 a.m., Dominguez and another D&BR worker were on the roof. Neither was wearing PPE. Dominguez and his coworker walked across a decking sheet outside of the CDZ, and it gave away, causing them to fall approximately 25 feet. Dominguez was killed as a result of the fall. A subsequent investigation showed the decking sheet had originally been secured with two temporary screws, but that someone had removed the screws or cut them off, so the sheet was actually unsecured. Dominguez' unused PPE was discovered near the fall area.

Gaytan, as special administrator of Dominguez' estate, brought this negligence action against Wal-Mart and Graham.

Wal-Mart and Graham moved for summary judgment. After conducting an evidentiary hearing, the district court sustained their motion. After two appeals from this order were dismissed by the Nebraska Court of Appeals for lack of jurisdiction, the district court entered an order disposing of all pending motions and claims. Gaytan filed a timely appeal from this order, 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

Gaytan assigns that the district court erred in (1) concluding as a matter of law that neither Wal-Mart nor Graham retained control over the work being done by D&BR, (2) concluding as a matter of law that neither Wal-Mart nor Graham retained control over the premises, (3) concluding as a matter of law that Graham did not have a nondelegable duty imposed upon it by statute or rule, (4) concluding as a matter of law that the work being done by Dominguez did not present a peculiar risk of harm, (5) making inaccurate factual findings and finding certain facts were uncontroverted, and (6) ruling on the motion for summary judgment before discovery was completed.

## III. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that

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

[2] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013); *U.S. Bank Nat. Assn. v. Peterson*, 284 Neb. 820, 823 N.W.2d 460 (2012).

party the benefit of all reasonable inferences deducible from the evidence.[3]

## IV. ANALYSIS

### 1. Timeliness of Ruling on Summary Judgment Motion

At the hearing on the motion for summary judgment, Gaytan orally informed the court that entry of summary judgment was inappropriate because discovery in the case had not been completed. The district court noted that Gaytan's position was "akin to a motion to continue until the completeness of discovery."[4] In response, Wal-Mart and Graham argued that the case had been pending for some time; that Gaytan had had a similar previous case against Graham pending for over 1 year and then dismissed it; and that in the 60 days since the motion for summary judgment was filed, Gaytan had made no request for depositions or discovery and no formal request for a continuance.

As part of her evidence at the summary judgment hearing, Gaytan submitted an affidavit from her attorney, offered pursuant to § 25-1335. The affidavit identified a number of attached documents and stated in part that the attorney had to date taken no depositions and was having trouble locating employees of D&BR because it was a Texas company no longer in business. The attorney also averred that he had "not yet reviewed" "numerous" documents referenced by the discovery responses of Wal-Mart and Gaytan.

The district court rejected Gaytan's argument that summary judgment was premature because she had not had an adequate opportunity for discovery. The court noted that Gaytan had originally filed suit against Graham based on the same accident on December 8, 2008, and had then voluntarily dismissed that suit approximately 1 year later, after some discovery had occurred. The court further noted that the deadline for completion of fact discovery in the instant case was July 1, 2011.

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

[4] See Neb. Rev. Stat. § 25-1335 (Reissue 2008).

Although the hearing on the motion for summary judgment was held on April 26, the court did not issue its order on the motion until July 15. According to the district court, it waited for the fact discovery deadline to pass in order to give Gaytan an opportunity to alert the court to any later-discovered facts which would have impacted the summary judgment. The court also noted that although expert witness discovery had not been completed, any information learned from that process would not have been relevant to its disposition of the summary judgment motion.

After the district court entered summary judgment in favor of Wal-Mart and Graham, Gaytan filed a motion to alter or amend. This motion asserted, inter alia, that summary judgment was inappropriate when discovery had not been completed. Wal-Mart and Graham objected to the motion and argued that Gaytan could have filed a motion seeking to continue the summary judgment hearing but did not do so. After a hearing, the district court overruled the motion to alter or amend.

[3-7] In this appeal, Gaytan contends the district court abused its discretion in entering summary judgment when discovery had not been completed. This situation is governed by statute in Nebraska. According to § 25-1335:

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for [summary] judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The purpose of this statute is to provide a safeguard against an improvident or premature grant of summary judgment.[5] As a prerequisite for a continuance, or additional time or other relief, a party is required to submit an affidavit stating a reasonable excuse or good cause for the party's inability to

[5] *Dresser v. Union Pacific. RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011).

oppose a summary judgment motion.[6] The affidavit need not contain evidence going to the merits of the case, but must explain why the party is presently unable to offer evidence essential to justify opposition to the motion for summary judgment.[7] In ruling on a request for a continuance or additional time in which to respond to a motion for summary judgment, a court may consider the complexity of the lawsuit, the complications encountered in litigation, and the availability of evidence justifying opposition to the motion.[8] The court may also consider whether the party has been dilatory in completing discovery and preparing for trial.[9] A trial court's grant or denial of a continuance will be reviewed for an abuse of discretion.[10]

Although Gaytan did not file a formal motion to continue, the affidavit filed by her attorney adequately raised issues encompassed by § 25-1335. The issue of whether the summary judgment proceedings should be continued was before the district court, and that court held it was proper to proceed. Considering the history of the case, the deadline for fact discovery, the factual nature of the issues before the court, and the arguments for continuance advanced by Gaytan's attorney in his affidavit, we conclude the district court did not abuse its discretion in entering the summary judgment order.

### 2. Merits of Summary Judgment

[8-10] 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.[11] The duty in a negligence case is to conform to the legal standard of reasonable conduct in the light of the apparent

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[6] See, *DeCamp v. Lewis*, 231 Neb. 191, 435 N.W.2d 883 (1989); *Holt Cty. Sch. Dist. No. 0025 v. Dixon*, 8 Neb. App. 390, 594 N.W.2d 659 (1999).

[7] *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988).

[8] *DeCamp, supra* note 6.

[9] See *id.*

[10] *Wachtel, supra* note 7.

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

risk.[12] The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.[13]

[11] Here, Wal-Mart was the owner of the construction project and Graham was its general contractor. D&BR, as a subcontractor hired by Graham, was an independent contractor as to Wal-Mart and Graham.[14] Generally, one who employs an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or its servants.[15] This is the general rule, because an employer of an independent contractor generally has no control over the manner in which the work is to be done by the contractor, so the contractor, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk and bearing and distributing it.[16]

[12,13] Our case law has recognized four exceptions to the general rule.[17] Specifically, an employer of an independent contractor can be liable for physical harm caused to another if (1) the employer retains control over the contractor's work, (2) the employer is in possession and control of premises, (3) a statute or rule imposes a specific duty on the employer, or (4) the contractor's work involves special risks or dangers.[18] We often refer to the latter three exceptions as involving "nondelegable" duties.[19] A nondelegable duty means that an

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[12] *Id.*

[13] *Id.*

[14] See, generally, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

[15] *Didier v. Ash Grove Cement Co.*, 272 Neb. 28, 718 N.W.2d 484 (2006); *Parrish, supra* note 14.

[16] See Restatement (Second) of Torts § 409, comment *b*. (1965).

[17] See, *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007); *Didier, supra* note 15; *Whalen v. U S West Communications*, 253 Neb. 334, 570 N.W.2d 531 (1997); *Parrish, supra* note 14. See, also, *Dellinger v. Omaha Pub. Power Dist.*, 9 Neb. App. 307, 611 N.W.2d 132 (2000).

[18] *Id.*

[19] *Id.*

employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed.[20] Gaytan argues that all four exceptions are applicable in this case.

(a) Control Over Work

[14] Gaytan assigns and argues that both Wal-Mart and Graham retained control over the work and thus can be liable to Dominguez. We have held that if an owner of premises retains control over an independent contractor's work, the owner has a duty to use reasonable care in taking measures to prevent injury to those who are working on the premises.[21] We have also held that to fall within this exception to the general rule of nonliability, the owner's involvement in overseeing the construction process must be substantial.[22]

[15] We have recognized that when a general contractor retains control over an independent contractor's work, the general contractor has a duty to use reasonable care in taking measures to prevent injuries to workers.[23] We have expressly stated, however, that in order to impose liability on a general contractor for injury to a subcontractor's employee, the general contractor must have (1) supervised the work that caused the injury to the employee, (2) actual or constructive knowledge of the danger which ultimately caused the injury, and (3) the opportunity to prevent the injury.[24]

[16,17] The control of the work exception is based on the premise that the entity that controls the work should be responsible for ensuring it is done safely. Although we have not specifically addressed the issue in prior cases, we see no reason why the exception as applied to owners and general contractors should differ, and we note that the Restatements

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[20] *Eastlick, supra* note 17; *Dellinger, supra* note 17.

[21] *Parrish, supra* note 14.

[22] See *id*. See, also, *Dellinger, supra* note 17.

[23] See, *Eastlick, supra* note 17; *Whalen, supra* note 17; *Parrish, supra* note 14.

[24] *Parrish, supra* note 14.

of Torts[25] do not treat owners differently than general contractors. Thus, we now clarify our case law and hold that it is not enough that an owner's involvement in the work be "substantial" in order to subject it to liability for injury to the employee of an independent contractor. Rather, the same rule applies to owners as applies to general contractors: to impose liability on an owner for injury to an independent contractor's employee based upon the owner's retained control over the work, the owner must have (1) supervised the work that caused the injury, (2) actual or constructive knowledge of the danger which ultimately caused the injury, and (3) the opportunity to prevent the injury. While this necessarily means that the control exerted by the owner must be substantial, it also necessarily means that the control must directly relate to the work that caused the injury. Further, control over the work by the general contractor or the owner must manifest in an ability to dictate the way the work is performed, and not merely include powers such as a general right to start and stop work, inspect progress, or make suggestions which need not be followed.[26]

*(i) Wal-Mart*

The district court found the evidence established as a matter of law that Wal-Mart did not retain substantial control over D&BR's work. We agree, and further conclude as a matter of law that Wal-Mart did not supervise or control the work which caused Dominguez' injury and thus cannot be held liable on a theory that it retained control over the work.

[18] In examining whether an owner or a general contractor exercises control over the work, both the language of any applicable contract and the actual practice of the parties should be examined.[27] Here, there is no contract between Wal-Mart and D&BR. There is a contract between Wal-Mart

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[25] See, generally, Restatement (Second), *supra* note 16, § 414; Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 56 (2012).

[26] *Eastlick, supra* note 17. See Restatement (Second), *supra* note 16, § 414, comment *c*.

[27] See, *Whalen, supra* note 17; *Parrish, supra* note 14.

and Graham, however. And that contract specifically states that Wal-Mart has no right to exercise control over Graham, Graham's employees, or Graham's agents. There is no evidence that any Wal-Mart representative actually exercised any control over the construction site. All of this evidence demonstrates that Wal-Mart did not supervise any work at the jobsite, let alone the work performed by D&BR that caused the injury to Dominguez.

Gaytan generally acknowledges that there is no evidence of actual control over D&BR's work by Wal-Mart. But she contends that provisions in the Wal-Mart/Graham contract create a genuine issue of material fact as to whether Wal-Mart exercised the requisite control over D&BR's work to expose it to liability. She relies particularly on the contract's reference to an "Owner Construction Manager" who was to be Wal-Mart's authorized representative on the jobsite. She also contends that the contract between Wal-Mart and Graham provides that all work shall comply with it; that all work shall comply with applicable statutes, regulations, codes, and standards; and that Wal-Mart retained the right to enforce the terms and conditions of the contract.

Even assuming Wal-Mart had an authorized representative on the jobsite, on this record, there is no reasonable inference that such representative controlled the roofing work performed by D&BR. And the contractual provisions relied upon by Gaytan demonstrate no more than a general power to stop and start work. None of them, especially when read in light of the more explicit provisions of the contract, create a genuine issue of material fact as to whether Wal-Mart exercised control over the work which resulted in the injury to Dominguez. The district court correctly held that Wal-Mart as a matter of law did not retain control over the work being performed by D&BR and therefore cannot be liable to Dominguez under the control of the work exception.

*(ii) Graham*

Gaytan also asserts that Graham can be liable because it retained control of the work being performed by D&BR. The

district court concluded that Graham did not retain control of the work because it only generally supervised the work being done by D&BR and neither directed nor controlled the manner in which that work was done. The court particularly relied on the fact that Graham employees were not allowed on the roof and had no experience or training in the methods of steel erection.

In examining whether there is a genuine issue of material fact on this theory of liability, we examine both the language of the applicable contract and the actual control exerted by Graham.[28] In doing so, we are mindful that the "work that caused the injury to the employee"[29] in the context of this case includes two factual elements: (1) the use of safety equipment by workers on the roof and (2) the manner in which the decking was secured to the roof. We examine each of these in turn.

### a. Use of Safety Equipment

#### *i. Supervision of Safety Equipment Usage*

According to the subcontract between Graham and D&BR, Graham had the general right to supervise D&BR's work and require D&BR to resolve safety issues. In addition, D&BR was required to comply with all applicable federal, state, and local safety regulations, including Graham's own safety programs and rules.

The record shows that after the accident, the Occupational Safety and Health Administration (OSHA) penalized Graham because the CDZ had been improperly designated with cones meant to be used as a warning line instead of using a guardrail. In doing so, OSHA noted that even though Graham had no employees of its own exposed to the roofing hazard, it was "the controlling employer for the site, and ha[d] explicit control over the overall safety and health of the site." The record also

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[28] See *id.*

[29] See *Parrish, supra* note 14, 242 Neb. at 798, 496 N.W.2d at 912.

shows that Graham had supervisory personnel on the jobsite and that after the accident, Graham both held a meeting with D&BR about roof safety and warned a D&BR foreman that a D&BR worker was seen not using PPE while on the roof. The record further shows that prior to the accident, Graham monitored whether D&BR employees were wearing PPE while on the roof and developed a fall protection plan for D&BR. In addition, Graham orientated Dominguez, and the orientation checklist notes he was instructed by Graham about safe work practices.

There is thus evidence in the record that the contract authorized Graham to monitor and control the use of safety equipment by D&BR workers on the roof and that it actually did so. It is undisputed that Dominguez was not wearing his PPE when he fell. A finder of fact could reasonably infer from the evidence that Graham's control over the use of safety equipment on the roof directly related to the work which caused the injury to Dominguez. A genuine issue of material fact thus exists on this subissue.

*ii. Knowledge of PPE Usage*

[19] As noted, even if Graham controlled the work which caused Dominguez' injury, it can be liable only if it had actual or constructive knowledge of the danger which ultimately caused the injury and the opportunity to prevent the injury.[30] In *Parrish*, we found the general contractor had the requisite knowledge because it was aware that no safety net or adequate substitute was in place below the area where a steelworker's fall occurred. Here, there is no evidence that Graham had actual knowledge prior to the accident that Dominguez or any other D&BR worker was working without his PPE. Thus, the question is whether there is any evidence to support an inference that Graham had constructive knowledge that D&BR workers were not using PPE. Constructive knowledge

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[30] See *Parrish*, *supra* note 14.

is generally defined as "[k]nowledge that one using reasonable care or diligence should have . . . ."[31]

The record reflects that Graham monitored D&BR employees on January 9, 10, 19, and 22, 2008, to determine whether they were properly wearing their PPE. This evidence supports an inference that despite the fact that they did not have access to the roof, Graham employees were able to observe whether or not D&BR workers on the roof were using PPE as required. According to Graham's evidence, on each of these occasions, all D&BR employees were complying with the PPE requirements. But there is also evidence that after Dominguez fell, three unused sets of PPE were found on the roof, which suggests the failure to use PPE was so widespread that Graham should have known of it. On this record, there is a genuine issue of material fact as to whether Graham had constructive knowledge that D&BR employees were not using PPE prior to the accident.

*iii. Opportunity to Prevent Injury*

As noted, Graham had the contractual authority to require D&BR to comply with safety requirements, which reasonably includes the proper use of PPE. Thus, Graham had the ability to require D&BR employees to wear PPE while on the roof and the opportunity to prevent the injury to Dominguez to the extent it was caused by his failure to use his PPE.

*iv. Conclusion*

Construing the evidence in a light most favorable to Gaytan, as our standard of review requires, there are genuine issues of material fact with respect to Gaytan's claim against Graham on the theory that it retained control over the safety practices on the jobsite, and specifically the use of PPE by D&BR workers on the roof of the building. The district court erred in concluding that Graham cannot, as a matter of law, be liable to Dominguez under the control of the work exception.

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[31] Black's Law Dictionary 1004 (10th ed. 2014).

### b. Improper Installation of Decking

The district court found, as a matter of law, that Graham did not exert sufficient control over the manner in which the decking was installed to be liable to Dominguez. Again, we look at the relevant contract and the actual conduct in assessing whether there is a genuine issue of material fact in this regard.[32]

Nothing in the subcontract gives Graham the authority to dictate the manner in which D&BR installed the roof decking, and the record shows that Graham employees did not do so. To the contrary, the evidence in the record is that Graham employees were not allowed to be on the roof at all.

Gaytan argues that even if Graham could not go on the roof directly to inspect how the sheeting was installed, it could have inspected it via other means. But she offers no argument or evidence as to why Graham should have inspected it, in that it had no contractual or other obligation to control the manner in which D&BR performed its actual work. And the relevant test is whether the general contractor actually exerted control over the methodology of the subcontractor's work.[33]

In *Eastlick v. Lueder Constr. Co.*,[34] a mason employed by a subcontractor was injured when he fell 20 feet to the ground after the scaffolding he was on collapsed. We found the evidence showed that the general contractor had overall control of and generally supervised the jobsite. However, there was no evidence that the general contractor owned, maintained, erected, or dismantled the scaffolding. We reasoned that overall control of the jobsite was not enough, and emphasized that the general contractor did not direct the work done by the subcontractor or have control over the manner in which the subcontractor's work was done.

Here, the actual control issue is very similar to *Eastlick*. Graham did not dictate or control the actual methods by which

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[32] See, *Whalen, supra* note 17; *Parrish, supra* note 14.

[33] *Eastlick, supra* note 17; *Parrish, supra* note 14.

[34] *Eastlick, supra* note 17.

D&BR installed the roof decking. We conclude the district court correctly determined, as a matter of law, that Graham did not oversee or supervise the manner in which the roof decking was installed and that thus, it cannot as a matter of law be liable for injuries caused to Dominguez by the improper installation of the roof decking on the theory that it controlled the work.

### (b) Control of Premises/ Safe Place to Work

[20] Our jurisprudence has recognized that one in possession and control of premises has a duty to provide a safe place to work for a contractor's employee.[35] In earlier cases, we sometimes comingled this exception with the control of the work exception.[36] In our more recent cases, we have clarified that this exception is separate and distinct from the control of the work exception.[37] Specifically, the safe place to work exception relates to the physical condition of the premises, not the manner in which the work is done.[38]

#### *(i) Wal-Mart*

The district court, citing *Parrish*, reasoned that because Wal-Mart did not retain control of the work, Wal-Mart did not as a matter of law maintain possession and control of the premises so as to have a duty to provide a safe place to work for Dominguez. Gaytan does not directly challenge this rationale, but it is incorrect. In *Parrish*, we found that the owner retained sufficient control of the work so as to be liable for injuries to a subcontractor's employee. We then stated that because the owner retained control of the work, it also had the nondelegable duty to provide a safe place to work. It was this rationale to which the district court in this case referred.

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[35] *Id.*; *Didier, supra* note 15; *Parrish, supra* note 14.

[36] *Whalen, supra* note 17; *Parrish, supra* note 14. See, also, *Dellinger, supra* note 17.

[37] *Eastlick, supra* note 17; *Didier, supra* note 15.

[38] *Eastlick, supra* note 17.

But the syllogism does not work the opposite way. That is, the fact that the owner does not retain sufficient control of the work so as to become liable for injuries to employees of an independent contractor does not mean that the owner is relieved of its nondelegable duty to provide a safe place to work for employees of independent contractors. We explained in *Didier* v. *Ash Grove Cement Co*.[39] that the duty imposed on an owner derived from the owner's control of the work is distinguishable from the nondelegable duty derived from the owner's ownership and control of the workplace premises. Thus, the mere fact that the owner did not retain sufficient control of the work so as to have a legal duty of care does not mean that the owner has no duty to provide a safe place to work arising from its ownership and control of the premises.[40]

Nevertheless, we agree with the conclusion reached by the district court. An owner has a duty to keep the premises safe and to provide a safe place to work only when the owner maintains possession and control of the premises.[41] Nothing in the record before us supports an inference that Wal-Mart remained in possession or control of the premises during the construction. Thus, as a matter of law, it had no duty to maintain the premises in a safe condition for Dominguez.

*(ii) Graham*

The district court did not analyze whether Graham breached a nondelegable duty to provide a safe place to work. Gaytan contends that this was error. She argues that some entity must be in possession and control of the premises and that if Wal-Mart was not, then surely Graham was. As such, she asserts that Graham had a duty to provide a safe place to work.

We agree that Graham had such a duty. The record fully supports that Graham, as a matter of law, was the entity in possession and control of the premises. But it is also clear on this record that Dominguez' injury as a matter of law was

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[39] *Didier, supra* note 15.

[40] *Id*.

[41] See, generally, Restatement (Second), *supra* note 16, § 422, comment *c*.

not proximately caused by any breach of this duty. The duty owed by one in possession and control to an employee of a subcontractor is "to exercise reasonable care to keep the premises in a safe condition while the contract is in the course of performance."[42] The possessor can be liable only when the employee is injured because the workplace premises were not safe.[43]

Here, Dominguez was not injured because there was something unsafe about the premises he was working on. Instead, he was injured due to specific actions or inactions involved in the construction process. Thus, any breach of Graham's duty to provide a safe place to work did not cause the accident and his injuries. There is no genuine issue of material fact with respect to this allegation of negligence.

### (c) Duty Imposed by Statute or Rule

The district court determined that the "record contains no evidence, nor does [Gaytan] assert the existence of, any statutes or rules of law that imposed a duty upon [Wal-Mart or Graham]. Therefore, the Court does not find a duty based upon this theory." Gaytan argues that this finding is incorrect as to Graham.

Our case law in this area is not well developed. In both *Didier* and *Eastlick*, we recognized this exception to the general rule of nonliability, but concluded it did not apply because there was no evidence that any statute, rule, or regulation was violated. Here, the record shows that a regulation was violated. Specifically, Graham was cited by OSHA for violating 29 C.F.R. § 1926.760(a)(1) (2007), which requires that each employee working in steel erection on a surface higher than 15 feet be protected from fall hazards. The OSHA citation states that employees "were not regularly protected from falls" by Graham. The attached inspection documents show that

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[42] *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 191, 202 N.W.2d 157, 163 (1972). See, also, *Eastlick, supra* note 17.

[43] *Eastlick, supra* note 17.

Graham was cited by OSHA because the CDZ was marked with cones instead of a guardrail. The record further shows that D&BR, but not Graham, was cited by OSHA for how the metal decking was secured.

[21] The duty to provide specified safeguards or precautions for the safety of others that is imposed by a statute or administrative regulation is nondelegable, in that the one upon whom the duty is imposed cannot escape liability by delegating responsibility for the safeguards to another.[44] But the duty arises only if the statute or regulation specifically imposes the obligation on only the employer and at least implicitly prohibits delegation.[45] It is the nature of the regulation itself that determines whether the duties it creates are nondelegable.[46]

It is clear from the language of § 1926.760 and the record that no regulation imposed a nondelegable duty on Graham as to how the metal decking on the roof was to be secured. At most, § 1926.760 relates to Graham's duty to provide for worker safety on the roof through the use of safety equipment, a duty we have already recognized may arise via Graham's control of the safety aspects of the roof work. We acknowledge that 29 C.F.R. § 1926 (2007) does impose certain specific duties on a general contractor when it controls the project.[47] But these duties do not include those articulated in § 1926.760.[48] While violation of § 1926.760 may be evidence of Graham's negligence, nothing in its language or any other part of § 1926 provides that responsibility for worker safety and use of safety equipment always rests with the general contractor and cannot be delegated. We conclude that as a matter of law, no statute or regulation imposed a nondelegable duty on Graham.

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[44] Restatement (Second), *supra* note 16, § 424, comment *a*.

[45] Restatement (Third), *supra* note 25, § 63, comment *d*.

[46] See *Padilla v. Pomona College*, 166 Cal. App. 4th 661, 82 Cal. Rptr. 3d 869 (2008).

[47] See 29 C.F.R. § 1926.750(c) (2007).

[48] *Id*.

(d) Special or Peculiar Risks

Gaytan argues that the district court erred in determining that neither Wal-Mart nor Graham had a nondelegable duty arising from the "peculiar risk" associated with steel construction. She relies on *Parrish*,[49] in which we stated:

> As expressed in Restatement (Second) of Torts § 416 (1965), if a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions.

We further noted a "peculiar risk" was distinguishable from "'the common risks to which persons in general are commonly subjected by ordinary forms of negligence which are usual in the community'" and must involve "'some special hazard resulting from the nature of the work done, which calls for special precautions.'"[50] We concluded that because "steel construction work involves risks which an average person does not ordinarily encounter on a day-to-day basis," it involved a "'peculiar risk'" within the meaning of § 416.[51]

But contrary to our statement in *Parrish*, § 416 makes no mention of liability "for physical harm caused to employees of the subcontractor." Instead, it speaks generally of a "peculiar risk of physical harm *to others*."[52] The illustrations included in the comments to § 416 refer to injuries sustained by persons who had no involvement in the construction

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[49] *Parrish, supra* note 14, 242 Neb. at 799-800, 496 N.W.2d at 913.

[50] *Id.* at 800, 496 N.W.2d at 913, quoting Restatement (Second), *supra* note 16, § 416, comment *d*.

[51] *Parrish, supra* note 14, 242 Neb. at 800, 496 N.W.2d at 913.

[52] Restatement (Second), *supra* note 16, § 416 (emphasis supplied).

project, such as a pedestrian who falls into an unguarded excavation, the owner of adjoining property damaged by the collapse of an inadequately shored party wall, and a motorist who collides with an unilluminated gravel pile left in the street by a cement contractor.[53] Although a tentative draft of § 416[54] included a "Special Note" stating that the rule would not apply to employees of independent contractors covered by workers compensation, the final version was silent on this issue.[55]

As noted by the authors of the Restatement (Second) of Torts, the liability principles stated in §§ 416 to 429 are rules of vicarious liability which arise "in situations in which, for reasons of policy, the employer is not permitted to shift the responsibility for the proper conduct of the work to the contractor."[56] A majority of state courts have held that these vicarious liability rules do not apply to claims by injured employees of a subcontractor against a property owner or general contractor.[57] A minority of jurisdictions apply vicarious liability principles relating to peculiar risk to claims of a subcontractor's employee.[58]

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[53] *Id.*, comments *c.* and *e.*

[54] Restatement (Second) of Torts § 416 (Tentative Draft No. 7, 1962, ch. 15, p. 17-18).

[55] See, *Privette v. Superior Court (Contreras)*, 5 Cal. 4th 689, 854 P.2d 721, 21 Cal. Rptr. 2d 72 (1993); *Wagner v. Continental Cas. Co.*, 143 Wis. 2d 379, 421 N.W.2d 835 (1988).

[56] Restatement (Second), *supra* note 16, Introductory Note for § 416 at 394.

[57] See, e.g., *Fleck v. ANG Coal Gasification Co.*, 522 N.W.2d 445 (N.D. 1994); *Privette, supra* note 55; *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384 (Mo. 1991); *Wagner, supra* note 55; *Jones v. Chevron U.S.A., Inc.*, 718 P.2d 890 (Wyo. 1986); *Vertentes v. Barletta Co.*, 392 Mass. 165, 466 N.E.2d 500 (1984); *Sierra Pac. Power Co. v. Rinehart*, 99 Nev. 557, 665 P.2d 270 (1983); *Conover v. Northern States Power Co.*, 313 N.W.2d 397 (Minn. 1981); *Tauscher v. Puget Sound Power & Light Co.*, 96 Wash. 2d 274, 635 P.2d 426 (1981); *State v. Morris*, 555 P.2d 1216 (Alaska 1976).

[58] See, *Lindler v. District of Columbia*, 502 F.2d 495 (D.C. Cir. 1974); *Lorah v. Luppold Roofing Co., Inc.*, 424 Pa. Super. 439, 622 A.2d 1383 (1993); *Makaneole v. Gampon*, 70 Haw. 501, 777 P.2d 1183 (1989); *Elliott v. Public Serv. Co. of N.H.*, 128 N.H. 676, 517 A.2d 1185 (1986).

The courts adopting the majority view cite various reasons for not applying the principle embodied in § 416 of the Restatement (Second) to claims by injured employees of subcontractors, but most of the rationale stems from the fact that a subcontractor's employees are generally covered by workers' compensation laws. Some courts note that the policy concern underlying § 416, which is to provide a remedy to persons injured as a result of a peculiar risk at a construction site, is already met in the case of a subcontractor's employee covered by workers' compensation.[59] These courts note that the employer of the subcontractor has indirectly funded this remedy because workers' compensation premiums are necessarily included in the contract price.[60] Some courts reason that under agency principles, the subcontractor's release from tort liability to an injured employee by operation of workers' compensation laws operates to release the party which employed the subcontractor.[61] And as the California Supreme Court noted in overruling its prior cases holding § 416 applicable to claims of subcontractor's employees, "to impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees."[62]

Our own case law in this area is somewhat ambiguous. We have never specifically disapproved of the language in *Parrish* which applied the vicarious liability principle of § 416 to the claim of a subcontractor's employee against the general contractor. In *Whalen v. U S West Communications*,[63]

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[59] *Fleck, supra* note 57; *Privette, supra* note 55; *Zueck, supra* note 57; *Wagner, supra* note 55; *Jones, supra* note 57.

[60] *Id.*

[61] *Fleck, supra* note 57; *Wagner, supra* note 55; *Jones, supra* note 57; *Tauscher, supra* note 57.

[62] *Privette, supra* note 55, 5 Cal. 4th at 700, 854 P.2d at 729, 21 Cal. Rptr. 2d at 79.

[63] *Whalen, supra* note 17.

and *Ray v. Argos Corp.*,[64] we cited the language in *Parrish* but concluded that the injury to a subcontractor's employee did not result from a peculiar risk. The Nebraska Court of Appeals took the same approach in *Dellinger v. Omaha Pub. Power Dist.*[65] But in *Anderson v. Nashua Corp.*,[66] we held that a property owner could not be vicariously liable for injuries sustained by its independent contractor's employee resulting from inherently dangerous work because under principles of agency, the independent contractor's immunity from tort liability by operation of Nebraska's workers' compensation law necessarily precluded any liability on the part of the owner.[67] In *Downey v. Western Comm. College Area*,[68] we disapproved other aspects of the holding in *Anderson* but re-affirmed the principle that "a possessor of property is not liable for injury to an independent contractor's employee caused by a dangerous condition that arose out of the contractor's work, as distinguished from a condition of the property or a structure on the property."

The Restatement (Third) of Torts provides some clarity in this area. Section 57 provides: "Except as stated in §§ 58-65, an actor who hires an independent contractor is not subject to vicarious liability for physical harm caused by the tortious conduct of the contractor."[69] Section 59, which replaced Restatement (Second) of Torts § 416, provides:

> An actor who hires an independent contractor for an activity that the actor knows or should know poses a peculiar risk is subject to vicarious liability for physical

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[64] *Ray v. Argos Corp.*, 259 Neb. 799, 612 N.W.2d 246 (2000).

[65] *Dellinger, supra* note 17.

[66] *Anderson v. Nashua Corp.*, 246 Neb. 420, 519 N.W.2d 275 (1994), *disapproved on other grounds, Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012).

[67] See, also, *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), *overruled on other grounds, Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997).

[68] *Downey, supra* note 66, 282 Neb. at 979, 808 N.W.2d at 848.

[69] Restatement (Third), *supra* note 25, § 57 at 400.

> harm when the independent contractor is negligent as to the peculiar risk and the negligence is a factual cause of any such harm within the scope of liability.[70]

But unlike the Second Restatement, the Third Restatement specifically states: "The hirer of an independent contractor is not subject to liability to an employee of the independent contractor under any of the vicarious-liability avenues in this Chapter."[71] As the authors explain, the "central reasons for this conclusion stem from the design of workers' compensation."[72] The authors explain:

> Under the exclusive-remedy provisions of workers' compensation, employers are immune from negligence claims by injured employees. This exclusivity provision bars a negligence claim by an employee against the employer even when the employer is an independent contractor hired by another. Because the hirer of the independent contractor is not the employer of the injured employee, an exclusivity provision does not, by itself, expressly bar a claim against the hirer by the injured employee of the independent contractor. Yet the exclusivity of workers' compensation undermines the usual predicate for vicarious liability—the underlying negligence of the person whose negligence is attributed to the vicariously liable defendant. A claim against the hirer would seek to attribute liability, under a vicarious-liability theory, even though the initial or primary liability claim is barred.[73]

This rationale is consistent with our holdings in *Anderson* and *Downey*, but inconsistent with our application of the "peculiar risk" principle derived from § 416 of the Restatement (Second) to the claim of the subcontractor's employee in *Parrish*.

[22] We need not decide in this case whether to adopt the principles of the Restatement (Third) of Torts with respect to the vicarious liability principle relating to peculiar risk.

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[70] *Id.*, § 59 at 417.

[71] *Id.*, § 57, comment *d.* at 403.

[72] *Id.*

[73] *Id.* at 403-04.

Instead, we join the majority of jurisdictions which hold that the principle as articulated in § 416 of the Restatement (Second) of Torts does not apply to personal injury claims by employees of subcontractors against general contractors or owners. To the extent that *Parrish* and subsequent cases hold to the contrary, they are disapproved. Although our reasoning differs from that of the district court, we agree with its conclusion that as a matter of law, the peculiar risk exception affords no legal basis for Gaytan's claims against either Wal-Mart or Graham.

(e) Facts Identified by District Court

For completeness, we note that Gaytan also assigns that the district court erred "because its decision was based on inaccurate facts, and facts that were controverted." We have considered this assignment of error in our analysis of the various theories of liability advanced by Gaytan. With the exception of the genuine issues of material fact which we have identified above with respect to Gaytan's claim against Graham on the theory of retained control over safety practices, we find this assignment of error to be without merit.

## V. CONCLUSION

For the reasons discussed, there are no genuine issues of material fact as to any of Gaytan's claims against Wal-Mart, and the district court did not err in sustaining its motion for summary judgment. There are also no genuine issues of material fact with respect to Gaytan's claims against Graham, with the exception of the direct negligence claim arising from Graham's alleged retention of control over the use of safety equipment on the roof. Because there are genuine issues of material fact on that claim, the district court erred in sustaining Graham's motion for summary judgment. Accordingly, we affirm the judgment of the district court as to Wal-Mart, but reverse the judgment with respect to Graham and remand the cause to the district court for further proceedings consistent with this opinion.

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

MILLER-LERMAN, J., participating on briefs.

# Dr. Brett Speece, D.C., appellee, v. Allied Professionals Insurance Company, a Risk Retention Group, Inc., appellant.

853 N.W.2d 169

Filed September 19, 2014. No. S-13-700.

1. **Arbitration and Award.** Arbitrability presents a question of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Pretrial Procedure: Arbitration and Award: Final Orders.** The denial of a motion to compel arbitration is a final, appealable order because it affects a substantial right and is made in a special proceeding.
4. **Federal Acts: Insurance: Contracts: Arbitration and Award.** The Federal Arbitration Act does not preempt Neb. Rev. Stat. § 25-2602.01(f)(4) (Cum. Supp. 2012).
5. **Federal Acts: Insurance.** The Liability Risk Retention Act of 1986 is a federal act that specifically relates to the business of insurance.
6. **Federal Acts: Insurance: States.** The Liability Risk Retention Act of 1986 is the type of federal law excluded from the operation of 15 U.S.C. § 1012(b) (2012) of the McCarran-Ferguson Act, and therefore, the McCarran-Ferguson Act does not prevent the Liability Risk Retention Act of 1986 from being construed to preempt state law.
7. **Constitutional Law: Federal Acts: States.** Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid.
8. **Federal Acts: States: Intent.** Federal law preempts state law when state law conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an intent to preempt state law. Preemption can also impliedly occur when Congress has occupied the entire field to the exclusion of state law claims.
9. **Federal Acts: Insurance: States: Intent.** In the Liability Risk Retention Act of 1986, Congress explicitly declared an intent to preempt state law regulating the operation of foreign risk retention groups except in certain enumerated instances.
10. **Federal Acts: Insurance: States.** The purpose of the Liability Risk Retention Act of 1986 is to permit risk retention groups to efficiently operate on a nationwide basis by providing that they are regulated by their domiciliary states with only limited variations in regulation in the other states in which they operate.
11. **Federal Acts: Insurance: Contracts: Arbitration and Award.** The prohibition of an arbitration clause in insurance policies pursuant to Neb. Rev. Stat. § 25-2602.01(f)(4) (Cum. Supp. 2012) regulates the operation of a risk retention group within the meaning of 15 U.S.C. § 3902 (2012) of the Liability Risk Retention Act of 1986.
12. **Federal Acts: Insurance: States.** The Liability Risk Retention Act of 1986, by its terms, preempts the application of Neb. Rev. Stat. § 25-2602.01(f)(4) (Cum. Supp. 2012) to foreign risk retention groups.

13. **Appeal and Error.** An appellate court will not consider an issue on appeal that the trial court has not decided.

Appeal from the District Court for Fillmore County: VICKY L. JOHNSON, Judge. Reversed and remanded for further proceedings.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., and Rick A. Cigel, of Cigel Law Group, P.C., for appellant.

Andrew D. Strotman, Jonathan J. Papik, and Cristin McGarry Berkhausen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee.

Justin D. Eichmann, of Bradford & Coenen, L.L.C., for amicus curiae National Risk Retention Association.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Allied Professionals Insurance Company (APIC) appeals the order of the district court for Fillmore County in which the court determined that Neb. Rev. Stat. § 25-2602.01(f)(4) (Cum. Supp. 2012) prohibited enforcement of the mandatory arbitration clause in the parties' insurance contract and overruled APIC's motion to compel arbitration. Section 25-2602.01(f)(4) generally prohibits mandatory arbitration clauses in insurance contracts. At issue is whether federal law preempts § 25-2602.01(f)(4). We conclude that the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 through 16 (2012), does not preempt the state statute, but that the Liability Risk Retention Act of 1986 (LRRA), 15 U.S.C. §§ 3901 through 3906 (2012), does preempt application of the Nebraska statute to foreign risk retention groups, and that therefore, the district court erred when it determined that § 25-2602.01(f)(4) prohibited enforcement of the arbitration clause in the parties' insurance contract. We reverse the district court's order overruling

APIC's motion to compel arbitration and remand the cause for further proceedings.

## STATEMENT OF FACTS

Dr. Brett Speece, D.C., a chiropractor practicing in Exeter, Nebraska, purchased a professional liability insurance policy from APIC. APIC is a risk retention group incorporated in Arizona and registered with the Nebraska Department of Insurance as a foreign risk retention group. In our analysis, we sometimes refer to Nebraska as the nonchartering or nondomiciliary state. As a general statement, a risk retention group is an entity formed by persons or businesses with similar or related exposure for the purpose of self-insuring. See LRRA, 15 U.S.C. § 3901(a)(4).

The policy included a provision requiring binding arbitration in California of any dispute concerning the policy. Paragraph V.C. of the policy stated as follows:

> **Arbitration**. All disputes or claims involving [APIC] shall be resolved by binding arbitration, whether such dispute or claim arises between the parties to this Policy, or between [APIC] and any person or entity who is not a party to the Policy but is claiming rights either under the Policy or against [APIC]. This provision is intended to, and shall, encompass the widest possible scope of disputes or claims, including any issues a) with respect to any of the terms or provisions of this Policy, or b) with respect to the performance of any of the parties to the Policy, or c) with respect to any other issue or matter, whether in contract or tort, or in law or equity. Any person or entity asserting such dispute or claim must submit the matter to binding arbitration with the American Arbitration Association, under the Commercial Arbitration Rules of the American Arbitration Association then in effect, by a single arbitrator in good standing. If the person or entity asserting the dispute or claim refuses to arbitrate, then any other party may, by notice as herein provided, require that the dispute be submitted to arbitration within fifteen (15) days. All procedures, methods, and rights with respect to the right to compel arbitration

> pursuant to this Article shall be governed by the [FAA]. The arbitration shall occur in Orange County, California. The laws of the State of California shall apply to any substantive, evidentiary or discovery issues. Any questions as to the arbitrability of any dispute or claim shall be decided by the arbitrator. If any party seeks a court order compelling arbitration under this provision, the prevailing party in such motion, petition or other proceeding to compel arbitration shall recover all reasonable legal fees and costs incurred thereby and in any subsequent appeal, and in any action to collect the fees and costs. A judgment shall be entered upon the arbitration award in the U.S. District Court, Central District of California, or if that court lacks jurisdiction, then in the Superior Court of California, County of Orange.

In 2012, Speece was audited by the Nebraska Department of Health and Human Services with regard to his billing for Medicaid reimbursements, and in January 2013, the State of Nebraska filed a civil suit against Speece for violations of law regarding false Medicaid claims. Speece gave notice of the proceedings to APIC and demanded that APIC cover the expenses of his defense. A dispute arose between Speece and APIC regarding whether and to what extent the policy covered the costs of Speece's defense. Speece filed an action in the district court seeking a declaration that APIC was obligated to provide coverage for his defense in the Medicaid proceeding; he also sought damages for breach of contract and bad faith.

APIC filed a motion to compel arbitration. The district court overruled the motion. The court relied on § 25-2602.01. Subsection (b) of the statute generally provides that a provision in a written contract to submit controversies between the parties to arbitration is valid and enforceable. However, subsection (f) of the statute lists certain exceptions to this general rule. Section 25-2602.01(f)(4) provides that, with certain exceptions not relevant to the present case, an arbitration provision is not valid and enforceable in "any agreement concerning or relating to an insurance policy."

The court considered and rejected APIC's argument that § 25-2602.01(f)(4) cannot be applied to Speece's insurance policy because that Nebraska statute is preempted by federal law at least as it applies to foreign risk retention groups. The federal laws that are relevant to this argument are: (1) the FAA, which generally provides that arbitration provisions in written contracts are valid and enforceable; (2) the McCarran-Ferguson Act (MFA), 15 U.S.C. §§ 1011 through 1015 (2012), which provides in relevant part at § 1012(b) that a federal statute does not preempt a state statute "regulating the business of insurance" unless the federal statute "specifically relates to the business of insurance"; and (3) the LRRA, which provides in relevant part at § 3902(a)(1) that a foreign risk retention group is exempt from any state law that would "regulate, directly or indirectly, the operation of a risk retention group."

The district court determined that neither the FAA nor the LRRA preempted § 25-2602.01(f)(4). The court further determined that the Nebraska statute's prohibition of arbitration provisions in "any agreement concerning or relating to an insurance policy" applied to the professional liability policy issued by APIC to Speece in this case. The court concluded that the arbitration clause in the policy was not valid and enforceable, and the court therefore overruled APIC's motion to compel arbitration.

APIC appeals.

## ASSIGNMENT OF ERROR

APIC claims that the district court erred when it overruled its motion to compel arbitration.

## STANDARD OF REVIEW

[1,2] Arbitrability presents a question of law. *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010). On a question of law, we reach a conclusion independent of the court below. See *id.*

## ANALYSIS

APIC claims that the district court erred when it overruled the motion to compel arbitration. APIC contends that federal

law preempts § 25-2602.01(f)(4), which prohibits arbitration clauses in insurance contracts, and that therefore, the court must enforce the arbitration clause in the policy it issued to Speece. As explained below, we conclude that the FAA does not preempt § 25-2602.01(f)(4), but that the LRRA does preempt the application of the Nebraska statute to foreign risk retention groups, and that therefore, the district court erred when it overruled APIC's motion to compel arbitration on the basis that the arbitration clause was prohibited by § 25-2602.01(f)(4).

*Jurisdiction.*

[3] We note as an initial matter that the denial of a motion to compel arbitration is a final, appealable order because it affects a substantial right and is made in a special proceeding. *Webb v. American Employers Group*, 268 Neb. 473, 684 N.W.2d 33 (2004). Therefore, this court has jurisdiction to consider this appeal of the district court's order overruling APIC's motion to compel arbitration.

*FAA Does Not Preempt*
*§ 25-2602.01(f)(4).*

With respect to its conclusion that the FAA does not preempt § 25-2602.01(f)(4), the district court relied on this court's decision in *Kremer, supra*. We agree with the district court's reliance on *Kremer* and the district court's conclusion that the FAA does not preempt § 25-2602.01(f)(4).

[4] In *Kremer*, we noted generally that the FAA provides that written provisions for arbitration are valid and enforceable and that the FAA by its terms preempts inconsistent state laws that apply solely to the enforceability of arbitration provisions. However, we further noted in *Kremer* that the MFA also applied to our analysis and that under the MFA, state law regulating the business of insurance "reverse preempts" federal law that does not specifically govern insurance. 280 Neb. at 605, 788 N.W.2d at 551. We quoted 15 U.S.C. § 1012(b) of the MFA, which provides in part, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of

insurance . . . unless such Act specifically relates to the business of insurance." Applying this provision of the MFA, we determined in *Kremer* that § 25-2602.01(f)(4) is a state statute that regulates the business of insurance; that the FAA is a federal act that does not specifically relate to the business of insurance; and that the FAA operates to invalidate, impair, or supersede § 25-2602.01(f)(4). Based on these determinations and applying § 1012(b) of the MFA, we held that the FAA does not preempt § 25-2602.01(f)(4). However, given the nature of the dispute in *Kremer*, the FAA was not the only federal law that we needed to consider to determine whether federal law preempted § 25-2602.01(f)(4).

Because the dispute at issue in *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010), involved a crop insurance policy, we considered whether federal laws and regulations governing crop insurance, not repeated here, preempted § 25-2602.01(f)(4). We determined in *Kremer* that relevant federal crop insurance laws and regulations specifically "relate[d] to the business of insurance." 280 Neb. at 610, 788 N.W.2d at 554. Therefore, under § 1012(b) of the MFA, such laws were of the type that were not reverse preempted by state statutes "regulating the business of insurance." We noted that the federal crop insurance laws and regulations expressed an intent to preempt state law if state law conflicted with the federal regulations. Because federal regulations requiring arbitration conflicted with the prohibition of arbitration clauses in insurance contracts in § 25-2602.01(f)(4), we concluded that under the MFA, § 25-2602.01(f)(4) did not reverse preempt federal crop insurance law and regulations and that therefore, federal regulations requiring arbitration preempted § 25-2602.01(f)(4) and thus the arbitration clauses of the crop insurance contracts at issue were enforceable.

Similar to the framework we employed in *Kremer*, in the present case, we must consider whether federal law other than the FAA, specifically the LRRA, preempts § 25-2602.01(f)(4) in the same manner that the federal crop insurance law at issue in *Kremer* preempted the state statute.

*LRRA Preempts Application of § 25-2602.01(f)(4) to Foreign Risk Retention Groups.*

The district court concluded that the LRRA does not preempt § 25-2602.01(f)(4) and that as a result, the arbitration clause in Speece's insurance policy was not enforceable. In reaching its conclusion, the district court relied on *Sturgeon v. Allied Professionals Ins. Co.*, 344 S.W.3d 205 (Mo. App. 2011), in which the Missouri Court of Appeals held that a Missouri statute similar to § 25-2602.01(f)(4) was not preempted by the LRRA. Because we respectfully disagree with the analysis in *Sturgeon*, we determine that the district court's reliance on *Sturgeon* was misplaced. In our analysis which follows, we conclude that under the MFA, the LRRA is a federal statute that "specifically relates to the business of insurance"; that an examination of the provisions of the LRRA shows an express intent to preempt certain state regulations; and that the LRRA preempts the application of § 25-2602.01(f)(4) to foreign risk retention groups. Having eliminated the application of the antiarbitration provision in § 25-2602.01(f)(4), the arbitration clause at issue is enforceable.

We must first determine whether, under § 1012(b) of the MFA, the LRRA is a federal act that "specifically relates to the business of insurance." If it is, then the MFA's "reverse preemption" provision of § 1012(b) does not apply and, if the terms of the LRRA so indicate, the LRRA can be construed to preempt conflicting state law.

[5] We conclude that the LRRA is a federal act that specifically relates to the business of insurance. The basis for this conclusion is apparent from the purpose of the LRRA and its terms. The U.S. Court of Appeals for the Second Circuit recently provided a brief description of the history and purpose of the LRRA as follows:

> In the late 1970s, . . . Congress perceived a seemingly unprecedented crisis in the insurance markets, during which many businesses were unable to obtain product liability coverage at any cost. And when businesses could obtain coverage, their options were unpalatable. Premiums often amounted to as much as six percent of gross sales,

> and insurance rates increased manyfold within a single year. . . .
>
> After several years of study, Congress enacted the Product Liability Risk Retention Act of 1981 . . . which was meant to be a national response to the crisis. As relevant here, the 1981 Act authorized persons or businesses with similar or related liability exposure to form "risk retention groups" for the purpose of self-insuring. . . . The 1981 Act only applied to product liability and completed operations insurance, but following additional disturbances in the interstate insurance markets, in 1986, Congress enacted the LRRA, and extended the 1981 Act to all commercial liability insurance.

*Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100, 102-03 (2d Cir. 2014) (citations omitted).

[6] With the just-described understanding of the history and purpose of the LRRA, it is clear that the LRRA is a federal act that "specifically relates to the business of insurance" within the meaning of § 1012(b) of the MFA. In contrast to the FAA considered in *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010), the LRRA is the type of federal law excluded from the operation of § 1012(b) of the MFA, and therefore, the MFA does not prevent the LRRA from being construed to preempt state law.

However, the fact that the MFA does not prevent us from construing the LRRA to preempt a state statute does not end our inquiry. We need to determine whether some provision of the LRRA does in fact preempt § 25-2602.01(f)(4).

[7,8] We have stated the following standards with respect to determining whether federal law preempts state law. Under the Supremacy Clause of the U.S. Constitution, state law that conflicts with federal law is invalid. *Kremer, supra*. Federal law preempts state law when state law conflicts with a federal statute or when the U.S. Congress, or an agency acting within the scope of its powers conferred by Congress, explicitly declares an intent to preempt state law. *Id*. Preemption can also impliedly occur when Congress has occupied the entire field to the exclusion of state law claims. *Id*.

[9] As discussed below, we conclude that in the LRRA, Congress explicitly declared an intent to preempt state law regulating the operation of foreign risk retention groups except in certain enumerated instances not applicable here. The LRRA at 15 U.S.C. § 3902 provides in relevant part: "(a) . . . Except as provided in this section, a risk retention group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would . . . (1) make unlawful, or regulate, directly or indirectly, the operation of a risk retention group[.]" The LRRA thereafter more particularly provides that the state in which a risk retention group is chartered shall regulate the formation and operation of the risk retention group but then provides certain exceptions to preemption pursuant to which any state may impose the specified requirements. An example of a nonchartering power is the LRRA provision authorizing nonchartering states to specify acceptable means for risk retention groups to demonstrate "financial responsibility" as a condition for granting a risk retention group a license or permit to undertake activity within the state. See 15 U.S.C. § 3905(d).

As noted above, the district court in this case relied on the decision of the Missouri Court of Appeals in *Sturgeon v. Allied Professionals Ins. Co.*, 344 S.W.3d 205 (Mo. App. 2011), when it determined that the LRRA did not preempt § 25-2602.01(f)(4). The Missouri court in *Sturgeon* interpreted § 3902 of the LRRA to mean that "a state may not pass laws that keep risk retention groups from operating as insurance companies; however, the LRRA preserves the state's traditional role in the regulation of insurance." 344 S.W.3d at 215. The Missouri court determined that a Missouri antiarbitration statute similar to Nebraska's § 25-2602.01(f)(4) did not conflict with § 3902, because the Missouri state statute did not "'"make unlawful"'" the operation of a risk retention group nor did it "'regulate' the operation of [the insurance entity] *as a risk retention group*." *Sturgeon*, 344 S.W.3d at 216 (emphasis in original). The Missouri court basically reasoned that the purpose of the LRRA was to prevent states from discriminating against risk retention groups vis-a-vis other types

of insurance companies. The Missouri court stated that "[t]he LRRA's protection of risk retention groups is based on states' possible discrimination against them. Missouri's prohibition of arbitration clauses in insurance contracts applies to insurance companies across the board, and has no discriminatory effect on risk retention groups." *Sturgeon*, 344 S.W.3d at 217. Because Missouri's prohibition of arbitration clauses did not discriminate against risk retention groups as compared to other insurance companies, the Missouri court concluded that the LRRA did not preempt the state statute. See, also, *National Home Ins. Co. v. King*, 291 F. Supp. 2d 518, 531 (E.D. Ky. 2003) (prohibiting enforcement of arbitration clause did not "'make unlawful'" operation of risk retention group and put it on equal footing with other insurers).

We disagree with the reasoning of the court in *Sturgeon* and its interpretation of the LRRA. Such reasoning focuses on the portion of § 3902 exempting risk retention groups from state laws making their operations unlawful without recognizing or giving adequate emphasis to the additional exemption from laws that regulate their operations. Instead, we agree with the reasoning and interpretation of the Second Circuit Court of Appeals in *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014).

At issue in *Wadsworth* was whether the LRRA preempts a New York state law which requires that any insurance policy issued in the state must include a provision allowing an injured party a direct action against the tort-feasor's insurer for satisfaction of an unsatisfied judgment. The Second Circuit Court of Appeals concluded that the LRRA preempts the application of the New York law to foreign risk retention groups. In reaching this conclusion, the Second Circuit determined that the portions of § 3902 quoted above "clearly announce Congress's explicit intention to preempt state laws regulating risk retention groups." *Wadsworth*, 748 F.3d at 106. The Second Circuit noted that while § 3902 provides for the chartering state to regulate the operations of a risk retention group, "[i]n stark contrast, the [LRRA] authorizes nonchartering states to require risk retention groups to comply only with certain basic

registration, capitalization, and taxing requirements, as well as various [unfair] claim settlement and fraudulent practice laws." *Wadsworth*, 748 F.3d at 106.

This expressed intent to preempt state regulation of foreign risk retention groups is in line with the structure of the LRRA. The Second Circuit described the LRRA as enacting "a reticulated structure under which risk retention groups are subject to a tripartite scheme of concurrent federal and state regulation." *Wadsworth*, 748 F.3d at 103. The first part of the scheme is that at the federal level, the LRRA, in what the Second Circuit described as the "'expansive'" and "'sweeping'" language of § 3902, preempts state laws regulating risk retention groups. *Wadsworth*, 748 F.3d at 103. In the second part of the scheme, the LRRA then scales back such preemption by authorizing the domiciliary or chartering state to regulate the formation and operation of a risk retention group, and, in the third part of the scheme, authorizing nondomiciliary states to impose certain specifically enumerated requirements on foreign risk retention groups. In this regard, the Second Circuit stated that "as compared to the near plenary authority [the LRRA] reserves to the chartering state, the [LRRA] sharply limits the secondary regulating authority of nondomiciliary states over risk retention groups . . . ." *Wadsworth*, 748 F.3d at 104. According to the Second Circuit, the purpose of the scheme is "to allow a risk retention group to be regulated by the state in which it is chartered, and to preempt most ordinary forms of regulation by the other states in which it operates." *Wadsworth*, 748 F.3d at 103.

[10] We agree with the Second Circuit's reading of the LRRA. Rather than merely ensuring that risk retention groups are not treated differently from other insurance companies as the district court and the Missouri Court of Appeals reasoned, the LRRA's more encompassing purpose is to permit risk retention groups to efficiently operate on a nationwide basis by providing that they are regulated by their domiciliary states with only limited variations in regulation in the other states in which they operate. The Second Circuit Court of Appeals in *Wadsworth* stated:

> A major benefit extended to risk retention groups by the LRRA is the ability to operate on a nationwide basis according to the requirements of the law of a single state, without being compelled to tailor their policies to the specific requirements of every state in which they do business.

748 F.3d at 108. The dictates of the LRRA promote the smooth interstate operation of risk retention groups. The purpose of the LRRA is achieved by the preemption of most regulation of risk retention groups' operations by nondomiciliary states in § 3902.

With this understanding of the LRRA in mind, we consider whether application of § 25-2602.01(f)(4) and its prohibition on arbitration clauses in insurance contracts to foreign risk retention groups is preempted by § 3902 of the LRRA. The relevant portion of § 3902 provides that "a risk retention group is exempt from any State law . . . to the extent that such law . . . would . . . regulate, directly or indirectly, the operation of a risk retention group." The question then is whether application of § 25-2602.01(f)(4) would "regulate . . . the operation of a risk retention group." In this regard, we note that in *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 608, 788 N.W.2d 538, 553 (2010), for purposes of determining whether the MFA "reverse preemption" applied, we concluded that "a statute precluding the parties to an insurance contract from including an arbitration agreement for future controversies regulates the insurer-insured contractual relationship[, and t]hus, it regulates the business of insurance." Similar to the reasoning that led us to conclude that § 25-2602.01(f)(4) "regulates the business of insurance," we conclude that this statute regulates the "operation of a risk retention group."

As noted above, in *Wadsworth v. Allied Professionals Ins. Co.*, 748 F.3d 100 (2d Cir. 2014), the Second Circuit Court of Appeals considered a New York state law requiring that any insurance policy issued in the state must include a provision allowing an injured party a direct action against the tortfeasor's insurer for satisfaction of an unsatisfied judgment. The Second Circuit Court of Appeals considered whether the

New York law regulates the operations of a risk retention group within the meaning of § 3902 of the LRRA. The Second Circuit concluded that it did, reasoning as follows:

> [The New York law] specifically governs the content of insurance policies, requiring insurers to place in their New York contracts a provision that is not contemplated by the LRRA, and that is not required by all other states. Application of the statute would therefore make it difficult for a foreign risk retention group to maintain uniform underwriting, administration, claims handling, and dispute resolution processes. . . . Requiring compliance with various state regulations governing the content of insurance policies would, in the aggregate, thwart the efficient interstate operation of risk retention groups.

*Wadsworth*, 748 F.3d at 108.

[11] We similarly conclude that the prohibition of an arbitration clause in insurance policies pursuant to § 25-2602.01(f)(4) regulates the operation of a risk retention group within the meaning of § 3902 of the LRRA. Although the Nebraska law prohibits a contract term rather than mandating a term like the New York law at issue in *Wadsworth*, the Nebraska statute nevertheless "governs the content of insurance policies" and prohibits a term that might be allowed by a foreign risk retention group's domiciliary state. Application of § 25-2602.01(f)(4) would make it difficult for a foreign risk retention group whose domiciliary state allowed arbitration clauses in insurance policies to maintain uniform underwriting, administration, claims handling, and dispute resolution processes nationwide, and it therefore would also "thwart the efficient interstate operation of risk retention groups." *Wadsworth, supra*. Because § 25-2602.01(f)(4) regulates the operation of a risk retention group, it is the type of statute from which a foreign risk retention group is "exempt" under § 3902 of the LRRA. In other words, we conclude that application of § 25-2602.01(f)(4) is preempted by the LRRA and that APIC's motion to compel arbitration had merit.

Notwithstanding our conclusion that § 25-2602.01(f)(4) is preempted by the LRRA, Speece makes several arguments

all to the effect that § 25-2602.01(f)(4) is within the type of requirements that the LRRA permits nondomiciliary states to impose on foreign risk retention groups. We find none of these arguments to have merit.

Speece first argues that § 25-2602.01(f)(4) falls within the exception of § 3902(a)(4) of the LRRA, which provides that although risk retention groups are exempt from any state law that would "discriminate against a risk retention group, . . . nothing in this section shall be construed to affect the applicability of State laws generally applicable to persons or corporations." Speece's argument relies on the understanding of the LRRA set forth in *Sturgeon v. Allied Professionals Ins. Co.*, 344 S.W.3d 205 (Mo. App. 2011), which emphasized that the purpose of the LRRA is to ensure that noncharter-ing states do not treat risk retention groups differently from other insurance companies. We note, however, that the language of § 3902(a)(4) of the LRRA means that "State laws generally applicable to persons or corporations" apply to risk retention groups, but it does not mean that risk retention groups must comport with laws generally applicable to insurance companies. The prohibition of arbitration clauses in § 25-2602.01(f)(4) applies to "insurance contracts," and it therefore applies specifically to insurance companies rather than generally to persons or corporations. The prohibition in § 25-2602.01(f)(4) is not one of general application, and it therefore is not excluded from the preemptive effect of § 3902.

Speece also refers us to § 3901(b) of the LRRA, which provides in relevant part that "[n]othing in this chapter shall be construed to affect . . . the law governing the interpretation of insurance contracts of any State . . . ." He argues that this provision saves § 25-2602.01(f)(4) from the preemptive effect of § 3902 because the state statutory law "determines the effect that is to be given to mandatory arbitration clauses in insurance contracts under Nebraska law." Brief for appellee at 9. We reject this argument. A statute prohibiting an arbitration clause does not govern the interpretation of the contract. It does not mandate or guide how contract terms are to be interpreted;

instead, it mandates that certain terms may not be included in the contract. It is not a "law governing the interpretation of insurance contracts" as used in § 3901(b).

Finally, Speece refers us to § 3905(c) of the LRRA, which provides that "[t]he terms of any insurance policy provided by a risk retention group . . . shall not provide or be construed to provide insurance policy coverage prohibited generally by State statute . . . ." He argues that this section provides that states may regulate the terms risk retention groups include in insurance policies and that therefore, the LRRA does not preempt § 25-2602.01(f)(4). Section 3905(c) does not apply to all terms of an insurance policy, only to terms setting forth the coverage provided under the policy. An arbitration clause does not concern—much less prohibit—the coverage provided, but instead governs how disputes between the parties are to be resolved.

[12] We determine that § 25-2602.01(f)(4) is a state law that would regulate the "operation of a risk retention group" as understood in § 3902(a) of the LRRA, that it is not the type of requirement that the LRRA allows states to impose on foreign risk retention groups, and that it is the type of statute from which Congress exempts foreign risk retention groups in § 3902 of the LRRA. We conclude therefore that by virtue of the exemption in § 3902, the LRRA, by its terms, preempts the application of § 25-2602.01(f)(4) to foreign risk retention groups.

Because of such preemption, the prohibition of arbitration clauses in insurance contracts in § 25-2602.01(f)(4) does not extend to insurance contracts issued by a foreign risk retention group such as APIC. The district court therefore erred when it denied APIC's motion to compel arbitration on the basis that the arbitration clause in the parties' insurance contract was prohibited by § 25-2602.01(f)(4).

*We Do Not Address Whether the Arbitration Clause Is Unconscionable.*

[13] In their briefs, both parties assert that Speece argued to the district court that even if § 25-2602.01(f)(4) is preempted

by federal law, the arbitration clause in the policy in this case is unconscionable and therefore unenforceable. However, because the district court concluded that § 25-2602.01(f)(4) was not preempted by federal law and that the Nebraska statute prohibited enforcement of the arbitration clause in the parties' insurance contract, the court did not address the issue of unconscionability. No cross-appeal has been filed claiming that the district court erred when it did not address the unconscionability issue. An appellate court will not consider an issue on appeal that the trial court has not decided. *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009). We therefore do not comment on whether the arbitration provision is unconscionable.

## CONCLUSION

Section 25-2602.01(f)(4) generally provides that an arbitration provision is not valid and enforceable in "any agreement concerning or relating to an insurance policy." We conclude that although the FAA does not preempt § 25-2602.01(f)(4), the LRRA does preempt the application of this Nebraska statute to foreign risk retention groups, and that as a result, the arbitration clause in the policy APIC issued to Speece was not prohibited by § 25-2602.01(f)(4). We conclude therefore that the district court erred when it overruled APIC's motion to compel arbitration on the basis that the arbitration clause was prohibited by § 25-2602.01(f)(4). We reverse the district court's order and remand the cause to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. MALUAL MAMER, APPELLANT.

853 N.W.2d 517

Filed September 19, 2014. No. S-13-785.

1. **Motions to Dismiss: Rules of the Supreme Court: Pleadings: Appeal and Error.** A court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Constitutional Law: Postconviction.** A manifest injustice common-law claim must be founded on a constitutional right that cannot and never could have been vindicated under the Nebraska Postconviction Act or by any other means.
3. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
4. **Effectiveness of Counsel: Pleas: Proof.** To show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.
5. **Effectiveness of Counsel: Proof.** The factual predicate for a claim based on ineffective assistance of counsel includes facts suggesting both unreasonable performance and the resulting prejudice.
6. **Pleadings: Proof: Time.** The factual predicate for a claim concerns whether the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts.
7. **Due Process.** Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

Appeal from the District Court for Douglas County: W. RUSSELL BOWIE III, Judge. Affirmed.

Kevin Ruser, of University of Nebraska Civil Clinical Law Program, and Sarah Safarik, Senior Certified Law Student, for appellant.

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

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

McCormack, J.

## NATURE OF CASE

Malual Mamer appeals from the district court's dismissal of his motion to vacate his plea and set aside his conviction under the common-law remedy for "manifest injustice" set forth in *State v. Gonzalez*.[1] Such procedure is only available if the defendant was never able to seek relief through the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012) or any other means. The district court determined that Mamer could have brought a postconviction action, but Mamer argues that postconviction relief was never available to him. Mamer alleges that he could not have reasonably discovered the factual predicate of his claim while incarcerated because he did not receive notice of the government's decision to deport him until after his release.

## BACKGROUND

On March 31, 2010, the U.S. Supreme Court decided *Padilla v. Kentucky*.[2] Subsequently, on February 9, 2011, Mamer was charged with first degree sexual assault, a Class II felony. On July 20, the State filed an amended information charging Mamer with attempted sexual assault in the first degree, a Class III felony. Mamer, represented by counsel, pled guilty to the reduced charge that same date. Before the court accepted Mamer's plea, Mamer was given the statutory advisement of Neb. Rev. Stat. § 29-1819.02 (Reissue 2008). The court stated: "Do you understand that if you are not a United States citizen, a conviction for this offense may have the consequences of removal from the United States, or denial of naturalization, pursuant to the laws of the United States?" Mamer responded that he did. On September 15, the court sentenced Mamer to 12 to 18 months' incarceration, with credit for 248 days served.

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[1] *State v. Gonzalez*, 285 Neb. 940, 942, 830 N.W.2d 504, 507 (2013).

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

The parties agree that Mamer was incarcerated for approximately 3 weeks following his conviction, and the State does not dispute that Mamer was not represented by counsel during the time of his incarceration. Mamer was discharged on October 7, 2011.

On February 9, 2012, Mamer filed a motion to withdraw his plea and vacate the judgment. Mamer alleged that not allowing him to withdraw his plea would result in "manifest injustice."

The motion specifically alleged that Mamer is not a citizen of the United States and that his trial counsel did not inform him before entering his plea of guilty that under 8 U.S.C. § 1227(a)(2)(A)(iii) (2012), deportation is presumptively mandatory for a conviction of attempted first degree sexual assault. Mamer alleged that pursuant to *Padilla*,[3] the failure of trial counsel to advise him of these immigration consequences denied him his Sixth Amendment right to effective assistance of counsel. Mamer alleged that he entered the plea of guilty without knowing the presumptively mandatory deportation consequences of the conviction. He then alleged that a "decision to reject the plea bargain would have been rational" had he been properly advised of the immigration consequences of his plea. Mamer alleged that he was currently in removal proceedings as a result of his conviction for attempted first degree sexual assault, and the exhibit attached to the motion showed that a notice to appear was sent by the U.S. Department of Homeland Security to Mamer on October 7, 2011. Mamer generally alleged that trial counsel's performance was deficient and that Mamer was prejudiced by the deficient performance. Mamer did not allege why he could not have brought this *Padilla* claim in an earlier postconviction motion or through other means.

The court granted the State's motion to dismiss, which we find in this context was a motion to dismiss for failure to state a claim. The court noted that the claim under the "manifest injustice" procedure recognized in *Gonzalez*[4] is only stated

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[3] *Id.*

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

when the Nebraska Postconviction Act is not, and never was, available as a means of asserting the ground or grounds justifying withdrawing the plea. Because *Padilla* was decided before Mamer's conviction and Mamer was thereafter in custody, the court concluded that the Nebraska Postconviction Act was available to Mamer, but that he failed to avail himself of it. Accordingly, the common-law procedure for withdrawing his plea was not available to Mamer.

Mamer appeals the dismissal of his motion to withdraw his plea and vacate the conviction under our common-law "manifest injustice" procedure.

## ASSIGNMENT OF ERROR

Mamer assigns that the district court erred in dismissing, without an evidentiary hearing, his motion to withdraw his plea and vacate the judgment.

## STANDARD OF REVIEW

[1] A court's grant of a motion to dismiss for failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[5]

## ANALYSIS

[2] The district court dismissed without a hearing Mamer's motion for relief under a manifest injustice claim. The question presented is whether, accepting all the allegations in the motion as true, Mamer stated a manifest injustice common-law claim to set aside his former plea. In *State v. Gonzalez*, we set forth the scope and parameters of a manifest injustice claim.[6] A manifest injustice common-law claim must be founded on a constitutional right that cannot and never could have been vindicated under the Nebraska Postconviction Act or by any other means.[7] It is a limited claim created to provide

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[5] *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

[6] *State v. Gonzalez, supra* note 1.

[7] See, *id.*; *State v. Chiroy Osorio*, 286 Neb. 384, 837 N.W.2d 66 (2013).

due process in the "very rare circumstance" where there is no other forum for vindicating a constitutional right.[8]

### Constitutional Right

[3] Mamer alleged that his constitutional right to effective assistance of counsel was violated.[9] To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[10]

[4] Mamer alleged that under *Padilla*, counsel's performance was deficient by failing to advise Mamer of the risk of the deportation consequences associated with his plea agreement.[11] The U.S. Supreme Court in *Padilla* did not address whether the plaintiff had demonstrated prejudice as a result of such an inadequate advisement. But we have said that to show prejudice when the alleged ineffective assistance relates to the entry of a plea, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have entered the plea and would have insisted on going to trial.[12]

Although Mamer's assertions of prejudice were unartful, taken together, we find they sufficiently alleged prejudice for purposes of a motion to dismiss. To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.[13] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable

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[8] *State v. Gonzalez, supra* note 1, 285 Neb. at 950, 830 N.W.2d at 511.

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

[10] See *State v. Dixon*, 286 Neb. 157, 835 N.W.2d 643 (2013).

[11] See *State v. Gonzalez, supra* note 1.

[12] *State v. Fester*, 287 Neb. 40, 840 N.W.2d 543 (2013).

[13] *Bruno v. Metropolitan Utilities Dist.*, 287 Neb. 551, 844 N.W.2d 50 (2014).

expectation that discovery will reveal evidence of the element or claim.[14]

### Cannot and Never Could Have Been Vindicated Under Nebraska Postconviction Act or By Any Other Means

Mamer did not, however, allege any facts suggesting that he could not have vindicated his ineffective assistance of counsel claim through other means. On that basis alone, the district court was correct in dismissing Mamer's motion. Even if Mamer had asked to amend the motion to make the assertions that now form the basis of the arguments made in this appeal, Mamer's motion would have been properly dismissed. In arguing that he could not have brought his ineffective assistance of counsel claim while incarcerated, Mamer fundamentally misunderstands what objective facts formed the factual predicate for his ineffective assistance of counsel claim.

In order to bring a postconviction action, a prisoner must be in custody under sentence and claiming a right to be released.[15] Unlike the situation recently addressed in *State v. Yuma*,[16] Mamer was in custody following the alleged ineffective assistance of counsel. And Mamer does not argue that the relatively limited time he was incarcerated was inadequate to vindicate his *Padilla* right if he had been aware of trial counsel's ineffective assistance during that time. Rather, Mamer argues he could not have vindicated his *Padilla* right in a postconviction action because he was no longer in custody by the time he was notified by the U.S. Department of Homeland Security of its intention to begin removal proceedings. Mamer argues in essence that his claim did not arise until after he was released from incarceration and knew of the immigration consequences of his plea—and thus knew that his trial counsel's performance was ineffective.

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[14] *Id.*

[15] § 29-3001(1).

[16] *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013).

Mamer and the State agree that the Nebraska Postconviction Act's definition of when a postconviction action accrues for purposes of the act's 1-year period of limitation is the proper framework for the question of whether Mamer's postconviction action could have been brought while he was still in custody. While § 29-3001 is not directly controlling of our manifest injustice analysis, we see no reason not to adhere to the Legislature's framework for when a postconviction claim could have been brought.

Under § 29-3001(4), the 1-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;
>
> (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.

The constitutional claim Mamer asserts was initially recognized by the U.S. Supreme Court before Mamer's plea. Thus, the subsection at issue is: "(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."

Mamer views the factual predicate as including the actual commencement of removal proceedings, especially since he lacked representation while incarcerated to inform him of the presumptively mandatory deportation law. The State argues that even if the factual predicate of a *Padilla* claim includes knowledge of the possibility of deportation, pro se inmates

are held to the same standards as inmates represented by new counsel to exercise due diligence in discovering potential claims.[17] Especially when Mamer was advised by the district court that his plea could have immigration consequences, Mamer with due diligence could have discovered his *Padilla* claim while still incarcerated. We agree with the State.

[5] The court in *Hasan v. Galaza*[18] addressed similar factual predicate language in the context of a habeas action and said that the factual predicate for a claim based on ineffective assistance of counsel includes facts suggesting both unreasonable performance and the resulting prejudice.

[6] The court in *Owens v. Boyd*,[19] addressing the habeas statute, explained that the discovery through due diligence of the factual predicate for a claim concerns whether the important objective facts could reasonably have been discovered, not when the claimant should have discovered the legal significance of those facts. The court reasoned that if courts were to wait "until the prisoner has spent a few years in the institution's law library" before the limitations period began to run, there would be "no effective time limit."[20]

Although Mamer believes that our discovery rule should be pertinent to our inquiry and that it furthers his argument, such limitations period likewise begins when the *facts* underlying the claim could reasonably be discovered.[21] This is distinct from discovering that those facts are actionable.[22]

The question is thus whether, while incarcerated, Mamer in the exercise of due diligence could have discovered the important objective facts concerning both trial counsel's deficient conduct and the resulting prejudice. Mamer plainly knew at the time of trial counsel's representation what trial counsel did and did not advise him of. But Mamer allegedly did not

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[17] See *State v. Sims*, 277 Neb. 192, 761 N.W.2d 527 (2009).

[18] *Hasan v. Galaza*, 254 F.3d 1150 (9th Cir. 2001).

[19] *Owens v. Boyd*, 235 F.3d 356 (7th Cir. 2001).

[20] *Id.* at 359.

[21] See § 29-3001(4)(b).

[22] *Franzen v. Deere and Co.*, 377 N.W.2d 660 (Iowa 1985).

know of *Padilla*, nor did he know of the immigration law that governed his future deportation. If Mamer did not know of *Padilla* or of the deportation law, he would not have had actual knowledge that counsel's advice was deficient. Further, without knowing the deportation consequences that counsel should have informed him of, Mamer would not have known of the prejudice, i.e., whether he would not have entered the plea and would have insisted on going to trial.

We conclude that Mamer's unawareness of the *Padilla* opinion, which was decided before his plea, does not concern the factual predicate for his ineffective assistance of counsel claim. Such alleged ignorance of *Padilla* concerns only the legal significance of the relevant objective facts.

In contrast, the existence of the applicable deportation law was an objective fact inasmuch as counsel would not be deficient for failing to advise of law that did not exist.

What Mamer misunderstands is that the existence of the deportation law itself forms the factual predicate, not the immigration officials' execution of deportation law. For counsel is not required under *Padilla* to predict the future execution of existing law or whether the law will change; counsel's duty is to advise upon the existing law's stated terms. And the prejudice element of a claim to set aside a plea due to ineffective assistance of counsel relates directly to the decision to plead guilty, not to whether the defendant was ultimately deported as a result of that decision.

In the exercise of due diligence—either with or without new counsel—Mamer could have discovered the applicable deportation law while incarcerated. The parties agree that the court advised Mamer at sentencing, in accordance with § 29-1819.02: "Do you understand that if you are not a United States citizen, a conviction for this offense may have the consequences of removal from the United States, or denial of naturalization, pursuant to the laws of the United States?" The advisement, which Mamer acknowledged he understood, put Mamer on notice of potential deportation laws. With due diligence, Mamer could have discovered that law while incarcerated. Because pro se inmates are held to the same standards

as inmates represented by new counsel,[23] the fact that Mamer was not represented by counsel while incarcerated does not change this conclusion.

Mamer therefore is unable to demonstrate an essential element of his manifest injustice claim: that he had no other means to vindicate the constitutional right at issue. While incarcerated, Mamer knew what trial counsel advised him of and, with due diligence, he should have discovered that counsel's advice omitted important deportation consequences. Accordingly, in the exercise of due diligence, Mamer would have discovered his claim while incarcerated and could have vindicated his claim through a postconviction action.

[7] We find no merit to Mamer's argument that dismissal of his manifest injustice claim denies him due process of law. The very definition of a manifest injustice claim encompasses the minimum protections of due process. If a claimant does not satisfy the elements of manifest injustice, due process has not been violated. Due process of law may be said to be satisfied whenever an opportunity is offered to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.[24] Mamer had the opportunity to vindicate his *Padilla* claim through a postconviction action, but he failed to exercise due diligence in discovering that claim and in bringing a postconviction action while incarcerated.

## CONCLUSION

Because Mamer should have discovered and brought his *Padilla* claim while incarcerated, the court properly granted the State's motion to dismiss Mamer's claim for manifest injustice relief.

AFFIRMED.

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[23] See *State v. Sims*, *supra* note 17.

[24] *State ex rel. Nebraska State Bar Assn. v. Jensen*, 171 Neb. 1, 105 N.W.2d 459 (1960).

# STATE OF NEBRASKA, APPELLEE, V. CURTIS H. LAVALLEUR, APPELLANT.

853 N.W.2d 203

Filed September 19, 2014. No. S-13-821.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.
3. **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.
4. **Evidence: Testimony: Words and Phrases.** In their ordinary meanings, "sexual behavior" refers to specific instances of conduct and "sexual predisposition" refers to more generalized evidence in the form of opinion or reputation testimony about what would often be referred to as "character."
5. **Sexual Misconduct: Evidence: Words and Phrases.** Evidence about the existence of a relationship between the complaining witness and a third party is not, by itself, evidence of "sexual behavior" or "sexual predisposition" under the rape shield statute.
6. **Evidence.** Relevancy requires only that the degree of probativeness be something more than nothing.
7. **Sexual Misconduct: Evidence: Appeal and Error.** The erroneous exclusion of evidence under Neb. Rev. Stat. § 27-412 (Cum. Supp. 2012) is subject to harmless error review.
8. **Trial: Juries: Verdicts: Appeal and Error.** Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
9. **Criminal Law: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
10. **Trial: Verdicts: Appeal and Error.** Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered was surely unattributable to the error.
11. **Constitutional Law: Criminal Law: Double Jeopardy: Evidence: New Trial: Appeal and Error.** The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after prejudicial error in a criminal trial so long as the sum of all the evidence admitted, erroneously or not, is sufficient to sustain a guilty verdict.

12. **Appeal and Error.** An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal but likely to recur during further proceedings.
13. **Criminal Law: Jury Instructions.** If there is an applicable instruction in the Nebraska Jury Instructions, the court should usually give this instruction to the jury in a criminal case.
14. **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 Lancaster County: ANDREW R. JACOBSEN, Judge. Reversed and remanded for a new trial.

Dennis R. Keefe, Lancaster County Public Defender, and Webb E. Bancroft 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

Curtis H. Lavalleur appeals from his conviction for attempted first degree sexual assault. The district court ruled that the rape shield statute, Neb. Rev. Stat. § 27-412 (Cum. Supp. 2012), prohibited Lavalleur from introducing evidence that the complaining witness was in an intimate relationship with a third party. Lavalleur sought to cross-examine the complaining witness about the relationship to establish a motive to falsely report that she had not consented to sexual activities with Lavalleur. On appeal, Lavalleur argues that evidence of an intimate relationship, standing alone, is not within the scope of the rape shield statute. We agree. We reverse, and remand for a new trial.

## II. BACKGROUND

The complaining witness, M.J., testified that in August 2012, she was working at a used-car dealership at which Lavalleur was the assistant manager. They socialized outside

of work but were not intimate. Lavalleur said that in July 2012, he told M.J. that he was developing feelings for her and that if the feelings were not reciprocal, they should distance themselves. M.J. told him she wanted to just be friends.

On August 17, 2012, Lavalleur and M.J. planned to repossess a vehicle together but changed their minds because it was too risky. Sometime before midnight, M.J. discovered that she was locked out of her apartment and asked Lavalleur to pick her up. M.J. testified that she had smoked marijuana before calling Lavalleur and wanted to drink at his house.

Once at Lavalleur's residence, Lavalleur and M.J. went to the basement and drank alcoholic beverages made by Lavalleur in a blender. M.J. testified that she had about four drinks and was very tired but not drunk; she did not feel sick or dizzy. Lavalleur testified they played drinking games and flirted.

According to M.J., sometime before they were ready to retire, she asked Lavalleur not to make her sleep alone in the basement. He said that she could sleep on a bed in the basement and that he would sleep on a nearby couch. M.J. testified that she remembered getting into bed but that she then fell into a deep sleep. When she awoke the next morning, she was naked from the waist down and Lavalleur, similarly unclothed, was lying next to her. M.J. said she could not remember anything when she woke up. Some of M.J.'s testimony suggested that Lavalleur might have drugged her. For example, M.J. testified that she did not see him mix the drinks and knew that consuming four drinks would not have made her "blackout like that." Lavalleur said they were drinking from the same blender.

According to Lavalleur, when M.J. said she was tired, he started upstairs for bed but she asked him not to leave her alone. Encouraged, Lavalleur retrieved a blanket and lay next to her. M.J. was on her side, and Lavalleur was behind her. Lavalleur believed M.J. was awake because she thanked him when he gave her the blanket. Lavalleur testified that he caressed M.J.'s body and that she responded with moaning and heavy breathing. Lavalleur testified that M.J.'s shorts were unbuttoned and unzipped when he entered the bed and

that he took this as further encouragement. Lavalleur began to stimulate her genitalia with his fingers and, after she did not resist, removed her shorts. Lavalleur testified that her responsive movements aided him in removing her shorts. But, Lavalleur testified, when his penis touched her leg, M.J. moved her hand back and said "no." Lavalleur did not believe it was a "firm" no and began to stimulate her with his fingers again. Lavalleur testified that M.J. did not resist the digital penetration but that, when he tried to position himself for intercourse again, she firmly told him no. At that point, Lavalleur testified, he was discouraged and went to sleep. In a police interview played for the jury, however, Lavalleur said that he tried to have intercourse with M.J. two or three times after she said no.

In the morning, M.J. did not accuse Lavalleur of misconduct, talk to him about their nakedness, or try to call anyone. Lavalleur said that when his alarm went off, M.J. was sitting on the couch and he thought she was hung over. On the way to work, M.J.'s silence was uncomfortable, so Lavalleur asked whether she remembered the previous night. She said she did not, and he told her they did not have intercourse. M.J. agreed that Lavalleur had briefly talked about the incident and assured her that things had not gone too far.

An hour after she got to work, M.J. called her roommate to pick her up so she that could shower at her apartment. After they got back to the apartment, M.J. testified, she told her roommate what happened. She planned to "let it go," but her roommate encouraged her to report the incident.

About 11:30 a.m., M.J., who had not showered, went to the hospital and was examined for sexual assault evidence. M.J. gave a statement to a police officer summoned by hospital personnel that was consistent with the testimony above. She vaguely remembered saying "no" to Lavalleur but could not remember where he touched her. M.J. told the officer that Lavalleur had touched her but that "it wasn't a big deal."

At the hospital, M.J. began text messaging Lavalleur and she agreed to send controlled messages at the officer's suggestion. The messages sent by Lavalleur were generally

consistent with his testimony at trial. He admitted to digitally penetrating M.J. but denied penile penetration. In response to M.J.'s accusation that she was unconscious, Lavalleur replied that he thought she was "somewhat still awake" because she responded to his touch. Lavalleur's messages also expressed regret, including statements that he had become "the very thing i hate" and "didn't know [he] was capable of doing something like that." Lavalleur testified that he expressed remorse because M.J. was obviously upset and he wanted to placate rather than argue.

There was no sperm found on any of the vaginal swabs from the sexual assault collection kit. The kit also contained swabs from M.J.'s thighs, breasts, and neck. Lavalleur was a weak contributor to a DNA sample from the swab of M.J.'s right thigh. The forensic scientist who tested the swab of M.J.'s right thigh testified that the DNA sample was not semen and that its source may be other bodily fluid or skin cells.

The State charged Lavalleur with first degree sexual assault and attempted first degree sexual assault. Before trial, the State moved in limine to exclude evidence of M.J.'s past sexual behavior and Lavalleur filed a notice of his intent to offer evidence under § 27-412. At the pretrial hearing, Lavalleur explained that he wanted to show that M.J. had an intimate relationship with a third party with whom she had a fight on August 17, 2012. Lavalleur argued that the relationship showed that M.J. had a motive to falsely report a sexual assault. Lavalleur stated that he would not question M.J. about her sexual conduct but might ask whether the relationship was intimate.

The district court excluded evidence of M.J.'s relationship with the third party under § 27-412. In response to Lavalleur's argument that the exclusion violated his confrontation rights, the court stated that the relationship was relevant only if M.J. had a need to conceal or explain her whereabouts on the night of August 17, 2012. The court reasoned that unless M.J.'s partner was aware that M.J. had spent the night with Lavalleur when M.J. first reported the assault, the relationship was irrelevant.

At trial, defense counsel made an offer of proof out of the jury's presence by questioning M.J. about her relationship with a woman who was not her roommate. M.J. admitted that she was involved with a woman named "Sable" and that they had a fight on August 17, 2012, and were still fighting when M.J. went to Lavalleur's house. M.J. testified that she called Lavalleur to pick her up because Sable would not answer her telephone. Sable visited M.J. at the hospital, and M.J. told her that she had awoke without pants and suspected that something happened.

The jury found Lavalleur not guilty of first degree sexual assault but guilty of attempted first degree sexual assault, which is a Class III felony. The court sentenced Lavalleur to imprisonment for 24 to 36 months.

## III. ASSIGNMENTS OF ERROR

Lavalleur assigns, restated, that the court erred by (1) prohibiting evidence of M.J.'s relationship with a third party; (2) failing to properly instruct the jury on attempted first degree sexual assault; and (3) imposing an excessive sentence. Lavalleur also assigns that (4) he was denied effective assistance of counsel and (5) the evidence was insufficient to sustain his conviction for attempted first degree sexual assault.

## IV. STANDARD OF REVIEW

[1,2] Statutory interpretation presents a question of law.[1] When reviewing questions of law, an appellate court resolves the question independently of the lower court's conclusion.[2]

[3] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[3]

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[1] *Underwood v. State Patrol*, 287 Neb. 204, 842 N.W.2d 57 (2014).

[2] See *id.*

[3] *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

## V. ANALYSIS

### 1. Evidence of M.J.'s Relationship With a Third Party

Lavalleur argues that the court erred by excluding evidence of a romantic relationship between M.J. and another woman under the rape shield statute. Lavalleur contends that the testimony he sought to elicit from M.J. established a motive to fabricate and was not evidence of her past sexual behavior or sexual predisposition. The State argues that the rape shield statute bars the admission of the testimony and that the testimony is irrelevant unless M.J.'s girlfriend knew M.J. had spent the night at Lavalleur's house when M.J. first reported a sexual assault. We conclude that the rape shield statute does not bar evidence of M.J.'s relationship with another woman, that it is relevant to her credibility, and that its exclusion was not harmless.

#### (a) Rape Shield Statute

Nebraska's rape shield statute is codified in the Nebraska rules of evidence. Subject to several exceptions, § 27-412(1) bars "[e]vidence offered to prove that any victim engaged in other sexual behavior" and "[e]vidence offered to prove any victim's sexual predisposition" in civil or criminal proceedings involving sexual misconduct. Before 2010,[4] the rape shield statute was codified at Neb. Rev. Stat. § 28-321 (Reissue 2008) and generally prohibited evidence of the complaining witness' "past sexual behavior" in sexual assault cases.

We recognized two purposes of the previous rape shield statute which we also find applicable to § 27-412. First, the statute protects rape victims from grueling cross-examination about their past sexual behavior or sexual predisposition that too often yields testimony of questionable relevance.[5] Second, the rape shield statute prevents the use of evidence of the complaining witness' past sexual conduct with third parties or sexual predisposition from which to infer consent or undermine

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[4] 2009 Neb. Laws, L.B. 97, § 3.

[5] See *State v. Lessley*, 257 Neb. 903, 601 N.W.2d 521 (1999).

the witness' credibility.[6] The rape shield statute is not meant to prevent defendants from presenting relevant evidence, but to deprive them of the opportunity to harass and humiliate the complaining witness and divert the jury's attention to irrelevant matters.[7] We note that, like its predecessor,[8] § 27-412 is patterned after its counterpart in the Federal Rules of Evidence.[9] The advisory committee notes to Fed. R. Evid. 412, the federal rape shield rule, explain that the rule "aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process."[10]

The problems rape shield statutes were meant to address are well established. Traditionally, courts often admitted evidence of a complaining witness' prior sexual activity as relevant to consent and credibility.[11] As one court explained, the rationale was that "'[n]o impartial mind can resist the conclusion that a female who has been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure.'"[12] Fear of a courtroom inquisition into their sexual activities led many victims to forgo reporting sexual assaults altogether.[13] Evidence of the complaining witness' sexual history was usually of little probative value and was instead aimed to inflame "nebulous notions of unchastity, impurity, and immorality."[14]

Lavalleur's attorney described the testimony he sought to elicit from M.J. at a pretrial hearing and in an offer of proof

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[6] See *State v. Sanchez-Lahora*, 261 Neb. 192, 622 N.W.2d 612 (2001).

[7] *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

[8] *State v. Sanchez-Lahora, supra* note 6.

[9] Compare § 27-412(1) with Fed. R. Evid. 412(a).

[10] Fed. R. Evid. 412, advisory committee notes on 1994 amendment.

[11] *State v. Hopkins*, 221 Neb. 367, 377 N.W.2d 110 (1985).

[12] *Id.* at 372, 377 N.W.2d at 114, quoting *Lee v. State*, 132 Tenn. 655, 179 S.W. 145 (1915).

[13] See *State v. Hopkins, supra* note 11.

[14] *Id.* at 373, 377 N.W.2d at 115.

made during trial. In response to the State's motion in limine, Lavalleur's counsel explained:

> I want to be able to talk about this particular young lady who is involved in a relationship with someone else and that on the night this happened, they were in a fight and that they had broken up and now she ends up over at . . . Lavalleur's house that — as a way of why she would maybe make a false report, as to her credibility or as to her bias.

The offer of proof made at trial was consistent with this purpose:

> [Defense counsel:] [O]n August 17, 2012, you were involved in a relationship, right?
>
> [M.J.:] Correct.
>
> Q. And that was with who?
>
> A. Sable.
>
> Q. And on that particular day, were you and — had a fight with Sable?
>
> A. Yes.
>
> Q. Okay. And were you still fighting with her that night when you went to . . . Lavalleur's?
>
> A. Yes.
>
> Q. And that was one of the reasons that you called . . . Lavalleur is because not only was [your roommate] not answering her phone but Sable wasn't answering her phone to help you out, too, right?
>
> A. Correct.
>
> . . . .
>
> Q. Now, the next day when you went to the hospital, you said you had some friends — you had to call a friend to come down, is that right?
>
> A. That's right.
>
> Q. Was it Sable that came down?
>
> A. Yes.
>
> . . . .
>
> Q. When did she learn about what happened?
>
> A. When she had gotten there.
>
> . . . .

> Q. . . . [D]id you discuss fully with Sable what — what you knew at that point?
>
> . . . .
>
> A. I didn't tell her the details of it until later that night, but she knew basically why I was there.
>
> Q. Did you tell her you were at — that you went — had fallen asleep at . . . Lavalleur's house, and you woke up with your pants off?
>
> A. Correct.
>
> Q. Did you tell her you suspected something happened?
>
> A. Yes.

In response to questioning from the court, Lavalleur's counsel stated that he would not cross-examine M.J. about her sexual conduct with Sable, but that he might ask whether the relationship was intimate.

[4,5] We conclude that M.J.'s relationship with Sable was not evidence of "sexual behavior" or "sexual predisposition." Thus, the court erred in prohibiting Lavalleur from cross-examining M.J. about the relationship under § 27-412(1). In their ordinary meanings, "'sexual behavior' refers to specific instances of conduct and 'sexual predisposition' refers to more generalized evidence in the form of opinion or reputation testimony about what we would often call 'character.'"[15] Questioning about the existence of a relationship between the complaining witness and a third party does not, by itself, implicate either form of evidence regulated by § 27-412:

> If questioning about this subject were to lead to evidence or questions about details of particular acts, encounters, or practices, then such evidence and quests are indeed covered by rape shield legislation . . . . On the other hand, it seems equally clear that *the fact* that the complaining witness is in an ongoing relationship, particularly if it entails living together, an engagement, or some other form of commitment, would not ordinarily be described as sexual conduct even if the relationship involves ongoing

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[15] 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:78 at 256 (4th ed. 2013).

> sexual intimacy. Ordinary notions of privacy would not be offended by questions or evidence disclosing such relationships and some routine details, such as how often the people see each other or how long they have lived together, and even the basic question whether the relationship includes sexual intimacy.[16]

The testimony Lavalleur sought from M.J. did not stray into the sexual acts performed with her partner. Nor was it an appeal to the jurors' sexual mores or an attempt to inflame perceived prejudices. Lavalleur sought to establish that M.J. had a motive to falsify her accounting of the events of August 17, 2012. Her relationship with Sable and the strength of their bond—including whether they were intimate—are relevant to M.J.'s motivation to report a sexual assault. Her testimony would not amount to proof of her sexual behavior, involve a "propensity inference based on sexual acts," or be a "significant invasion of [her] personal privacy."[17]

The potential for the jury to infer that M.J. has engaged in sexual acts does not bring evidence of her relationship with Sable within § 27-412. Evidence is not barred by the rape shield statute "simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct."[18] The jury could have drawn similar inferences from M.J.'s marital status and the existence of her daughter, to which she testified on cross-examination without objection.

The Georgia Supreme Court reached a similar conclusion in *Richardson v. State*.[19] The defendant in *Richardson* was convicted of rape and kidnapping with bodily injury. He admitted that he had sexual contact with the complaining witness but claimed it was consensual. During cross-examination of the complaining witness, the defense sought to inquire about her relationship with a former boyfriend. The witness had

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[16] *Id.* at 263-64 (emphasis in original).

[17] See *id.* at 264.

[18] *People v. Cobb*, 962 P.2d 944, 951 (Colo. 1998).

[19] *Richardson v. State*, 276 Ga. 639, 581 S.E.2d 528 (2003).

been wearing a jacket belonging to her ex-boyfriend during the alleged sexual assault, and the jacket had become stained with blood and semen. The defendant theorized that the complaining witness fabricated the sexual assault to account for the stains and rekindle the relationship with her former boyfriend. The trial judge refused to permit questioning about the relationship under Georgia's rape shield statute, which generally prohibited evidence "'relating to the past sexual behavior of the complaining witness . . . .'"[20]

The Georgia Supreme Court reversed, concluding that questioning about the existence of the complaining witness' prior relationship with a third party was not evidence of past sexual behavior. Furthermore, "[e]vidence merely that the [complaining witness] has or had a romantic relationship with another man" did not amount to character evidence.[21] As long as the defendant "confined his questioning to the non-sexual nature of the [complaining witness'] former relationships," the rape shield statute was not a bar to admissibility.[22] As to the defendant's theory of relevance, the court acknowledged that the complaining witness "was not compelled to return the stained jacket and had other options."[23] But the fact that she could have simply thrown the jacket away went to the strength of the defendant's theory and involved "credibility determinations . . . properly left to the jury."[24]

In another analogous case, the Colorado Court of Appeals reversed the exclusion of evidence under a rape shield statute in *People v. Golden*.[25] According to the prosecution, the female complaining witness lived with two men and another woman in a rental house managed by the defendant. The defendant went to the residence and asked the complaining witness to accompany him in his vehicle for the purpose of signing a lease.

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[20] *Id.* at 640, 581 S.E.2d at 529.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 641, 581 S.E.2d at 530.

[24] *Id.*

[25] *People v. Golden*, 140 P.3d 1 (Colo. App. 2005).

While in the vehicle, the prosecution claimed, the defendant sexually assaulted her and then dropped her off at the rental unit. The defendant claimed the intercourse was consensual. When the complaining witness entered her house, she collapsed and told her roommates that the defendant had assaulted her. At trial, the defendant sought to cross-examine her about a "committed romantic relationship" with her female roommate to establish a motive to lie about whether she had consented to intercourse.[26] The trial judge refused to permit the line of questioning under Colorado's rape shield statute, which generally prohibited "[e]vidence of specific instances," "opinion evidence," and "reputation evidence" of the complaining witness' "sexual conduct."[27]

The appellate court reversed, holding that cross-examination about the complaining witness' intimate relationship with her roommate was not evidence of sexual conduct. The court "recognize[d] that a 'committed romantic relationship' between adults may be generally understood to have a sexual component, [but] the initial questions did not, standing alone, inquire into that component or any sexual conduct."[28] Instead of subjecting the complaining witness to a "fishing expedition into her past sexual conduct," the evidence sought to be elicited "called into question her credibility and her possible motive in telling her roommates that she had been sexually assaulted."[29] The potential for the jury to draw inferences about her past sexual conduct did not mandate exclusion under the rape shield statute.

We similarly conclude that Lavalleur's intended cross-examination of M.J. would not have amounted to a prohibited fishing expedition. Evidence of M.J.'s relationship with Sable is not within the ordinary meanings of "sexual behavior" or "sexual predisposition" and does not implicate the purposes for which § 27-412 was enacted. Thus, we turn to

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[26] *Id.* at 3.

[27] *Id.* (emphasis omitted).

[28] *Id.* at 5.

[29] *Id.* at 6.

whether the evidence was relevant and whether its exclusion was harmless.

(b) M.J.'s Relationship Was Relevant

In concluding that the rape shield statute barred evidence of M.J.'s relationship with Sable, the court indicated that it was irrelevant. It stated that Lavalleur could not adduce evidence of the relationship until he could "show that [M.J.] had some need to cover or to explain her whereabouts or whom she was with at the time she made the report." The court reasoned that M.J. did not have a motive to fabricate unless, at the time she made the report, Sable was aware that M.J. had spent the night at Lavalleur's house. We disagree.

[6] Relevancy is governed by Neb. Rev. Stat. § 27-401 (Reissue 2008). Under § 27-401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The bar set by § 27-401 is not a high one. Relevancy requires only that the degree of probativeness be something more than nothing.[30]

We cannot say that the probativeness of M.J. and Sable's relationship amounted to nothing. It is not improbable that M.J.'s absence from her apartment on the night of August 17, 2012, was noticed and that she would eventually have to explain her whereabouts to Sable. A report of sexual assault would have helped dispel any air of infidelity. While it would make Lavalleur's case stronger if Sable confronted M.J. before M.J. reported the sexual assault, the absence of this circumstance does not wholly strip the relationship of probative value. Whether Lavalleur's theory was credible is for the jury.

(c) Exclusion of the Evidence Was Not Harmless

[7-10] The erroneous exclusion of evidence of M.J.'s relationship with Sable under § 27-412 is subject to harmless

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

error review. Errors, other than structural errors, which occur within the trial and sentencing process, are subject to harmless error review.[31] Harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.[32] In a jury trial of a criminal case, an erroneous evidentiary ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.[33] Harmless error review looks to the basis on which the trier of fact actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered was surely unattributable to the error.[34]

The State has not demonstrated that the exclusion of evidence about M.J.'s relationship with Sable was harmless beyond a reasonable doubt. Two considerations lead us to this conclusion. First, M.J.'s testimony, and therefore credibility, was crucial to the State's case.[35] No other witness for the State was present in Lavalleur's basement on the night of August 17, 2012. The importance of M.J.'s testimony was heightened by the paucity of physical evidence. What little physical evidence the State produced was consistent with Lavalleur's version of events. Second, the State's case against Lavalleur was not overwhelming.[36] M.J.'s memory of what occurred after she got into bed was very limited, and Lavalleur testified that he acted only on the belief that M.J. had given consent. We also note that to acquit Lavalleur of the sexual assault charge, the jury necessarily found that M.J. consented to digital penetration.

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[31] *State v. Pangborn*, 286 Neb. 363, 836 N.W.2d 790 (2013).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] See *Olden v. Kentucky*, 488 U.S. 227, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988).

[36] See *id.*

### 2. Sufficiency of the Evidence

[11] Lavalleur argues that the evidence was insufficient to support his conviction for attempted first degree sexual assault. Our conclusion that the district court's exclusion of evidence under § 27-412 was erroneous and prejudicial requires us to determine whether retrial is permitted. The Double Jeopardy Clauses of the federal and state Constitutions do not forbid a retrial after prejudicial error in a criminal trial so long as the sum of all the evidence admitted, erroneously or not, is sufficient to sustain a guilty verdict.[37]

Though the evidence was not overwhelming, it is sufficient evidence to support Lavalleur's conviction for attempted sexual assault. Lavalleur testified that M.J. said "no"—or made a sound that the jury could interpret as "no"—after the first time he tried to initiate penile penetration. Lavalleur testified that, despite registering M.J.'s disapproval, he made a second effort to penetrate M.J. with his penis. Four days after the incident, Lavalleur told a police investigator that he tried again "two or three times" after M.J. expressed her lack of consent. From this evidence, the jury could infer that, before aborting his subsequent attempts to penetrate M.J. with his penis, Lavalleur developed an intent to penetrate M.J. without her consent or at a time when she was incapable of resisting or appraising the nature of her conduct.

### 3. Jury Instructions

[12] Though we need not reach Lavalleur's assignment that the jury instruction for attempted first degree sexual assault was erroneous, we address the issue because it is likely to recur on remand. An appellate court may, at its discretion, discuss issues unnecessary to the disposition of an appeal but likely to recur during further proceedings.[38]

To convict Lavalleur of first degree sexual assault, the State had to prove that he subjected M.J. to sexual penetration without her consent or when he knew or should have known that M.J. was "mentally or physically incapable of

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[37] See *State v. Pangborn, supra* note 31.

[38] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

resisting or appraising the nature of . . . her conduct."[39] The criminal attempt statute, Neb. Rev. Stat. § 28-201 (Cum. Supp. 2012), required the State to prove that Lavalleur "[i]ntentionally engage[d] in conduct which, under the circumstances as he . . . believe[d] them to be, constitute[d] a substantial step in a course of conduct intended to culminate in his . . . commission of the crime." Section 28-201(3) provides that conduct is not a substantial step "unless it is strongly corroborative of the defendant's criminal intent." So, to find Lavalleur guilty of attempted first degree sexual assault, the jury had to find that he intended to subject M.J. to penetration either without her consent or when she was incapable of resisting or appraising the nature of her conduct, and that Lavalleur took a substantial step that strongly corroborated this intent.

Instruction No. 4, which the court gave the jury for the charge of attempted first degree sexual assault, failed to adequately describe the proof needed for conviction:

> The elements which the state must prove beyond a reasonable doubt in order to convict . . . Lavalleur of attempted first degree sexual assault are:
>
> 1. . . . Lavalleur intended to subject [M.J.] to sexual penetration; and
>
> 2. . . . Lavalleur intentionally engaged in a substantial step in a courseof [sic] conduct intended to culminate in subjecting [M.J.] to sexual penetration; and
>
> 3. [M.J.] did not give her consent; and
>
> 4. . . . Lavalleur did so on, about, or between August 17, 2012, and August 18, 2012, in Lancaster County, Nebraska.

This instruction is flawed in two respects. First, it fails to state that the substantial step must strongly corroborate Lavalleur's criminal intent. Second, the statement that one of the "elements" of attempted first degree sexual assault is that Lavalleur intended to subject M.J. to sexual penetration might cause confusion about the requisite state of mind. The State has to prove not only that Lavalleur intended to subject M.J. to sexual penetration, but also that he intended to do so without

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[39] Neb. Rev. Stat. § 28-319(1) (Reissue 2008).

her consent or when she was incapable of resisting or appraising the nature of her conduct.[40]

[13] We note that the Nebraska Jury Instructions include an instruction for criminal attempt.[41] If there is an applicable instruction in the Nebraska Jury Instructions, the court should usually give this instruction to the jury in a criminal case.[42]

### 4. Remaining Assignments of Error

[14] Because we conclude that the exclusion of evidence of M.J.'s relationship with Sable requires a new trial, we do not reach Lavalleur'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.[43]

## VI. CONCLUSION

We conclude that evidence of M.J.'s relationship with another woman was not barred by the rape shield statute. Cross-examination about the existence of an intimate relationship does not, standing alone, amount to evidence of "sexual behavior" or "sexual predisposition." Furthermore, the relationship was relevant even if M.J.'s girlfriend was not yet aware that M.J. spent the night at Lavalleur's house at the time M.J. reported a sexual assault. The exclusion of evidence was not harmless considering the importance of M.J.'s testimony to the State's case and the lack of overwhelming evidence against Lavalleur. But, though the evidence was not overwhelming, it was sufficient to support Lavalleur's conviction. Accordingly, we reverse Lavalleur's conviction for attempted first degree sexual assault and remand the cause for a new trial on that charge.

Reversed and remanded for a new trial.

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[40] See, §§ 28-201(1)(b) and 28-319(1)(b); 2 Wayne R. LaFave, Substantive Criminal Law § 11.3(a) (2d ed. 2003).

[41] NJI2d Crim. 3.3.

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

[43] *Lang v. Howard County*, 287 Neb. 66, 840 N.W.2d 876 (2013).

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. KEITH A. PRETTYMAN, RESPONDENT.

853 N.W.2d 856

Filed September 19, 2014. No. S-14-462.

Original action. Judgment of suspension.

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

PER CURIAM.

## INTRODUCTION

Keith A. Prettyman, respondent, was admitted to the practice of law in the State of Nebraska on July 2, 1976. At all relevant times, he was engaged in the private practice of law in Lincoln, Nebraska. On May 22, 2014, the Counsel for Discipline of the Nebraska Supreme Court filed formal charges against respondent consisting of one count. In the one count, 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)(1) through (5) and (b) (communications), and 3-508.4(a) and (c) (misconduct).

On June 30, 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)(1) through (5) and (b), and 3-508.4(a) and (c). In the conditional admission, 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 a 2-year suspension.

The proposed conditional admission included a declaration by the Counsel for Discipline, stating that respondent's request for a 2-year suspension is appropriate.

Upon due consideration, we approve the conditional admission and order that respondent be suspended from the practice of law for a period of 2 years.

## FACTS

The formal charges state that at all times relevant to these proceedings, respondent served as outside counsel for Swanson Russell Associates (Swanson Russell). The one count contained in the formal charges stem from respondent's representation of Swanson Russell.

In November 2009, an I-129 "Petition for Nonimmigrant Worker" status was filed with the U.S. Citizenship and Immigration Services by someone other than respondent on behalf of an individual who was a citizen and national of Indonesia (individual). The purpose of filing the I-129 petition was to classify the individual as a nonimmigrant worker in a specialty occupation. The petition was approved on January 13, 2010, and it provided a change of the individual's status to H-1B status so that the individual could work for a certain employer in Lincoln. The individual's H-1B status was good until November 14, 2012. However, the individual's initial employer went out of business later in 2010.

In 2010, Swanson Russell wished to hire the individual. Swanson Russell contacted respondent, who agreed to represent Swanson Russell to ensure that the individual could legally work for Swanson Russell and maintain his correct status as a nonimmigrant worker. Respondent had not previously handled this type of immigration matter. The formal charges state that respondent failed to educate himself so that he could competently handle Swanson Russell's legal matter, and respondent failed to consult with a lawyer of established competence in the field.

In order for the individual to be legally employed by Swanson Russell, a new I-129 petition needed to be filed. Beginning in late 2010, respondent falsely informed Swanson Russell that he had filed the I-129 petition on behalf of the individual. Respondent's untruthfulness regarding the filing of the I-129 petition continued through July 2013.

In August 2013, Swanson Russell hired an immigration attorney to determine what could be done to complete the processing of the individual's I-129 petition. The immigration attorney discovered that respondent had not timely filed the I-129 petition and had repeatedly lied to Swanson

Russell about the matter. As a result of respondent's failure to competently handle the matter, it was necessary that the individual return to Indonesia in order to avoid additional legal difficulties.

The formal charges allege that respondent's actions constitute violations of his oath of office as an attorney as provided by § 7-104 and professional conduct rules §§ 3-501.1, 3-501.3, 3-501.4(a)(1) through (5) and (b), and 3-508.4(a) and (c).

## 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)(1) through (5) and (b), and 3-508.4(a) and (c), 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

Respondent is suspended from the practice of law for a period of 2 years, 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. 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) 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.

STEPHAN, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
ALI J. ABDULLAH, APPELLANT.
853 N.W.2d 858

Filed September 26, 2014. No. S-12-908.

1. **Effectiveness of Counsel: Appeal and Error.** Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.
2. **Appeal and Error.** Whether an assignment of error and accompanying argument is too vague to be sufficiently raised before the appellate court is a question of law.
3. **Effectiveness of Counsel: Records: Appeal and Error.** The trial record reviewed on appeal is devoted to issues of guilt or innocence and, as such, does not usually address issues of counsel's performance.
4. **Effectiveness of Counsel: Appeal and Error.** When a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record.
5. **Trial: Effectiveness of Counsel: Evidence: Appeal and Error.** An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.
6. **Appeal and Error.** A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.

7. **Postconviction: Effectiveness of Counsel: Records: Appeal and Error.** In the case of an argument presented for the purpose of avoiding procedural bar to a future postconviction action, appellate counsel must present the claim with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.
8. **Evidence: Appeal and Error.** An appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals affirmed in part, and in part reversed.

Dennis R. Keefe, Lancaster County Public Defender, John C. Jorgensen, and, on brief, Elizabeth D. Elliott, for appellant.

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

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

MCCORMACK, J.

## NATURE OF CASE

Ali J. Abdullah was convicted in a bench trial of first degree assault. With counsel different from his trial counsel, Abdullah appealed to the Nebraska Court of Appeals. Abdullah argued that there was insufficient evidence to support the conviction and that the sentence was excessive. Abdullah also raised three points of ineffective assistance of trial counsel, expressly to avoid waiver of those issues for a future postconviction motion. In a memorandum opinion filed July 11, 2013, the Court of Appeals found no merit to the claims of insufficiency of the evidence and excessive sentence. The Court of Appeals also found Abdullah's ineffective assistance of counsel claims lacked "merit," because Abdullah made insufficient allegations of fact that would support findings of prejudice. We granted further review, primarily to address the question of

whether Abdullah sufficiently alleged his ineffective assistance of counsel claims.

## BACKGROUND

Abdullah's first degree assault conviction arises from a fight between Abdullah and Adrian Jacob, who had previously been in a relationship with Abdullah's girlfriend. The fight occurred in the parking lot of the girlfriend's apartment complex.

Jacob testified that when he attempted to shake hands with Abdullah, Abdullah tried to punch him in the face. After some wrestling, the girlfriend yelled for them to stop. Jacob testified that he stopped fighting and dropped his hands. At that point, Abdullah head butted him and broke his eye socket.

Abdullah testified that Jacob attacked him first by slapping him in the face. Then, in the course of wrestling with Jacob to defend himself, they found themselves underneath one of the apartment's balconies. According to Abdullah, Jacob accidentally hit his own face against one of the balcony's wooden support beams.

At the sentencing hearing, Abdullah's trial counsel asked the court to "consider running [the assault sentence] consecutive to the federal case . . . but we would ask the Court to consider the totality of the circumstances and a sentence toward the lower end of the statutory scheme." Abdullah was serving a federal sentence of 24 months for a parole violation arising from the same assault. The trial court sentenced Abdullah to 6 to 10 years' imprisonment, to be served consecutively to any other sentence Abdullah was serving. Abdullah has a criminal history, including two prior convictions for assault.

Abdullah had private counsel at trial, but was represented by the public defender on appeal. The public defender argued on appeal that the trial court erred in convicting Abdullah upon insufficient evidence and in imposing an excessive sentence. The public defender also raised three issues of ineffective assistance of trial counsel and asked the Court of Appeals to review the bill of exceptions and transcript to determine whether there was a sufficient record to evaluate those claims on direct appeal or whether an additional evidentiary hearing

was necessary. The public defender indicated that he did not believe the ineffective assistance of counsel issues could be determined upon the trial record, but he raised those issues so that they would not later be deemed waived for purposes of a postconviction motion. The public defender generally asserted as to all three alleged acts of ineffective assistance of trial counsel that "there is a reasonable probability that but for [Abdullah's] counsel's performance, the result of the proceedings would have been different."[1]

The Court of Appeals held that the weight and credibility of the conflicting testimony was a matter for the trial court and that, therefore, the evidence was sufficient to support the conviction.

The Court of Appeals further held that the sentence was not excessive. The Court of Appeals noted Abdullah's "extensive criminal record" and the fact that the sentence was at the lower end of the statutory limits. The Court of Appeals concluded that the trial court did not abuse its discretion.

As for the three claims of ineffective assistance of trial counsel, the Court of Appeals held they were "without merit."

The first ineffective assistance issue raised by the public defender was that trial counsel "failed to adequately advise and inform [Abdullah] prior to his decision between a bench trial and a trial by jury."[2] The Court of Appeals reasoned that Abdullah had failed to specifically state what advice he had received from counsel or why, particularly, this advice was insufficient. Furthermore, the Court of Appeals reasoned that Abdullah had failed to allege any specific facts that would show his trial counsel interfered with his freedom to decide whether to waive his right to a jury trial. Finally, the Court of Appeals said that Abdullah had failed to allege he would have chosen to be tried by a jury or that the outcome of the trial would have been different had he done so.

The second ineffective assistance issue raised by the public defender was that trial counsel "failed to call at least two

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[1] Brief for appellant at 13.

[2] *Id.*

witnesses that [Abdullah] informed would be beneficial to his case."[3] The Court of Appeals reasoned that Abdullah failed to disclose in his appellate brief the identity of the alleged favorable witnesses or exactly what those witnesses' testimony would have been. Thus, Abdullah again failed to allege how the failure to call those alleged witnesses prejudiced him. The Court of Appeals stated, "Therefore, Abdullah has not provided sufficient allegations to support this assertion for ineffective assistance of counsel."

The last ineffective assistance issue raised by the public defender was that trial counsel had failed to ask the court to impose Abdullah's sentence concurrently with the corresponding federal sentence. The Court of Appeals recognized that counsel asked for consecutive sentences, but held that Abdullah had failed to surpass the "high hurdle in this case because of the deference normally given to a trial court's decision to impose consecutive sentences." The Court of Appeals found that the public defender's argument in the appellate brief that the trial court "likely failed to consider running [Abdullah's] sentence concurrently"[4] was "not a sufficient showing." The Court of Appeals stated that Abdullah "has not shown that the proceedings would have resulted differently but for his attorney's statement."

We granted Abdullah's petition for further review.

## ASSIGNMENTS OF ERROR

Abdullah assigns that the trial court erred in (1) finding the evidence sufficient to support his conviction and (2) imposing an excessive sentence. Abdullah also assigns that trial counsel was ineffective.

## STANDARD OF REVIEW

[1] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[5]

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[3] *Id.*

[4] *Id.* at 13-14.

[5] See *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[2] Whether an assignment of error and accompanying argument is too vague to be sufficiently raised before the appellate court is a question of law.

## ANALYSIS

### Specificity of Ineffective Assistance of Counsel Claims

[3-5] We granted further review in this case to clarify the necessary specificity of allegations of ineffective assistance of trial counsel on direct appeal for purposes of avoiding waiver of such claims in a later postconviction motion. The trial record reviewed on appeal is devoted to issues of guilt or innocence and, as such, does not usually address issues of counsel's performance.[6] Nevertheless, it is our longstanding rule that when a defendant's trial counsel is different from his or her counsel on direct appeal, the defendant must raise on direct appeal "any issue of trial counsel's ineffective performance which is known to the defendant or is apparent from the record."[7] Otherwise, the ineffective assistance of trial counsel issue will be procedurally barred.[8] Once raised, the appellate court will determine whether the record on appeal is sufficient to review the merits of the ineffective performance claims.[9] An ineffective assistance of counsel claim

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[6] See *id*.

[7] *Id*. at 767, 848 N.W.2d at 576. See, also, *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012); *State v. Molina*, 279 Neb. 405, 778 N.W.2d 713 (2010); *State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009).

[8] See, e.g., *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013); *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013); *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011); *State v. Vo*, 279 Neb. 964, 783 N.W.2d 416 (2010); *State v. Gibilisco*, 279 Neb. 308, 778 N.W.2d 106 (2010); *State v. Duncan, supra* note 7; *State v. Sepulveda*, 278 Neb. 972, 775 N.W.2d 40 (2009).

[9] See, *State v. Morgan, supra* note 8; *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013); *State v. Watt, supra* note 8; *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013); *State v. Ramirez*, 285 Neb. 203, 825 N.W.2d 801 (2013); *State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281 (2011); *State v. Davlin*, 272 Neb. 139, 719 N.W.2d 243 (2006).

will not be addressed on direct appeal if it requires an evidentiary hearing.[10]

This rule that appellate counsel who is different from trial counsel must raise known or apparent ineffective assistance of trial counsel claims derives in part from the principle of judicial economy that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice.[11] We are cognizant that the U.S. Supreme Court, on behalf of the federal appellate court system, as well as a growing majority of state courts, has rejected the application of this general rule of judicial economy to ineffective assistance of counsel claims.[12]

The Court in *Massaro v. United States*[13] explained that the application of this rule in the context of ineffective assistance of counsel claims puts appellate counsel in an "awkward position vis-à-vis trial counsel," whom appellate counsel will need assistance from in order to become "familiar with a lengthy record on a short deadline." Further, the Court reasoned that this rule creates "perverse incentives . . . to bring claims of ineffective trial counsel, regardless of merit."[14] Finally, the Court found little utility in forcing "'parties and the district judges [considering petitions for postconviction relief] to search for needles in haystacks—to seek out the rare claim that could have been raised on direct appeal, and deem it waived.'"[15] The Court concluded that the rare benefit of a speedy resolution on direct appeal of certain ineffective assistance of counsel claims is "outweighed by

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[10] *State v. Watt, supra* note 8.

[11] See, e.g., *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735 (D.C. Cir. 1995); *State v. Lee*, 909 So. 2d 672 (La. App. 2005).

[12] See *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690, 155 L. Ed. 2d 714 (2003).

[13] *Id.*, 538 U.S. at 506.

[14] *Id.*

[15] *Id.*, 538 U.S. at 507.

the increased judicial burden the rule would impose in many other cases."[16]

But our court has repeatedly declined to adopt the rejection of the waiver rule in *Massaro*.[17] We have explained that our waiver rule derives not just from principles of judicial economy, but also from the mandates of the Nebraska Postconviction Act.[18] Our refusal to adopt the *Massaro* standard is not "simply a policy determination made by this court, but the consequence of well-established reasoning based in the language of the Nebraska Postconviction Act."[19] In particular, the Nebraska Postconviction Act requires that its remedy is "cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state."[20]

Moreover, we do not lay primary onus upon postconviction courts to "search for needles in haystacks" of whether a viable claim could have been made on direct appeal. A postconviction court need only determine whether the claim was known or apparent at the time of direct appeal and, if so, whether it was made. Our opinion on direct appeal will be the law of the case on whether the claim could be determined upon the trial record and, thus, whether there was some other remedy existing in the courts of this state.[21] This approach is more efficient insofar as the appellate court is already examining the trial record before it. And in those instances when the claim can be determined upon the trial record, our rule further supports judicial economy by addressing the merits of the claim at the first opportunity to do so.

[6] The Court of Appeals' memorandum opinion rejecting Abdullah's ineffective assistance of counsel claims presents

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[16] *Id.*, 538 U.S. at 507-08.

[17] See, *State v. Filholm, supra* note 5; *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006); *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005).

[18] See *id.*

[19] *State v. Molina, supra* note 17, 271 Neb. at 532, 713 N.W.2d at 449.

[20] Neb. Rev. Stat. § 29-3003 (Reissue 2008).

[21] See *id.*

an intersection of this waiver rule for raising known or apparent ineffective assistance of trial counsel claims with another waiver rule: An alleged error must be both specifically assigned and specifically argued in the appellate brief in order to be considered by an appellate court.[22] A generalized and vague assignment of error that does not advise an appellate court of the issue submitted for decision will not be considered.[23] Thus, we have said that "[g]eneral allegations that trial counsel performed deficiently or that trial counsel was ineffective are insufficient to . . . preserve the issue for later review."[24] Beyond the rejection of broad, conclusory statements, we have had few opportunities to examine what allegations are sufficient to preserve the issue for later review.

Abdullah's appellate counsel clearly attempted in his brief to avoid the procedural bar attending the failure to raise ineffective assistance of counsel claims on direct appeal, and he made more than the conclusory and vague statement that trial counsel performed deficiently or was ineffective. Yet, the Court of Appeals determined that Abdullah's attempt was not good enough. According to the Court of Appeals, Abdullah's assignment of error and accompanying arguments lacked specific factual allegations of prejudice. Thus, the Court of Appeals rejected Abdullah's claims on their "merits," effectively preventing Abdullah from raising those claims in a future postconviction motion.

It was a misnomer for the Court of Appeals to characterize its determination as being on the "merits." Nevertheless, we would agree there is a difference between determining that a claim is inappropriate for decision upon the trial record

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[22] See, e.g., *Irwin v. West Gate Bank*, 288 Neb. 353, 848 N.W.2d 605 (2014); *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014); *In re Interest of Nicole M.*, 287 Neb. 685, 844 N.W.2d 65 (2014). See, also, *State v. Karch*, 263 Neb. 230, 639 N.W.2d 118 (2002).

[23] *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013); *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004); *Gilroy v. Ryberg*, 266 Neb. 617, 667 N.W.2d 544 (2003).

[24] *State v. Filholm, supra* note 5, 287 Neb. at 770, 848 N.W.2d at 578.

and determining that a claim was insufficiently stated to be addressed. By definition, a claim insufficiently stated is no different than a claim not stated at all. Therefore, if insufficiently stated, an assignment of error and accompanying argument will not prevent the procedural bar accompanying the failure to raise all known or apparent claims of ineffective assistance of trial counsel.

But the level of specificity required in order for an assignment of error and its accompanying argument to be "sufficient" must logically depend upon the purposes of the appellate court's review. Thus, we recently held in *State v. Filholm*[25] that it is an inefficient use of time and resources to require appellate counsel to specifically allege how the defendant was prejudiced by trial counsel's allegedly deficient conduct, because such allegations are unnecessary in our determination of whether the trial record supports the assigned error. We explained that it is the appellant's allegations of deficient conduct and not the appellant's allegations of prejudice that have historically guided our review of whether the claims of ineffective assistance of counsel can be determined upon the trial record.[26] We could find no instance where specific allegations of prejudice were part of our assessment of whether the claim could be determined upon the trial record. As noted by the Court in *Massaro*, such allegations of prejudice are in the realm of facts that would need to be developed in an evidentiary hearing.[27] We held in *Filholm* that appellate counsel need only make specific allegations of deficient conduct.[28]

[7] We did not elaborate, however, on the level of specificity of such allegations beyond the general principles concerning vague and conclusory assignments of error and arguments. Given that Abdullah's arguments are stated more cursorily than those presented in *Filholm*, we are more squarely presented with that question here. We hold that in the case of an

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[25] *State v. Filholm, supra* note 5.

[26] *Id.*

[27] *Massaro v. United States, supra* note 12.

[28] *State v. Filholm, supra* note 5.

argument presented for the purpose of avoiding procedural bar to a future postconviction action, appellate counsel must present the claim with enough particularity for (1) an appellate court to make a determination of whether the claim can be decided upon the trial record and (2) a district court later reviewing a petition for postconviction relief to be able to recognize whether the claim was brought before the appellate court.

The argument that counsel was deficient for failing to call "at least two witnesses that [Abdullah] informed would be beneficial to his case"[29] is the closest of the three claims to a conclusory and general allegation that trial counsel was ineffective. A showing that the witnesses whom defendant advised counsel would have been "beneficial" to the defendant's case at trial raises potential issues of deficient performance and prejudice.[30] But the vague assertion referring to "at least two" witnesses seems little more than a placeholder. Our case law is clear that were this a motion for postconviction relief, Abdullah would be required to specifically allege what the testimony of these witnesses would have been if they had been called in order to avoid dismissal without an evidentiary hearing.[31] Without such specific allegations, the postconviction court would effectively be asked to "'conduct a discovery hearing to determine if anywhere in this wide world there is some evidence favorable to defendant's position.'"[32]

In a direct appeal, we do not need specific factual allegations as to who should have been called or what that person or persons would have said to be able to conclude that any evidence of such alleged ineffective assistance will not be found in the trial record. Nevertheless, we are concerned with the lack of any specificity as to who those uncalled witnesses were

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[29] Brief for appellant at 13.

[30] See, *State v. Hochstein*, 216 Neb. 515, 344 N.W.2d 469 (1984); *State v. Pankey*, 208 Neb. 377, 303 N.W.2d 305 (1981).

[31] See, *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

[32] *State v. McGhee, supra* note 31, 280 Neb. at 564, 787 N.W.2d at 705.

from the standpoint of a potential postconviction court's ability to identify if a particular failure to call a witness claim is the same one that was raised on direct appeal.

Abdullah's appellate counsel argues that it is impractical in the time granted for a direct appeal to fully research the alleged deficient conduct of trial counsel and to allege factual details of such conduct with specificity. And we are sensitive to some of the concerns expressed by the U.S. Supreme Court in *Massaro*.[33] But we can think of no good reason why Abdullah would be unable to give appellate counsel the names or descriptions of the uncalled witnesses he claims he informed trial counsel of. Thus, we agree with the Court of Appeals' general conclusion that Abdullah failed to make sufficiently specific allegations of deficient conduct relating to the alleged failure to call witnesses.

We disagree with the Court of Appeals as to whether Abdullah sufficiently alleged his remaining two ineffective assistance of trial counsel claims. We find those claims would require an evidentiary hearing and therefore cannot be decided upon the trial record.

The claim that trial counsel failed to "adequately advise and inform him"[34] about his decision to waive a jury trial is sufficiently specific both for purposes of our review and for the purpose of a potential postconviction court's analysis. The failure of counsel to inform the defendant of the right to a jury trial may form the basis for an ineffective assistance of counsel claim, depending upon a showing of prejudice.[35] And the record plainly does not contain evidence necessary to the determination of this claim, including the extent and content of any discussions between Abdullah and trial counsel or Abdullah's knowledge from other sources of his right to a jury trial.

Likewise, Abdullah sufficiently argued his claim that trial counsel was ineffective when it asked the court to sentence

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[33] See *Massaro v. United States, supra* note 12.

[34] Brief for appellant at 13.

[35] See, e.g., *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995).

Abdullah consecutively rather than concurrently. The record reflects that trial counsel asked the court to run Abdullah's assault sentence consecutive to his federal sentence. The record, however, reveals nothing of the attorney's reasons for this request, his discussions with Abdullah on this matter, or the extent to which this request influenced the judge's sentencing determination. Abdullah does not claim that the request to run the sentences consecutively was a structural error. Therefore, this matter also cannot be determined upon the trial record before us.

## Remaining Claims

We affirm the Court of Appeals' memorandum opinion and adopt its analysis as to Abdullah's sufficiency of the evidence and excessive sentence claims.

[8] There was sufficient evidence to support the trial court's verdict of first degree assault. There was a factual dispute as to the cause of the victim's injuries and whether Abdullah acted in self-defense. Such disputes in the evidence are for the finder of fact. An appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh the evidence.[36]

Nor was the sentence of 6 to 10 years' imprisonment for an offense that carries a sentencing range of 1 to 50 years' imprisonment excessive.[37] The victim suffered serious injury, and Abdullah has an extensive criminal history, including two prior assault convictions.

## CONCLUSION

We generally affirm the Court of Appeals' memorandum opinion insofar as it affirmed the judgment below. We agree with the Court of Appeals' determination that the evidence supported Abdullah's conviction and sentence. We agree with its conclusion that Abdullah's claim regarding trial counsel's failure to call "at least two" beneficial witnesses was too vague for determination. We disagree with the Court of

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[36] See *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014).

[37] See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2012).

Appeals' determination that Abdullah's remaining ineffective assistance of trial counsel claims were alleged with insufficient specificity and thus lacked "merit." We find, instead, that the merits of these arguments cannot be reviewed upon the trial record. To that extent, the Court of Appeals' decision is reversed.

AFFIRMED IN PART, AND IN PART REVERSED.

HEAVICAN, C.J., not participating.

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## deNOURIE & YOST HOMES, LLC, A NEBRASKA LIMITED LIABILITY COMPANY, APPELLANT, V. JOE FROST AND AMY FROST, HUSBAND AND WIFE, AND SECURITY STATE BANK, DOING BUSINESS AS DUNDEE BANK, A NEBRASKA CORPORATION, APPELLEES.

854 N.W.2d 298

Filed September 26, 2014. No. S-13-656.

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. **Equity: Estoppel.** Although a party can raise estoppel claims in both legal and equitable actions, estoppel doctrines have their roots in equity.
4. **Equity: Appeal and Error.** In reviewing judgments and orders disposing of claims sounding in equity, an appellate court decides factual questions de novo on the record and reaches independent conclusions on questions of fact and law. But when credible evidence is in conflict on material issues of fact, an appellate court considers and may give weight to the fact the trial court observed the witnesses and accepted one version of the facts over another.
5. **Contracts: Fraud.** A party to a business transaction can be liable to another party for failing to disclose a fact that he or she knows may justifiably induce the other to act or refrain from acting in the transaction. But a nondisclosing party can only be liable if it was under a duty to the other to exercise reasonable care to disclose the fact at issue.
6. **Fraud: Proof.** A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation

was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.

7. **Fraud.** Misleading half-truths can constitute fraud. When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent. Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false. To reveal some information on a subject triggers the duty to reveal all known material facts.
8. ____. If a defendant's partial or ambiguous representation is materially misleading, then the defendant has a duty to disclose known facts that are necessary to prevent the representation from being misleading.
9. ____. A party's mere silence about its financial condition cannot constitute a misrepresentation unless the other party asks for the information.
10. ____. The recipient of an intentionally false statement of material fact may justifiably rely on the statement if the recipient would have to investigate to discover the truth.
11. ____. The recipient of a representation must exercise ordinary prudence to ascertain its truth when the means of discovering the truth was in his or her hands. But in claims of intentional misrepresentations, this rule applies only in limited circumstances.
12. **Negligence: Fraud.** A plaintiff's contributory negligence is not a defense to claims of intentional misrepresentation.
13. **Fraud: Notice.** Absent information that should put a recipient on notice that a representation may be false, a person may generally rely on the truth of another's representation.
14. **Fraud.** In intentional misrepresentation cases, a plaintiff fails to exercise ordinary prudence only when the plaintiff's reliance was wholly unreasonable, given the facts open to the plaintiff's observation and his or her own skill and experience.
15. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
16. **Conspiracy: Damages.** The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants.
17. **Conspiracy: Proof.** A party does not have to prove a civil conspiracy by direct evidence of the acts charged. It may be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished. It is, however, necessary to prove the existence of at least an implied agreement to establish conspiracy.
18. **Actions: Conspiracy: Torts.** A civil conspiracy is only actionable if the alleged conspirators actually committed some underlying misconduct. That is, a conspiracy is not a separate and independent tort in itself; rather, it depends upon the existence of an underlying tort.

19. **Conspiracy: Torts: Proof.** A claim of civil conspiracy requires the plaintiff to establish that the defendants had an expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff.
20. **Conspiracy: Torts.** A plaintiff is not required to plead the underlying tort of civil conspiracy as a separate claim against the defendants.
21. **Rules of the Supreme Court: Pleadings.** Under Nebraska's liberal pleading rules, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.
22. **Notice.** A plaintiff's allegations are sufficient if they give the defendant fair notice of the claim to be defended against.
23. **Appeal and Error.** For an appellate court to consider an alleged error, a party must specifically assign and argue it.
24. **Forbearance: Estoppel.** A claim of promissory estoppel requires a plaintiff to show (1) a promise that the promisor should have reasonably expected to induce the plaintiff's action or forbearance, (2) the promise did in fact induce the plaintiff's action or forebearance, and (3) injustice can only be avoided by enforcing the promise. A plaintiff need not show a promise definite enough to constitute a unilateral contract, but it must be definite enough to show that the promisee's reliance on it was reasonable and foreseeable.
25. **Estoppel: Proof.** In an estoppel claim, a plaintiff generally fails to show that he or she reasonably and in good faith relied on the defendant's false statements or conduct if it knew or had reason to know that the misrepresentations were false when made or when it acted in reliance upon them.
26. ____: ____. A plaintiff must establish each element of equitable estoppel by clear and convincing evidence.
27. **Fraud: Estoppel: Proof.** A clear and convincing standard of proof applies to a promissory estoppel claim resting on allegations of fraud.
28. **Fraud: Proof.** In claims for equitable relief, Nebraska law imposes a clear and convincing standard of proof for allegations of fraud. But it does not impose a clear and convincing standard of proof for fraud claims in actions at law.
29. ____: ____. The standard of proof for fraudulent misrepresentation claims is proof by a preponderance of the evidence.
30. **Issue Preclusion: Proof.** Issue preclusion does not apply to a party who had a higher standard of proof in the first action than the standard that applies in a later proceeding.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jerrold L. Strasheim for appellant.

Christopher J. Tjaden, Michael J. Whaley, and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellee Security State Bank.

Kristopher J. Covi, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees Joe Frost and Amy Frost.

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

CONNOLLY, J.

## I. SUMMARY

deNourie & Yost Homes, LLC (D&Y), contracted with Joe Frost (Frost) and Amy Frost to finish construction on a house the Frosts had started with another builder but had discontinued 1½ years earlier. The Frosts defaulted on progress payments after D&Y started work. D&Y eventually sued the Frosts and Security State Bank, doing business as Dundee Bank (the bank). It claimed, in part, that at different times, the defendants falsely represented or concealed material information about whether the Frosts could pay for the work.

In D&Y's operative complaint, it alleged five claims against the Frosts and the bank: (1) breach of contract against the Frosts; (2) fraud, concealment, and nondisclosure against the Frosts for representing that they could pay for D&Y's work when they were insolvent and could not perform their obligations under the contract; (3) civil conspiracy against Frost and the bank for falsely creating the appearance, after D&Y had stopped work, that the Frosts were solvent, to induce D&Y to resume work; (4) equitable estoppel against the bank, as guarantor; and (5) promissory estoppel against the bank to enforce its promise to pay funds directly to D&Y for its services.

The district court sustained the defendants' motions for summary judgment on the fraud and conspiracy claims. In April 2012, before the bench trial began on the remaining claims, the Frosts confessed judgment on D&Y's breach of contract claim. And after the bench trial, the court ruled for the defendants on D&Y's equitable and promissory estoppel claims. D&Y assigns error to all the court's rulings.

We will explain our holdings with some specificity in the following pages, but briefly stated, we hold as follows:

- The court erred in granting summary judgment to the Frosts on D&Y's fraud claim because genuine issues of material

fact existed whether the Frosts had intentionally made false or misleading representations that they could pay for D&Y's work.
- The court erred in granting summary judgment to the bank on D&Y's civil conspiracy claim because the complaint was sufficient to put the bank on notice that the claim rested on the bank's alleged conspiracy to commit fraud.
- The court erred in granting summary judgment to the Frosts on D&Y's civil conspiracy claim because its ruling rested on its incorrect judgment that D&Y's fraud claim failed as a matter of law and because it failed to consider that D&Y alleged two separate instances of fraudulent conduct.
- In the bench trial, the court did not err in finding that D&Y had failed to prove by clear and convincing evidence that the bank promised to finance D&Y's construction contract and to pay these funds directly to D&Y.

But the court's factual findings in the bench trial do not preclude D&Y's proof of the same facts for its fraud claims because a preponderance standard of proof governs those claims, instead of the clear and convincing standard that applied to the claims in the bench trial. We affirm in part and reverse in part the judgment and remand the cause to the court to conduct further proceedings consistent with this opinion.

## II. BACKGROUND

### 1. Historical Facts

In September 2004, the Frosts obtained two loans for a new home: a $133,000 loan to purchase a lot and a $712,500 construction loan. The construction stopped in December 2005. The bank was not the lender for either loan. But in 2007, the bank made several business loans to the Frosts. The Frosts used these loans to acquire and renovate houses, which they then sold or rented.

In April 2007, the Frosts contracted with D&Y to complete their house. The previous builder had completed the exterior of the house, but not the interior. Jon deNourie and Shane Yost are the principals of D&Y. The "Recitals" section of the contract stated that the original construction had stopped in December 2005 "due to builder default." The contract made

the Frosts the general contractor. They were to pay D&Y for materials and labor and directly pay subcontractors. D&Y was the project manager. It would obtain subcontractors and approve their invoices for payment by the Frosts and also furnish materials. D&Y would bill the Frosts for outstanding invoices. The Frosts agreed to pay $51,280 to D&Y for management services. The parties estimated construction costs to be $274,350. The contract also required the Frosts to make monthly progress payments during construction.

Yost testified in his deposition that before D&Y signed the contract, Frost told him that he had sued the previous builder but that they had settled the case and there were no liens against the property. Yost also testified Frost told him that $200,000 from the original construction loan was available for the work and that he could easily obtain an additional $75,000. The contract's recitals stated that the Frosts had "made arrangements for financing" to complete construction of the house.

But in his deposition, Yost said that sometime in 2008, after the Frosts defaulted on D&Y's contract, he learned that the first builder had sued the Frosts and that there were liens against the property. The record from the bench trial showed that the first builder had filed a lien against the property in April 2005 because the Frosts had defaulted on their payments. The builder had sought a $315,567.52 judgment and a decree of foreclosure. Yost said that D&Y would not have contracted to do the work if it had known that the previous builder had sued the Frosts. Yost stated that because of Frost's representations, D&Y did not perform independent research on the property.

After D&Y sent the first bill to the Frosts in May 2007, they defaulted. They did not pay the entire bill, and they wrote a check with insufficient funds to a subcontractor. After that, D&Y required the Frosts to pay the money they owed directly to D&Y so it could pay its subcontractors. By August 1, the Frosts were substantially behind in payments. On August 20, Frost told deNourie and Yost that he had not obtained financing from his construction lender but that he was meeting with the president of the bank to obtain funding.

In early October, D&Y stopped work because the Frosts had failed to pay the amount owed or to provide a commitment letter from a lender.

At some point, D&Y informed Frost that it intended to file a lien. After that, the parties attempted to negotiate. At a November 1, 2007, meeting, Frost told deNourie and Yost that the bank would be providing funding for the construction. Frost told Yost that although he still had $200,000 left from the construction loan, he had to get the loan extended to make a draw against it. On November 14, Frost told D&Y that he had received an extension for the construction loan and wrote checks to D&Y for about $34,000. D&Y refused to resume work because the Frosts owed considerably more.

On November 27, 2007, Amy Frost asked Yost, via e-mail, to stop e-mailing her about the money the Frosts owed. She stated that she had only $800 in her checking account, that the Frosts had drained their retirement savings, that they owed $60,000 to a lawyer, and that she was worried whether they could pay their mortgage payments and subcontractors. On November 30, D&Y filed a construction lien against the property for $208,896.41. The Frosts had paid a little over $108,000 toward the total contract price.

On December 10, 2007, Jeff Royal, the president of the bank, sent the following e-mail to Frost, which Frost then forwarded to Yost on December 11:

> Per our conversation - please provide this e-mail to your builder, [D&Y], that you have funds available to complete the renovation of your property . . . .
>
> If anyone from [D&Y] needs any additional information on this e-mail please have them call me directly . . . .

deNourie believed that this e-mail showed the funds would come from the bank because Royal could not have been referring to funding from any other lender. From his experience with construction loans, deNourie believed that Royal could not have made this statement without knowing the payments that had been made and the amount of money needed to complete the project. According to Yost, he called Royal on December 11, 2007, and said that D&Y was considering foreclosure and would continue the work only if the bank would

pay the amount of its lien directly to D&Y. Yost said that during this call and later calls, Royal assured him that the bank would provide the funding and a letter detailing the terms. Yost testified that on December 11, at Royal's request, he sent an e-mail to Royal to confirm their conversation:

> As per our discussion, the intent of the requested letter is to document the exact funds necessary to complete the Frost Home . . . .
>
> The key to this is not only total funds to be paid out, but also the timing of these funds to be distributed to [D&Y]. This letter will enable us to work w/ the subs in when and how they will get paid.
>
> Thus, the following items will help in this purpose:
>
> 1) The amount to be paid directly to [D&Y] will be $208,896.41.
>
> 2) The above funds will be paid directly to [D&Y] upon [the Frosts'] move-in date, refinancing/closing of the home, or Certificate of Occupancy . . . whichever comes first.

Yost said that he then called Royal, who told him that D&Y should proceed with construction because the bank would provide the necessary funding. Yost said that D&Y relied on this oral commitment from Royal and wanted a confirmation letter only to assure its subcontractors that funding for their work was secure.

D&Y resumed work on December 12, 2007, and paid a significant amount to subcontractors. Yost said that on December 13, 17, and 21, he again spoke with Royal, who assured him that funding would be available and that the bank would pay the funds directly to D&Y. Yost said that during these calls, Royal repeatedly assured him that the bank would send him a written confirmation letter, but Royal never sent the letter. On December 19, Yost e-mailed Royal to ask whether Royal had written the letter. The record shows no e-mail response from Royal until January 3, 2008. According to Yost, during a telephone conversation on December 31, 2007, Royal said that he had asked Frost to contact the lot lender about obtaining the construction loan because it held the first mortgage lien against the property, but that the bank would provide

the funding if the lot lender did not. Yost testified that until December 31, D&Y never heard about the lot lender's possibly loaning the Frosts money.

Royal's testimony conflicted with the testimony of deNourie and Yost. Royal admitted that on the same day he sent the December 10, 2007, e-mail, Frost had told him he might need money to pay his builders, and that he sent the e-mail at Frost's request. And Royal admitted that he had not verified Frost's available cash or credit worthiness. But Royal said he did not have a specific plan to provide funds to D&Y when he sent the e-mail. He testified that the reason he stated Frost had funds available was because (1) he knew Frost had recently generated income from real estate transactions on projects the bank had financed and (2) Frost had told him that Amy Frost's father would make funds available to them for the house. Although Royal had not spoken to Amy Frost's father when he sent the e-mail, he said he was not committing the bank to loan the Frosts money by stating that they had funds available because he knew that Amy Frost's father wanted to help them. Royal said he was simply committed to helping the Frosts come up with the money.

Regarding his conversations with Yost, Royal said he told Yost that Frost had mentioned getting money from the lot lender so that he would not need help from Royal. But deNourie testified that D&Y would not have resumed work if Royal had said that Frost was seeking a loan from the lot lender. Royal denied telling Yost that the bank would directly pay D&Y the amount of its lien. Royal could not recall having a telephone conversation with Yost about an agreement with the bank on December 11 or 19, 2007. Royal said he never sent a written confirmation to provide funding because the Frosts never applied for a loan.

On January 3, 2008, Royal replied to Yost's December 19, 2007, e-mail asking whether Royal had written a confirmation letter yet. In Royal's January 3, 2008, response, he asked whether Yost had ever connected with Frost on "this." Yost testified that he understood "this" to refer to a possible loan from the lot lender. Yost responded to Royal that Frost had

not returned his calls. He asked Royal to contact Frost and find out whether Frost was going to "refinance" through the lot lender or the bank. Yost said D&Y would like to have the financing resolved because D&Y was close to finishing the house.

On January 4, 2008, Yost sent an e-mail to Frost stating that Royal was waiting to hear from Frost about the financing. He asked Frost to verify Royal's statement that Frost was seeking a loan from the lot lender but that otherwise Royal would "set it up" at the bank. Frost did not respond. Royal testified that by "set it up," he meant that he would "be open to working with the Frosts and their overall financial picture to make funds available for [D&Y] to the extent that [the Frosts] wanted them."

On January 10, 2008, Royal sent an e-mail to Yost stating that Frost had said he was "in good shape" with the lot lender and asking Yost to confirm that information. Neither Frost nor Royal replied to Yost's later inquiries about the financing. On January 30, the house was inspected and approved for occupancy.

On March 3, 2008, Frost told Yost that the lot lender would not provide a loan to the Frosts but that he was working with the bank to obtain the money. Royal acknowledged that after the lot lender refused to loan the Frosts money, he spoke to Frost about possibly loaning money to Amy Frost's father, who would provide the money to the Frosts to pay D&Y. Royal said to settle the dispute with D&Y, the bank loaned $150,000 to Amy Frost's father, who made the money available to the Frosts. The Frosts received this money, but Frost then claimed that D&Y's work was inferior and did not pay anything to D&Y. Royal claimed that he did not know why the Frosts had been turned down for a loan by the lot lender and did not ask.

On March 18, 2008, Royal informed deNourie and Yost that the bank could not loan money to the Frosts because the bank had purchased Frost's mortgage company and Frost was now the bank's employee. Yost said that this meeting was the first time Royal had notified D&Y that the bank would not

provide funding for the construction. deNourie said that D&Y did not learn about the bank's loan to Amy Frost's father until November 2008, when it took Royal's deposition.

In April 2008, D&Y sued the Frosts and the bank. At some point, the house was foreclosed. In December 2008, the Frosts filed for chapter 7 bankruptcy. D&Y sought a determination in bankruptcy court that the debt to it was nondischargable.[1] The bankruptcy court stayed that action pending the outcome of this litigation.

### 2. Procedural History

In 2011, the Frosts and the bank moved for summary judgment. The court granted the motions in part. The court determined that the Frosts had no duty to disclose their financial condition because D&Y had not asked for this information. It found that the Frosts made no misleading representations about their financial condition and that D&Y had instead assumed that they were solvent. It granted summary judgment to the Frosts on D&Y's fraud claim. Because it found no evidence of fraud, it concluded that the civil conspiracy claim against the Frosts failed. It further concluded that the conspiracy claim failed against the bank because D&Y had not specifically alleged a separate fraud claim against the bank. It granted summary judgment to the Frosts and the bank on the conspiracy claim. But it denied summary judgment on D&Y's equitable estoppel and promissory estoppel claims.

In April 2013, at the start of the bench trial, the Frosts confessed judgment for $245,000 on D&Y's breach of contract claim. After the trial, the court entered judgment against D&Y on its remaining claims of equitable and promissory estoppel.

## III. ASSIGNMENTS OF ERROR

D&Y assigns, reordered and somewhat reduced, that the court erred in (1) granting partial summary judgment to the defendants and failing to rule that the defendants did not meet their burden of proof for summary judgment; (2) failing

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[1] See 11 U.S.C. § 523(a)(2) (2006).

to view the summary judgment evidence in the light most favorable to D&Y and to give it the benefit of all reasonable inferences; (3) failing to rule on D&Y's claims of fraudulent representations and promises at the summary judgment stage; (4) ruling that the Frosts had no duty to disclose their financial condition despite evidence that they did have this duty; (5) failing to rule on objections to evidence taken under advisement; (6) failing to find that D&Y's reliance on the bank's promise was reasonable and in good faith; (7) failing to find that D&Y had proved all the elements of its claims for promissory estoppel and equitable estoppel; and (8) failing to award D&Y $208,896.41, plus prejudgment interest.

## IV. STANDARD OF REVIEW

[1,2] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in the light most favorable to the party against whom the judgment was granted, and give that party the benefit of all reasonable inferences deducible from the evidence.[3]

[3,4] Regarding the trial court's judgment after the bench trial on D&Y's equitable and promissory estoppel claims, the traditional distinction between legal and equitable claims remains relevant to our review of the court's judgment.[4] Although a party can raise estoppel claims in both legal and equitable actions, estoppel doctrines have their roots in equity.[5] In reviewing judgments and orders disposing of claims

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[2] *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 850 N.W.2d 745 (2014).

[3] *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

[4] See *Christiansen v. County of Douglas*, 288 Neb. 564, 849 N.W.2d 493 (2014).

[5] See, *D & S Realty v. Markel Ins. Co.*, 280 Neb. 567, 789 N.W.2d 1 (2010); *Rauscher v. City of Lincoln*, 269 Neb. 267, 691 N.W.2d 844 (2005); 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.3(5) (2d ed. 1993); 28 Am. Jur. 2d *Estoppel and Waiver* §§ 1 and 34 (2011).

sounding in equity, we decide factual questions de novo on the record and reach independent conclusions on questions of fact and law.[6] 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.[7]

## V. ANALYSIS

### 1. Court Incorrectly Granted the Defendants Summary Judgment on D&Y's Claims for Fraud and Civil Conspiracy

#### (a) Questions of Fact Precluded Summary Judgment for the Frosts on D&Y's Fraud Claim

In D&Y's fraud claim against the Frosts, it alleged that (1) they induced D&Y to enter the contract by falsely representing their ability to pay for D&Y's work and (2) they concealed that they were insolvent and lacked the resources to fulfill their obligations under the contract. As noted, the court found that the Frosts had no duty to disclose their financial condition because the facts show none of the triggering circumstances requiring disclosure of material facts under the Restatement (Second) of Torts § 551.[8]

[5] Under § 551 of the Restatement, which we have adopted,[9] a party to a business transaction can be liable to another party for failing to disclose a fact that he or she knows may justifiably induce the other to act or refrain from acting in the transaction. But a nondisclosing party can only be liable if it was under a duty to the other to exercise reasonable care to

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[6] See, Neb. Rev. Stat. § 25-1925 (Reissue 2008); *Christiansen, supra* note 4; *American Family Mut. Ins. Co. v. Regent Ins. Co.*, 288 Neb. 25, 846 N.W.2d 170 (2014); *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[7] *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 830 N.W.2d 191 (2013).

[8] Restatement (Second) of Torts § 551 (1977).

[9] See *Streeks v. Diamond Hill Farms*, 258 Neb. 581, 605 N.W.2d 110 (2000), *overruled in part on other grounds, Knights of Columbus Council 3152 v. KFS BD, Inc.*, 280 Neb. 904, 791 N.W.2d 317 (2010).

disclose the fact at issue.[10] Whether a duty to disclose exists is determined by all the circumstances, but § 551(2) sets out "several situations which have been consistently recognized as creating a duty to disclose."[11] The court found that none of these circumstances were present.

D&Y contends that the court erred because it overlooked D&Y's claims and evidence of fraudulent misrepresentations that induced it to enter into the contract. D&Y argues that its evidence showed there were genuine issues of fact whether the Frosts had falsely represented the following facts:

- The Frosts' first builder defaulted, and they had sued the builder (when the first builder had sued them for defaulting).
- No liens had been filed against the property (when contractors had filed liens against it).
- They had $200,000 from the original construction loan (when they had defaulted on this loan).
- They could easily obtain cash or financing for an additional $75,000 toward the contract price.

The Frosts counter that they had no duty to disclose their financial condition because they made no ambiguous or misleading statements about their finances. They also contend that whether they were insolvent was immaterial to the transaction because the construction was to be funded by third-party financing. Finally, they contend that D&Y did not rely on their statements.

But to support their nonreliance argument, the Frosts cherry-pick statements from deNourie's depositions. deNourie stated that he could not recall "specifics" about his conversations with Frost before the parties contracted for the work. And the Frosts point to Yost's deposition statement that he and deNourie had assumed the Frosts were solvent because Frost owned a mortgage company that was located in a building that he owned. We disagree that there were no genuine issues of fact regarding these issues.

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[10] See *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 280 Neb. 997, 792 N.W.2d 484 (2011).

[11] See *Streeks, supra* note 9, 258 Neb. at 590, 605 N.W.2d at 118.

[6] Initially, we point out that in addition to alleging fraudulent concealment, D&Y alleged the Frosts made fraudulent misrepresentations. A fraudulent misrepresentation claim requires a plaintiff to establish the following elements: (1) A representation was made; (2) the representation was false; (3) when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) the representation was made with the intention that the plaintiff should rely on it; (5) the plaintiff did so rely on it; and (6) the plaintiff suffered damage as a result.[12]

[7] But misleading half-truths can also constitute fraud:

> When a party makes a partial or fragmentary statement that is materially misleading because of the party's failure to state additional or qualifying facts, the statement is fraudulent. "Fraudulent misrepresentations may consist of half-truths calculated to deceive, and a representation literally true is fraudulent if used to create an impression substantially false." "'To reveal some information on a subject triggers the duty to reveal all known material facts.'" Consistent with imposing liability for half-truths, the Restatement (Second) of Torts § 527 provides that an ambiguous statement is fraudulent if made with the intent that it be understood in its false sense or with reckless disregard as to how it will be understood.[13]

[8] We have recognized an overlap between fraudulent concealment and fraudulent misrepresentation claims. If a defendant's partial or ambiguous representation is materially misleading, then under § 551(2)(b) of the Restatement, the defendant has a duty to disclose known facts that are necessary to prevent the representation from being misleading.[14]

It is true that the record shows Yost admitted to making some assumptions about Frost's solvency based on the appearance of a successful mortgage business that he owned. The court apparently relied on Yost's statement in sustaining the Frosts'

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[12] See *Knights of Columbus Council 3152, supra* note 9.

[13] *Id.* at 922-23, 791 N.W.2d at 331-32.

[14] See *Knights of Columbus Council 3152, supra* note 9.

motion for summary judgment. But the court erred in implicitly concluding that because of D&Y's assumptions, it could not have relied upon or been misled by Frost's positive statements of facts about the Frosts' ability to pay for D&Y's work. The Frosts' house had not been worked on for 1½ years when they asked D&Y to finish the construction. So a fact finder could reasonably conclude that deNourie and Yost would have been reluctant to contract for the work without some explanation for why the first builder stopped its work—even if they generally believed Frost ran a successful business. Under these circumstances, a fact finder could determine that deNourie and Yost's assumptions about Frost's solvency made them more likely to believe Frost's statements, while still finding that they had in fact relied on them.

[9] And we recognize that a party's mere silence about its financial condition cannot constitute a misrepresentation unless the other party asks for the information.[15] But here, the Frosts voluntarily made statements about their ability to pay for D&Y's work and they had to do so in a manner that was not false or materially misleading. Giving D&Y the benefit of all reasonable inferences, the record supports its claim that the Frosts made fraudulent misrepresentations or concealed material information that they had a duty to disclose.

In his deposition, deNourie stated that Frost had told him before executing the contract that no liens against the property existed. Yost testified that before entering the contract, Frost told him that he had sued the previous builder but that the litigation had been resolved and there were no liens against the property. Yost said that Frost told him that he had $200,000 left from the original construction loan and that he could easily obtain an additional $75,000 in cash or financing. Moreover, the contract itself stated that the original construction had stopped in December 2005 "due to builder default" and that the Frosts had arranged financing to complete the construction of their house.

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[15] See, *Moyer v. Richardson Drug Co.*, 70 Neb. 190, 97 N.W. 244 (1903); 37 Am. Jur. 2d *Fraud and Deceit* § 223 (2013).

So this is not a case in which a party to a contract promised to seek financing or was merely silent about its ability to fulfill its obligations. If a fact finder believed deNourie and Yost's evidence, then Frost represented that he had $200,000 left from a construction loan when he had defaulted on the first construction contract funded by the loan and been sued by the builder. And if the Frosts had defaulted on their original construction contract, a fact finder could conclude that the Frosts knew their ability to obtain further draws against the construction loan was likely compromised. So D&Y's evidence was sufficient to raise an issue of fact whether Frost knew his representation about funds being available from the original construction loan to pay for D&Y's work was false or materially misleading.

In some circumstances, Frost's statement that he could easily obtain cash or financing for an additional $75,000 toward the contract price would amount to an opinion of his abilities. But here, a fact finder could conclude that Frost knew his statement was false when made or made recklessly to induce D&Y's reliance on it without knowledge that it was true. The same facts that undermine his representation about funding availability from the original construction loan support an inference that the Frosts knew in April 2007 that they could not easily obtain cash or financing for an additional $75,000. The evidence supports a finding that the Frosts had defaulted on the original construction contract and that soon after D&Y's work began, the Frosts defaulted on required payments during construction. In sum, the court failed to consider whether a fact finder could conclude that Frost made intentionally false or misleading statements intended to dispel any concerns D&Y had about the unfinished construction and the Frosts' ability to pay for the work to induce D&Y to enter the contract.

[10,11] The Frosts also argue that D&Y failed to exercise reasonable diligence to ask for financial statements showing the Frosts' ability to pay for its work. But this argument assumes that the Frosts did not make fraudulent statements about their ability to pay for D&Y's work. If D&Y proves that they did, then the applicable rule is that the recipient of an

intentionally false statement of material fact may justifiably rely on the statement if the recipient would have to investigate to discover the truth.[16] It is true that under Nebraska law, the recipient of a representation must exercise ordinary prudence to ascertain its truth when the means of discovering the truth is in his or her hands.[17] But in claims of intentional misrepresentations, we have applied this rule only in limited circumstances: (1) when a property's defects would be obvious to a potential buyer upon inspection[18]; (2) when the seller of a business gave the buyer all the expense and sales records to a buyer to ascertain the accuracy of the seller's statements regarding profits, did not vouch for his estimates, and recommended that the buyer have his estimates independently evaluated, but the buyer failed to follow through[19]; and (3) when a plaintiff failed to read a legal agreement before signing it and had an opportunity to do so,[20] assuming that the plaintiff's execution of the contract was not induced by fraud.[21]

[12-14] And regarding intentional misrepresentations, we have explained that a plaintiff's contributory negligence is not a defense to such claims: "'[A] fraud-feasor will not be heard to assert that his victim was negligent in relying on the misrepresentation.'"[22] So, absent information that should put a recipient on notice that a representation may be false, a person may generally rely on the truth of another's representation.[23] In intentional misrepresentation cases, a plaintiff fails to exercise ordinary prudence only when the plaintiff's reliance is wholly

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[16] See *Omaha Nat. Bank v. Maufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983).

[17] See *Lucky 7 v. THT Realty*, 278 Neb. 997, 775 N.W.2d 671 (2009).

[18] See *id.*

[19] *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

[20] See *Omaha Nat. Bank, supra* note 16.

[21] See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[22] See *Omaha Nat. Bank, supra* note 16, 213 Neb. at 884, 332 N.W.2d at 203, quoting *Kubeck v. Consolidated Underwriters*, 267 Or. 548, 517 P.2d 1039 (1974).

[23] *Id.*

unreasonable, given the facts open to the plaintiff's observation and his or her own skill and experience.[24] "[A] plaintiff '"may not close his eyes to what is obviously discoverable by him."'"[25]

But here, the truth of the facts presented by Frost's alleged false statements was not obvious. Discovering whether the first builder had defaulted, whether liens had been placed on the property, and whether $200,000 was still available from the construction loan money would have required an investigation. So, a fact finder could reasonably infer that the Frosts made intentionally false or misleading statements and that D&Y justifiably relied on them.

Finally, if a fact finder believed D&Y's evidence, he or she could conclude that Frost's alleged misrepresentations were material to the transaction. Yost testified that D&Y would not have entered the contract if it had known the first builder had sued the Frosts for defaulting on the contract. Obviously, if D&Y had known that the Frosts defaulted, it would have questioned whether the Frosts were in financial trouble and could obtain funding from the original construction loan or a new loan. Equally important, this information would have alerted D&Y that filing a lien if the Frosts defaulted might be futile. We conclude that the court erred in granting summary judgment to the Frosts on D&Y's fraud claim.

(b) Questions of Fact Precluded Summary Judgment for the Frosts and the Bank on D&Y's Civil Conspiracy Claim

In D&Y's civil conspiracy claim, it alleged that Frost and the bank conspired to conceal that the Frosts were insolvent and could not pay their debts by assuring D&Y that funding was available to pay D&Y the amount of their lien. D&Y alleged that the bank, as part of the conspiracy, assured D&Y that funding for the full amount of D&Y's lien was available

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[24] *Id.*

[25] *Lucky 7, supra* note 17, 278 Neb. at 1004, 775 N.W.2d at 676.

to the Frosts to pay D&Y for its work. It alleged that this deception benefited the bank by maximizing the returns the bank would receive on loans it had already made to the Frosts. It further alleged that the bank wanted to conceal from other creditors that the Frosts were insolvent and that the bank had already made loans to the Frosts or for their benefit that exceeded the bank's legal lending limit. The court granted summary judgment to both the Frosts and the bank on the conspiracy claim.

*(i) Court Erred in Granting Summary Judgment to the Frosts*

Because the court had already determined that D&Y's fraud claim against the Frosts failed as a matter of law, it concluded that Frost could not have conspired to commit fraud. It granted the Frosts summary judgment on this claim.

D&Y contends that the court erred because D&Y's evidence established that after D&Y stopped work in October 2007, Frost and the bank were acting in concert. D&Y contends that the conspiracy occurred when Royal, on Frost's behalf, sent the December 10, 2007, e-mail to Frost to forward to D&Y and when Royal assured Yost in telephone conversations that the bank would finance the Frosts' construction and pay the amount of D&Y's lien directly to it. In addition, D&Y argues that the court failed to recognize that its fraud claim and civil conspiracy claim rested on two separate periods. That is, its second cause of action for fraud rested on facts showing the Frosts' alleged misrepresentations in April 2007, before the parties entered into the contract. But its third cause of action for civil conspiracy rested on facts that occurred in December 2007, after D&Y stopped work in October. D&Y alleged that after D&Y stopped work, Frost and the bank conspired to make fraudulent misrepresentations that the Frosts had funding available to pay for D&Y's work to induce D&Y to *resume* work.

We agree with D&Y that the court incorrectly granted Frost summary judgment on D&Y's third cause of action because

it had determined that D&Y's second cause of action against the Frosts failed as a matter of law. First, we have determined that the court incorrectly granted summary judgment to the Frosts on D&Y's second cause of action for conduct occurring in April 2007. Second, even if its ruling had been proper, it would not have invalidated D&Y's claim that Frost colluded with Royal in December 2007 to make fraudulent misrepresentations about the availability of funding to induce D&Y to resume work.

### *(ii) Court Erred in Granting Summary Judgment to the Bank*

The court concluded that D&Y's conspiracy claim against the bank failed because a civil conspiracy claim depends on the existence of an underlying tort. Because D&Y did not allege a separate fraudulent concealment claim against the bank, the court concluded that D&Y could not maintain a conspiracy claim against the bank. We disagree.

[15,16] A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[26] The gist of a civil conspiracy action is not the conspiracy charged, but the damages the plaintiff claims to have suffered due to the wrongful acts of the defendants.[27]

[17,18] A party does not have to prove a civil conspiracy by direct evidence of the acts charged. It may be proved by a number of indefinite acts, conditions, and circumstances which vary according to the purpose to be accomplished. It is, however, necessary to prove the existence of at least an implied agreement to establish conspiracy.[28] Furthermore, a civil conspiracy is only actionable if the alleged conspirators actually committed some underlying misconduct.[29] That is, a conspiracy is not a separate and independent tort in itself;

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[26] *Eicher, supra* note 21.

[27] *Id.*

[28] *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

[29] *Id.*

rather, it depends upon the existence of an underlying tort.[30] So without such underlying tort, there can be no cause of action for a conspiracy to commit the tort.

[19,20] As these rules illustrate, a claim of civil conspiracy requires the plaintiff to establish that the defendants had an expressed or implied agreement to commit an unlawful or oppressive act that constitutes a tort against the plaintiff. But we have never held that the plaintiff must plead the underlying tort of civil conspiracy as a separate claim against the defendants. To the contrary, in *Ashby v. State*,[31] we specifically looked to the plaintiff's allegations of the underlying tort in his conspiracy claim. The tort allegations were not set forth as a separate claim in the complaint, nor need they be.

[21,22] Nebraska is a notice pleading jurisdiction. Under our liberal pleading rules, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[32] A plaintiff's allegations are sufficient if they give the defendant fair notice of the claim to be defended against.[33] We conclude that D&Y met this requirement.

But the bank argues that the court's summary judgment order was correct because no evidence established that the bank conspired with the Frosts to conceal their insolvency in April 2007. This argument is irrelevant. As stated, the conspiracy claim allegations focused on conduct occurring in December 2007, after D&Y had stopped working in October. Finally, the bank argues that no evidence established the following facts: (1) The bank knew the Frosts were insolvent, (2) the bank assured D&Y that it would provide a loan for the construction, or (3) the bank agreed to conceal that it would not provide funding. But the court did not address these factual issues, and we decline to do so for the first time on appeal. We conclude only that the court erred in granting summary judgment for its stated reason.

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[30] *Id.*

[31] *Id.*

[32] *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

[33] See *id.*

### 2. D&Y Has Not Shown That the Court Erred in Denying Its Claims for Equitable and Promissory Estoppel

As explained, after the court granted summary judgment to the Frosts and the bank on D&Y's fraud and civil conspiracy claims, it ruled in a bench trial for the defendants on D&Y's claims of equitable and promissory estoppel.

In D&Y's claim for equitable estoppel, it alleged that "[o]n or about December 10, 2007, [the bank] committed to paying D&Y $208,000 for completion of [the house]." It alleged that the bank's commitment was akin to a guarantee of the Frosts' payment of the contract and that the bank was estopped to deny the commitment. In its claim for promissory estoppel, D&Y alleged that it relied on Royal's written and oral representations in completing the contract. It alleged that the bank knew or should have known that D&Y would rely on its representations in providing its services.

In finding for the defendants on D&Y's equitable estoppel claim, the court concluded that D&Y had alleged it resumed and finished the work only because of Royal's representations in the December 10, 2007, e-mail. It stated that if D&Y had immediately resumed work, its reliance on the e-mail would have presented a closer case. But the court emphasized that Yost had called Royal on December 11, the day D&Y received the e-mail, and then asked Royal in an e-mail to confirm their alleged agreement over the telephone. The court recognized that the parties disputed whether Royal had orally committed to provide funding for the work. But it stated that "it is undisputed that Royal never responded to any of Yost's requests for a letter of assurance."

From these findings, the court determined that D&Y had not established by clear and convincing evidence that it had "relied in good faith on Royal's December 10, 2007 email." It noted that D&Y had not specifically alleged that it relied on a combination of the e-mail and later telephone calls with Royal. But the court concluded that this allegation would have failed because it found that D&Y had failed to establish by clear and

convincing evidence that Royal gave any assurances to Yost in telephone conversations.

In ruling against D&Y on its promissory estoppel claim, the court concluded that D&Y had not reasonably relied on the bank's alleged promise:

> A reasonable person in similar circumstances would not have resumed construction on the Property at issue one day after receiving no response to a request for a written letter of assurance. Furthermore, D&Y did not present evidence during trial establishing that it knew any of the answers to the questions in Yost's December 11, 2007 email regarding the method of payment of the alleged loan, to whom the funds would be paid, or the timing of payment prior to resuming construction. The Court finds that any reliance on [the bank's] alleged promise without answers to these critical questions would have been both unwise and unreasonable, particularly in this situation where D&Y was operating as a sophisticated business entity within the construction industry and was actively seeking to protect its financial interests after the Frosts had failed to pay for much of the work already completed.

### (a) D&Y Has Not Argued That the Court's Judgment on Its Equitable Estoppel Claim Was Incorrect

In D&Y's brief, it fails to explain why it believes the court erred in finding that it failed to prove its claim that the bank should be equitably estopped from denying it had committed to guaranteeing the Frosts' payment of the contract price. D&Y argues only that we try the issue de novo and that we should not defer to the court's reliance on Royal's deposition testimony because he did not appear at trial.

[23] As stated in the standard of review section, we agree that this claim is grounded in equity and that for such appeals, we decide factual questions de novo on the record. But to raise a factual question on appeal, D&Y must comply with our rules for appellate briefs. For an appellate court to consider an

alleged error, a party must specifically assign and argue it.[34] Although we conclude that the court's reasoning is relevant to D&Y's promissory estoppel claim, we decline to address its assignments of error related to equitable estoppel.

### (b) Court Did Not Err in Entering Judgment for the Defendants on D&Y's Promissory Estoppel Claim

Regarding the promissory estoppel judgment, D&Y argues that the undisputed evidence on its promissory estoppel claim showed that Yost asked Royal to send D&Y a confirmation letter of his oral promise and that Royal never complied. D&Y contends that the court erred in characterizing the requested letter as a "letter of assurance" and in concluding that these facts showed D&Y had not reasonably or in good faith relied on Royal's promise. D&Y argues that although it wanted the letter in order to get its subcontractors to work on the house again, D&Y itself reasonably relied on Royal's oral promise in a December 11, 2007, telephone conversation to fund the work. D&Y argues that a party's reliance on a promise is reasonable when it has no reason to know the truth or the means of discovering the truth with reasonable diligence. It contends that it did not know, and could not have discovered with reasonable diligence, that Royal's promises were untrue when made.

[24] A claim of promissory estoppel requires a plaintiff to show (1) a promise that the promisor should have reasonably expected to induce the plaintiff's action or forbearance, (2) the promise did in fact induce the plaintiff's action or forebearance, and (3) injustice can only be avoided by enforcing the promise.[35] Under Nebraska law, a plaintiff need not show a promise definite enough to constitute a unilateral contract, but

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[34] See, *Rodehorst Bros. v. City of Norfolk Bd. of Adjustment*, 287 Neb. 779, 844 N.W.2d 755 (2014); *Curtis v. Giff*, 17 Neb. App. 149, 757 N.W.2d 139 (2008). See, also, Neb. Ct. R. App. P. § 2-109(D)(1)(e) (rev. 2014).

[35] See, *Cass Cty. Bank v. Dana Partnership*, 275 Neb. 933, 750 N.W.2d 701 (2008); *Fast Ball Sports v. Metropolitan Entertainment*, 21 Neb. App. 1, 835 N.W.2d 782 (2013), citing *Rosnick v. Dinsmore*, 235 Neb. 738, 457 N.W.2d 793 (1990).

it must be definite enough to show that the promisee's reliance on it was reasonable and foreseeable.[36]

[25] We agree with D&Y that in an estoppel claim, a plaintiff generally fails to show that he or she reasonably and in good faith relied on the defendant's false statements or conduct if it knew or had reason to know that the misrepresentations were false when made or when it acted in reliance upon them.[37] Our case law is consistent with these cited authorities. We have held that a property owner did not rely in good faith on a zoning variance when the owner had learned that the variance faced a court challenge before beginning a construction project.[38]

Moreover, D&Y's reliance on Royal's promise to provide funding for the project would not be in bad faith just because the promise was oral.[39] And D&Y's evidence showed that it was relying on both Royal's December 10, 2007, e-mail and his alleged statements to clarify the e-mail in a December 11 telephone conversation with Yost. D&Y also presented evidence to show that Royal assured Yost that he would send a confirmation letter of the bank's oral promise and repeated these statements in later telephone calls. Under D&Y's version of events, until Royal informed D&Y that Frost was seeking a loan from the lot lender, D&Y would have had no reason to suspect that Royal's alleged promise to provide funding was false.

But we disagree with D&Y that all the facts relevant to its promissory estoppel claim were undisputed. In his deposition, Royal denied telling Yost that the bank would provide funding for D&Y's work. He could not recall speaking to Yost on December 11, 2007, when Yost claimed Royal orally promised

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[36] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[37] See, *Heckler v. Community Health Services*, 467 U.S. 51, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984), citing 3 John Norton Pomeroy, A Treatise on Equity Jurisprudence §§ 805, 810, and 812 (Spencer W. Symons ed., 5th ed. 1941); Restatement (Second) of Torts, *supra* note 8, § 541 and comment *a*.

[38] See *Bowman v. City of York*, 240 Neb. 201, 482 N.W.2d 537 (1992).

[39] See *Cass Cty. Bank, supra* note 35.

to provide the funding. And Royal said he told Yost that Frost had mentioned getting money from the lot lender. The district court specifically found that D&Y had failed to prove that Royal promised to fund D&Y's work.

We recognize that the court made this finding in deciding D&Y's equitable estoppel claim instead of its promissory estoppel claim. But we cannot ignore this finding, which is ostensibly incompatible with its conclusion that D&Y did not reasonably rely on Royal's alleged oral promises. The court's conclusion that D&Y did not rely in good faith on Royal's promise rests on an implicit assumption that a promise was made. We believe the court's order is consistent only if it is interpreted as concluding D&Y had failed to prove by clear and convincing evidence that Royal's oral statements were sufficiently definite to show a promise to fund D&Y's work that would reasonably and foreseeably induce its reliance. And we conclude there is support for this finding. But the court's judgment for the defendants on D&Y's estoppel claims does not preclude D&Y from attempting to prove—for its claims of fraud and civil conspiracy—that Royal made statements that foreseeably induced its reliance.

### 3. D&Y's Failure to Satisfy Clear and Convincing Standard of Proof Does Not Preclude Litigation of Same Issue Under a Lower Standard of Proof

[26-30] A plaintiff must establish each element of equitable estoppel by clear and convincing evidence.[40] The same standard of proof applies to a promissory estoppel claim resting on allegations of fraud. In claims for equitable relief, Nebraska law imposes a clear and convincing standard of proof for allegations of fraud.[41] But it does not impose a clear

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[40] *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

[41] See, *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007); *Schuelke v. Wilson*, 255 Neb. 726, 587 N.W.2d 369 (1998); *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989).

and convincing standard of proof for fraud claims in actions at law.[42] The standard of proof for fraudulent misrepresentation claims is proof by a preponderance of the evidence.[43] And issue preclusion does not apply to a party who had a higher standard of proof in the first action than the standard that applies in a later proceeding.[44]

## VI. CONCLUSION

We conclude that the court erred in granting summary judgments to the Frosts on D&Y's fraud claim and to the Frosts and the bank on D&Y's civil conspiracy claim. In its final judgment, we conclude that the court did not err in finding that D&Y failed to prove by clear and convincing evidence that Royal, the bank's president, made a promise to fund D&Y's work that was definite enough to induce D&Y's foreseeable reliance on the statement. But we conclude that this finding does not preclude D&Y from attempting to prove otherwise under the lower standard of proof that applies to its fraud claims. We reverse the court's summary judgment orders and remand the cause to the court to conduct further proceedings on D&Y's claims of fraud and civil conspiracy.

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

STEPHAN, J., not participating.

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[42] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

[43] See *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997).

[44] See, *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002); *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995); Restatement (Second) of Judgments § 28(4) (1982).

# In re Trust Created by LaVerne D. Nabity and Evelyn A. Nabity, Grantors. Robert D. Nabity and Mark L. Nabity, appellees, v. Elizabeth A. Rubek, appellant.

# In re Guardianship and Conservatorship of Evelyn A. Nabity. Robert D. Nabity, appellee, v. Mary C. Rose, appellant.

854 N.W.2d 551

Filed September 26, 2014. Nos. S-13-670, S-13-671.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record.
2. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
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. ____: ____. In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
5. ____: ____. An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings.
6. **Mental Competency: Proof.** To set aside an instrument for lack of mental capacity on the part of the person executing such instrument, there must be clear and convincing evidence that the mind of the person executing the instrument was so weak or unbalanced when the instrument was executed that the person could not understand or comprehend the purport and effect of what he or she was doing.
7. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
8. **Moot Question: Appeal and Error.** Under the public interest exception, an appellate court may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.
9. **Appeal and Error.** Errors argued but not assigned will not be considered on appeal.

Appeals from the County Court for Douglas County: Darryl R. Lowe, Judge. Affirmed.

Lawrence K. Sheehan, of Ellick, Jones, Buelt, Blazek & Longo, L.L.P., and, on brief, Nick Halbur, of Thompson Law Office, P.C., L.L.O., for appellants.

Lisa M. Line, of Brodkey, Peebles, Belmont & Line, L.L.P., for appellees.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Wright, J.

## I. NATURE OF CASE

These consolidated appeals arise from proceedings involving the appointment of a guardian and conservator for Evelyn A. Nabity and the administration of a trust established for her care. In the appeal from the trust administration proceeding, the issue presented is whether Evelyn was competent to execute amendments to the trust agreement which changed the identity of the trustees. We find that there was clear and convincing evidence that Evelyn was incompetent to execute those amendments, and we affirm the order setting them aside. In the other appeal, we consider whether the appointment of a permanent guardian and conservator for Evelyn denied her the benefit of a valid health care power of attorney. We conclude that it did not, and we affirm the order setting aside the 1998 health care power of attorney and appointing a permanent guardian and conservator for Evelyn.

## II. SCOPE OF REVIEW

[1] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record. *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. 389, 849 N.W.2d 458 (2014).

[2,3] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Conservatorship of Gibilisco*, 277 Neb. 465, 763 N.W.2d 71 (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. *Id*.

[4,5] In instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *In re Trust Created by Hansen*, 274 Neb. 199, 739 N.W.2d 170 (2007). An appellate court, in reviewing a judgment for errors appearing on the record, will not substitute its factual findings for those of the trial court when competent evidence supports those findings. *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007).

## III. FACTS

Evelyn is a resident of Omaha, Nebraska. She has 11 living children: Elizabeth A. Rubek (Elizabeth); Robert D. Nabity; Gerald P. Nabity; Mark L. Nabity; Dwayne J. Nabity; Katherine M. Wells; Patricia J. Krehoff, now known as Patricia J. Brock (Patricia); Philip J. Nabity; Cynthia A. Ray (Cynthia); Sandra M. Burrows; and Mary C. Nabity, now known as Mary C. Rose (Mary). Evelyn's husband, LaVerne D. Nabity, passed away in 2004.

### 1. Creation of Trust

In September 1998, LaVerne and Evelyn formed the LaVerne D. Nabity and Evelyn A. Nabity Trust. LaVerne and Evelyn were designated as trustees. The trust agreement provided that if one of them became unable or unwilling to serve as trustee, "the remaining Trustee shall temporarily serve as the Trustee. Until a successor Trustee is appointed, the remaining Trustee may take any action or exercise any power granted to the Trustee . . . ." The surviving original trustee had the power to appoint a successor trustee to act as cotrustee.

The trust agreement provided that Robert and Mark were to serve as successor cotrustees. They were to become trustees "when there is no acting trustee or when the trustee is unable or unwilling to act." There is no indication that Evelyn appointed Robert and Mark to serve as her cotrustees after LaVerne died.

### 2. 1998 Health Care Power of Attorney

In September 1998, in addition to forming the trust, Evelyn executed a health care power of attorney. The document named LaVerne as Evelyn's attorney in fact for health care and Elizabeth and Mary as successor attorneys in fact for health care. It did not nominate anyone to serve as guardian in the event that one was later appointed.

### 3. 2011 Neuropsychological Evaluation and Powers of Attorney

In 1999, Evelyn was diagnosed with "mild memory impairment." By late 2010 and early 2011, her children started noticing a decline in her mental and physical condition.

On September 30, 2011, Dr. Nadia Pare, a clinical neuropsychologist, performed an examination of Evelyn to determine her "medical and financial capacity." During the examination, Evelyn did not know the date or the day of the week, was "repetitious in conversation," "show[ed] slowness in thinking," and had "difficulty with more complex tasks" meant to show "concrete thinking processes." The examination revealed that Evelyn suffered from impairments to multiple mental processes, including "working memory" and "executive functioning (including poor reasoning and problem solving, insight, concrete thinking, and impulsivity)."

On October 3, 2011, Pare diagnosed Evelyn with "dementia of probable Alzheimer's disease etiology" with a "moderate level of severity." Pare opined that Evelyn did not have the capacity to "make complex medical decisions" or decide whether she should remain in her home. Pare also noted that Evelyn was "unable to define the concept of power of attorney" and "confus[ed] this concept with a lawyer or a trust, despite being re-explained the question." Pare recommended that Evelyn's family pursue a conservatorship and a health care power of attorney.

In response to Pare's recommendations, Patricia downloaded a durable general power of attorney from the Internet and took Evelyn to execute it before a notary. This power of attorney,

signed on October 3, 2011, named Patricia and Elizabeth as joint agents.

On October 10, 2011, Evelyn executed yet another durable general power of attorney and a health care power of attorney. Both documents were prepared by her attorney and executed before a notary. The durable general power of attorney named Patricia and Elizabeth as Evelyn's attorneys in fact and gave them "full power to act or to omit to act regarding [her] estate or [her] person." The document specifically granted the power to name a guardian or conservator for Evelyn, but it did not require the attorneys in fact to nominate any particular individual. The health care power of attorney named Elizabeth and Mary as Evelyn's attorneys in fact for health care. The document did not nominate anyone to serve as guardian in the event that one was later appointed.

### 4. Amendment of Trust

Evelyn also executed amendments to the original trust agreement on October 10, 2011. The amendments identified Evelyn, Patricia, and Elizabeth as cotrustees and removed the provision designating Robert and Mark as successor trustees. The amendments were signed by Evelyn as "grantor" and by Evelyn, Patricia, and Elizabeth, allegedly as cotrustees. Since the trust agreement was amended, Patricia and Elizabeth have not taken over the duties of cotrustees.

### 5. 2012 Health Care Power of Attorney

On January 20, 2012, Evelyn executed a third health care power of attorney. The document named Mary as Evelyn's attorney in fact for health care and Elizabeth as an alternate agent. It differed from the prior powers of attorney in that it nominated the attorney in fact for health care to serve as Evelyn's guardian in the event a guardian was later appointed.

At the time Evelyn executed this health care power of attorney, her attorney believed Evelyn was competent to do so, because Evelyn "understood what she was signing and was willing to do so." Evelyn's attorney knew that Evelyn experienced "some confusion" but was not aware that Evelyn had

been diagnosed with dementia or Alzheimer's disease. After the document was executed, Evelyn's attorney learned about the October 2011 neuropsychological evaluation.

### 6. Family Dispute

In the following months, a family dispute developed over Evelyn's care. Some of Evelyn's children, including Robert, did not feel that Mary was keeping the other children informed of their mother's condition. Evelyn's attorney attempted to facilitate communication between the children, to no avail, and on June 6, 2012, she recommended that the children engage in mediation, which did not occur.

In early June 2012, Mary took Evelyn to stay with her in Illinois. Evelyn believed she was going there for a 2-week vacation, and Mary represented to Evelyn's other children that Evelyn was going to Illinois for a vacation. However, Evelyn stayed with Mary for several months.

Subsequently and without Mary's knowledge, Cynthia brought Evelyn from Illinois to Nebraska. Evelyn stayed with Patricia until Evelyn was admitted to a hospital on November 8, 2012. On November 20, Evelyn was discharged from the hospital to "House of Hope," where she continues to reside.

### 7. Guardianship, Conservatorship, and Trust Administration Proceedings

Shortly before Evelyn returned to Nebraska, Robert petitioned for the appointment of a guardian, conservator, and guardian ad litem for her and for registration and administration of the trust. The resulting guardianship and conservatorship proceeding was designated "No. PR12-1422" in Douglas County Court. The trust administration proceeding was designated "No. PR12-1425" in Douglas County Court.

Robert filed for registration and administration of the trust in his capacity as "Nominated Successor Trustee/Interested Party." He alleged that there was need for "instruction and oversight by the [county] court" due to LaVerne's death and Evelyn's "inability . . . to independently handle her own affairs." Robert argued that in October 2011, Evelyn had not been competent to amend the trust agreement, and he requested a determination

whether Robert and Mark (as identified in the original trust agreement) or Evelyn, Patricia, and Elizabeth (as identified in the amendments) were the proper trustees. Elizabeth and Mary objected to Robert's petition. They asserted that Evelyn was competent to execute the trust amendments and that as a result, Evelyn, Patricia, and Elizabeth were the trustees.

In the petition for appointment of a guardian and conservator, Robert alleged that Evelyn was "unable to make responsible decisions as to (1) determining appropriate residential assistance . . . ; (2) protecting personal effects and financial assets; (3) responsibly arranging for and following her medical care[;] and (4) receiving and applying [her] money and property . . . for her benefit." He asserted that Evelyn had executed several powers of attorney within the previous year, all of which were executed "after she was determined unable to handle her own affairs." The county court determined that an emergency existed, appointed Robert to serve as temporary guardian and conservator, and appointed a guardian ad litem.

Mary objected to the guardianship and conservatorship proceeding and moved to intervene. She claimed that she should be recognized as Evelyn's chosen attorney in fact for health care under the 1998 health care power of attorney. She requested a hearing on the necessity of the temporary guardianship and conservatorship, for which she claimed there was no justification in light of the 1998 health care power of attorney.

As temporary guardian and conservator, Robert moved for a determination of the validity of the 1998 health care power of attorney. He argued that the 1998 health care power of attorney should be revoked pursuant to Neb. Rev. Stat. § 30-3421 (Reissue 2008), because even if it was effective, the attorneys in fact had failed to "act in a manner consistent with the wishes of the principal or in the best interests of the principal."

At a hearing, Robert adduced evidence that called into question Mary's ability to care for Evelyn in the manner recommended by Evelyn's doctors. He demonstrated that as temporary guardian and conservator, he had followed the advice of Evelyn's doctors and guardian ad litem. He also adduced

evidence relevant to Evelyn's competency to execute the various documents at issue. Mary adduced evidence that Evelyn expressed a desire for Mary to make health care decisions for her and that Evelyn was happy and cared for while she stayed with Mary in Illinois. The evidence received at the hearing was considered in both the guardianship and conservatorship proceeding and the trust administration proceeding.

On February 19, 2013, at Robert's request, the county court extended the temporary guardianship and conservatorship for an additional 90 days. The court also received additional evidence. Relevant to the guardianship and conservatorship proceeding was the testimony of Evelyn's guardian ad litem that a guardianship for Evelyn was necessary and that Evelyn had not been properly cared for prior to the temporary guardianship. The guardian ad litem recommended Robert to serve as permanent guardian. She opined that Robert had the "emotional wherewithal to be able to take a step back for the good of his mother and the good of the rest of his siblings." Relevant to the trust administration proceeding was Robert's evidence (1) that on the day Evelyn amended the trust agreement, she was "confused"; (2) that after being appointed cotrustees by the trust amendments, Patricia and Elizabeth never took control of the trust assets; and (3) that Patricia and Elizabeth would not be able to work together as cotrustees.

On May 6, 2013, Robert moved for an "order finalizing the guardianship/conservatorship or in the alternative finding good cause to continue the temporary guardianship." Elizabeth and Mary objected to the motion. They asked the county court to deny Robert's request to continue the temporary guardianship and conservatorship or, in the alternative, to appoint Elizabeth and Mary to serve as conservator and guardian, respectively. Over Elizabeth and Mary's objection, the court extended the temporary guardianship and conservatorship for an additional 90 days.

### 8. County Court Orders

On July 3, 2013, the county court entered an order in the guardianship and conservatorship proceeding. It found that Evelyn was not competent to execute the 2011 and 2012

powers of attorney but that the attempts to execute those powers of attorney nonetheless revoked the 1998 health care power of attorney. It determined that in any event, the agents for health care identified in the various powers of attorney had failed to act in Evelyn's best interests. In regard to Mary in particular, the court concluded that

> by neglecting her obligations under a power of attorney and continuing to allow Evelyn [to] make her own decisions when Evelyn does not have insight or judgment into taking care of herself, [Mary] has disqualified herself from serving as an agent for Evelyn either under a power of attorney or as a guardian.

In light of these factual findings and pursuant to § 30-3421(1)(d), the court set aside the 1998 health care power of attorney. It ordered the temporary guardianship and conservatorship to become permanent, with Robert continuing to serve as guardian and conservator.

On July 11, 2013, the county court entered an order in the trust administration proceeding declaring Robert and Mark cotrustees. It cited to and incorporated the court's finding in the guardianship and conservatorship proceeding that Evelyn was "not competent to execute estate planning documents, including powers of attorney and trust amendments[,] in October, 2011."

On August 2, 2013, the county court overruled Elizabeth's motion to waive a supersedeas bond and set the supersedeas bond at $25,000. The record does not reflect that Elizabeth posted the supersedeas bond.

### 9. Appellate Proceedings

Elizabeth and Mary separately appealed. Elizabeth's appeal, case No. S-13-670, is brought within the context of the trust administration proceeding. Mary's appeal, case No. S-13-671, arises within the guardianship and conservatorship proceeding. Their appeals have been consolidated.

Pursuant to our statutory authority to regulate the dockets of the appellate courts of this state, we moved the consolidated cases to our docket. See Neb. Rev. Stat. § 24-1106(3)

(Reissue 2008). Robert and Mark filed a motion to dismiss Elizabeth's appeal due to lack of standing and failure to post bond, which motion we overruled without prejudice.

## IV. ASSIGNMENTS OF ERROR

A single brief was submitted by Elizabeth and Mary. As is relevant to case No. S-13-670, Elizabeth assigns that the county court erred in finding that Evelyn lacked capacity to amend the trust agreement in October 2011, in removing Patricia and Elizabeth as cotrustees, and in appointing Robert and Mark as cotrustees. In case No. S-13-671, Mary assigns, restated, that the county court erred in failing to find that Evelyn was being deprived of the benefit of an agent appointed under a valid power of attorney and in finding that Elizabeth and Mary should be removed as Evelyn's attorneys in fact for failing to act in Evelyn's best interests.

## V. ANALYSIS

### 1. Appeal in Trust Administration Proceeding

[6] Robert's petition for trust administration requested a determination whether Robert and Mark (as identified in the original trust agreement) or Evelyn, Patricia, and Elizabeth (as identified in the October 2011 amendments) were the proper trustees. The county court found by clear and convincing evidence that Evelyn was not competent to execute the trust amendments and thus declared Robert and Mark to be trustees. Although the court did not explicitly state that it set aside the trust amendments due to Evelyn's lack of competence, it was implicit in the order, given that the court subsequently named Robert and Mark as successor trustees, in accordance with the original, unamended trust agreement. To set aside an instrument for "lack of mental capacity on the part of the person executing such instrument," there must be clear and convincing evidence that "the mind of the person executing the instrument was so weak or unbalanced when the instrument was executed that the person could not understand or comprehend the purport and effect of what he or she was doing."

See *Cotton v. Ostroski*, 250 Neb. 911, 918, 554 N.W.2d 130, 135 (1996).

Elizabeth argues that the evidence of incompetence was not sufficient for the county court to set aside the amendments. But we do not agree. There was clear and convincing evidence that supported the court's determination.

The evidence showed that on the day Evelyn executed the trust amendments, she suffered from a weak and unbalanced mind. Those who witnessed her execute the trust amendments testified that she was "confused" and did not know what day of the week it was. Due to Evelyn's confusion, someone had to "point out where she needed to sign." At the time of executing the trust amendments, Evelyn was under a recent diagnosis of "[m]oderate dementia . . . secondary to Alzheimer[']s disease" and suffered impairments in "executive functioning (including poor reasoning and problem solving, insight, concrete thinking, and impulsivity)." The evidence was that from the date of that diagnosis forward, there would be only a decline in Evelyn's condition.

There was also clear and convincing evidence that Evelyn did not understand the effect of what she was doing by executing the trust amendments. Elizabeth testified that Evelyn believed the purpose of the document was to take Robert's name "off of there." But there was no evidence that Evelyn understood what the implications of that removal would be. Only a few days earlier, Evelyn had been unable to distinguish between the concepts of a trust, a lawyer, and a financial power of attorney. This evidence satisfied the legal burden for setting aside the trust amendments. See *id*.

The county court did not err in setting aside the trust amendments. And once the trust amendments were set aside by reason of Evelyn's incompetence, there was no question as to the identity of the trustees. The original trust agreement clearly provided that Robert and Mark were cotrustees. We find no error on the record in the court's order naming Robert and Mark as cotrustees. Therefore, we affirm the order in the trust administration proceeding.

### 2. Appeal in Guardianship and Conservatorship Proceeding

The issues before the county court in the guardianship and conservatorship proceeding were (1) whether any of the various powers of attorney executed by Evelyn were valid and (2) whether there should be a permanent guardianship and conservatorship. The court determined that Evelyn was not competent to execute the 2011 and 2012 powers of attorney and that the 1998 health care power of attorney had been revoked. In concluding that the 1998 health care power of attorney was revoked, the court determined that the agents named in that document had disqualified themselves from serving in that capacity by taking actions contrary to the best interests of Evelyn. Finally, the court determined that there should be a permanent guardian and conservator and appointed Robert to serve as such. Mary challenges all of these determinations.

#### (a) Mootness

Before we can address the merits of Mary's appeal, we must first discuss the mootness of her claims as to the temporary guardianship and conservatorship. Mary alleges that the county court erred by failing to recognize the 1998 health care power of attorney as valid. She argues that the court committed this error at various points throughout the guardianship and conservatorship proceeding, including when the court (1) appointed a temporary guardian and conservator instead of relying upon the agents named in the 1998 health care power of attorney and (2) allowed Robert to seek an emergency temporary guardianship and conservatorship without requiring him to first obtain a hearing on the effectiveness of the 1998 health care power of attorney. Robert and Mark argue that because these issues relate to the appointment of a temporary guardian and conservator, they were "rendered moot upon the entrance of the permanent order" of guardianship and conservatorship. See brief for appellees at 29. We agree.

[7] A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the

issues presented are no longer alive. *In re Estate of Jeffrey B.*, 268 Neb. 761, 688 N.W.2d 135 (2004). In the case of a temporary order later replaced by a permanent order, the question whether it was "issued in error was relevant only from the time that it was ordered until it was replaced by the . . . permanent order." *Id.* at 777, 688 N.W.2d at 147. In an appeal from the permanent order, "any issue relating to the temporary order is moot and need not be addressed." *Id.*

In the instant case, any arguments raised by Mary in relation to the granting and extension of the temporary guardianship and conservatorship became moot upon entry of the permanent guardianship and conservatorship. The orders granting and extending the temporary guardianship and conservatorship were temporary in nature. By statute, they were effective for only 90 days each. See Neb. Rev. Stat. § 30-2626(d) (Cum. Supp. 2012). Upon entry of the July 3, 2013, order, the temporary guardianship and conservatorship, along with the orders establishing and extending them, were replaced by the permanent guardianship and conservatorship. At that time, any issues relating to the granting and extension of the temporary guardianship and conservatorship became moot.

[8] Mary argues that even if we determine that the issues relating to the temporary guardianship and conservatorship are moot, we should consider them under the public interest exception to the mootness doctrine. "'[U]nder the public interest exception, we may review an otherwise moot case if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.'" *In re Interest of Thomas M.*, 282 Neb. 316, 321, 803 N.W.2d 46, 51 (2011).

Mary alleges that the errors in the temporary guardianship and conservatorship affect the public interest, because such temporary proceedings "will continue to be employed" to circumvent the protections of health care powers of attorney unless we clarify that the protections of a health care power of attorney "must be exhausted before resorting to Guardianship proceedings." See reply brief for appellants at 9-10. Mary urges us to consider the propriety of temporary guardianship and conservatorship proceedings so that we can

prevent other individuals from being deprived of the protections of valid health care powers of attorney through the use of such proceedings.

But as we explain below, the temporary guardianship and conservatorship proceeding in the instant case did not deprive Evelyn of the protections of a valid health care power of attorney. Consequently, this case does not present us with an opportunity to discuss the alleged dangers identified by Mary and does not concern a matter of public interest.

However, not all of Mary's arguments relate solely to the temporary guardianship and conservatorship. Those that relate to the permanent appointment of a guardian and conservator are not moot.

(b) Validity of Power of Attorney

Mary alleges that the county court erred in failing to find that Evelyn was being deprived of the benefit of a valid power of attorney. She argues that the 1998 health care power of attorney remained valid and that the agents named therein should not have been disqualified. She does not allege that the court erred in determining that Evelyn was not competent to execute the 2011 and 2012 powers of attorney. Therefore, we address only the validity of the 1998 health care power of attorney.

The county court concluded that the 1998 health care power of attorney was invalid for two reasons: (1) It was revoked by the execution of the 2011 and 2012 powers of attorney, and (2) it should be set aside due to the actions of the attorneys in fact named therein, pursuant to § 30-3421(1)(d). We can reverse the judgment of the county court only if these determinations did not conform to the law, were not supported by competent evidence, or were arbitrary, capricious, or unreasonable. See *In re Conservatorship of Gibilisco*, 277 Neb. 465, 763 N.W.2d 71 (2009).

*(i) Revocation by Subsequent Documents*

The county court concluded that even though Evelyn was not competent to execute the 2011 and 2012 health care powers of attorney, those documents revoked the 1998 health care

power of attorney. We find this to be not in conformity with the law.

Neb. Rev. Stat. § 30-3420(4) (Reissue 2008) provides that the "execution of a valid power of attorney for health care shall revoke any previously executed power of attorney for health care." But the 2011 and 2012 health care powers of attorney were not valid. The county court found by clear and convincing evidence that Evelyn was not competent to execute those documents, and this finding has not been challenged. Because the 2011 and 2012 powers of attorney were not valid due to Evelyn's incompetence, her signing of those documents did not effectively revoke the 1998 health care power of attorney. The county court erred in concluding to the contrary.

*(ii) Revocation by Actions of Attorneys in Fact for Health Care*

The county court also concluded that the 1998 health care power of attorney should be set aside pursuant to § 30-3421(1)(d). A court can revoke a power of attorney for health care

> upon a determination by the court of both of the following: (i) That the attorney in fact has violated, failed to perform, or is unable to perform the duty to act in a manner consistent with the wishes of the principal or, when the desires of the principal are unknown, to act in a manner that is in the best interests of the principal; and (ii) that at the time of the determination by the court, the principal lacks the capacity to revoke the power of attorney for health care.

§ 30-3421(1)(d). The court determined that Elizabeth and Mary, the attorneys in fact under the 1998 health care power of attorney, had failed to act in Evelyn's best interests, because they had failed to provide the "necessary health care support" for Evelyn or arrange for the "necessary health care provisions identified" in the neuropsychological examination. The court also determined that Evelyn was not competent to revoke the 1998 health care power of attorney. Accordingly, the court concluded that the requirements for revocation under

§ 30-3421(1)(d) were satisfied and set aside the 1998 health care power of attorney.

Mary argues that in determining whether she and Elizabeth failed to perform their duties under the 1998 health care power of attorney, the county court applied a standard that was contrary to § 30-3421(1)(d). She alleges that because Evelyn's wishes regarding health care were known, her best interests were not a factor. We do not agree that the court erred in considering best interests.

In order for a court to revoke a health care power of attorney pursuant to § 30-3421(1)(d), the attorney in fact for health care must have violated or failed to perform his or her duty in that capacity. Depending on the circumstances, the duty of an attorney in fact for health care is defined according to either the wishes of the person on whose behalf the attorney in fact is acting or the person's best interests. Neb. Rev. Stat. § 30-3418(1) (Reissue 2008) provides that

> an attorney in fact shall have a duty . . . to make health care decisions (a) in accordance with the principal's wishes as expressed in the power of attorney for health care or as otherwise made known to the attorney in fact or (b) if the principal's wishes are not reasonably known and cannot with reasonable diligence be ascertained, in accordance with the principal's best interests, with due regard for the principal's religious and moral beliefs if known.

Section 30-3421(1)(d) reflects this same difference in duty depending on whether the principal's wishes are known, requiring a determination that the attorney in fact violated the duty either "to act in a manner consistent with the wishes of the principal" or "to act in a manner that is in the best interests of the principal." This latter determination is required "when the desires of the principal are unknown." See *id*.

Evelyn's primary wish regarding health care—that she remain in her home—was known. Evelyn's attorney and Mary testified that on more than one occasion, Evelyn indicated her desire to remain in her home. Evelyn's doctor also testified that Evelyn said she wanted to stay in her home.

But beyond Evelyn's general desire to remain in her home, the record does not reflect that she expressed specific wishes as to her medical care at any time when she was competent. Mary testified that in October 2011, Evelyn expressed her desire to live with Mary if she ever needed to live with someone. However, in October, Evelyn was not competent to execute legal documents and did not have the mental capacity to decide whether she could live at home or make complex medical decisions. Evelyn's statement that she wished to live with Mary was expressed at a time when Evelyn was not competent to make such a decision.

Mary's testimony includes several references to Evelyn's wish not to be placed in a nursing home or assisted living facility or have in-home care. But we cannot ascertain from Mary's testimony when Evelyn expressed these desires. In the absence of such evidence, we cannot conclude that Evelyn expressed her desires while competent.

The only desire Evelyn expressed while competent was her general desire to live alone in her home. Otherwise, her wishes as to medical care were not known. In particular, it was unknown what Evelyn would have desired if and when it became impossible for her to remain in her home. There is no evidence that she expressed her wishes on this matter at any time when she was competent.

In October 2011, Elizabeth and Mary were advised by Evelyn's doctor that it was impossible for Evelyn to remain in her home and that they "needed to start looking . . . for more care." From that time forward, the wishes that Evelyn had expressed while competent (staying in her home) were impossible to fulfill and Elizabeth and Mary faced medical decisions about which Evelyn's wishes were not known and could not be reasonably ascertained due to Evelyn's incompetence (how she wished to be cared for once it became impossible for her to remain in her home).

Because after October 2011, Evelyn's wishes about care outside of the home were not known, Elizabeth and Mary's duty was to act in a manner consistent with Evelyn's "best

interests." See § 30-3418(1). They were no longer required to defer to the limited "wishes" Evelyn had expressed while competent. The county court did not err in applying a best interests analysis to Elizabeth's and Mary's actions under the 1998 health care power of attorney.

The county court determined that Elizabeth and Mary had failed to act in Evelyn's best interests:

> They failed to acknowledge the severity of Evelyn's condition, refused to obtain or provide assistance in Evelyn's home or in an alternate placement near Evelyn's home. They have failed to take Evelyn to scheduled appointments, failed to act on the advice of Evelyn's counsel or medical providers, substituted their own medical knowledge in lieu of health care professionals working with Evelyn and allowed Evelyn in her diminished mental capacity to make her own decisions in regard to her care.

This determination is amply supported by the evidence. In October 2011, one of Evelyn's doctors, Pare, informed Elizabeth and Mary that Evelyn should not live alone at home. Pare advised them that failure to provide the necessary care and support for Evelyn would be considered "elder neglect." Yet, from October 2011 to June 2012, Elizabeth and Mary allowed Evelyn to reside alone in her home. Mary testified that they never looked into alternative options for Evelyn, such as in-home health care, assisted living, day centers, or inpatient skilled placement. Such behavior was consistent with other evidence that Mary either did not understand or refused to recognize the full extent of Evelyn's mental impairment. Finally, we note that while Evelyn was in Illinois, Mary did not take Evelyn to scheduled medical appointments and may not have ensured that Evelyn took her prescription medications. Based on this evidence, we agree with the county court's determination that Elizabeth and Mary failed to act in Evelyn's best interests. The county court did not err in setting aside the 1998 health care power of attorney under § 30-3421(1)(d).

### (c) Permanent Guardianship and Conservatorship

We next decide whether the county court erred in establishing a permanent guardianship and conservatorship for Evelyn. Mary's principal argument is that the 1998 health care power of attorney should have superseded the guardianship and conservatorship and made them unnecessary. In fact, this is the only ground upon which she challenges the entry of the permanent conservatorship. However, given our determination that the 1998 health care power of attorney was properly set aside, there is not a valid health care power of attorney at issue. 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). Accordingly, we do not address the interplay between health care powers of attorney and guardianship and conservatorship proceedings.

We find no error in the county court's entry of a permanent guardianship and conservatorship for Evelyn. A court can appoint a permanent guardian "if it is satisfied by clear and convincing evidence that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as the least restrictive alternative available for providing continuing care or supervision of the person . . . alleged to be incapacitated." Neb. Rev. Stat. § 30-2620(a) (Cum. Supp. 2012).

A court can appoint a permanent conservator

> in relation to the estate and property affairs of a person if the court is satisfied by clear and convincing evidence that (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, [or] physical illness or disability . . . and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him or her and that protection is necessary or desirable to obtain or provide funds.

Neb. Rev. Stat. § 30-2630(2) (Reissue 2008).

Competent evidence supports a finding that Evelyn is "incapacitated." See § 30-2620(a). Due to Evelyn's dementia and Alzheimer's disease, she does not recognize her cognitive limitations, has "difficulty in daily living," and cannot make medical or financial decisions. Her condition is not expected to improve.

Given that Evelyn cannot make decisions for herself, there is clear and convincing evidence that a permanent guardianship is necessary and is the "least restrictive alternative available for providing continuing care" for her. See § 30-2620(a). Evelyn's guardian ad litem testified that it was in Evelyn's best interests to receive "24-hour care" and that Evelyn "needs to be under a guardianship." Indeed, there does not appear to be an alternative option.

The aforementioned evidence of Evelyn's incapacity supports a finding that she is "unable to manage" her property due to "mental deficiency." See § 30-2630(2). And because Evelyn requires continual care outside of the home and is unable to manage her affairs, a conservator is necessary for the proper management of her property. See *id*.

The statutory elements for appointing a guardian and conservator have been shown by clear and convincing evidence. We affirm the entry of a permanent guardianship and conservatorship for Evelyn.

### (d) Appointment of Robert

[9] Mary argues, but does not assign, that the county court erred in appointing Robert to serve as guardian and conservator, because "his appointment has not been in Evelyn's best interests." See brief for appellants at 14. Errors argued but not assigned will not be considered on appeal. *Butler County Dairy v. Butler County*, 285 Neb. 408, 827 N.W.2d 267 (2013). Therefore, we do not address whether it was error to choose Robert to serve as guardian and conservator.

## VI. CONCLUSION

For the foregoing reasons, in case No. S-13-670, we affirm the order of the county court setting aside the trust amendments and naming Robert and Mark as cotrustees. In case

No. S-13-671, we affirm the judgment of the county court setting aside the 1998 health care power of attorney, entering a permanent guardianship and conservatorship for Evelyn, and appointing Robert to serve as guardian and conservator.

AFFIRMED.

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STATE OF NEBRASKA, APPELLEE, V.
WILLIAM W. MATTHEWS, APPELLANT.
854 N.W.2d 576

Filed October 3, 2014. No. S-12-1052.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
2. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
3. **Evidence.** All relevant evidence normally is admissible. Evidence which is not relevant is not admissible.
4. **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.
5. **Self-Defense.** A determination of whether the victim was the first aggressor is an essential element of a self-defense claim.
6. **Self-Defense: Evidence: Proof.** Evidence of a victim's violent character is probative of the victim's violent propensities and is relevant to the proof of a self-defense claim.
7. **Criminal Law: Trial: Evidence: Appeal and Error.** An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.
8. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
9. **Self-Defense: Evidence.** When character evidence is being offered to establish whether the defendant's fear was reasonable in a self-defense claim, it is being used subjectively to determine the defendant's state of mind and his beliefs

regarding the danger he was in. When character evidence is used for such a purpose, the defendant necessarily must have known of the incidents or reputation which makes up the character evidence at the time of the assault.

10. **Convictions: Evidence: Appeal and Error.** Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and RIEDMANN, Judges, on appeal thereto from the District Court for Hall County, WILLIAM T. WRIGHT, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Gerard A. Piccolo, Hall County Public Defender, and Matthew A. Works for appellant.

Jon Bruning, Attorney General, and Melissa R. Vincent for appellee.

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

CASSEL, J.

## INTRODUCTION

William W. Matthews was convicted of six felonies arising from a shooting involving multiple victims in Grand Island, Nebraska. On appeal, the Nebraska Court of Appeals reversed his convictions for attempted first degree murder and use of a deadly weapon to commit a felony with respect to Kevin Guzman and remanded the cause for a new trial.[1] We granted the State's petition for further review.

The Court of Appeals determined that Matthews' self-defense claim was prejudiced by the exclusion of evidence of Guzman's aggressive and violent character. We disagree that the exclusion of the character evidence caused Matthews prejudice. There was ample evidence before the jury to establish that Guzman was the first aggressor. Thus, the character evidence was cumulative, and its exclusion was harmless error.

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[1] See *State v. Matthews*, 21 Neb. App. 869, 844 N.W.2d 824 (2014).

We reverse the decision of the Court of Appeals and remand the cause with direction that the relevant convictions and sentences be reinstated.

## BACKGROUND

On April 21, 2011, a witness was driving on Eddy Street when he observed a large crowd of people near 11th and 12th Streets walking toward the center of Eddy Street from the west. The people in the crowd appeared to be arguing. The witness observed a man and woman standing on the east side of Eddy Street, near a garage and an alley. The man was waving a gun, which appeared to be pointed toward the woman. The witness went around the block to obtain a second look, and upon his return, he observed that the crowd had proceeded to the center of the street. A man from the crowd pulled out a gun, waved it, and fired shots at the man and woman. The witness described that at the time the shots were fired, the man near the garage had his gun out, but it was at his side and not pointed in any specific direction. The witness identified Matthews as the shooter at trial.

Another witness observed the altercation while sitting in a parked vehicle. The witness heard a man and woman arguing and yelling across the street. The witness heard the man say, "'Bring it on . . . I'm packing.'" She saw the man lift up his shirt and "flash" a gun. The man took the gun from his waistband and pointed it in the direction of the other side of the street. Two other individuals came running into the middle of the street, and one of the individuals started shooting. The shooter initially fired into the air, but subsequently lowered the gun to chest level and fired toward the man and woman. The witness first testified that she could not remember what the man and woman were doing when the shots were fired. She later testified that they were standing near some bushes facing the shooter. But during cross-examination, the witness admitted that she was unsure whether the man and woman had proceeded down the alley when the shots were fired. The witness identified Matthews as the shooter at trial.

Guzman, the man with the woman on the east side of Eddy Street, was called as a witness for the State at trial. However,

when asked about the altercation with Matthews, Guzman stated, "You know something, I plead the 5th." After a break to allow Guzman to speak with his attorney, Guzman returned to the stand and testified that he had no recollection of the events of April 21, 2011. On cross-examination, Guzman admitted that one of the reasons for his lack of memory was that he was usually under the influence of drugs and alcohol in April 2011. Matthews' counsel asked Guzman whether he was aggressive and violent while using drugs and alcohol in the following exchange:

> [Matthews' counsel:] [Y]ou were constantly under the influence of alcohol and drugs in April of 2011. Am I correct?
>
> [Guzman:] Yes.
>
> [Matthews' counsel:] In your opinion, did that state of affairs in April of 2011 make you aggressive?
>
> [The State]: Objection, Your Honor. Improper character evidence, improper opinion, it's irrelevant, improper under 404, and unfairly prejudicial over 403.
>
> THE COURT: Objection is sustained.
>
> [Matthews' counsel:] Guzman, again, in April of 2011, did those circumstances, being under the influence of drugs and alcohol, make you, in your opinion, violent?
>
> [The State]: Objection, Your Honor.
>
> THE COURT: Sustained.

In his offer of proof, Matthews' counsel explained that he sought to introduce testimony by Guzman that, in Guzman's opinion, being under the influence of drugs and alcohol in April 2011 made him aggressive and violent.

Due to Guzman's lack of memory, his deposition testimony was received at trial and read to the jury. On April 21, 2011, Guzman and his then girlfriend, Mariel Betancourt, walked to a gas station from the home of a cousin of Betancourt. Upon their return, Guzman saw a group of people on Eddy Street who had been "starting . . . all these problems" with him. Guzman had previously seen one of the group's members at a gas station, and the two had exchanged insults. Guzman explained that since that encounter, the group had been trying to "get" him.

When Guzman saw the group across the street, he wanted to "just get it done" by fighting them. The group was yelling at him, so he approached the group and started "talking shit to them," with the intent of inviting the group to fight. Guzman had a gun with him because he had heard of various threats the group had made and wanted to be prepared. But he did not see a gun among the members of the group.

Guzman and the group began exchanging threats. Three members of the group crossed the street and approached Guzman. According to Guzman, the three consisted of "Julio," "MJ," and "Will," i.e., Matthews. Guzman showed his gun, and on cross-examination, he confirmed that he was the first to display a firearm. The three opposite Guzman produced a gun as well. The three pointed the gun in Guzman's face and tossed it back and forth among themselves. Guzman pulled out his gun and pointed it back at the three. Matthews attempted to knock the gun from Guzman's hand, but was unsuccessful. Matthews then took the group's gun and pointed it in Guzman's face, and Guzman pointed his gun at Matthews in return.

The standoff ceased when Guzman was advised that the police were on their way and lowered his gun. He turned his back and began to walk away with Betancourt and Betancourt's cousin Maira Sanchez. Sanchez had seen the altercation between Guzman and the group taking place and had come over to Guzman and Betancourt. Guzman heard a woman scream, "'Shoot it,'" and MJ say, "'Shoot it, so they can see we don't play around.'" After MJ's statement, Guzman heard shots being fired. He turned around and saw leaves falling from nearby bushes. Guzman confirmed that Matthews was the last person he saw holding the group's gun. After the shots were fired, Guzman, Betancourt, and Sanchez went into the home of a relative of Betancourt, and they were called out upon the arrival of police.

Miguel Lemburg, Jr., or "MJ," testified at trial and largely confirmed Guzman's deposition testimony. He testified that a fight was supposed to occur on April 21, 2011, between "Kevin," i.e., Guzman, and Lemburg's friend Jaime Valles. Guzman arrived on the opposite side of the street from

Lemburg's group and started "[t]alking smack." Guzman "flashed" a gun by lifting his shirt. Lemburg, Matthews, and Valles crossed the street, and Guzman pulled out his gun and pointed it at them. Another gun was produced, but Lemburg denied knowledge of its origin. Out of the corner of his eye, Lemburg saw the gun being fired, but he did not see who had the gun, because he ran away. However, he recalled giving testimony at his deposition that Matthews had the gun and that he saw Matthews fire it.

Finally, an investigator with the Grand Island Police Department testified as to statements made by Matthews while in custody. Matthews initially denied any involvement in the altercation, but eventually admitted that he was present at the scene. Matthews stated that a fight was supposed to occur between Valles and Guzman. Guzman came down the alley, and some words were exchanged. Guzman produced a gun from his waistband and waved it. Matthews and Lemburg crossed the street and confronted Guzman. Matthews initially told the investigator that words were exchanged and that everyone left the scene without further incident. But he later stated that Valles produced a gun and started firing it.

Matthews was charged with six felonies arising from the shooting. He was charged with attempted first degree murder and use of a deadly weapon to commit a felony with respect to Guzman, terroristic threats and use of a deadly weapon to commit a felony with respect to Betancourt, and terroristic threats and use of a deadly weapon to commit a felony with respect to Sanchez. At the conclusion of trial, the jury returned a verdict finding Matthews guilty of all six charges. He was sentenced to 3 to 5 years' imprisonment on the attempted murder conviction, 5 to 5 years' imprisonment on each of the use of a deadly weapon convictions, and 20 to 60 months' imprisonment on each of the terroristic threats convictions.

Matthews appealed his convictions to the Court of Appeals. Among his assignments of error, he alleged that the district court erred in excluding Guzman's testimony as to his aggressive and violent character while using drugs and alcohol. The Court of Appeals agreed that the testimony was improperly excluded and found that its exclusion resulted in prejudice

to Matthews' claim of self-defense. It therefore reversed his convictions as to Guzman and remanded the cause for a new trial.

The Court of Appeals further found plain error as to credit for time served and the district court's jury instructions regarding the terroristic threats charges. And it concluded that the instructional error required reversal of the use of a deadly weapon convictions as to Betancourt and Sanchez and remand of the cause for a new trial. But these findings are not at issue before this court. The State timely petitioned for further review solely upon the reversal of Matthews' convictions as to Guzman, and we granted its petition.

## ASSIGNMENT OF ERROR

The State assigns, reworded, that the Court of Appeals erred in reversing Matthews' convictions for attempted first degree murder and use of a deadly weapon to commit a felony with respect to Guzman upon the basis that Matthews was prejudiced by the exclusion of the evidence of Guzman's character.

## 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.[2] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[3]

## ANALYSIS

The State raises two arguments in support of its assertion that the Court of Appeals erred in reversing Matthews' convictions for attempted first degree murder and use of a deadly weapon to commit a felony with respect to Guzman. First, it

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[2] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013).

[3] *Id.*

contends that Matthews failed to establish the relevancy of Guzman's testimony as to his aggressive and violent character while using drugs and alcohol. Second, it asserts that the exclusion of the testimony was harmless error.

[3,4] We first address the State's argument regarding the relevancy of the excluded testimony. Our rules of evidence make clear that all relevant evidence normally is admissible. Evidence which is not relevant is not admissible.[4] 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.[5]

[5,6] It is clear that evidence of a victim's aggressive and violent character is relevant to a defendant's claim of self-defense. We have previously observed that a determination of whether the victim was the first aggressor is an essential element of a self-defense claim.[6] And evidence of a victim's violent character is probative of the victim's violent propensities and is relevant to the proof of a self-defense claim.[7]

But the State asserts that Matthews failed to establish the relevancy of the excluded testimony, because he did not ask Guzman whether he was under the influence of drugs and alcohol at the time of the April 21, 2011, altercation. We find no merit to this assertion. Matthews' counsel asked Guzman, "[Y]ou were constantly under the influence of alcohol and drugs in April of 2011. Am I correct?" Guzman responded, "Yes." From this exchange, the jury could reasonably infer Guzman to have admitted to being under the influence of drugs and alcohol on April 21.

The State further contends that Guzman was not qualified to give an opinion as to his character while using drugs and alcohol, because he testified that he could not remember his actions while using drugs and alcohol. But we do not construe

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[4] See Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 2008).

[5] See Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 2008).

[6] See, e.g., *State v. Kinser*, 259 Neb. 251, 609 N.W.2d 322 (2000).

[7] See *State v. Lewchuk*, 4 Neb. App. 165, 539 N.W.2d 847 (1995).

Guzman's testimony as indicating that he had no recollection of his character while using drugs and alcohol. Guzman testified only that he would not know what he did the previous night while using drugs and alcohol. He did not testify that he was unaware of the effect of drugs and alcohol on his character or disposition.

[7,8] Although we reject the State's assertions as to the relevancy of the proffered character evidence, we agree that its exclusion was harmless error. An error in admitting or excluding evidence in a criminal trial, whether of constitutional magnitude or otherwise, is prejudicial unless it can be said that the error was harmless beyond a reasonable doubt.[8] Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.[9]

[9] Guzman's testimony as to his aggressive and violent character while using drugs and alcohol was relevant to the issue of whether Guzman was the first aggressor.[10] Although Matthews' counsel asserted at oral argument that the testimony was also relevant to the reasonableness of Matthews' belief that deadly force was necessary, this assertion has no support within the record. No evidence was presented at trial establishing that Matthews had knowledge of Guzman's aggressive and violent character at the time of the shooting. When character evidence is being offered to establish whether the defendant's fear was reasonable in a self-defense claim, it is being used subjectively to determine the defendant's state of mind and his beliefs regarding the danger he was in.[11] When character evidence is used for such a purpose, the defendant necessarily must have known of the incidents or reputation

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[8] *State v. Faust*, 265 Neb. 845, 660 N.W.2d 844 (2003), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007).

[9] *Id.*

[10] See *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983).

[11] See *Lewchuk, supra* note 7.

which makes up the character evidence at the time of the assault.[12] Thus, the excluded testimony bore solely upon the issue of whether Guzman was the first aggressor.

And there was ample evidence before the jury to establish, if it chose to find so, that Guzman was the first aggressor. Guzman testified in his deposition that he approached the members of the group in order to fight them and "get it done." He confirmed that he was inviting the group to fight physically. Lemburg testified that Guzman arrived and started "[t]alking smack." A witness heard Guzman say, "'Bring it on . . . I'm packing,'" and saw him display a gun, pull it out, and point it in the direction of the other side of the street. Further, the testimony of both Guzman and Lemburg and the statements made by Matthews to the investigator established that Guzman was the first to display a firearm.

[10] Based upon the above evidence, we conclude that Guzman's testimony as to his aggressive and violent character while using drugs and alcohol was cumulative to other evidence which tended to establish that he was the first aggressor. As such, the exclusion of the testimony was harmless error.[13] Where the evidence is cumulative and there is other competent evidence to support the conviction, the improper admission or exclusion of evidence is harmless beyond a reasonable doubt.[14] We therefore reverse the Court of Appeals' decision and remand the cause with direction that Matthews' convictions and sentences for attempted first degree murder and use of a deadly weapon to commit a felony with respect to Guzman be reinstated.

## CONCLUSION

Although Guzman's testimony as to his aggressive and violent character while using drugs and alcohol was relevant to Matthews' self-defense claim and properly admissible, its exclusion did not cause Matthews prejudice. Guzman's testimony was cumulative to other evidence which tended to

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[12] See *id.*

[13] See *Sims*, *supra* note 10.

[14] *Kinser*, *supra* note 6.

establish that he was the first aggressor. Consequently, its exclusion was harmless error. We reverse the decision of the Court of Appeals and remand the cause with direction that the relevant convictions and sentences be reinstated.

REVERSED AND REMANDED WITH DIRECTION.

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LARRY L. RICE, APPELLANT AND CROSS-APPELLEE, V.
JOE K. BIXLER AND BONNIE L. BIXLER SZIDON,
APPELLEES AND CROSS-APPELLANTS, AND
DONALD M. MCDOWELL ET AL., APPELLEES.
854 N.W.2d 565

Filed October 3, 2014. No. S-13-699.

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. **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. **Statutes.** Statutory interpretation presents a question of law.
4. **Mines and Minerals: Title.** In general, dormant mineral statutes were enacted to address title problems that developed after mineral estates were fractured.
5. **Statutes: Intent: Appeal and Error.** In interpreting the requirements of a statute, an appellate court looks to the intent and purpose of the statute.
6. **Statutes.** Statutory language is to be given its plain and ordinary meaning.
7. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court's duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
8. **Statutes: Words and Phrases.** As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.
9. **Statutes: Appeal and Error.** An appellate court must not read anything plain, direct, and unambiguous out of a statute.

Appeal from the District Court for Sioux County: TRAVIS P. O'GORMAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

Daniel H. Skavdahl, of Skavdahl, Edmund & Stecher Law Offices, for appellant.

John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees.

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

WRIGHT, J.

## NATURE OF CASE

The surface owner of various tracts of land in Sioux County, Nebraska, sued the alleged owners of the severed mineral interests in those tracts under Nebraska's "dormant mineral statutes," Neb. Rev. Stat. §§ 57-228 to 57-231 (Reissue 2010).

All of the alleged mineral owners involved in this appeal filed verified claims to the mineral interests prior to the action commenced by the surface owner. Both sides moved for summary judgment. The district court determined that the alleged mineral owners had either strictly complied or substantially complied with the requirements of § 57-229 to exercise publicly the right of ownership of the severed mineral interests. It concluded the alleged mineral owners had not forfeited their mineral interests, except for one of the claims. It found that such claim failed to reference the source of the deed or other instrument under which the mineral interests were claimed. The surface owner appeals, and two of the alleged mineral owners cross-appeal as to the mineral interests that were terminated.

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

[2] In reviewing a summary judgment, an appellant 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. *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

[3] Statutory interpretation presents a question of law. *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013).

## FACTS

Larry L. Rice is the surface owner of the land in question. He claims that the alleged owners of the severed mineral interests named herein have abandoned their interests, because they did not comply with the requirements of § 57-229. Prior to the time this action was commenced, Joe K. Bixler; Bonnie L. Bixler Szidon; Charles Albert Cunningham, Jr.; Richard Bixler Cunningham; John H. McDowell; and Donald M. McDowell (defendants) filed verified claims to the severed mineral interests of the real estate owned by Rice.

Some, but not all, of the mineral interests in question were owned by Delia Bixler during her lifetime. She died intestate, and her heirs at law were John Bixler and Charles Bixler, her sons; LaVerna Reardon and Joan Cunningham, her daughters; and John McDowell and Donald McDowell, her grandsons. A final decree entered in the county court for Sioux County transferred all of her mineral interests to her heirs.

Joe Bixler and Bonnie Bixler Szidon received their mineral interests from Charles Bixler and his wife by two recorded deeds. Joe Bixler and Bonnie Bixler Szidon filed two verified claims on January 26, 2011, one for a small interest and one for a large interest. The smaller of the two claims was filed in the office of the Sioux County clerk/register of deeds in "Book A-61 of Miscell[aneous,] Page 635." The larger claim was filed in "Book A-61 of Miscell[aneous,] Page 634." Both verified claims describe the land and the nature of the interest claimed, provide the claimants' names and addresses, and state that they claimed the interest and do not intend to abandon it.

The smaller interest of Joe Bixler and Bonnie Bixler Szidon's claim includes a statement that the "interest is based on a Mineral Deed issued 13 August 1981 (BOOK A-15 Page

66).” The larger interest does not include this language and does not cite to any document that identifies the deed or other instrument under which the interest was claimed.

Charles Cunningham and Richard Cunningham are the heirs of the estate of Joan Cunningham, whose will was admitted to probate July 29, 1993, in Mobile County, Alabama.

Richard Cunningham filed a verified claim in the office of the Sioux County clerk/register of deeds on January 31, 2011, in “Book A-61 of Miscell[aneous,] Page 648.” The claim states that it is intended to be a “verified claim of severed interests . . . of an undivided 10%(ten) percent interest in all oil, gas and other minerals that may be produced from” the described land. It states the name and address of the person claiming the interest and states that the claimant “makes continued claim to this interest and has no intention of abandoning the interests.”

Charles Cunningham filed two verified claims. The first claim was filed January 24, 2011, in “Book A-61 of Miscell[aneous,] Page 633.” The second claim was filed February 7, 2011, in “Book A-61 of Miscell[aneous,] Page 657.” Both claims included statements similar in substance to those contained in the claim filed by Richard Cunningham.

The Cunninghams’ verified claims provide no reference to a deed or other conveyance recorded in Sioux County under which their interest was claimed. Instead, they include documents that trace their interest from their mother, Joan Cunningham, through her will probated in Mobile County, Alabama. These statements were offered and received at the hearing on the motions for summary judgment.

As stated above, John McDowell and Donald McDowell received their mineral interest from the estate of Delia Bixler. John McDowell and Donald McDowell filed verified claims in the office of the Sioux County clerk/register of deeds on January 21 and February 14, 2011. The claims of the McDowells were filed in “Book A-61 of Miscell[aneous,] Page 632,” and in “Book A-62 of Miscell[aneous,] Page 1.” They both identify the document as a “verified claim of several [sic] interests . . . of an undivided 1/10 [interest in] mineral rights to all oil, gas and other minerals that may be produced

from" the described land. They state the name and address of the person claiming the interest and state that the claimant "intends to claim this interest and has no intention of abandoning the claim."

The claims of the McDowells state that the interest was conveyed from the estate of Delia Bixler and is based on a "Joint Tenancy Mineral Deed" that was issued on December 17, 1958. The record does not contain a "Joint Tenancy Mineral Deed" of record in Sioux County.

All parties moved for summary judgment. At the hearing on the motions, Rice offered no evidence. The defendants offered the verified claims described above. They also offered the mineral deeds from Charles Bixler and his wife to Joe Bixler and Bonnie Bixler Szidon recorded in "Book A-14 of Deeds[,] Page 537-538," and "Book A-15 of Deeds[,] Page 66," in Sioux County, and the "Last Will and Testament" and "Letters Testamentary" of the estate of Joan Cunningham.

The district court determined that all the defendants had filed verified claims but that some of the claims filed did not strictly comply with the statutes. The court concluded that the doctrine of substantial compliance could be applied to those claims that did not strictly comply with the requirements of § 57-229(3). Relying on *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013), the court determined that all provisions of the dormant mineral statutes should be construed in favor of the mineral owner. It also concluded that our decision in *Gibbs Cattle Co.* mandated that substantial compliance with the statutes was sufficient.

The district court then analyzed the verified claims filed by the parties. The court determined that the claims of Charles Cunningham and Richard Cunningham, the claims of John McDowell and Donald McDowell, and the smaller claim of Joe Bixler and Bonnie Bixler Szidon all substantially complied with the statutes, and it dismissed the action against those parties. However, the court determined that Joe Bixler and Bonnie Bixler Szidon's larger claim, filed in "Book A-61 of Miscell[aneous,] Page 634," failed to protect their mineral interest because it did not reference the deed or other instrument under which the interest was claimed. The court granted

summary judgment in favor of Rice as to the larger claim and terminated and extinguished the mineral interests of Joe Bixler and Bonnie Bixler Szidon in the larger claim.

Rice appealed the decision of the district court overruling his motions for summary judgment and dismissing his actions as above described. Joe Bixler and Bonnie Bixler Szidon cross-appealed the summary judgment against them as to the larger of their verified claims. The defendants filed a petition to bypass, which we granted.

## ASSIGNMENTS OF ERROR

On appeal, Rice assigns that the district court erred in failing to terminate the mineral interests of the Cunninghams and the McDowells.

On cross-appeal, Joe Bixler and Bonnie Bixler Szidon assign that the district court erred in granting Rice's motion for summary judgment terminating their mineral interests in the larger claim and in failing to grant their motion for summary judgment.

## ANALYSIS

The issue is whether the purported owners of the severed mineral interests have complied with the provisions of Nebraska's dormant mineral statutes. The defendants do not claim that the statutory requirements were permissive, but, rather, assert that they substantially complied with these requirements. The ultimate question is whether strict compliance with § 57-229 is required or whether substantial compliance is sufficient.

Section 57-229 provides:

> A severed mineral interest shall be abandoned unless the record owner of such mineral interest has within the twenty-three years immediately prior to the filing of the action provided for in sections 57-228 to 57-231, exercised publicly the right of ownership by . . . (3) recording a verified claim of interest in the county where the lands from which such interest is severed are located. Such a claim of interest shall describe the land and the nature of the interest claimed, shall properly identify the deed

> or other instrument under which the interest is claimed, shall give the name and address of the person or persons claiming the interest, and shall state that such person or persons claim the interest and do not intend to abandon the same.

We have addressed the dormant mineral statutes in recent years. See, *WTJ Skavdahl Land v. Elliott*, 285 Neb. 971, 830 N.W.2d 488 (2013); *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013); *Peterson v. Sanders*, 282 Neb. 711, 806 N.W.2d 566 (2011); *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010). However, those cases all addressed issues outside the scope of a verified claim. The issues in those cases concerned the status of the severed mineral interest in the absence of a verified claim. We have not addressed a situation in which the severed mineral interest owner filed a verified claim and the surface owner contended that the verified claim was not sufficient to protect the severed mineral interest.

The defendants argue, and the district court agreed, that given our precedent in regard to the dormant mineral statutes, substantial compliance with the statutes was sufficient to protect the interest of the severed mineral owner. The surface owner, Rice, argues that strict compliance with the dormant mineral statutes is required in order to protect the severed rights or the owner risks forfeiture of those rights.

[4] In general, dormant mineral statutes were enacted to address title problems that developed after mineral estates were fractured. *Ricks v. Vap, supra*. At common law, mineral interests could not be abandoned. *Id*. Permanent or long-term mineral interests could be created during a period of activity in a particular industry, and those interests did not terminate when the activity ceased. *Id*. As a result, the mineral estate could be held by owners who had long since disappeared from the area, leaving no trace. *Id*. When the record owner of severed mineral interests could not be contacted, the dormant interests could cloud the titles of surface owners and hinder further development of the mineral estates. *Id*. The Legislature sought to remedy some of those problems by enacting statutes to reunite dormant mineral estates with surface owners. *Id*.

Any surface owner of the real estate from which a mineral interest has been severed may sue in equity in the county where the real estate or some part thereof is located to terminate and extinguish the severed mineral interest if the court shall find that the severed mineral interest has been abandoned. See *id*. 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. *Gibbs Cattle Co. v. Bixler, supra*.

In the case at bar, the district court relied upon *Gibbs Cattle Co*. to reach its conclusion that substantial compliance with the requirements of § 57-229 was sufficient. In *Gibbs Cattle Co*., the issue was whether the "record owner" of mineral interests included a person identified by the probate records in the county where the interests were located. We concluded that it did. We reasoned that equity abhors forfeitures and that because the case sounded in equity, "if any doubt remains as to the meaning of 'record owner,' it should be construed against forfeiture." *Id*. at 962, 831 N.W.2d at 703. Since § 57-229 did not define "record owner," the question was whether the person described in the records of the probate in Sioux County was a record owner. But *Gibbs Cattle Co*. did not address the requirements of § 57-229(3) for recording a verified claim.

The requirements for filing a verified claim to exercise publicly the interest are not in doubt. If the severed mineral owner elects to exercise publicly his or her interest by filing a verified claim, such owner must meet the statutory requirements. The requirements are not difficult, and § 57-229 gives the severed mineral owner ample time in which to comply with such requirements. For the reasons set forth, we hold that severed mineral owners must strictly comply with the statutory requirements of § 57-229 and that the district court erred in concluding that substantial compliance was sufficient.

[5-7] Statutory interpretation presents a question of law, *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013), and our de novo review is guided by these legal principles. In interpreting the requirements of a statute, we look to the

intent and purpose of the statute. See *Harvey v. Nebraska Life & Health Ins. Guar. Assn.*, 277 Neb. 757, 765 N.W.2d 206 (2009). Statutory language is to be given its plain and ordinary meaning. *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010). Our duty in discerning the meaning of a statute is to determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *Id.*

So what must the owners of severed mineral interests do to exercise publicly their rights of ownership? Our answer to this question is based upon the purpose of § 57-229.

As stated above, the purpose of the dormant mineral statutes was to address title problems that developed after mineral estates were fractured. *Gibbs Cattle Co. v. Bixler*, 285 Neb. 952, 831 N.W.2d 696 (2013); *Peterson v. Sanders*, 282 Neb. 711, 806 N.W.2d 566 (2011). The text of the dormant mineral statutes also demonstrates that the Legislature balanced this purpose with protecting the owners' property rights. The dormant mineral statutes have a dual purpose: to clear title records and protect identifiable rights. *Gibbs Cattle Co. v. Bixler, supra.*

Each of the alleged mineral owners presents different arguments as to how he or she exercised publicly his or her ownership of the mineral interests in question. Each of these alleged mineral owners argues that there is no material issue of fact, and the owners assert that they have substantially complied with the requirements of the dormant mineral statutes and that substantial compliance is all the statute requires. Exercising publicly the right of ownership by recording a verified claim of interest has several requirements. See § 57-229. We examine each of these requirements.

The person recording the verified claim must be the record owner. In *Gibbs Cattle Co.*, the surface owner asked us to limit the definition of "record owner" to the fee owner of real property as shown in the records of the register of deeds office in the county in which the business area is located. See Neb. Rev. Stat. § 19-4017.01 (Reissue 2012). We declined that limitation. Because the term was not defined in the statutes, we referred to Black's Law Dictionary, which defined a record

owner as "'[a] property owner in whose name the title appears in the public records.'" *Gibbs Cattle Co.*, 285 Neb. at 959, 831 N.W.2d at 701. We held that the record owner of mineral interests, as used in § 57-229, may be determined not only from the register of deeds but also from the probate records in the county where the interests are located. We reasoned that including an owner identified through probate records in the county where the interests were located was consistent with the dormant mineral statutes' purpose of clearing title records and also protected the identifiable property rights. Because this was an action in equity, we concluded that any doubt as to the meaning of the term "record owner" should be construed against forfeiture.

But any construction of the term "record owner" to include an owner whose interests were not recorded in the county where the interests were located would not serve the purpose of clearing title to dormant mineral interests in real estate located in such county. And it is consistent with the statutory purpose of preventing abandonment of mineral estates to require an absent owner of dormant interests to actively exercise those interests. *Ricks v. Vap*, 280 Neb. 130, 784 N.W.2d 432 (2010). Section 57-229 expressly requires the record owner of such minerals to exercise publicly the right of ownership by one of the methods specified in the statute during the statutory period. *Ricks v. Vap, supra*.

There are different methods by which a record owner may exercise publicly the right of ownership. See § 57-229. If the record owner elects to proceed under § 57-229(3) by filing a verified claim, the record owner must follow certain requirements. In interpreting these requirements, we 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. *Ricks v. Vap, supra*.

[8] In the case at bar, the plain and ordinary meaning of the term "shall" is mandatory. The term "shall" appears several times in § 57-229 in describing what actions must be done to exercise publicly the right of ownership. As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion. *McDougle v. State*

*ex rel. Bruning, ante* p. 19, 853 N.W.2d 159 (2014); *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007). If the stated requirements for the filing of a verified claim were not mandatory, the statute would serve no purpose and there would be no clear statement of what the mineral owner must do. "Shall" means that the record owner must comply with the requirements set forth in § 57-229(3).

Strict compliance is mandatory and must be met prior to the date the action is filed by the surface owner. The severed mineral owners cannot assert their claims by recording documents after the surface owner's action has commenced. A lesser standard would serve only to further cloud the title to the severed mineral interests.

We point out that the burden imposed by § 57-229 upon the severed mineral owners is not great. And only two requirements provide for some diligence and effort by the mineral owner. The owner must describe the land and the interest claimed, as well as properly identify the deed or other instrument under which the interest is claimed. Strict compliance with such requirements is the responsibility of the owner, and it is not an onerous burden.

With that said, we address the requirements of § 57-229(3) as they relate to the claims filed by the defendants.

### Charles Cunningham and Richard Cunningham

Charles Cunningham and Richard Cunningham filed their verified claims in the office of the Sioux County clerk/register of deeds as above described. But the Cunninghams have not established they are record owners of the interests described in their verified claims. The record owner of the interests described in their claims was Joan Cunningham, as shown by the final decree in the matter of the estate of Delia Bixler recorded in "BOOK A-1" in the office of the Sioux County clerk/register of deeds, at pages 297-301.

There is no evidence that the Cunninghams have filed anything in the records of Sioux County that would prove they are the record owners of the mineral interests located in Sioux County. They claim through the last will and testament

of their mother, Joan Cunningham. But the record before us presents nothing in the public records of Sioux County that establishes that her interests were transferred to them.

It is true that after the case at bar was commenced, the Cunninghams offered certified copies of their mother's will and letters testamentary filed in Mobile County, Alabama. The Cunninghams were required to establish themselves as the record owners before the action was commenced. The plain language of § 57-229 provides that the record owner of such mineral interest has 23 years immediately prior to the filing of the actions provided for in the dormant mineral statutes to exercise publicly the right of ownership. The record does not reflect that the Alabama probate documents through which the Cunninghams claim mineral interests were ever recorded in the office of the Sioux County clerk/register of deeds or filed in the probate records of that county before Rice commenced this action.

The Cunninghams have not established within the time required by § 57-229 that they are the record owners of the mineral interests in question. Therefore, they have abandoned such interests. The order of the district court is reversed with directions to enter judgment that the Cunninghams have abandoned their claimed mineral interests described in their verified claims, and their interests are terminated.

### John McDowell and Donald McDowell

John McDowell and Donald McDowell filed the verified claims described above on January 21 and February 14, 2011. The McDowells were record owners of the minerals as heirs named in the final decree of the estate of Delia Bixler. But the McDowells did not properly identify the deed or other interest under which their interest was claimed. Both claims referred to a "Joint Tenancy Mineral Deed" dated December 17, 1958, but they do not reference a book and page where the deed is recorded in the public records of Sioux County.

Section 57-229(3) provides that the record owner "shall properly identify the deed or other instrument under which the interest is claimed." The McDowells did not properly

identify the instrument under which their interest was claimed. Reference to an unrecorded deed that may or may not exist does not establish the proper chain of ownership necessary to comply with the requirements for filing a verified claim. Without proper identification of the deed or other instrument under which the interest is claimed, there has been no compliance with § 57-229.

[9] An appellate court must not read anything plain, direct, and unambiguous out of a statute. *Herrington v. P.R. Ventures*, 279 Neb. 754, 781 N.W.2d 196 (2010). The McDowells did not properly identify the deed or other interest under which their interest was claimed within the time required by § 57-229. Therefore, they have abandoned such interests; the order of the district court is reversed with directions to enter judgment that the McDowells have abandoned said mineral interests; and their interests are terminated.

### Joe Bixler and Bonnie Bixler Szidon

Joe Bixler and Bonnie Bixler Szidon filed two verified claims that described different parcels of real estate located in Sioux County in which they claimed their mineral interests. As to the smaller interest, filed in Sioux County on January 26, 2011, in "Book A-61 of Miscell[aneous,] Page 635," the district court found there was no dispute that Joe Bixler and Bonnie Bixler Szidon met the requirements of § 57-229. It granted summary judgment in their favor and dismissed the complaint. Rice has not appealed from that judgment.

The district court found that the claim filed on January 26, 2011, by Joe Bixler and Bonnie Bixler Szidon in "Book A-61 of Miscell[aneous,] Page 634," and referred to as the "larger" claim, did not meet the requirements of § 57-229, because it did not purport to identify the deed or other instrument under which this interest was claimed. The court entered judgment in favor of Rice and against Joe Bixler and Bonnie Bixler Szidon, terminating and extinguishing the severed mineral interests above described and vesting those interests in Rice. We agree.

As previously stated, if the land subject to the dormant mineral statutes is not described correctly or the verified claim does not properly identify the deed or other instrument under which the interest is claimed, such failure does not meet either statutory purpose of clearing title records or protecting identifiable property rights. The burden is upon the record owner to properly identify such instrument.

Because Joe Bixler and Bonnie Bixler Szidon failed to describe the deed or other instrument under which the larger mineral interest was claimed, they did not comply with the statutory requirements. We therefore affirm that portion of the judgment of the district court which terminated the mineral interests of Joe Bixler and Bonnie Bixler Szidon described in the verified claim filed in Sioux County in "Book A-61 of Miscell[aneous,] Page 634."

## CONCLUSION

For the reasons set forth herein, we affirm that portion of the district court's judgment described above and we reverse that portion of the judgment of the district court which sustained the motions for summary judgment in favor of Charles Cunningham and Richard Cunningham and John McDowell and Donald McDowell. We remand the cause with directions to enter judgment in favor of Rice that the Cunninghams and the McDowells have abandoned their interests in the minerals described in their claims, and such interests are terminated. For the reasons described above, the cross-appeal of Joe Bixler and Bonnie Bixler Szidon is dismissed.

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

HEAVICAN, C.J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. DOMINICK L. DUBRAY, APPELLANT.

854 N.W.2d 584

Filed October 10, 2014. No. S-12-1171.

1. **Trial: Photographs.** The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.
2. **Trial: Photographs: Appeal and Error.** An appellate court reviews a trial court's admission of photographs of a victim's body for abuse of discretion.
3. **Homicide: Photographs.** If the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.
4. ____: ____. In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.
5. **Criminal Law: Evidence.** The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.
6. **Motions for Mistrial: Prosecuting Attorneys: Waiver: Appeal and Error.** A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert on appeal that the court erred in not declaring a mistrial due to the misconduct.
7. **Trial: Prosecuting Attorneys: Appeal and Error.** When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, an appellate court will review the record only for plain error.
8. **Appeal and Error.** An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process. Generally, an appellate court will find plain error only when a miscarriage of justice would otherwise occur.
9. **Trial: Prosecuting Attorneys.** Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.
10. **Trial: Prosecuting Attorneys: Words and Phrases.** Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.
11. **Trial: Prosecuting Attorneys: Appeal and Error.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct. If it concludes that a prosecutor's act were misconduct, it next considers whether the misconduct prejudiced the defendant's right to a fair trial.
12. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.

13. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.
14. **Trial: Prosecuting Attorneys.** Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.
15. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, an appellate court considers the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.
16. **Trial: Prosecuting Attorneys: Juries.** Prosecutors are not to inflame the jurors' prejudices or excite their passions against the accused. This rule includes intentionally eliciting testimony from witnesses for prejudicial effect.
17. ____: ____: ____. Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim. These facts lack any relevance to the criminal prosecution and have the potential to evoke jurors' sympathy and outrage against the defendant.
18. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor commits misconduct when he or she persists in attempting to introduce evidence that the court has ruled inadmissible. This prohibition precludes an artful examination that refers directly to the inadmissible evidence.
19. **Prosecuting Attorneys.** A prosecutor's attributing deceptive motives to a defense counsel personally or to defense lawyers generally constitutes misconduct.
20. **Trial: Prosecuting Attorneys.** When a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. These types of comments are distinguishable from attacking a defense counsel's personal character or stating a personal opinion about the character of a defendant or witness.
21. **Trial: Prosecuting Attorneys: Juries.** A distinction exists between arguing that a defense strategy is intended to distract jurors from what the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct.
22. **Postconviction: Effectiveness of Counsel: Appeal and Error.** A defendant who is represented by different counsel in his or her direct appeal must raise any known or apparent claims of the trial counsel's ineffective assistance, or the claim will be procedurally barred in a later postconviction proceeding.
23. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.

24. **Criminal Law: Effectiveness of Counsel.** A defense counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.
25. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To show prejudice from a trial counsel's alleged deficient performance, a defendant must demonstrate a reasonable probability that but for his or her trial counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. An appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair.
26. **Effectiveness of Counsel: Proof.** The two components of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffective assistance claim due to the lack of sufficient prejudice, a court will follow that course.
27. **Postconviction: Effectiveness of Counsel: Appeal and Error.** When an appellate court reviews a claim of ineffective assistance of counsel in a postconviction proceeding, it often, but not always, presents a mixed question of law and fact.
28. **Effectiveness of Counsel: Appeal and Error.** For "mixed question" ineffective assistance claims, an appellate court reviews the lower court's factual findings for clear error but independently determines whether those facts show counsel's performance was deficient and prejudiced the defendant.
29. ____: ____. In reviewing claims of ineffective assistance on direct appeal, an appellate court is deciding only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?
30. **Effectiveness of Counsel: Constitutional Law: Statutes: Records: Appeal and Error.** If an alleged ineffective assistance claim rests solely upon the interpretation of a statute or constitutional requirement, which claims present pure questions of law, an appellate court can decide the issue on direct appeal. Otherwise, it addresses ineffective assistance claims on direct appeal only if the record is sufficient to review these questions without an evidentiary hearing.
31. **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.
32. **Confessions: Due Process: Case Overruled.** Nebraska's requirement that a defendant's incriminating statements to private citizens must be voluntary to be admissible is incorrect under established due process precedents, overruling *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985), and *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).
33. **Criminal Law: Confessions: Rules of Evidence.** A defendant should challenge incriminating statements allegedly procured through a private citizen's coercion or duress under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008).
34. **Effectiveness of Counsel.** Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant who claims ineffective assistance of counsel is not prejudiced by an alleged error that deprives the defendant of the chance to have a court make an error in his or her favor.

35. **Criminal Law: Intoxication: Intent: Jury Instructions.** Under Nebraska common law, intoxication is not a justification or excuse for a crime, but it may be considered to negate specific intent. To submit this defense to the jury, however, the defendant must not have become intoxicated to commit the crime and, because of the intoxication, must have been rendered wholly deprived of reason.
36. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.
37. **Homicide: Words and Phrases.** Voluntary manslaughter is an intentional killing committed under extenuating circumstances that mitigate, but do not justify or excuse, the killing.
38. **Homicide: Evidence.** For a defense of sudden quarrel, Nebraska law requires an objective standard for determining whether the evidence shows a sufficient provocation that would cause a loss of self-control.
39. **Homicide: Intoxication: Intent.** Intoxication is not relevant in determining the reasonableness of a defendant's response to a claimed provocation. Because the defendant has intentionally killed another person, an objective reasonable person test is the appropriate means of determining whether the law should recognize the circumstances as warranting a reduction from murder to manslaughter.
40. **Homicide.** The concept of manslaughter is a concession to the frailty of human nature, but it was not intended to excuse a defendant's subjective personality flaws.
41. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** In determining whether a defense counsel's failure to object to prosecutorial misconduct rendered the trial unreliable or unfair, an appellate court considers whether the defendant's right to a fair trial was prejudiced because of the prosecutorial misconduct.

Appeal from the District Court for Box Butte County: TRAVIS P. O'GORMAN, Judge. Affirmed.

James R. Mowbray and Sarah P. Newell, of Nebraska Commission on Public Advocacy, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

CONNOLLY, J.

## I. SUMMARY

The State charged Dominick L. Dubray with two counts of first degree murder for killing Catalina Chavez and Mike

Loutzenhiser, and two related counts of use of a deadly weapon to commit a felony. The bizarre, bloody scene revealed that the victims died from multiple stab wounds. Dubray's defense centered on his claims that the evidence showed he had killed the victims in self-defense or upon a sudden quarrel. A jury found Dubray guilty of all four counts. The court sentenced him to terms of life imprisonment for each of the murder convictions and to terms of 30 to 40 years' imprisonment for each of the use of a deadly weapon convictions, with all terms to be served consecutively. This is Dubray's direct appeal.

Dubray assigns trial errors related to an evidentiary ruling, a jury instruction, prosecutorial misconduct, and his trial counsel's performance. We conclude that his claims are either without merit or do not constitute reversible error. We affirm.

## II. BACKGROUND

These murders occurred on Saturday morning, February 11, 2012. Dubray and Chavez had lived together for 2 to 3 years in Alliance, Nebraska, with their child and Chavez' older child from a previous relationship. Chavez' 16-year-old half brother, Matthew Loutzenhiser (Matthew), had also been living at their house since June 2011. Loutzenhiser, who lived in Scottsbluff, Nebraska, was Chavez' stepfather and Matthew's father.

On Friday, February 10, 2012, Loutzenhiser arrived in Alliance for a visit. Dubray worked that day from 5 a.m. to 1 p.m. Matthew was scheduled to work that night, and Chavez asked Dubray's mother to watch her two children overnight while the adults went out. Dubray went to a club with Chavez and Loutzenhiser around 8 p.m. They stayed there drinking alcoholic beverages until 1 a.m. and then went to Dubray's aunt's home and continued drinking with four other people until about 6 a.m. Loutzenhiser walked with Dubray and Chavez back to their nearby house. A business surveillance camera captured them walking back to the house around 6 a.m.

Matthew fell asleep around 1 a.m. in his bedroom, located off of the living room. He testified that he heard yelling

through his closed door before 6 a.m. but that he ignored the yelling because he thought the adults were intoxicated.

According to Dubray's cousin, Carlos Reza, Dubray called Reza at 6:49 a.m. Dubray said, "'I love you, Bro. Take care of my daughter.'" He said that he was going to kill himself and that he had two dead bodies in the house. Reza immediately dressed and drove to Dubray's house, which was about 5 minutes away. En route, he called another cousin, Marco Dubray (Marco), who also drove to Dubray's house.

When Reza entered the house, he immediately saw Loutzenhiser's motionless body lying against the living room couch with a lot of blood under him. Reza began screaming for Dubray and walked into his bedroom. He found Dubray, covered in blood, lying on the floor by his bed. The television was knocked over, the mattress was sideways, and clothes were all over the room. Dubray did not move initially, but he got up in response to Reza's yelling and walked into the kitchen.

When Reza asked what happened, Dubray began crying and shaking his head. He told Reza that Chavez was going to leave him. At some point, Dubray said, "'I can't believe what I have done.'" Dubray told Reza that he had tried to kill himself because he did not want to go to prison. He showed Reza a stab wound to the left of his heart where he had tried to kill himself. Reza could also see a cut on Dubray's neck and blood dripping on the back of his neck. Dubray picked up a clean knife and told Reza that he was going to kill himself, but he put the knife down on the kitchen table.

Marco arrived 5 or 10 minutes after Reza. When Marco entered, he saw Loutzenhiser's body in the living room and Dubray and Reza standing by the kitchen table. When Marco asked what happened, Dubray responded, "'I don't know. I snapped. And I just [want to kill] myself.'"

Marco and Reza were asking aloud what they should do, and Dubray responded, "'I just want to die. I don't want to go to prison.'" At this point, Reza said that he was going to call Lonnie Little Hoop, who was Dubray's and Reza's uncle. But Dubray told Reza not to call Little Hoop. He then told Marco and Reza to both go outside. They told Dubray that

they loved him and went outside, intending to let him kill himself. While Marco and Reza were outside, they decided to seek help. They both said they went next door to ask Dubray's father for help, but he was apparently unavailable. Reza then called Little Hoop. While waiting for Little Hoop, Reza said he heard Dubray screaming inside and believed that the screaming was coming from Dubray's bedroom.

Little Hoop said that he received Reza's call about 7:05 a.m. and that he lived 3 to 4 minutes away. When he got there, Little Hoop and Reza entered the house and Little Hoop called for Dubray. Dubray was lying on the floor by his bed again, but this time with a knife in his back. When Little Hoop called him, Dubray pushed his upper body up and leaned against the bed. Dubray told Little Hoop the same thing that he had said to Marco and Reza, i.e., that he did not want to live anymore and did not want to go to jail. When Dubray lay back down, Little Hoop could see a body under him. Little Hoop told Dubray not to move until he got help and told Reza to call an ambulance.

Reza saw two patrol cars close by and ran over to the officers to request an ambulance. One of the officers was State Patrol Trooper Craig Kumpf, and the other one was Officer Matthew Shannon with the Alliance Police Department. Shannon requested an ambulance, and then the two officers entered the house. Shannon said he saw wounds to Loutzenhiser's neck and shoulder and could not detect signs of life. Kumpf said Loutzenhiser's neck was nearly severed. The officers followed a trail of blood through the kitchen to the bedroom. Dubray was still lying on the floor with a knife in his back. Shannon moved closer and saw a smaller, motionless female under his body. After finding the three bodies, the officers discovered Matthew in the closed bedroom off the living room and placed him in a patrol car.

The ambulance arrived at 7:22 a.m. Loutzenhiser, Chavez, and Dubray were all initially pronounced dead at the scene; the supervising emergency medical technician could not detect Dubray's pulse, and there were no signs of breathing or response to stimulation. The emergency medical personnel then left the house. But while taking photographs, Shannon saw

Dubray move and heard him moan when Shannon called his name. Shannon called back the emergency medical personnel, who pulled Dubray from the area between the bed and the wall. There was a knife on the floor, and a knife impaled in the right side of Dubray's back. While readying Dubray for a move, the bedsheet moved and they found another knife. When they got outside, they put Dubray in a gurney, and Dubray then pulled the knife out of his back and dropped it. He was taken to the emergency room at the county hospital.

Because the evidence of Dubray's injuries is relevant to his defenses and ineffective assistance claims, we recount that evidence in detail. A trauma surgeon diagramed Dubray's 17 stab wounds or lacerations. Dubray had nine lacerations on his neck. The surgeon considered three of the stab wounds to his body to be potentially life threatening. During exploratory surgery, however, the surgeon determined that only the stab wound near Dubray's heart was life threatening. He considered the other wounds, including the neck lacerations, to be superficial, meaning that they might require stitches or similar care, but not surgery. The surgeon saw no blackening under Dubray's eyes or behind his ears that would have indicated a skull fracture, and a CAT scan revealed no trauma to his head. After stabilizing Dubray, the surgeon sent him to a hospital in Denver, Colorado, for surgical treatment of his chest wound. He was sedated for this trip and accompanied by his sister. She testified that she and other family members saw him in the intensive care unit about noon the next day and that Dubray was sitting up and talking.

While the police were interviewing Reza, he learned that Dubray had been transported to the Denver hospital. Reza went to the hospital with others the next morning to see Dubray. He said Dubray had two black eyes and a crooked nose. Dubray's aunt, sister, and mother gave similar testimony about his appearance. Reza was shown a photograph of Dubray that the prosecutor said was taken 2 days after Reza saw him. But Reza denied that the depiction reflected Dubray's appearance when he saw Dubray because it did not show his "fat lips" or black eyes. Reza said that when he saw Dubray, Dubray was sedated, his hands were secured to the bed, and he would

come in and out of consciousness. During this visit, Dubray told Reza that he had "fucked up."

The pathologist who performed the forensic autopsies of Chavez' and Loutzenhiser's bodies found 22 stab wounds or cuts to Loutzenhiser's body: three in his neck, five in his chest, four in his upper extremities, and 10 in his posterior neck and upper back. The pathologist explained that the depth of some wounds, which were deeper than the length of the knife blade, indicated the force with which the knife had been thrust into Loutzenhiser's body. The pathologist found 19 stab wounds or cuts to Chavez' body: 10 wounds to her neck, one to her chest, one to her abdomen, one to her shoulder, numerous wounds to her upper back and posterior neck, and defensive wounds to her hands.

At trial, the court instructed the jury on the elements of first degree murder and the lesser-included offenses of second degree murder and manslaughter. In addition, the court instructed the jury that it must find that Dubray did not act in self-defense. The jury returned a verdict of guilty for both counts of first degree murder and both counts of use of a weapon to commit a felony.

## III. ASSIGNMENTS OF ERROR

Dubray's nine assignments of error fall into three categories, with some factual overlap: trial court error, prosecutorial misconduct, and ineffective assistance of counsel. Regarding the trial court's actions, Dubray assigns that under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), the court erred in admitting cumulative, misleading, and gruesome photographs, despite their prejudicial effect. Relatedly, he assigns that his trial counsel was ineffective to the extent that he failed to object to the court's admission of the photographs.

Regarding the State's actions, Dubray assigns prosecutorial misconduct in the prosecutor's closing argument and questioning of witnesses. He also assigns that his trial counsel was ineffective in failing to object to this alleged misconduct.

Regarding his trial attorney's actions, Dubray assigns that in addition to failing to preserve the above trial errors, his attorney was ineffective as follows:

(1) failing to move to suppress Dubray's involuntary statements;

(2) failing to request a jury instruction on intoxication or to challenge the constitutionality of Neb. Rev. Stat. § 29-122 (Cum. Supp. 2012);

(3) failing to object to the court's jury instruction defining sudden quarrel;

(4) failing to call Megan Reza to testify that Chavez kept one of the knives used in the murder in her bedroom for self-protection; and

(5) failing to subpoena Jonathan Stoeckle, an emergency room nurse, to testify about Dubray's condition at a Denver hospital after the murders.

## IV. ANALYSIS

### 1. Trial Court Did Not Err in Admitting Autopsy Photographs

#### (a) Additional Facts

The two law enforcement officers who were first summoned to the house testified about the scene and their observations of the victims' bodies. During one of the officer's testimony, the court admitted into evidence two photographs of the victims' bodies at the scene. A different police officer testified about being present during the autopsies of the victims' bodies. She explained in simple terms the wounds depicted in the nine photographs that the State offered through her testimony. Over Dubray's rule 403 objections, the court admitted the photographs and allowed the State to publish eight of them after the officer testified that they accurately represented what she had seen and photographed.

Later, the pathologist who performed the autopsies testified in more detail about the wounds depicted in five of these photographs, including their depth and trajectory. During the pathologist's testimony, the State withdrew two of the photographs that the court had admitted during the officer's testimony, but submitted 12 additional autopsy photographs. Dubray's attorney did not object to the State's offer of these 12 photographs. The court stated that all the admitted photographs could go to the jury.

(b) Standard of Review

[1,2] The admission of photographs of a gruesome nature rests largely with the discretion of the trial court, which must determine their relevancy and weigh their probative value against their prejudicial effect.[1] We review the court's admission of photographs of the victims' bodies for abuse of discretion.[2]

(c) Analysis

Dubray contends that many of these photographs were cumulative to other evidence and duplicative of photographs of the victims' wounds that were taken from only slightly different angles. He contends that the court erred in allowing the photographs to go to the jury through both the officer and pathologist, which allowed the State to enhance their prejudicial nature.

[3,4] If the State lays proper foundation, photographs that illustrate or make clear a controverted issue in a homicide case are admissible, even if gruesome.[3] In a homicide prosecution, a court may admit into evidence photographs of a victim for identification, to show the condition of the body or the nature and extent of wounds and injuries to it, and to establish malice or intent.[4]

Here, the prosecutor stated that he offered the photographs to rebut Dubray's claim of self-defense, to show his intent and malice, to show the positioning and trajectory of the wounds, and to show the position of the bodies as they were found at the scene. Dubray does not contend that the photographs were irrelevant for these purposes. And they were not inadmissible just because crime scene photographs and other testimony established that Dubray had stabbed the victims multiple times.

[5] The crime scene photographs showed the position of the victims' bodies as the officers found them. But they

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[1] *State v. Smith*, 286 Neb. 856, 839 N.W.2d 333 (2013).

[2] *State v. Abdulkadir*, 286 Neb. 417, 837 N.W.2d 510 (2013).

[3] *Id.*

[4] *Smith, supra* note 1.

did not depict the victims' wounds, which was the primary purpose for presenting the autopsy photographs. The State is allowed to present a coherent picture of the facts of the crimes charged, and it may generally choose its evidence in so doing.[5] The photographs clearly helped the jurors understand the pathologist's testimony and were highly probative of how the victims died and Dubray's intent and malice in killing them. Given the many times that Dubray stabbed the victims, it is not surprising that the State submitted multiple photographs of their wounds—gruesome crimes produce gruesome photographs.[6]

We agree that the prosecutor could have provided foundation for admitting nine of the photographs without having the police officer verify their authenticity in addition to the pathologist. But rule 403 does not require the State to have a separate purpose for every photograph, and it requires a court to prohibit cumulative evidence only if it "substantially" outweighs the probative value of the evidence. Because the court admitted the photographs for a proper purpose, we do not believe that additional photographs of the same wounds were unfairly prejudicial to Dubray. We conclude the court did not abuse its discretion in admitting the exhibits.

### 2. Prosecutorial Misconduct

Dubray contends that the prosecutor asked prejudicial questions of witnesses and made prejudicial comments during his closing argument. He admits that his counsel did not object to the statements, but contends that they constituted plain error.

#### (a) Additional Facts

During the State's case in chief, the prosecutor asked Matthew, Chavez' half brother, about his high school activities and school plans. The prosecutor also elicited testimony from the two responding officers about Matthew's shocked reaction upon seeing his father's body.

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[5] *Abdulkadir, supra* note 2.

[6] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

During Dubray's cross-examination of Reza, Reza stated that when he visited Dubray in the Denver hospital the day after the murders, Dubray had black eyes, "fat lips," and a crooked nose. During the State's redirect examination, the prosecutor presented a photograph of Dubray to Reza. The prosecutor asked whether Reza had any reason to dispute his representation that the photograph was taken 2 days after Reza visited Dubray. After the court sustained Dubray's objection to the prosecutor's improper testimony, the prosecutor tried to ask the question another way: "[I]f I represented to you that it was taken two days after you visited with him, can you explain to us why he doesn't have bruising under his eye?" The court again sustained Dubray's objection to this questioning. The prosecutor then asked Reza whether Dubray was intubated when Reza visited him and whether Reza knew that this procedure could sometimes cause damage to patients. When Dubray objected again, the prosecutor moved on to a different line of questioning.

During the State's initial closing argument, the prosecutor remarked on the victims' attributes and lost future plans:

> Now, I don't — never knew [Chavez], I never knew [Loutzenhiser]. These are two beautiful human beings. They had love in their heart, they had goals, they had aspirations, they had children, they had all of those things in life that people could want. Nothing was perfect but is it ever for any of us? And to have their lives taken from them so savagely, so brutally at 22 years old. And [Loutzenhiser is] never going to his boy's ball games. And [Chavez] to never see her kids again. "Take care of my baby." That's what you are supposed to be doing. That's what she's supposed to be doing. They were killed for no reason. He took their lives and the evidence shows that he did so brutally with premeditation.
>
> Find him guilty of two counts of first degree murder and use of a weapon. The law requires it. And justice demands it. Thank you.

During Dubray's closing argument, his attorney argued that because Dubray was shirtless when he was stabbed, the evidence suggested that Chavez or Loutzenhiser had attacked

him with a knife while he was getting ready for bed. He also argued that Matthew would not still be alive if Dubray had planned the murders and that Matthew was still alive because he was not the one who had attacked Dubray. He suggested that three intoxicated people had simply got into a sudden quarrel and events had turned tragic.

During the State's rebuttal argument, the prosecutor responded to Dubray's argument by stating that Dubray had asked the jury to engage in speculation for which no evidence existed:

> I wish [Loutzenhiser] was here to tell us what happened. I wish [Chavez] was here to get up on the stand and say this is what happened in this case, this is the truth.
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> . . . .
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> . . . I'm not going to speculate what would've happened to Matt[hew] if he would've came out earlier . . . apparently [Loutzenhiser] got together with [Chavez] and there's this grand conspiracy for these two much smaller people to attack [Dubray.] But he won't say . . . that [Chavez] tried to cut his throat or stab him. He won't say that [Loutzenhiser] tried to do it. Do you want to know why? Because [his] theory won't hold up. That's why he's doing that. . . . He's throwing it on the walls to see what sticks. . . .
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> . . . .
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> [Defense counsel is] up here speculating and he's walking on the graves of these two people. And he wants to do it in an aw-shucks sort of manner. Now, I don't want to really talk badly about these two people . . . but they probably attacked my client and deserved to die. That's what he's saying. . . .
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> . . . .
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> . . . I'm surprised [the defense attorney] didn't say that [Matthew] was one of the third conspirators. But maybe that would be pushing it too far.

(b) Standard of Review

[6-8] A party who fails to make a timely motion for mistrial based on prosecutorial misconduct waives the right to assert

on appeal that the court erred in not declaring a mistrial due to the misconduct.[7] When a defendant has not preserved a claim of prosecutorial misconduct for direct appeal, we will review the record only for plain error.[8] An appellate court may find plain error on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[9] Generally, we will find plain error only when a miscarriage of justice would otherwise occur.[10]

(c) Analysis

[9,10] Prosecutors are charged with the duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.[11] Because prosecutors are held to a high standard for a wide range of duties, the term "prosecutorial misconduct" cannot be neatly defined. Generally, prosecutorial misconduct encompasses conduct that violates legal or ethical standards for various contexts because the conduct will or may undermine a defendant's right to a fair trial.[12]

[11,12] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct.[13] A prosecutor's conduct that does not mislead and unduly influence the jury is not misconduct.[14] But if we conclude that a prosecutor's act were misconduct, we next

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

[8] See *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[9] *Id.*

[10] See *id.*

[11] See *id.*

[12] See, *U.S. v. Santos-Rivera*, 726 F.3d 17 (1st Cir. 2013); *State v. Barfield*, 272 Neb. 502, 723 N.W.2d 303 (2006), *disapproved on other grounds, State v. McCulloch*, 274 Neb. 636, 742 N.W.2d 727 (2007). See, generally, Bennett L. Gershman, Prosecutorial Misconduct (2d ed. 2013).

[13] See *Watt, supra* note 8.

[14] *Id.*

consider whether the misconduct prejudiced the defendant's right to a fair trial.[15]

[13-15] Prosecutorial misconduct prejudices a defendant's right to a fair trial when the misconduct so infected the trial that the resulting conviction violates due process.[16] Whether prosecutorial misconduct is prejudicial depends largely on the context of the trial as a whole.[17] In determining whether a prosecutor's improper conduct prejudiced the defendant's right to a fair trial, we consider the following factors: (1) the degree to which the prosecutor's conduct or remarks tended to mislead or unduly influence the jury; (2) whether the conduct or remarks were extensive or isolated; (3) whether defense counsel invited the remarks; (4) whether the court provided a curative instruction; and (5) the strength of the evidence supporting the conviction.[18]

### *(i) Questions to and About Witness Matthew*

Dubray argues that the prosecutor improperly asked Matthew about the sports he played in high school and whether he planned to go to homecoming that night. Dubray also argues that the prosecutor asked irrelevant and prejudicial questions of officers about Matthew's shocked reaction to seeing his father's body when he came out of his bedroom.

[16,17] Prosecutors are not to inflame the jurors' prejudices or excite their passions against the accused.[19] This rule includes intentionally eliciting testimony from witnesses for prejudicial effect.[20] Prosecutors should not make statements or elicit testimony intended to focus the jury's attention on the qualities and personal attributes of the victim. These facts lack any relevance to the criminal prosecution and have

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[15] See *id.*

[16] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[17] *State v. Watson*, 285 Neb. 497, 827 N.W.2d 507 (2013).

[18] See *Watt, supra* note 8.

[19] See *id.*

[20] *Iromuanya, supra* note 16.

the potential to evoke jurors' sympathy and outrage against the defendant.[21]

But the prosecutor did not violate these rules by questioning Matthew about his high school activities. These questions are distinguishable from the comments that we considered improper in *State v. Iromuanya*.[22] There, the prosecutor remarked about the victims' personal achievements and lost future plans during his opening statement. But here, the prosecutor's questions about Matthew's activities were obviously intended to put a young witness at ease on the witness stand—not to evoke the jurors' sympathy for Matthew as an indirect victim of these crimes. And we reject Dubray's argument that the prosecutor's closing argument affected the innocuous nature of these questions. Because the jury would not have been misled or improperly influenced by these questions, they were not misconduct.

Regarding the prosecutor's questions to officers about Matthew's shocked reaction to seeing his father's body, we agree with the State that this testimony was relevant to eliminate Matthew as a suspect in the jurors' minds. The jurors heard testimony that officers handcuffed Matthew, put him in a patrol car, and took him to the station for questioning. So the questions were relevant to show that although the officers detained Matthew for questioning, he was not a suspect and had nothing to do with the killings. They were not misconduct.

*(ii) Questions to Reza*

Dubray also contends that while questioning Reza about Dubray's appearance at the hospital, the prosecutor committed misconduct by persisting in an action that the court had ruled against. He argues that the prosecutor's repeated comments about the photograph of Dubray bolstered his description of it to the jurors and undermined Reza'a testimony. Because the court did not admit the photograph, Dubray contends the

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[21] *Id.*

[22] *Id.*

jury had no means of determining the truth of the prosecutor's statements.

[18] A prosecutor commits misconduct when he or she persists in attempting to introduce evidence that the court has ruled inadmissible.[23] This prohibition precludes an artful examination that refers directly to the inadmissible evidence.[24] It is true that the court likely would have admitted the photograph if the prosecutor had called a witness to lay foundation for it. But the prosecutor could not do this himself. And the protections against the use of "inadmissible evidence would be of little benefit if the prosecutor were allowed, under the guise of 'artful cross-examination,' to tell the jury the substance of inadmissible evidence."[25] So we agree that the prosecutor's persistence in questioning Reza about the unadmitted photograph and his suggestion that evidence outside the record existed to refute Reza's testimony was misconduct.

But we conclude that the misconduct did not deprive Dubray of a fair trial. We agree that the point of the prosecutor's reference to the unadmitted photograph was to rebut Reza's testimony about Dubray's appearance the day after the murders. But this was a minor scene in a long play, and three other witnesses for Dubray and the trauma surgeon testified about his appearance soon after the murders. So the prosecutor's comments would not have misled or influenced the jurors about Dubray's appearance, particularly when the court sustained Dubray's objections to the photograph and the prosecutor's statements. We conclude that this conduct did not rise to the level of plain error.

*(iii) Prosecutor's Closing Argument*

We turn to Dubray's argument that the prosecutor's closing argument was prejudicial because it was intended to appeal to the jurors' sympathies and prejudices and to disparage his

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[23] See *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[24] See *U.S. v. Hall*, 989 F.2d 711 (4th Cir. 1993). See, also, Annot., 90 A.L.R.3d 646 (1979).

[25] *Hall, supra* note 24, 989 F.2d at 716.

defense counsel. He first argues that in the State's initial summation, the prosecutor's remarks about the victims' qualities and personal attributes were intended to inflame the jury's passions against Dubray. The State does not dispute that the argument was improper, but it points out that the court instructed the jurors that they must not let sympathy or passion influence their verdict.

We conclude that the argument constituted misconduct. As we have explained, a victim's qualities and personal attributes are irrelevant to the facts that the State must prove in a criminal prosecution and have the potential to distort the jurors' reasoned consideration of the evidence by evoking their sympathy for the victim and corresponding outrage toward the defendant.[26] Inflaming those passions appears to have been the prosecutor's intent, and we strongly disapprove of such tactics.

Dubray also contends that during the State's rebuttal argument, the prosecutor improperly "demoniz[ed] the arguments of defense counsel."[27] He argues that although the prosecutor's rebuttal argument was not as egregious as the rebuttal argument in *State v. Barfield*,[28] the effect was the same. The State contends that these statements are distinguishable because the prosecutor was responding to defense counsel's blaming the victims. The State does not argue that the remarks were proper but urges that the jury would have been able to filter out these statements.

In *Barfield*, the prosecutor characterized the defendant as a monster and strongly insinuated that all defense lawyers are liars. We disapproved of the prosecutor's personal expression of the defendant's culpability and especially found his remarks about defense lawyers as being liars to be a serious violation of the prosecutor's duty to ensure a fair trial. We agreed with the 10th Circuit's statement about attributing deceptive

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[26] *Iromuanya, supra* note 16.

[27] Brief for appellant at 87.

[28] *Barfield, supra* note 12.

motives to a defense counsel personally or to defense lawyers generally:

> "[C]omments by prosecutors to the effect that a defense attorney's job is to mislead the jury in order to garner an acquittal for his client is not only distasteful but borders on being unethical. . . . Such comments only serve to denigrate the legal profession in the eyes of the jury and, consequently, the public at large."[29]

[19] We concluded that such comments are misconduct. We noted that the prosecutor had made numerous improper remarks and that the defense had no opportunity to respond to the prosecutor's remarks about defense attorneys because they were made during rebuttal. We further stated that the evidence was not overwhelming and that the credibility of witnesses was a key factor: "[T]he implication that defense counsel was a liar, and by extension was willing to suborn perjury, was highly prejudicial when viewed in that context."[30] We concluded that the remarks were plain error and required a new trial.

[20] But when a prosecutor's comments rest on reasonably drawn inferences from the evidence, he or she is permitted to present a spirited summation that a defense theory is illogical or unsupported by the evidence and to highlight the relative believability of witnesses for the State and the defense. These types of comments are a major purpose of summation, and they are distinguishable from attacking a defense counsel's personal character or stating a personal opinion about the character of a defendant or witness.[31]

[21] So a distinction exists between arguing that a defense strategy is intended to distract jurors from what the evidence shows, which is not misconduct, and arguing that a defense counsel is deceitful, which is misconduct. Most of

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[29] *Id.* at 514, 723 N.W.2d at 314, quoting *U.S. v. Linn*, 31 F.3d 987 (10th Cir. 1994).

[30] *Id.* at 516, 723 N.W.2d at 315.

[31] See, e.g., *U.S. v. Rivas*, 493 F.3d 131 (3d Cir. 2007); *U.S. v. Lore*, 430 F.3d 190 (3d Cir. 2005); *U.S. v. Hartmann*, 958 F.2d 774 (7th Cir. 1992).

the prosecutor's statements fell into the former category and were intended to rebut the defense argument that the evidence showed Dubray had killed the victims in self-defense or upon a sudden quarrel. They were not "foul blow[s]."[32]

But the prosecutor crossed the line when he characterized defense counsel as "walking on the graves of these two people" and arguing that the victims "deserved to die." The latter statement was not a fair characterization of the defense theory, and the former statement amounted to a personal opinion that defense counsel was defiling the victims through misleading and deceptive arguments. The same is true of the prosecutor's statement that he was surprised Dubray's counsel had not attempted to cast Matthew as a third conspirator. These statements do not amount to calling defense attorneys liars. But they were directed at Dubray's counsel personally—not at his arguments. So they were the type of remarks that "'serve to denigrate the legal profession in the eyes of the jury and, consequently, the public at large.'"[33] They have no place in a courtroom and constitute misconduct.

Nonetheless, the prosecutor has dodged a reversal this time. On this record, we cannot conclude that these improper arguments deprived Dubray of a fair trial. Contrary to Dubray's argument, we do not agree that prosecutorial misconduct permeated this trial. Moreover, in addition to the court's admonition not to let sympathy or passion influence the jury's verdict, the court also instructed the jury that the attorneys' statements were not evidence. In another case, these general admonitions might be insufficient to counter the same misconduct. But the State correctly argues that evidence against Dubray was strong and that the credibility of witnesses was not at issue. The most damning evidence of Dubray's guilt

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[32] *State v. Beeder*, 270 Neb. 799, 805, 707 N.W.2d 790, 795 (2006), *disapproved on other grounds, McCulloch, supra* note 12, quoting *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

[33] *Barfield, supra* note 12, 272 Neb. at 514, 723 N.W.2d at 314, quoting *Linn, supra* note 29.

was his own statements to witnesses who had no reason to lie about them. We conclude that viewing the trial as a whole, the improper arguments did not deprive Dubray of a fair trial. We find no plain error.

### 3. Ineffective Assistance of Counsel

[22] Because Dubray is represented by different counsel in his direct appeal, he must raise any known or apparent claims of his trial counsel's ineffective assistance, or the claim will be procedurally barred in a later postconviction proceeding.[34]

[23,24] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[35] the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.[36] Counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.[37]

[25] To show prejudice from a trial counsel's alleged deficient performance, a defendant must demonstrate a reasonable probability that but for his or her trial counsel's deficient performance, the result of the proceeding would have been different.[38] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[39] We focus on whether a trial counsel's deficient performance renders the result of the trial unreliable or fundamentally unfair.[40]

[26] The two components of the ineffective assistance test, deficient performance and prejudice, may be addressed in

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[34] See *Watt, supra* note 8.

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

[36] *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

[37] *Iromuanya, supra* note 16.

[38] See *State v. Fox*, 286 Neb. 956, 840 N.W.2d 479 (2013).

[39] *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013).

[40] See *id.*

either order.[41] If it is more appropriate to dispose of an ineffective assistance claim due to the lack of sufficient prejudice, we follow that course.[42]

(a) Standard of Review

[27,28] When we review a claim of ineffective assistance of counsel in a postconviction proceeding, it often, but not always,[43] presents a mixed question of law and fact.[44] For "mixed question" ineffective assistance claims, we review the lower court's factual findings for clear error but independently determine whether those facts show counsel's performance was deficient and prejudiced the defendant.[45]

[29,30] But in reviewing claims of ineffective assistance on direct appeal, we are deciding only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[46] If the alleged ineffective assistance claim rests solely on the interpretation of a statute or constitutional requirement, which claims present pure questions of law, we can decide the issue on direct appeal. Otherwise, we address ineffective assistance claims on direct appeal only if the record is sufficient to review these questions without an evidentiary hearing.[47]

One of Dubray's ineffective assistance claims rests solely on the meaning of a constitutional requirement to exclude involuntary statements from evidence. We turn to that claim first.

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[41] See *Fox, supra* note 38.

[42] See *Morgan, supra* note 36.

[43] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[44] See *State v. Robinson*, 287 Neb. 799, 844 N.W.2d 312 (2014).

[45] See *State v. Fester*, 287 Neb. 40, 840 N.W.2d 543 (2013).

[46] See *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013). Accord, *U.S. v. Henry*, 472 F.3d 910 (D.C. Cir. 2007); *U.S. v. Angel*, 355 F.3d 462 (6th Cir. 2004); *U.S. v. Bender*, 290 F.3d 1279 (11th Cir. 2002).

[47] See *Morgan, supra* note 36.

### (b) Dubray Was Not Prejudiced by His Counsel's Failure to Seek Suppression of His Incriminating Statements

Relying on *State v. Kula*,[48] Dubray contends that his trial counsel should have moved to suppress Dubray's allegedly involuntary statements to persons who were not law enforcement officers. He contends that under *Kula*, an accused's statement to private citizens—like statements to law enforcement officers—must be voluntary to be admissible at trial. But the State argues that Dubray's position is inconsistent with the U.S. Supreme Court's holding on this issue and our adoption of that holding in other cases. We agree.

In *Colorado v. Connelly*,[49] the U.S. Supreme Court held that coercive police activity is a necessary predicate to a court's finding that a confession is not voluntary under the Due Process Clause. There, the defendant, who suffered from chronic schizophrenia, walked into a police station and confessed to a murder committed several months earlier. A state psychiatrist opined that he had confessed to the murder while experiencing "'command hallucinations'" from the "'voice of God,'" raising the issue whether his confession was voluntary.[50] The state appellate court affirmed the suppression of the confession. The U.S. Supreme Court reversed because there was no evidence that the police officers had exploited a mental weakness with coercive tactics:

> Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. . . .
>
> . . . [W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry.

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[48] *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000).

[49] *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

[50] *Id.*, 479 U.S. at 161.

> Our "involuntary confession" jurisprudence is entirely consistent with the settled law requiring some sort of "state action" to support a claim of violation of the Due Process Clause . . . .[51]

[31] The Court specifically held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment."[52] We have stated this holding in several cases.[53]

But in 1985, a year before the U.S. Supreme Court decided *Connelly*, we decided *State v. Bodtke*.[54] In *Bodtke*, we agreed with other state courts that an accused's incriminating statement to a private citizen must be voluntary to be admissible: "On questioned voluntariness, an accused's statement, whether an admission or a confession, made to private citizens, as well as to law enforcement personnel, must be voluntary as determined by a court for admissibility and as a fact ascertained by the jury."[55] We reasoned that the State's "[u]se of an accused's involuntary statement, whether admission or confession, offends due process and fundamental fairness in a criminal prosecution, because one acting with coercion, duress, or improper inducement transports his volition to another who acts in response to external compulsion, not internal choice."[56]

Later, in *State v. Phelps*,[57] we cited a criminal law treatise that called into question our holding in *Bodtke* in light of the

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[51] *Id.*, 479 U.S. at 164-65.

[52] *Id.*, 479 U.S. at 167.

[53] See, e.g., *State v. Landis*, 281 Neb. 139, 794 N.W.2d 151 (2011); *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010); *State v. Garner*, 260 Neb. 41, 614 N.W.2d 319 (2000); *State v. Ray*, 241 Neb. 551, 489 N.W.2d 558 (1992), *abrogated on other grounds, State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

[54] *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

[55] *Id.* at 513, 363 N.W.2d at 923.

[56] *Id.* at 510, 363 N.W.2d at 922.

[57] See *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992), citing 1 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 6.2 n.77.2 (Supp. 1991).

*Connelly* decision. But we concluded that it was unnecessary for us to resolve whether the *Bodtke* rule was still viable in Nebraska because the defendant's statements to private citizens were voluntarily made.

In *Kula*,[58] on which Dubray relies, we had previously reversed the defendant's convictions, because of prosecutorial misconduct, and remanded the cause for a new trial. At the defendant's retrial, a fellow inmate testified about incriminating statements that the defendant had made in prison after he was convicted in the first trial. The defendant requested a hearing to determine whether his statements were voluntary, but the court never ruled on the issue. On appeal, he assigned that the court erred in denying his request for a hearing. He claimed that his incriminating statements resulted from the State's improper influence, i.e., the stress, anxiety, and coercive environment that he allegedly experienced because prosecutorial misconduct had caused his wrongful conviction. Relying on *Bodtke*, we held that the trial court erred in failing to make a preliminary determination whether the defendant's statements were voluntary before admitting the inmate's testimony about the content of his statements.

As noted, however, in several cases, we have recognized that the Due Process Clause of the U.S. Constitution does not exclude an involuntary statement unless coercive police activity was involved in obtaining it. Even the "most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause"[59]:

> We think the Constitution rightly leaves this sort of inquiry to be resolved by state laws governing the admission of evidence and erects no standard of its own in this area. A statement rendered by one in the condition of respondent might be proved to be quite unreliable, but this is a matter to be governed by the evidentiary laws of the forum . . . and not the Due Process Clause of the

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[58] *Kula, supra* note 48.

[59] *Connelly, supra* note 49, 479 U.S. at 166.

> Fourteenth Amendment. "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false."[60]

We recognize that incriminating statements obtained through a private citizen's coercion or duress raise an obvious concern about their reliability.[61] But to date, the Supreme Court has interpreted the Due Process Clause to exclude only involuntary statements improperly obtained through the coercive conduct of state actors—not "'presumptively false evidence'"[62] that was not obtained through the coercion of any state actor. Moreover, a statement allegedly obtained solely by private citizens through coercion or duress could be challenged under rule 403[63] as inadmissible because the danger of prejudice outweighs any probative value.[64] Even if a court did not exclude the statement, the existence of coercion or duress in obtaining it would clearly present a jury question whether the statement was reliable evidence of the fact at issue.

[32,33] Here, Dubray does not contend that he made his incriminating statements in response to a private citizen's coercion or duress. Most of his statements were not even made in response to a question. But we conclude that Nebraska's requirement that a defendant's incriminating statements to private citizens must be voluntary to be admissible is incorrect under established due process precedents. We have held that the due process protections of the Nebraska Constitution are coextensive with the protections afforded by the Due Process Clause of the U.S. Constitution.[65] And, as stated, we have cited the *Connelly* holding in many cases. We therefore overrule

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[60] *Id.*, 479 U.S. at 167 (citations omitted).

[61] See *Phelps, supra* note 57.

[62] See *Connelly, supra* note 49, 479 U.S. at 167.

[63] See § 27-403.

[64] Compare *Boren v. Sable*, 887 F.2d 1032 (10th Cir. 1989).

[65] See, *Keller v. City of Fremont*, 280 Neb. 788, 790 N.W.2d 711 (2010); *State v. Thomas*, 268 Neb. 570, 685 N.W.2d 69 (2004).

*Bodtke*[66] and *Kula*[67] to the extent that they hold due process precludes the admission of a defendant's involuntary statement to a private citizen. A defendant should challenge incriminating statements allegedly procured through a private citizen's coercion or duress under rule 403.

It is true that we had not overruled *Bodtke* and *Kula* when Dubray was tried, and we will assume for this analysis that his trial counsel was deficient in failing to request a preliminary hearing on the voluntariness of Dubray's statements. Even if this assumption were true, however, Dubray cannot show prejudice under *Strickland* because he is not entitled to the benefit of an incorrect ruling on due process requirements. The U.S. Supreme Court addressed this issue in *Lockhart v. Fretwell*.[68]

In *Fretwell*, the petitioner in a federal habeas corpus action had been convicted of capital murder in state court and sentenced to death by a jury. The prosecutor had argued that the evidence established two aggravating factors. The petitioner claimed that his trial counsel was ineffective for failing to raise an Eighth Circuit case, decided 8 months before his trial, that would have rendered the aggravators invalid. Three years after the petitioner's trial, the U.S. Supreme Court decided a case that resulted in the Eighth Circuit's overruling its case which had invalidated the aggravators.[69] The federal district court recognized that after the judgment was affirmed on appeal, the Eighth Circuit had overruled the case supporting the petitioner's claim.[70] But because the law was in effect at his trial, the district court concluded that trial counsel was ineffective in failing to raise it. The court concluded that the

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[66] *Bodtke, supra* note 54.

[67] *Kula, supra* note 48.

[68] *Lockhart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

[69] See *Fretwell v. Lockhart*, 946 F.2d 571 (8th Cir. 1991), *reversed, Fretwell, supra* note 68.

[70] See *Fretwell v. Lockhart*, 739 F. Supp. 1334 (E.D. Ark. 1990), *reversed, Fretwell, supra* note 68.

prejudice was obvious because without a valid aggravator, the petitioner would have been sentenced to life in prison. The Eighth Circuit affirmed, reasoning that the petitioner was entitled to the benefit of a decision that was still in effect at the time of his sentencing.

The U.S. Supreme Court disagreed and reversed. The Court emphasized that the prejudice component of the *Strickland* test is not simply a question of whether the outcome would have been different:

> [A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.[71]

[34] The Court rejected the petitioner's reliance on the rule that ineffective assistance claims are not judged from hindsight. It explained that this rule applies under the deficient performance component of *Strickland*, not the prejudice component. It concluded that under *Strickland*, a defendant is not prejudiced by an error that deprives the defendant "'of the chance to have the state court make an error in his [or her] favor.'"[72]

The U.S. Supreme Court has clarified that *Fretwell* did not modify or supplant the *Strickland* test for ineffective assistance.[73] Instead, in *Williams v. Taylor*,[74] the Court classified *Fretwell* as one of the unusual situations "in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'"[75] "[G]iven the overriding interest in fundamental fairness, the likelihood of a different outcome

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[71] *Fretwell, supra* note 68, 506 U.S. at 369-70.

[72] *Id.*, 506 U.S. at 371.

[73] See *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012).

[74] *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

[75] *Id.*, 529 U.S. at 391-92.

attributable to an incorrect interpretation of the law should be regarded as a potential 'windfall' to the defendant rather than the legitimate 'prejudice' contemplated by . . . *Strickland*."[76] But *Fretwell* does "not justify a departure from a straightforward application of *Strickland* when the ineffectiveness of counsel *does* deprive the defendant of a substantive or procedural right to which the law entitles him."[77]

Dubray's claim clearly falls within *Fretwell*'s windfall circumstance. The only distinction between *Fretwell* and the history here is that we had not previously overruled *Bodtke* and *Kula* before deciding his ineffective assistance claims. But that distinction is immaterial. The point under *Fretwell* is that the relief Dubray requests rests upon an incorrect judicial interpretation of constitutional law. *Connelly* has been the final word on this issue since 1986, and *Bodtke* and *Kula* are both incorrect under *Connelly*. So under *Fretwell*, Dubray asks for a windfall to which he is not entitled—an incorrect state court ruling on due process requirements. Because he cannot establish *Strickland* prejudice, his ineffective assistance claim is without merit.

### (c) Dubray Was Not Prejudiced by His Counsel's Failure to Request an Intoxication Instruction or Challenge the Constitutionality of § 29-122

Dubray contends that his trial counsel was ineffective in failing to (1) ask the court to instruct the jury that voluntary intoxication can negate specific intent of the charged crimes and (2) challenge the constitutionality of § 29-122. Dubray argues that this court has long recognized a defendant's voluntary intoxication as a defense if it would negate the intent element of a specific intent crime. He recognizes that in 2011, the Legislature enacted § 29-122,[78] which, in most circumstances, eliminates voluntary intoxication as a defense and precludes its consideration in determining the existence of a mens rea requirement:

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[76] *Id.*, 529 U.S. at 392.

[77] *Id.*, 529 U.S. at 393 (emphasis in original).

[78] See 2011 Neb. Laws, L.B. 100 (effective Aug. 27, 2011).

> A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and *shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense unless* the defendant proves, by clear and convincing evidence, that he or she did not (1) know that it was an intoxicating substance when he or she ingested, inhaled, injected, or absorbed the substance causing the intoxication or (2) ingest, inhale, inject, or absorb the intoxicating substance voluntarily.

(Emphasis supplied.)

But Dubray contends that his counsel should have challenged § 29-122 because its application violated his right to due process. Dubray argues that the preclusion of an intoxication defense relieved the State of its burden to prove his mental state beyond a reasonable doubt and shifted the burden to him to prove that his crimes were not premeditated. He recognizes that in 1996, the U.S. Supreme Court upheld a similar statute in *Montana v. Egelhoff*.[79] But he contends that the decision was limited by Justice Ginsburg's reasoning in her concurring opinion because without her concurrence, the opinion would have split equally between the plurality and the dissent. He cites to the U.S. Supreme Court's rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'"[80] Dubray contends that § 29-122 is unconstitutional under the reasoning of the concurring opinion in *Egelhoff* because it limits the admissibility of relevant evidence instead of redefining the elements of the crime.

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[79] *Montana v. Egelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996).

[80] See *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

We decline to address the constitutionality of § 29-122 here because it is unnecessary to deciding this appeal.[81] Even under the common-law rule that intoxication can be a defense in limited circumstances, we conclude that Dubray was not entitled to an intoxication instruction as a matter of law.

[35] Under Nebraska common law, intoxication is not a justification or excuse for a crime, but it may be considered to negate specific intent.[82] To submit this defense to the jury, however, the defendant must not have become intoxicated to commit the crime and, because of the intoxication, must have been rendered wholly deprived of reason.[83] The excessive intoxication must support a conclusion that the defendant lacked the specific intent to commit the charged crime.[84] The evidence did not support that finding here.

Contrary to Dubray's argument, there is no evidence in the record to show that his blood alcohol concentration was at least .221 of a gram. During the State's examination of the trauma surgeon at the emergency room, the following exchange occurred:

> [Prosecutor:] What was [Dubray's] blood alcohol level in the tox screen that you did?
>
> [Surgeon:] I don't recall the number off hand but it would be in the chart.
>
> [Prosecutor:] If I represent to you that your chart says it was a .221, would you have any reason to dispute that?
>
> [Surgeon:] I wouldn't dispute it, no.

But the prosecutor's unsworn factual assertion was not evidence, absent a showing that the parties stipulated to this fact. And the surgeon's statement that he could not dispute the prosecutor's representation did not magically transform it into evidence. Dubray also points to evidence of the victims' blood alcohol concentrations. But the pathologist testified

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[81] See *State v. Johnson*, 269 Neb. 507, 695 N.W.2d 165 (2005).

[82] *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

[83] See *id.*, citing *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951).

[84] See, *State v. Bevins*, 187 Neb. 785, 194 N.W.2d 181 (1972); *State v. Brown*, 174 Neb. 393, 118 N.W.2d 332 (1962).

that the higher concentrations found in the victims' vitreous eye fluid was not necessarily more accurate, and no evidence suggested that Dubray's concentration would have been comparable to the victims' concentrations.

More important, the evidence shows that Dubray was not wholly deprived of reason immediately before or after the murders. As explained, Dubray, Chavez, and Loutzenhiser walked back to Dubray's house around 6 a.m. No witness testified that Dubray was behaving unreasonably at his aunt's house at this time. By 6:49 a.m., Dubray had killed Chavez and Loutzenhiser and called Reza to take care of his child. By the time Reza arrived a few minutes later, Dubray had also attempted suicide for the first time. But his concern for his daughter and his conduct after the murders showed he was contemplating how to respond to his imminent arrest. He specifically told Marco and Reza that he intended to kill himself to avoid prison, and he insisted that they not call Little Hoop so that he could carry out this plan. He was clearly reasoning and anticipating the consequences of the acts he had just committed.

Because the record shows that Dubray's consumption of alcohol did not wholly deprive him of reason, he would not have been entitled to an intoxication instruction even under our common-law rules. So he cannot show prejudice from his counsel's failure to seek an intoxication instruction or to challenge the constitutionality of § 29-122.

### (d) Dubray Was Not Prejudiced by His Counsel's Failure to Object to Jury Instruction Defining Sudden Quarrel

[36] Dubray's trial counsel did not object to instruction No. 4, which included a definition of sudden quarrel. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error indicative of a probable miscarriage of justice.[85] But Dubray claims that his trial counsel provided

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[85] *Abdulkadir, supra* note 2.

ineffective assistance in failing to object to the italicized language in the following definition:

> **A sudden quarrel** is a legally recognized and sufficient provocation which causes a reasonable person to lose normal self[-]control. It does not necessarily mean an exchange of angry words or an altercation contemporaneous with an unlawful killing and does not require a physical struggle or other combative corporal contact between the defendant and the victim. It is not the provocation alone that reduces the grade of the crime, but, rather, the sudden happening or occurrence of the provocation so as to render the mind incapable of reflection and obscure the reason so that the elements necessary to constitute murder are absent. The question is whether there existed reasonable and adequate provocation to excite one's passion and obscure and disturb one's power of reasoning to the extent that one acted rashly and from passion, without due deliberation and reflection, rather than from judgment. *The test is an objective one. Qualities peculiar to the defendant which render him or her particularly excitable, such as intoxication, are not considered.*

This instruction is consistent with our recent definitions of a sudden quarrel.[86] But Dubray contends that his intoxication was relevant to whether he was capable of reflection and reasoning. He further argues that the instruction undermined his trial counsel's argument that his intoxication prevented him from forming the requisite intent to kill. We reject these arguments. We have already determined that Dubray was not entitled to an intoxication instruction. Moreover, his trial counsel's intoxication argument was not relevant to a sudden quarrel defense.

[37,38] Voluntary manslaughter is an intentional killing committed under extenuating circumstances that mitigate, but do not justify or excuse, the killing.[87] Even apart from the

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[86] See, e.g., *id.*; *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012).

[87] See *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

language that Dubray challenges, our consistent references to a "reasonable person" in defining a sudden quarrel shows that we require an objective standard for determining whether the evidence shows a sufficient provocation that would cause a loss of self-control. The reasonable person test is a reference to a hypothetical ordinary person.[88]

[39,40] Other courts agree with us that intoxication is not relevant in determining the reasonableness of a defendant's response to a claimed provocation.[89] Because the defendant has intentionally killed another person, an objective reasonable person test is the appropriate means of determining whether the law should recognize the circumstances as warranting a reduction from murder to manslaughter. The concept of manslaughter is a concession to the frailty of human nature, but it was not intended to excuse a defendant's subjective personality flaws.[90] We conclude that Dubray's trial counsel was not ineffective for failing to object to the court's definition of sudden quarrel.

### (e) Dubray Was Not Prejudiced by His Counsel's Failure to Object to Every Photograph of the Victims' Bodies

Dubray argues that to the extent his trial counsel failed to preserve the issue of the court's admission of photographs of the victims' bodies, he provided ineffective assistance. As discussed, however, Dubray's counsel did object to the admission of photographs during the police officer's testimony. And we have concluded that the court did not abuse its discretion in admitting additional and similar photographs and that the additional photographs did not unfairly prejudice Dubray. So Dubray cannot show that he was prejudiced by his trial court's failure to object to the court's rulings.

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[88] See Black's Law Dictionary 1457 (10th ed. 2014).

[89] See, e.g., *People v. Manriquez*, 37 Cal. 4th 547, 123 P.3d 614, 36 Cal. Rptr. 3d 340 (2005); *Commonwealth v. Garabedian*, 399 Mass. 304, 503 N.E.2d 1290 (1987); *Bland v. State*, 4 P.3d 702 (Okla. Crim. App. 2000); *Com. v. Bridge*, 495 Pa. 568, 435 A.2d 151 (1981).

[90] See *Smith, supra* note 87.

### (f) Dubray Was Not Prejudiced by His Counsel's Failure to Object to the Prosecutor's Closing Argument and Questioning of Witnesses

[41] Dubray argues that his trial counsel's performance was deficient to the extent that he failed to preserve Dubray's claims of prosecutorial misconduct by failing to object to the conduct. But in determining whether a defense counsel's failure to object to prosecutorial misconduct rendered the trial unreliable or unfair, we consider whether the defendant's right to a fair trial was prejudiced because of the prosecutorial misconduct.[91] We have determined that Dubray's claims of prosecutorial misconduct are without merit or that he was not deprived of a fair trial because of the prosecutor's misconduct. So Dubray cannot show prejudice from his trial counsel's failure to object to the conduct.

### (g) The Record is Insufficient to Evaluate Trial Counsel's Failure to Call Megan Reza as a Witness

Dubray contends that his trial counsel should have called Megan Reza, who was one of Dubray's cousins, as a witness. He argues that Megan Reza was also a friend of Chavez and would have testified that Chavez kept a knife hidden under her mattress for protection. He contends that her testimony would have helped to negate the premeditation charge and support his theory of self-defense or sudden quarrel. We agree with the State that the claim requires an evaluation of trial strategy, for which the record is insufficient. We decline to address it on direct appeal.

### (h) Dubray Was Not Prejudiced by His Counsel's Failure to Subpoena an Out-of-State Witness

During the trial, the court sustained the State's objection to admitting a deposition of Stoeckle, an emergency room nurse at the Denver hospital where Dubray was treated. Stoeckle had described Dubray's injuries in a report. The court excluded

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[91] See *Iromuanya, supra* note 16.

the deposition because Dubray had not shown that Stockle was unavailable.

Dubray contends that his trial counsel's performance was deficient in failing to subpoena Stoeckle to testify about his injuries. He argues that his trial counsel could have subpoenaed Stoeckle under Neb. Rev. Stat. § 29-1908 (Reissue 2008). Dubray contends he was prejudiced by his counsel's misunderstanding of the law because Stoeckle could have provided an unbiased account of Dubray's condition—as distinguished from the descriptions provided by family members. He argues Stoeckle's testimony would have rebutted the State's evidence that all his wounds were self-inflicted or illusory.

The State disagrees that Dubray could have subpoenaed Stoeckle under § 29-1908. It argues that Dubray cannot show a reasonable probability that the outcome would have been different even if Stoeckle had testified. Because we agree that Dubray cannot show prejudice from not having Stoeckle testify, we do not address whether his counsel's performance was deficient.

No offer of proof was made at trial about the substance of Stoeckle's statements. But Dubray's description of Stoeckle's potential testimony shows that Stoeckle's absence from the trial is insufficient to undermine confidence in its outcome. As stated, Dubray's family members testified about his appearance at the hospital. Moreover, the trauma surgeon at the Nebraska emergency room testified to all of Dubray's injuries. So Dubray has not shown the necessity of having another nonfamily member testify to his injuries. We conclude that this claim is without merit.

## V. CONCLUSION

We conclude that the court did not err in admitting the autopsy photographs. We conclude that Dubray's claims of prosecutorial misconduct are without merit or that he was not prejudiced by the misconduct. Accordingly, Dubray cannot show prejudice from his trial counsel's failure to object to

these alleged trial errors. We conclude that his trial counsel was not ineffective for failing to seek suppression of his statements to private citizens. We conclude that under the common law, he was not entitled to an intoxication defense. We therefore do not address his challenges to § 29-122. We conclude that his ineffective assistance claims either fail or cannot be addressed on direct appeal. We affirm.

AFFIRMED.

MILLER-LERMAN, J., concurring in the result.

I concur in the result, but respectfully disagree with the breadth of the majority opinion regarding the interplay between voluntariness of admissions and due process, specifically, the failure of the majority opinion to analyze Dubray's hospital statement made to a private citizen. I disagree with the majority's apparent conclusion that Dubray's hospital statement, arguably coerced by State action but made to a private citizen, is not subject to a due process challenge.

Dubray claims that counsel was ineffective for failing to challenge certain of his statements on due process grounds. The statements were made in two contexts: at Dubray's home and when Dubray was in the hospital. The set of statements at the home were made to private citizens before the police arrived. I agree with the majority that there was no coercion by the State or private person and that hence, no due process hearing was required.

However, Dubray also made a statement to Carlos Reza after Dubray was in custody, when Dubray was sedated in the hospital and restrained to the bed with "little white straps." Dubray claims the hospital statement was involuntary, but the majority does not explain how this statement fits within its holding. Where the coercive circumstances are created by the State or where there is a private citizen acting in concert with the State, or as a state agent, statements to a private citizen should be considered for due process review.

However, whether or not the hospital statement would be subject to a due process voluntariness challenge, I note that the statement would be cumulative of the prior statements

not subject to such a challenge. Therefore, Dubray could not show prejudice from counsel's purported failure to challenge the hospital statement. Thus, I agree with the majority that Dubray has not shown ineffective assistance of counsel regarding his various admissions.

WRIGHT, J., joins in this concurrence.

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## STATE OF NEBRASKA ON BEHALF OF CONNOR H., A MINOR CHILD, APPELLEE, V. BLAKE G., DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLEE, AND AMANDA H., NOW KNOWN AS AMANDA G., THIRD-PARTY DEFENDANT, APPELLANT.

## IN RE CHANGE OF NAME OF CONNOR H., BY AND THROUGH HIS NEXT FRIEND, AMANDA G. AMANDA G., APPELLANT, V. BLAKE G., APPELLEE.

856 N.W.2d 295

Filed October 10, 2014. Nos. S-13-995, S-13-1000.

1. **Minors: Names: Appeal and Error.** An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Minors: Names.** The question of whether the name of a minor child should be changed is determined by what is in the best interests of the child.
3. **Minors: Names: Proof.** The party seeking the change in surname has the burden of proving that the change in surname is in the child's best interests.
4. **Minors: Names.** Substantial welfare is related to best interests, because a change in surname is in a child's best interests only when the substantial welfare of the child requires the name to be changed.
5. ____: ____. In Nebraska, there is no preference for a surname—paternal or maternal—in name change cases; rather, the child's best interests is the sole consideration.
6. ____: ____. Nonexclusive factors to consider in determining whether a change of surname is in a child's best interests are (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit.

7. **Names: Child Custody: Presumptions.** No presumption exists in favor of the surname desired by a custodial parent, even if the parent has sole legal and physical custody of the child.
8. **Names.** Name-change decisions are to be made on a case-by-case basis.

Appeals from the District Court for Johnson County: DANIEL E. BRYAN, JR., Judge. Judgment in No. S-13-995 reversed, and cause remanded with direction. Judgment in No. S-13-1000 affirmed.

Marc J. Odgaard, of Hanson, Hroch & Kuntz, for appellant.

Diane L. Merwin, of Fankhauser, Nelsen, Werts, Ziskey & Merwin, P.C., for appellee Blake G.

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

CASSEL, J.

## INTRODUCTION

This appeal addresses the surname of a child born out of wedlock and given his mother's maiden surname. After the mother married and began using her husband's surname, both parents sought to change the child's surname—the father proposing his surname and the mother requesting her married surname. The district court granted the father's request, giving preference to the paternal surname and using a "substantial evidence" standard. But the child's best interests, without any presumption favoring either parent's surname, is the controlling standard. Upon our de novo review, we conclude that the evidence was insufficient to show that a change in the child's surname was in his best interests.

## BACKGROUND

Connor H. was born out of wedlock to Blake G. and Amanda H., now known as Amanda G., in October 2008. Blake signed the birth certificate, which listed Amanda's maiden surname as Connor's surname. Amanda made the decision to use her maiden surname as Connor's surname, and Blake testified that he was "[n]ot really" allowed any input in that decision. Blake and Amanda ceased living together prior to Connor's

birth, and Amanda has been Connor's custodial parent since his birth.

Blake and Amanda entered into a stipulation regarding paternity, child support, and other matters. On December 1, 2009, the district court entered a judgment, styled as an order, granting Amanda sole legal and physical custody of Connor, granting Blake reasonable rights of visitation, and ordering Blake to pay child support.

In December 2011, Amanda married. She then changed her surname to that of her husband.

On January 28, 2013, Blake filed a complaint to modify the December 2009 judgment. He alleged that a material change in circumstances had occurred and requested, among other things, that Connor's surname be changed to Blake's surname.

On August 12, 2013, Amanda initiated a separate case by filing a petition for name change. She alleged that it was in Connor's best interests to change his surname from Amanda's maiden surname to her married surname.

The district court heard both matters in October 2013. At that time, Connor was 4 years old and enrolled in preschool. Evidence established that Connor had leukemia and that he was covered under Amanda's insurance. Both parents were involved in his medical care.

Blake was able to build a strong relationship with Connor despite their different surnames. Connor referred to Blake as "'Dad.'" Amanda was supportive of Blake's relationship with Connor and allowed Blake additional visitation at times. Blake testified that he exercised his visitation rights and paid child support. At the time of trial, he was current on child support, but he had been in arrears until approximately May 2011. Blake attended Connor's T-ball games and school activities. Blake also took Connor hunting and fishing and to watch football games. Connor knew his paternal grandparents and was involved with both of Blake's brothers.

Amanda wished to change Connor's surname to match her married surname. Because Amanda, Connor's stepfather, and Connor's half sister have the same surname, Amanda thought that Connor "would feel more part of the family and feel like he belongs if he could have the same last name as everybody

that he lives with." Amanda testified that Connor asked about her last name and that of his half sister and that he knew he had a different last name. As it pertained to Amanda's state of mind and not for the truth of the matter, the court allowed Amanda to testify that Connor had told her that he would like his last name to be Amanda's married surname. Amanda testified that Connor loves his stepfather and that Connor has a great relationship with his stepgrandparents, who live in the same town.

Following the presentation of evidence, the district court stated:

> Well, the Court doesn't find that there's evidence to change [Connor's surname] to [Amanda's married surname]. I think that's like a de facto adoption. I'm not going to do that; that would just simply be wrong.
>
> Now, the evidence here is that the dad has had a good contact with the child, the natural father, and he's kept contact with the child. There's no reason to be changing the name to a stepfather's name.
>
> The question really comes down to whether or not there's evidence supplied that it would be in the best interest of the child to change the name at all.
>
> Now, mom says there is because she has changed her name now from [her maiden surname to her married surname]. And, of course, in the case of [Amanda's] name change request, I'm not going to find it's in the best interest to change it to [Amanda's married surname], so I'm going to deny [Amanda's] application in that regard.
>
> The father — the natural father's allegation under the paternity law to change the name to the — to his name I'm going to find is probably in the best interest of the minor child. Now, that may be considered an old-fashioned statement, but, on the other hand, I think there's substantial evidence here in this sense. Now, substantial evidence defined in Nebraska's law is — actually, it comes down to being more than a scintilla and less than a preponderance, which is interesting because the name "substantial" means that it would be substantial but, yet,

> that's the definition. I deal with that definition every day and in dealing with appeals and so forth.
>
> But the Court is going to find that there's been primary contact; the contact with the natural father has been good with the minor child. And since mom's name has already been changed, [her maiden surname] no longer is really relevant to this young man, and so if he was going to take a name, it would seem to me it would be in the best interest to take the natural father's name instead of taking what would be — in the Court's thinking would be a stepfather's name.

On October 15, 2013, the district court entered an order in the paternity case changing Connor's surname to Blake's surname. On October 28, the district court entered a judgment denying Amanda's separate petition for change of name. The court found that changing Connor's surname to Amanda's married surname "would amount to a de facto adoption" and that granting the petition would not be in the child's best interests.

Amanda filed a timely appeal in each case. The parties agreed to consolidate the appeals for briefing, argument, and disposition. We moved the cases to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1]

## ASSIGNMENTS OF ERROR

Amanda assigns, reordered, that the district court erred in denying her petition for name change and in granting Blake's complaint to modify the decree, because the court (1) applied an incorrect burden of proof, (2) wrongfully gave preference to Blake's surname, and (3) ignored evidence which supported the name change to Amanda's married surname.

## STANDARD OF REVIEW

[1] An appellate court reviews a trial court's decision concerning a requested change in the surname of a minor de novo

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

on the record and reaches a conclusion independent of the findings of the trial court.[2]

## ANALYSIS

### Burden of Proof

[2,3] The question of whether the name of a minor child should be changed is determined by what is in the best interests of the child.[3] The party seeking the change in surname has the burden of proving that the change in surname is in the child's best interests.[4] Cases considering this question have granted a change of name only when the substantial welfare of the child requires the name to be changed.[5]

[4] Amanda contends that the district court applied an incorrect burden of proof. The court recognized that the question was whether there was evidence that a name change would be in the child's best interests, but the court also referred to a "substantial evidence" standard, which it defined as "more than a scintilla and less than a preponderance." Thus, the court may have conflated "substantial evidence" with the "substantial welfare" concept referred to in name-change cases. Substantial welfare is related to best interests, because a change in surname is in a child's best interests only when the substantial welfare of the child requires the name to be changed.[6] To the extent the court deviated from a best interests standard, it did so in error. But our review on appeal is de novo on the record. And in conducting our review, we will consider only whether the evidence established that Connor's best interests necessitate a name change.

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[2] *In re Change of Name of Slingsby*, 276 Neb. 114, 752 N.W.2d 564 (2008).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] See, *In re Change of Name of Slingsby, supra* note 2; *In re Change of Name of Andrews*, 235 Neb. 170, 454 N.W.2d 488 (1990); *Cohee v. Cohee*, 210 Neb. 855, 317 N.W.2d 381 (1982); *Spatz v. Spatz*, 199 Neb. 332, 258 N.W.2d 814 (1977).

## PREFERENCE FOR PATERNAL SURNAME

Amanda argues that the district court wrongfully gave a preference to the surname of Blake, the biological father. She points to the following statement by the court: "[T]he natural father's allegation under the paternity law to change the name to . . . his name I'm going to find is probably in the best interest of the minor child. Now, that may be considered an old-fashioned statement . . . ." It is not clear from this statement that the court accorded a preference for the paternal surname in making a best interests determination. But to the extent the court may have done so, we expressly disapprove of such a practice.

[5] Over 30 years ago, we recognized that no automatic preference as to the surname of a child born in wedlock exists in Nebraska law.[7] We likewise conclude that there should be no automatic preference as to the surname of a child born out of wedlock. We acknowledge that some courts have recognized a preference for the paternal surname.[8] But other courts have rejected that practice.[9] We conclude that in Nebraska, there is no preference for a surname—paternal or maternal—in name change cases; rather, the child's best interests is the sole consideration.[10]

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[7] See *Cohee v. Cohee, supra* note 6.

[8] See, e.g., *D. R. S. v. R. S. H.*, 412 N.E.2d 1257 (Ind. App. 1980); *Burke v. Hammonds*, 586 S.W.2d 307 (Ky. App. 1979); *Application of Tubbs*, 620 P.2d 384 (Okla. 1980).

[9] See, e.g., *Pizziconi v. Yarbrough*, 177 Ariz. 422, 868 P.2d 1005 (Ariz. App. 1993); *In re Marriage of Schiffman*, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980); *In re Marriage of Gulsvig*, 498 N.W.2d 725 (Iowa 1993); *Gubernat v. Deremer*, 140 N.J. 120, 657 A.2d 856 (1995); *Bobo v. Jewell*, 38 Ohio St. 3d 330, 528 N.E.2d 180 (1988); *Ribeiro v. Monahan*, 524 A.2d 586 (R.I. 1987); *Keegan v. Gudahl*, 525 N.W.2d 695 (S.D. 1994); *Barabas v. Rogers*, 868 S.W.2d 283 (Tenn. App. 1993); *Hamby v. Jacobson*, 769 P.2d 273 (Utah App. 1989); *In re Wilson*, 162 Vt. 281, 648 A.2d 648 (1994).

[10] See, *In re Marriage of Schiffman, supra* note 9; *Ribeiro v. Monahan, supra* note 9; *Keegan v. Gudahl, supra* note 9.

## Sufficiency of Evidence

Lastly, we consider Amanda's claim that the district court ignored the evidence which supported the name change to her married surname and thereby erred in denying her petition for name change and in granting Blake's complaint to modify the decree. As discussed above, whether Connor's name should be changed is driven by his best interests.

Before engaging in a best interests analysis, we briefly address some concerning statements by the district court. The court stated that changing Connor's name to Amanda's married surname would be "like a de facto adoption" and "would just simply be wrong." The court also stated that "[t]here's no reason to be changing the name to a stepfather's name" and that "it would be in the best interest to take the natural father's name instead of taking what would be — in the Court's thinking would be a stepfather's name." In making these statements, the court seemingly overlooked the fact that Amanda's married surname is *her* surname—not just "a stepfather's name." The court's focus on Amanda's married surname as being merely a stepfather's surname was clearly misplaced.

[6] We have previously set forth a list of nonexclusive factors to consider in determining whether a change of surname is in the child's best interests.[11] These factors are (1) misconduct by one of the child's parents; (2) a parent's failure to support the child; (3) parental failure to maintain contact with the child; (4) the length of time that a surname has been used for or by the child; (5) whether the child's surname is different from the surname of the child's custodial parent; (6) a child's reasonable preference for one of the surnames; (7) the effect of the change of the child's surname on the preservation and development of the child's relationship with each parent; (8) the degree of community respect associated with the child's present surname and the proposed surname; (9) the difficulties, harassment, or embarrassment that the child may experience

[11] See, *In re Change of Name of Slingsby, supra* note 2; *In re Change of Name of Andrews, supra* note 6.

from bearing the present or proposed surname; and (10) the identification of the child as a part of a family unit.[12]

The application of these nonexclusive factors to the evidence does not support a finding that a name change—either to Blake's surname or to Amanda's married surname—is in Connor's best interests. Several factors either weigh against a change or do not militate in favor of one parental surname rather than the other: Connor had used his present surname for nearly 5 years at the time of trial; the evidence did not establish Connor's preference for one of the surnames; there had been no misconduct by either party; both parents had supported Connor (although Blake had been in arrears on his child support obligation, he was current at the time of trial); both parents maintained contact with Connor; and both parents had been able to form and maintain a relationship with Connor despite the difference in surnames. Amanda opined that Connor would feel more a part of the family if he had the same surname as the rest of the household, but the evidence did not establish difficulties in identifying Connor as part of a family unit. In our view, only one factor weighed in favor of changing Connor's surname: Connor's surname was different from the surname of Amanda, Connor's custodial parent.

Amanda argues that the district court should have considered that she has sole legal custody of Connor. She contends that as Connor's legal custodian, she has the responsibility and authority to make fundamental decisions for Connor and that she has determined that it is in the best interests of Connor for his surname to be changed to Amanda's married surname.

Her contention finds some support in case law from other jurisdictions.[13] The Supreme Court of New Jersey adopted

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[12] *In re Change of Name of Slingsby, supra* note 2.

[13] See, e.g., *Cormier v. Quist*, 77 Mass. App. 914, 933 N.E.2d 153 (2010); *Gubernat v. Deremer, supra* note 9. See, also, *Aitkin County Family Serv. Agency v. Girard*, 390 N.W.2d 906, 909 (Minn. App. 1986) ("absent evidence that the change will be detrimental to the preservation of the children's relationship with their father, we see no reason to put aside the preference expressed by their custodial parent").

a strong presumption in favor of the surname chosen by the custodial parent, noting the "judicial and legislative recognition that the custodial parent will act in the best interest of the child."[14] A Massachusetts appellate court reasoned that "[a] decision to change a child's surname is a significant life decision; in making such a decision in the child's best interests, the allocation of custodial responsibility should at least be considered."[15] But Nebraska has not recognized a presumption in favor of the surname chosen by the custodial parent.

Long ago, we "refuse[d] to suggest or hold that a presumption exists in favor of the custodial parent."[16] Rather, we stated that "custody, along with the other factors, is to be considered in determining the best interests of the child."[17] Although we made those statements concerning a name change for a child in the context of a marital dissolution action, we see no reason to apply a custodial—legal or physical—presumption regarding a child born out of wedlock.

[7] Other courts have similarly refused to adopt a presumption in favor of the surname desired by the custodial parent.[18] The Supreme Court of Arkansas reasoned that "such an inflexible resolution will not serve the best interests of the children involved."[19] Courts in Utah and Vermont have observed that "the best interests of the child test can appropriately include consideration of the custodial situation of the child, as well as other relevant factors"[20] and that a presumption "would be inconsistent with the best interests analysis because it is not the custodial parent's preference, but the best interests of the child that 'is the paramount consideration in determining

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[14] *Gubernat v. Deremer, supra* note 9, 140 N.J. at 144, 657 A.2d at 869.

[15] *Cormier v. Quist, supra* note 13, 77 Mass. App. at 916, 933 N.E.2d at 155-56.

[16] *Cohee v. Cohee, supra* note 6, 210 Neb. at 861, 317 N.W.2d at 384.

[17] *Id.*

[18] See, e.g., *Huffman v. Fisher*, 337 Ark. 58, 987 S.W.2d 269 (1999); *In re Marriage of Schiffman, supra* note 9; *Hamby v. Jacobson, supra* note 9; *In re Wilson, supra* note 9.

[19] *Huffman v. Fisher, supra* note 18, 337 Ark. at 70, 987 S.W.2d at 275.

[20] *Hamby v. Jacobson, supra* note 9, 769 P.2d at 277.

whether a child's name should be changed.'"[21] We agree. No presumption exists in favor of the surname desired by a custodial parent, even if the parent has sole legal and physical custody of the child. We will continue to apply a best interests of the child test exclusive of any presumption favoring one parent's surname over the other.

We are not unmindful that declining to change Connor's surname leaves him with a surname different from the surnames of both of his parents. We were faced with a similar situation in *In re Change of Name of Slingsby*.[22] In that case, as in the instant case, the child was born out of wedlock and given the mother's surname, the mother subsequently married and changed her name, and the mother sought to change the child's surname from her maiden name to her married surname. The district court denied the petition, determining that the mother failed to prove that the name change was in the child's best interests. On appeal, we affirmed. We noted that there was no evidence that the child "would be more or less likely to identify himself with a family unit with or without a change in his surname."[23]

The dissent in *In re Change of Name of Slingsby* raised serious concerns. It pointed out that "where the child bears neither the mother's new surname nor the biological father's surname, the child will likely be questioned in the future as to why he does not carry the last name of either his mother or his father."[24] The dissent noted the mother's desire for the child's name to match potential siblings and reasoned, "There is no question that sharing the same surname within a family unit provides security, stability, and a feeling of identity and limits the potential difficulties, confusion, and embarrassment that may arise relating to the paternity of the child."[25]

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[21] *In re Wilson, supra* note 9, 162 Vt. at 284, 648 A.2d at 650.

[22] *In re Change of Name of Slingsby, supra* note 2.

[23] *Id.* at 119, 752 N.W.2d at 568.

[24] *Id.* at 121, 752 N.W.2d at 569 (Gerrard, J., dissenting; Miller-Lerman, J., joins).

[25] *Id.* at 122, 752 N.W.2d at 570 (Gerrard, J., dissenting; Miller-Lerman, J., joins).

Several courts have reached a similar conclusion. In *Carter v. Reddell*,[26] the child was given the mother's maiden surname, the mother married and changed her surname, and the father filed a petition requesting that the child's surname be changed to that of the father. In affirming the name change, the appellate court stated that it did not appear the name change would affect the child's relationship with either parent, that the father's surname would not change, and that although the child had gone by her surname for 4 years, "there would be very little stigma attached if she changes her last name now, at the beginning of her school attendance."[27] Faced with a similar situation, a Missouri appellate court stated, "We fail to see how the best interest of this child is served by setting him apart from other children in the community who may carry either their father's or mother's surname."[28] In *M.L.M. ex rel. Froggatte v. Millen*,[29] the trial court granted the father's request to change the child's surname to that of the father, reasoning that because the mother had married and taken her husband's last name, it was in the child's best interests that the child's last name match that of the other biological parent. The appellate court affirmed, stating that "[t]he net effect of [the mother's] remarriage and refusal to consent to a name change leaves [the child] bearing a last name not used by either parent, particularly the custodial parent."[30]

But other courts have declined to change a child's surname, even when the child's surname is different from both parents. In *In re Berger ex rel. K.C.F.*,[31] the father filed an action to change the child's surname to that of the father so that the child would have the same surname as one of his parents. At that time, the child was 7 years old. The father testified that

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[26] *Carter v. Reddell*, 75 Ark. App. 8, 52 S.W.3d 506 (2001).

[27] *Id.* at 13, 52 S.W.3d at 509.

[28] *R.W.B. v. T.W. ex rel. K.A.W.*, 23 S.W.3d 266, 268 (Mo. App. 2000).

[29] *M.L.M. ex rel. Froggatte v. Millen*, 28 Kan. App. 2d 392, 15 P.3d 857 (2000).

[30] *Id.* at 394, 15 P.3d at 859.

[31] *In re Berger ex rel. K.C.F.*, 778 N.W.2d 579 (N.D. 2010).

the child indicated a desire to have the father's surname and that the child had encountered "awkward situations" due to having a different last name.[32] The mother testified that when she changed her name, the child's only concern was that he would not have to change his surname. Upon her inquiry, the child said he would not be sad or hurt if she had a different surname than the child. In affirming the denial of the petition for name change, the appellate court reasoned that the child was now in school, that he had an established identity, that friends have known him by his name for some time, and that changing his surname now could invite more questions from his peers. In a similar situation, a North Dakota appellate court affirmed a trial court's denial of a mother's petition to change the child's surname to match her own. The trial court in that case had reasoned:

> "Whatever the Court's decision, there are going to be awkward moments in the child's future when she will be forced to explain her name. It will be more confusing for her to explain that her stepfather is not her father though she has his last name than to explain that she has her mother's maiden name. If the petitioner and her husband divorce, the petitioner said [the child's] surname would remain the stepfather's name. Not only would that be confusing, but then [the child's] surname would be that of a man to whom she has no legal or biological connections. Finally, the Court believes allowing the name change could lead to alienation of the child from the respondent, even if there is no intent to do so."[33]

As the North Dakota court cogently explained, some awkwardness is probably inevitable.

[8] In each of the cases discussed above, a child was born out of wedlock and given his mother's maiden name, the mother later married and changed her surname, and one of the parents brought an action to change the child's surname. But courts reached different conclusions from case to case. The

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[32] *Id.* at 583.

[33] *Grad ex rel. Janda v. Jepson*, 652 N.W.2d 324, 325 (N.D. 2002).

differing conclusions reinforce the concept that name-change decisions are to be made on a case-by-case basis.[34]

The case before us presents a twist in that both parents sought to change Connor's surname, but the *evidence* does not establish that Connor's best interests necessitate a change in his surname. The testimony disclosed Blake's and Amanda's respective reasons for wanting to change Connor's surname, but the evidence fell short of demonstrating that Connor's substantial welfare required such a change. In the future, Connor may very well decide that he wants to change his surname. But at this time, the evidence is simply insufficient to show that a change to either Blake's surname or Amanda's married surname would promote his best interests. We therefore reverse the order in the paternity action granting Blake's request to change Connor's surname and affirm the judgment denying Amanda's separate petition to change Connor's surname.

## CONCLUSION

Upon our de novo review of the record, we conclude that neither parent met his or her burden to show that a change in Connor's surname was in his best interests. Accordingly, in case No. S-13-995, we reverse the district court's order changing Connor's surname to that of Blake and remand the cause with direction to deny the requested relief. In case No. S-13-1000, we affirm the judgment dismissing Amanda's petition.

JUDGMENT IN NO. S-13-995 REVERSED, AND CAUSE REMANDED WITH DIRECTION.
JUDGMENT IN NO. S-13-1000 AFFIRMED.

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[34] See *Matthews v. Smith*, 80 Ark. App. 396, 97 S.W.3d 418 (2003).

MILLER-LERMAN, J., concurring.

I concur and write separately only to observe that unlike *In re Name Change of Slingsby*, 276 Neb. 114, 752 N.W.2d 564 (2008), this record does not contain testimony of a trained fact witness or professional, the testimony of whom regarding the impact of a name change on the child could be helpful in meeting a party's burden of proof.

# STATE OF NEBRASKA, APPELLEE, V. CHARLES E. KAYS, APPELLANT.

854 N.W.2d 783

Filed October 17, 2014. No. S-11-504.

1. **Courts: Appeal and Error.** Appellate review is limited to those errors specifically assigned in an appeal to the district court and again assigned as error in an appeal to the higher appellate court.
2. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in briefs, an appellate court may, at its option, notice plain error.
3. ____. Plain error exists where there is error, plainly evident from the record but not complained of at trial, that prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
4. **Rules of the Supreme Court: Appeal and Error.** Absent plain error, the Supreme Court's review on a petition for further review is restricted to matters assigned and argued in the briefs.
5. ____: ____. Incorporating by reference the assignments of error and arguments made in one's appellate brief is not an appropriate way to set forth separately and concisely the assignments of error in a petition for further review. Nor is mere incorporation by reference an appropriate discussion of the errors assigned as required by Neb. Ct. R. App. P. § 2-102(F)(3) (rev. 2012).
6. **Appeal and Error.** Absent plain error, an issue not raised to the district court will not be considered by an appellate court on appeal.
7. ____. A petition for further review cannot be utilized to circumvent the general rule that an appellant may not raise issues or arguments for the first time on appeal.
8. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
9. **Rules of the Supreme Court: Trial: Judges: Appeal and Error.** It is not structural error for a hearing under Neb. Ct. R. App. P. § 2-105(B)(5) (rev. 2010) to be conducted by a judge who did not preside over the original trial.
10. **Records: Appeal and Error.** The reliability of the bill of exceptions on appeal is central to the integrity, reputation, and fairness of the judicial process.
11. **Rules of the Supreme Court: Records: Proof: Appeal and Error.** The burden of proof in a proceeding under Neb. Ct. R. App. P. § 2-105(B)(5) (rev. 2010) challenging the bill of exceptions is necessarily upon the party seeking the amendment.
12. **Courts: Records: Appeal and Error.** Under a plain error standard of review, it is not the role of an appellate court to substitute its opinion for the opinion of a district court that is reasonably supported by the record.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and MOORE, Judges, on appeal thereto from the District Court for Douglas County, LEIGH ANN RETELSDORF, Judge. Judgment of Court of Appeals affirmed.

Frank E. Robak, Sr., of Robak Law Office, for appellant.

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

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## NATURE OF CASE

The originally filed bill of exceptions prepared for this appeal indicated that the alternate 13th juror was polled in the verdict against the defendant. A reproofread version of the bill of exceptions that replaced the original bill of exceptions indicates that the alternate juror did not deliberate and was not polled. The question of the accuracy of the bill of exceptions was remanded for a hearing before the district court. The district court found that the reproofread version of the bill of exceptions was the bill of exceptions upon which the appeal should proceed. The court reporter testified at the hearing that the reproofread bill of exceptions accurately portrayed what occurred at trial. The 13th juror averred at the hearing that she did not deliberate and was not polled for the verdict. Subsequent to the order on remand, the defendant amended his brief on appeal to assign and argue that the bill of exceptions was not trustworthy in any respect and that, as a result, he was entitled to a new trial. The Nebraska Court of Appeals affirmed the district court's determination that the appeal should proceed upon the reproofread bill of exceptions and affirmed the defendant's convictions. On further review, we find no plain error in the district court's order determining that the presently filed bill of exceptions is accurate. We do not address any other assignments of error that were not

properly preserved, assigned, or argued in the petition for further review.

## BACKGROUND

Charles E. Kays was convicted by a jury of one count of first degree sexual assault of a child and two counts of third degree sexual assault of a child. He was sentenced to 15 to 15 years' imprisonment on the conviction of first degree sexual assault of a child and 20 months' to 5 years' imprisonment on each of the remaining convictions.

Kays timely appealed to the Court of Appeals. He had different counsel on direct appeal than his trial counsel. Among other things, Kays assigned as error that the district court failed to select and discharge an alternate juror before submission of the case to the jury and that the alternate 13th juror deliberated and was polled in the guilty verdict against him. Trial counsel did not object to the alleged alternate juror's deliberation or move for a new trial on that basis, but appellate counsel assigned and argued as error ineffective assistance of trial counsel for failing to object to the 13th juror.

In preparing Kays' brief, appellate counsel had relied on the most recent copy of the bill of exceptions that had been e-mailed to him by the court reporter. That version reflected the 13th juror's being polled. But the bill of exceptions filed in the case reflected only 12 jurors polled for the verdict. Neither version reflected that the district court had explicitly discharged the 13th juror on the record.

When the court reporter became aware that appellate counsel was arguing that the 13th juror deliberated in Kays' case, she wrote to appellate counsel that she must have mistakenly e-mailed him a prior version of the bill of exceptions that was not adequately proofread. The court reporter explained that she personally remembered that the 13th juror did not participate in deliberation or polling. Further, she had checked the audiotape to confirm that the 13th juror did not deliberate.

Kays filed an application with the Court of Appeals for remand of the cause to the district court to correct the bill of exceptions due to the discrepancies between the version e-mailed to appellate counsel and the version on file. The

Court of Appeals granted the motion and remanded the matter to the district court for a hearing under Neb. Ct. R. App. P. § 2-105(B)(5) (rev. 2010).

Section 2-105(B)(5) states:

> The parties in the case may amend the bill of exceptions by written agreement to be attached to the bill of exceptions at any time prior to the time the case is submitted to the Supreme Court. Proposed amendments not agreed to by all the parties to the case shall be heard and decided by the district court after such notice as the court shall direct. The order of the district court thereon shall be attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court. Hearings with respect to proposed amendments to a bill of exceptions may be held at chambers anywhere in the state. If the judge shall have ceased to hold office, or shall be prevented by disability from holding the hearing, or shall be absent from the state, such proposed amendments shall be heard by the successor judge, or by another district judge in the district, or by a district judge in an adjoining judicial district.

The trial judge who tried the case against Kays recused herself due to a conflict of interest and reassigned the § 2-105(B)(5) hearing to another judge. Kays' appellate counsel did not object to the trial judge's recusal.

The court reporter who created the bill of exceptions testified at the § 2-105(B)(5) hearing. The court reporter testified that after preparing and filing the bill of exceptions, she received a letter from Kays' attorney asking her to correct some errors in the bill of exceptions and refile it. Those errors involved misidentification of the parties and numbering errors. The presence of the 13th juror during polling was not brought to her attention, and she was unaware that the original version of the bill of exceptions reflected 13 jurors' being polled.

The court reporter sent the bill of exceptions to have it reproofread. This process, she explained, involves listening to an audiotape of the proceedings. The court reporter entered onto her electronic copy all the corrections made by

the proofreader with red pen markings. The court reporter explained that she did this without paying particular attention to the substance of the changes.

The court reporter then printed the entire two-volume bill of exceptions with the new corrections and filed it, directing the clerk's office to backdate it to reflect the same date as the original bill of exceptions. The court reporter shredded the original bill of exceptions. She apparently did not personally retain any copy of the original bill of exceptions that was filed. However, the court reporter identified an e-mail attachment sent to Kays' appellate counsel as being identical to the originally filed bill of exceptions. That version showed 13 jurors polled in the verdict.

The court reporter testified that she had come to realize that shredding the original bill of exceptions and backdating the reproofread version was improper; however, she was not aware this was improper procedure at the time and she was not trying to hide anything. She explained that she thought she was following Kays' counsel's directions to refile the bill of exceptions as corrected.

The court reporter testified that the reproofread bill of exceptions was the most accurate and complete version of what took place at Kays' trial. She stated specifically that, to the best of her knowledge, the reproofread bill of exceptions showing that 12 jurors deliberated and were polled was an accurate portrayal of what happened at trial.

The court reporter explained that in preparing the original bill of exceptions, she likely had accidentally hit the wrong bank when transcribing her stenographer notes, adding an additional juror's name to the polling. The court reporter explained that she had attempted to e-mail the reproofread and corrected bill of exceptions to Kays' appellate counsel so he would not have to pay for copies, because she felt bad about the prior proofreading errors. But she stated that she "must have picked the wrong file" when she e-mailed appellate counsel.

The affidavit of the 13th juror was entered into evidence at the hearing. Her affidavit set forth that she had been impaneled as a member of the jury in Kays' case and that she sat

as a juror until the case was submitted for deliberation at the close of the evidence, at which time the judge explained that she was the alternate juror and that her service was no longer needed. Her affidavit stated that she did not deliberate in Kays' case.

The audiotape of the trial was not entered into evidence at the hearing. Neither were the court reporter's stenographer notes. Although the court reporter indicated at the hearing that these items could probably be found in the courtroom where she had worked, Kays' appellate counsel did not request them.

At the close of the evidence submitted at the § 2-105(B)(5) hearing, Kays' appellate counsel stated that he did not dispute the 13th juror's affidavit averring that she did not deliberate in Kays' trial. Rather, he argued that the entire bill of exceptions lacked credibility, based on its history of being mishandled. Kays' appellate counsel elaborated that he believed a new trial was the only remedy, especially given the fact that the trial judge had recused herself and the court reporter had resigned.

The district court disagreed and entered an order finding that the reproofread bill of exceptions prepared and filed by the court reporter constituted the correct bill of exceptions upon which Kays' appeal should proceed.

Kays thereafter filed a second amended appellate brief assigning and arguing to the Court of Appeals that the district court erred in finding that the reproofread bill of exceptions was credible and allowing that bill of exceptions to be used for this appeal. He also reassigned and argued his previously assigned errors (1) that the judge failed to discharge the alternate juror prior to submission of the case to the jury for deliberation, (2) prosecutorial misconduct, (3) insufficient evidence, (4) ineffective assistance of counsel, and (5) excessive sentences.

Kays did not argue in his brief on appeal that the cause should be remanded for another § 2-105(B)(5) hearing before the judge who had presided over his trial, nor did Kays argue that the trial judge's recusal from the § 2-105(B)(5) hearing was improper. Rather, Kays continued to argue that due to

the acts of the court reporter and the fact of the trial judge's recusal, the bill of exceptions was generally not credible and could not be remedied in a § 2-105(B)(5) hearing. As a result, Kays argued that a new trial would be warranted. However, he also argued that such a new trial would be barred by double jeopardy, "due to the prejudice suffered."[1] Kays alternatively argued that due to the irregularities caused by the court reporter and his reliance on the e-mailed version of the bill of exceptions, the e-mailed version of the bill of exceptions reflecting polling of the 13th juror should be utilized.

The Court of Appeals found no merit to Kays' assignments of error.[2] Particularly, the Court of Appeals found no error in the district court's determination that the amended bill of exceptions was credible. In so finding, the Court of Appeals noted that a "conflict of interest" could be considered a "disability" and, thus, was one of the acceptable reasons listed in § 2-105(B)(5) for allowing the hearing on a motion to amend a bill of exceptions to be held before a judge other than the judge presiding over the trial.

The dissenting opinion took issue with the majority's conclusion that the term "disability" encompassed situations where the trial judge has recused himself or herself due to a conflict of interest, especially when the record did not suggest a conflict of interest. The dissent explained that in proceedings under § 2-105(B)(5), the trial judge who presided at trial is crucial to the process, because that judge is in the best position to exercise judgment about any disputed amendments or corrections and how to most accurately complete the record of what occurred at trial.[3] The dissent wished to remand the matter for a § 2-105(B)(5) hearing before the original trial judge.

Kays petitioned for further review, which we granted. His brief in support of his petition for further review purported

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[1] Second replacement brief for appellant at 15.

[2] *State v. Kays*, 21 Neb. App. 376, 838 N.W.2d 366 (2013), *disapproved on other grounds, State v. Filholm*, 287 Neb. 763, 838 N.W.2d 571 (2014).

[3] *Id.* (Irwin, Judge, dissenting).

to "incorporate[] by reference" the assignments of error and arguments from his brief on appeal.[4] The only assignment of error actually stated in his petition for further review is that the Court of Appeals erroneously held that the term "disability" as used in § 2-105(B)(5) encompasses a conflict of interest. He asks for the first time in his petition for further review that we remand the matter for a new § 2-105(B)(5) hearing before the trial judge or demand from the trial judge a further explanation of her stated conflict of interest.

## ASSIGNMENTS OF ERROR

Kays assigns that the Court of Appeals erroneously concluded that the term "disability" in § 2-105(B)(5) encompassed a conflict of interest.

## STANDARD OF REVIEW

[1] Appellate review is limited to those errors specifically assigned in an appeal to the district court and again assigned as error in an appeal to the higher appellate court.[5]

[2] Although an appellate court ordinarily considers only those errors assigned and discussed in briefs, an appellate court may, at its option, notice plain error.[6]

[3] Plain error exists where there is error, plainly evident from the record but not complained of at trial, that prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.[7]

## ANALYSIS

[4] We begin by noting that there is no asserted error in this appeal that has not been waived. Absent plain error, our review

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[4] Brief in support of petition for further review at 4.

[5] *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

[6] *Id.*

[7] See *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

on a petition for further review is restricted to matters assigned and argued in the briefs.[8]

[5] Neb. Ct. R. App. P. § 2-102(F)(3) (rev. 2012) provides that the petition for further review and supporting memorandum brief shall set forth a separate, concise statement of each error alleged to have been made by the Court of Appeals and that the memorandum brief must discuss the errors assigned. Incorporating by reference the assignments of error and arguments made in one's appellate brief is not an appropriate way to set forth separately and concisely the assignments of error in a petition for further review. Nor is mere incorporation by reference an appropriate discussion of the errors assigned as required by § 2-102(F)(3).[9]

[6,7] The only error properly assigned and argued in the petition for further review concerns the trial judge's recusal from the hearing on Kays' motion to amend the bill of exceptions. However, Kays did not object below to the trial judge's recusal. Absent plain error, an issue not raised to the district court will not be considered by an appellate court on appeal.[10] A petition for further review cannot be utilized to circumvent the general rule that an appellant may not raise issues or arguments for the first time on appeal.

[8] In fact, appellate counsel's arguments at the § 2-105(B)(5) hearing revealed a larger strategy in which Kays hoped to gain a new trial because of the trial judge's recusal. We have repeatedly said that one may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.[11]

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[8] *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013).

[9] Cf., e.g., *Baldwin v. Reese*, 541 U.S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004); *Allegheny Power v. Federal Energy Regulatory Com'n*, 437 F.3d 1215 (D.C. Cir. 2006); *Castillo v. McFadden*, 399 F.3d 993 (9th Cir. 2005); *Toney v. Gammon*, 79 F.3d 693 (8th Cir. 1996); *Perillo v. Johnson*, 79 F.3d 441 (5th Cir. 1996); *Georgia Osteopathic Hosp. v. O'Neal*, 198 Ga. App. 770, 403 S.E.2d 235 (1991).

[10] See *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006), *abrogated on other grounds, State v. Thorpe*, 280 Neb. 11, 783 N.W.2d 749 (2010).

[11] *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

Furthermore, we observe that although Kays was allowed to amend his appellate brief subsequent to the hearing on the motion to amend the bill of exceptions, Kays did not assign or argue to the Court of Appeals any error in the trial judge's recusal from the hearing. He did not question whether the trial judge had a conflict of interest or whether a conflict of interest was proper grounds for recusal from a § 2-105(B)(5) hearing. We would be hard pressed to conclude on further review that the Court of Appeals erred by failing to reverse the lower court's decision on a point not complained of.

[9] While it may be preferable for the trial judge to preside over a § 2-105(B)(5) hearing, it is not structural error for the hearing to be conducted by a judge who did not preside over the original trial. Therefore, any issue as to the trial judge's recusal from the § 2-105(B)(5) hearing has been waived.

[10] Nevertheless, the reliability of the bill of exceptions on appeal is central to the integrity, reputation, and fairness of the judicial process. Accordingly, given the history of this case, we will conduct a plain error review on the limited issue of the Court of Appeals' affirmance of the determination at the § 2-105(B)(5) hearing that the bill of exceptions properly reflected the proceedings below. 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.[12]

We find that the evidence presented at the § 2-105(B)(5) hearing was uncontroverted that the 13th juror did not deliberate in Kays' trial. In fact, Kays' appellate counsel ultimately stated at the hearing that he did not dispute the 13th juror's affidavit.

We observe that the district court's failure to specifically discharge the 13th juror on the record exacerbated the confusion caused by the court reporter's mishandling of the bill of exceptions. We therefore encourage trial courts to vigilantly make a record discharging any alternate jurors before deliberation.

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[12] *In re Interest of Justine J. & Sylissa J., supra* note 7.

But the purpose of a § 2-105(B)(5) hearing is to resolve disputes or doubts about the accuracy of the bill of exceptions, no matter how those doubts may have come about.[13] The record from the § 2-105(B)(5) hearing does not plainly reflect any inaccuracy in the reproofread bill of exceptions insofar as it shows 12 jurors deliberated and were polled for the verdict.

Kays does not really dispute this point. Kays argues instead that the bill of exceptions is generally unreliable because of the court reporter's negligent mishandling of it. He does not point to any particulars, but argues that we cannot know what else might be inaccurate and that we must, therefore, find it wanting. We find no merit to this assertion.

The evidence presented at the § 2-105(B)(5) hearing indicated that one of the versions of the bill of exceptions that was e-mailed to Kays' counsel was the version originally filed and shredded. Kays points to nothing in this e-mailed bill of exceptions indicating that any question other than that of the 13th juror required clarification, and we find nothing plainly evident therein.

[11] Regardless, the burden of proof in a proceeding under § 2-105(B)(5) challenging the bill of exceptions is necessarily upon the party seeking the amendment.[14] The court reporter testified that the filed reproofread bill of exceptions constituted the most accurate version of what transpired at trial and was in conformity with the audiotape of the proceedings. Her negligence in shredding the original bill of exceptions and backdating the currently filed bill of exceptions does not negate her testimony as a matter of law. And Kays brought forth no evidence contradicting the court reporter's testimony. If Kays had further concerns, he was free to introduce additional evidence or call witnesses and explain how he thought the bill of exceptions required correction.

[12] Under a plain error standard of review, it is not the role of an appellate court to substitute its opinion for the opinion

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[13] See *id*.

[14] See *Black v. Youmans*, 245 F. 460 (8th Cir. 1917).

of a district court that is reasonably supported by the record.[15] We cannot conclude from the record that the findings of the district court in the § 2-105(B)(5) hearing were so unsubstantiated that any purported errors were injurious to the integrity, reputation, or fairness of the judicial process as to justify reversal on appeal under the plain error doctrine.[16]

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the Court of Appeals.

AFFIRMED.

HEAVICAN, C.J., and CASSEL, J., not participating.

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[15] *Steffy v. Steffy*, 287 Neb. 529, 843 N.W.2d 655 (2014).

[16] See *id*.

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STATE OF NEBRASKA, APPELLEE, V.
TILLMAN T. HENDERSON, APPELLANT.
854 N.W.2d 616

Filed October 17, 2014. No. S-13-559.

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. **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. **Rules of Evidence: Appeal and Error.** Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.
4. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.

5. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
6. **Criminal Law: Pretrial Procedure: Appeal and Error.** Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion.
7. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
8. **Search and Seizure: Arrests: Police Officers and Sheriffs.** The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.
9. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a totality of the circumstances test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
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. **Constitutional Law: Probable Cause.** In addition to the requirement of probable cause, the Fourth Amendment contains a particularity requirement.
12. **Constitutional Law: Search and Seizure: Search Warrants: Probable Cause.** The Fourth Amendment's particularity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone. Accordingly, a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.
13. ____: ____: ____: ____. The particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described.
14. **Search Warrants: Search and Seizure.** A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it. That is, a warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching.
15. **Motions to Suppress: Search Warrants: Affidavits: Police Officers and Sheriffs: Evidence: Search and Seizure.** The good faith exception to the exclusionary rule provides that evidence seized under an invalid warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant. Nevertheless, evidence suppression will still be appropriate if one of four circumstances exists: (1) The magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless

disregard for the truth; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.

16. **Search and Seizure: Police Officers and Sheriffs.** The good faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.
17. **Search Warrants: Affidavits: Police Officers and Sheriffs: Appeal and Error.** In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit.
18. **Criminal Law: Trial: Evidence.** Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the initial possession of the object or article to its final custodian; and if one link in the chain is missing, the object may not be introduced in evidence.
19. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
20. **Trial: Evidence.** Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis.
21. **Hearsay: Words and Phrases.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
22. **Criminal Law: Due Process: Pretrial Procedure.** A defendant in a criminal proceeding has no general due process right to discovery.
23. **Criminal Law: Constitutional Law: Due Process: Rules of Evidence.** Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.
24. **Pretrial Procedure.** A defendant does not have an unfettered right to discovery.
25. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
26. **Motions for Mistrial: Proof.** A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, Matthew J. Miller, and Zoë R. Wade 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.

## I. NATURE OF CASE

Tillman T. Henderson appeals his convictions in the district court for Douglas County for several felonies. He claims, inter alia, that the district court erred when it denied his motion to suppress evidence obtained from a search of the contents of a cell phone that was found on his person at the time he was arrested. We affirm Henderson's convictions and sentences.

## II. STATEMENT OF FACTS

### 1. Charges and General Evidence

Henderson was convicted of first degree murder in connection with the shooting death of Matthew Voss and attempted first degree murder in connection with the shooting of Antonio Washington. He was convicted of two counts of use of a deadly weapon to commit a felony in connection with the foregoing crimes. He was also convicted of possession of a deadly weapon by a prohibited person.

Testimony at trial indicated that in the early morning hours of February 18, 2012, a fight broke out at an after-hours party in downtown Omaha, Nebraska. Witnesses reported seeing two men firing guns. Voss and Washington both sustained gunshot wounds; Voss died as a result of his wounds, while Washington survived but was severely injured.

Henderson was apprehended by police as he was running from the scene of the incident. A person who was at the scene had identified Henderson to a police officer as one of the shooters. The other suspect was not apprehended. One gun was found on Henderson's person when he was arrested, and a police officer saw Henderson throw another gun under a vehicle as the officer was chasing him.

Forensic evidence presented at trial indicated that bullets and casings found at the scene of the shootings had been fired from the gun found on Henderson and from the gun he was seen throwing under a vehicle. A fingerprint on the gun found under the vehicle matched Henderson's. In addition, DNA testing of blood found on the clothing worn by Henderson at the time of his arrest indicated that the blood had come from Voss.

The State maintained at trial that Henderson shot Voss and Washington to retaliate for an assault on Henderson's friend, Jimmy Levering. Levering and Voss had both been inmates at a prison in Florida, and Voss had allegedly stabbed and punched Levering.

### 2. Apprehension of Henderson

Omaha police officer Paul Sarka responded to a call regarding a fight or disturbance in the area of 16th and Harney Streets around 3 a.m. on February 18, 2012. Sarka saw a group of people outside a building in the area, but he did not see a disturbance. He circled the block and then pulled his police cruiser into an alley to park and write a report on his response to the call. Soon after parking, Sarka heard several gunshots. He pulled his cruiser out of the alley and, with the lights and sirens turned on, drove in the direction from which he thought he had heard the gunshots, which direction was toward the group of people he had seen near 16th and Harney Streets. As he drove, he radioed a message to dispatch saying, "'Shots were fired. Send more officers.'"

Sarka saw 20 to 30 people running from the scene screaming and looking like they were in fear. Sarka yelled out of his cruiser's window to the people asking them who had done the shooting, but he did not get a response. The driver of a white sport utility vehicle rolled down his window, and when Sarka asked whether the driver had seen who did the shooting, the driver replied that it was "'the black male running down the sidewalk of this side of the street in the tan Carhartt.'" Sarka saw only one man in the group of people running on the sidewalk who was wearing a tan Carhartt jacket; the man was later identified as Henderson.

Sarka yelled at Henderson, "'Police, stop!'" Henderson made eye contact with Sarka but then turned and continued running. Sarka chased Henderson, first in his cruiser and then on foot. As Sarka was chasing Henderson on foot, another police cruiser came toward Henderson which caused him to change direction. Sarka saw Henderson pull an object that looked like a gun out of his waistband or pocket and throw the object under a vehicle that was parked on the street. Sarka continued to chase Henderson and was joined by another officer. The two eventually tackled Henderson and handcuffed him. Sarka turned Henderson over to another officer, Fred Hiykel. Sarka returned to the place where he had seen Henderson throw the object under a vehicle. The object proved to be a gun.

Hiykel responded to Sarka's "'Shots were fired'" call and arrived just as Sarka took Henderson into custody. Hiykel escorted Henderson to his police cruiser. Hiykel searched Henderson and found a handgun in his pocket. He removed the gun and put it in a plastic evidence bag. Hiykel put Henderson into the back of his cruiser and drove him to police headquarters. In the interview room, Hiykel removed other personal property from Henderson's person and placed the property in an evidence bag.

### 3. Search of Cell Phone

Dave Schneider was one of the homicide detectives from the Omaha Police Department (OPD) assigned to investigate the shootings. One of Schneider's duties was to obtain a search warrant for a cell phone that was among the items of personal property taken from Henderson upon his arrest. Schneider himself had not come into contact with the cell phone, but he knew that other officers had turned the cell phone on to obtain its serial number and telephone number. Schneider testified that the other officers had placed the cell phone into "airplane mode" so that the cell phone could not be remotely accessed for the purpose of deleting data. Schneider prepared an affidavit and application for issuance of a warrant to search the contents of the cell phone. In the affidavit and application, Schneider generally requested a warrant to search "[a]ny and

all information" contained on the cell phone. He specifically listed contacts, cell phone call lists, text messages, and voice mails, and he also requested "any other information that can be gained from the internal components and/or memory Cards." As grounds for the issuance of the warrant, Schneider asserted that Henderson was a suspect in a shooting and that the cell phone was in Henderson's possession when he was arrested. The county court for Douglas County issued the requested search warrant on February 18, 2012.

The search of the cell phone was conducted by another detective, Nick Herfordt, during the afternoon of February 18, 2012. Herfordt downloaded information from the cell phone, including the contact list, call history, and text messages. Included in the information downloaded was a series of text messages exchanged between the cell phone and another number between 2:34 a.m. and 3:11 a.m. on February 18. Messages coming from the other number included two which stated, "That Nigga that stab Jb up here" and "After hour on harney downtown." Messages sent from the searched cell phone included two which stated, "On my way keep close eye" and "Im out side wat up?" Other messages appear to indicate that the two persons exchanging the messages were attempting to meet up with one another outside the location mentioned in earlier messages. Herfordt also found a picture that was used as "wallpaper," or the background on the cell phone's screen. The picture depicted a man, and at trial, witnesses identified the man in the picture as Levering.

Prior to trial, on June 13, 2012, Henderson filed a motion to suppress evidence obtained from the search of the cell phone. He asserted, inter alia, that the affidavit supporting the request for the search warrant "did not contain sufficient information to establish probable cause to believe a crime or evidence of a crime would be found on [Henderson's] cellular telephone." The district court held a hearing on the motion to suppress on August 16. However, before the court ruled on the motion to suppress, Schneider obtained a second warrant to search the cell phone.

The affidavit Schneider submitted to the county court in support of the second warrant included the same information

that had been included in the request for the first warrant, but there was additional language stating:

> In Affiant Officers [sic] experience and training as a detective it is known that suspects that we have had contact with use cell phones to communicate about shootings that they have been involved it [sic], before, during, and afterwards. The communication can be though [sic] voice, text, and social media, to name a few.

The county court issued a second search warrant based on the new affidavit on September 14. On September 20, Herfordt searched the contents of the cell phone a second time.

On November 13, 2012, Henderson filed a motion to suppress evidence obtained from the second search of the cell phone, and the district court held a hearing on the motion on November 19. The court entered an order on January 17, 2013, overruling Henderson's motion to suppress evidence obtained from the second search. The court agreed with Henderson's argument that the affidavit submitted in support of the first search warrant issued on February 18, 2012, did not sufficiently state why a search of the cell phone would produce evidence relevant to the crimes for which Henderson was arrested and that therefore, there was not probable cause to support the first search warrant. But the court continued that no warrant was necessary because, in its view, the search of the cell phone, which was found on Henderson at the time of his arrest, was a valid warrantless search incident to his arrest. The court stated that because no warrant was needed to conduct the search, issues regarding the validity of the second search warrant were moot.

Notwithstanding its conclusion that a warrant was not required, the district court addressed the warrant issue "in the event it is eventually determined that the Court is in error on that issue" regarding the need for a warrant. The court rejected Henderson's argument that the second warrant was an attempt to rehabilitate the deficiencies of the first warrant and that the second warrant was tainted by the execution of the first warrant. The court concluded that "there is little or no evidence that 'but for' the execution of the first search warrant the State

would not have searched the cellular telephone using the properly issued second search warrant."

After Henderson filed a motion to reconsider the ruling on the motion to suppress, the court held another hearing focused on the validity of the second search warrant. On February 7, 2013, the court entered an order overruling the motion to reconsider and suppress evidence obtained from the second search. In the order, the court specifically determined that the affidavit offered in support of the second search warrant, which included the additional language quoted above, established probable cause to search the cell phone. The court concluded that the second search warrant was properly issued and executed.

### 4. Issues Prior to and During Trial

Prior to trial, OPD filed a motion for a protective order against a subpoena duces tecum that had been served by Henderson. The subpoena requested the keeper of OPD's records to appear at trial and provide a copy of gang files related to Henderson and to an individual known as JB. At a hearing on the motion, OPD argued that the files were confidential and subject to confidentiality restrictions imposed by OPD and the federal government. OPD further asserted that disclosure of such information could jeopardize its efforts in monitoring gang activity.

At the hearing on OPD's motion, the court also considered motions in limine Henderson had filed seeking to preclude the State from adducing evidence regarding gang affiliations. At this hearing, the State represented that it had not seen any of the OPD files and that it did not intend to introduce any evidence at trial regarding gang affiliation. The court granted OPD's motion for a protective order but indicated that it might change its ruling if at trial the State introduced evidence to establish that the "JB" referred to in the text message found on Henderson's cell phone was Levering and if such evidence was derived from information in the OPD gang files.

Herfordt testified at trial. When the State began to question Herfordt regarding his search of the cell phone and the

evidence he obtained from the search, Henderson made a foundation objection that a proper chain of custody had not been established for the cell phone. The court initially sustained the foundation objection, and the State recalled Hiykel as a witness regarding the chain of custody. Hiykel testified generally that after Henderson's arrest, he took all items that Henderson had on his person and put them into an evidence bag; however, Hiykel did not specifically recall taking a cell phone. Herfordt then returned to the stand, and upon questioning by the State, identified the cell phone as the one that he booked into property in connection with the present case. When the State offered the cell phone into evidence, Henderson objected based on foundation and the court admitted the cell phone into evidence over the objection.

Henderson also renewed his objections that the evidence was obtained in violation of his Fourth Amendment rights against unreasonable searches. The court overruled the objections based on its prior alternative rulings that the search of the cell phone was valid as a warrantless search incident to Henderson's arrest, that the second search warrant was valid and supported by probable cause, and that the search conducted pursuant thereto was legal.

Herfordt testified regarding what he found in his search of the cell phone. He testified that the background picture that came up on the screen when the cell phone was turned on "was that of someone known to be Jimmy Levering." Henderson objected based on foundation, and the court sustained the objection. The State attempted to provide foundation by asking Herfordt how he knew the identity of the person in the picture. Herfordt replied, "I worked Northeast Omaha when I was in uniform, and Jimmy Levering, I guess, was kind of an infamous gang member . . . ." Henderson immediately moved for a mistrial based on Herfordt's reference to gang affiliations, noting that the State had agreed in connection with Henderson's pretrial motion in limine that it would not introduce evidence regarding gang affiliations. The court overruled the motion for a mistrial, and the State continued questioning Herfordt regarding how he knew the person in the picture was Levering. Herfordt testified that he had not had

personal contact with Levering but had seen pictures of him in the course of previous investigations. The State offered the picture taken from the cell phone into evidence, and the court overruled Henderson's objections based on foundation and Fourth Amendment grounds.

Herfordt also testified regarding the text messages that he found on the cell phone. Henderson objected to evidence regarding text messages on the basis that the evidence was inadmissible hearsay. The State argued that the evidence was not being offered to prove the truth of the matter asserted but to show the effect the messages had on Henderson. The court overruled the hearsay objection.

The State also called Ramone Narvaez as a witness. Narvaez was a correctional officer from a federal penitentiary in Florida. Narvaez testified that in December 2009, Levering, who was then an inmate at the penitentiary, ran into his office followed by three other inmates who started punching Levering. Narvaez testified that he and other officers broke up the fight and that Levering was taken to the medical unit because he was bleeding from his torso. Narvaez testified that the last name of one of the other inmates was "Voss" but that he did not know Voss' first name. Narvaez was shown the picture that was taken from the cell phone, and he testified that the person in the picture was the same person who had been involved in the incident in Florida.

After the cross-examination and redirect testimony of Narvaez were completed, Henderson moved for a mistrial or, in the alternative, for an order striking Narvaez' testimony on the basis that he was not able to establish that the "Voss" to whom he referred in his testimony was the "Matthew Voss" who was a victim in this case and that he had not testified that Levering was stabbed. Henderson argued that without establishing these facts, Narvaez' testimony was unfairly prejudicial. The court overruled the motion for a mistrial and the motion to strike the testimony.

The State also called Omaha Police Det. Christopher Perna as a witness. Perna was shown the picture from the cell phone, and he identified that person as Levering. Perna testified that he had personally interviewed Levering in the course

of other investigations. Perna also testified that he had briefly interviewed a "Matthew Voss" on March 31, 2010, at a federal penitentiary in Florida and that Levering's name "came up" in the interview. Perna was shown a picture of the victim in this case, and Perna testified that the person in the picture was the "Matthew Voss" he had interviewed in Florida.

### 5. Convictions and Sentences

The jury found Henderson guilty of first degree murder, attempted first degree murder, two counts of use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The court sentenced Henderson to imprisonment for life for first degree murder, for 50 to 50 years for attempted first degree murder, for 20 to 20 years on each of the convictions for use of a deadly weapon, and for 20 to 20 years on the conviction for possession of a deadly weapon by a prohibited person. The court ordered the sentences to be served consecutively.

Henderson appeals his convictions.

## III. ASSIGNMENTS OF ERROR

Henderson claims that the district court erred when it (1) overruled his motion to suppress evidence obtained from the search of the cell phone; (2) admitted evidence obtained from the allegedly illegal search of the cell phone, including text messages and pictures; (3) admitted evidence of items found on the cell phone over his foundation objections; (4) admitted evidence of text messages over his hearsay objections; (5) granted OPD's motion for a protective order relating to gang files; (6) denied Henderson's motion for a mistrial based on Herfordt's testimony that Levering was "an infamous gang member"; (7) denied his motion to strike Herfordt's testimony for lack of foundation identifying Levering as the person in the cell phone picture; and (8) overruled his motion for a mistrial and his motion to strike Narvaez' testimony.

## IV. STANDARDS OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, 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).

[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. *State v. Merchant*, 285 Neb. 456, 827 N.W.2d 473 (2013). Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion. *Id*. An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

[5] An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[6] Discovery in a criminal case is generally controlled by either a statute or court rule. Therefore, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. *State v. Collins*, 283 Neb. 854, 812 N.W.2d 285 (2012).

[7] Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion. *Ramirez, supra*.

## V. ANALYSIS

### 1. District Court Did Not Err When It Overruled Henderson's Motion to Suppress Evidence Obtained From Search of Cell Phone

Henderson claims that the district court erred when it overruled his motion to suppress evidence obtained from

the search of his cell phone and when it admitted evidence obtained from the allegedly illegal search of the cell phone. We determine that the search was not justified as a warrantless search incident to arrest and that there was probable cause to issue the warrant, but that the scope of the search warrant lacked particularity and was too broad to protect privacy interests in the contents of the cell phone. However, we conclude that the search was conducted in good faith reliance on the warrant and that therefore, the district court did not err when it overruled the motion to suppress and when it admitted evidence obtained from the search.

(a) Search Was Not Justified as Search Incident to Arrest

When it overruled the motion to suppress, the district court determined that because the cell phone was found in a search of Henderson's person at the time he was arrested, subsequent searches of the contents of the cell phone were proper as searches incident to an arrest. Contrary to the district court's reasoning, we conclude that the searches of the cell phone contents were not justified as searches incident to arrest.

[8] The U.S. Supreme Court recently held in *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), that the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. The Court reasoned that a search of digital information on a cell phone does not further the government interests identified in other cases authorizing the search of a person and his or her effects incident to an arrest, which interests include addressing the threat of harm to officers and preventing the destruction of evidence. The Court stated that such interests must be balanced against the individual privacy interests at stake.

In *Riley*, the Court determined that the digital data stored on a cell phone did not present a risk of being used as a weapon to harm an arresting officer and that the potential risk of destruction of evidence could be prevented by seizing and securing the cell phone itself. The Court further determined that as compared to the diminished privacy interests involved

in the physical search of an arrestee, the search of data on a cell phone implicated substantial privacy interests. The Court noted that cell phones "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person" because they collect in one place distinct types of information that could reveal significant knowledge regarding an individual's private interests and activities. 134 S. Ct. at 2489. The Court further noted that such a search could extend well beyond evidence in physical proximity to the arrestee because data viewed on a cell phone could be stored on a remote server. The Court acknowledged that exigent circumstances could justify a warrantless search but held that as a general matter, the warrantless search of a cell phone seized from an arrestee is not justified as a search incident to an arrest, and that before searching a cell phone, the police must get a warrant. For completeness, we add that based on the facts recited, we understand the relief actually extended to the defendant in *Riley* was limited to data stored on the seized cell phone, and not explicitly extended to data stored in the cloud network or accessible from another device.

The present appeal was pending before this court when the opinion in *Riley* was filed on June 25, 2014. The parties were asked to comment on the application of *Riley* to this case. The State concedes that *Riley* would be applicable to any case that was on direct review when it was decided. We agree that *Riley* applies in this case. See *State v. Castaneda*, 287 Neb. 289, 314, 842 N.W.2d 740, 759 (2014) ("'a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past'") (quoting *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987)).

In the present case, there is no indication that there were exigent circumstances that required the police to search the contents of Henderson's cell phone without taking the time to obtain a warrant. To the contrary, any argument that there were exigent circumstances would likely fail in light of the fact that the police actually waited until they obtained a

warrant before they searched the cell phone. We therefore conclude that under the U.S. Supreme Court's holding in *Riley*, the district court erred when it concluded that the search of Henderson's cell phone was justified or necessitated as a search incident to arrest. Because a search of the contents of Henderson's cell phone required a warrant, we must consider whether the evidence Henderson sought to be suppressed was obtained in a search that was supported by a valid warrant.

(b) Validity of Search Warrants

In the event the district court was wrong in its conclusion that the searches of the cell phone were justified as warrantless searches incident to arrest, it considered whether there was a valid search warrant in this case. The court concluded that there was not probable cause to support the first search warrant, but then concluded in its February 7, 2013, order that the second search warrant was supported by probable cause and that "the search warrant was properly issued and executed."

The Fourth Amendment provides that warrants may not be granted "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 similarly provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." Neb. Const. art. I, § 7. Although the district court found probable cause to support a search warrant, it did not analyze whether the scope of the warrant as issued met the particular requirement. We conclude that although there was probable cause to support issuance of both warrants, the warrants as issued were too broad to meet the particularity requirement of the Fourth Amendment.

*(i) Probable Cause*

[9,10] We first consider whether the affidavits submitted by the police established probable cause for issuance of the search warrants. 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. *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013). 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. *Id*. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012).

In the affidavits filed in support of both the first and second warrants in this case, Schneider stated as grounds for the issuance of a search warrant that police had been dispatched to the scene where two victims had suffered gunshot wounds, that witnesses had seen two men firing at a victim, that an officer saw two men running from the scene, that one of the two men was later identified as Henderson, that the officer chased Henderson and saw Henderson throw a handgun under a vehicle, and that officers searched Henderson and found a handgun in his pocket and a cell phone in his possession. Schneider stated that the warrant for the search of the cell phone was requested to assist in a homicide investigation. In the affidavit submitted to obtain the second warrant, Schneider added language stating that in his experience as a detective, he knew that suspects used cell phones to communicate about shootings they have been involved in before, during, and after the shootings and that such communications could be through, inter alia, voice or text messages or social media.

We determine that both affidavits provided the county court a substantial basis to find that probable cause existed to search the contents of the cell phone. The affidavits established that two victims had been shot, that two men committed the shootings, that Henderson was one of two men seen running from the scene, that Henderson threw one gun under a vehicle, and that he had another gun in his possession. The allegations established a fair probability that Henderson was involved in the shootings. The allegations also indicated that

two people were shooters. Because Henderson was working with at least one other person to commit the shootings, it is reasonable to infer that the cell phone that was in his possession was used to communicate with others regarding the shootings before, during, or after they occurred. We believe that the court that issued the search warrant could have reached this inference without the additional allegations that cell phones are used in relation to crimes found in the second affidavit. The court therefore had a basis to determine that the cell phone would contain evidence regarding the shootings and that probable cause existed to support issuance of the search warrants.

*(ii) Particularity*

[11] Although there was probable cause that a search of the cell phone would provide relevant evidence, we do not think that such probable cause justified the scope of the search warrants actually issued by the county court in this case. We have noted that in addition to the requirement of probable cause, the Fourth Amendment contains a particularity requirement. See *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012). As noted above, the Fourth Amendment states in part that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." We stated in *Sprunger* that "[t]he Founding Fathers' abhorrence of the English King's use of general warrants—which allowed royal officials to engage in general exploratory rummaging in a person's belongings—was the impetus for the adoption of the Fourth Amendment. Simply put, the Fourth Amendment prohibits 'fishing expeditions.'" 283 Neb. at 539, 811 N.W.2d at 243. In *Sprunger*, we observed that allowing the unfettered search of a computer's contents would allow officers to go "rummaging through a treasure trove of information." 283 Neb. at 540, 811 N.W.2d at 244. We further stated, "'"[T]he modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs."'"

*Id*. at 540-41, 811 N.W.2d at 244 (quoting *Mink v. Knox*, 613 F.3d 995 (10th Cir. 2010), quoting *U.S. v. Otero*, 563 F.3d 1127 (10th Cir. 2009)).

The concerns we noted with regard to the vast amount of data stored on computers in *Sprunger* were echoed by the U.S. Supreme Court with regard to cell phones in *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). As we have quoted above, the Court in *Riley* stated, "Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." 134 S. Ct. at 2489. The Court in *Riley* noted that such quantitative and qualitative differences included the "immense storage capacity" of cell phones, their "ability to store many different types of information," their functioning as "a digital record of nearly every aspect of their [owners'] lives," and their ability to "access data located elsewhere." 134 S. Ct. at 2489-90.

[12] Given the privacy interests at stake in a search of a cell phone as acknowledged by the Court in *Riley* and similar to our reasoning in *Sprunger*, we think that the Fourth Amendment's particularity requirement must be respected in connection with the breadth of a permissible search of the contents of a cell phone. Accordingly, we conclude that a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search.

[13,14] It has been observed that the particularity requirement of the Fourth Amendment protects against open-ended warrants that leave the scope of the search to the discretion of the officer executing the warrant, or permit seizure of items other than what is described. *U.S. v. Clark*, 754 F.3d 401 (7th Cir. 2014). A warrant satisfies the particularity requirement if it leaves nothing about its scope to the discretion of the officer serving it. *Id*. That is, a warrant whose authorization is particular has the salutary effect of preventing overseizure and oversearching.

In this case, both warrants containing identical language were defective for failing to meet the particularity requirement of the Fourth Amendment. The warrants did not refer

to the specific crime being investigated or to the type of information encompassed by their authorization. The warrants authorized a search of "[a]ny and all information." Although the warrants listed types of data, such as cell phone calls and text messages, they concluded with a catchall phrase stating that they authorized a search of "any other information that can be gained from the internal components and/or memory Cards." We conclude that the search warrants in this case did not comply with the particularity requirement because they did not sufficiently limit the search of the contents of the cell phone.

We are aware that there is currently a discussion in state and federal courts regarding whether a court issuing a warrant has the authority to—or should—set forth a protocol specifying how the search of digital data should be conducted. See, e.g., *U.S. v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162 (9th Cir. 2010) (en banc) (Kozinski, Chief Judge, concurring; Kleinfeld, Fletcher, Paez, and Smith, Circuit Judges, join); *In re Search Warrant*, 193 Vt. 51, 71 A.3d 1158 (2012). See, also, Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 Va. L. Rev. 1241 (2010), and Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 Va. L. Rev. in Brief 1 (2011). In a related area, we are also aware that certain jurisdictions have adopted statutes that require that authorizations to conduct electronic surveillance include procedures for minimizing the capture of nonpertinent information. E.g., N.Y. Crim. Proc. § 700.30(7) (McKinney 2009). However, the warrants in the present case did not set forth such a protocol and we need not consider whether such a protocol is required or even proper.

The parameters of how specific the scope of a warrant to search the contents of a cell phone must be will surely develop in the wake of *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014). In the present case, because the search warrants allowed a search of "[a]ny and all" content, their scope was clearly not sufficiently particular and therefore the warrants did not meet the Fourth Amendment particularity requirement and were invalid for this reason.

*(iii) Good Faith*

The State contends that even if the search warrants were not valid, exclusion of the evidence is not required because of the good faith exception. We agree that application of the good faith exception is appropriate in this case.

That a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies. *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012). The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands. The U.S. Supreme Court has held that for the exclusionary rule to apply, the benefits of its deterrence must outweigh its costs. *Herring v. United States*, 555 U.S. 135, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). Recognizing that the benefits of deterrence often do not outweigh the social costs of exclusion, the U.S. Supreme Court created the good faith exception to the exclusionary rule. *Id.*

[15] The good faith exception provides that evidence seized under an invalid warrant need not be suppressed when police officers act in objectively reasonable good faith in reliance upon the warrant. Nevertheless, evidence suppression will still be appropriate if one of four circumstances exists: (1) The magistrate or judge in issuing the warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard for the truth; (2) the issuing magistrate wholly abandoned his or her judicial role; (3) the supporting affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. See *Sprunger, supra*.

[16,17] We have said that the "'good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite a magistrate's authorization.'" *Id.* at 542, 811 N.W.2d at 245. Officers are assumed to "'have a reasonable knowledge of what the law prohibits.'" *Id.* In assessing the good faith of an officer's conducting a search under a warrant, an appellate court must look to the totality of the

circumstances surrounding the issuance of the warrant, including information not contained within the four corners of the affidavit. *Id*.

In connection with the inquiry just noted, there is no indication in this case that the officers would reasonably have known of the defects in the warrants as authorized. Further, there is no indication that the police used the warrant to conduct a search for evidence other than that related to the shootings investigation. The evidence that the officers obtained and that the State offered at trial was limited to evidence that was relevant to the shootings under investigation and that would have been found pursuant to a properly limited warrant.

Circumstances that might require suppression despite a good faith execution are not present here. There is no indication that the issuing court was misled by false information in the affidavit, that the issuing court wholly abandoned its judicial role, or that probable cause was obviously lacking. As we discussed above, the affidavits provided probable cause and, therefore, it was not unreasonable for officers executing the warrants to presume them to be valid. And although the warrants contained language that made them too broad to satisfy the particularity requirement, they also contained references to specific items that did not make the warrants so facially deficient that the officers could not reasonably presume them to be valid and the search legal. We conclude that the good faith exception applies to this case.

(c) Conclusion

We determine that although the scope of the search warrants was not properly limited in compliance with the particularity requirement of the Fourth Amendment, the issuance of the warrants was reasonable and the warrants were carried out in good faith. We further note that the State did not offer evidence that would not have been discovered pursuant to a sufficiently limited search warrant. Although our reasoning differs from that of the district court, we conclude that the district court did not err when it overruled the motions to suppress or when it admitted evidence obtained from the search over Henderson's Fourth Amendment objections.

### 2. District Court Did Not Err When It Overruled Henderson's Other Objections to Admission of Evidence Obtained From Search of Cell Phone

In addition to his claim that the district court erred when it admitted evidence obtained from the search of the cell phone because the search was illegal, which assertion we rejected above, Henderson claims that the court erred when it admitted evidence obtained from the search of the cell phone over other objections based on foundation and hearsay. We conclude that the district court did not err when it rejected Henderson's objections and admitted the evidence.

#### (a) Foundation and Chain of Custody

Henderson claims that the district court erred when it admitted evidence obtained from the search of the cell phone because there was not sufficient foundation to establish that the cell phone that was searched was taken from Henderson's person at the time of his arrest. We reject this claim and conclude that there was adequate foundation for admission of the cell phone and evidence of its contents.

Henderson notes that Hiykel, the officer who searched Henderson upon his arrest, testified at trial that he did not specifically recall removing a cell phone from Henderson's person. The district court sustained Henderson's initial objection to evidence of the contents of the cell phone based on foundation and chain of custody. But the court received the evidence after Hiykel provided additional testimony to the effect that he searched Henderson's person, placed Henderson's personal items into a bag, and watched Henderson and his personal items until another officer took over observation.

[18-20] Where objects pass through several hands before being produced in court, it is necessary to establish a complete chain of evidence, tracing the initial possession of the object or article to its final custodian; and if one link in the chain is missing, the object may not be introduced in evidence. *State v. Glazebrook*, 282 Neb. 412, 803 N.W.2d 767 (2011). Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient

foundation to permit its introduction into evidence. *State v. Tolliver*, 268 Neb. 920, 689 N.W.2d 567 (2004). Whether there is sufficient foundation to admit physical evidence is determined on a case-by-case basis. *Glazebrook, supra*.

We note that in addition to Hiykel's testimony regarding his search and removal of items from Henderson's person, the State provided the testimony of another police officer who took over observation of Henderson and his personal items when Hiykel went off duty. That officer testified that when he relieved Hiykel, the belongings he observed included a coat and an evidence bag containing personal items. He testified that the items inside the bag included a cell phone. The cell phone was eventually retrieved from the evidence bag by Herfordt, who searched the contents and testified at trial regarding the search.

The testimony indicates that the cell phone and the other contents of the evidence bag remained in the possession of law enforcement officials after their initial removal from Henderson's person, including during Herfordt's subsequent search of the contents. Such evidence provides adequate foundation for the chain of custody of the cell phone. We conclude that the district court did not abuse its discretion when it determined that there was sufficient foundation regarding the chain of custody of the cell phone. We reject this assignment of error.

(b) Hearsay

Henderson also claims that the district court erred when it admitted evidence of the content of the text messages over his hearsay objections. We reject this claim.

Henderson filed a motion in limine prior to trial seeking to preclude the State from introducing evidence of the content of text messages found on the cell phone because the text messages were inadmissible hearsay. The district court overruled the motion in limine based on the State's argument that the evidence was not being offered for the truth of the matters asserted but instead in order to show the impact of the messages on Henderson's state of mind, which was relevant to proving premeditation with respect to the charge of the first degree murder

of Voss. The district court also overruled Henderson's renewed hearsay objections during the trial.

[21] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008). Under Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 2008), hearsay is not admissible unless a specific exception to the hearsay rule applies.

The text messages in this case were not admitted for the truth of the statements contained therein but instead for the purpose of showing their effect on Henderson. The State used the messages to show that Henderson believed that an individual who was responsible for an attack on an acquaintance of his was at the location where the shootings would eventually occur and that Henderson coordinated with other individuals to go to that place in order to retaliate. The messages were not used to establish that the individual was at that location or that the individual had attacked Henderson's acquaintance. Instead, the messages were offered to support the State's theory that Henderson went to the location for the purpose of retaliating against the person who assaulted his acquaintance, which was relevant to the premeditation element of first degree murder. We therefore conclude that because the evidence was not hearsay, the district court did not err when it admitted the evidence over Henderson's hearsay objection.

With regard to this assignment of error, Henderson also argues that the State erroneously asserted that the text messages met an exception to the hearsay rule as statements of coconspirators. Because the evidence was not hearsay, we need not consider whether the evidence would have met a hearsay exception.

Finally, Henderson argues in connection with this assignment of error that the district court erroneously rejected his proposed limiting instruction with regard to the text messages. We need not consider this argument because Henderson did not assign error to the court's rejection of the instruction. We do not consider errors which are argued but not assigned.

*State v. Duncan*, 278 Neb. 1006, 775 N.W.2d 922 (2009). We reject this assignment of error.

### 3. District Court Did Not Abuse Its Discretion With Respect to Discovery When It Granted OPD's Motion for Protective Order

Henderson claims that the district court erred when it granted OPD's motion for a protective order relieving it of producing files relating to gangs. We reject this assignment of error.

Henderson argues that the files were a proper subject for discovery because they might contain information that would affect the outcome of the trial. In particular, he asserts that the State planned to show that the "JB" referenced in the text messages was Levering and that information in the files might indicate that there were other individuals who were also known as JB, which information would be helpful to his defense. Henderson argues that the protective order infringed his right to present a complete defense.

The State argues in response that at trial, it did not introduce evidence, either from the OPD files or from other sources, to establish that "JB" was Levering. The State further contends that Henderson was free to introduce evidence to establish that "JB" was someone other than Levering, which he did not do, or to argue that the State never established that "JB" was Levering, which he did do in closing arguments.

[22] Discovery in a criminal case is generally controlled by either a statute or court rule. Thus, unless granted as a matter of right under the Constitution or other law, discovery is within the discretion of a trial court, whose ruling will be upheld on appeal unless the trial court has abused its discretion. *State v. Collins*, 283 Neb. 854, 812 N.W.2d 285 (2012). A defendant in a criminal proceeding has no general due process right to discovery. *Id.*

[23,24] Whether rooted directly in the Due Process Clause of the 14th Amendment or in the Compulsory Process or Confrontation Clauses of the 6th Amendment, the federal Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *State v. Phillips*, 286 Neb. 974, 840 N.W.2d 500 (2013), *cert. denied* ___ U.S.

___, 134 S. Ct. 1899, 188 L. Ed. 2d 930 (2014). We have said, however, with respect to admission of evidence, that a defendant "'does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Id.* at 996, 840 N.W.2d at 519 (quoting *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)). Similarly, a defendant does not have an unfettered right to discovery.

We conclude that the district court did not abuse its discretion with respect to Henderson's discovery of information contained in the OPD gang files. OPD had valid reasons to refrain from disclosing the information, and Henderson has failed to show how information contained therein was necessary or peculiarly helpful to his defense. As the State argues, the prosecution used no evidence from the files or from other sources to establish that "JB" was Levering.

With regard to a complete defense, if Henderson wanted to present evidence that "JB" referred to someone other than Levering, there likely would have been other sources better familiar with the intended meaning of the "JB" reference in the text message; any information in the gang files at best might only have shown that other people were known as JB and that one of those other persons *might* have been referenced in the text message. Furthermore, Henderson was able to argue and did so argue that the State did not prove that "JB" was Levering and that therefore, the reference in the text message may have been to someone else. The protective order did not limit Henderson's ability to present a complete defense.

The district court did not abuse its discretion with regard to discovery of the gang files, and Henderson has not shown that the court's rulings prevented him from presenting a complete defense. We reject this assignment of error.

### 4. District Court Did Not Abuse Its Discretion When It Overruled Henderson's Motion for Mistrial Based on Testimony Describing Levering as "infamous gang member"

Henderson next claims that the district court erred when it overruled his motion for a mistrial based on Herfordt's

comment that Levering was "an infamous gang member." We conclude that the district court did not abuse its discretion when it overruled the motion for a mistrial.

[25,26] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014). A defendant faces a higher threshold than merely showing a possibility of prejudice when attempting to prove error predicated on the failure to grant a mistrial. *State v. Dixon*, 286 Neb. 334, 837 N.W.2d 496 (2013). Instead, the defendant must prove the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice. *Id.*

When the State questioned Herfordt regarding what he found in his search of the cell phone, Herfordt testified that the background picture that came up on the screen when the cell phone was turned on "was that of someone known to be Jimmy Levering." Henderson objected based on foundation, and the court sustained the objection. The State then attempted to provide foundation by asking Herfordt how he knew the identity of the person in the picture. Herfordt replied, "I worked Northeast Omaha when I was in uniform, and Jimmy Levering, I guess, was kind of an infamous gang member . . . ." Henderson immediately moved for a mistrial based on Herfordt's reference to gang affiliations, noting that the State had agreed in connection with Henderson's pretrial motion in limine that it would not introduce evidence regarding gang affiliations. The court overruled the motion for a mistrial. In challenging this ruling on appeal, Henderson reasserts contentions he made at trial and also offers some additional arguments.

Henderson contends that the reference to Levering as "an infamous gang member" was a violation of the order on the motion in limine precluding evidence of gang affiliation, that the motion for a mistrial should have been granted, and that the damaging effect could not be removed by admonition to the jury. With regard to Henderson's argument that the damaging effect of the reference could not be removed by

admonition to the jury, the record shows that the court overruled Henderson's motion for a mistrial and the State resumed questioning Herfordt. Henderson did not ask the court for an admonition, and furthermore, the court asked Henderson whether he was moving to strike Herfordt's last answer, which contained the gang reference to which Henderson replied, "Not at this time, Judge, no." We believe that any damage caused by the lack of an admonition was the result of Henderson's failure to request such admonition.

It appears from the record that the State was not expecting Herfordt to make the gang reference in his answer and that the questioning by the State was not directed at eliciting such response. The comment does not appear to be the result of intentional misconduct by the prosecution. Upon resuming questioning of Herfordt, the State cautioned Herfordt to avoid testifying about his knowledge of any affiliations the person in the picture may have had. Herfordt's gang reference was an isolated comment, the State did not present other evidence of gang affiliations, and the State did not offer evidence that Henderson had a gang affiliation.

We conclude that the court did not abuse its discretion when it overruled the motion for a mistrial, and we reject this assignment of error.

### 5. District Court Did Not Err When It Overruled Henderson's Motion to Strike Herfordt's Identification of Person in Cell Phone Picture

Henderson also claims that the district court erred when it denied his motion to strike Herfordt's testimony identifying Levering as the person in the cell phone picture after Herfordt admitted he had not personally met Levering. We find no merit to this assignment of error.

After the court overruled the motion for a mistrial related to Herfordt's comment regarding gang affiliation as discussed above, the State resumed questioning Herfordt to provide foundation for his identification of the person in the picture found on Henderson's cell phone. Herfordt testified that he had not personally had contact with the person in the picture but that

he had seen pictures of that person in connection with previous investigations and in news reports. Henderson renewed his objection that the State had not provided foundation for Herfordt's identification of the person in the picture.

We note that two other witnesses—Narvaez and Perna—also identified the person in the picture as Levering. Therefore, whether or not there was sufficient foundation to admit Herfordt's testimony identifying the person in the picture, even if it was error to admit such testimony, it was harmless error because it was cumulative of other properly admitted evidence. See *State v. Taylor*, 287 Neb. 386, 842 N.W.2d 771 (2014).

### 6. District Court Did Not Err When It Overruled Henderson's Motions to Strike and for Mistrial Related to Narvaez' Testimony

Finally, Henderson claims that the district court erred in connection with its rulings regarding Narvaez' testimony. Specifically, the court overruled Henderson's motion for a mistrial and his motion to strike Narvaez' testimony. We reject this assignment of error.

Narvaez, a correctional officer from a federal penitentiary in Florida, testified regarding an altercation between an inmate named "Jimmy Levering," whom Narvaez identified as the subject of the picture found on Henderson's cell phone, and another inmate he identified as "Voss." Narvaez testified he did not know the first name of the inmate he identified as "Voss." The court overruled Henderson's motion for a mistrial and his motion to strike related to this testimony.

Henderson argues that a mistrial should have been declared or that Narvaez' testimony should have been stricken because Narvaez did not identify Voss, the murder victim in this case, as the "Voss" who was involved in the altercation in Florida and because there was no evidence other than Narvaez' testimony to establish that Levering was involved in the altercation. Henderson argues that because of these failings, Narvaez' testimony was not relevant and was unfairly prejudicial.

Although Narvaez did not know the first name of the person he identified as "Voss," another witness, Perna, testified that he had visited "Matthew Voss" in the prison in Florida, and Perna identified the murder victim in this case as the "Voss" he visited in Florida. Perna also testified that Levering was discussed during his conversation with "Voss" in Florida.

Narvaez' testimony was relevant to the State's case and was not unfairly prejudicial. The strength of the evidence was for the jury to assess. See *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014) (appellate court does not pass on credibility of witnesses or reweigh evidence because such are matters for finder of fact). The court did not abuse its discretion when it overruled Henderson's motion for a mistrial and his motion to strike Narvaez' testimony. We reject this assignment of error.

## VI. CONCLUSION

Henderson makes numerous assignments of error pertaining to pretrial and trial rulings, including the claim that the district court erred when it did not suppress evidence obtained from the search of his cell phone and admitted such evidence at trial. For the reasons explained above, we find no error and we affirm his convictions and sentences.

AFFIRMED.

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# FEDERAL NATIONAL MORTGAGE ASSOCIATION, APPELLEE, V. BRIAN S. MARCUZZO AND DONNA M. MARCUZZO, APPELLANTS.

854 N.W.2d 774

Filed October 17, 2014. No. S-13-929.

1. **Courts: Time: Appeal and Error.** Where no timely statement of errors is filed in an appeal from a county court to a district court, appellate review is limited to plain error.
2. **Jurisdiction: Appeal and Error.** 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. ____: ____. If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.
4. ____: ____. The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.
5. **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.
6. **Forcible Entry and Detainer: Property: Words and Phrases.** The forcible entry and detainer action is a special statutory proceeding designed to provide a speedy and summary method by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession.
7. **Forcible Entry and Detainer: Legislature.** Because of its summary nature, the Legislature, under Neb. Rev. Stat. § 25-21,219 (Reissue 2008), has narrowed the issues that can be tried in a forcible entry and detainer action to the right of possession and statutorily designated incidents thereto.
8. **Forcible Entry and Detainer: Title.** A forcible entry and detainer action does not try the question of title, but only the immediate right of possession.
9. **Forcible Entry and Detainer: Title: Courts: Jurisdiction.** If the resolution of a forcible entry and detainer action requires a court to determine a title dispute, the court must dismiss the case for lack of jurisdiction.
10. ____: ____: ____: ____. When a forcible entry and detainer action is ongoing, the mere averment that title is in dispute in another action involving the same property does not automatically divest the court hearing the forcible entry and detainer action of jurisdiction. Instead, the court may proceed until the evidence discloses that the question involved is one of title.
11. **Trial: Evidence.** An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission.
12. **Real Estate: Title: Evidence.** A court must find from the competent evidence whether title to real estate is drawn in question, and not from the pleadings or from the claims or pretensions of the parties.
13. **Forcible Entry and Detainer.** A forcible entry and detainer action is limited in scope. Its purpose is to determine the immediate right of possession.
14. ____. Forcible detainer actions prevent protracted litigation by limiting the scope of the proceeding so collateral issues not connected with the question of possession do not burden or delay the proceeding.
15. **Forcible Entry and Detainer: Time.** Generally, no continuance shall be granted in a forcible entry and detainer action for a period longer than 7 days.
16. ____: ____. A forcible entry and detainer action is intended to provide a speedy and more or less summary remedy.
17. ____: ____. In a forcible entry and detainer action, trial is to be held not more than 14 days after the date of issuance of the summons.
18. **Forcible Entry and Detainer: Ejectment: Time.** With its accelerated trial procedures, a forcible entry and detainer action is intended to avoid much of

the expense and delay incident to the more cumbersome action of ejectment formerly employed at common law.

19. **Forcible Entry and Detainer: Courts: Jurisdiction.** The court has authority to proceed with the hearing of a forcible entry and detainer action until it is clearly established that the question to be determined is one of title.

Appeal from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge, on appeal thereto from the County Court for Sarpy County, JEFFREY J. FUNKE, Judge. Judgment of District Court affirmed.

Douglas W. Ruge, P.C., L.L.O., for appellants.

Dustin J. Kessler, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellee.

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

CASSEL, J.

## INTRODUCTION

Our case law requires a court to dismiss a forcible entry and detainer action upon receiving evidence of the existence of a title dispute. We must decide whether the rule applies where, after the defendants had merely alleged the existence of a title dispute, the plaintiff obtained a continuance without confessing the nature of a pending district court action. Thus, by the time the county court was presented with evidence regarding a title dispute, the district court action had been decided. Because no *evidence* of the dispute was presented to the county court until after it had been resolved, we conclude the county court was not divested of jurisdiction.

## BACKGROUND

Brian S. Marcuzzo and Donna M. Marcuzzo purchased property in Sarpy County, Nebraska, financed in part by a promissory note secured by a deed of trust. They subsequently ceased making payments on the note and received a notice of default and notice of sale. The property was later conveyed to Federal National Mortgage Association (FNMA) by trustee's deed.

FNMA filed a forcible entry and detainer complaint against the Marcuzzos in the county court for Sarpy County. On April 11, 2012, the Marcuzzos entered an "Appearance for Jurisdictional Challenge Only." They alleged that they had filed an action in the district court for Sarpy County, case No. CI 12-116, which challenged title in FNMA. The Marcuzzos therefore claimed that the county court lacked jurisdiction pursuant to *Cummins Mgmt. v. Gilroy*.[1] No parties appeared for a hearing on April 17. Thus, no evidence was presented at that hearing.

On November 7, 2012, FNMA filed a motion to continue the county court case. FNMA requested to continue the matter "until such time as the Sarpy County District Court action, Case No. CI 12-116, has been decided. Such action in the District Court has prevented this County Court action from proceeding." The bill of exceptions does not contain a hearing on this motion. In an order prepared by FNMA's counsel, which repeated the above-quoted language of the motion, the court ordered that "this action [be] continued until such time as the District Court action has been decided."

On January 29, 2013, FNMA moved for an order setting a hearing date, stating that the district court action had been dismissed as to FNMA. The court set the hearing for February 12. At the hearing, the court took judicial notice of the forcible entry and detainer complaint which had attached to it the deed of trust and trustee's deed, the notice of service upon the Marcuzzos, and the 3-day notice to quit. The court also received four exhibits into evidence. Exhibit 1 was a certified copy of the trustee's deed in which Erika Knapstein conveyed the property to FNMA. Exhibit 2 was the amended complaint filed in district court by the Marcuzzos against several parties, including two banks, the original trustee, Knapstein, and FNMA (sued as "Fannie Mae"). The complaint contained several causes of action, including quiet title, declaratory judgment, and wrongful foreclosure. Exhibits 3 and 4 were orders in the district court case entered on January 24. Exhibit 3 granted summary judgment in favor of Knapstein on all causes

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[1] *Cummins Mgmt. v. Gilroy*, 266 Neb. 635, 667 N.W.2d 538 (2003).

of action against her. Exhibit 4 granted summary judgment in favor of FNMA and one of the banks on all causes of action against them.

The county court entered an order overruling the Marcuzzos' oral motion to dismiss. The court stated that "no evidence has been offered herein that title to the subject property is in dispute; or that this matter has been transformed to an equitable action to determine title; or that this court needs to determine title to the property, a determination this court would lack jurisdiction to make." Following a later trial at which the Marcuzzos' counsel stated that he was "appearing just on jurisdictional challenge only" and would not be offering any evidence, the court found in favor of FNMA and ordered a writ of restitution to be issued.

The Marcuzzos appealed to the district court. The district court reviewed the matter for plain error, because the Marcuzzos failed to file a statement of errors. The district court concluded that because the Marcuzzos failed to meet their burden of establishing that a question of title existed, the county court had jurisdiction to proceed in the forcible entry and detainer action. The district court therefore affirmed the judgment of the county court.

The Marcuzzos timely appealed, and we moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

## ASSIGNMENTS OF ERROR

The Marcuzzos allege that the county court and the district court erred in ruling that the county court had the power (1) to continue the forcible entry and detainer action rather than dismissing it and (2) to enter the final order on restitution.

[1] The record does not show that the Marcuzzos filed the required statement of errors when they appealed the judgment of the county court to the district court.[3] Where no timely statement of errors is filed in an appeal from a county court to

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

[3] See Neb. Ct. R. § 6-1452(A)(7) (rev. 2011).

a district court, appellate review is limited to plain error.[4] Due to the Marcuzzos' failure to file the statement of errors, we, like the district court, review for plain error only.

[2,3] However, 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.[5] If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[6] We therefore consider the Marcuzzos' assignments of error relating to jurisdiction in the course of our review for plain error.

## STANDARD OF REVIEW

[4] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.[7]

[5] 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.[8]

## ANALYSIS

[6-8] The forcible entry and detainer action is a special statutory proceeding designed to provide a speedy and summary method by which the owner of real estate might regain possession of it from one who had unlawfully and forcibly entered into and detained possession thereof, or one who, having lawfully entered, then unlawfully and forcibly detained possession.[9] Because of its summary nature, the Legislature, under Neb. Rev. Stat. § 25-21,219 (Reissue 2008), has narrowed the issues that can be tried in a forcible entry and

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[4] *State v. Zimmerman*, 19 Neb. App. 451, 810 N.W.2d 167 (2012). See, also, *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997).

[5] See *Carney v. Miller*, 287 Neb. 400, 842 N.W.2d 782 (2014).

[6] See *Big John's Billiards v. State*, 283 Neb. 496, 811 N.W.2d 205 (2012).

[7] *In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[8] *Connelly v. City of Omaha*, 284 Neb. 131, 816 N.W.2d 742 (2012).

[9] *Cummins Mgmt., supra* note 1.

detainer action to the right of possession and statutorily designated incidents thereto.[10] A forcible entry and detainer action does not try the question of title, but only the immediate right of possession.[11]

[9,10] If the resolution of a forcible entry and detainer action requires a court to determine a title dispute, the court must dismiss the case for lack of jurisdiction.[12] When a forcible entry and detainer action is ongoing, the mere averment that title is in dispute in another action involving the same property does not automatically divest the court hearing the forcible entry and detainer action of jurisdiction. Instead, the court may proceed until the evidence discloses that the question involved is one of title.[13]

In order to divest the county court of jurisdiction, there needed to be evidence that a question of title was at issue. The Marcuzzos failed to present such evidence, either at the hearing on April 17, 2012, or in connection with the disposition of the November 7 motion to continue.

There was no evidence of a title dispute produced at the hearing on April 17, 2012. In the Marcuzzos' "Appearance for Jurisdictional Challenge Only," they alleged that their district court action challenged title in FNMA. But this was a "mere averment" and was insufficient to divest the county court of jurisdiction. The record shows that the county court attempted to hold a hearing shortly after the Marcuzzos filed their "appearance," at which hearing the Marcuzzos could have offered evidence of a title dispute, but no parties appeared. Consequently, no party produced evidence at that time.

Approximately 7 months later, FNMA filed a motion to continue the forcible entry and detainer action until the district court action had been decided. The motion stated that the district court case "prevented" the forcible entry and detainer

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[10] *Id.*

[11] *Id.*

[12] See *id.*

[13] *Id.*

action from proceeding, but it did not contain an admission that a title dispute existed. The motion did not state the nature of the district court proceeding. The court sustained the motion. But there is no record of any hearing on this motion, and the motion itself does not confess the existence of a title dispute. Here, again, no evidence of a title dispute appears in the record.

[11,12] The strongest argument that evidence of a title dispute was presented to the county court surrounds the content of FNMA's motion, coupled with the Marcuzzos' allegation that the district court case concerned a title dispute. The motion identified the district court action by its case number, stated that the district court case "prevented" the forcible entry and detainer action from proceeding, and requested that the forcible entry and detainer action be continued until the district court action had been decided. Perhaps the content of FNMA's motion could be regarded as a piece of evidence to be considered by the court as an extrajudicial or "simple" admission. An extrajudicial admission is simply an item of evidence in the mass of evidence adduced during a trial, admissible in contradiction and impeachment of the present claim and other evidence of the party making the admission.[14] But we long ago said that a court must find from the competent evidence whether title to real estate is drawn in question, and not from the pleadings or from the claims or pretensions of the parties.[15] While from the Marcuzzos' perspective the content of FNMA's motion might be considered as evidence, they cannot treat the content of *their own* pleading as evidence. And FNMA's motion did not confess the existence of a title dispute. Thus, the record does not demonstrate that the county court was presented with *evidence* of a title dispute at the time of the continuance. Because there is no bill of exceptions from any hearing on the motion for continuance, the Marcuzzos have failed to present a record

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[14] *Kipf v. Bitner*, 150 Neb. 155, 33 N.W.2d 518 (1948).

[15] *Stone v. Blanchard*, 87 Neb. 1, 126 N.W. 766 (1910). See, also, *Green v. Morse*, 57 Neb. 391, 77 N.W. 925 (1899).

demonstrating that evidence of a title dispute was presented at that time.[16]

The Marcuzzos, relying upon our opinion in *Cummins Mgmt.*,[17] argue that the county court lacked jurisdiction to grant the motion to continue. They contend that the demurrer in *Cummins Mgmt.* is comparable to FNMA's motion to continue. We disagree.

In *Cummins Mgmt.*, the appellants filed a demurrer to the petition for forcible entry and detainer, claiming that the court lacked subject matter jurisdiction because there was a dispute over who had title to the property. The district court treated the demurrer as a plea in abatement and suspended the action until a determination was made in the appellants' quiet title action. We stated that because the district court treated the demurrer as a plea in abatement and granted it, the court must have determined title to the property was in dispute. Thus, we concluded that the court should have dismissed the case for lack of subject matter jurisdiction rather than suspending the proceedings.

But there is a critical distinction between the circumstances of this case and those in *Cummins Mgmt.* In *Cummins Mgmt.*, the court held a hearing on the demurrer/plea in abatement, and although the record did not show what evidence was offered in support of the plea in abatement, the trial court determined that title was in dispute. In contrast, the record in the instant case does not show that the county court held a hearing on the motion to continue or that it received evidence at any time prior to sustaining the motion. And because there was no evidence demonstrating a title dispute, the county court had jurisdiction to sustain FNMA's motion to continue. The Marcuzzos' first assignment of error lacks merit.

The history and summary character of a forcible entry and detainer action reinforces our conclusion. Over a century ago,

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[16] See *Intercall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012) (it is incumbent upon appellant to present record supporting errors assigned; absent such record, appellate court will affirm lower court's decision regarding those errors).

[17] *Cummins Mgmt., supra* note 1.

we stated that if on trial, a forcible entry and detainer action turns into an action to determine title, the court has no authority to proceed and the case must be dismissed.[18] In *Cummins Mgmt.*,[19] we recognized two reasons for the rule.

First, the courts initially having original jurisdiction over forcible entry and detainer actions lacked the authority to try title.[20] At first, only justices of the peace were expressly given jurisdiction over the subject matter.[21] But probate judges were given authority to exercise the jurisdiction of a justice of the peace.[22] And long ago, we determined that county courts, as the successors of probate courts, had jurisdiction of actions for forcible entry and detainer.[23] Later, municipal courts were created and allowed to exercise the jurisdiction of a justice of the peace.[24] It was not until 1984 that a district court—which had the authority to resolve title disputes—was given original jurisdiction over forcible entry and detainer actions.[25]

[13,14] Second, a forcible entry and detainer action is limited in scope. Its purpose is to determine the immediate right of possession.[26] "Forcible detainer actions prevent protracted litigation by limiting the scope of the proceeding so collateral issues not connected with the question of possession do not burden or delay the proceeding."[27]

[15-18] Although we conclude that the county court had the power to continue the matter because there was no evidence of

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[18] See *Pettit v. Black*, 13 Neb. 142, 12 N.W. 841 (1882). See, also, *Jones v. Schmidt*, 163 Neb. 508, 80 N.W.2d 289 (1957); *Lipp v. Hunt*, 25 Neb. 91, 41 N.W. 143 (1888).

[19] *Cummins Mgmt., supra* note 1.

[20] See *id.*

[21] See Gen. Stat. ch. 57, §§ 905 and 1019 (1873).

[22] See *id.*, ch. 14, § 60.

[23] See *Blaco v. Haller*, 9 Neb. 149, 1 N.W. 978 (1879).

[24] See Comp. Stat. §§ 1201 and 1202 (1922).

[25] See, 1984 Neb. Laws, L.B. 1113; § 25-21,219; *Cummins Mgmt., supra* note 1.

[26] See *Cummins Mgmt., supra* note 1.

[27] 35A Am. Jur. 2d *Forcible Entry and Detainer* § 6 at 890 (2010).

a title dispute, we do not condone its granting of an indefinite continuance. Generally, no continuance shall be granted in a forcible entry and detainer action for a period longer than 7 days.[28] A forcible entry and detainer action is "'intended to provide a speedy and more or less summary remedy.'"[29] Trial is to be held not more than 14 days after the date of issuance of the summons.[30] With its accelerated trial procedures, a forcible entry and detainer action "is intended to avoid much of the expense and delay incident to the more cumbersome action of ejectment formerly employed at common law."[31] Granting an extended continuance and allowing the matter to pend defeats the speedy nature of the remedy.

The Marcuzzos' argument that the county court lacked jurisdiction to enter the final order also fails. At the February 12, 2013, hearing, the Marcuzzos finally introduced evidence that there was an action in district court concerning title to the property. But by that time, the district court action had been dismissed as to FNMA. Thus, although there had been a dispute as to title to the property, the evidence did not show that the dispute was ongoing. Counsel for the Marcuzzos admitted as much when he stated that "the district court has determined the rights of the parties, so any issues that we had with them have already been decided." Then, at trial, the Marcuzzos offered no evidence, appearing "just on jurisdictional challenge only."

[19] The county court had the authority to proceed because at the only time evidence was presented to the county court regarding a title dispute, the dispute had already been concluded. Thus, at that time, it did not appear that the action was one to determine a question of title. To the contrary, at the critical time, the undisputed evidence showed that the portion of the district court proceeding disputing title had been completed. Long ago, we stated that the court has authority

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[28] See Neb. Rev. Stat. § 25-21,225 (Reissue 2008).

[29] *Sporer v. Herlik*, 158 Neb. 644, 649, 64 N.W.2d 342, 346 (1954).

[30] Neb. Rev. Stat. § 25-21,223 (Reissue 2008).

[31] 35A Am. Jur. 2d, *supra* note 27.

to proceed with the hearing of a forcible entry and detainer action until it is clearly established that the question to be determined is one of title.[32] Because upon trial, the evidence did not show that the action concerned a present question of title, the county court had jurisdiction to issue the writ of restitution. The Marcuzzos' second assignment of error also lacks merit. We find no plain error appearing on the record.

## CONCLUSION

Because the Marcuzzos failed to offer evidence of a question of title until after that question had been resolved, the county court properly exercised jurisdiction. We find no plain error appearing on the record. We therefore affirm the judgment of the district court, which affirmed the county court's judgment.

AFFIRMED.

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[32] See *Pettit, supra* note 18.

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# STATE OF NEBRASKA, APPELLEE, V. NICCOLE A. WETHERELL, APPELLANT.

855 N.W.2d 359

Filed October 24, 2014. No. S-13-805.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Constitutional Law: Sentences.** Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
5. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
6. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion

contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.

7. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
8. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.
9. **Postconviction: Right to Counsel.** There is no federal or state constitutional right to an attorney in state postconviction proceedings.
10. ____: ____. Under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), it is within the discretion of the trial court whether to appoint counsel to represent the defendant.
11. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** When the defendant's motion presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel. Where the assigned errors in the postconviction motion before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.

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

Niccole A. Wetherell, pro se.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

In 1999, Niccole A. Wetherell pled no contest to first degree murder, a Class IA felony, and a three-judge panel imposed a mandatory sentence of life imprisonment. Wetherell was 18 years old at the time of the offense. Her conviction and sentence were affirmed by this court on direct appeal. The denial of her first postconviction motion was later affirmed. Wetherell filed a second motion for postconviction relief pro se, and this is the motion which gives rise to this appeal.

In her motion, Wetherell claimed that because she was a "minor" as defined under certain Nebraska law at the time of her offense, her mandatory life sentence without the possibility of parole is cruel and unusual and, therefore, unconstitutional under *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (*Miller*). *Miller* generally held that mandatory life sentences without the possibility of parole for persons under 18 at the time they committed their offense were unconstitutional. For relief, Wetherell sought a resentencing.

The district court for Sarpy County determined that because Wetherell was not under the age of 18 at the time of her offense, *Miller* does not apply to her case. The court denied her motion without conducting an evidentiary hearing and without appointing counsel. Wetherell appeals. Because we determine that Wetherell has failed to allege any facts which, if proved, constitute an infringement of her constitutional rights and the records and files show she is entitled to no relief, we affirm.

## STATEMENT OF FACTS

On March 24, 1999, Wetherell pled no contest to first degree murder, a Class IA felony. The offense for which Wetherell was charged occurred in September 1998. Wetherell was born in July 1980. She was 18 years old when the offense occurred. A three-judge panel rejected the death penalty and imposed a mandatory sentence of life imprisonment.

Wetherell's conviction and sentence were affirmed by this court on direct appeal. See *State v. Wetherell*, 259 Neb. 341, 609 N.W.2d 672 (2000). The sole error Wetherell assigned in her direct appeal was that the district court erred when it did not permit her to withdraw her plea prior to sentencing.

On August 1, 2007, Wetherell filed her first motion for postconviction relief. The district court denied the motion without an evidentiary hearing, and the denial was affirmed by this court on January 31, 2008, in case No. S-07-939.

Wetherell later filed a second motion for postconviction relief pro se. This is the motion which gives rise to this appeal. In her second motion for postconviction relief, Wetherell

alleged that she was 18 years old at the time of the offense but claimed that under Neb. Rev. Stat. § 43-2101 (Cum. Supp. 2012), she was still a "minor." Section 43-2101 states, inter alia, that "[a]ll persons under nineteen years of age are declared to be minors . . . ." Based on her "minor" status at the time of the offense, Wetherell contends that her mandatory life sentence is unconstitutional under *Miller* and that she is entitled to be resentenced under 2013 Neb. Laws, L.B. 44, which generally deals with sentencing juveniles convicted of Class IA felonies who were "under the age of eighteen years" when they committed the offense. See Neb. Rev. Stat. § 28-105.02 (Supp. 2013).

The district court denied Wetherell's second motion for postconviction relief without an evidentiary hearing and without appointing counsel. The district court noted that by their terms, both *Miller* and L.B. 44 apply to offenders who were under the age of 18 years at the time of the offense. Because it is undisputed that Wetherell was 18 years old at the time she committed the offense, the district court concluded that *Miller* and the relief afforded by L.B. 44 do not apply to her case. Therefore, the court determined that Wetherell failed to establish a basis for postconviction relief, and it denied her motion without an evidentiary hearing and without appointing counsel.

Wetherell appeals.

## ASSIGNMENTS OF ERROR

Wetherell claims, restated, that the district court erred when it (1) denied her motion for postconviction relief, because under *Miller*, her life sentence was imposed in violation of the cruel and unusual punishment provisions of the Nebraska and U.S. Constitutions, and (2) failed to appoint counsel to represent her on her second motion for postconviction relief.

## STANDARDS OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files

affirmatively show that the defendant is entitled to no relief. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014).

[2,3] Whether a sentence violates the Eighth Amendment's cruel and unusual punishment clause presents a question of law. *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014), *cert. denied* No. 13-1348, 2014 WL 1831466 (U.S. Oct. 6, 2014). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

[4] Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

[5] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court. *State v. Kudlacz*, 288 Neb. 656, 850 N.W.2d 755 (2014).

## ANALYSIS

### *First Assignment of Error: Resentencing Under* Miller.

In her first assignment of error, Wetherell claims that the district court erred when it denied her motion for postconviction relief without an evidentiary hearing. Wetherell contends that because she was a "minor" under Nebraska law at the time of her offense, *Miller* applies to her case. Wetherell asserts that her life sentence is in violation of the cruel and unusual punishment provisions of the Nebraska and U.S. Constitutions and that she is entitled to resentencing. We find no merit to this assignment of error.

#### *Applicable Law.*

In *Miller*, the U.S. Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460. In *State v. Castaneda*, 287 Neb. 289, 842 N.W.2d 740 (2014), we observed that life imprisonment sentences imposed on juveniles in Nebraska for first degree murder prior to *Miller* were mandatory sentences and were effectively life imprisonment without parole. See, also, *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014). Applying our observation regarding

mandatory life imprisonment sentences under Nebraska's sentencing scheme, Wetherell's sentence was tantamount to life imprisonment without the possibility of parole.

In *Mantich, supra*, this court concluded that the U.S. Supreme Court's holding in *Miller* was a substantive change to the law that applies retroactively on collateral review. Therefore, because this court has stated that *Miller* applies retroactively on collateral review, *Miller* may be considered in connection with Wetherell's second motion for postconviction relief.

In response to *Miller*, the Nebraska Legislature passed, and the Governor approved, L.B. 44, which amended state law to "'change penalty provisions with respect to Class IA felonies committed by persons under eighteen years of age [and] to change parole procedures with respect to offenses committed by persons under eighteen years of age.'" *State v. Castaneda*, 287 Neb. at 314, 842 N.W.2d at 759.

Section 2 of L.B. 44 was codified at § 28-105.02, and provides:

> (1) Notwithstanding any other provision of law, the *penalty for any person convicted of a Class IA felony for an offense committed when such person was under the age of eighteen years* shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment.
>
> (2) In determining the sentence of a convicted person under subsection (1) of this section, the court shall consider mitigating factors which led to the commission of the offense. The convicted person may submit mitigating factors to the court, including, but not limited to:
>
> (a) The convicted person's age at the time of the offense;
>
> (b) The impetuosity of the convicted person;
>
> (c) The convicted person's family and community environment;
>
> (d) The convicted person's ability to appreciate the risks and consequences of the conduct;
>
> (e) The convicted person's intellectual capacity; and

> (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history.

(Emphasis supplied.)

Section 3 of L.B. 44 was codified at Neb. Rev. Stat. § 83-1,110.04 (Supp. 2013), and generally provides that an "*offender who was under the age of eighteen years* when he or she committed the offense," if the offender is denied parole, shall be considered for parole annually after the denial. (Emphasis supplied.)

*Postconviction Motion*
*Not Time Barred.*

As an initial matter, the State has suggested that Wetherell's postconviction motion is time barred. We disagree. Given the not unreasonable, albeit unpersuasive, assertion by Wetherell that *Miller* applies, we determine that Wetherell's second postconviction motion, to the extent it relies on *Miller* as made retroactive by *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014), *cert. denied* No. 13-1348, 2014 WL 1831466 (U.S. Oct. 6, 2014), is not time barred. The statutory limitation periods regarding postconviction motions are found at Neb. Rev. Stat. § 29-3001(4) (Cum. Supp. 2012) and provide that a 1-year limitation period applies to the filing of a motion for postconviction relief and that such period begins to run on the later of one of five dates. As relevant to this case, § 29-3001(4)(d) provides:

> 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:
>
> . . . .
>
> . . . 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[.]

Under *Mantich, supra*, decided in 2014, this court concluded that the holding in *Miller* applies retroactively, and we therefore determine that Wetherell's motion is not time barred.

*Application of the Law.*

As stated above, *Miller* provides that "mandatory life without parole for those *under the age of 18 at the time of their crimes* violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.'" 132 S. Ct. at 2460 (emphasis supplied). Section 28-105.02(1) provides in part that "the penalty for any person convicted of a Class IA felony *for an offense committed when such person was under the age of eighteen years* shall be a maximum sentence of not greater than life imprisonment and a minimum sentence of not less than forty years' imprisonment." (Emphasis supplied.) See, also, § 83-1,110.04. Thus, by their terms, both *Miller* and § 28-105.02 explicitly apply only to those persons who were "under the age of eighteen years" when they committed their offense.

The language of *Miller*, "under the age of 18," is clear. 132 S. Ct. at 2460. The holding in *Miller* applies to persons who were "under the age of 18 at the time of their crimes" and does not encompass persons such as Wetherell, who was already 18 at the time of her crime. See *id*. The relief afforded in *Miller* does not apply to Wetherell. We further observe that Wetherell's reliance on § 28-105.02(1) as a basis for resentencing is misplaced. Statutory interpretation is a question of law. *State v. Kudlacz*, 288 Neb. 656, 850 N.W.2d 755 (2014). We give the language of § 28-105.02(1) its plain and ordinary meaning. See *Kudlacz, supra*. Section 28-105.02(1) applies to persons who stand convicted of a Class IA felony for an offense committed when such person was "under the age of eighteen years." Wetherell factually was not under the age of 18 years at the time of the offense, and she is not encompassed within the provisions of § 28-105.02(1). We conclude that § 28-105.02(1) does not apply to persons who committed the Class IA felony offense when they were 18 years of age.

Wetherell concedes that she was 18 years old when she committed the offense for which she was convicted and acknowledges that both *Miller* and § 28-105.02(1) refer to offenders under the age of 18. She nevertheless contends that *Miller* applies to her case, because under Nebraska law, she was a "minor" at the time the offense was committed. Wetherell refers us to Neb. Rev. Stat. § 43-2101 (Cum. Supp. 2012), which states that "[a]ll persons under nineteen years of age are declared to be minors . . . ." She also points to Neb. Rev. Stat. § 43-245 (Supp. 2013), which states that "[f]or purposes of the Nebraska Juvenile Code, unless the context otherwise requires: (1) [a]ge of majority means nineteen years of age . . . (9) [j]uvenile means any person under the age of eighteen." Wetherell therefore asserts that because she was 18 and a "minor" or a "juvenile" under various Nebraska statutes at the time she committed her offense, *Miller* applies to her case. She contends that the gist of *Miller* is directed to sentencing of minors and juveniles and that pursuant to *Miller*, her life sentence is unconstitutional and she should be resentenced by applying § 28-105.02. We reject this argument.

We recognize that as a general matter pursuant to § 43-2101, all persons under age 19 are considered to be "minors" in Nebraska. However, we stated in the controlling opinion in *State v. Johnson*, 269 Neb. 507, 519, 695 N.W.2d 165, 175 (2005):

> We think it is a proper reading of the Nebraska Revised Statutes that § 43-2101 sets the age of majority and that, *except where a statute references a specific age*, § 43-2101 defines "minor" for general purposes. Where the word "minor" is used elsewhere in the statutes without further definition, it may be presumed to have the general meaning declared under § 43-2101. Where the Legislature wishes to provide a different definition or wishes to proscribe conduct based on an age other than the age of majority, the Legislature will explicitly do so . . . .

(Emphasis supplied.) See, also, § 43-245 (providing that "*unless the context otherwise requires*: (1) [a]ge of majority means nineteen years of age" (emphasis supplied)).

In the instant case, the Legislature has explicitly provided that the sentencing provisions in § 28-105.02 apply to those persons who were under the age of 18 at the time of their offenses. That is, the Legislature has provided a specific quantifiable definition of age other than general terms such as "majority," "minority," "minor," or "juvenile." Therefore, the specific age that the Legislature has provided in § 28-105.02(1) will apply, and not the general definition of "minor" found in § 43-2101 as urged by Wetherell. Section 28-105.02 and our explanation are consistent with the U.S. Supreme Court in *Miller*, which explicitly limited its holding to those individuals who were under the age of 18 at the time of their crimes.

[6,7] Because Wetherell was undisputedly 18 years old when she committed her offense, neither *Miller* nor resulting resentencing under § 28-105.02 applies to her case. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014). If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*. Where there is no justiciable issue, no hearing is required. Wetherell has failed to allege any facts in her motion which, if proved, constitute an infringement of her constitutional rights, and the records and files show that she is entitled to no relief. Upon our de novo review, we conclude that the district court did not err when it denied Wetherell's motion for postconviction relief without an evidentiary hearing.

[8] We note for completeness that to the extent that Wetherell does not rely upon *Miller* and generally claims that her sentence of life imprisonment without parole was unconstitutionally disproportionate to her offense and violates the cruel and unusual punishment provisions of the Nebraska and U.S. Constitutions, we reject this argument. An appellate court will not entertain a successive motion for postconviction relief

unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012). Wetherell's second motion for postconviction relief does not affirmatively show on its face that her claim that her sentence was unconstitutionally excessive, to the extent it does not rely on *Miller*, was not available at the time she filed her first motion for postconviction relief. As such, it is procedurally barred.

*Second Assignment of Error: Appointment of Counsel.*

In her second assignment of error, Wetherell claims that the district court erred when it failed to appoint counsel to represent her on her second motion for postconviction relief. We conclude that because Wetherell's second motion for postconviction relief did not raise justiciable issues, the district court did not abuse its discretion when it did not appoint counsel prior to denying postconviction relief.

[9] We have recognized that there is no federal or state constitutional right to an attorney in state postconviction proceedings. *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010). Therefore, a person seeking postconviction relief is not entitled to appointment of counsel as a matter of right.

[10,11] Instead, under the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), it is within the discretion of the trial court whether to appoint counsel to represent the defendant. *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). When the defendant's motion presents a justiciable issue to the district court for postconviction determination, an indigent defendant is entitled to the appointment of counsel. *Id.* Where the assigned errors in the postconviction motion before the district court are either procedurally barred or without merit, establishing that the postconviction proceeding contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant. *Id.*

The standards for determining whether discretion requires appointment of counsel are similar to those applied when

determining whether an evidentiary hearing is warranted, which are set forth above. As we have noted, Wetherell has not alleged facts sufficient to entitle her to an evidentiary hearing on her postconviction claim and the records and files show that she is entitled to no relief. Wetherell has raised no justiciable issue of law or fact, and therefore, the district court did not abuse its discretion when it did not appoint counsel.

## CONCLUSION

The relief afforded in *Miller* and resulting resentencing under § 28-105.02 apply to persons who were under the age of 18 at the time of their crimes and do not apply to Wetherell, because she was 18 years old at the time of her offense. Upon our de novo review, we determine that in her postconviction motion, Wetherell has failed to assert any facts which, if proved, constitute an infringement of her constitutional rights, and the records and files show she is entitled to no relief. Therefore, the district court did not err when it denied her postconviction motion without an evidentiary hearing and without appointing counsel.

AFFIRMED.

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# IN RE INTEREST OF GABRIELLA H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RICARDO R., APPELLANT.

855 N.W.2d 368

Filed October 24, 2014. No. S-13-900.

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. **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.
3. **Parent and Child.** "Just cause or excuse" for a parent's failure to maintain a relationship with a minor child has generally been confined to circumstances that are, at least in part, beyond the control of the parent.

4. **Parental Rights: Abandonment: Intent: Proof.** Whether a parent has abandoned a child within the meaning of Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 2012) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence.
5. **Parental Rights: Abandonment: Proof.** To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.
6. **Parental Rights: Abandonment: Time.** A parent's abandonment of his or her child for 6 months or more immediately prior to the filing of a petition to terminate parental rights is a ground for termination of such rights.
7. ____: ____: ____. The 6-month statutory period for determining abandonment need not be considered in a vacuum.
8. **Parental Rights: Abandonment: Intent.** One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his or her child or children.
9. **Parent and Child.** Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.
10. **Parental Rights.** Incarceration does not insulate an inmate from the termination of his or her parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent.
11. **Parental Rights: Parent and Child.** Incarceration does not excuse a parent's obligation to provide the child with a continuing relationship.
12. **Parental Rights: Parent and Child: Abandonment.** The parental obligation requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.
13. **Courts: Appeal and Error.** Upon reversing a decision of the Nebraska Court of Appeals, the Nebraska Supreme Court may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.

Petition for further review from the Court of Appeals, IRWIN, RIEDMANN, and BISHOP, Judges, on appeal thereto from the County Court for Colfax County, PATRICK R. MCDERMOTT, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Jerod L. Trouba, of Knoepfle & Trouba, P.C., L.L.O., for appellant.

Leslie J. Buhl, Deputy Colfax County Attorney, for appellee.

Jacqueline M. Tessendorf, of Tessendorf & Tessendorf, P.C., guardian ad litem.

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

CASSEL, J.

## INTRODUCTION

The juvenile court terminated a father's parental rights based on abandonment of the child. The Nebraska Court of Appeals reversed that decision due to the father's lack of absolute certainty concerning paternity and his incarceration while awaiting trial.[1] We granted the State's petition for further review. Because the father was initially involved in the child's life but then demonstrated no interest in the child or in exercising parental responsibilities, we conclude that clear and convincing evidence supports the finding of abandonment. We reverse the decision of the Court of Appeals and remand the cause with direction.

## BACKGROUND

### BIRTH AND CUSTODY OF GABRIELLA H.

In November 2011, Dorothy G. gave birth to Gabriella H. The birth certificate did not identify her father, and Ricardo R. was not present for the birth. Gabriella was immediately taken into custody by the Nebraska Department of Health and Human Services (DHHS) due to Dorothy's use of illegal drugs.

### RICARDO'S INITIAL INVOLVEMENT

Dorothy identified Ricardo as Gabriella's potential biological father, and Gabriella's caseworker approved Ricardo to be present with Dorothy during visitation with Gabriella. Dorothy referred to Ricardo as "the dad" when he attended visitation. According to visitation notes, Ricardo was present during visits on December 17, 2011, and January 12 and 13 and February 2, 2012.

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[1] See *In re Interest of Gabriella H.*, 22 Neb. App. 70, 847 N.W.2d 103 (2014).

Some of the visitation notes discuss Ricardo's interaction with Gabriella. The January 12, 2012, visitation note stated that Ricardo attended the visit for an hour, during which time he played with Gabriella and fed her. The January 13 visitation note reflected that Ricardo was present for 45 minutes and that he held Gabriella and fed her from a bottle. The February 2 note stated in part: "A male stopped by toward the last hour of the visit whom Dorothy identified as Gabriella's father, Ricardo. . . . Ricardo said Gabriella needed a diaper change. Dorothy told him to change it, but he refused, so she did it."

## Procedural History

Shortly after Gabriella's birth, the State filed a petition to adjudicate her due to the fault or habits of Dorothy. The petition listed Gabriella's father as "[u]nknown." During a December 6, 2011, prehearing conference, Dorothy identified Ricardo as a possible father and the court ordered DHHS to determine paternity. The court subsequently adjudicated Gabriella.

DNA test results issued on November 12, 2012, established a 99.997-percent probability that Ricardo was Gabriella's biological father. On November 20, the court recognized Ricardo as Gabriella's father and appointed counsel to represent him.

On May 3, 2013, the State filed a supplemental petition to adjudicate Gabriella and to terminate Ricardo's parental rights, alleging that Ricardo had abandoned Gabriella and that termination was in Gabriella's best interests. An amended supplemental petition made no changes to the allegations against Ricardo but added allegations against Dorothy's husband, who was Gabriella's legal father. Ricardo denied the allegations of the amended supplemental petition.

## Termination Hearing

On July 30, 2013, the juvenile court held a termination hearing. Ricardo appeared, but he did not testify. Dorothy testified that when she discovered she was pregnant, she informed Ricardo he was potentially the father and he responded that "he would be there." She testified that she also informed Ricardo

there was a possibility he was not the father, but that she "was always more sure he was the father."

The caseworker testified that from the beginning of Gabriella's case until the time of genetic testing, she attempted to call Ricardo on a monthly basis, using telephone numbers provided by Dorothy. The caseworker left messages for Ricardo, but he never returned the calls. To the caseworker's knowledge, Ricardo last saw Gabriella in February 2012.

Ricardo was arrested on a criminal charge in late July 2012, and he remained incarcerated while awaiting trial throughout the pendency of this case. Upon receiving the results of genetic testing, Gabriella's caseworker sent a letter to Ricardo at the detention facility informing him that he was Gabriella's biological father and that "if he wanted to make contact with [the caseworker] he should." She testified that Ricardo did not try to communicate with her. Ricardo did not try to arrange visitation, nor did his attorney or anyone else acting on Ricardo's behalf. He never sent money, mail, or gifts for Gabriella. The caseworker testified that Ricardo never inquired about Gabriella and that Gabriella "does not know who Ricardo . . . is."

### Juvenile Court's Decision

The juvenile court entered an order terminating Ricardo's parental rights to Gabriella. The court observed that even after it appointed counsel for Ricardo, there was no evidence that Ricardo, either directly or through his attorney, made any request for visitation. The court reasoned:

> [A] parent must do something more than just enter a denial to a petition to terminate. This father knew where the child was, knew he was the father, had counsel, and knew how to reach [DHHS'] caseworkers clearly since November 20, 2012. Even being incarcerated he could have undertaken some action consistent with evidencing his intent to be a part of his child's life. He did nothing.

The court found clear and convincing evidence that Ricardo abandoned Gabriella and that termination of Ricardo's parental rights was in her best interests. Ricardo appealed.

### Court of Appeals' Decision

The Court of Appeals reversed the judgment of the juvenile court. The Court of Appeals recognized that the record clearly showed that Ricardo had no contact with Gabriella during the statutory 6-month period and that there was "a complete abandonment of all parental rights and responsibilities."[2] But the Court of Appeals concluded that the evidence was insufficient as a matter of law to establish that Ricardo intentionally abandoned Gabriella, because he did not know he was her father until November 2012. The Court of Appeals further found that "even if Ricardo had known that he was Gabriella's father for the entire 6-month period, his incarceration was a circumstance out of his control which impeded his ability to parent Gabriella and, thus, precludes a finding of intentional abandonment."[3] We granted the State's petition for further review.

## ASSIGNMENT OF ERROR

The State assigns, restated, that the Court of Appeals erred in reversing the juvenile court's finding of abandonment.

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[4]

## ANALYSIS

### Abandonment

[2-5] The law governing abandonment is well settled. 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] "Just cause or excuse"

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[2] *Id.* at 77, 847 N.W.2d at 109.

[3] *Id.* at 78, 847 N.W.2d at 110.

[4] *In re Interest of Justine J. & Sylissa J.*, 288 Neb. 607, 849 N.W.2d 509 (2014).

[5] *Id.*

for a parent's failure to maintain a relationship with a minor child has generally been confined to circumstances that are, at least in part, beyond the control of the parent.[6] Whether a parent has abandoned a child within the meaning of § 43-292(1) is a question of fact and depends upon parental intent, which may be determined by circumstantial evidence.[7] To prove abandonment in determining whether parental rights should be terminated, the evidence must clearly and convincingly show that the parent has acted toward the child in a manner evidencing a settled purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and an abandonment of parental rights and responsibilities.[8]

[6-8] A parent's abandonment of his or her child for 6 months or more immediately prior to the filing of a petition to terminate parental rights is a ground for termination of such rights.[9] The relevant 6-month period in this case ran from November 3, 2012, to May 3, 2013. In the context of adoption, we have stated that the 6-month statutory period for determining abandonment need not be considered in a vacuum.[10] "'One may consider the evidence of a parent's conduct, either before or after the statutory period, for this evidence is relevant to a determination of whether the purpose and intent of that parent was to abandon his [or her] child or children.'"[11] We see no reason why the same rule should not apply in a termination of parental rights case, and thus, we take into consideration Ricardo's conduct before and after the statutory period.

The Court of Appeals determined that the State failed to prove by clear and convincing evidence that Ricardo intended to abandon Gabriella. The Court of Appeals based that

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[6] *In re Interest of Chance J.*, 279 Neb. 81, 776 N.W.2d 519 (2009).

[7] *Kenneth C. v. Lacie H.*, 286 Neb. 799, 839 N.W.2d 305 (2013).

[8] *Id.*

[9] See § 43-292(1).

[10] See *In re Adoption of David C.*, 280 Neb. 719, 790 N.W.2d 205 (2010).

[11] *Id.* at 726, 790 N.W.2d at 211.

determination on uncertainty regarding Ricardo's paternity prior to receipt of the genetic testing results and on Ricardo's pretrial incarceration. We will address these reasons in turn.

The Court of Appeals focused on when Ricardo had absolute certainty of his paternity. It reasoned that the evidence did not establish that Ricardo intended to abandon Gabriella, because the genetic testing results were not known until November 2012. But there was no evidence that Ricardo ever believed himself not to be the father. When Dorothy told Ricardo that she was pregnant, he said he would "be there." Dorothy also told Ricardo of her involvement with another man at the time Gabriella was conceived. But Ricardo attended visitations with Gabriella, holding himself out as her father. Such action is not consistent with a belief that he was not the father.

[9] The evidence demonstrates that Ricardo abandoned Gabriella after initially being involved in her life. Visitation notes reflected that he attended visitations with Gabriella on December 17, 2011, and January 12 and 13 and February 2, 2012. He played with Gabriella, held her, and fed her. But then Ricardo ceased involvement in Gabriella's life and never did anything further to demonstrate an interest in his child. Gabriella was 20 months old at the time of the termination hearing, but Ricardo last visited with her when she was less than 3 months old. He never sent money for her support, nor had he sent her a card or a gift. Parental obligation requires a continuing interest in the child and a genuine effort to maintain communication and association with that child.[12] There is no evidence that Ricardo ever called anyone to speak to or inquire about Gabriella since last seeing her on February 2. He denied the allegations of the petition seeking to terminate his parental rights but otherwise has demonstrated no interest in Gabriella. In *Kenneth C. v. Lacie H.*,[13] the father's only direct contact with a child he did not dispute was his occurred during the 2 months immediately after birth. We stated that the father's "sporadic, insubstantial efforts to establish a

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[12] *Kenneth C. v. Lacie H., supra* note 7.

[13] *Id.*

relationship with his son, coupled with his complete failure to provide financial support, constitute clear and convincing evidence of abandonment."[14] The evidence in this case supports the same conclusion.

The lack of evidence as to any belief on Ricardo's part that he was not Gabriella's father distinguishes this case from the situations in *In re Interest of Chance J.*[15] and *In re Interest of Dylan Z.*[16]

In *In re Interest of Chance J.*, we reversed the judgment of the Court of Appeals, which found no abandonment based on the husband's lack of actual knowledge that he was the child's father. In that case, a married couple separated due in part to the wife's prostituting herself. Less than a year later, the wife gave birth to a baby with white skin, blue eyes, and red hair. Because the husband was African-American, he did not believe he was the child's father. The State later filed a petition to terminate the husband's parental rights based partly on abandonment, and genetic testing subsequently established his paternity of the child. The juvenile court terminated the husband's parental rights due in part to abandonment, but the Court of Appeals reversed. The Court of Appeals concluded that because the husband did not have actual knowledge that the child was his until genetic testing was completed, the father could not have intentionally abandoned the child. But we reversed the judgment of the Court of Appeals. We stated that "paternal uncertainty based on physical appearance of a child or suspicions of infidelity is not just cause or excuse for abandoning a child born into wedlock, especially when there are ample means to verify one's paternity."[17]

In *In re Interest of Dylan Z.*,[18] the Court of Appeals reversed a finding of abandonment based on the father's lack of knowledge that he was the child's father. In that case,

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[14] *Id.* at 808, 839 N.W.2d at 312.

[15] *In re Interest of Chance J., supra* note 6.

[16] *In re Interest of Dylan Z.*, 13 Neb. App. 586, 697 N.W.2d 707 (2005).

[17] *In re Interest of Chance J., supra* note 6, 279 Neb. at 91, 776 N.W.2d at 527.

[18] *In re Interest of Dylan Z., supra* note 16.

Roy T. and the child's mother were no longer together when the child was born and Roy was aware that the mother was involved with another man approximately 9 or 10 months prior to the child's birth. After learning of the birth from a newspaper, Roy called a relative of the child's mother and was specifically told that he was not the child's father. When Roy was served with the supplemental petition to terminate his parental rights, he immediately contacted the DHHS worker and requested visitation. The juvenile court determined that Roy abandoned the child, but the Court of Appeals reversed. The Court of Appeals stated that Roy's lack of contact with the child was directly attributable to his lack of knowledge that he was the child's father and that his failure to connect with the child during the relevant time period was due to just cause and excuse.

In comparison to those cases, Ricardo has no justification for his abandonment. There is no evidence of any significant differences in physical characteristics between Gabriella and Ricardo. Nor is there evidence that Ricardo was ever affirmatively told by anyone that he was not Gabriella's father. And unlike the circumstances in those cases, Ricardo initially interacted with the child and held himself out as her father before disappearing from her life.

Further, the Court of Appeals minimized Ricardo's inaction once his paternity was confirmed. He knew in November 2012 that genetic testing showed him to be Gabriella's biological father. Yet, he did nothing to demonstrate an interest in Gabriella other than to deny the allegations of the supplemental petition. And even though the juvenile court appointed counsel for Ricardo in November, there has been no motion filed with the court or communication with DHHS requesting visitation or other contact with Gabriella. This inaction clearly and convincingly demonstrates an intent to be rid of parental responsibilities.

The Court of Appeals also found that Ricardo's incarceration was a circumstance out of his control and precluded a finding of intentional abandonment. The Court of Appeals cited two opinions from this court where we acknowledged

that while the fact of incarceration is involuntary, the illegal activities leading to incarceration are voluntary. But the Court of Appeals distinguished those cases because the parents there were incarcerated following a conviction, whereas Ricardo was incarcerated awaiting trial. Because Ricardo had not been found guilty of any crime, the Court of Appeals stated that Ricardo was presumed innocent. We agree with the Court of Appeals that our proposition of law regarding the voluntariness of activities leading to incarceration does not apply to a pretrial detainee.

[10,11] But incarceration does not insulate an inmate from the termination of his or her parental rights if the record contains the clear and convincing evidence that would support the termination of the rights of any other parent.[19] We believe this proposition applies with equal force to pretrial detainees. As mentioned, Ricardo has done nothing to demonstrate an interest in his child while incarcerated. The Court of Appeals rationalized that "[a]side from visitation, it would have been very difficult, if not impossible, for Ricardo to develop a relationship with Gabriella while he was incarcerated, given that she was too young to understand or participate in cards, letters, or telephone calls."[20] We do not believe that Gabriella's young age excuses parental inaction. A letter or telephone call from Ricardo would have at least been *something* to demonstrate love for and interest in Gabriella. And there was no evidence to establish whether visitation was possible at the detention facility. Simply put, incarceration does not excuse a parent's obligation to provide the child with a continuing relationship.[21] Here, the termination of Ricardo's rights was not based on his incarceration, but, rather, on his failure to manifest any commitment to parental responsibilities. Further, Ricardo's incarceration does not explain his inaction during the nearly 6-month period

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[19] *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992).

[20] *In re Interest of Gabriella H., supra* note 1, 22 Neb. App. at 79, 847 N.W.2d at 110.

[21] See *In re M.J.H.*, 398 S.W.3d 550 (Mo. App. 2013).

of time between his last visit with Gabriella until the time of his incarceration.

[12] The evidence clearly and convincingly supports a finding that Ricardo abandoned Gabriella. "The parental obligation 'requires continuing interest in the child and a genuine effort to maintain communication and association with that child. Abandonment is not an ambulatory thing the legal effects of which a parent may dissipate at will by token efforts at reclaiming a discarded child.'"[22] Here, Ricardo voluntarily discontinued contact with Gabriella when she was not quite 3 months old. Even after Ricardo's paternity was definitively established, he did not inquire about Gabriella's welfare, attempt to arrange visitation, or take any other action to build a relationship with her. We reverse the Court of Appeals' determination on the issue of abandonment.

## Best Interests

[13] Upon reversing a decision of the Court of Appeals, we may consider, as we deem appropriate, some or all of the assignments of error the Court of Appeals did not reach.[23] Due to its erroneous conclusion that the State failed to prove a statutory ground for termination, the Court of Appeals did not address whether termination of Ricardo's parental rights was in Gabriella's best interests. We now turn to that issue.

The evidence clearly and convincingly established that termination of Ricardo's parental rights was in Gabriella's best interests. Gabriella had never lived with Ricardo; rather, she continuously lived in a foster home since she was approximately 3 days old. Gabriella, who was 20 months old at the time of the termination hearing, last saw Ricardo when she was less than 3 months old. He has not been involved in her life since that time. The caseworker testified that she did not feel permanency could be achieved with Ricardo, because Gabriella "does not know who [he] is." The caseworker testified that Ricardo was in a detention facility "for an undetermined

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[22] *In re Adoption of David C., supra* note 10, 280 Neb. at 726, 790 N.W.2d at 211.

[23] *Incontro v. Jacobs*, 277 Neb. 275, 761 N.W.2d 551 (2009).

amount of time," that Gabriella deserved permanency sooner rather than later, and that Gabriella "needs to get out of the foster care system." We conclude the juvenile court did not err in finding that termination of Ricardo's parental rights was in Gabriella's best interests.

## CONCLUSION

Upon our de novo review, we conclude that the State proved by clear and convincing evidence that Ricardo abandoned Gabriella and that termination of his parental rights was in Gabriella's best interests. We reverse the decision of the Court of Appeals, and we remand the cause to the Court of Appeals with direction to affirm the judgment of the juvenile court.

REVERSED AND REMANDED WITH DIRECTION.

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# STATE OF NEBRASKA, APPELLEE, V. RICKY J. SANDERS, APPELLANT.

855 N.W.2d 350

Filed October 24, 2014. No. S-13-901.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
2. **Postconviction: Constitutional Law: Proof.** The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
3. ____: ____: ____. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the

defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.

4. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
5. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. A court may address the two prongs of this test, deficient performance and prejudice, in either order.
6. **Constitutional Law: Criminal Law: Effectiveness of Counsel.** The federal Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every conceivable constitutional claim.
7. **Effectiveness of Counsel.** The failure to anticipate a change in existing law does not constitute deficient performance.
8. ____. Counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance.
9. **Investigative Stops: Motor Vehicles: Police Officers and Sheriffs: Probable Cause.** A traffic violation, no matter how minor, creates probable cause for an officer to stop the driver of a vehicle.
10. **Investigative Stops: Police Officers and Sheriffs: Probable Cause.** If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant.
11. **Search and Seizure: Motor Vehicles: Police Officers and Sheriffs: Arrests: Evidence.** Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Affirmed.

Jerry L. Soucie for appellant.

Ricky J. Sanders, pro se.

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

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

MILLER-LERMAN, J.

## NATURE OF CASE

Ricky J. Sanders appeals the order of the district court for Douglas County denying his motion for postconviction relief without an evidentiary hearing. Sanders had been convicted of discharging a firearm at a dwelling while in or near a motor vehicle, in violation of Neb. Rev. Stat. § 28-1212.04 (Cum. Supp. 2012), and using a firearm to commit a felony. He contends that an evidentiary hearing should have been held on his ineffective assistance of counsel claims in which he asserted that trial counsel was deficient for failing to challenge the constitutionality of § 28-1212.04 and for failing to move to suppress evidence obtained from the stop and search of his vehicle.

Because counsel could not have been deficient for failing to raise a novel constitutional challenge to § 28-1212.04, the court did not err when it rejected Sanders' claim of ineffective counsel on this basis. We further conclude that the court did not err when it determined that the record showed that Sanders was not entitled to relief on his claim that counsel was deficient for failing to move to suppress evidence obtained from the stop and search of his vehicle. We therefore affirm the denial of Sanders' postconviction motion.

## STATEMENT OF FACTS

Sanders was convicted of discharging a firearm, in violation of § 28-1212.04, and a related charge of use of a firearm to commit a felony. The evidence at trial indicated that Sanders was the driver and one of two persons inside a vehicle from which gunshots were fired at a house in Omaha on May 21, 2011. The evidence included bullets and a shell casing that were found in a search of Sanders' vehicle. The jury was given an aiding and abetting instruction.

The evidence shows that police officers who responded to 911 emergency dispatch calls of shots being fired from a vehicle followed Sanders' vehicle because it met the description of the suspect vehicle. At one point, Sanders' vehicle violated traffic laws, but police awaited backup before stopping

the vehicle. The officers coordinated with other officers to block Sanders' vehicle. Following the stop, Sanders and his passenger were taken into custody. Officers standing near the vehicle saw numerous bullets inside the vehicle in plain view. An officer searched the vehicle and found over 30 bullets and a spent casing.

Sanders appealed his convictions to the Nebraska Court of Appeals, claiming that there was not sufficient evidence to support his convictions and that the district court had imposed excessive sentences. Sanders was represented by attorneys from the Douglas County public defender's office both at trial and on appeal. In case No. A-12-050, the Court of Appeals overruled Sanders' motions to remove counsel and appoint new counsel, and on July 9, 2012, the Court of Appeals summarily affirmed Sanders' convictions and sentences.

Sanders filed a pro se motion for postconviction relief. He asserted several layered claims of ineffective assistance of trial counsel and appellate counsel. Among the claims Sanders asserted in his 59-page motion were claims that counsel was ineffective for failing to challenge the constitutionality of § 28-1212.04 and that counsel was ineffective for failing to move to suppress evidence obtained from the warrantless search of his vehicle.

Section 28-1212.04, to which Sanders' constitutional argument is directed, was enacted in 2009 and amended in 2010. The statute is titled "Discharge of firearm in certain cities and counties; prohibited acts; penalty" and provides as follows:

> Any person, within the territorial boundaries of any city of the first class or county containing a city of the metropolitan class or primary class, who unlawfully, knowingly, and intentionally or recklessly discharges a firearm, while in any motor vehicle or in the proximity of any motor vehicle that such person has just exited, at or in the general direction of any person, dwelling, building, structure, occupied motor vehicle, occupied aircraft, inhabited motor home as defined in section 71-4603, or inhabited camper unit as defined in section 60-1801, is guilty of a Class IC felony.

With regard to the constitutional challenge, Sanders asserted in his postconviction motion that § 28-1212.04 violates Neb. Const. art. III, § 18, which prohibits the enactment of "local or special laws." He argued that the statute was facially unconstitutional as a local law because it applies only in certain cities and counties in the State and it therefore targets only the citizens of those cities and counties. He also argued that, as applied, the statute violated constitutional guarantees of equal protection because it targeted those areas that contain 95 percent of the State's African-American population.

With regard to the motion to suppress, Sanders asserted in his postconviction motion that the stop of his vehicle was not proper and that under the Fourth Amendment, the subsequent warrantless search of his vehicle was an illegal search. He argued that trial counsel should have moved to suppress evidence obtained from the search of the vehicle.

The district court denied Sanders' motion for postconviction relief without an evidentiary hearing and without appointing counsel. In the order denying postconviction relief, the court stated that Sanders "failed to show how he was prejudiced by his attorney's failure to [challenge the constitutionality of § 28-1212.04], or how the statute in question is somehow unconstitutional." The court further stated that Sanders' other claims of ineffective assistance were "conclusory, . . . refuted by the record, and . . . not pleaded in enough detail to warrant an evidentiary hearing." The court concluded that Sanders had "not alleged sufficient facts . . . which, if proved, would establish a reasonable probability that the outcome of his case would have been different but for his trial counsel's alleged deficient performance." The court therefore denied postconviction relief without an evidentiary hearing and without appointing counsel.

Sanders appeals the denial of his postconviction motion.

## ASSIGNMENTS OF ERROR

Sanders claims, restated, that the district court erred when it denied postconviction relief without an evidentiary hearing on his claims that counsel was deficient for (1) failing to challenge the constitutionality of § 28-1212.04 and (2) failing to

file a motion to suppress evidence obtained from the warrantless search of his vehicle.

## STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014).

## ANALYSIS

As an initial matter, we note that although Sanders asserted numerous claims of ineffective assistance of counsel in his postconviction motion, on appeal, he assigns error to the district court's denial of only two claims of ineffective assistance of counsel: failure to challenge the constitutionality of § 28-1212.04 and failure to move to suppress evidence. The district court's denial of Sanders' remaining claims is affirmed.

Sanders' assignments of error on appeal relate to claims of ineffective assistance of counsel. We therefore review general propositions relating to postconviction and ineffective assistance of counsel claims before applying those propositions to the claims asserted by Sanders in this appeal.

[2] The Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2008 & Cum. Supp. 2012), provides that postconviction relief is available to a prisoner in custody under sentence who seeks to be released on the ground that there was a denial or infringement of his constitutional rights such that the judgment was void or voidable. *State v. Dragon, supra*. Thus, in a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *Id*.

[3] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an

infringement of the defendant's rights under the Nebraska or federal Constitution. *Id*. If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

[4,5] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *Id*. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *Id*.; *State v. Dragon, supra*. A court may address the two prongs of this test, deficient performance and prejudice, in either order. *Id*.

*Counsel Could Not Be Found Deficient for Failing to Raise a Novel Constitutional Challenge, and Therefore, the District Court Did Not Err When It Denied the Claim Without an Evidentiary Hearing.*

Sanders claims that the court erred when it denied relief without an evidentiary hearing on his claim that trial and appellate counsel were ineffective for failing to challenge the constitutionality of § 28-1212.04, the statute under which he was convicted of discharging a firearm at a dwelling while in or near a motor vehicle. We conclude that the court did not err when it denied an evidentiary hearing on this claim, because counsel could not be found to be deficient for failing to raise a novel constitutional challenge.

Sanders' allegations with regard to this claim were that counsel failed both at trial and on direct appeal to challenge § 28-1212.04 as being unconstitutional as a special or local law in violation of Neb. Const. art. III, § 18. In order for Sanders to be granted an evidentiary hearing on this claim, he needed to show that if his allegations were proved, such failure infringed his constitutional rights to effective assistance of counsel.

In order to prevail on a constitutional claim of ineffective assistance of counsel, Sanders needed to show that counsel's performance was deficient and that such deficient performance prejudiced his defense. See *Strickland, supra*. The district court focused on the second prong of the *Strickland* test when it concluded that because Sanders failed to show that the statute was unconstitutional, he failed to show that his defense was prejudiced. Unlike the district court's approach, we conclude that Sanders' claim of ineffective assistance of counsel fails the first prong of the test because counsel's performance could not be found to be deficient for failing to raise a novel constitutional challenge. Although our reasoning differs from that of the district court, we agree that a purported failure to challenge the constitutionality of § 28-1212.04 does not afford relief.

[6] As we noted above, a claim of ineffective assistance of counsel alleges a violation of the fundamental constitutional right to a fair trial. *State v. Dragon*, 287 Neb. 519, 843 N.W.2d 618 (2014). The U.S. Supreme Court recognized the limits of an ineffective assistance of counsel claim when it stated: "We have long recognized . . . that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not [e]nsure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 134, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). In *Anderson v. U.S.*, 393 F.3d 749 (8th Cir. 2005), the U.S. Court of Appeals for the Eighth Circuit cited *Engle v. Isaac* when it determined that a counsel's performance was not constitutionally deficient. In *Anderson*, the court rejected the defendant's claim that counsel's failure to raise a constitutional challenge to his plea-based conviction was ineffective assistance of counsel. The Eighth Circuit Court stated that "[w]hile the argument, in hindsight, may have had merit, it was a wholly novel claim at the time," noting that no published opinion had addressed the issue. *Id.* at 754. The court concluded that "[c]ounsel's failure to raise this novel argument does not render his performance constitutionally ineffective." *Id.*

Courts in other jurisdictions have similarly concluded that "counsel's failure to advance novel legal theories or arguments does not constitute ineffective performance." *Ledbetter v. Commissioner of Correction*, 275 Conn. 451, 461, 880 A.2d 160, 167 (2005) (citing various cases). Such novel legal theories or arguments may include challenges to the constitutionality of the statute pursuant to which the defendant is convicted. In *Hughes v. State*, 266 Ga. App. 652, 598 S.E.2d 43 (2004), the court concluded that trial counsel's failure to challenge the statute pursuant to which the defendant was convicted as unconstitutionally vague was not ineffective assistance, because counsel was not required to anticipate changes in the law or pursue novel theories of defense. The court in *Hughes* noted that the defendant had not cited, and it had not found, any case addressing a similar constitutional challenge to the statute at issue.

[7,8] In a similar vein, we have stated that the failure to anticipate a change in existing law does not constitute deficient performance. *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011), citing *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). It logically follows, and we now conclude, that counsel's failure to raise novel legal theories or arguments or to make novel constitutional challenges in order to bring a change in existing law does not constitute deficient performance. We apply this proposition in the current case and conclude counsel were not deficient in their performance.

In the present case, Sanders asserts that counsel at his trial and on his direct appeal were deficient when they failed to challenge the constitutionality of § 28-1212.04. Sanders does not cite, and we do not find, cases raising similar challenges to the statute. This court has decided two published cases, *State v. Castillas*, 285 Neb. 174, 826 N.W.2d 255 (2013), and *State v. Ross*, 283 Neb. 742, 811 N.W.2d 298 (2012), which involved an earlier version of § 28-1212.04 that did not include amendments that were effective July 15, 2010. Neither case included or hinted at a challenge to the constitutionality of the statute. We determine that the constitutional challenge to § 28-1212.04 that Sanders asserts his counsel should have

made was a novel constitutional challenge at the time of his trial and direct appeal in 2011 and 2012. This is true whether the challenge would have related to language that has been in the statute since its enactment or whether it related to language that was added by the 2010 amendments.

We determine that counsel in this case could not have been shown to be deficient for failing to make a constitutional challenge to § 28-1212.04 and that therefore, Sanders could not show ineffective assistance of counsel. Although our reasoning differs from that of the district court, we conclude that the court did not err when it denied this claim without an evidentiary hearing.

*The Record Refutes the Claim That Counsel Was Ineffective for Failing to File a Motion to Suppress, and Therefore, the District Court Did Not Err When It Denied the Claim Without an Evidentiary Hearing.*

Sanders claims that the court erred when it denied relief without an evidentiary hearing on his claim that trial counsel was ineffective for failing to move to suppress evidence obtained as a result of the stop and search of his vehicle. We conclude that the court did not err when it determined that the record refutes this claim and denied this claim without an evidentiary hearing.

Sanders asserts two separate bases in support of his claim that counsel was ineffective for failing to move to suppress evidence. He first asserts that counsel should have moved to suppress the evidence on the basis that the stop of his vehicle was illegal. In this regard, Sanders indicates that the stop was based on 911 calls and he refers us to cases involving uncorroborated anonymous calls which proved not sufficiently reliable to justify a stop. Second, he asserts that counsel should have moved to suppress the evidence found in the vehicle on the basis that the warrantless search of his vehicle was illegal because it was not a proper search incident to arrest.

With regard to the legality of the stop, in his postconviction motion, Sanders cites *Florida v. J. L.*, 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000), in which the U.S. Supreme

Court held that an anonymous tip lacked sufficient indicia of reliability to establish reasonable suspicion for an investigatory stop. We recently discussed *Florida v. J. L.* and anonymous tips in *State v. Rodriguez*, 288 Neb. 878, 852 N.W.2d 705 (2014). Although prior to *Rodriguez*, we had not extensively discussed the current state of Fourth Amendment law with regard to anonymous tips, *Florida v. J. L.* and other precedent regarding anonymous tips existed at the time of Sanders' trial in this case. Therefore, in contrast to the novelty of a constitutional challenge to § 28-1212.04 discussed above, a Fourth Amendment challenge to evidence obtained from an illegal stop based solely on an anonymous tip would not have been a novel challenge at the time of Sanders' trial.

Reading the assertions in Sanders' motion for postconviction relief generously, Sanders suggests that the stop of his vehicle was an illegal stop because it was based on an anonymous tip. Even so reading the motion, the claim must fail because the record indicates that the traffic stop was justified and, therefore, refutes Sanders' claim regarding the propriety of the stop.

The officer who stopped Sanders testified at trial. The officer stated that he began following Sanders' vehicle after he received a dispatch regarding 911 calls reporting shots fired and a suspect vehicle that matched the description and location of Sanders' vehicle. The officer testified that while he was following Sanders' vehicle, the driver was initially following traffic laws. However, at a later point, the vehicle executed an illegal turn. The "short corner" maneuver was described in part as accelerating through a sharp turn, cutting the turn short such that the officers lost sight of the vehicle. The officer testified that thereafter, the vehicle "returned to following all traffic laws, signaling turns, [and] remain[ing] within the speed limit" and that no further "erratic driving was observed at that point."

[9,10] The testimony indicates that there was a traffic violation that gave the officer a basis to make a stop without regard to the 911 calls. We have said that a traffic violation, no matter how minor, creates probable cause for an officer to stop the driver of a vehicle. *State v. Nolan*, 283 Neb. 50, 807

N.W.2d 520 (2012). The question before us is not whether the officer issued a citation for a traffic violation or whether the State ultimately proved the violation. Instead, a stop of a vehicle is objectively reasonable when the officer has probable cause to believe that a traffic violation has occurred. *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008). If an officer has probable cause to stop a violator, the stop is objectively reasonable and any ulterior motivation is irrelevant. *Id.* The records and files refute Sanders' assertion that there were insufficient facts to justify the stop. Thus, we conclude that the record showed that Sanders was not entitled to relief on this theory of his claim and that the district court did not err when it denied an evidentiary hearing on the claim that counsel was ineffective for failing to file a motion to suppress based on an illegal stop.

With regard to the challenge of the warrantless search of his vehicle as an incident to an arrest, Sanders cited *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), in his postconviction motion and asserts that it stands for the proposition that a warrantless search of a defendant's vehicle after a defendant has been handcuffed and placed in the back of a squad car violates the Fourth Amendment's prohibition of unreasonable searches and seizures. He argued that under *Arizona v. Gant*, the warrantless search of his vehicle after he had been arrested was illegal because he was not able to either grab a weapon or destroy evidence from the vehicle and that therefore, the search was not justified as a search incident to arrest.

[11] Sanders' reference to *Arizona v. Gant* is incomplete. The complete holding in *Arizona v. Gant* was, "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search *or it is reasonable to believe the vehicle contains evidence of the offense of arrest*." 556 U.S. at 351 (emphasis supplied). The record in this case indicates that at trial, officers testified that Sanders' vehicle was stopped and that he was subsequently taken into custody. Sanders was taken into custody on the basis of reports that shots had been fired at a house from a vehicle matching the

description of Sanders' vehicle. Officers looked through the window of the vehicle and observed loose ammunition in plain sight. Therefore, it was reasonable for officers to believe that Sanders' vehicle contained evidence of the offense for which Sanders as a recent occupant had been arrested.

Sanders states in his motion that "[n]o arrest [had been] made at the time of the search . . . ." He therefore argues that the warrantless search of his vehicle could not have been a search incident to arrest. However, Sanders also asserted in the motion that he had been "stopped, handcuffed, and placed in the backseat of the police cruiser." The record contains testimony at trial that prior to the search, officers had taken Sanders into custody, handcuffed him, and placed him under arrest. The record therefore shows that the search was made incident to Sanders' arrest and was based on a reasonable belief that the vehicle contained evidence of the offense for which Sanders was arrested.

The records and files in the case affirmatively show that Sanders was entitled to no relief on this claim, and we therefore conclude that the district court did not err when it denied an evidentiary hearing on Sanders' claim that counsel was ineffective for failing to move to suppress evidence based on the warrantless search of his vehicle.

## CONCLUSION

As explained above, Sanders was not entitled to an evidentiary hearing on any of his claims, and we affirm the district court's denial of his motion for postconviction relief.

AFFIRMED.

CASSEL, J., not participating.

# STATE OF NEBRASKA, APPELLEE, V. LUIS FERNANDO-GRANADOS, APPELLANT.

854 N.W.2d 920

Filed October 31, 2014. No. S-13-899.

1. **Postconviction: Appeal and Error.** Appeals of postconviction proceedings will be reviewed independently if they involve a question of law.
2. **Postconviction.** A trial court's ruling that the petitioner's allegations are too conclusory is a finding as a matter of law that the petitioner has failed to state a claim for postconviction relief.
3. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
4. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing the claim, an appellate court reviews the factual findings of the lower court for clear error. However, with regard to the questions of deficient performance and prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
5. **Postconviction: Constitutional Law: Proof.** The Nebraska Postconviction Act provides relief to a convicted prisoner if that prisoner can show that his or her conviction was the result of an infringement of the prisoner's constitutional rights.
6. **Postconviction.** Upon presentation of a motion for postconviction relief to the court, the court may set aside the judgment if it is found to be void or voidable.
7. ____. Postconviction relief may be denied without an evidentiary hearing if (1) the petitioner failed to allege facts supporting a claim of ineffective assistance of counsel or (2) the files and records affirmatively show that he or she is entitled to no relief.
8. **Effectiveness of Counsel.** In an ineffective assistance of counsel claim, there must be a finding of both deficiency of counsel and prejudice to the defendant's case.
9. ____. In an ineffective assistance of counsel claim, deficient performance and prejudice may be addressed in either order.
10. **Effectiveness of Counsel: Presumptions.** The entire ineffective assistance of counsel analysis should be viewed with a strong presumption that counsel's actions were reasonable.
11. **Effectiveness of Counsel: Proof.** Prejudice in an ineffective assistance of counsel case is shown when there is a reasonable probability, or a probability sufficient to undermine confidence in the outcome, that but for counsel's deficient performance, the result of the proceeding would have been different.

Appeal from the District Court for Douglas County: DUANE C. DOUGHERTY, Judge. Affirmed.

James J. Regan for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

In 2003, following a bench trial, Luis Fernando-Granados was convicted of first degree murder and use of a deadly weapon to commit a felony. We affirmed Fernando-Granados' convictions on direct appeal.[1] In 2012, Fernando-Granados brought a motion for postconviction relief in the district court for Douglas County, claiming ineffective assistance of counsel, prosecutorial misconduct, and a violation of the terms of the Vienna Convention on Consular Relations. The district court dismissed Fernando-Granados' motion without an evidentiary hearing. Fernando-Granados appeals the dismissal of his ineffective assistance of counsel claim.

## BACKGROUND

### ORIGINAL TRIAL AND APPEAL

The facts of the original crime are summarized below, but are set forth in greater detail in *State v. Fernando-Granados*.[2]

On May 26, 2002, the body of the victim was found in the parking lot of a restaurant in Douglas County. Authorities arrested two suspects in the subsequent investigation, including Fernando-Granados. During police questioning, Fernando-Granados confessed to the murder of the victim in the course of an armed robbery. The evidence against Fernando-Granados included the victim's personal effects,

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[1] See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004).

[2] *Id*.

such as her checkbook, credit cards, and driver's license, which were found in Fernando-Granados' apartment. DNA and other physical evidence also linked Fernando-Granados' cash and footprints to the scene of the crime. In particular, the victim had been run over by a car during her murder. Tire prints on her clothing and body were linked to the car driven by Fernando-Granados and his accomplice.

Trial counsel for Fernando-Granados was employed through the Douglas County public defender's office. Counsel mounted defenses primarily based on admissibility of evidence. After a bench trial, the trial court found Fernando-Granados guilty of first degree murder and use of a deadly weapon to commit a felony. He was sentenced to life imprisonment, plus an additional 10 to 20 years for the weapon conviction. The terms were to be served consecutively.

On direct appeal, Fernando-Granados retained his counsel from the Douglas County public defender's office. Defense counsel argued that Fernando-Granados was inadequately advised of his *Miranda* rights prior to confession. Further, counsel argued that the trial court erred in receiving certain DNA evidence at trial. We upheld the rulings of the trial court.

### Motion for Postconviction Relief

In 2012, Fernando-Granados filed a motion for postconviction relief. In his motion, he alleged ineffective assistance of counsel on several grounds. Among Fernando-Granados' complaints were failure to request an independent forensic expert, failure to object to certain hearsay testimony, and failure to investigate and interview several other potential witnesses. Further, Fernando-Granados claimed that counsel erred in failing to raise on direct appeal issues of prosecutorial misconduct and an alleged infringement of his rights under the Vienna Convention on Consular Relations. Altogether, Fernando-Granados raised 24 specific instances of ineffective assistance of counsel in his initial motion. Fernando-Granados requested an evidentiary hearing on these claims.

The claims were dismissed without an evidentiary hearing. On appeal, Fernando-Granados argues that the trial court

erred in dismissing, without an evidentiary hearing, four instances of ineffective assistance of counsel, all involving a failure to investigate. Specifically, Fernando-Granados names four individuals and claims that each witness could have testified against Michael Puzynski. Fernando-Granados claims that Puzynski had a motive to commit the murder of which Fernando-Granados was convicted.

Fernando-Granados alleged the nature of the testimony that could have been provided by each potential witness. In his motion for postconviction relief, Fernando-Granados asserted that counsel should have interviewed and investigated Kara Rassmussen. Fernando-Granados asserts that, if called, Rassmussen would have testified against Puzynski, stating that Puzynski had a similar car to the one involved in the crime, that Puzynski was being investigated by the Omaha Police Department for theft of the victim's frequent flier points at the time of her death, and that Puzynski had stated the victim "'was an annoying bitch that should be dead.'"

In his motion, Fernando-Granados alleges error in trial counsel's failure to interview and investigate Erin Gillespie, who would have corroborated the facts known by Rassmussen, and added that Gillespie heard Puzynski state, "'I wish she was dead.'"

Fernando-Granados further states that Deputy G. Scheer could have testified that Rassmussen contacted him at the Douglas County sheriff's office with the above information soon after the crime occurred.

Fernando-Granados also states that Sgt. M.R. Gentile also received the information regarding Puzynski from Gillespie and could testify as to that information.

## ASSIGNMENTS OF ERROR

Fernando-Granados asserts, restated, that the trial court erred in failing to grant him an evidentiary hearing. He argues that the alleged facts in his motion for postconviction relief, if proved, would constitute an infringement of his constitutional rights resulting from ineffective assistance of trial counsel.

## STANDARD OF REVIEW

[1] Appeals of postconviction proceedings will be reviewed independently if they involve a question of law.[3]

[2] A trial court's ruling that the petitioner's allegations are too conclusory is a finding as a matter of law that the petitioner has failed to state a claim for postconviction relief.[4]

[3] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[5]

[4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[6] When reviewing the claim, an appellate court reviews the factual findings of the lower court for clear error. However, with regard to the questions of deficient performance and prejudice under *Strickland v. Washington*,[7] an appellate court reviews such legal determinations independently of the lower court's decision.[8]

## ANALYSIS

[5-8] The Nebraska Postconviction Act provides relief to a convicted prisoner if that prisoner can show that his or her conviction was the result of an infringement of the prisoner's constitutional rights.[9] Upon presentation of a motion for postconviction relief to the court, the court may set aside the judgment if it is found to be void or voidable.[10] Postconviction relief may be denied without an evidentiary hearing if (1) the petitioner failed to allege facts supporting a claim of

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[3] See *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

[4] See *State v. Edwards*, 284 Neb. 382, 821 N.W.2d 680 (2012).

[5] *Id.*

[6] *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

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

[8] *State v. Rocha, supra* note 6.

[9] Neb. Rev. Stat. § 29-3001(1) (Cum. Supp. 2012).

[10] § 29-3001(2).

ineffective assistance of counsel or (2) the files and records affirmatively show that he or she is entitled to no relief.[11] In an ineffective assistance of counsel claim, there must be a finding of both deficiency of counsel and prejudice to the defendant's case.[12] We find that the trial court was correct to deny an evidentiary hearing for the reason that the files and records affirmatively show that no prejudice was caused to Fernando-Granados' case.

[9,10] In order to show ineffective assistance of counsel under *Strickland v. Washington*,[13] a defendant must show, first, that counsel was deficient and, second, that the deficient performance actually caused prejudice to the defendant's case. The two prongs of this test may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.[14]

[11] Prejudice caused by counsel's deficiency is shown when there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[15] A reasonable probability is "a probability sufficient to undermine confidence in the outcome."[16] This court follows the approach to the prejudice inquiry outlined by the U.S. Supreme Court in *Strickland*:

> "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect

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[11] See, *State v. Glover*, 276 Neb. 622, 756 N.W.2d 157 (2008); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007). See, also, *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[12] *Strickland v. Washington, supra* note 7.

[13] *Id.*

[14] See, *State v. Soukharith*, 260 Neb. 478, 618 N.W.2d 409 (2000); *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

[15] See *State v. Poe*, 284 Neb. 750, 822 N.W.2d 831 (2012).

[16] *Id.* at 774, 822 N.W.2d at 849.

> on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."[17]

In *State v. Poe*,[18] the petitioner, Ryan L. Poe, filed a post-conviction motion claiming trial counsel was ineffective for failing to elicit testimony of Poe's father and failing to pursue avenues of impeachment with other witnesses. Poe submitted affidavits to the district court detailing his father's proposed testimony proving Poe's alibi. Poe alleged his father also would have testified that Poe did not have financial need to commit the robbery of which Poe was convicted, thus allegedly negating Poe's motive.[19] Finally, Poe alleged that, if cross-examined, an adverse witness would have said that "'the police were trying to get him to say something that was not true.'"[20] The district court denied Poe an evidentiary hearing.

We held that an allegation of trial counsel's failure to call a witness who might negate an alleged motive was insufficient to warrant an evidentiary hearing.[21] In so holding, we reasoned that the proposed testimony in the affidavit did not involve facts tending to negate Poe's fault or culpability and, thus, was not prejudicial.[22]

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[17] *Id.* at 774-75, 822 N.W.2d at 849 (quoting *Strickland v. Washington, supra* note 7).

[18] *State v. Poe, supra* note 15.

[19] *Id.*

[20] *Id.* at 773, 822 N.W.2d at 848.

[21] *State v. Poe, supra* note 15.

[22] See *id.*

However, where the witness could have testified to Poe's alibi, the allegation was sufficient to warrant an evidentiary hearing. Similarly, where defense counsel failed to properly cross-examine a witness as to a prior inconsistent statement, the allegation was sufficient to warrant an evidentiary hearing.[23] We could not say, as a matter of law, that had defense counsel pursued the specified avenue of interrogation at trial, the result would not have been different.[24] Though defense counsel could have had reason for not pursuing this avenue of impeachment, an evidentiary hearing was necessary to determine more facts and whether or not trial counsel's strategy was reasonable.

Here, all of Fernando-Granados' arguments concern alleged evidence of another suspect who had a motive to murder the victim. Fernando-Granados alleges that witnesses would have testified Puzynski "wish[ed] [the victim] was dead" and that Puzynski was being investigated for a theft of the victim's frequent flier miles.

There was overwhelming evidence against Fernando-Granados in his original trial. Fernando-Granados confessed to the crimes of robbery and murder. Evidence connected the victim's DNA to Fernando-Granados' home and to his personal belongings. Circumstantial evidence showed that Fernando-Granados was with his accomplice the night he was involved in the robbery. Fernando-Granados' live-in girlfriend testified against him in connection with the robbery and murder. Fruits of the crime, such as cash and the victim's personal belongings, were all found with Fernando-Granados. The proposed testimony supposedly would have shown that Puzynski had, on one instance, threatened to kill the victim and that Puzynski had motive to kill the victim. However, given the substantial corroborating evidence indicating Fernando-Granados' guilt, evidence that another person may have wanted to kill the victim would not have been enough to change the direction of the case.

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[23] *Id.*

[24] *Id.*

None of the proposed allegations called into question Fernando-Granados' fault or culpability. Therefore, we find that, given the great weight of the evidence against Fernando-Granados, there was no ineffective assistance of counsel because there was no prejudice to Fernando-Granados' case.

## CONCLUSION

The trial court did not err in denying Fernando-Granados an evidentiary hearing because, given the great weight of the evidence against him, even finding the allegations true would not have been prejudicial to Fernando-Granados' case.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LENNY W. THEBARGE, JR., RESPONDENT.

854 N.W.2d 914

Filed October 31, 2014. Nos. S-13-1001, S-14-128.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. Failure to answer formal charges subjects a respondent to judgment on the formal charges filed.
3. ____. Six factors are considered in determining whether and to what extent discipline should be imposed: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.
5. ____. Absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.
6. ____. Neglect of client cases and failure to cooperate with the Counsel for Discipline are grounds for disbarment.
7. ____. Fabricating evidence with the intent to deceive the Counsel for Discipline interferes in a disciplinary investigation, which merits a severe sanction.
8. ____. In an attorney discipline proceeding, failure to regard the rules of professional conduct and failure to abide by one's oath as an attorney are considered aggravating factors.

Original actions. Judgment of disbarment.

Kent L. Frobish and John W. Steele, Assistant Counsels for Discipline, for relator.

No appearance for respondent.

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

PER CURIAM.

## NATURE OF CASE

Lenny W. Thebarge, Jr. (Respondent), a member of the Nebraska State Bar Association, has been formally charged with violations of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. Formal charges involved misappropriation of client funds, failure to communicate with clients, and obstruction of justice. We granted judgment on the pleadings, and we now determine the appropriate discipline for Respondent.

## BACKGROUND

In 2011, Respondent was admitted to practice law in the State of Nebraska. At all times relevant to these proceedings Respondent was engaged in the private practice of law in Omaha, Nebraska.

Charges against Respondent are set forth below in detail. Respondent has not answered any of the formal charges against him, and therefore, judgment on the pleadings was entered.

### COUNT I

In April 2012, Respondent was engaged in legal services with his client Jonathan Nelson. On August 28, 2012, Respondent received a check for $10,939.50 on behalf of Nelson. Respondent placed the check in his client trust fund account. Nelson says he never gave Respondent permission to apply this check to his outstanding bill, although Respondent claims he was authorized by Nelson to do so. However, on August 29, Respondent withdrew $1,700 from his client trust fund, leaving an account balance of only $9,989.50 and leaving Respondent out of trust by $950 in regard to Nelson's funds.

In November 2012, Nelson filed a grievance with the Counsel for Discipline, claiming that Nelson had never been provided an accounting on the check received by Respondent. During the investigation, Respondent claimed he had a written fee agreement with Nelson, but failed to provide copies of the written fee agreement to the Counsel for Discipline.

Therefore, Respondent was charged with violating and was determined to have violated Neb. Ct. R. of Prof. Cond. §§ 3-501.15 (safekeeping property), 3-501.16 (declining or terminating representation), 3-508.1 (bar admission and disciplinary matters), and 3-508.4 (misconduct).

### Count II

In October 2012, Respondent engaged in legal services for Kimberly Cabriales. Cabriales paid Respondent an advance fee of $300. Respondent deposited Cabriales' check into his trust account. Prior to this deposit, Respondent's client trust account had a zero balance. Immediately upon depositing Cabriales' check, Respondent transferred $200 from the trust account to his own personal account, leaving a balance in the trust account of only $100. The next day, Respondent transferred the remaining $100 to another account owned by Respondent.

Cabriales filed a grievance with the Counsel for Discipline. In response to the grievance, Respondent submitted copies of four letters he claims he mailed to Cabriales in October, November, and December 2012. However, these letters were dated 2013. Cabriales denies ever having received any letters from Respondent, while Respondent claims that none of the letters were returned to him by the post office. Respondent refused the Counsel for Discipline's request to have his computer examined by an expert to establish when the letters in question were actually created on Respondent's computer. Therefore, it is assumed that the four letters were fabricated for purposes of the grievance filed by Cabriales.

Therefore, Respondent was charged with violating and was determined to have violated Neb. Ct. R. of Prof. Cond. §§ 3-501.3 (diligence) and 3-501.4 (communications) and

conduct rules §§ 3-501.15 (safekeeping property), 3-508.1 (bar admission and disciplinary matters), and 3-508.4 (misconduct).

### Count III

In June 2013, Respondent engaged in legal services for Michael Miller. Miller paid Respondent a $1,000 advance fee for the handling of his divorce. No portion of this advance fee was placed into Respondent's client trust fund account. Miller filed a grievance alleging that Respondent failed to communicate with him and failed to provide Miller with an accounting regarding his advance fee.

Therefore, Respondent was charged with violating and was determined to have violated conduct rules §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.15 (safekeeping property), and 3-508.4 (misconduct).

### Count IV

When Counsel for Discipline informed Respondent that it was performing an audit of his client trust account, he failed to produce any requested information.

Therefore, Respondent was charged with violating and was determined to have violated conduct rules §§ 3-501.15 (safekeeping property), 3-508.1 (bar admission and disciplinary matters), and 3-508.4 (misconduct).

### Count V

In July 2012, Respondent entered into legal services on behalf of Brian Rodwell to represent him regarding his child support. On July 25, Rodwell paid Respondent a $1,500 advance fee, against which Respondent agreed to bill Rodwell at an hourly rate. On July 26, Respondent had zero funds in his client trust account. On July 27, Respondent deposited Rodwell's advance fee payment into his trust account and immediately withdrew $1,000 of the funds. On July 30, Respondent withdrew Rodwell's remaining $500 from his trust account, leaving a zero balance.

Respondent filed a complaint to modify decree on behalf of Rodwell on May 23, 2013, but then failed to take further

action on behalf of Rodwell's case and failed to keep him informed of his case's status. On November 15, the district court issued a progression order stating that Rodwell's complaint to modify would be dismissed unless he failed to schedule a mediation. Respondent did not inform his client of this order, and no response to the district court was filed.

Therefore, Respondent was charged with violating and was determined to have violated conduct rules §§ 3-501.3 (diligence), 3-501.4 (communications), 3-501.15 (safekeeping property), and 3-508.4 (misconduct).

### Proceedings Against Respondent

On December 18, 2013, Respondent's license to practice law was suspended by the Nebraska Supreme Court. Respondent failed to notify either the district court or Rodwell of his suspension.

Formal charges were entered against Respondent on February 13, 2014. The process server has stated that after diligent search and inquiry, Respondent could not be found in Douglas County, Nebraska. The process server also stated that he verified the address with Respondent's apartment manager and that Respondent was avoiding service.

On May 7, 2014, we granted judgment on the pleadings and the facts were deemed established. On June 30, counsel appointed for Respondent in this matter resigned due to a failure by Respondent to communicate with counsel in any respect since the filing of formal charges. Respondent then failed to submit a brief, and thus waived his oral argument.

## STANDARD OF REVIEW

[1,2] A proceeding to discipline an attorney is a trial de novo on the record.[1] Failure to answer formal charges subjects a respondent to judgment on the formal charges filed.[2]

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[1] *State ex rel. Counsel for Dis. v. Chapin*, 270 Neb. 56, 699 N.W.2d 359 (2005).

[2] *State ex rel. Counsel for Dis. v. Bouda*, 282 Neb. 902, 806 N.W.2d 879 (2011).

## ANALYSIS

An attorney is bound to the Nebraska Rules of Professional Conduct, under which an attorney must perform diligently and promptly in representing a client, communicate fully with a client, and properly administrate a client's funds in a separate trust account until the attorney has earned the fees he withdraws.[3] Further, a lawyer cannot withdraw from or terminate representation unless the lawyer takes steps to protect a client's interests, gives notice to the client, and surrenders papers and property to which the client is entitled.[4] Lawyers must respond to demands for information in disciplinary investigations and are prohibited from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.[5] Finally, a lawyer cannot engage in conduct that is prejudicial to the administration of justice, including failing to give the Counsel for Discipline access to the records of a trust account for auditing purposes.[6]

[3,4] The goal of attorney disciplinary proceedings is not as much punishment as determination of whether it is in the public interest to allow an attorney to keep practicing law.[7] We consider six factors in determining whether and to what extent discipline should be imposed: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[8] Further, in determining the appropriate sanction, we consider the discipline imposed in similar

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[3] See, § 3-501.3; § 3-501.4; § 3-501.15.

[4] § 3-501.16(c) and (d).

[5] See, § 3-508.1(a) and (b); § 3-508.4(a) and (c).

[6] See, § 3-508.4(d); Neb. Ct. R. § 3-906.

[7] See *State ex rel. Counsel for Dis. v. Orr*, 277 Neb. 102, 759 N.W.2d 702 (2009).

[8] *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012).

circumstances.[9] Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[10] We have noted that "'a pattern of neglect reveals a particular need for a strong sanction to deter others from similar misconduct, to maintain the reputation of the bar as a whole, and to protect the public.'"[11]

[5] We have held that absent mitigating circumstances, disbarment is the appropriate discipline in cases of misappropriation or commingling of client funds.[12] In cases involving misappropriation and commingling of client funds, mitigating factors overcome the presumption of disbarment only if they are extraordinary.[13]

[6,7] Similarly, neglect of client cases and failure to cooperate with the Counsel for Discipline are grounds for disbarment.[14] We have stated that an attorney's failure to make timely responses to inquiries of the Counsel for Discipline violates ethical canons and disciplinary rules which prohibit conduct prejudicial to the administration of justice[15] and that an attorney's failure to respond to inquiries and requests for information from the office of the Counsel for Discipline is considered to be a grave matter and a threat to the credibility of attorney disciplinary proceedings.[16] Even worse, fabricating evidence with the intent to deceive the Counsel for Discipline interferes in a disciplinary investigation, which we have held merits a severe sanction.[17]

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 338, 808 N.W.2d at 642.

[12] *State ex rel. Counsel for Dis. v. Crawford*, 285 Neb. 321, 827 N.W.2d 214 (2013).

[13] *State ex rel. Counsel for Dis. v. Wintroub*, 267 Neb. 872, 678 N.W.2d 103 (2004).

[14] See *State ex rel. Counsel for Dis. v. Coe*, 271 Neb. 319, 710 N.W.2d 863 (2006).

[15] See *State ex rel. NSBA v. Simmons*, 259 Neb. 120, 608 N.W.2d 174 (2000).

[16] *State ex rel. Counsel for Dis. v. Crawford, supra* note 12.

[17] See *State ex rel. Counsel for Dis. v. Ellis*, *supra* note 8.

In *State ex rel. Counsel for Dis. v. Ellis*,[18] the respondent was facing sanctions for a failure to communicate with his clients. The respondent in *Ellis* claimed he had told the clients about an impending dismissal of their case. After an investigation of the respondent's computer, it was found that the respondent had fabricated the letter he alleged to have sent to his clients.[19] There, the respondent was disbarred from the practice of law in Nebraska. The court considered particularly that the respondent had been dishonest and had engaged in fraud, deceit, and misrepresentation.

As reiterated in the formal charges, Respondent did not communicate with his clients regarding their cases and did not properly appropriate his clients' trust fund accounts. He did not properly withdraw from representation of any of his clients and still maintains their files to this day. Correspondingly, Respondent prejudiced several of his clients' cases; in particular, he allowed Rodwell's case to be dismissed completely for failure to update the court. The Respondent has not cooperated with the Counsel for Discipline in its efforts to investigate his case, and in fact, Respondent is evading service from the Counsel for Discipline and this court. Respondent failed to provide records necessary to audit his client trust account. In the one instance when Respondent did reply to the Counsel for Discipline, he fabricated evidence of alleged communication with his clients. Thus, Respondent has engaged in dishonesty, fraud, deceit, and misrepresentation.

[8] Because Respondent has not given any sign of mitigating factors to the court, there are none to consider. However, it is considered an aggravating factor that he has exhibited a complete failure to regard the rules of professional conduct and abide by his oath as an attorney. In order to protect the public and to end Respondent's pattern of conduct, disbarment is the proper sanction.

Upon due consideration of the facts of this case, and based upon Respondent's cumulative acts of misconduct and

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[18] *Id.*

[19] *Id.*

disrespect for this court's disciplinary jurisdiction, the court finds that the proper sanction is disbarment.

## CONCLUSION

It is the judgment of this court that Respondent should be and is hereby disbarred from the practice of law, effective immediately. Respondent is directed to pay costs and expenses, if any, in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012).

JUDGMENT OF DISBARMENT.

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# STATE OF NEBRASKA, APPELLEE, V. KERSTIN M. PIPER, ALSO KNOWN AS KERSTIN M. CLARKSON, APPELLANT.

855 N.W.2d 1

Filed October 31, 2014. No. S-13-1029.

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. **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.
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. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
8. ____. 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.
9. ____. Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
10. **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.
11. **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.
12. **Motions to Suppress: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.
13. **Motions to Suppress: Trial: Pretrial Procedure: Appeal and Error.** When a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress.
14. **Pretrial Procedure: Rules of Evidence.** A suppression hearing is a preliminary hearing within the meaning of Neb. Evid. R. 1101(4)(b), Neb. Rev. Stat. § 27-1101(4)(b) (Reissue 2008).
15. ____: ____. In a criminal case, the Nebraska rules of evidence do not apply to suppression hearings.
16. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect individuals against unreasonable searches and seizures by the government.
17. **Constitutional Law: Highways: Motor Vehicles: Investigative Stops: Search and Seizure.** A vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.
18. **Highways: Investigative Stops.** A highway checkpoint must be both authorized by an approved plan and conducted in a manner that complies with the plan and the policy established by the authority at the policymaking level.

Appeal from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES M. WORDEN, Judge. Judgment of District Court affirmed.

Bell Island, of Island & Huff, P.C., L.L.O., 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.

## I. NATURE OF CASE

Kerstin M. Piper, also known as Kerstin M. Clarkson, appeals from the district court's order which affirmed her conviction and sentence in the county court for driving while under the influence (DUI), second offense. She challenges the county court's determinations that the Nebraska rules of evidence did not apply at the hearing on her motion to suppress and that the Nebraska State Patrol checkpoint at which Piper was stopped was constitutional. Finding no error in these determinations, we affirm the order of the district court which affirmed Piper's conviction and sentence.

## II. SCOPE 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.* 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. *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013).

[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. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014). 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. *Id.*

## III. FACTS

On July 14, 2012, at approximately 12:30 a.m., the vehicle driven by Piper was stopped at a vehicle checkpoint in Scotts Bluff County, Nebraska. Nebraska State Patrol Trooper Edward J. Petersen approached the vehicle and asked to see Piper's driver's license, vehicle registration, and proof of insurance. He observed that Piper's eyes were bloodshot and watery and that an odor of alcohol was emanating from the vehicle. There were two other people in the vehicle besides Piper.

At Petersen's instruction, Piper drove her vehicle to a nearby parking lot and joined Petersen in his cruiser. Inside the cruiser, Petersen noted an odor of alcohol emanating from Piper's person and decided to administer several standardized, as well as nonstandardized, field sobriety tests, including a preliminary breath test. Because the preliminary breath test registered a breath alcohol content of .174 of 1 gram of alcohol per 210 liters of breath, Petersen arrested Piper for DUI.

At the Scotts Bluff County corrections facility, Petersen administered a chemical breath test, which produced a result of .134 of 1 gram of alcohol per 210 liters of breath. Piper was subsequently charged by complaint in county court with DUI, second offense. (She had previously been convicted of DUI in 2005.)

Piper moved to suppress "all fruits of the illegal search and seizure, and her subsequent arrest." At the suppression hearing, over Piper's objection, the county court determined that the rules of evidence did not apply.

The State adduced evidence regarding the administration of the July 14, 2012, checkpoint. Petersen testified that the operation of the checkpoint was governed by State Patrol policy; that the checkpoint was operated according to a plan approved by Sgt. Dana Korell, who worked in a "supervisory capacity" at the State Patrol; and that to Petersen's knowledge, every car that came through the checkpoint was stopped. He also testified to the purpose for the checkpoint: "[W]e were specifically doing a DUI — you know, it was an alcohol-related enforcement project." He further explained, "I was paid through an alcohol enforcement grant. And that's what we were targeting

was alcohol-related violations, but I was just told that this was just a vehicle check." Piper offered no evidence at the suppression hearing.

The county court suppressed all evidence of the horizontal gaze nystagmus test, the nonstandardized field sobriety tests, and the preliminary breath test. It concluded that (1) the July 14, 2012, checkpoint "conform[ed] to the standard established . . . for a proper police 'check point'"; (2) the odor of alcohol and Piper's watery eyes justified Petersen's continued investigation; and (3) there was probable cause to arrest Piper.

At the start of trial, Piper renewed her objection to any evidence obtained from the July 14, 2012, checkpoint. The county court stated that it was "reaffirming" its ruling on the motion to suppress, but recognized Piper's continuing objection on the issue. Piper also objected to the State's adducing any evidence regarding the checkpoint, because it "has already been litigated" and would thus be irrelevant. The court ruled as follows:

> So as far as any objections to testimony or information regarding the checkpoint, I will — I'm going to have to reserve my rulings for the — for the trial. If [the prosecutor] gets extremely detailed and I think we're wasting time, then, of course, an objection will probably be appropriate, and I'll probably sustain it, but I can't — I can't prejudge that.

Piper did not make any additional objections that the State's evidence regarding the checkpoint was repetitive.

The State presented evidence that the plan for the July 14, 2012, checkpoint was prepared by Lt. Jamey Balthazor and approved by Korell and that the checkpoint was governed by State Patrol "policy [No.] 07-29-01." The approved plan and policy No. 07-29-01 were received as exhibits. Balthazor testified that "[e]very car that came through [the checkpoint] was either stopped or had been through previously, at which time we identified the driver and the vehicle, and we did not recheck them after they had already been checked once." Another State Patrol officer who helped administer the checkpoint gave similar testimony.

The jury found Piper guilty of DUI, second offense. She was sentenced to 18 months' probation and ordered to pay a $500 fine. Additionally, her driver's license was revoked for 1 year.

Piper appealed to the district court. She claimed that the county court erred in failing to apply the rules of evidence at the suppression hearing and in failing to sustain the motion to suppress, because the checkpoint was invalid.

The district court affirmed Piper's conviction and sentence. Relying on *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011), it concluded that the rules of evidence did not apply to suppression hearings. It also found that the checkpoint was lawful, because it was implemented "pursuant to a written action plan adopted by the Nebraska State Patrol for this particular vehicle check stop" and because the "date, time, location, and method of selecting motorists to stop were not selected by the troopers in the field." The court held that the stop of Piper's vehicle was "not made at Petersen's 'unfettered discretion.'"

Piper timely appealed. 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

Piper assigns that the county court erred in (1) determining that the rules of evidence do not apply to a motion to suppress hearing and (2) failing to sustain Piper's motion to suppress the evidence obtained as a result of the stop, because the checkpoint was constitutionally invalid. By inference, she assigns that the district court erred in upholding the judgment of the county court.

## V. ANALYSIS

The questions presented by this appeal are (1) whether the rules of evidence apply at suppression hearings and (2) whether Piper's motion to suppress should have been sustained because the State Patrol checkpoint was unconstitutional. We address each question in turn.

### 1. Application of Rules of Evidence at Suppression Hearing

There are two statutes applicable to our determination whether the rules of evidence apply to a suppression hearing. Neb. Evid. R. 104, Neb. Rev. Stat. § 27-104 (Reissue 2008), provides in pertinent part as follows:

> (1) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to the provisions of subsection (2) of this section.
>
> . . . .
>
> (3) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests.

Neb. Evid. R. 1101, Neb. Rev. Stat. § 27-1101 (Reissue 2008), states as follows:

> (1) The Nebraska Evidence Rules apply to the following courts in the State of Nebraska: Supreme Court, Court of Appeals, district courts, county courts, and juvenile courts. . . .
>
> (2) The rules apply generally to all civil and criminal proceedings, including contempt proceedings except those in which the judge may act summarily.
>
> . . . .
>
> (4) The rules, other than those with respect to privileges, do not apply in the following situations:
>
> . . . .
>
> (b) Proceedings for extradition or rendition; preliminary examinations or hearings in criminal cases; sentencing or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

[7-10] In interpreting these statutes, we apply well-established principles of statutory interpretation. 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. *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013). Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013). 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. *State v. Medina-Liborio*, 285 Neb. 626, 829 N.W.2d 96 (2013). Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision. *State v. Hamilton*, 277 Neb. 593, 763 N.W.2d 731 (2009). 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).

This court has never explicitly considered whether the rules of evidence apply at suppression hearings. But we have held, more generally, that under § 27-104, the rules of evidence do not apply to a trial court's preliminary rulings on the admissibility of evidence.

In *State v. Pullens*, 281 Neb. 828, 800 N.W.2d 202 (2011), we considered whether the rules of evidence applied during a pretrial hearing to determine if a certain hearsay statement qualified as an excited utterance. The defendant had argued that the rules of evidence applied, because § 27-104 differed from the corresponding federal rule. Fed. R. Evid. 104(a) explicitly stated that in determining preliminary questions of admissibility, a court was "'not bound by the rules of evidence except those with respect to privileges.'" See *Pullens*, 281 Neb. at 841, 800 N.W.2d at 217 (quoting Fed. R. Evid. 104(a)). Section 27-104 omitted this statement so as "to avoid 'unduly encourag[ing] the trial judge to depart from the usual rules.'" See *Pullens*, 281 Neb. at 841, 800 N.W.2d at 217 (alteration in original).

We rejected the argument that this omission meant Nebraska had adopted a position contrary to that of federal law. We

determined that the "'usual rules'" in Nebraska "largely coincided" with the federal rules. See *id*. at 845, 800 N.W.2d at 219. We stated that Nebraska's rules of evidence were consistent with the U.S. Supreme Court's statement in *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), that "'the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence.'" See *Pullens*, 281 Neb. at 843, 800 N.W.2d at 218. Finally, we explained that there was "no logical necessity" to apply the rules of evidence to preliminary determinations of admissibility, because "the trial judge's experience and legal training can be relied on to inform crucial distinctions and to reveal the inherent weakness of evidence by affidavit or hearsay." See *id*.

Because the instant case does not present a hearsay question, Piper argues that *Pullens* is not applicable. But we do not agree. The question in *Pullens* was whether the rules of evidence applied to the evidence considered by a trial court when determining a preliminary question of the admissibility of evidence. It was not crucial to our holding that the court in *Pullens* was faced with a question about the admissibility of hearsay. Rather, our determination was based on "a historical analysis of preliminary determinations of admissibility" and the intent behind § 27-104. See *Pullens*, 281 Neb. at 841, 800 N.W.2d at 217.

*Pullens* is relevant and applicable to the instant case. It tells us that the interpretation of the Nebraska rules of evidence regarding preliminary questions of admissibility is consistent with the interpretation of the corresponding federal rules. See *Pullens, supra*. It also tells us that § 27-104 was never intended to treat preliminary questions of admissibility differently than Fed. R. Evid. 104(a). The federal approach is that the rules of evidence do not usually apply at hearings to determine preliminary questions of admissibility, including suppression hearings. See, Fed. R. Evid. 104(a); *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980); *Matlock, supra*. See, also, e.g., *U.S. v. Stepp*, 680 F.3d 651 (6th Cir. 2012); *U.S. v. Thompson*, 533 F.3d 964 (8th Cir. 2008); *U.S. v. Miramonted*, 365 F.3d 902 (10th Cir. 2004); *U.S.*

*v. Bunnell*, 280 F.3d 46 (1st Cir. 2002); *U.S. v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *reversed on other grounds* 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000); *U.S. v. Hodge*, 19 F.3d 51 (D.C. Cir. 1994); *United States v. Bent-Santana*, 774 F.2d 1545 (11th Cir. 1985), *abrogated on other grounds, Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990); *United States v. de la Fuente*, 548 F.2d 528 (5th Cir. 1977); *United States v. Bolin*, 514 F.2d 554 (7th Cir. 1975). Because our interpretation of the rules of evidence is meant to be the same as the federal rules, we conclude that under § 27-104, the rules of evidence do not apply at hearings to determine preliminary questions of admissibility, including suppression hearings.

We reach the same conclusion under § 27-1101(4)(b), which provides that the Nebraska rules of evidence do not apply to "preliminary examinations or hearings in criminal cases." Our rules of evidence do not specify what types of hearings qualify as preliminary hearings. Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State v. Au*, 285 Neb. 797, 829 N.W.2d 695 (2013).

[11] Piper advocates against giving the term "preliminary hearings" in § 27-1101(4)(b) its ordinary meaning. She argues that preliminary hearings are the same as preliminary examinations and that the language "preliminary examinations or hearings" refers only to proceedings held pursuant to Neb. Rev. Stat. § 29-1607 (Reissue 2008). She claims that as a result, the exception for "preliminary examinations or hearings" in § 27-1101(4)(b) applies only to the "preliminary examination" that is required to be held prior to the filing of an information. See § 29-1607. We reject Piper's argument, because § 27-1101(4)(b) includes "preliminary examinations *or hearings*." (Emphasis supplied.) If we accepted Piper's assertion that preliminary hearings are the same as preliminary examinations, then the statutory language "or hearings" would be rendered superfluous. 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. *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014).

There is no statutory indication that the reference to preliminary hearings in § 27-1101(4)(b) was meant to carry a special or limited meaning. Accordingly, we look to its ordinary meaning. Something that is preliminary is "something that precedes a main discourse, work, design, or business" or "something introductory or preparatory." Webster's Third New International Dictionary of the English Language, Unabridged 1789 (1993). Given this definition, a suppression hearing qualifies as a preliminary hearing.

A suppression hearing precedes the "main discourse" of a criminal case in the sense that a motion to suppress is decided prior to trial. See *id*. Neb. Rev. Stat. § 29-822 (Reissue 2008) provides that any person claiming an unlawful search and seizure generally must move to suppress the evidence so obtained at least 10 days before trial and that unless a claim of unlawful search and seizure is raised by motion before trial, it is deemed waived. "[I]t is clearly the intention of [§ 29-822] that motions to suppress evidence are to be ruled on and finally determined before trial, unless the motion is within the exceptions contained in the statute." *State v. Harms*, 233 Neb. 882, 892, 449 N.W.2d 1, 8 (1989).

[12-14] A suppression hearing is also preparatory, because it relates to "auxiliary" issues "not immediately relevant to the question of guilt" and is held in anticipation of certain evidence being introduced at a forthcoming trial. See Wayne R. LaFave et al., Criminal Procedure § 10.1 at 557 (5th ed. 2009). Additionally, "[w]hen a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal." See *State v. Smith*, 269 Neb. 773, 784, 696 N.W.2d 871, 882 (2005). And thus, "[w]hen a motion to suppress is denied pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearings on the motion to suppress." See *State v. Bromm*, 285 Neb. 193, 199, 826 N.W.2d 270, 275 (2013). A suppression hearing is a preliminary hearing within the meaning of § 27-1101(4)(b).

[15] For the foregoing reasons, we conclude that in a criminal case, our rules of evidence do not apply to suppression hearings. The district court did not err in affirming the county court's determination that it was not bound by the rules of evidence when considering Piper's motion to suppress.

### 2. Constitutionality of Checkpoint

The second question presented by Piper's appeal is whether all evidence obtained as a result of the July 14, 2012, checkpoint should have been suppressed because the checkpoint was unconstitutional. The county court concluded the checkpoint was constitutional and overruled the motion to suppress on two occasions—before trial and again during trial. On appeal, the district court also concluded that the checkpoint was constitutional and affirmed the county court's decision not to suppress the evidence.

Piper argues that in reviewing the constitutionality of the checkpoint, we should consider only that evidence adduced at the suppression hearing. We disagree. When a motion to suppress is overruled pretrial and again during trial on renewed objection, an appellate court considers all the evidence, both from trial and from the hearing on the motion to suppress. *Bromm, supra*. Therefore, in reviewing the district court's conclusion that the county court did not err in determining that the checkpoint was constitutional, we consider the evidence adduced both at the suppression hearing and at the trial.

#### (a) Background Legal Principles

[16,17] 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. *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014). "[A] vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment." *Indianapolis v. Edmond*, 531 U.S. 32, 40, 121 S. Ct. 447, 148 L. Ed. 2d 333 (2000). See, also, *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). Whether a checkpoint is lawful thus depends

upon whether it is reasonable. See *Sitz, supra*. "The reasonableness of seizures that are less intrusive than a traditional arrest . . . depends '"on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."'" *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979) (citations omitted).

The public interest served by a checkpoint is assessed according to the primary purpose of the checkpoint. See *Edmond, supra*. A court does not look at the subjective intent of individual law enforcement officers administering the checkpoint, but examines purpose "at the programmatic level." See *id.*, 531 U.S. at 48.

The U.S. Supreme Court has upheld the constitutionality of checkpoints "designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety." *Id.*, 531 U.S. at 41. In *Sitz*, 496 U.S. at 447, the Court approved the use of "sobriety checkpoints" meant to prevent drunken driving. And in *Illinois v. Lidster*, 540 U.S. 419, 124 S. Ct. 885, 157 L. Ed. 2d 843 (2004), the Court ruled that law enforcement could legally conduct checkpoints seeking information about a specific, recently committed hit-and-run accident.

Conversely, a vehicle checkpoint whose primary purpose was "to uncover evidence of ordinary criminal wrongdoing" violated the Fourth Amendment. See *Edmond*, 531 U.S. at 42. In *Edmond*, the Court explained:

> We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.

531 U.S. at 44.

The purpose of a checkpoint must be balanced against the checkpoint's "intrusion" on motorists' individual rights. See *Prouse*, 440 U.S. at 654. See, also, *Brown, supra*. The intrusion effectuated by a checkpoint can, depending on the

circumstances, be "slight" and "minimal." See *Sitz*, 496 U.S. at 451, 452. However, even where a checkpoint effectuates only a limited intrusion, it cannot subject motorists to "the unbridled discretion of law enforcement officials." See *Prouse*, 440 U.S. at 661. A "central concern in balancing" the public interest and the interference with individual liberty is "to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." See *Brown*, 443 U.S. at 51.

In *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986), we adopted the "unfettered discretion" standard of *Brown*. Several on-duty police officers, none of whom ranked higher than sergeant, had decided to set up unplanned, "transitory" checkpoints during their shift. See *Crom*, 222 Neb. at 274, 383 N.W.2d 461. The checkpoints were not governed by "any standards, guidelines, or procedures promulgated by the policymakers for the police department or other law enforcement agency." See *id.* at 274, 383 N.W.2d at 461-62. Rather, "[t]he officers were free to move the checkpoint from place to place and in fact established a number of such checkpoints at different locations throughout the city of Omaha at various times, as they alone saw fit." See *id.* at 274, 383 N.W.2d at 462.

We concluded that such checkpoints were unconstitutional. We explained that because "there was no plan formulated at the policymaking level of the Omaha Police Department, or elsewhere," the officers in the field were "left free to decide when, where, and how to establish and operate the transitory checkpoint in question." *Id.* at 277, 383 N.W.2d at 463. As such, motorists stopped at the checkpoints were subjected "to arbitrary invasion solely at the unfettered discretion of officers in the field." See *id.*

### (b) Application to July 14, 2012, Checkpoint

Considering these principles within the context of the instant appeal, we conclude that the July 14, 2012, checkpoint was reasonable. It was established for a permissible

purpose, involved only minimal intrusion, and was not operated according to the unfettered discretion of law enforcement officers.

*(i) Purpose*

Petersen testified that although the checkpoint was called a "vehicle check," it was funded by an "alcohol enforcement grant" and was part of an "alcohol-related enforcement project." He explained that the purpose of the checkpoint was to "target[] alcohol-related violations." Based on this evidence, the programmatic purpose of the checkpoint was comparable to that of the sobriety checkpoints upheld in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), and was thus permissible.

*(ii) Intrusion*

The intrusion caused by the checkpoint was minimal. Absent signs of criminal activity, each vehicle was stopped for only a brief period of time—the driver of each vehicle was allowed to proceed after an officer conducted a brief check of the motorist's condition, driver's license, vehicle registration, and insurance card, as well as the vehicle's lights, turn signals, brakes, horn, and windshield wipers. All vehicles were stopped. Thus, the intrusion caused by the checkpoint was no greater than the minimal intrusion caused by the checkpoints in *Sitz*.

*(iii) Discretion of Officers*

Piper argues that the July 14, 2012, checkpoint subjected motorists to the unfettered discretion of officers in the field, because the plan was "not formulated by a person at the policy making level, but by a person involved in the field." See brief for appellant at 15. She cites to *State v. Crom*, 222 Neb. 273, 277, 383 N.W.2d 461, 463 (1986), in which we held that a checkpoint subjected motorists to the "unfettered discretion of officers in the field" and was thus unconstitutional, because "there was no plan formulated at the policy-making level."

Piper acknowledges that the plan for the July 14, 2012, checkpoint was approved by a supervisor within the State

Patrol. But she argues that this approval was not sufficient to make the checkpoint at which she was stopped constitutional. She alleges that the plan was not "formulated" at the policymaking level, because it was written by a nonsupervisor, and that

> [m]erely having the formality of rubber stamping a plan at the supervisory level is insufficient. A plan must start at the top and work its way down to officers in the field, not vice-versa. When the officer's [sic] in the field create the plan and seek approval, it is an unconstitutional checkpoint.

See brief for appellant at 15. In effect, Piper argues that as it was used to describe the unconstitutional checkpoint in *Crom*, the term "formulated" meant "conceived" or "created."

But in the context of *Crom*, "formulated" refers to acts which would make a plan binding, such as approval and endorsement by an individual at the policymaking level. *Crom* did not hold, as Piper argues, that the plan for a checkpoint must be conceived at the policymaking level in order for the checkpoint to pass the test for unfettered discretion.

Any question as to the meaning of "formulated" in *Crom* was clarified by *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989), *overruled on other grounds, State v. Spotts*, 257 Neb. 44, 595 N.W.2d 259 (1999). There, we considered whether a checkpoint that was operated according to a plan created by an officer in a nonsupervisory capacity met the test established in *Crom*. If "formulated" meant "conceived" or "created," the fact that the checkpoint plan in *One 1987 Toyota Pickup* was created by a nonsupervisor would have been the determinative fact in our analysis. But it was not. Instead, in holding the checkpoint unconstitutional, we focused on the fact that the officers conducting the checkpoint had deviated from the plan by changing the date, time, location, and type of checkpoint without obtaining "reapproval." See *id*. at 674, 447 N.W.2d at 246. We read "formulated" as meaning "approved."

[18] In addition to clarifying the meaning of "formulated," *One 1987 Toyota Pickup* established that a highway checkpoint must be both authorized by an approved plan and

conducted in a manner that complies with the plan and the policy established by the authority at the policymaking level. As such, to determine whether the discretion of the officers operating a checkpoint was sufficiently constrained, we consider whether the checkpoint was approved and whether it was operated in accordance with the approved plan and State Patrol policy, as well as any other circumstances that may indicate the exercise of unfettered discretion.

In the instant case, the checkpoint did not involve the exercise of unfettered discretion. As we explain below, the discretion of the officers conducting the checkpoint was limited by an approved plan that conformed to State Patrol policy. Operation of the checkpoint did not deviate from the plan or the policy.

The existence of a valid checkpoint plan limited the discretion of the officers conducting the checkpoint. The plan was valid, because as required by paragraph II(A)(2) of policy No. 07-29-01, the decision to conduct the checkpoint was made by "a neutral source, such as a supervisor who is not involved in conducting the operation in the field." Korell made the decision to operate the checkpoint by approving and signing the plan. And he was a "neutral source," because he was a supervisor and did not participate in conducting the checkpoint. The approved plan established the date, time, location, and duration of the checkpoint, as well as the pattern for placement of signs and flares. In operating the checkpoint, the officers did not deviate from the plan.

All remaining aspects of the checkpoint were delineated by State Patrol policy No. 07-29-01. The policy specified that "[a]ll vehicles must be stopped and checked" except when there was heavy traffic flow or there were more than three waiting vehicles per officer. It required that each stopped vehicle be checked for 10 specific items, including driver's license, vehicle registration, proof of insurance, and "driver's condition." The policy prohibited officers from asking motorists to get out of their vehicles unless "violations of the law [were] detected or reasonably suspected." Thus, the policy significantly constrained the exercise of discretion by the officers administering the checkpoint.

Piper argues that the checkpoint violated paragraph II(A)(7) of policy No. 07-29-01, because the officers conducting the checkpoint "made a decision not to stop every car." See brief for appellant at 16. Piper is referring to the fact that in the case of vehicles that approached the checkpoint on multiple occasions, the officers "did not recheck them after they had already been checked once." This occurred with either one or two vehicles. They were stopped on their initial approach to the checkpoint. But after the initial stop, the officers waved the repeat vehicles through the checkpoint once they had ascertained that it was the same driver. No evidence was adduced about the reason these vehicles approached the checkpoint on multiple occasions. However, at trial, the parties' attorneys suggested that the vehicles were driven by designated drivers for a local celebration that was going on at the time.

The fact that these vehicles were stopped only on their first approach to the checkpoint did not violate State Patrol policy No. 07-29-01. Paragraph II(A)(7) of the policy required "[a]ll vehicles" to be "stopped and checked." At the July 14, 2012, checkpoint, all vehicles were stopped and checked. Each vehicle that approached the checkpoint was stopped without exception. Vehicles that were waved through the checkpoint had been stopped and inspected on their first pass through the checkpoint. Thus, no vehicle escaped being stopped and checked at the checkpoint.

Piper does not argue that the checkpoint violated any other provisions of the policy, and we find no evidence of any violations. As such, we find that operation of the checkpoint complied with State Patrol policy.

### *(iv) Conclusion as to Constitutionality of Checkpoint*

The July 14, 2012, checkpoint was administered for an appropriate purpose, the intrusion caused by the checkpoint was minimal, and the officers were not allowed to exercise unfettered discretion in the administration of the checkpoint. The district court did not err in affirming the order of the county court which overruled Piper's motion to suppress the

evidence obtained as a result of the checkpoint as the fruit of an illegal search and seizure.

## VI. CONCLUSION

For the foregoing reasons, we affirm the district court's order which affirmed the county court's judgment of conviction and sentence.

AFFIRMED.

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# STATE OF NEBRASKA, APPELLEE, V. JESUS R. CASTILLO-ZAMORA, APPELLANT.

855 N.W.2d 14

Filed October 31, 2014. No. S-14-020.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances when judicial discretion is a factor involved in the admissibility of evidence.
2. **Rules of Evidence: Appeal and Error.** When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.
3. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
4. **Motions for Mistrial: Appeal and Error.** Whether to grant a mistrial is within the trial court's discretion, and an appellate court will not disturb its ruling unless the court abused its discretion.
5. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
6. **Effectiveness of Counsel: Appeal and Error.** In reviewing claims of ineffective assistance on direct appeal, an appellate court is deciding only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?
7. **Effectiveness of Counsel: Constitutional Law: Statutes: Appeal and Error.** If the alleged ineffective assistance claim rests solely on the interpretation of a statute or constitutional requirement, which claims present pure questions of law, an appellate court can decide the issue on direct appeal.

8. **Effectiveness of Counsel: Appeal and Error.** Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are questions of law that are reviewed independently of the lower court's decision.
9. **Rules of Evidence: Witnesses: Prior Convictions.** When impeaching a witness pursuant to Neb. Rev. Stat. § 27-609(1) (Reissue 2008), after the conviction is established, the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof.
10. **Courts: Motions for Mistrial: Appeal and Error.** Courts have considerable discretion in passing on the motions for mistrial, to the end that justice be more nearly effectuated. The trial court's decision will not be disturbed unless the trial court abused that discretion.
11. **Criminal Law: Motions for Mistrial: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.
12. **Motions for Mistrial: Proof.** A defendant seeking mistrial must prove that an alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.
13. **Motions for Mistrial.** A party is barred from moving for a mistrial because of a prejudicial error when the party was responsible for creating the error.
14. **Rules of Evidence: Hearsay: Proof.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
15. **Rules of Evidence: Hearsay.** Hearsay is not admissible unless otherwise provided for under the Nebraska Evidence Rules or elsewhere.

Appeal from the District Court for Hall County: JAMES D. LIVINSGTON, Judge. Affirmed.

Gerard A. Piccolo, Hall 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.

HEAVICAN, C.J.

## NATURE OF CASE

Jesus R. Castillo-Zamora appeals his conviction for first degree sexual assault. Castillo-Zamora alleges that the district court for Hall County, Nebraska, erred in two different

evidentiary rulings; that the district court abused its discretion in denying a joint motion for mistrial; and that he received ineffective assistance of counsel. We conclude that the district court did not err in its evidentiary rulings and did not abuse its discretion in denying the motion for mistrial. Because the record is incomplete, we decline to reach the ineffective assistance of counsel claims on direct appeal.

## BACKGROUND

This case centers around two separate incidents involving Castillo-Zamora and his sister-in-law, A.O. At the time of trial, A.O. was a 21-year-old college student at the University of Nebraska-Lincoln. A.O. has five brothers and two sisters, including Jacqueline Castillo, who is married to Castillo-Zamora. The extended family would often celebrate holidays and birthdays together. The first relevant incident occurred during a Christmas party at the Castillo-Zamora residence in Grand Island, Nebraska, on December 24, 2011. The second incident, when the alleged sexual assault took place, occurred during the early morning hours of March 25, 2012, at a party at the Castillo-Zamora residence to celebrate Jacqueline's birthday.

A.O. and Castillo-Zamora were both present at the December 24, 2011, party, along with Jacqueline; two of her brothers, Erick O. and William O.; and William's fiance, Chanda Schroyer. A.O. was on winter break from the university. A.O. testified to drinking two to three mixed drinks containing tequila over the course of the night, but said she did not feel intoxicated. Castillo-Zamora was also drinking alcohol that night. A.O. testified that late in the evening, she got up from the party to use the bathroom. Because a hallway bathroom was in use by Schroyer, A.O. went down the hallway to use the bathroom located in the Castillo-Zamora master bedroom. As A.O. was leaving the bedroom, she testified, she was pulled back into the bedroom by Castillo-Zamora. According to A.O., Castillo-Zamora asked her if she "found him attractive and if [she] was into him." She told him no and explained that "it was wrong for him to even approach [her] because he was with [her] sister."

A.O. then saw Schroyer exiting the hallway bathroom and pushed her back into the bathroom. Both A.O. and Schroyer testified that A.O. explained to Schroyer what Castillo-Zamora had said to her and how she responded. A.O. was visibly upset and crying. Both A.O. and Schroyer also testified that Castillo-Zamora knocked on the door of the bathroom, asked what was going on, and stated that he wanted to talk to A.O. again. Castillo-Zamora then grabbed A.O.'s arm and tried to pull her out of the bathroom, while Schroyer held onto A.O.'s other arm. Shortly after, the party ended and A.O. left the Castillo-Zamora home. Besides Schroyer, A.O. did not immediately tell anyone about this incident.

The families had another party at the Castillo-Zamora residence on March 24, 2012, that lasted into the early hours of March 25. This party was to celebrate Jacqueline's birthday. Several members of the family were present, including Castillo-Zamora; Jacqueline; A.O.; Erick; William; Schroyer; the siblings' mother; the siblings' uncle; and Castillo-Zarmora's cousin, Rodrigo Bolanos. A.O. and Castillo-Zamora were both drinking alcohol that night. Jacqueline was drinking alcohol as well.

Erick testified that around 11 p.m., he helped Jacqueline to her bedroom. Shortly after, A.O. decided that she would spend the night at the Castillo-Zamora home and went to the basement to lie on a couch. Erick also testified that after he left the party with his mother and uncle at 1 or 2 a.m., the only people left at the home were Castillo-Zamora, Jacqueline, their children, and A.O.

A.O. testified that while it was still dark out, she was awakened by Castillo-Zamora as he was carrying her to the laundry room in the basement. Once in the laundry room, Castillo-Zamora put A.O. down and again asked if she was attracted to him. He told her that "girls [her] age would kill to be with someone like me." A.O. told him that would only be the case "if they [the girls] weren't very bright and desperate." He then left to go upstairs. A.O. estimated that the incident occurred at approximately 2 a.m. and lasted for about 2 minutes. A.O. went back to the couch and stayed awake for approximately 30 minutes to see whether Castillo-Zamora returned.

Later in the night, A.O. testified, she was again awakened by Castillo-Zamora. This time, A.O. estimated it was around 5 or 6 a.m., because it was light outside. A.O. testified that she felt Castillo-Zamora's left hand down the back of her jeans. When she struggled, he used his right arm to pin her down. A.O. grabbed his wrist and told him to stop. Castillo-Zamora then reached around and unbuttoned A.O.'s pants and again put his hand down the backside of A.O.'s jeans, beneath her underwear. He then inserted his finger into A.O.'s vagina three or four times, while A.O. told him to stop. A.O. estimated that this lasted for about a minute, until Castillo-Zamora stopped without saying anything and went back upstairs. A.O. then stayed awake for approximately 2 hours waiting for her sister, Jacqueline, to get up so she could get a ride back to their mother's house.

Initially, A.O. did not tell anyone about the incident. After the spring semester was over in May 2012, A.O. went to visit her other sister in California. A.O. told that sister about what had happened with Castillo-Zamora during the early hours of March 25. A.O.'s sister convinced A.O. to go to the police about the incident. Upon returning to Nebraska in July, A.O. filed a report with the Grand Island Police Department. Castillo-Zamora was arraigned on February 13, 2013, for a single count of first degree sexual assault.

The jury found Castillo-Zamora guilty of first degree sexual assault. On December 11, 2013, Castillo-Zamora was sentenced to 3 to 5 years' imprisonment.

Castillo-Zamora appeals his conviction.

## ASSIGNMENTS OF ERROR

Castillo-Zamora assigns as error that the district court erred in (1) failing to allow Castillo-Zamora to inquire on redirect examination into the nature of his own witness' felony conviction after he was impeached by the State, (2) not granting a mistrial when both parties joined in the motion for mistrial, and (3) admitting hearsay statements. In addition, Castillo-Zamora assigns that he received ineffective assistance of counsel when his trial counsel failed to (1) object at trial to the introduction of evidence under Neb. Rev. Stat.

§ 27-404 (Cum. Supp. 2012), (2) properly object to testimony that constituted impermissible bolstering of a witness' credibility, (3) introduce two pieces of evidence during trial, and (4) object to prosecutorial misconduct during the State's closing argument.

## STANDARD OF REVIEW

[1-3] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the rules, not judicial discretion, except in those instances when judicial discretion is a factor involved in the admissibility of evidence.[1] When judicial discretion is not a factor, whether the underlying facts satisfy the legal rules governing the admissibility of such evidence is a question of law, subject to de novo review.[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[3]

[4] Whether to grant a mistrial is within the trial court's discretion, and we will not disturb its ruling unless the court abused its discretion.[4]

[5] Apart from rulings under the residual hearsay exception, an appellate court will review for clear error the factual findings underpinning a trial court's hearsay ruling and review de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.[5]

[6-8] In reviewing claims of ineffective assistance on direct appeal, we are deciding only questions of law: Are the undisputed facts contained within the record sufficient to conclusively determine whether counsel did or did not provide effective assistance and whether the defendant was or was not prejudiced by counsel's alleged deficient performance?[6]

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[1] *State v. McManus*, 257 Neb. 1, 594 N.W.2d 623 (1999).

[2] *State v. Parker*, 276 Neb. 661, 757 N.W.2d 7 (2008).

[3] *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

[4] *State v. Ramirez*, 287 Neb. 356, 842 N.W.2d 694 (2014).

[5] *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

[6] *State v. Dubray, ante* p. 208, 854 N.W.2d 584 (2014).

If the alleged ineffective assistance claim rests solely on the interpretation of a statute or constitutional requirement, which claims present pure questions of law, we can decide the issue on direct appeal.[7] Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are questions of law that are reviewed independently of the lower court's decision.[8]

## ANALYSIS

### *Scope of Neb. Rev. Stat. § 27-609(1) (Reissue 2008).*

In his first assignment of error, Castillo-Zamora assigns that the district court erred in failing to allow him to inquire on redirect examination into the nature of his own witness' felony conviction after the witness was impeached by the State.

During trial, the State properly impeached Castillo-Zamora's witness, Bolanos, by asking whether he had previously been convicted of a felony or crime of dishonesty. On redirect examination, trial counsel for Castillo-Zamora asked Bolanos if he had "been convicted of a felony," to which the State objected. The trial court sustained the objection on the ground that the statute does not draw a distinction between felonies and crimes involving dishonesty and, therefore, does not permit counsel to question whether a witness was convicted of a felony or crime involving dishonesty.

[9] Section 27-609(1) provides for the impeachment of a witness on cross-examination when the witness has committed a felony or crime of dishonesty. After the conviction is established, "the inquiry must end there, and it is improper to inquire into the nature of the crime, the details of the offense, or the time spent in prison as a result thereof."[9] This rule has also been applied to the impeachment of nonparty witnesses.[10]

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[7] See *id.*

[8] See *id.*

[9] *State v. Johnson*, 226 Neb. 618, 621, 413 N.W.2d 897, 898 (1987).

[10] *State v. Garza*, 236 Neb. 215, 459 N.W.2d 747 (1990).

This court has not previously considered how this rule applies on redirect examination.

The inquiry is restricted, because a witness' conviction of a crime is meant to be used for whatever effect it has on only the credibility of the witness, and it is not meant to otherwise impact the jury's view of the character of the witness.[11] Nebraska is among a small number of jurisdictions that has adopted this view.[12] The vast majority of jurisdictions allow inquiry into the nature of the underlying conviction.[13] But a long history of case law in Nebraska strictly construing § 27-609 establishes that the nature of the underlying conviction does not matter for impeachment purposes. We see no reason to reconsider our prior § 27-609 jurisprudence and no reason why the rule should not be extended to redirect examination as well.

Once the State had established Bolanos' conviction on cross-examination, the inquiry should have ceased. It was improper for Castillo-Zamora's counsel to ask on redirect examination whether Bolanos had "been convicted of a felony" after the witness had been impeached on cross-examination. As such, the trial court did not err when it sustained the State's objection to the further questioning on redirect examination of Bolanos on the nature of his earlier convictions.

Castillo-Zamora's first assignment of error is without merit.

*Joint Motion for Mistrial.*

In his second assignment of error, Castillo-Zamora argues that the district court erred when it denied the parties' joint motion for mistrial. This assignment of error also involves § 27-609(1).

The State moved for a mistrial after the following exchange took place between Castillo-Zamora's trial counsel and a witness for the State. On cross-examination, Castillo-Zamora attempted to impeach Schroyer:

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[11] *Latham v. State*, 152 Neb. 113, 40 N.W.2d 522 (1949).

[12] *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989).

[13] *Id.*

> [Castillo-Zamora's counsel:] While you were in Lincoln, were you ever convicted of a crime of dishonesty?
>
> [Schroyer:] Yes.
>
> Q That was for forgery, wasn't it?
>
> A Yes.
>
> [The State]: Objection.
>
> THE COURT: Basis?
>
> [The State]: I will withdraw my objection at this point.
>
> THE COURT: Go ahead, please.
>
> Q Then in the last ten years, you have been to Omaha, haven't you?
>
> A Yes.
>
> . . . .
>
> Q During that time, you were convicted of a crime of dishonesty, weren't you?
>
> A Yes.

Schroyer was then dismissed as a witness. Before calling the next witness, the State approached the bench and moved for a mistrial. The State argued that a mistrial was appropriate because counsel for Castillo-Zamora improperly impeached Schroyer by going into the details of her previous convictions. Castillo-Zamora's counsel stated that he did not have an objection to the mistrial and joined in the motion. The trial court denied the motion because the State failed to object when the question was asked and answered, but also noted that "[i]f objections were made, it very well would be that the Court would have sustained [the] objections . . . ."

[10] "Courts have considerable discretion in passing on the motions for mistrial, to the end that justice be more nearly effectuated."[14] The trial court's decision will not be disturbed unless the trial court abused that discretion.[15]

[11] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial which is of such a nature that its damaging effect cannot be removed by proper

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[14] *State v. Archbold*, 217 Neb. 345, 351, 350 N.W.2d 500, 504 (1984).

[15] See, e.g., *State v. Ramirez, supra* note 4.

admonition or instruction to the jury and thus prevents a fair trial.[16]

As discussed above, after a conviction is established, Nebraska law does not permit inquiry into the nature of the underlying crime.[17] Castillo-Zamora exceeded the proper scope of § 27-609. Assuming without deciding that this improper questioning could have given rise to a mistrial, the State withdrew its objection and had therefore waived it.[18] Because of the State's failure to timely object, the trial court correctly determined that the State could not move for a mistrial in this case.

[12,13] Because Castillo-Zamora merely joined in on the State's motion for mistrial, his claim also fails as a result of the State's failure to object. Castillo-Zamora also does not have any independent basis for a mistrial because he cannot demonstrate he suffered any prejudice. A defendant seeking mistrial must prove that an alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.[19] A party is barred from moving for a mistrial because of a prejudicial error when the party was responsible for creating the error.[20] Castillo-Zamora was wholly responsible for the improper questioning of the State's witness, and Castillo-Zamora cannot claim he was prejudiced by his own counsel's improperly exceeding the scope of § 27-609 while cross-examining the State's witness.

In this case, the trial court did not abuse its discretion in denying the joint motion for mistrial, because the State failed to object at the time the evidence was admitted, thereby waiving the error, and Castillo-Zamora only joined in the State's motion. Castillo-Zamora's second assignment of error is without merit.

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

[17] *State v. Johnson, supra* note 9.

[18] See *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[19] *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993), *disapproved on other grounds, State v. Johnson*, 256 Neb. 133, 589 N.W.2d 108 (1999).

[20] See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

*December 24, 2011, Hearsay Statements.*

In his third assignment of error, Castillo-Zamora assigns that the district court erred in admitting certain hearsay statements contained in Schroyer's testimony from the December 24, 2011, incident. Schroyer's testimony included statements A.O. made to Schroyer during the party on December 24 about how Castillo-Zamora asked A.O. in the bedroom whether A.O. was attracted to him and A.O.'s reaction to his comments. The court did not give a basis for overruling Castillo-Zamora's objection. Castillo-Zamora assigns that the trial court erred in admitting this testimony.

[14,15] Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.[21] Hearsay is not admissible unless otherwise provided for under the Nebraska Evidence Rules or elsewhere.[22] The statements clearly are hearsay.

The statements, however, can still be admissible if they fall under an exception to the general rule prohibiting hearsay. One such exception exists for excited utterances. For a statement to qualify as an excited utterance, the following criteria must be met: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event.[23] The justification for the excited utterance exception is that "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."[24]

Castillo-Zamora disputes that A.O.'s statements to Schroyer fall under the excited utterance exception for two reasons. First, Castillo-Zamora contends that the conversation in the bedroom did not constitute a startling event. Second, he argues that even if the conversation was a startling event, any

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[21] Neb. Rev. Stat. § 27-801 (Reissue 2008).

[22] Neb. Rev. Stat. § 27-802 (Reissue 2008).

[23] Neb. Rev. Stat. § 27-803(1) (Reissue 2008). See, also, *State v. Hembertt*, 269 Neb. 840, 696 N.W.2d 473 (2005).

[24] *State v. Pullens*, 281 Neb. 828, 840, 800 N.W.2d 202, 216-17 (2011).

shock from the event dissipated by the time A.O. had talked to Schroyer.

Castillo-Zamora contends that the excited utterance exception is not appropriate here, because the conversation between Castillo-Zamora and A.O. was not of significant magnitude to trigger the exception. The key inquiry does not necessarily concern the magnitude of the startling event, but whether an event caused the declarant to be under enough stress to speak without reflecting on the event, increasing the likelihood the statements were not fabricated.[25]

We have held that the visible reaction of the declarant can be enough to create an inference of a startling event. For example, a description that the declarant gave a "'teary-eyed and incoherent, raggedy, choked-up kind of explanation'" was sufficient to show a startling event.[26] An inference was also made when the declarant "appeared flushed, very fidgety, and visibly upset" at the time of the statement.[27] In the case at bar, both Schroyer and Erick testified to the fact that A.O. was crying and visibly upset while in the hallway bathroom. We conclude that Castillo-Zamora's unwanted sexual advances toward A.O. in a secluded area would be a startling event.

And the record further indicates that the statements were made while A.O. was still experiencing the effects of this startling event. To be excited utterances, statements need not be made contemporaneously with the exciting cause but may be subsequent to it, provided there has not been time for the exciting influence to lose its sway and to be dissipated.[28] The true test in spontaneous exclamations is not when the exclamation was made, but whether under all the circumstances of the particular exclamation the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act at issue.[29] The time between when the

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[25] *State v. Hembertt, supra* note 23; *State v. Pullens, supra* note 24.

[26] *State v. Pullens, supra* note 24, 281 Neb. at 840, 800 N.W.2d at 216.

[27] *State v. Jacob*, 242 Neb. 176, 188, 494 N.W.2d 109, 118 (1993).

[28] *State v. Hembertt, supra* note 23.

[29] *State v. Pullens, supra* note 24.

event occurs and the statements are made is not "of itself dispositive of the spontaneity issue."[30] The length of time for the exception to apply depends on the facts of the case.[31]

Castillo-Zamora argues that the 30- to 40-foot walk from the bedroom to the hallway bathroom gave A.O. the necessary time to reflect and demonstrates a lack of spontaneity. The facts in the record would seem to suggest otherwise. Based on the record, only a short period of time could have passed between the time A.O.'s conversation with Castillo-Zamora ended and the conversation between A.O. and Schroyer began. Both Schroyer and Erick testified that A.O. was crying and visibly upset while in the hallway bathroom. While not necessary, a showing that the declarant is visibly excited is relevant to the third prong of the excited utterance test.[32]

The fact that A.O. was still visibly upset from the encounter would raise inferences that she was still under stress from the incident and that any statements made by her were spontaneous. We conclude that the statements made by A.O. to Schroyer were excited utterances as per § 27-803(1). The trial court did not err in admitting Schroyer's testimony. Castillo-Zamora's third assignment of error is without merit.

*Ineffective Assistance of Counsel.*

In his final assignment of error, Castillo-Zamora assigns, restated, that he received ineffective assistance of counsel because his trial counsel failed to (1) object at trial to the introduction of evidence under § 27-404, (2) properly object to testimony that constituted impermissible bolstering of a witness' credibility, (3) introduce two pieces of evidence during trial, and (4) object to alleged prosecutorial misconduct during the State's closing argument.

On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record, and the fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be

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[30] *State v. Boppre*, 243 Neb. 908, 927, 503 N.W.2d 526, 538 (1993).

[31] *Id.*

[32] *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990).

resolved.[33] The determining factor is whether the record is sufficient to adequately review the question.[34] An appellate court will not address an ineffective assistance of counsel claim on direct appeal if it requires an evidentiary hearing.[35]

We determine that the record on direct appeal is insufficient to review the first, third, and fourth claims made by Castillo-Zamora, and we decline to reach them. We determine that the record is sufficient to reach the second claim.

To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[36] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[37] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[38]

To show prejudice under the prejudice component of the *Strickland* test, there must be a reasonable probability that but for the deficient performance, the result of the proceeding would have been different.[39] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[40]

Castillo-Zamora assigns that he received ineffective assistance of counsel when his trial counsel failed to properly object to testimony that allegedly impermissibly bolstered a witness' credibility. The State called Investigator Mark Wiegert, of the Grand Island Police Department, to testify. Wiegert was the primary investigator for the case. During the State's direct examination of Wiegert, Castillo-Zamora objected to a portion of his testimony in the following exchange:

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[33] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[34] *Id.*

[35] *State v. McClain*, 285 Neb. 537, 827 N.W.2d 814 (2013).

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

[37] *State v. Filholm, supra* note 33.

[38] *Id.*

[39] *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

[40] *Id.*

> [The State:] Did you ask [Castillo-Zamora] if he felt like he got along with the rest of [A.O.'s] family?
>
> [Wiegert:] Yes, I did.
>
> Q And what did he tell you in response to that?
>
> A Yes, he got along with all family members.
>
> Q Did you ask him if he knew of any reason why [A.O.] might fabricate these allegations?
>
> [Castillo-Zamora's counsel]: Objection.
>
> THE COURT: Your basis, sir?
>
> [Castillo-Zamora's counsel]: You Honor, I would think that's boasting.
>
> THE COURT: Your objection is boasting?
>
> [Castillo-Zamora's counsel]: Or boosting, whatever.
>
> THE COURT: Boasting or boosting is your basis?
>
> [Castillo-Zamora's counsel]: We will withdraw the objection.

The failure of Castillo-Zamora's trial counsel to properly object would preclude appeal on the matter.[41] The question then is whether the outcome would be any different had Castillo-Zamora's trial counsel properly objected. Neb. Rev. Stat. § 27-608(1) (Reissue 2008) provides that a party may offer supporting evidence of a witness' credibility so long as (1) the evidence is in the form of reputation or opinion, (2) it only relates to the witness' character for truthfulness, and (3) the witness' credibility has already been put at issue.

Section 27-608 does not apply to the type of evidence the State was trying to solicit from Wiegert. The focus of § 27-608 is not on witness credibility generally, but specifically pertains to regulating the use of evidence regarding the witness' character for truthfulness. Commentators have suggested a similar interpretation for the federal version of § 27-608, which is nearly identical to Nebraska's version of the rule.[42] The federal advisory committee made it clear that "the statutory limitations on the use of specific instances of conduct are intended to apply only with respect to character

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[41] See *State v. Hall*, 270 Neb. 669, 708 N.W.2d 209 (2005).

[42] See 1 McCormick on Evidence § 47 (Kenneth S. Broun et al. eds., 7th ed. 2013).

for truthfulness, not with respect to other kinds of credibility attacks such as bias or motive to falsify."[43]

*State v. Beermann*[44] illustrates the type of testimony which would speak toward an accuser's "character for truthfulness." *Beermann* involved sexual assault charges. At trial, after the victim testified, the State called the sheriff's deputy who originally interviewed the victim to testify. The State asked whether the victim's prior testimony was consistent with what she had told the deputy, and the deputy responded in the affirmative. The deputy then testified that based on his experience and training, he believed the victim had been sexually abused. Because the deputy's testimony could be "construed as stating" that the victim's testimony was true, it was "totally improper for one witness to testify as to the credibility of another witness."[45]

In *State v. Archie*,[46] a witness stated that "she did not have 'any concerns that [the accuser] wasn't telling [her] the truth.'" Relying on *Beermann*, this court held that it was improper for the court to "inquire of a witness whether another person may or may not have been telling the truth in a certain instance."[47]

The Nebraska Court of Appeals overturned a conviction when one witness testified that it was "uncharacteristic" of the accuser to lie and another witness, a police officer, stated that the accuser was truthful and straightforward when he interviewed her.[48] The Court of Appeals concluded that the witnesses' testimony "in effect told the jury to believe [the accuser's] accusations."[49]

In this case, the State asked Wiegert whether he asked Castillo-Zamora "if he knew of any reason why [A.O.] might

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[43] *Id.* at 306 n.2.

[44] *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

[45] *Id.* at 396, 436 N.W.2d at 509.

[46] *State v. Archie*, 273 Neb. 612, 634, 733 N.W.2d 513, 531 (2007).

[47] *Id.*

[48] *State v. Burkhardt*, No. A-05-335, 2005 WL 3470484 at *6 (Neb. App. Dec. 20, 2005) (not designated for permanent publication).

[49] *Id.*

fabricate these allegations." It was at this point that trial counsel attempted, but failed, to object to the question. After the objection was withdrawn, Wiegert testified that Castillo-Zamora "said he had no idea why [A.O.] would fabricate it because he got along with all of them, so he didn't have any idea why."

Assuming without deciding that Wiegert's testimony was inadmissible, he still could not establish that he was prejudiced from his trial counsel's failure to properly object. The erroneous admission of evidence is not reversible error if the evidence and other relevant evidence, properly admitted, supports the finding of the trier of fact.[50] The State asked similar questions to several other witnesses.

The State asked A.O. if, before the incident, she had had any "big arguments" or grudges against Castillo-Zamora, and she replied that she had not. Schroyer and Erick were both asked if they were aware, before the incident, of any big arguments or grudges between A.O. and either Castillo-Zamora or Jacqueline, and they both replied they were not. Jacqueline also testified that A.O. had a good relationship with both Castillo-Zamora and Jacqueline prior to the incident. From all the above testimony, the jury could properly infer that A.O. had no reason to fabricate the allegations due to any disagreement within the family. Even if Castillo-Zamora's trial counsel properly objected, it is not reasonably probable there would have been a different result.

Even if it was improper bolstering, Castillo-Zamora was not prejudiced, because almost identical questions were posed to other witnesses. Castillo-Zamora's assignment of error that he received ineffective assistance of counsel when his trial counsel failed to properly object to alleged impermissible bolstering of a witness' credibility is without merit.

## CONCLUSION

The judgment and sentence of the district court is affirmed.

AFFIRMED.

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[50] *State v. Ramirez, supra* note 4.

# GEORGE SHEPARD, AND ALL OTHER INMATES IN A SIMILAR SITUATION, APPELLEES, V. ROBERT P. HOUSTON, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, APPELLANT.

855 N.W.2d 559

Filed November 7, 2014. No. S-13-1032.

1. **Constitutional Law.** Constitutional interpretation presents a question of law.
2. **Courts: Justiciable Issues.** Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.
3. **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.
4. **Courts: Jurisdiction.** A determination of ripeness depends upon the circumstances in a given case and is a question of degree.
5. **Courts: Jurisdiction: Appeal and Error.** With regard to the jurisdictional aspect of ripeness, an appellate court employs a two-part test in which it considers (1) the fitness of the issues for judicial decision and (2) the hardship of the parties of withholding court consideration.
6. **Actions.** Generally, a case is ripe when no further factual development is necessary to clarify a concrete legal dispute susceptible to specific judicial relief, as distinguished from an advisory opinion regarding contingent future events.
7. **Constitutional Law: Criminal Law.** The Ex Post Facto Clauses forbid the application of any new punitive measure to a crime already consummated.
8. **Constitutional Law: Statutes: Legislature.** The Ex Post Facto Clauses ensure that individuals have fair warning of applicable laws, and they guard against vindictive legislative action.
9. **Constitutional Law: Criminal Law: Statutes.** To fall within the ex post facto prohibition, a law must be retrospective or retroactive—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it either by altering the definition of criminal conduct or by increasing the punishment for the crime.
10. ____: ____: ____. Any statute that punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.
11. **Constitutional Law.** Subtle ex post facto violations are no more permissible than overt ones.
12. **Criminal Law: DNA Testing.** When a law requiring a DNA sample punishes refusal to provide a sample as an offense separate from the offense that made the person subject to DNA sampling, such law does not violate ex post facto prohibitions.

13. **DNA Testing: Statutes: Sentences.** Regardless of whether the requirement of a DNA sample is itself considered civil, Neb. Rev. Stat. § 29-4106(2) (Cum. Supp. 2012) is punitive in mandating forfeiture of all good time and thereby increasing the period of a defendant's incarceration.

Appeal from the District Court for Lancaster County: ANDREW R. JACOBSEN, Judge. Affirmed.

Jon Bruning, Attorney General, and Jessica M. Forch for appellant.

George Shepard, pro se.

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

MCCORMACK, J.

## I. NATURE OF CASE

Neb. Rev. Stat. § 29-4106(2) (Cum. Supp. 2012) provides for retroactive application of its requirement that all inmates convicted of a felony sex offense or other specified offense submit a DNA sample before being discharged from confinement. Section 29-4106(2) also specifically provides that those inmates convicted before the passage of § 29-4106 "shall not be released prior to the expiration of his or her maximum term of confinement or revocation or discharge from his or her probation unless and until a DNA sample has been collected." In effect, § 29-4106(2) provides that an inmate will forfeit his or her past and future good time credit if the inmate refuses to submit a DNA sample. The issue is whether § 29-4106(2), as applied to an inmate who was convicted before its passage, violated the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

## II. BACKGROUND

George Shepard was sentenced on July 11, 1990, to a combined term of up to 50 years' imprisonment. He was sentenced to 40 years' imprisonment for sexual assault in the first degree

and 10 years' imprisonment for manufacturing child pornography, the sentences to run consecutively.[1]

Under the good time law in effect at the time of Shepard's crimes, Shepard's projected mandatory discharge date was May 4, 2015. Neb. Rev. Stat. § 83-1,107 (Reissue 1987) provided:

> (1) The chief executive officer of a facility shall reduce for good behavior the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:
>
> (a) From his minimum term, to determine the date of his eligibility for release on parole; and
>
> (b) From his maximum term, to determine the date when his discharge from the custody of the state becomes mandatory.
>
> (2) While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding the charges of misconduct.
>
> (3) While the offender is in the custody of the Board of Parole, reductions of such terms may be forfeited, withheld, and restored by the Parole Administrator with the approval of the director after the offender has been consulted regarding the charges of misconduct or breach of the conditions of his parole. In addition, the Board of Parole may recommend such forfeitures of good time to the director.

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[1] See *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991).

> (4) Good time or other reductions of sentence granted under the provisions of any law prior to August 24, 1975, may be forfeited, withheld, or restored in accordance with the terms of the act.

Neb. Rev. Stat. § 83-1,107.01 (Reissue 1987) further provided:

> (1) In addition to the reductions provided in section 83-1,107, an offender shall receive, for faithful performance of his assigned duties, a further reduction of five days for each month of his term. The total of all such reductions shall be deducted from his maximum term to determine the date when his discharge from the custody of the state becomes mandatory.
>
> (2) While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited, withheld, and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding any charges of misconduct.
>
> (3) While the offender is in the custody of the Board of Parole, reductions of such terms may be forfeited, withheld, and restored by the Parole Administrator with the approval of the director after the offender has been consulted regarding the charges of misconduct or breach of the conditions of his parole. In addition, the Board of Parole may recommend such forfeitures of good time to the director.

Disciplinary procedures for the Nebraska Department of Correctional Services (Department) are governed by Neb. Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 2008). Under § 83-4,111(3), which continues to be in essentially the same form as it was at the time of Shepard's crimes, the Department has broad powers to adopt and promulgate rules and regulations, including criteria concerning good time credit, but such rules and regulations "shall in no manner deprive an inmate of any rights and privileges to which he or she is entitled under other provisions of law." Under § 83-4,114.01(2), previously located at Neb. Rev. Stat. § 83-185(2) (Reissue 1987), good time may be forfeited only in cases involving "flagrant or

serious misconduct." Further, pursuant to § 83-4,122, in disciplinary cases involving the loss of good time, forfeiture must be done through disciplinary procedures adopted by the director of the Department that are consistent with various requirements of the statute.

Various factors could be considered before making a determination regarding a committed offender's actual release on parole upon the date of eligibility.[2] As for the mandatory discharge date, however, the Board of Parole was required to discharge a parolee from parole and the Department was required to discharge a legal offender from the custody of the Department "when the time served . . . equals the maximum term less all good time reductions."[3]

In 1997, the Legislature passed provisions under the DNA Detection of Sexual and Violent Offenders Act, now known as the DNA Identification Information Act (the Act),[4] for collecting DNA samples from any person convicted of a felony sex offense or other specified offense, in order to place such sample for use in the State DNA Sample Bank. Since 1997, § 29-4106(2) has provided for the retroactive application of the Act to persons convicted before the effective date of the Act but still serving a term of confinement on the effective date of the Act.

Under § 29-4106(2), such person shall not be released prior to the expiration of his or her maximum term of confinement unless and until a DNA sample has been drawn. Section 29-4106(2) currently states:

> A person who has been convicted of a felony offense or other specified offense before July 15, 2010, who does not have a DNA sample available for use in the State DNA Sample Bank, and who is still serving a term of confinement or probation for such felony offense or other specified offense on July 15, 2010, *shall not be released prior to the expiration of his or her maximum*

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[2] See Neb. Rev. Stat. § 83-1,115 (Reissue 1999).

[3] Neb. Rev. Stat. § 83-1,118(3) and (4) (Reissue 1987).

[4] See Neb. Rev. Stat. §§ 29-4101 to 29-4115.01 (Reissue 2008 & Cum. Supp. 2012).

> *term of confinement or revocation or discharge from his or her probation unless and until a DNA sample has been collected*.

(Emphasis supplied.)

Department administrative regulation (A.R.) 116.04 implements this statute and provides that an inmate's refusal to provide a DNA sample will result in administrative withholding of all good time and that the inmate's sentence will be recalculated to the maximum prison term. Department employees testified that under A.R. 116.04, the Department gives inmates until 7 days prior to their release date, as calculated with good time credit, to submit their DNA sample. If an inmate does not submit a sample by that time, the inmate is given notice of a classification hearing. The deputy director over institutions for the Department explained that under A.R. 116.04, good time credit is taken away through a reclassification process rather than through a disciplinary procedure. The reclassification results in forfeiture of the good time. The deputy director explained, "That's what our policy allows for and that's carrying out what we believe state law says." The deputy director was aware of no other behaviors for which good time credits would be forfeited through a reclassification process.

The crimes for which Shepard was sentenced in 1990 are subject to DNA testing under § 29-4106. Section 29-4106 was not in effect when the crimes were committed. On August 18, 2010, Shepard was asked by the Department staff to provide a DNA sample. He declined to do so, and he has not given a DNA sample since that time. The deputy director testified that if Shepard continued to refuse to submit to DNA testing, his good time credit would be forfeited through reclassification under A.R. 116.04. Although in 2011, Shepard apparently would have been parole eligible based on good time, the record does not clearly reflect the reason why Shepard has not been released on parole.

After dismissing a prior complaint as not yet ripe for review, on April 7, 2011, the district court granted Shepard leave to file an amended complaint challenging the impending forfeiture

of his good time credit. After sustaining various motions to dismiss and for summary judgment, the only remaining claim of Shepard's amended complaint was for declaratory judgment challenging the application of § 29-4106 as violative of the prohibition against ex post facto laws. The only remaining defendant was Robert P. Houston in his official capacity as director of the Department.

The court noted that Shepard had failed to make the agency promulgating the challenged rule a party to the action, as required by the Uniform Declaratory Judgments Act, but the court found that the action challenging the validity of § 29-4106 was not so barred. The court further found Shepard's declaratory judgment claim was ripe for review. The court reasoned that although § 29-4106(2) and A.R. 116.04 would not potentially be applied to Shepard until his May 4, 2015, release date, declaratory judgment is appropriate under the circumstances to prevent future harm. The court did not address Shepard's parole eligibility.

The district court declared § 29-4106(2) unconstitutional under the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, as applied to Shepard, an inmate sentenced prior to the statute's enactment. Houston was accordingly enjoined from withholding from Shepard any good time under the provisions of § 29-4106(2).

The court reasoned that the effect of § 29-4106(2) was to retroactively repeal the good time statutes as to Shepard if he did not provide a DNA sample. The court noted that Shepard had not been found guilty of any misconduct while incarcerated. The court stated that while merely requiring a DNA sample would not impose any additional penalty on an inmate, the language of the statute eliminating good time credit does impose an additional penalty not present at the time of Shepard's convictions.

The court rejected the argument that the forfeiture of good time for refusing to submit to DNA testing is a result of a violation of valid administrative prison regulations rather than the imposition of the penalty imposed by statute. The court said that A.R. 116.04 is facially a mere enforcement of the statute

and that Neb. Rev. Stat. § 83-173(6) (Reissue 2008) does not grant the Department director authority to impose penalties for failure to comply with a statutory requirement. And, under § 83-4,111, discipline may be imposed only for conduct outlined in the "Code of Offenses" adopted by the Department and appearing in title 68, chapter 5, of the Nebraska Administrative Code. Failure to submit a DNA sample, the court noted, is not listed as an offense within the code of offenses. While "[d]isobeying an [o]rder" and "[v]iolation of [r]egulations" are listed as offenses, loss of good time may be imposed only for such violations if they are "serious or flagrant," and no more than 1 month of good time can be lost for such serious and flagrant violations.[5]

Houston appeals. Shepard does not cross-appeal.

## III. ASSIGNMENTS OF ERROR

Houston assigns that the district court erred in (1) determining Shepard's action was ripe for review and (2) determining that § 29-4106(2) violates the constitutional prohibition against ex post facto laws, "as this statute is a Constitutional civil regulatory scheme which does not impose punishment."

## IV. STANDARD OF REVIEW

[1] Constitutional interpretation presents a question of law.[6]

## V. ANALYSIS

The only issues presented by the parties in this appeal are whether the district court erred in determining that Shepard's claim was ripe for review and whether it erred in concluding that the retroactive application of § 29-4106(2) was unconstitutional.

### 1. Ripeness

We first address the question of ripeness. According to Houston, Shepard's claim is not ripe, because "[t]here is merely a possible threat of harm, sometime in the future, and we

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[5] See 68 Neb. Admin. Code, ch. 5, § 005, and ch. 6, § 011 (2008).

[6] *Krings v. Garfield Cty. Bd. of Equal.*, 286 Neb. 352, 835 N.W.2d 750 (2013).

have no idea whether that harm will even come to fruition."[7] We disagree.

[2,3] Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.[8] 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.[9]

[4-6] A determination of ripeness depends upon the circumstances in a given case and is a question of degree.[10] With regard to the jurisdictional aspect of ripeness, we employ a two-part test in which we consider (1) the fitness of the issues for judicial decision and (2) the hardship of the parties of withholding court consideration. Because ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the district court's decision that must govern.[11] Generally, a case is ripe when no further factual development is necessary to clarify a concrete legal dispute susceptible to specific judicial relief, as distinguished from an advisory opinion regarding contingent future events.[12]

First, this appeal presents a constitutional question that is essentially legal in nature and may be resolved without further factual development.[13]

Second, this appeal presents a concrete controversy and does not present merely abstract disagreements based on contingent future events that may not occur at all or may not

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[7] Brief for appellant at 11.

[8] *Pennfield Oil Co. v. Winstrom*, 276 Neb. 123, 752 N.W.2d 588 (2008).

[9] *Id.*

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

[11] *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S. Ct. 335, 42 L. Ed. 2d 320 (1974).

[12] *Pennfield Oil Co. v. Winstrom, supra* note 8.

[13] See *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008).

occur as anticipated. Shepard has already declined to submit a DNA sample and professes that he will continue to do so. The deputy director of the Department testified that Shepard's good time will be forfeited if he continues to refuse to submit a DNA sample. The deputy director, indeed, has no discretion under § 29-4106(2) to do otherwise. While it is possible that Shepard will change his mind, thereby making the controversy moot, that possibility is more speculative than the present reality. The hypothetical possibility of future mootness does not render the present appeal unripe.

Finally, addressing the underlying merits in the present appeal will avoid significant hardship. The Department does not conduct the reclassification proceedings that result in good time forfeiture until 7 days before the mandatory release date. If we decline to address the merits in this appeal and demand that the process of reclassification be complete before we consider the matter ripe, then it will not be possible for Shepard's action to be determined before Shepard would be subjected to potentially illegal incarceration. Deciding the case now avoids the possibility of the irreparable harm to Shepard of being imprisoned past the mandatory discharge date (without forfeiture) of May 4, 2015. In addition, by deciding the case now, we avoid the needless waste of judicial resources through future relitigation of the issues.[14]

Having found the matter ripe for review, we turn to the underlying merits of Shepard's ex post facto claim.

### 2. Ex Post Facto

Under the laws in effect at the time Shepard committed his crimes, he was entitled to mandatory "regular" good time, automatically earned under the formula stated above, as well as "meritorious" good time, if earned though good conduct.[15] His parole eligibility date was calculated by deducting good time from his minimum sentence, and his mandatory discharge date was calculated by deducting good time from his

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[14] See *id.*

[15] See *Johnson v. Bartee*, 228 Neb. 111, 421 N.W.2d 439 (1988).

maximum sentence.[16] This appeal, however, concerns only Shepard's mandatory discharge date.

Good time earned could be forfeited under the scheme in effect at the time of Shepard's crimes, but only pursuant to specified procedures and regulations and only, under § 83-4,114.01(2), for "flagrant or serious misconduct." There were no statutory provisions allowing for the forfeiture of future mandatory good time or for general ineligibility for participation in the good time scheme as a result of misconduct. There were no provisions mandating that inmates provide a DNA sample.

By changing the release date to the maximum term of confinement or revocation or discharge from probation, § 29-4106(2) effectively provides for mandatory forfeiture of participation in the good time credit system upon the act of refusing to submit a DNA sample under the requirements first passed in 1997. The State does not claim that the refusal to provide a DNA sample is an act of "flagrant or serious misconduct," and it is clear from the record that when a convicted person refuses to provide a DNA sample, the Department does not change the mandatory discharge date pursuant to procedures provided for disciplinary forfeiture of good time.

Facially, § 29-4106(2) applies retroactively to any person who has been convicted of a felony offense or other specified offense before July 15, 2010. It thus facially encompasses both inmates whose crimes occurred before the passage of the Act in 1997 and those whose crimes occurred after the passage of the Act. As applied to Shepard, however, § 29-4106(2) is retroactive. Section 29-4106(2) plainly expanded the scope of potential forfeiture of good time beyond the limitations to flagrant or serious misconduct in existence at the time of his crimes. Further, by mandating that the inmate shall not be released prior to the expiration of his or her maximum term of confinement or revocation or discharge from his or her probation, § 29-4106(2) increased the amount of good time that could be lost for any singular act.

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[16] See § 83-1,107.

Nevertheless, the State argues that providing a DNA sample is not in itself punitive. And to the extent that Shepard is punished for refusing to provide a DNA sample, the State argues he was given fair notice of the consequences before he refused.

For the reasons that follow, we agree with Shepard and the district court that the retroactive expansion of the scope of good time forfeiture violated the prohibitions against ex post facto laws, found in the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16. While the requirement of DNA sampling, in itself, may be civil, the attendant forfeiture of good time increases the quantum of punishment for Shepard's original crimes beyond the measure of punishment legally stated at the time they were committed.

(a) Ex Post Facto Prohibitions

[7] The ex post facto prohibitions found in the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, forbid Congress and the states to enact any law "'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"[17] Stated another way, the Ex Post Facto Clauses "'forbid[] the application of any new punitive measure to a crime already consummated.'"[18]

[8] The Ex Post Facto Clauses ensure that individuals have fair warning of applicable laws, and they guard against vindictive legislative action.[19] Even where these concerns are not directly implicated, the clauses also safeguard "'a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'"[20]

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[17] *Weaver v. Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[18] *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).

[19] See *Peugh v. U.S.*, ___ U.S. ___, 133 S. Ct. 2072, 186 L. Ed. 2d 84 (2013).

[20] *Id.*, 133 S. Ct. at 2085.

[9] To fall within the ex post facto prohibition, a law must be retrospective or retroactive[21]—that is, it must apply to events occurring before its enactment—and it must disadvantage the offender affected by it either by altering the definition of criminal conduct or by increasing the punishment for the crime.[22]

[10,11] Only retroactive criminal punishment for past acts is prohibited.[23] The retroactive application of civil disabilities and sanctions is permitted.[24] But any statute that punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.[25] Subtle ex post facto violations are no more permissible than overt ones.[26]

### (b) Retrospective Increases in Quantum of Punishment Through Changes in Good Time Scheme Violate Ex Post Facto Principles

In *Weaver v. Graham*,[27] the U.S. Supreme Court held that it is a violation of the prohibition against ex post facto laws to apply a new formula for calculating future good time credits to a person incarcerated for a crime committed before the new law was passed. The new law reduced the amount of good time automatically available through performance of satisfactory work and avoidance of disciplinary violations, but

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[21] See 16A C.J.S. *Constitutional Law* § 559 (2005).

[22] See *Lynce v. Mathis*, 519 U.S. 433, 117 S. Ct. 891, 137 L. Ed. 2d 63 (1997).

[23] *State v. Worm*, 268 Neb. 74, 680 N.W.2d 151 (2004).

[24] *Id.*

[25] *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012). See, also, *Carmell v. Texas*, 529 U.S. 513, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000); *Collins v. Youngblood*, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

[26] *Collins v. Youngblood, supra* note 25.

[27] *Weaver v. Graham, supra* note 17.

increased the amount of discretionary good time available for specific productive conduct.[28] The Court reasoned that regardless of whether the good time was a vested right, there was a lack of fair notice and governmental restraint because the legislature increased the inmate's punishment beyond what was prescribed when the crime was consummated.[29] "[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."[30]

The Court in *Weaver v. Graham* rejected the state's argument that the law altering the availability of good time was prospective, and not retrospective, because it operated only upon the accumulation of good time after its effective date. The Court explained:

> This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is *ex post facto*. The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether [the statute] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative.[31]

The Court in *Weaver v. Graham* also rejected the state's argument that the new good time statute was not retrospective, because good time is not part of the punishment annexed to the crime. The Court explained:

> First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term—and that his effective sentence is altered once this determinant is changed. . . . Second,

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[28] *Id*. See, also, *Lynce v. Mathis, supra* note 22.

[29] *Weaver v. Graham, supra* note 17.

[30] *Id*., 450 U.S. at 30-31.

[31] *Id*., 450 U.S. at 31.

> we have held that a statute may be retrospective even if it alters punitive conditions outside the sentence.[32]

The Court concluded that the new good time statute "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'"[33]

Finally, the Court rejected the state's argument that the net effect of all the new good time provisions was to increase availability of good time deduction and, thus, that the change was not to the defendant's disadvantage. The Court held that the alteration in the quantum of punishment was to the inmate's disadvantage because there was a reduced opportunity to shorten time in prison "simply through good conduct."[34] The Court explained:

> The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision . . . than he could for the same conduct under the new provision . . . . To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions. Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program. . . . In contrast, under both the new and old statutes, an inmate is automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks.[35]

Because the new good time scheme made more onerous the punishment for the crimes committed before its enactment, the Court in *Weaver v. Graham* held that it violated the prohibition against ex post facto laws.[36]

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[32] *Id.*, 450 U.S. at 32.

[33] *Id.*, 450 U.S. at 33.

[34] *Id.*, 450 U.S. at 34.

[35] *Id.*, 450 U.S. at 35.

[36] *Weaver v. Graham, supra* note 17.

### (c) Retroactive Application of Changes to Discretionary Elements of Parole Only Ex Post Facto if Significant Risk of Lengthening Time Incarcerated

Such alteration of the substantive formula for good time is treated distinctly from the retrospective application of changes to discretionary elements of the parole process. The U.S. Supreme Court has observed that "[w]hether retroactive application of a particular change in parole law respects the prohibition on *ex post facto* legislation is often a question of particular difficulty when the discretion vested in a parole board is taken into account."[37] The question in such cases is a "matter of degree" and depends on whether the retroactive application of the change creates "'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'"[38]

In two cases, the U.S. Supreme Court held that retroactive changes that decreased the frequency of parole hearings did not create a sufficient risk of increasing the likelihood of longer incarceration that would violate the ex post facto prohibition.[39] In *Garner v. Jones*[40] and *California Dept. of Corrections v. Morales*,[41] the Court reasoned that the changes to the parole laws in question (1) did not change the substantive formula for securing any reductions to sentence ranges, (2) did not affect the standards for determining a prisoner's suitability for parole and setting a release date, and (3) did not

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[37] *Garner v. Jones*, 529 U.S. 244, 250, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

[38] *Id.*

[39] See, *Garner v. Jones, supra* note 37; *California Dept. of Corrections v. Morales, supra* note 18. See, also, *Moore v. Nebraska Bd. of Parole*, 12 Neb. App. 525, 679 N.W.2d 427 (2004).

[40] *Garner v. Jones, supra* note 37.

[41] *California Dept. of Corrections v. Morales, supra* note 18.

present any "significant risk"[42] of lengthening the time spent in prison.[43]

The Court explained that "the *Ex Post Facto* Clause should not be employed for 'the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.' . . . The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release."[44] And, while

> [t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause, . . . to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice[,] . . . where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised.[45]

The concurring opinion in *Garner v. Jones* advocated for a distinction between the penalties that a person can anticipate for the commission of a particular crime and the opportunities for mercy or clemency that may go to the reduction of the penalty. The concurrence admitted, "At the margins, to be sure, it may be difficult to distinguish between justice and mercy."[46] It illustrated then: "A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement—a reduction of the prescribed penalty—rather than a discretionary grant of leniency. But that is immeasurably far removed from the present case."[47]

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[42] *Garner v. Jones, supra* note 37, 529 U.S. at 255.

[43] See, *id.*; *California Dept. of Corrections v. Morales, supra* note 18.

[44] *Garner v. Jones, supra* note 37, 529 U.S. at 252.

[45] *Id.*, 529 U.S. at 253.

[46] *Id.*, 529 U.S. at 258 (Scalia, J., concurring in part in judgment).

[47] *Id.*

### (d) Requiring DNA Sample Is Not Punitive

The State is correct that, standing alone, requiring DNA sampling is not punishment at all. Courts have consistently held that requiring a convicted person to submit a DNA sample does not violate the prohibition against ex post facto laws, because such a requirement is not punitive.[48]

[12] Further, courts consistently hold that when a law requiring a DNA sample punishes refusal to provide a sample as an offense *separate* from the offense that made the person subject to DNA sampling, such law does not violate ex post facto prohibitions.[49] Rather, the punishment is solely for the new offense of refusing to provide the DNA sample—even though the original offense may have been the "but for" reason for the DNA sample requirement. Such punishment is not a new punitive measure of the original offense.

This is similar to our Sex Offender Registration Act (SORA). The requirement of registration, in itself, is not punitive.[50] Further, we have held that although Neb. Rev. Stat. § 29-4011 (Cum. Supp. 2012) imposes a criminal penalty for those found guilty of failing to register under SORA, such punishment is not for behavior that occurred before the statute's enactment.[51]

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[48] See, e.g., *U.S. v. Coccia*, 598 F.3d 293 (6th Cir. 2010); *Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998); *People v. Espana*, 137 Cal. App. 4th 549, 40 Cal. Rptr. 3d 258 (2006); *State v. Raines*, 383 Md. 1, 857 A.2d 19 (2004); *State v. Norman*, 660 N.W.2d 549 (N.D. 2003); *Doe v. Gainer*, 162 Ill. 2d 15, 642 N.E.2d 114, 204 Ill. Dec. 652 (1994).

[49] See, e.g., *U.S. v. Hook*, 471 F.3d 766 (7th Cir. 2006); *Word v. U.S. Probation Dept.*, 439 F. Supp. 2d 497 (D.S.C. 2006); *Vore v. U.S. Dept. of Justice*, 281 F. Supp. 2d 1129 (D. Ariz. 2003); *In re D.L.C.*, 124 S.W.3d 354 (Tex. App. 2003).

[50] *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009); *Welvaert v. Nebraska State Patrol*, 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004); *State v. Worm, supra* note 23. See, also, *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003).

[51] See *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

It is "not additional punishment for the crimes that resulted in a person's being subject to SORA; instead, it punishes the act of failing to comply with SORA once a person is subject to its requirements."[52]

At issue here, however, is not punishment of refusal to submit a DNA sample as a separate offense. At issue here is the mandatory forfeiture of all good time, and this forfeiture results in an increased period of incarceration for the original offense, which was committed before the statute's enactment.

### (e) Changes to Consequences of Original Crime as Result of Failure to Abide by New Rules

Section 29-4106(2) arguably falls under a class of "close cases" wherein courts have traditionally had more difficulty determining if the consequence for failure to adhere to new prescriptions should be considered the continuing legal consequence of the original crimes or the independent legal consequence of later misconduct.[53]

The Sixth Circuit, in *U.S. v. Reese*,[54] opined that if the new punishment applies to everyone who has committed the predicate offense without regard to any subsequent offense, there is clearly an ex post facto violation. In contrast, an increased punishment *of the new crime*, but based on recidivism, has uniformly been upheld as constitutional.[55] In such cases, the punishment is not "'for the earlier offense,'" even though the punishment was a "but for" consequence of that earlier offense.[56]

Changes to the consequences attendant to the original crime, but based on new conduct subsequent to those changes,

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[52] *Id.* at 224, 817 N.W.2d at 269.

[53] *U.S. v. Reese*, 71 F.3d 582, 588 (6th Cir. 1995).

[54] *Id.*

[55] See, e.g., *Taylor v. State*, 114 Neb. 257, 207 N.W. 207 (1926); *Smith v. State*, 199 P.3d 1052 (Wyo. 2009); *State v. Everett*, 816 So. 2d 1272 (La. 2002); *State v. Jones*, 344 S.C. 48, 543 S.E.2d 541 (2001).

[56] *U.S. v. Reese, supra* note 53, 71 F.3d at 589.

however, create more confusion. The Sixth Circuit framed the relevant ex post facto question for these situations as: "Is there fair notice, and is the punishment for the *original* conduct being imposed or increased?"[57]

In the context of changes to release eligibility based on the failure to provide a DNA sample, courts illustrate that the ex post facto question is more specifically whether the subsequently established requirement lengthens the time incarcerated under the original sentence and, if so, whether the inmate was on fair notice at the time the crime was committed that the requirement in question could change. Where the length of incarceration is increased by virtue of the new law, the distinction of whether the new law is ex post facto hinges on whether the change involved matters of discretion—or other changes clearly contemplated by the original statutory scheme—or whether instead the change involved the standards for determining a prisoner's suitability for parole or for setting a release date.

### *(i)* Jones v. Murray—*Forfeiture of Mandatory Good Time for Refusing DNA Sample Violated Ex Post Facto Principles*

Thus, in *Jones v. Murray*,[58] the Fourth Circuit held that a statute that required a DNA sample from convicted felons and sex offenders violated the prohibition against ex post facto laws to the extent it could be enforced to modify mandatory parole.

The statutory scheme in force when the inmate in question committed his crimes provided that every person "'shall be released on parole . . . six months prior to his date of final discharge.'"[59] The only exception at the time of the inmate's crimes was if new information was provided to the parole board giving the board reasonable cause to believe that release

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[57] *Id.* at 590 (emphasis in original).

[58] *Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992).

[59] *Id.* at 309 (emphasis omitted).

posed a clear and present danger to the life or physical safety of any person.[60]

Subsequent to the inmate's crimes, a DNA blood testing requirement was passed, stating:

> "Notwithstanding the provisions [providing for release 6 months before the date of final discharge with such limited exception in the case of being a clear and present danger], any person convicted of a felony who is in custody after July 1, 1990, shall provide a blood sample prior to his release."[61]

The court in *Jones v. Murray* noted that the DNA testing itself was not punitive. Further, the court observed in dicta that it would not be contrary to the prohibitions against ex post facto laws for violators to be administratively punished "within the terms of the prisoners' original sentence" for the failure to provide samples.[62] This was because "reasonable prison regulations, and subsequent punishment for infractions thereof, are contemplated as part of the sentence of every prisoner."[63] "[S]ince a prisoner's original sentence does not embrace a right to one set of regulations over another, reasonable amendments, too, fall within the anticipated sentence of every inmate."[64] Accordingly, the statute did not violate the prohibition against ex post facto in "its possible effect in authorizing prison punishment, the denial of good-time credits, or consideration by the parole board in granting discretionary parole to compel the inmate to provide a sample, because it does not thereby alter any prisoner's sentence for past conduct."[65]

However, the court held that punishing the refusal to provide a DNA sample through the denial of the statutory

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[60] *Id.*

[61] *Id.* at 308 (emphasis omitted).

[62] *Id.* at 310.

[63] *Id.* at 309.

[64] *Id.* at 309-10.

[65] *Id.* at 310.

6-month mandatory parole inherent to the original sentence constituted after-the-fact punishment of the original crimes. The court elaborated that the prisoner was being denied the benefit present at the time of his original crimes of being entitled to a 6-month reduction in sentence unless he constituted a clear and present danger to society. There was no indication that refusing to provide a DNA sample made the inmate a clear and present danger to society.

The court severed that part of the DNA statute which referred to modifying mandatory parole upon an inmate's refusal to provide a DNA sample.

*(ii)* State v. Henry County Dist. Ct.—*Changes to Laws Specifying New Conduct That Would Earn or Forfeit Good Time Violated Ex Post Facto Principles*

Though not a DNA case, in *State v. Henry County Dist. Ct.*,[66] the court similarly held that a statute that added requirements to the previously automatic accrual of good time for simple good conduct violated the prohibition against ex post facto laws. The statutory scheme in place at the time the inmate committed his crimes allowed an inmate to earn a specified amount of good time for simple good conduct and another specified amount of good time for participation in listed activities. Subsequently, the statute was amended such that an inmate who was required to participate in a sex offender treatment program was ineligible for any good time reduction of his or her sentence unless the inmate participated in and completed the sex offender treatment program. An implementing regulation stated that inmates required to participate in sex offender treatment programs who refused treatment, were removed from treatment, or failed program completion criteria would not be eligible for earned time credits. The inmate in question had been temporarily removed from a sex offender treatment program for misconduct. During his removal, the inmate did not earn any good time, thus ultimately extending his tentative date for discharge by 4 months.

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[66] *State v. Henry County Dist. Ct.*, 759 N.W.2d 793 (Iowa 2009).

The court in *State v. Henry County Dist. Ct.* reasoned that to the extent the inmate could no longer automatically earn good time merely by following institutional rules, without participating in programs required by the director, the amended statute and its implementing regulation made the penalty for the inmate's original crime more onerous. "[I]f [the inmate] does not participate in the [sex offender treatment program,] he will have a longer period of incarceration under the amended statute than he would have had under the statute in effect at the time of his sentencing."[67] In fact, the inmate's "failure to satisfactorily participate renders him ineligible to earn *any* reduction in his sentence, even if he has no disciplinary infractions."[68]

The court rejected the argument that the inmate was given fair notice because his failure to participate in the sex offender treatment occurred after the passage of the amended statute and the pertinent regulation. The court found that the state's analysis was "misplaced."[69] The question, the court reasoned, was whether the inmate was on notice when he committed his original crime and was sentenced that he would not be eligible for a reduction in his sentence by merely following prison rules.[70]

The court also rejected the State's argument that the amended statute and the implementing regulation merely changed the institutional rules contemplated as part of the sentence of every prisoner. Although an inmate would have been on notice that the precise conduct required to qualify for good time credit could vary over time, an inmate "would have had the expectation that, if he simply complied with institutional rules, he could cut his sentence in half."[71] Furthermore, given the wording of the statutes at the time of the inmate's crimes, he would have understood that compliance with

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[67] *Id.* at 800.

[68] *Id.* at 801 (emphasis in original).

[69] *Id.* at 799.

[70] *State v. Henry County Dist. Ct.*, *supra* note 66.

[71] *Id.* at 802.

institutional rules and participation in treatment programs were treated distinctly.

### *(iii) Courts Distinguish* Jones v. Murray *and Find No Ex Post Facto Violation When New Law or Regulation Does Not Lengthen Time in Prison*

In contrast to the facts presented in *Jones v. Murray* or *State v. Henry County Dist. Ct.*, internal prison sanctions for failure to submit a DNA sample that do not affect the prisoner's parole eligibility date or discharge date have uniformly been held not to violate the prohibition against ex post facto laws.[72] Such changes to internal punishments are contemplated as part of the sentence of every prisoner.

Thus, in *Padgett v. Ferrero*,[73] the court held that disciplinary action, followed by taking a sample by force in the event of continued refusal, was not an ex post facto law, because "no prison sentences will be extended because of the failure to cooperate with the statute."[74] Likewise, the court in *Cooper v. Gammon*[75] held that it did not violate ex post facto prohibitions for the prison to impose solitary confinement for an inmate who refused to submit a DNA sample under laws enacted since he committed his crimes.

### *(iv) Courts Distinguish* Jones v. Murray *and Find No Ex Post Facto Violation When Inmate Was on Notice at Time of Crimes That the Act Was Available and Subject to Changing Regulations or Discretion*

Furthermore, courts have held that there is no violation of the prohibition against ex post facto laws in the denial or

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[72] See, *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996); *Padgett v. Ferrero*, 294 F. Supp. 2d 1338 (N.D. Ga. 2003); *Schreiber v. State*, 666 N.W.2d 127 (Iowa 2003); *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. App. 1997).

[73] *Padgett v. Ferrero, supra* note 72.

[74] *Id.* at 1344-45.

[75] *Cooper v. Gammon, supra* note 72. See, also, *Dominique v. Weld, supra* note 72.

revocation of parole or good time for refusing to submit a DNA sample when the original statutory scheme made clear that actual release, continued release, or the earning of good time credits was subject to the discretion of prison officials or to changing laws or regulations.[76]

Thus, where the convicted person was previously subject to the generally stated requirement that while on supervised release or parole, he or she follow parole agent directives and not commit other crimes, then new laws criminalizing refusal to submit a DNA sample and allowing for revocation of parole or supervised release based on such refusal did not violate the prohibition against ex post facto laws.[77] Such potential revocation of supervised release or parole did not increase the plaintiff's punishment for a prior conviction because, as a part of the original sentence, the plaintiff was subject to the mandatory conditions that he or she not commit another crime (refusal to submit a DNA sample being a separate misdemeanor) and that he or she follow the instructions of the probation officer.[78] "[I]t is well settled that the conditions of parole can be changed at any time."[79]

Similarly, courts hold that there is no violation of the prohibition against ex post facto laws when refusal to submit a DNA sample is the basis for the discretionary determination to deny release on parole.[80] For example, in *Dial v. Vaughn*,[81] the DNA testing statute provided that an inmate shall not be

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[76] *U.S. v. Hook, supra* note 49; *Johnson v. Quander, supra* note 48; *Word v. U.S. Probation Dept., supra* note 49; *Miller v. U.S. Parole Comm'n*, 259 F. Supp. 2d 1166 (D. Kan. 2003); *Cannon v. South Carolina Dept. of Probation*, 361 S.C. 425, 604 S.E.2d 709 (2006), *reversed on other grounds* 371 S.C. 581, 641 S.E.2d 429 (2007).

[77] See cases cited *supra* note 76.

[78] *Word v. U.S. Probation Dept., supra* note 49; *Miller v. U.S. Parole Comm'n, supra* note 76.

[79] *Miller v. U.S. Parole Comm'n, supra* note 76, 259 F. Supp. 2d at 1170.

[80] See, *Boling v. Romer*, 101 F.3d 1336 (10th Cir. 1997); *Dial v. Vaughn*, 733 A.2d 1 (Pa. Commw. 1999). See, also, *Com. v. Derk*, 895 A.2d 622 (Pa. Super. 2006).

[81] *Dial v. Vaughn, supra* note 80. See, also, *Com. v. Derk, supra* note 80.

released before expiration of the maximum term of confinement unless and until the inmate provided a DNA sample. The court interpreted this statute, however, as not changing either the mandatory release date or the parole eligibility date. Instead, the court focused on the distinction between parole eligibility and parole release, and found that the statute governed only parole release. Then, the court explained that the inmate was on notice from the time of his crimes that actual release on parole depended upon full compliance with a variety of prison rules and administrative requirements. Therefore, the court concluded that the changes to the specifics of those rules and regulations did not increase the measure of punishment attached to the original sentence.

In *Ewell v. Murray*,[82] the court held that where the original law set forth broad categories of good time eligibility, and where the inmate was on notice that the details of those categories were subject to changing rules and regulations, retrospective changes to the criteria for the categories of good time eligibility did not violate the prohibition against ex post facto laws.

At the time of the inmate's crimes, the law considered in *Ewell v. Murray* stated that inmates shall be given the opportunity to earn good time, based on a four-level classification system. But the law explicitly stated that persons could be reclassified according to prison rules and regulations. One of those classifications meant that no good time could be earned. Subsequently, an amended regulation provided for reclassification to a good-time-ineligible category for refusing to provide a DNA sample. Another amended regulation provided for forfeiture of previously earned good time.

Considering some of the same laws at issue in *Jones v. Murray*, the court in *Ewell v. Murray* explained that the good time credits under the four categories were cumulative to the mandatory 6-month release period discussed in *Jones v.*

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[82] *Ewell v. Murray*, 813 F. Supp. 1180 (W.D. Va. 1993). See, also, *Smith v. Beck*, 176 N.C. App. 757, 627 S.E.2d 284 (2006).

*Murray*. These laws were distinguishable from changes affecting the mandatory 6-month release date because, under the laws controlling at the time of the inmate's crimes, an inmate had no right to be released on either discretionary or mandatory parole before that 6-month release date.

*(v) U.S. Supreme Court Has Indicated That Whether Change to Original Punishment Based on New Conduct Implicates Ex Post Facto Must Be Determined From Notice at Time of Original Crimes, Not at Time of New Conduct*

Cases finding no ex post facto violation upon such consequences for failing to provide a DNA sample sometimes play lipservice to the notion that the punishment was for the refusal to provide a sample, which occurred after the amended law or regulation, and was not an increase in the quantum of punishment for the original crime occurring before the amended law or regulation. But we can find no case wherein a court has concluded that the new law was constitutionally applied to the convicted person when the consequences were an increase in the time incarcerated and the convicted person would not have contemplated the underlying change in the law or regulation at the time of the crime leading to that incarceration.

Most important, the U.S. Supreme Court has repeatedly rejected the notion that a law affecting the period of incarceration for the original crime, but only if the inmate commits or fails to commit certain actions after passage of the new law, somehow does not relate to the original crime for purposes of an ex post facto analysis.

As already discussed, in *Weaver v. Graham*, the U.S. Supreme Court rejected the idea that changes to the good time system, because they applied only to the accumulation of good time after passage of the changes, were prospective and not retrospective.[83] The Court explained that the point of time to

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[83] *Weaver v. Graham, supra* note 17.

be focused on was when the crimes were committed that led to the incarceration that is being affected by the good time.[84]

In *Scafati v. Greenfield*,[85] the U.S. Supreme Court summarily affirmed a decision by the lower court that a law passed after the inmate's crimes but before his release on parole, making a prisoner good time ineligible for 6 months if the prisoner committed a violation of parole, was ex post facto. In *Greenfield v. Scafati*,[86] the lower court explained that while under the law at the time of the prisoner's crime, the inmate could become good time ineligible through misbehavior *during confinement*, there was no prior provision for forfeiture of future good time eligibility through misbehavior while *on parole*. The court found that insofar as the new law thus increased the scope of opportunities to forfeit good time eligibility, it was ex post facto. The court observed that the availability of good conduct deductions was considered part of the sentence for the original crime. Likewise, although a prisoner's entitlement to parole lies in the discretion of the parole board, it does "not follow because a prisoner might not receive parole that it would not be an unlawful ex post facto burden to deprive him altogether of the right to be found qualified," and "hence earn, parole."[87]

Subsequently, in *Johnson v. United States*,[88] the U.S. Supreme Court reaffirmed, in dicta, its decision in *Scafati v. Greenfield*. In *Johnson v. United States*, the Court determined that because the district court always had the same powers under preexisting law, there was no ex post facto question concerning a statute that allowed for revocation of the supervised release of the original offense, including no credit for time served under such supervised release, upon violation of the conditions of release. Nevertheless, the Court went out of its

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[84] *Id*.

[85] *Scafati v. Greenfield*, 390 U.S. 713, 88 S. Ct. 1409, 20 L. Ed. 2d 250 (1968).

[86] *Greenfield v. Scafati*, 277 F. Supp. 644 (D.C. Mass. 1967).

[87] *Id*. at 646.

[88] *Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).

way to reject the reasoning of the lower court that there was no ex post facto violation, because the law imposed a punishment for the new offense of violating the supervised release conditions and did not increase the quantum of punishment for the original offense.

The Court said that "[w]hile this understanding of revocation of supervised release has some intuitive appeal, [such understanding raises] serious constitutional questions . . . ."[89] First, "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt."[90] Second, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense."[91] The Court concluded that "[t]reating postrevocation sanction as part of the penalty for the initial offense . . . avoids these difficulties."[92] The Court further observed that treating such sanctions as part of the penalty for the initial offense is "all but entailed by our summary affirmance of *Greenfield v. Scafati*."[93]

"We therefore attribute postrevocation penalties to the original conviction,"[94] said the Court. The Court explained:

> Since postrevocation penalties relate to the original offense, to sentence [the defendant] to a further term of supervised release [under the law enacted after the original crimes but before the conduct on supervised release] would be to apply this [law] retroactively (and to raise the remaining *ex post facto* question, whether that application makes him worse off).[95]

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[89] *Id.*, 529 U.S. at 700.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*, 529 U.S. at 701.

[94] *Id.*

[95] *Id.*

### *(vi) § 29-4106(2) and A.R. 116.04 Are Ex Post Facto to Extent They Provide for Forfeiture of Good Time for Refusing to Submit DNA Sample*

Cases such as *Weaver v. Graham*, *Scafati v. Greenfield*, and *Johnson v. United States* make clear that we cannot accept the State's argument that the penalties for Shepard's refusal to provide a DNA sample relate to the prospective act of refusal and not to the original crimes for which Shepard was incarcerated. The analysis is as simple as observing that § 29-4106(2) affects changes to Shepard's period of incarceration for the original crimes committed before its enactment. Section 29-4106(2) does not set forth a separate crime with a separate punishment. We are not presented with the question of punishment for the refusal to submit a DNA sample as a separate crime. Section 29-4106(2) as applied to Shepard was retrospective because it changed the period of incarceration for a crime committed before its enactment.

We further conclude that Shepard did not have fair notice of the changes to the good time scheme mandated by § 29-4106(2). Section 29-4106(2) did not make changes in the kind of discretionary disciplinary measures discussed in cases such as *California Dept. of Corrections v. Morales* or *Ewell v. Murray*. Nor did § 29-4106(2) merely change or elaborate upon the category of disciplinary measures considered to be gross or serious misconduct.

At the time of Shepard's crimes, he expected that his mandatory discharge date would be calculated based on a mandatory scheme of good time accumulation. He further expected that the only possible forfeiture of this good time would be in finite amounts upon the discretion of the prison officials, and only upon gross or serious misconduct. Looking at the well-defined parameters of the mandatory good time scheme in effect at the time of Shepard's crimes with a limited scope of forfeiture, we find he did not have fair notice that the scheme would change to mandating automatic forfeiture of all past and future good time upon refusal to submit a DNA sample, thereby entailing a much larger amount of forfeiture than previously possible, for an act that was not gross or serious

misconduct, and outside the traditional discretionary, disciplinary process.

[13] Finally, we conclude that § 29-4106(2), in mandating forfeiture of all good time and thereby increasing the period of Shepard's incarceration, is punitive. While the requirement of providing a DNA sample is not itself punitive, the provision of § 29-4106(2) that increases the period of incarceration by mandating recalculation of the release date to the maximum term of confinement clearly is. This is not meaningfully different from cases such as *California Dept. of Corrections v. Morales*,[96] *State v. Henry County Dist. Ct.*,[97] *Jones v. Murray*,[98] *Scafati v. Greenfield*,[99] and *Johnson v. United States*.[100] Those cases illustrate that it does not matter if the new requirement is especially onerous or could be, in itself, considered "civil." The new requirement considered in *State v. Henry County Dist. Ct.*, that the inmate participate in sex offender treatment, although not in itself onerous or even punitive, was held to be an ex post facto law when the consequence for the failure to participate in the treatment was removal from good time eligibility. The new requirement considered in *Weaver v. Graham*, that the inmate demonstrate meritorious behavior, might in itself be considered civil, but the court held that when such meritorious behavior was not a requirement for good time eligibility before, the law adding that requirement was ex post facto.

Failure to satisfy the new requirement of providing a DNA sample results in an increased period of incarceration. And an increased period of incarceration is punitive. Due to the expanded scope of good time forfeiture and the imminent removal of his good time, Shepard is "worse off" than he was before the passage of § 29-4106(2).[101]

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[96] *California Dept. of Corrections v. Morales, supra* note 18.

[97] *State v. Henry County Dist. Ct., supra* note 66.

[98] *Jones v. Murray, supra* note 58.

[99] *Scafati v. Greenfield, supra* note 85.

[100] *Johnson v. United States, supra* note 88.

[101] See *id.*

In conclusion, we agree with the district court that insomuch as § 29-4106(2) forfeits Shepard's past and future good time and recalculates his parole eligibility and mandatory discharge dates without regard to any good time, it violates the constitutional prohibitions against ex post facto laws. Shepard, at the time of his crimes, expected to automatically incur good time simply through good conduct, and he expected to have his mandatory discharge date calculated upon his maximum sentence minus good time. Section 29-4106(2), by allowing for forfeiture of more good time than could have been forfeited before and by allowing for forfeiture based on conduct that is something less than flagrant and serious misconduct—indeed, conduct not even contemplated at the time of Shepard's crimes—substantially altered the punitive consequences attached to his crimes.

## VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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# IN RE INTEREST OF NATHANIEL M., A CHILD UNDER 18 YEARS OF AGE. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT, V. STATE OF NEBRASKA AND NATHANIEL M., APPELLEES.

855 N.W.2d 580

Filed November 7, 2014. Nos. S-13-1066 through S-13-1068.

1. **Moot Question: Jurisdiction: Appeal and Error.** Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions.
2. ____: ____: ____. When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.
3. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.

4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Moot Question.** The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.
6. **Moot Question: Appeal and Error.** An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination. This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.

Appeals from the County Court for Madison County: Ross A. Stoffer, Judge. Appeals dismissed.

Neleigh N. Boyer, Special Assistant Attorney General, for appellant.

Gail Collins, Deputy Madison County Attorney, for appellee State of Nebraska.

Brad Ewalt, of Ewalt Law Office, for appellee Nathaniel M.

Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Per Curiam.

In these consolidated appeals, the Nebraska Department of Health and Human Services (the Department) appeals from orders of the county court for Madison County, sitting as a juvenile court, which committed a 13-year-old juvenile to the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska. At issue is whether the court had the authority under Neb. Rev. Stat. § 43-286(1)(b)(i) (Supp. 2013) to so commit the juvenile when he was under the age of 14 years. The Office of Juvenile Services (OJS) initially refused to accept the juvenile, but was ordered by the court to do so. OJS then accepted him but quickly discharged him, causing the appeals before us to become moot. The Department asks us to decide the statutory issue presented under the public

interest exception to the doctrine of mootness. For the reasons discussed, we decline to do so and dismiss the appeals.

## BACKGROUND

Nathaniel M., born in May 2000, is the subject of three juvenile proceedings in the county court for Madison County. The first, which is our case No. S-13-1066, originated on June 29, 2012, with the filing of a petition alleging that Nathaniel was a juvenile as defined by Neb. Rev. Stat. § 43-247(1) and (3)(b) (Reissue 2008), based in part on allegations of assault and criminal mischief. Nathaniel admitted the allegations in the petition, and at an August 30 disposition hearing, he was committed to OJS for placement at the foster or group home level.

Case No. S-13-1067 originated on May 8, 2013, when a petition was filed in York County, Nebraska, alleging that Nathaniel stole property worth more than $1,500 and operated another's vehicle without consent. Nathaniel admitted to the theft, and the other allegation was dismissed. The case was then transferred to Madison County. On July 29, Nathaniel was committed to OJS.

Case No. S-13-1068 originated on September 19, 2013, when a petition was filed in Madison County alleging Nathaniel exercised control over the movable property of another worth $500 or more with the intent to deprive them thereof. The petition was later amended to add allegations of theft by receiving stolen property and criminal mischief. A day after this petition was filed, the State moved for a higher level of placement for Nathaniel with respect to the two prior pending juvenile cases.

A hearing on all three cases was held on November 12, 2013. In the first two cases, the hearing addressed the State's motion for a higher level of placement. In the third case, the hearing was a pretrial hearing. At this hearing, Nathaniel admitted to certain allegations in the third case. A caseworker employed by the Department testified that Nathaniel was a flight risk, that he posed a risk to himself and others, that no disposition less restrictive than commitment to the YRTC would suffice to meet his needs, and that such commitment was in Nathaniel's

best interests. The parties stipulated that he should be placed at the YRTC in Kearney in all three cases.

The court placed Nathaniel on intensive supervised probation and ordered that he be placed at the YRTC. The court explained its disposition to Nathaniel as follows:

> Basically it means even though I've told you you're on probation until you're 19, what's going to happen is . . . that you're going to go to Kearney, and you're going to be expected to complete the program there. And they will keep you there until you do complete that program.

At the time of this disposition, Nathaniel was less than 14 years old.

Two days later, the prosecutor filed a motion for change of disposition in each of the three cases. At a hearing on these motions, at which representatives of the Department were present, the prosecutor advised the court that the YRTC refused to accept Nathaniel because of his age and asked the court to rescind its prior order placing him at the YRTC in accordance with a stipulation entered into by the parties.

The court refused to change its disposition. It explained that it construed § 43-286(1)(b)(i) to authorize the commitment of a juvenile under the age of 14 to a YRTC if the juvenile was committed to OJS prior to July 1, 2013; the juvenile had subsequently committed another offense; and the interests of the juvenile and the welfare of the community demanded such commitment. The court found that Nathaniel met these criteria. And the court further explained:

> And I'm just not going to stand for the fact that the [D]epartment [and OJS are] able to say, we don't agree with you, and without appealing they refuse to take the child under my order.
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> When the court has entered an order . . . the court expects that order to be followed unless there is an appeal or something else happens. And so if the [D]epartment wants to appeal that, [it] certainly can appeal it. And, in fact, if the juvenile is not taken back into the [YRTC], I'm ordering that the director . . . at the [YRTC] at Kearney, that that person appear here in the court on November the 19th at ten o'clock to show cause why

> they should not be held in contempt of court for refusing to follow my order.
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> I mean . . . if I ordered anybody else to do something and they refused to do it, I wouldn't just let them say, I disagree with your interpretation of the law and so I'm not going to do it. And I don't think that the [YRTC] at Kearney or the [D]epartment should be able to do that either.
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> There are proper procedures for challenging a court's order, and just saying we're not going to do it and we're not going to take the kid is not one of them. . . . I've ordered them to take him back.
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> If they don't do it, then they're ordered to be here on the 19th and explain why they're not taking him back. And if they want to, the 30 days has not yet run, they can appeal, but that's the proper way to do it, not just to say we're going to refuse to do what you've told us to do.
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> I mean, how would that be any different than if I ordered the [D]epartment to pay for something and [it says], well, [it] interpret[s] the law differently than you do, [it is] not going to do it? I mean, there's plenty of cases out there where the [D]epartment has disagreed with the court, and [it has] appealed, and sometimes the Supreme Court finds for the [D]epartment. That's the proper way to do it, not just to refuse to do it.
>
> . . . .
>
> The [D]epartment just basically says that [it] disagree[s] with the way you read the law and so [it is] just not going to follow it. And I don't care if it's [the Department's] attorney or whoever. I mean, attorneys can disagree with me on my interpretation of the law, but it's my job to interpret the law. And if they disagree with me, there are ways that they can go about doing that, not just say, we're not going to follow what you said. I mean, if that is allowed, what power does the court have at that point?

The records do not reflect whether the referenced contempt proceedings were held, although counsel for the Department mentioned such proceedings during oral argument before this

court. The Department filed notices of appeal in each case on December 9, 2013.

Nathaniel was ultimately accepted by the YRTC. The record indicates, however, that the court was almost immediately advised by the YRTC that Nathaniel would be discharged in 60 days.[1] At a reentry hearing held on January 9, 2014, the court left Nathaniel's probation in effect and placed him at a group home upon his discharge from the YRTC. The parties agree that Nathaniel was discharged from the YRTC after these appeals were filed.

We moved these cases to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[2]

## ASSIGNMENTS OF ERROR

The Department assigns that the juvenile court erred in (1) placing Nathaniel at a YRTC when he was less than 14 years old and (2) overruling its motions to change that disposition.

## STANDARD OF REVIEW

[1,2] Because mootness is a justiciability doctrine that operates to prevent courts from exercising jurisdiction, an appellate court reviews mootness determinations under the same standard of review as other jurisdictional questions. When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower courts.[3]

[3] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[4]

## ANALYSIS

The Department contends that the juvenile court lacked authority to commit Nathaniel to the YRTC, because Neb. Rev.

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[1] See, generally, § 43-286(1)(b)(ii).

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

[3] *In re Interest of Anaya*, 276 Neb. 825, 758 N.W.2d 10 (2008).

[4] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013); *Mutual of Omaha Bank v. Murante*, 285 Neb. 747, 829 N.W.2d 676 (2013).

Stat. § 43-251.01(4) (Supp. 2013) provides: "A juvenile under the age of fourteen years shall not be placed with or committed to a youth rehabilitation and treatment center[.]" But the juvenile court found that this general prohibition was subordinated to the specific provisions of § 43-286(1)(b)(i), which apply to "all juveniles committed to [OJS] prior to July 1, 2013." Section 43-286(1)(b)(i) prohibits placement of a juvenile under the age of 14 years at a YRTC "unless he or she has violated the terms of probation or has committed an additional offense and the court finds that the interests of the juvenile and the welfare of the community demand his or her commitment." The juvenile court reasoned that Nathaniel was originally committed to OJS in the first of these three juvenile cases on August 30, 2012, that he subsequently committed another offense, and that his best interests and the welfare of the community demanded his confinement.

Both §§ 43-251.01(4) and 43-286(1)(b)(i) are part of the Nebraska Juvenile Code, which was substantially amended by the Nebraska Legislature in 2013.[5] As we noted in *In re Interest of Marcella G.*,[6] L.B. 561 authorized a pilot project administered by the Office of Probation Administration to be expanded statewide in a three-step, phase-in process beginning July 1, 2013. As a result of this legislation, the Office of Probation Administration has taken over the previous duties of OJS with respect to community supervision and parole of juvenile law violators and evaluations of such juveniles, while the role of OJS is now limited to operating YRTC's and taking care and custody of juveniles placed at those facilities.[7]

[4,5] These cases became moot by OJS' decision to discharge Nathaniel from the YRTC shortly after his arrival there. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.[8] The central question in

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[5] See 2013 Neb. Laws, L.B. 561.

[6] *In re Interest of Marcella G.*, 287 Neb. 566, 847 N.W.2d 276 (2014).

[7] See *id.*

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

a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.[9] Nathanial's discharge from the YRTC is clearly such a change in circumstances.

[6] Acknowledging that the cases are moot, the Department asks us to decide them under the public interest exception to the mootness doctrine. An appellate court may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination.[10] This exception requires a consideration of the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.[11]

We focus here on the third element of the test. Like Neb. Rev. Stat. § 43-247.02(3) (Supp. 2013), which we examined in *In re Interest of Marcella G.*, § 43-286(1)(b)(i) is part of the process of phasing in the provisions of L.B. 561. It applies *only* to juveniles committed to OJS prior to July 1, 2013. With the passage of time, there will necessarily be fewer juveniles committed to OJS prior to July 1, 2013, who are under the age of 14 years and potentially subject to commitment to a YRTC pursuant to § 43-286(1)(b)(i). At some point, perhaps in the not-too-distant future, there will be none. During oral argument, the Department acknowledged that its records would reflect the date of birth and date of commitment of each juvenile currently committed to OJS and that based on such records, it should know precisely how many juveniles could be affected by the interpretation of § 43-286(1)(b)(i), which it challenges in these cases. But it has not provided this court with that information. Instead, in its response to our show

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[9] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012); *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[10] *In re Interest of Taylor W.*, 276 Neb. 679, 757 N.W.2d 1 (2008); *In re Applications of Koch*, 274 Neb. 96, 736 N.W.2d 716 (2007).

[11] *Id.*

cause order, the Department states only that there are "several other juveniles who were committed to [OJS] prior to July 1, 2013, who are under the age of 14 years." Thus, we can only speculate regarding the probability of a future recurrence of the issue presented in these appeals. It appears, however, that such probability is slight.

And in the increasingly unlikely event that the issue did recur, it would not necessarily escape appellate review, as the Department contends. These cases are moot because OJS made them so by discharging Nathaniel from the YRTC shortly after he arrived there. OJS is a statutorily created office within the Department to which a court may commit a juvenile for treatment, including supervision, care, confinement, and rehabilitative services.[12] The record suggests, and counsel for the Department confirmed at oral argument, that OJS discharged Nathaniel from the YRTC not because he completed a treatment program there, but at least in part because OJS and the Department disagreed with the juvenile court's interpretation of the law regarding its authority to commit Nathaniel to the YRTC—the precise issue which the Department asks us to decide in these appeals. Remarkably, in urging us to reach the merits of these appeals, the Department states in its brief:

> As the law stands now, should a judge enter an order committing one of these juveniles under the age of fourteen to a YRTC, the YRTC will act, as it did in these cases, and discharge the juvenile almost immediately because the statutes do not allow for such a commitment. At the current time, the only way the YRTC can comply with the law while following a court order committing a juvenile under the age of fourteen is to accept the juvenile into the YRTC and then discharge the juvenile promptly.[13]

That is not how the law stands now. It is apparent that the stern but appropriate admonition of the juvenile court which

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[12] Neb. Rev. Stat. §§ 43-403(2) and (7) (Reissue 2008) and 43-404(1) (Supp. 2013).

[13] Brief for appellant at 20.

we have quoted above has not disabused the Department of the notion that it is free to disregard a court order with which it disagrees. So we add our own admonition: In the seemingly unlikely event that the circumstances presented here should arise in the future, the Department, OJS, and the YRTC can, and indeed must, comply with the juvenile court's order, and it is their statutory duty to provide appropriate treatment to a juvenile committed to their care and custody unless and until an appellate court reverses or modifies the commitment order. Statutory interpretation and construction is a function of the judicial branch, not the executive branch.

Based upon the manner in which these cases became moot, and the distinct possibility that the issue presented is one of last impression, we decline to reach the merits of these appeals under the public interest exception to the doctrine of mootness.

## CONCLUSION

For the foregoing reasons, we lack appellate jurisdiction over these appeals because the issue presented is moot. Accordingly, the appeals are dismissed.

APPEALS DISMISSED.

HEAVICAN, C.J., not participating.

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CURTIS CHARLES HUSKEY, APPELLANT AND CROSS-APPELLEE, V. DEITRA MARIE HUSKEY, NOW KNOWN AS DEITRA MARIE OSTERFOSS, APPELLEE AND CROSS-APPELLANT.

855 N.W.2d 377

Filed November 7, 2014. No. S-13-1140.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
2. **Jurisdiction: Appeal and Error.** It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **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.
4. **Appeal and Error.** The right of appeal in Nebraska is purely statutory.

5. **Judgments: Words and Phrases.** A judgment is the final determination of the rights of the parties in an action.
6. ____: ____. Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.
7. **Jurisdiction: Final Orders: Appeal and Error.** In the absence of a judgment or order finally disposing of a case, an appellate court has no authority or jurisdiction to act, and in the absence of such judgment or order, the appeal will be dismissed.
8. **Actions: Parties.** Neb. Rev. Stat. § 25-1315(1) (Reissue 2008) is implicated only where multiple causes of action are presented or multiple parties are involved.
9. **Child Custody: Armed Forces: Legislature: Intent: Final Orders.** Because a court may dispense only temporary relief pursuant to Neb. Rev. Stat. § 43-2929.01(4)(a) (Cum. Supp. 2012), the Legislature did not intend for a truly temporary order entered under that subsection to be characterized as a final order under Neb. Rev. Stat. § 25-1902 (Reissue 2008).
10. **Final Orders: Words and Phrases: Appeal and Error.** A substantial right is an essential legal right, not a mere technical right. A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.
11. **Constitutional Law: Appeal and Error.** Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.
12. **Final Orders: Appeal and Error.** When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Appeal dismissed.

Vanessa J. Gorden and Abigail F. Littrell, of Gorden Law, L.L.C., and Megan McDowell, Senior Certified Law Student, for appellant.

Kelly T. Shattuck, of Vacanti Shattuck, for appellee.

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

CASSEL, J.

## INTRODUCTION

A recently enacted statute[1] affords procedural protections in cases involving child custody and parenting time to military

[1] Neb. Rev. Stat. § 43-2929.01 (Cum. Supp. 2012).

parents affected by mobilization or deployment.[2] Pursuant to one provision,[3] the district court permitted the children of a military mother to temporarily accompany her for the duration of her assignment to Fort Benning, Georgia. The nonmilitary father appeals. The statutory language persuades us that the Legislature did not intend for truly temporary orders legitimately falling within the scope of this specific provision to be subject to appellate review. We therefore dismiss the appeal for lack of jurisdiction.

## BACKGROUND

### Divorce

In March 2011, a decree was entered dissolving the marriage of Deitra Marie Osterfoss, who was then known as Deitra Marie Huskey, and Curtis Charles Huskey. Osterfoss was awarded sole legal and physical custody of the parties' two children. Huskey was granted parenting time and ordered to pay child support in the amount of $600 per month.

Osterfoss joined the U.S. Army Reserve shortly after the parties' divorce. On March 26, 2013, the Department of the Army sent Osterfoss orders requiring her to report to Fort Benning on August 17 for active duty for a period of 1 year, ending August 16, 2014.

### Pleadings for Modification

On July 2, 2013, Osterfoss filed a "Complaint for Modification," alleging that her assignment to Fort Benning constituted a material change in circumstances. She requested that the district court modify the parties' divorce decree and parenting plan for the 2013-14 school year and enter an order permitting her to temporarily relocate the parties' children to Georgia. In support of her request, she asserted that it would not be in the children's best interests to remain in Nebraska with Huskey, because he was in "an unstable relationship with his girlfriend and must move."

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[2] See Committee Statement, L.B. 673, Judiciary Committee, 102d Leg., 1st Sess. (Feb. 3, 2011).

[3] § 43-2929.01(4)(a).

In response to Osterfoss' complaint, Huskey filed an "Answer and Counter Complaint to Modify," in which he protested relocation of the children for any length of time that would impact his parenting time or the children's education. He further contended that remaining in Nebraska was in the children's best interests, because he would be able to exercise parenting time, the children would be able to continue their education in the Gretna Public Schools system, the children would have the support of extended family members, and relocation of the children would result in their removal from Nebraska for a minimum of 1 year. He therefore requested that the district court award him temporary primary custody during Osterfoss' assignment to Georgia, permanently modify custody to joint legal and physical custody, and order child support.

### Motions for Temporary or Expedited Relief

Osterfoss moved the district court for temporary orders and/or an expedited trial. In her motion, she clarified that she was not seeking to permanently relocate the children to Georgia, but sought only a temporary order. The court overruled Osterfoss' motion and granted Huskey temporary custody. The court further suspended Huskey's child support obligation while the children were in his possession and ordered Osterfoss to pay child support.

### Trial

Trial began on December 5, 2013. The district court first conducted an in camera interview of the parties' children. The parties' 12-year-old daughter testified that she wanted to go to Georgia with Osterfoss. The parties' 6-year-old son similarly testified that he desired to be with Osterfoss.

Huskey testified that he was currently living with his girlfriend and their 13-month-old daughter in Waverly, Nebraska. The parties' children had been living with him since the middle of August 2013 pursuant to the grant of temporary custody. Huskey described that he and the children had become "a lot closer." And his employment as a sergeant for the

Lancaster County Department of Corrections permitted him to pick up the children from school every day. However, Huskey explained that because he and his girlfriend were both required to work nights, his mother usually stayed overnight with the children two or three times a week and would take the children to school the following morning.

As to Osterfoss' allegation that Huskey and his girlfriend had an unstable relationship, Huskey testified that his relationship with his girlfriend was secure. He further explained that any discussion of a future move was for the purpose of being closer to Gretna, Nebraska, in order to minimize travel time to the children's school.

Huskey agreed that he and Osterfoss had generally "gotten along" and been able to cooperate with respect to the children's best interests. As to her parenting of the children, Huskey stated that he had "some issues," but that "for the most part, [Osterfoss] did a good job" and that he considered her to be a good parent. He further confirmed that both he and Osterfoss possessed good relationships with the children and indicated that the children missed Osterfoss.

However, Huskey described that Osterfoss had frustrated his parenting time "[v]ery early on" and that he had filed contempt proceedings against her. But he testified that he and Osterfoss had "gotten over that." He also confirmed that he did not believe Osterfoss would frustrate his parenting time if she was permitted to relocate the children to Georgia.

As to his concern for the children's welfare, Huskey testified that he believed the parties' daughter would have problems adjusting to life in Georgia. He explained that their daughter is shy, reserved, and slower at making friends. However, Huskey expressed that the parties' son would adjust because he is "pretty good at adjusting."

Osterfoss testified that she believed the children would benefit from relocating to Georgia. She explained that the children would receive educational benefits because the schools in Georgia have greater diversity. And relocating would permit the children to remain with her, which would provide them continuity, because she had been their primary care provider since their birth. She further confirmed that she

did not believe the children would suffer physically, emotionally, or developmentally if they relocated to Georgia. She testified that the children are resilient and would benefit from the experience.

Osterfoss also expressed concern as to Huskey's care of the children. She explained that she would be able to spend time with the children every day after work, but that Huskey was required to leave the children in the care of others. She also claimed that she was required to purchase a cell phone for the parties' daughter because Huskey was not permitting Osterfoss to speak with her.

A portion of Osterfoss' testimony also concerned Huskey's child support obligation under the divorce decree. On cross-examination, Huskey's counsel asked her, "You've requested in your response to the counterclaim that child support change permanently, is that correct, the amount that . . . Huskey pays to you?" Osterfoss responded affirmatively. Osterfoss testified that Huskey's hourly wage at the time of the parties' divorce was $16. However, Huskey testified that at the time of trial, his hourly wage had increased to approximately $23 per hour.

## District Court's Order

At the conclusion of trial, the district court made an oral pronouncement that the children would be permitted to relocate to Georgia with Osterfoss for the remainder of her temporary assignment. Osterfoss' counsel then inquired as to how child support would be treated, asking, "[A]re we assuming we're going back, then . . . to the old order as far as child support then?" The court responded, "Right."

The district court entered a written order on December 17, 2013, sustaining Osterfoss' motion for temporary removal. In its order, the court observed that it construed Osterfoss' complaint as a request for temporary removal pursuant to § 43-2929.01. And it further noted that, in this case, § 43-2929.01 placed the burden of proof on Huskey, the party seeking to prevent the removal. It therefore determined that Huskey had the burden of proving that a change in custody was in the children's best interests by clear and convincing evidence and that he had

failed to meet that burden. Consequently, the court declined to modify custody. But its order provided that the children were to be returned to Nebraska no later than August 16, 2014. The court's order did not address Huskey's countercomplaint, which apparently is still pending.

### Appeal

Huskey filed a timely notice of appeal, and the case was assigned to the docket of the Nebraska Court of Appeals. Osterfoss cross-appealed. Huskey filed a petition in this court to bypass the Court of Appeals, and Osterfoss filed a motion for summary dismissal, alleging a lack of appellate jurisdiction. Osterfoss also filed a motion for attorney fees incurred in association with the appeal. We granted Huskey's petition to bypass and overruled Osterfoss' motion for summary dismissal. However, we ordered the parties to further brief the issue of appellate jurisdiction. After briefing was completed, we heard oral arguments.

## ASSIGNMENTS OF ERROR

Huskey assigns, reworded, that the district court erred in (1) interpreting § 43-2929.01 as requiring that Osterfoss maintain physical custody of the parties' children unless a custody change was demonstrated to be in the children's best interests by clear and convincing evidence; (2) applying § 43-2929.01 in a manner that violated his right to equal protection under Neb. Const. art. I, § 3; and (3) finding that temporary removal of the children to Georgia was in the children's best interests.

In her cross-appeal, Osterfoss assigns that the district court erred in failing to modify Huskey's child support obligation.

## STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which we review independently of the lower court's determination.[4]

## ANALYSIS

[2] Before we are able to address the merits of the parties' assignments of error, we must determine whether this

[4] *Watkins v. Watkins*, 285 Neb. 693, 829 N.W.2d 643 (2013).

court has jurisdiction. It is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] In her motion for summary dismissal, Osterfoss alleged that the district court's December 17, 2013, order was not a final, appealable order. She therefore asserted that this court is without jurisdiction over the appeal. We focus our attention on that order.

The order implemented § 43-2929.01(4)(a). Because the question of appellate jurisdiction in this appeal focuses on a relatively new and unexplored statute, we set forth the full text of § 43-2929.01:

> (1) The Legislature finds that for children of military parents it is in the best interests of the child to maintain the parent-child bond during the military parent's mobilization or deployment.
>
> (2) In a custody or parenting time, visitation, or other access proceeding or modification involving a military parent, the court shall consider and provide, if appropriate:
>
> (a) Orders for communication between the military parent and his or her child during any mobilization or deployment of greater than thirty days. Such communication may be by electronic or other available means, including webcam, Internet, or telephone; and
>
> (b) Parenting time, visitation, or other access orders that ensure liberal access between the military parent and the child during any military leave of the military parent during a mobilization or deployment of greater than thirty days.
>
> (3) A military parent's military membership, mobilization, deployment, absence, relocation, or failure to comply with custody, parenting time, visitation, or other access orders because of military duty shall not, by itself, be sufficient to justify an order or modification of an order involving custody, parenting time, visitation, or other access.
>
> (4) *If a custody, child support, or parenting time, visitation, or other access proceeding, or modification*

[5] *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

*thereof, involves a military parent and is filed after the military parent's unit has received notice of potential deployment or during the time the military parent is mobilized or deployed:*

*(a) The court shall not issue a custody order or modify any previous custody order that changes custody as it existed on the day prior to the military parent's unit receiving notice of potential deployment, except that the court may issue a temporary custody order or temporary modification if there is clear and convincing evidence that the custody change is in the best interests of the child*;

(b) The court shall not issue a child support order or modify any previous child support order that changes child support as it existed on the day prior to the military parent's unit receiving notice of potential deployment, except that the court may issue a temporary child support order or temporary modification if there is clear and convincing evidence that the order or modification is required to meet the child support guidelines established pursuant to section 42-364.16; and

(c) The court shall not issue a parenting time, visitation, or other access order or modify any previous order that changes parenting time, visitation, or other access as it existed on the day prior to the military parent's unit receiving notice of potential deployment, except that the court may enter a temporary parenting time, visitation, or other access order or modify any such existing order to permit liberal parenting time, visitation, or other access during any military leave of the military parent.

(5) If a temporary order is issued under subsection (4) of this section, upon the military parent returning from mobilization or deployment, either parent may file a motion requesting a rehearing or reinstatement of a prior order. The court shall rehear the matter if the temporary order was the initial order in the proceeding and shall make a new determination regarding the proceeding. The court shall reinstate the original order if the temporary order was a modification unless the court finds that the

> best interests of the child or the child support guidelines established pursuant to section 42-364.16 require a new determination.
>
> (6) Upon finding an (a) unreasonable failure of a nonmilitary parent to accommodate the military leave schedule of the military parent, (b) unreasonable delay by the nonmilitary parent of custody, child support, parenting time, visitation, or other access proceedings, (c) unreasonable failure of the military parent to notify the nonmilitary parent or court of release from mobilization, or (d) unreasonable failure of the military parent to provide requested documentation, the court may order the offending party to pay any attorney's fees of the other party incurred due to such unreasonable action.
>
> (7) This section does not apply to permanent change of station moves by a military parent.

(Emphasis supplied.) The plain language of this statute shows that it contemplates various orders, some temporary and some final. Before addressing the specific jurisdictional issue involving § 43-2929.01(4)(a), we recall some basic principles of appellate jurisdiction.

[3,4] 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.[6] Thus, in order for this court to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature. The right of appeal in this state is purely statutory.[7]

[5-7] Neb. Rev. Stat. § 25-1911 (Reissue 2008) authorizes appellate jurisdiction over a judgment rendered or a final order. Of course, a "judgment" is the "final determination of the rights of the parties in an action."[8] In the case before us, the "judgment" was the March 2011 divorce decree. Conversely,

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[6] *Waite v. City of Omaha*, 263 Neb. 589, 641 N.W.2d 351 (2002).

[7] See *From v. Sutton*, 156 Neb. 411, 56 N.W.2d 441 (1953).

[8] Neb. Rev. Stat. § 25-1301(1) (Reissue 2008).

every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[9] In the absence of a judgment or order finally disposing of a case, the Supreme Court has no authority or jurisdiction to act, and in the absence of such judgment or order, the appeal will be dismissed.[10]

[8] Apart from the existence of a final judgment, the two statutes primarily relevant to the issue of appellate jurisdiction are Neb. Rev. Stat. §§ 25-1315(1) and 25-1902 (Reissue 2008).[11] Section 25-1315(1), however, is implicated only where multiple causes of action are presented or multiple parties are involved.[12] Because the order before us does not have either of those characteristics, we focus on § 25-1902.

Section 25-1902 defines the three types of final orders that may be reviewed on appeal: (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made upon summary application in an action after a judgment is rendered.

We have observed that an order modifying custody arises from a special proceeding, falling within the second category of § 25-1902.[13] However, it has been noted that an order modifying custody may be similarly classified under the third category of that section: an order affecting a substantial right made upon summary application in an action after a judgment is rendered.[14] But to constitute a final order under either category, the order must affect a substantial right.[15]

Turning to the specific statutory provision before us, we observe that in enacting § 43-2929.01, the Legislature intended to provide protection for military parents in the midst of

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[9] Neb. Rev. Stat. § 25-914 (Reissue 2008).

[10] *Lewis v. Craig*, 236 Neb. 602, 463 N.W.2d 318 (1990).

[11] See *Waite, supra* note 6.

[12] See, *id.*; § 25-1315(1).

[13] See *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010).

[14] See *id.* (Connolly, J., concurring in part, and in part dissenting).

[15] See, *id.*; § 25-1902.

mobilization or deployment with respect to custody, child support, parenting time, and related matters. In particular, § 43-2929.01(4) prohibits a court from undertaking several actions when a military parent's unit has received notice of potential deployment or the military parent has been mobilized or deployed: A court may not issue or modify a custody order, child support order, or parenting time, visitation, or other access order that changes custody, child support, or parenting time, visitation, or other access as it existed on the day prior to the military parent's unit receiving notice of potential deployment. However, if no such order is in existence or the modification of an existing order is shown to be warranted, a court may issue a temporary order or temporary modification.

The Legislature made clear that any relief to be afforded under § 43-2929.01(4)(a) should be strictly temporary. First, the Legislature expressly designated the permitted orders as "temporary." Thus, in plain language, the Legislature characterized these orders as "temporary" rather than "final." Second, § 43-2929.01(5) provides that upon the return of the military parent from mobilization or deployment, either parent may request a rehearing or reinstatement of a prior order. If the temporary order was the initial order, the court is required to rehear the matter and make a new determination. And if the temporary order was a modification, the court is required to reinstate the original order unless the best interests of the child or child support guidelines require otherwise.

[9] Because a court may dispense only temporary relief pursuant to § 43-2929.01(4)(a), we conclude that the Legislature did not intend for a truly temporary order entered under that subsection to be characterized as a "final order" under § 25-1902. An order entered pursuant to § 43-2929.01(4)(a) does not finally determine the rights of the parties, because further court action is contemplated once the military parent returns from mobilization or deployment.[16] And a truly temporary order under that subsection does not affect a substantial right.

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[16] See, § 43-2929.01(5); *Dorshorst v. Dorshorst*, 174 Neb. 886, 120 N.W.2d 32 (1963); *Buda v. Humble*, 2 Neb. App. 872, 517 N.W.2d 622 (1994).

[10] We have previously held that a temporary order affecting custody does not affect a substantial right. We have described a substantial right as an essential legal right, not a mere technical right.[17] A substantial right is affected if the order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant prior to the order from which an appeal is taken.[18]

In *Steven S. v. Mary S.*,[19] we determined that an order making a temporary custody determination and suspending the mother's right to visitation did not affect a substantial right. Our conclusion was based upon two factors: (1) The order disturbed the mother's relationship with her children for only a brief period of time, and (2) the order was not a permanent disposition.[20]

In *Carmicheal v. Rollins*,[21] we reinforced the principle that an order affecting custody only temporarily does not affect a substantial right. In that case, we observed that the temporary grant of custody to the father during the mother's military deployment period of 400 days was not a final order.[22] We noted that the grant of custody to the father was temporary and that custody would revert to the mother upon her return from active duty.[23]

The order before us did not affect a substantial right. It did not make a permanent disposition. Pursuant to § 43-2929.01(5), the order contemplated further action by the court upon Osterfoss' return. And it affected the custody arrangement of the parties only temporarily. It permitted Osterfoss to relocate the children only from December 25, 2013, to August 16, 2014—a period of less than 8 months. While we concede that 8 months is not an insignificant period of time, we have

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

[18] *Id.*

[19] See *id.*

[20] See *id.*

[21] See *Carmicheal, supra* note 13.

[22] See *id.*

[23] See *id.*

already determined that an order granting temporary custody for a period of 400 days did not affect a substantial right.[24] Further, we view the object of the order before us as less obtrusive. In contrast to *Steven S.* and *Carmicheal*, the order before us provided for continuity of custody by maintaining the custody arrangement of the parties as it existed before Osterfoss received her orders and filed her complaint. It disrupted only Huskey's right to parenting time. And Huskey's parenting time was not substantially reduced under the order. The order was truly a temporary order within the meaning of § 43-2929.01(4)(a).

Because the order was properly characterized as a "temporary" order under § 43-2929.01(4)(a), and because it did not affect a substantial right, we conclude that it was not a "final order" under § 25-1902. We are therefore without a statutory basis to exercise jurisdiction over the parties' appeal.

However, in holding that the order before us is not subject to appeal, we acknowledge the danger that a court might enter a final order disguised as a temporary order under § 43-2929.01(4)(a), that successive temporary orders could be employed in an attempt to evade appellate review, or that a temporary order might persist for such a duration that it would affect a substantial right and constitute a final order despite its label as "temporary." We are not suggesting that under any of those circumstances, a purportedly temporary order would evade appellate review.

[11] And we do not pass upon the constitutionality of § 43-2929.01. We lack jurisdiction to do so. But even if we had jurisdiction, we would not reach Huskey's constitutional claim. Although Huskey challenges the statute's constitutionality in his assignments of error, he failed to raise any constitutional issue before the district court. Generally, a constitutional issue not passed upon by the trial court is not appropriate for consideration on appeal.[25] Because he failed to raise the issue before the trial court, we would not reach it in this appeal even if we had jurisdiction.

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[24] See *id.*

[25] *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

[12] We further note that Huskey's countercomplaint for a permanent modification of custody is apparently still pending before the district court. The order before us made no mention of Huskey's countercomplaint. Although the court may have considered itself constrained by § 43-2929.01 from permanently modifying custody, it should have addressed the issue if only to make it clear that the pleading had not been adjudicated. When multiple issues are presented to a trial court for simultaneous disposition in the same proceeding and the court decides some of the issues, while reserving other issues for later determination, the court's determination of less than all the issues is an interlocutory order and is not a final order for the purpose of an appeal.[26]

Because the appeal was taken from an order that was not final, we must dismiss the appeal for lack of jurisdiction. And we are therefore without power to grant Osterfoss' motion for attorney fees. We overrule the motion for attorney fees without prejudice to the reassertion of the request before the district court.

## CONCLUSION

We conclude that the Legislature did not intend for appellate review of truly temporary orders entered pursuant to § 43-2929.01(4)(a). That subsection is limited to temporary relief, and orders which do not finally determine the rights of the parties or affect a substantial right are not final orders as defined by § 25-1902. Without a statutory basis to exercise jurisdiction, we must dismiss the appeal.

APPEAL DISMISSED.

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[26] *Wagner v. Wagner*, 275 Neb. 693, 749 N.W.2d 137 (2008).

# CHARLEEN J., APPELLANT, V. BLAKE O., APPELLEE.

855 N.W.2d 587

Filed November 7, 2014. No. S-14-021.

1. **Motions to Dismiss: Jurisdiction: Appeal and Error.** Aside from factual findings, dismissal for a lack of subject matter jurisdiction is subject to a de novo review.
2. **Actions: Jurisdiction.** A procedure permitting a cause of action to be transferred to another district court cannot operate to confer jurisdiction on a tribunal that lacked it.
3. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.
4. **Courts: Jurisdiction.** The district courts of Nebraska are courts of general jurisdiction and thus have inherent power to do all things necessary for the administration of justice within the scope of their jurisdiction.
5. **Constitutional Law: Jurisdiction.** Article V, § 9, of the Nebraska Constitution confers equity jurisdiction upon the district courts.
6. **Paternity: Statutes.** The paternity statutes modify common law and, therefore, must be strictly construed.
7. **Courts: Jurisdiction.** Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.
8. **Jurisdiction.** The rule of jurisdictional priority does not apply unless there are two cases pending at the same time.
9. **Jurisdiction: Paternity: Child Custody: Minors.** It is consistent with the principles of judicial comity and courtesy underlying the doctrine of jurisdictional priority to consider the matter of a child's custody still "pending" in the district court wherein the original action for paternity was brought until that court relinquishes its jurisdictional priority or the child reaches the age of majority.

Appeal from the District Court for Madison County: MARK A. JOHNSON, Judge. Affirmed.

Michael C. Moyer, of Moyer & Moyer, for appellant.

Joel E. Carlson, of Stratton, DeLay, Doele, Carlson & Buettner, P.C., L.L.O., for appellee.

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

McCormack, J.

## NATURE OF CASE

The district court for Boone County determined paternity in a paternity action, but did not explicitly determine custody. Approximately 3 years later, all parties lived in Madison County, Nebraska. The mother filed a complaint for custody in the district court for Madison County. The question presented is whether the district court for Madison County was correct in dismissing the case and vacating its prior orders under the mother's complaint on the ground that the child's paternity had been decided by the district court of another county.

## BACKGROUND

In December 2010, the district court for Boone County issued a default judgment of paternity against Blake O., the father of a child born out of wedlock in 2009. The action had been commenced by the Department of Health and Human Services. Charleen J., the mother, was not a party to the action, but the court ordered child support to be paid to the mother. The court apparently was not asked to explicitly determine custody, and it did not do so.

In 2013, the mother filed a complaint for custody in the district court for Madison County. By that time, both the mother and the father of the child lived in Madison County. The complaint set forth the prior paternity order from the district court for Boone County. The complaint further set forth that the district court for Madison County had issued a domestic abuse protection order against the father and that there was no other pending litigation in another county concerning the custody of the child.

In June 2013, the district court for Madison County granted the mother's motion for temporary custody of the child, subject to the father's reasonable visitation rights. The court's order noted the prior paternity determination in the district court for Boone County.

In October 2013, the mother moved for a default judgment. At the hearing, which the father failed to attend, the court orally pronounced that it was granting the motion for default judgment with the exception of determining the child's best

interests. The hearing on the child's best interests began, and the mother began to testify. Among other things, the mother testified that paternity was established by an order of the district court for Boone County.

At that point, the court interjected that it needed to set aside the default judgment on the ground that it lacked subject matter jurisdiction. The court said, "complaints for custody, we do not have subject matter jurisdiction for — statutorily — that we believe that the proper venue for that is in the original paternity action."

The court then indicated that the mother should move to transfer venue to Boone County. The mother orally moved to transfer venue, and the motion was orally granted. By written order, the court "vacate[d] its order announced in open Court" and continued the matter for another hearing. The court further stated in its order that the mother "may take action as she deems necessary to either transfer this case or initiate a new action in the paternity matter."

In a written order on November 1, 2013, subsequent to the scheduled hearing, the court stated that because paternity was previously established in a different county, it lacked "subject matter jurisdiction" to determine custody of the child. The court overruled the motion for default judgment and granted the mother's motion to transfer venue.

Thereafter, the father filed a motion with the district court for Madison County for leave to file a responsive pleading out of time. The motion requested that the court deny the motion to transfer venue or reconsider the order approving transfer, and to require the parties to enter into immediate mediation.

In response, the mother filed another motion to transfer venue to the district court for Boone County for all further proceedings on her complaint for custody.

After a hearing was held, on November 12, 2013, the court issued an order vacating its November 1 order. The court had by then come to the conclusion that because it lacked subject matter jurisdiction, it had no jurisdiction to transfer the cause to another county. The November 12 order also dismissed the case without prejudice.

On November 20, 2013, the mother filed a "Motion for New Trial, Motion to Amend and Motion to Clarify." The motion asked for a new trial and order reinstating the mother's complaint for custody "so that this matter may be transferred to Boone County District Court pursuant to [Neb. Rev. Stat.] § 25-410 [Cum. Supp.] 2010 for further proceedings."

On November 26, 2013, the father filed an objection to the mother's motion to transfer venue on the ground that the district court for Madison County lacked subject matter jurisdiction and that because neither the mother nor the father lived in Boone County, that venue would be inconvenient for them.

Another hearing was held, in which the mother argued that the court was incorrect in concluding that it lacked subject matter jurisdiction. She argued that instead, the case should be transferred for lack of venue so she would not have to start over with new filing fees, service fees, and more attorney fees, and without the benefit of the temporary custody order. The father indicated that he believed he would be able to file a third-party motion in Boone County and have the district court for Boone County transfer jurisdiction to Madison County. As the father again noted, that venue was inconvenient because the parties no longer lived there.

The court explained that it used to be the practice to allow separate actions for determination of custody when there was a prior paternity action that did not determine custody. But the district courts of the Seventh Judicial District now believed that they lack subject matter jurisdiction over such actions. The court issued an order denying the mother's motion to transfer venue; the mother's motion for new trial or, in the alternative, motion to amend; and the motion to clarify. The court reaffirmed its ruling that it lacked subject matter jurisdiction and that the prior order of November 1, 2013, was vacated. The mother timely appealed to this court.

## ASSIGNMENTS OF ERROR

The mother assigns that the district court for Madison County erred in (1) finding that it lacked subject matter jurisdiction to hear the mother's complaint for custody, visitation,

and parenting time; (2) overruling the mother's motion to transfer venue to the district court for Boone County; and (3) dismissing the mother's complaint for custody, visitation, and parenting time.

## STANDARD OF REVIEW

[1] Aside from factual findings, dismissal for a lack of subject matter jurisdiction is subject to a de novo review.[1]

## ANALYSIS

The mother argues that the district court for Madison County erred in concluding that it lacked subject matter jurisdiction, in vacating all its prior orders, and in dismissing her complaint for custody. The mother asserts that Madison County was the proper venue, but that even if it was not, venue is not jurisdictional.

The father argues that the district court for Madison County did not have subject matter jurisdiction over the mother's complaint. Relying primarily on Neb. Rev. Stat. § 43-1412(3) (Reissue 2008), he asserts that such complaint must be made in the underlying paternity action. He also believes that once a filing is made in the district court for Boone County, where the paternity order was issued in 2010, the cause could be transferred to Madison County.

[2] The district court for Madison County was correct in reasoning that it could not transfer the matter to the district court for Boone County if it lacked subject matter jurisdiction. But if the district court for Madison County truly lacked subject matter jurisdiction, then the father would likewise be unsuccessful in his stated intention to have the district court for Boone County transfer the case to the district court for Madison County. We have explained that a procedure permitting a cause of action to be transferred to another district court cannot operate to confer jurisdiction on a tribunal that lacked it.[2]

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[1] See *Kotrous v. Zerbe*, 287 Neb. 1033, 846 N.W.2d 122 (2014).

[2] See *Hofferber v. Hastings Utilities*, 282 Neb. 215, 803 N.W.2d 1 (2011).

The district court for Madison County, however, did not lack subject matter jurisdiction. Instead, under the doctrine of jurisdictional priority, it was precluded in the exercise of its subject matter jurisdiction. Thus, the district court for Madison County was correct in vacating its previous orders and dismissing the mother's complaint. However, because all of the district courts of Nebraska have concurrent subject matter jurisdiction, the parties are free to petition the district court for Boone County to transfer venue to Madison County.

## Subject Matter Jurisdiction

[3] Subject matter jurisdiction is the power of a tribunal to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject matter involved.[3] Article V, § 9, of the Nebraska Constitution states that "[t]he district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ." Neb. Rev. Stat. § 24-302 (Reissue 2008) accordingly states that "[t]he district courts shall have and exercise general, original and appellate jurisdiction in all matters, both civil and criminal, except where otherwise provided."

[4] The district courts of Nebraska are courts of general jurisdiction and thus have inherent power to do all things necessary for the administration of justice within the scope of their jurisdiction.[4] Any power conferred by the constitution cannot be legislatively limited or controlled.[5] The Legislature may, however, grant to the district courts such additional jurisdiction as it may deem proper.[6]

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[3] *Carey v. City of Hastings*, 287 Neb. 1, 840 N.W.2d 868 (2013). See, also, e.g., 24 Am. Jur. 2d *Divorce and Separation* § 171 (2008).

[4] See *Lincoln Lumber Co. v. Elston*, 1 Neb. App. 741, 511 N.W.2d 162 (1993).

[5] See, e.g., *Village of Springfield v. Hevelone*, 195 Neb. 37, 236 N.W.2d 811 (1975). See, also, *Kotrous v. Zerbe*, *supra* note 1; *Washington v. Conley*, 273 Neb. 908, 734 N.W.2d 306 (2007).

[6] See, e.g., *State, ex rel. Wright, v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937).

[5] We have said that article V, § 9, confers equity jurisdiction upon the district courts.[7] And issues of custody fall within that general equity jurisdiction.[8] Indeed, since a century ago, Nebraska common law has recognized an action in equity for custody apart from an action for dissolution of marriage or paternity.[9] Even when custody is determined within a dissolution or paternity action, it is considered "incidental" to those causes of action.[10] Questions of custody within such actions still derive from the court's general equity jurisdiction.[11]

The paternity statutes therefore cannot circumscribe the district courts' inherent powers in equity to determine child custody. Furthermore, we disagree with the father's contention that the paternity statutes purport to do so. Section 43-1412(3) states:

> If a judgment is entered under this section declaring the alleged father to be the father of the child, the court shall retain jurisdiction of the cause and enter such order of support, including the amount, if any, of any court costs and attorney's fees which the court in its discretion deems appropriate to the be paid by the father . . . .

[6] The paternity statutes modify common law and, therefore, must be strictly construed.[12] The statutes must accordingly indicate what questions can be decided in a paternity action. Matters not indicated, such as division of property, cannot be decided in a paternity action.[13] It appears that the

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[7] See, e.g., *State, ex rel. Sorensen, v. Nebraska State Bank*, 124 Neb. 449, 247 N.W. 31 (1933).

[8] See, *Blecha v. Blecha*, 257 Neb. 543, 599 N.W.2d 829 (1999); *Cox v. Hendricks*, 208 Neb. 23, 302 N.W.2d 35 (1981).

[9] See *Keup v. Keup*, 98 Neb. 321, 152 N.W. 555 (1915).

[10] See *Cox v. Hendricks, supra* note 8, 208 Neb. at 29, 302 N.W.2d at 38. See, also, *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939).

[11] See *id.*

[12] *Cross v. Perreten*, 257 Neb. 776, 600 N.W.2d 780 (1999); *Riederer v. Siciunas*, 193 Neb. 580, 228 N.W.2d 283 (1975).

[13] See *Cross v. Perreten, supra* note 12. See, also, *Timmerman v. Timmerman*, 163 Neb. 704, 81 N.W.2d 135 (1957).

purpose of § 43-1412(3) is to clarify what legal or equitable issues can properly be determined in a statutory paternity cause of action, nothing more. Furthermore, § 43-1412(3) nowhere states that the jurisdiction of the court in a paternity action is exclusive. There is a difference between original jurisdiction and exclusive jurisdiction.[14]

### Jurisdictional Priority

[7] A different "jurisdictional" doctrine nevertheless supports the district court's order in this case. Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court.[15] "Courts enforce the jurisdictional priority doctrine to promote judicial comity and avoid the confusion and delay of justice that would result if courts issued conflicting decisions in the same controversy."[16] To elaborate further:

> The rule is based on the public policies of avoiding conflicts between courts, and preventing vexatious litigation and a multiplicity of suits; the rule is established and enforced, not so much to protect the rights of parties, as to protect the rights of courts of coordinate jurisdiction to avoid conflict of jurisdiction, confusion, and delay in the administration of justice.[17]

The absence of a priority-of-jurisdiction rule would "'unavoidably lead to perpetual collision and be productive of most calamitous results.'"[18]

Thus, the rule of jurisdictional priority is a rule of both judicial comity and courtesy and a rule enforced to prevent

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[14] See *Washington v. Conley, supra* note 5.

[15] See, e.g., *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.w.2d 435 (2013).

[16] *Id.* at 103, 825 N.W.2d at 442.

[17] 20 Am. Jur. 2d *Courts* § 88 at 474 (2005).

[18] *Edwards v. Nelson*, 372 Ark. 300, 304, 275 S.W.3d 158, 161 (2008).

"unseemly, expensive, and dangerous conflicts of jurisdiction and of process."[19] Another court has explained that the rule of jurisdictional priority has several justifications, both jurisprudential and pragmatic:

> The jurisprudential reason is that once a matter is before a court of competent jurisdiction, "its action must necessarily be exclusive" because it is "impossible that two courts can, at the same time, possess the power to make a final determination of the same controversy between the same parties." . . . A pragmatic justification for the rule is efficiency in that proceedings earlier begun may be expected to be earlier concluded. . . . A final justification is fairness—in a race to the courthouse, the winner's suit should have dominant jurisdiction.[20]

To illustrate, in *Molczyk v. Molczyk*,[21] a dissolution action was brought in one county, but then dismissed for lack of prosecution. Subsequently, however, the husband moved to reinstate the action in the county where originally filed. While the motion to reinstate was pending, the wife filed a dissolution action in another county. The first county reinstated the action, proceeded to trial, and denied the wife's motion to dismiss. On appeal, the husband, having found the district court's order from the first county disadvantageous, argued that the first county lacked jurisdiction. We held that a motion to reinstate a dismissed action, of which the opposing party has notice, has jurisdictional priority over a later complaint filed in a different court involving the same subject matter and the same parties.[22] Therefore, we affirmed the order from the first county.

Some confusion has developed from our failure to always distinguish the improper exercise of jurisdiction under judicial comity from a lack of subject matter jurisdiction. We

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[19] *Askew v. Murdock Acceptance Corp.*, 225 Ark. 68, 72, 279 S.W.2d 557, 560 (1955).

[20] *Lee v. GST Transport System, LP*, 334 S.W.3d 16, 18 (Tex. App. 2008) (quoting *Perry v. Del Rio*, 66 S.W.3d 239 (Tex. 2001)).

[21] *Molczyk v. Molczyk, supra* note 15.

[22] *Id.*

have sometimes said, under the doctrine of jurisdictional priority, that a second court lacks "jurisdiction."[23] We mean that a subsequent court that decides a case already pending in another court with concurrent subject matter jurisdiction errs in the *exercise* of its jurisdiction.[24] Jurisdictional priority is neither a matter of subject matter jurisdiction nor personal jurisdiction. The subsequent court does not lack judicial *power* over the general class or category to which the proceedings belong and the general subject involved in the action before the court.

In *Barth v. Barth*,[25] the Nebraska Court of Appeals recently emphasized this point that the jurisdictional priority rule is not a question of traditional subject matter jurisdiction, but is rather a question of judicial administration. The Court of Appeals held that a district court where the action was filed secondly properly exercised jurisdiction when the district court where the action was first filed did not demand jurisdictional priority. After the second filing and informally conferring with the district court where the second filing was made, the first court had dismissed the action that had been filed there. The Court of Appeals explained that the principles of judicial administration were met in the second court's exercise of jurisdiction because there was no unnecessary litigation or danger of conflicting decisions.[26]

### Jurisdictional Priority in Continuing Jurisdiction Cases

Although its reasoning was somewhat imprecise, the district court for Madison County was correct that it could not properly exercise its jurisdiction over the mother's complaint for custody. We have not before been presented with the question of whether the first court in a prior paternity action maintains continuing jurisdictional priority over custody of the child

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[23] See, e.g. *Molczyk v. Molczyk, supra* note 15. See, also, *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990).

[24] Cf. *In re Interest of Jeremy T.*, 257 Neb. 736, 600 N.W.2d 747 (1999).

[25] *Barth v. Barth*, 22 Neb. App. 241, 851 N.W.2d 104 (2014).

[26] *Id.*

when it did not explicitly determine custody in its first order. For the reasons that follow, we hold that the matter of the minor child's custody remained "pending" in the district court for Boone County and that thus, the district court for Madison County could not simultaneously entertain a separate action by the mother for the child's custody.

[8] The rule of jurisdictional priority does not apply unless there are two cases pending at the same time.[27] The doctrine does not apply if the first action terminates, is resolved, or is disposed of before the second action commences.[28]

Furthermore, two pending cases fall under the doctrine of jurisdictional priority only when they involve the same "'whole issue.'"[29] In other words, the two actions must be materially the same,[30] involving substantially the same subject matter and the same parties.[31]

In custody matters, we speak of "'continuing jurisdiction.'"[32] In that sense, the action concerning custody of the child is not terminated, resolved, or disposed of until the age of majority. We have said that an application to modify a custody determination is not an independent proceeding, but is simply a proceeding supplementary or auxiliary to the original action in which certain matters were subject to modification.[33]

Other courts have more specifically held that a court which renders judgment for alimony, custody, or child support incident to an action for divorce or paternity retains the

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[27] See, e.g., *State ex rel. Vanni v. McMonagle*, 137 Ohio St. 3d 568, 2 N.E.3d 243 (2013); *In re Marriage of Huss*, 888 N.E.2d 1238 (Ind. 2008).

[28] See, *id.*; 21 C.J.S. *Courts* § 258 (2006).

[29] *State, ex rel., v. Morgan*, 17 Ohio St. 3d 54, 56, 476 N.E.2d 1060, 1062 (1985).

[30] See 21 C.J.S., *supra* note 28.

[31] See *In re Marriage of Huss, supra* note 27. See, also, *State ex rel. Otten v. Henderson*, 129 Ohio St. 3d 453, 953 N.E.2d 809 (2011) (must be same causes of action).

[32] See *Nemec v. Nemec*, 219 Neb. 891, 892, 367 N.W.2d 705, 706 (1985). See, also, *Burns v. Burns*, 2 Neb. App. 795, 514 N.W.2d 848 (1994); *Riederer v. Siciunas, supra* note 12.

[33] See, *Nemec v. Nemec, supra* note 32; *Burns v. Burns, supra* note 32.

exclusive exercise of jurisdiction for purposes of modifying such a decree.[34] In other words, where the first district court has issued a custody order, the issue of the child's custody remains pending in that court for purposes of a jurisdictional priority analysis. If the parties in such circumstances wished to proceed on a motion to modify in another county, they would first request from the court that issued the original order a transfer of venue or otherwise gain the original court's assent to another court's exercise of jurisdiction.

The mother in this case points out that there was no explicit custody determination in the paternity order of the district court for Boone County. Still, a recognition of custody was implicit in the district court for Boone County's order that the father pay child support. Furthermore, the district court for Boone County had continuing jurisdiction over the child's custody, whether or not it determined it in the first instance. In this regard, the father is correct that § 43-1412(3) is relevant to our analysis. Section 43-1412(3) states that there is continuing jurisdiction in paternity actions for the court to determine matters relating to the determination of paternity. While the statute does not explicitly specify custody, we have repeatedly recognized custody determinations as appropriate for decision in a paternity action.[35]

In *State ex rel. Storz v. Storz*,[36] we indicated that the first court that exercises jurisdiction in an action involving continuing jurisdiction over custody matters retains the exclusive exercise of jurisdiction over such matters even if they were not explicitly decided in the first appealable order. In *Storz*, the district court for Seward County, in a paternity action, had ordered custody of the minor child with the father. The mother later asked that court to set aside its order on the grounds that the child was conceived before the decree of dissolution became final and that therefore, the district court for

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[34] See *Trahant v. Ingram*, 393 So. 2d 901 (La. App. 1981).

[35] See, e.g., *Mitchell v. French*, 267 Neb. 656, 676 N.W.2d 361 (2004); *Jones v. Paulson*, 261 Neb. 327, 622 N.W.2d 857 (2001).

[36] *State ex rel. Storz v. Storz, supra* note 23.

Hall County, which had entered the order of dissolution, had the exclusive exercise of jurisdiction over the child's custody. The district court that decided the paternity action denied the mother's motion, but we reversed.

We said that the district court that decided the dissolution action had continuing jurisdiction over the child's custody, despite the fact that its original order did not address the custody issue. We reasoned that "the existence of a child born of the marriage would have ramifications with respect to the decree."[37] We further explained that "since the child was conceived during the marriage of the father and mother, it was improper to bring a paternity action rather than an action to amend the dissolution decree."[38] We concluded that because no application was made to transfer the Hall County dissolution proceeding, the district court for Seward County could not exercise jurisdiction to decide issues related to the custody of the child.[39]

[9] We hold that it is consistent with the principles of judicial comity and courtesy underlying the doctrine of jurisdictional priority to consider the matter of a child's custody still "pending" in the district court wherein the original action for paternity was brought until that court relinquishes its jurisdictional priority or the child reaches the age of majority. Recognizing the continuing jurisdictional priority of a district court over a paternity action and all matters properly decided in a paternity action furthers the purposes of avoiding delay and confusion that could result from a multiplicity of suits or vexatious litigation.

Here, the original action for paternity and the mother's subsequent action for custody are materially the same. They involve the same subject matter of the child's paternity and its concomitant support and custody issues. They also involve substantially the same parties. Because two actions that were materially the same were pending at the same time, the district

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[37] *Id.* at 372, 455 N.W.2d at 184.

[38] *Id.* at 373, 455 N.W.2d at 185.

[39] *Id.*

court for Boone County, where the action was brought first, had jurisdictional priority.

Because the district court for Boone County did not transfer the cause or otherwise relinquish its continuing jurisdictional priority, the district court for Madison County did not err in vacating its orders, denying the mother's motion for change of venue, and dismissing the complaint. It was proper for the district court for Madison County to defer to the district court for Boone County, in which these matters were still pending.

## CONCLUSION

For the foregoing reasons, we affirm the district court's order vacating its prior rulings, overruling the mother's motion for change of venue, and dismissing the mother's complaint without prejudice.

AFFIRMED.

HEAVICAN, C.J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
CHRISTOPHER M. PAYNE, APPELLANT.
855 N.W.2d 783

Filed November 14, 2014. No. S-13-495.

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.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
3. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
4. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.

5. **Postconviction: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.
6. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.
7. **Postconviction: Constitutional Law.** Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.
8. **Pleas: Waiver.** A plea of guilty generally embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional.
9. **Pleas: Effectiveness of Counsel.** When a defendant pleads guilty, he or she is limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.
10. **Postconviction: Appeal and Error.** The operation of the procedural bar prevents defendants from securing postconviction review of issues which were or could have been litigated on direct appeal.
11. **Postconviction: Effectiveness of Counsel: Conflict of Interest: Appeal and Error.** Where trial counsel and appellate counsel are the same, a postconviction motion is a defendant's first opportunity to raise a claim of ineffective assistance of trial counsel. This is so because counsel cannot be expected to argue his or her own ineffectiveness; to require such would create the potential for a conflict of interest.
12. **Attorney and Client.** An attorney who has appeared as an attorney of record cannot terminate the attorney-client relationship by withdrawal until application is made to the court and leave to withdraw is granted; until such occurs, the attorney-client relationship continues until the end of litigation.

Appeal from the District Court for Sarpy County: WILLIAM B. ZASTERA, Judge. Reversed and remanded with directions.

Christopher M. Payne, pro se, and, on brief, Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

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

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

HEAVICAN, C.J.

## INTRODUCTION

Christopher M. Payne appeals from the district court's denial, without an evidentiary hearing, of his motion for postconviction relief. We reverse, and remand with directions.

## FACTUAL BACKGROUND

Payne was charged by information on April 27, 2005, with first degree sexual assault on a child, incest, and sexual

assault of a child. Pursuant to a plea agreement, Payne pled no contest to first degree sexual assault on a child and was sentenced to 40 to 50 years' imprisonment. Payne did not file a direct appeal.

Payne filed a motion for postconviction relief on August 24, 2012, and subsequently filed an amended and second amended motion. In his operative motion, Payne alleges that his trial counsel (he was represented by two different counsel prior to his conviction) were ineffective in (1) failing to preserve his speedy trial rights and filing a motion to discharge based on that violation; (2) failing to move for discharge following a preindictment delay; (3) failing to adequately investigate possible defenses, specifically, not hiring an expert witness; (4) failing to request dismissal before the county court for the State's failure to provide sufficient evidence as to venue and corpus delicti and in failing to file a plea in abatement or motion to quash on these grounds; and (5) advising him to plead guilty or no contest despite the fact that a law enforcement witness testified falsely. In addition, Payne alleges that he should be permitted to withdraw his no contest plea due to the aforementioned false testimony.

The district court denied Payne's motion without an evidentiary hearing. Payne appeals.

## ASSIGNMENTS OF ERROR

Payne assigns that the district court erred in (1) denying Payne's motion without an evidentiary hearing and (2) not finding merit in Payne's allegations through plain error review.

## STANDARD OF REVIEW

[1] 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.[1]

[2-4] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion

[1] *State v. Watkins*, 284 Neb. 742, 825 N.W.2d 403 (2012).

contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[2] If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[3] In appeals from postconviction proceedings, we review de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[4]

[5,6] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law.[5] When reviewing questions of law, an appellate court resolves the questions independently of the lower court's conclusion.[6]

## ANALYSIS

In his first assignment of error, Payne argues that the district court erred in denying his motion without an evidentiary hearing. In particular, Payne contends that the district court incorrectly concluded that his claims were procedurally barred.

[7-9] To begin, we note that Payne pled no contest and thus has waived all of his claims except his claim that counsel was ineffective in advising him to plead no contest. Postconviction relief is a very narrow category of relief, available only to remedy prejudicial constitutional violations.[7] And, a plea of guilty generally embodies a waiver of every defense to the charge, whether procedural, statutory, or constitutional.[8] When a defendant pleads guilty, he or she is

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[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[8] *Id.*

limited to challenging whether the plea was understandingly and voluntarily made and whether it was the result of ineffective assistance of counsel.[9]

The only remaining issue left on appeal, then, is whether Payne's failure to pursue a direct appeal means that Payne's one remaining claim—that his trial counsel was ineffective in advising him to plead no contest—is procedurally barred.

[10,11] The operation of the procedural bar prevents defendants from securing postconviction review of issues which were or could have been litigated on direct appeal.[10] Where trial counsel and appellate counsel are the same, a postconviction motion is a defendant's first opportunity to raise a claim of ineffective assistance of trial counsel.[11] This is so because counsel cannot be expected to argue his or her own ineffectiveness; to require such would create the potential for a conflict of interest.[12]

In *State v. Bazer*,[13] this court held that allegations of ineffective assistance of counsel were not procedurally barred despite the failure of the defendant to file a direct appeal or to allege that his counsel was ineffective for failing to file a direct appeal. In so concluding, we noted:

> When a defendant was represented both at trial and on direct appeal by the same lawyers, the defendant's first opportunity to assert ineffective assistance of trial counsel is in a motion for postconviction relief. The same is true where trial counsel elects not to file a direct appeal at all. The current postconviction action, in which [the defendant] was appointed counsel different from his trial counsel, is [the defendant's] first opportunity to challenge trial counsel's effectiveness.[14]

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[9] *Id.*

[10] See *id.*

[11] See *id.*

[12] See *State v. Molina*, 271 Neb. 488, 713 N.W.2d 412 (2006).

[13] *State v. Bazer, supra* note 7.

[14] *Id.* at 18, 751 N.W.2d at 627.

We held similarly in *State v. Barnes*.[15] There, we concluded that trial counsel was not ineffective for failing to file a direct appeal when the record established that the defendant did not direct his trial counsel to do so. We then addressed the defendant's other allegations of ineffective assistance of trial counsel, concluding that they lacked merit. In contrast, we found one trial error not related to the ineffective assistance of trial counsel to be procedurally barred and declined to address it.

An examination of case law reveals an application of the proposition noted above—that where a defendant is represented both at trial and on appeal by the same lawyers, the defendant's first opportunity to assert the ineffective assistance of trial counsel is in a postconviction motion. This case law indicates that this result is not affected by the failure to file a direct appeal, so long as the defendant is still represented by trial counsel during the time a direct appeal could be filed. Under those circumstances, we would not expect trial counsel to raise his or her own ineffectiveness on direct appeal, regardless of whether such appeal is made.

But in order to determine whether an action is procedurally barred where no direct appeal was filed, a postconviction court must know whether trial counsel was still serving as counsel to the defendant during that critical period in which a direct appeal could be filed. If trial counsel was still engaged as counsel, trial counsel could not be expected to raise or address his or her own ineffectiveness, and the failure to file such an appeal would not result in those claims being procedurally barred in a later postconviction action. But if trial counsel were not still defendant's counsel, then those claims relating to the ineffective assistance of trial counsel could be raised in a direct appeal and would be procedurally barred in a later postconviction action.

[12] An attorney who has appeared as an attorney of record cannot terminate the attorney-client relationship by withdrawal until application is made to the court and leave to withdraw

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[15] *State v. Barnes*, 272 Neb. 749, 724 N.W.2d 807 (2006). But see *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

is granted; until such occurs, the attorney-client relationship continues until the end of litigation.[16] In this case, a review of the record establishes that trial counsel had not withdrawn and thus was still engaged as counsel during the critical appeals period. As such, Payne's claims are not procedurally barred, and the district court erred in concluding otherwise. We therefore reverse the judgment and remand the cause with directions.

## CONCLUSION

The decision of the district court dismissing Payne's postconviction motion is reversed, and the cause is remanded with directions.

REVERSED AND REMANDED WITH DIRECTIONS.

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[16] 7A C.J.S. *Attorney & Client* § 270 (2004). See, also, Neb. Ct. R. § 6-1510.

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# IN RE INTEREST OF SHAYLA H. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DAVID H., APPELLANT.

855 N.W.2d 774

Filed November 14, 2014. No. S-13-643.

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. **Indian Child Welfare Act: Parental Rights: Proof.** At any point in an involuntary juvenile proceeding involving Indian children at which a party is required to demonstrate its efforts to reunify or prevent the breakup of the family, the active efforts standard of the Indian Child Welfare Act of 1978 and the Nebraska Indian Child Welfare Act applies in place of the reasonable efforts standard applicable in cases involving non-Indian children.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and RIEDMANN, Judges, on appeal thereto from the Separate Juvenile Court of Lancaster County, LINDA S. PORTER, Judge. Judgment of Court of Appeals affirmed.

Patrick T. Carraher, of Legal Aid of Nebraska, for appellant.

Ashley Bohnet, Deputy Lancaster County Attorney, and Nikki Blazey, Senior Certified Law Student, for appellee.

Rosalynd Koob, of Heidman Law Firm, L.L.P., for amici curiae Winnebago Tribe of Nebraska and Omaha Tribe of Nebraska.

Brad S. Jolly, of Brad S. Jolly & Associates, L.L.C., for amicus curiae Ponca Tribe of Nebraska.

Jennifer Bear Eagle, of Fredericks, Peebles & Morgan, L.L.P., for amicus curiae Santee Sioux Nation.

Robert McEwen and Sarah Helvey, of Nebraska Appleseed Center for Law in the Public Interest, for amicus curiae Nebraska Appleseed Center for Law in the Public Interest.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Stephan, J.

This case is before us on the State's petition for further review. The sole issue presented is whether the active efforts standard of 25 U.S.C. § 1912(d) of the federal Indian Child Welfare Act of 1978 (ICWA)[1] and § 43-1505(4) of the Nebraska Indian Child Welfare Act (NICWA)[2] applies when a juvenile court physically places an Indian child[3] with his or her parent but awards another entity legal custody of the Indian child. The question is whether this disposition in an involuntary juvenile proceeding is "seeking to effect a foster care placement" within the meaning of ICWA/NICWA.[4] Upon further review, we agree with the Nebraska Court of Appeals[5]

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[1] 25 U.S.C. §§ 1901 to 1963 (2012).

[2] Neb. Rev. Stat. §§ 43-1501 to 43-1516 (Reissue 2008 & Supp. 2013).

[3] See, 25 U.S.C. § 1903(4); § 43-1503(4).

[4] See, 25 U.S.C. §§ 1903(1)(i) and 1912(d); §§ 43-1503(1)(a) and 43-1505(4).

[5] *In re Interest of Shayla H. et al.*, 22 Neb. App. 1, 846 N.W.2d 668 (2014).

and hold that at any point in an involuntary juvenile proceeding involving an Indian child at which a party is required to demonstrate its efforts to reunify or prevent the breakup of the family, the active efforts standard applies in place of the reasonable efforts standard[6] applicable in cases involving non-Indian children.

## FACTS

The underlying facts are detailed in the published opinion of the Court of Appeals.[7] For our purposes, it is sufficient to note that David H. is the father of three minor children. Through David, the children are eligible for enrollment with the Rosebud Sioux Tribe and are thus "Indian child[ren]" within the meaning of ICWA/NICWA.[8] In May 2013, the children were adjudicated as being within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) because they lacked proper parental care by reason of the fault or habits of their custodian, David's live-in girlfriend.

The "Indian child" status of the children and the corresponding possible application of ICWA/NICWA were properly recognized very early in the proceedings. Specifically, the petition to adjudicate, filed January 22, 2013, referenced the substantive and procedural protections of ICWA. The Rosebud Sioux Tribe was given notice of the adjudication proceedings on January 31. And the provisions of ICWA/NICWA were applied by the juvenile court when it was making preadjudication determinations with respect to the temporary custody of the children.

At the first dispositional hearing, the juvenile court physically placed the children with David, but awarded the Nebraska Department of Health and Human Services (DHHS) "legal custody" "for placement, treatment, and care, subject to the plan developed by" DHHS. In doing so, the court determined that although reasonable efforts had been made to return legal

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[6] See Neb. Rev. Stat. §§ 43-283.01 (Cum. Supp. 2012) and 43-284 (Supp. 2013).

[7] *In re Interest of Shayla H. et al., supra* note 5.

[8] See, 25 U.S.C. § 1903(4); § 43-1503(4).

custody to David, it remained in the children's best interests for David to have only physical custody, while DHHS retained legal custody. David appealed from this disposition, arguing that the juvenile court erred in analyzing whether reasonable efforts had been made to return legal custody to him, because under ICWA/NICWA, the heightened standard of "active efforts" to preserve and reunify the Indian family was applicable.

The Court of Appeals agreed with David, and held the juvenile court erred in not addressing at the dispositional hearing whether active efforts, as required by ICWA/NICWA, had been made to return the children's legal custody to David. The State petitioned for further review on this issue.

## ASSIGNMENT OF ERROR

The State assigns that the Court of Appeals erred in imposing a new requirement that the State must make "active efforts" when "no party is seeking to effectuate the foster care placement of the Indian Children and the children are placed with their parent at home."

## STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[9]

## ANALYSIS

### Mootness

After the opinion of the Court of Appeals was issued, and while the State's petition for further review was pending before this court, the children's guardian ad litem presented materials to this court suggesting the issue was moot, because the children were subsequently removed from David's physical custody. Assuming without deciding that such a removal could render the issue before us moot, we conclude that the public

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[9] *In re Interest of Samantha C.*, 287 Neb. 644, 843 N.W.2d 665 (2014); *In re Interest of Candice H.*, 284 Neb. 935, 824 N.W.2d 34 (2012).

interest exception to the mootness doctrine applies,[10] and we reach the merits of the issue presented.

## MERITS

The legal question before us is whether the State is "seeking to effect a foster care placement"[11] in an involuntary juvenile proceeding when the juvenile court physically places an Indian child with his or her parent but awards legal custody to DHHS. As the Court of Appeals aptly noted and analyzed,[12] jurisprudence from California, Oregon, and Iowa supports a finding that any involuntary juvenile proceeding addressing whether a child is in need of assistance due to parental unfitness could result in foster care placement and that it is most consistent with the underlying purposes of ICWA to characterize such a proceeding as one "seeking to effect a foster care placement." And, as the Court of Appeals reasoned, it is logical to apply the active efforts standard to the present disposition, because DHHS remained the legal custodian of the children.

[2] Having reviewed all of the relevant law and facts, we agree with the Court of Appeals that the active efforts standard applied to the disposition here and that the juvenile court erred in failing to apply it. We hold that at any point in an involuntary juvenile proceeding involving Indian children at which a party is required to demonstrate its efforts to reunify or prevent the breakup of the family, the active efforts standard of ICWA/NICWA applies in place of the reasonable efforts standard applicable in cases involving non-Indian children.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

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[10] See *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011).

[11] See, 25 U.S.C. § 1912(d); § 43-1505(4).

[12] *In re Interest of Shayla H. et al.*, *supra* note 5.

# STATE OF NEBRASKA, APPELLEE, V. DAPHNE HANSEN, APPELLANT.

855 N.W.2d 777

Filed November 14, 2014. No. S-13-653.

1. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
2. **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.
3. ____: ____: ____. The relevant question for an appellate court reviewing a sufficiency of the evidence claim 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. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal statue, 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. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court gives statutory language its plain and ordinary meaning, and the court will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.
6. **Criminal Law: Words and Phrases.** The word "profit" in Neb. Rev. Stat. § 28-205(1) (Reissue 2008) means to make "returns, proceeds, or revenue" on a transaction.
7. **Criminal Law: Convictions.** A defendant's conviction for aiding the consummation of a felony is not incompatible with a conviction as a principal of the underlying felony.
8. **Criminal Law: Aiding and Abetting: Time.** The crime of aiding the consummation of a felony is concerned with conduct that occurs after a felony is committed.

Petition for further review from the Court of Appeals, IRWIN, RIEDMANN, and BISHOP, Judges, on appeal thereto from the District Court for Antelope County, JAMES G. KUBE, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Matthew M. Munderloh, of Johnson & Mock, for appellant.

Jon Bruning, Attorney General, James D. Smith, and, on brief, J. Kirk Brown for appellee.

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

CONNOLLY, J.

## SUMMARY

Daphne Hansen conspired with her employee, Jerry Torres, to burn down a house that was owned and insured by Hansen's friend. In exchange for setting the fire, Torres testified that Hansen bought him various household goods. After a bench trial, the district court found Hansen guilty of arson in the second degree, conspiracy to commit arson, and aiding the consummation of a felony. Under Neb. Rev. Stat. § 28-205 (Reissue 2008), aiding the consummation of a felony is committed by one who intentionally aids another in securing the proceeds of or profiting from a felony. The Nebraska Court of Appeals reversed Hansen's conviction for aiding the consummation of a felony,[1] concluding that the State failed to prove the offense beyond a reasonable doubt. We granted the State's petition for further review. Because the Court of Appeals misinterpreted § 28-205, we conclude that the State proved beyond a reasonable doubt that Hansen is guilty of aiding the consummation of a felony.

## BACKGROUND

### FACTUAL HISTORY

Hansen's convictions arose from a June 2010 fire that destroyed a house in Neligh, Nebraska. A limited liability company owned the house. Cynthia Johnston, Hansen's friend, was a member of the company. Hansen was not a member of the company, but considered herself associated with the enterprise. The house was bought with the intent to repair and "flip" it, but renovations proved costly and the house became a "money pit."

Hansen owned a cafe in Neligh and employed Torres as a part-time dishwasher. Hansen expressed her frustration about the house to Torres and joked about destroying the residence. Torres testified that the levity eventually dissipated and that he agreed to burn the house down for $1,000. Torres' wife testified that Hansen drove her to a gas station and that Torres'

[1] *State v. Hansen*, No. A-13-653, 2014 WL 1199321 (Neb. App. Mar. 25, 2014) (selected for posting to court Web site).

wife filled a 5-gallon gas can with diesel fuel. Torres' wife left the container of fuel at the house, and Torres testified that he returned to the house late in the evening, starting a fire that severely damaged the house.

Johnston carried insurance on the house. After paying off a debt to Hansen's boyfriend, Hansen and Johnston split the remainder of the insurance proceeds. Hansen did not pay Torres $1,000. Instead, Hansen took Torres and his wife to Norfolk, Nebraska, and bought them a television, television stand, refrigerator, baby crib, trash bags, a pack of toilet paper, and "some Zyrtec." Torres testified that the shopping trip was his compensation for starting the fire. Hansen testified that it was an advance on Torres' wages. The record does not show whether the shopping trip occurred before or after Hansen received her share of the insurance proceeds.

Torres eventually confessed to his role in the fire, and the State charged Hansen with second degree arson, conspiracy to commit arson, theft by deception, aiding the consummation of a felony, and false reporting. The State did not charge Johnston with a crime. After a bench trial, the district court found Hansen guilty of arson, conspiracy, and aiding the consummation of a felony. The court sentenced Hansen to 24 to 30 months' imprisonment for second degree arson and 24 to 30 months' imprisonment for conspiracy to commit arson, the sentences to run concurrently. The court sentenced Hansen to 6 to 12 months' imprisonment for aiding the consummation of a felony, the sentence to run consecutively to the sentences for arson and conspiracy.

## Appeal

Before the Court of Appeals, Hansen argued that the evidence was insufficient to support her conviction for aiding the consummation of a felony. Under § 28-205(1), "[a] person is guilty of aiding consummation of felony if he intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony." The Court of Appeals framed the issue as whether the evidence was sufficient to find that Hansen "intentionally aided another person

to 'secrete, disguise, or convert' the house insurance proceeds . . . or that she intentionally aided another person to 'otherwise profit' from the house insurance proceeds."[2]

The court concluded that the record lacked sufficient evidence to show that Hansen intentionally aided another in profiting from the arson. The court interpreted § 28-205 to mean that the person whom Hansen aided must have been "involved . . . in committing the underlying felony."[3] The court concluded that there was no evidence that the persons who received part of the insurance proceeds, other than Hansen, had any part in the arson. The court did not discuss whether Hansen intentionally aided Torres in profiting from the arson by paying him off with household goods.

## ASSIGNMENT OF ERROR

The State assigns, restated, that the Court of Appeals erred by concluding that the evidence was insufficient to support Hansen's conviction for aiding the consummation of a felony.

## STANDARD OF REVIEW

[1] Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.[4]

[2,3] In reviewing a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact.[5] The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[6]

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[2] *Id.* at *5.

[3] *Id.*

[4] *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

[5] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[6] *Id.*

## ANALYSIS

The State argues that the Court of Appeals' concept of profiting from a felony is too narrow. Specifically, the State contends that the court erroneously focused on the insurance proceeds to the exclusion of the household goods Hansen bought for Torres. Torres profited by receiving the household goods, according to the State, and Hansen intentionally aided him in doing so. Hansen responds that because she was convicted as a principal of a felony, she could not also be convicted for aiding another in profiting from the same felony.

[4,5] In interpreting § 28-205, we set forth some familiar principles. 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.[7] We give statutory language its plain and ordinary meaning,[8] and we will not look beyond the statute to determine legislative intent when the words are plain, direct, and unambiguous.[9]

[6] We conclude that the terms "proceeds of" and "profits from" the arson are not limited to the insurance claim under the plain meaning of § 28-205(1). As noted above, a person aids the consummation of a felony under § 28-205(1) if she "intentionally aids another to secrete, disguise, or convert the proceeds of a felony or otherwise profit from a felony." The State does not argue that Hansen aided another to "secrete, disguise, or convert the proceeds of a felony." Instead, the State focuses on the second clause in § 28-205(1) and argues that Hansen intentionally aided Torres to "otherwise profit from a felony." In this context, the word "profit" is used as a verb and means to make "returns, proceeds, or revenue" on a transaction.[10] We see no requirement that the proceeds in question be

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[7] *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

[8] See *Dean v. State*, 288 Neb. 530, 849 N.W.2d 138 (2014).

[9] See *Unisys Corp. v. Nebraska Life & Health Ins. Guar. Assn.*, 267 Neb. 158, 673 N.W.2d 15 (2004).

[10] Webster's Encyclopedic Unabridged Dictionary of the English Language 1149 (1989).

"profit from a felony" as to both the one who aids and the one who is aided. It is enough, as to the person who is aided (i.e., Torres), that he receives the returns or proceeds as a result of the commission of a felony and that the person who aids (i.e., Hansen) has intentionally assisted the person aided in enjoying these returns or proceeds.

[7,8] Nor do we agree with Hansen that her conviction for aiding the consummation of a felony is incompatible with her conviction as a principal of the underlying arson. Hansen argues that "[t]he State's interpretation of consummation of felony makes that crime one [and] the same as aiding and abetting a felony," rendering § 28-205 "superfluous and meaningless."[11] The conduct by which Hansen aided and abetted the arson, however, must have occurred before or during the commission of the arson.[12] In contrast, aiding the consummation of a felony is concerned with conduct that occurs after a felony is committed.[13] Section 28-205 is a distinct crime requiring proof of conduct different from the proof necessary to show that Hansen aided and abetted Torres to commit the arson. Hansen's convictions as both a principal to the arson and one who aided the consummation of the arson does not render § 28-205 superfluous.

We conclude that the evidence is sufficient to find beyond a reasonable doubt that Hansen intentionally aided Torres in profiting from a felony. Torres testified that Hansen bought household goods for him as payoff for starting the fire. A rational trier of fact could have found that Torres, by receiving the household goods, profited from committing arson and that Hansen, by purchasing the household goods, intentionally aided him in profiting. So, the evidence is sufficient to support Hansen's conviction for aiding the consummation of a felony.

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[11] Brief for appellant in response to petition for further review at 6.

[12] See 2 Wayne R. LaFave, Substantive Criminal Law § 13.2(a) (2d ed. 2003).

[13] See A.L.I., Model Penal Code and Commentaries § 242.4, comments 1-2 (1980).

## CONCLUSION

We conclude that the evidence was sufficient to support Hansen's conviction for aiding the consummation of a felony. By purchasing household goods for Torres as compensation for the arson, Hansen intentionally aided Torres in enjoying the returns or proceeds from his commission of the crime. Therefore, we reverse the judgment of the Court of Appeals and remand the cause with directions to affirm the conviction.

REVERSED AND REMANDED WITH DIRECTIONS.

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# PAMELA A. MANON ET AL., AS SUCCESSORS IN INTEREST TO JUDY A. WHITE, DECEASED, AND WILLIAM E. WAECHTER, APPELLANTS, V. PEGGY J. ORR ET AL., APPELLEES.

856 N.W.2d 106

Filed November 14, 2014. No. S-13-1010.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
4. **Actions: Parties.** Neb. Rev. Stat. § 25-301 (Reissue 2008) provides that every action shall be prosecuted in the name of the real party in interest.
5. ____: ____. The purpose of Neb. Rev. Stat. § 25-301 (Reissue 2008) is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.
6. **Actions: Parties: Public Policy.** Neb. Rev. Stat. § 25-301 (Reissue 2008) discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.
7. **Actions: Parties: Standing.** The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
8. ____: ____: ____. The purpose of the real party in interest inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.

9. **Statutes.** Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
10. **Statutes: Legislature: Public Policy.** It is the function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state.
11. **Statutes: Legislature: Appeal and Error.** Where the language of a statute is clear and unambiguous, it is not the province of an appellate court to disturb the balance framed by the Legislature.

Appeal from the District Court for Lincoln County: RICHARD A. BIRCH, Judge. Affirmed.

William J. Erickson and George E. Clough for appellants.

Timothy P. Brouillette, of Brouillette, Dugan & Troshynski, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

## INTRODUCTION

The district court for Lincoln County dismissed for lack of standing the amended complaint of Pamela A. Manon, Amy M. White, Brian E. Krzykowski, Jill A. Krzykowski, and William E. Waechter (plaintiffs). Plaintiffs appeal. We affirm.

## FACTUAL BACKGROUND

Virginia M. Waechter is the mother of Judy A. White, William, and Peggy J. Orr. Virginia was the settlor of the Virginia M. Waechter Revocable Trust. Prior to November 11, 2012, Virginia was the trustee of the trust; since that date, First National Bank of North Platte has served as trustee.

At issue are certain parcels of land included in the corpus of the trust. In late 2010, these parcels were sold by Virginia as trustee of the trust to Peggy and her husband, Jeff C. Orr. Plaintiffs objected to the sale of this land. They filed a complaint on April 15, 2013, and an amended complaint on July 25, asking that a constructive trust be placed on the real estate, alleging that Virginia was not competent to sell the land to Peggy and Jeff and that the sale showed indications of fraud.

On August 1, 2013, Peggy and Jeff filed a motion to dismiss the amended complaint under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim upon which relief could be granted. Following a hearing, that motion was granted. In dismissing, the court reasoned that under Neb. Rev. Stat. § 30-3855(a) (Reissue 2008), the duties of the trustee to the trust are owed to Virginia as the still-living settlor of the trust, and that the rights of the beneficiaries are subject to Virginia's control. As such, those beneficiaries could have no standing. The court also declined to adopt a cause of action for intentional interference with an inheritance or gift.

Plaintiffs appeal.

## ASSIGNMENTS OF ERROR

On appeal, plaintiffs assign, restated and consolidated, that the district court erred in (1) finding they lacked standing and (2) finding that § 30-3855(a) bars a cause of action for intentional interference with an inheritance or gift.

## STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2]

[3] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[3]

## ANALYSIS

*Standing.*

In its first assignment of error, plaintiffs assign that the district court erred in finding they lacked standing to bring this

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[1] *Bruno v. Metropolitan Utilities Dist.*, 287 Neb. 551, 844 N.W.2d 50 (2014).

[2] *Id.*

[3] *Id.*

action. The district court, relying upon § 30-3855(a), concluded that plaintiffs had no right as beneficiaries of Virginia's revocable trust and that Virginia's alleged incapacity did not change that result.

On appeal, plaintiffs contend that contrary to the district court's finding, Virginia's incapacity was relevant to their standing, essentially arguing that Virginia's incapacity altered the trust from one that was revocable to one that was irrevocable. Plaintiffs further assert that principles of public policy suggest they should be found to have standing.

[4-8] Neb. Rev. Stat. § 25-301 (Reissue 2008) provides that "[e]very action shall be prosecuted in the name of the real party in interest . . . ." The purpose of § 25-301 is to prevent the prosecution of actions by persons who have no right, title, or interest in the cause.[4] Section 25-301 also discourages harassing litigation and keeps litigation within certain bounds in the interest of sound public policy.[5] The focus of the real party in interest inquiry is whether the party has standing to sue due to some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.[6] The purpose of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.[7]

This case presents the question of whether plaintiffs can show they are real parties in interest, given the provisions of § 30-3855. Section 30-3855(a) provides that "[w]hile a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."

[9] Absent a statutory indication to the contrary, words in a statute will be given their ordinary meaning.[8] And § 30-3855(a)

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

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Caniglia v. Caniglia*, 285 Neb. 930, 830 N.W.2d 207 (2013).

clearly provides that where the trust is revocable, as is the trust in this case, the settlor is in control of the trust. The plain language of this statute suggests that the only real party in interest in a case involving a revocable trust would be the settlor of that trust, or perhaps one that represents the settlor's interests, for example, a court,[9] a guardian or conservator,[10] or a next friend.[11] But plaintiffs here are contingent beneficiaries of the trust and have no real interest in the cause of action or a legal or equitable right, title, or interest in the subject matter of the controversy. This result is supported by our case law, which provides that a mere expectancy is insufficient to entitle a prospective heir to bring an action to recover property.[12]

Nor is this result affected by Virginia's alleged incapacity. There is nothing in the plain language of § 30-3855(a), nor do the parties direct us to any other authority, which would suggest that the revocable status of a trust is affected by the settlor's alleged incapacity.

These results are further supported by an examination of the legislative history of § 30-3855(a). Prior to 2005, § 30-3855(a) (Cum. Supp. 2004) provided in part that

> [w]hile a trust is revocable and the settlor has capacity to revoke the trust, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. A settlor's power to revoke the trust is not terminated by the settlor's incapacity.

The language of § 30-3855 was part of the Uniform Trust Code § 603. But a comment to the 2004 amendment to § 603 was added by the drafters of the Uniform Trust Code, explaining that the phrase "and the settlor has capacity to revoke the trust" was now optional language:

> Section 603 generally provides that while a trust is revocable, all rights that the trust's beneficiaries would

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[9] Neb. Rev. Stat. § 30-2637 (Reissue 2008).

[10] See Neb. Rev. Stat. §§ 30-2620 (Cum. Supp. 2012), 30-2628 (Supp. 2013), and 30-2653 (Reissue 2008).

[11] See *Dafoe v. Dafoe*, 160 Neb. 145, 69 N.W.2d 700 (1955).

[12] *Id.*

> otherwise possess are subject to the control of the settlor. This section, however, negates the settlor's control if the settlor is incapacitated. In such case, the beneficiaries are entitled to assert all rights provided to them under the Code, including the right to information concerning the trust.
>
> Two issues have arisen concerning this incapacity limitation. First, because determining when a settlor is incapacitated is not always clear, concern has been expressed that it will often be difficult in a particular case to determine whether the settlor has become incapacitated and the settlor's control of the beneficiary's rights have ceased. Second, concern has been expressed that this section prescribes a different rule for revocable trusts than for wills and that the rules for both should instead be the same. In the case of a will, the devisees have no right to know of the dispositions made in their favor until the testator's death, whether or not the testator is incapacitated. Under Section 603, however, the remainder beneficiary's right to know commences on the settlor's incapacity.
>
> Concluding that uniformity among the states on this issue is not essential, the drafting committee has decided to place the reference to the settlor's incapacity in Section 603(a) in brackets. Enacting jurisdictions are free to strike the incapacity limitation or to provide a more precise definition of when a settlor is incapacitated . . . .[13]

In 2005, the Nebraska Legislature revised § 30-3855(a) to the version in effect today. In making such an amendment to § 30-3855, it was explained that the change was done to

> reaffirm that the duties of a trustee of a revocable trust are owed exclusively to the settlor. These amendments would repeal the language now bracketed in the official [National Conference of Commissioners on Uniform State Laws] text. The rights of the beneficiaries of the revocable trust whose settlor becomes incompetent would

[13] Unif. Trust Code § 603, comment, 7C U.L.A. 554 (2006).

> be comparable to the rights of devisees under a will of a testator who becomes incompetent. A settlor's power to revoke the trust would not be terminated by the settlor's incapacity, although the incapacity may affect the settlor's legal ability to exercise the power.[14]

This history shows that incapacity does not terminate a settlor's power to revoke a trust, though it might well affect the ability of the settlor to exercise that power. And because it does not affect the power to revoke a trust, that trust remains revocable until revoked, either by the settlor, or by another acting in the settlor's stead.[15]

[10,11] Nor are we persuaded that public policy requires these plaintiffs to have standing. Indeed, it is the "function of the Legislature, through the enactment of statutes, to declare what is the law and public policy of this state."[16] The language of § 30-3855 (Reissue 2008) is clear and unambiguous, and it is not our province to disturb the balance framed by the Legislature.[17]

Plaintiffs lack standing to impose the constructive trust they seek, because under case law and § 30-3855(a), they have only a mere expectancy. Virginia's alleged incapacity does not change this result, because any incapacity would not affect the status of the trust as revocable. Plaintiffs' first assignment of error is without merit.

*Intentional Interference With Inheritance or Gift.*

In its second assignment of error, plaintiffs assign that the district court erred in concluding that § 30-3855(a) prevents the recognition of the cause of action for intentional interference with an inheritance or gift. That cause of action, from the

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[14] Floor Debate, L.B. 533, 99th Leg., 1st Sess. 1006-07 (Feb. 15, 2005).

[15] Cf. §§ 30-2628 and 30-2637. See, also, *In re Guardianship & Conservatorship of Garcia*, 262 Neb. 205, 631 N.W.2d 464 (2001).

[16] *Holdsworth v. Greenwood Farmers Co-op*, 286 Neb. 49, 59, 835 N.W.2d 30, 37-38 (2013).

[17] See *id.*

Restatement (Second) of Torts,[18] provides: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."

We expressly decline to opine on the interplay between § 30-3855(a) and § 774B of the Restatement. Even if we were to conclude that the statute did not prevent the adoption of a cause of action for intentional interference with an inheritance or gift, we would nevertheless decline to adopt this tort. Plaintiffs' second assignment of error is without merit.

*First National Bank as Party.*

For the sake of completeness, we note that in the last section of the brief for the appellees, they suggest that First National Bank of North Platte should be dismissed as a defendant because it has no interest in this suit. But because no cross-appeal was filed on this issue, we do not address the argument further.[19]

## CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

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[18] Restatement (Second) of Torts § 774B at 58 (1979).

[19] Neb. Ct. R. § 2-109(D)(4) (rev. 2014).

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JASON GAVER, APPELLEE, V. SCHNEIDER'S O.K. TIRE CO., APPELLANT.

856 N.W.2d 121

Filed November 14, 2014. No. S-13-1014.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court.
2. **Contracts: Appeal and Error.** The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.

3. **Contracts: Public Policy.** At common law, all contracts in restraint of trade are against public policy and void.
4. **Restrictive Covenants: Employer and Employee.** Covenants not to compete, as partial restraints of trade, are enforceable if the covenants are reasonable.
5. ____: ____. In determining whether a covenant not to compete is valid, a court considers whether the restriction is (1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee.
6. ____: ____. An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee.
7. **Restrictive Covenants: Employer and Employee: Goodwill: Words and Phrases.** To distinguish between ordinary competition and unfair competition, courts focus on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers.
8. **Restrictive Covenants: Employer and Employee: Goodwill.** Where an employee has substantial personal contacts with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair and the employer has a legitimate need for protection against the employee's competition.
9. **Restrictive Covenants: Employer and Employee.** An employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations.
10. ____: ____. An employer does not ordinarily have a legitimate business interest in the postemployment preclusion of an employee's use of some general skill.
11. **Contracts.** The law does not look with favor upon restrictions against competition, and therefore, an agreement which limits the right of a person to engage in a business or occupation will be strictly construed.
12. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.

Appeal from the District Court for Platte County: ROBERT R. STEINKE, Judge. Affirmed.

Ralph A. Froehlich, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Stan A. Emerson, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Jason Gaver, the appellee, was employed by Schneider's O.K. Tire Co. (Schneider's), the appellant, on two separate occasions, and on each occasion, Gaver signed a noncompete agreement. After Gaver's second employment relationship with Schneider's ended on July 23, 2012, he filed his amended complaint in the district court for Platte County seeking a declaratory judgment that the noncompete agreements were unenforceable. After a bench trial, the district court filed an order in which it determined that the scope of the noncompete agreements was greater than reasonably necessary to protect Schneider's against unfair competition and that therefore, the noncompete agreements were unreasonable and unenforceable. The district court entered declaratory judgment in favor of Gaver and against Schneider's. Schneider's appeals. We determine that the applicable noncompete agreement at issue in this case is greater than reasonably necessary to protect a legitimate interest of Schneider's, and therefore, we affirm the district court's determination that it is unreasonable and unenforceable.

## STATEMENT OF FACTS

Schneider's is a business located in Columbus, Nebraska, that sells tires and services motor vehicles. Gaver was twice employed by Schneider's: from October 29, 2001, to September 18, 2006, and from February 25, 2008, to July 23, 2012. Gaver voluntarily ended his employment relationships with Schneider's.

In 1991, prior to Gaver's employment relationship with Schneider's, Schneider's had established a profit-sharing plan with the First National Bank of Omaha as the trustee. The plan was later transferred to another entity. The profit-sharing plan is not in the record, but the adoption agreement, titled "Adoption Agreement #001 Standardized Profit Sharing Plan (Paired Profit Sharing Plan)," is in the record.

On each occasion that Gaver was employed by Schneider's, Gaver and the president of Schneider's, Bruce Schneider, entered into almost identical noncompete agreements. The

agreements are freestanding documents, not provisions of the profit-sharing plan, and we make no comment on the propriety of such noncompete provisions in profit-sharing plans. Schneider's asked its employees to enter into the noncompete agreements as a condition of participating in the company's profit-sharing plan.

The first agreement was entered into on April 16, 2003, and it was drafted by Schneider's attorney. The second agreement was entered into on December 5, 2008, and it was drafted by Schneider's secretary and treasurer, using the 2003 agreement as a model. As set forth in more detail below, the noncompete agreements generally state that Gaver may not establish or open any business similar to Schneider's or "in any manner become interested, directly or indirectly, either as an owner, partner, agent, stockholder, officer or otherwise, in any such business or trade" within a 25-mile radius of Columbus for a period of 5 years after the termination of Gaver's employment.

Because Gaver's first term of employment ended on September 18, 2006, the 5-year term designated in the 2003 agreement has expired. Because Gaver's second term of employment ended on July 23, 2012, the 5-year term designated in the 2008 agreement is still in effect. The second noncompete agreement is therefore the applicable agreement and the subject of our analysis.

The 2008 agreement provided:

> This Agreement made and entered into this first day of December 5, 2008, by and between [Schneider's] of Columbus, Nebraska, hereinafter referred to as Employer, and . . . Gaver, hereinafter referred to as Employee.
>
> Whereas, Employee is employed, at will, by Employer under terms and conditions acceptable to both parties, and;
>
> Whereas, Employer has established a Profit Sharing Plan for the benefit of his Employees, and;
>
> Whereas, Employer desires to insure [sic] that the benefits of said Profit Sharing Plan are not used by Employee to the detriment of the Employer,

> Now THEREFORE, in consideration of the benefits accruing to both parties as a result of the above-mentioned Profit Sharing Plan, the parties agree:
>
> 1. Employer shall maintain the Schneider's . . . Profit Sharing Plan under the terms and conditions as set forth in the Adoption Agreement #001, Standardized Profit Sharing Plan, (Paired Profit Sharing Plan) entered into by Employer on September 26, 1991.
>
> *2. Employee shall not establish or open any trade business similar to the business owned and operated by Employer or in any manner become interested, directly or indirectly, either as an owner, partner, agent, stockholder, officer or otherwise, in any such business or trade, within* [*a*] *twenty-five mile radius of Columbus, Platte County, Nebraska from and after the date of the execution of this agreement and continuing for a period of five (5) years after the termination of the Employee's employment for whatever reason.*
>
> THIS AGREEMENT IS NOT AND SHALL NOT BE INTERPRETED AS AN EMPLOYMENT AGREEMENT AND THIS AGREEMENT DOES NOT GIVE THE EMPLOYEE THE RIGHT TO BE EMPLOYED BY EMPLOYER.
>
> *THIS AGREEMENT IS NOT AND SHALL NOT BE INTERPRETED AS A RESTRICTION ON EMPLOYEE'S RIGHT TO BE EMPLOYEED* [sic] *IN A TRADE OR BUSINESS SIMILAR TO THE TRADE AND BUSINESS OWNED AND OPERATED BY EMPLOYED* [sic].

(Emphasis supplied.)

It appears undisputed that Gaver received all the profit-sharing money he was due with respect to each period of employment.

Gaver filed his amended complaint on July 23, 2013, against Schneider's, seeking a declaratory judgment that the 2003 and 2008 noncompete agreements were unenforceable. Gaver alleged, inter alia, that he "desires to operate a business consisting of buying and selling new and used tires, installing them and servicing them in all aspects of tire related issues

and to do general maintenance on vehicles." In paragraph 6 of his amended complaint, Gaver alleged:

> The Non-Compete Agreements . . . are inequitable, ambiguous, vague, lack consideration, is [sic] in contravention of the laws of the State of Nebraska, are not customer specific, are overly broad and provide excessive restrictions as to both time and area within which competition by [Gaver] is prohibited, are unreasonable and unenforceable.

Accordingly, Gaver sought an order "determining the Non-Compete Agreements to be unenforceable, unreasonable or, otherwise determining and adjudicating the rights, obligations and restrictions of the parties herein."

Schneider's filed its answer on August 15, 2013, generally denying Gaver's allegations. Schneider's stated in its answer that it admitted that "the Non-Compete Agreements . . . 'are not customer specific' and denie[d] the remaining averments in paragraph 6 [of Gaver's amended complaint]."

At the bench trial, Bruce Schneider, as president of Schneider's, testified that the profit-sharing documents do not require that employees execute the noncompete agreements. However, he testified as follows:

> [Gaver's attorney:] Why did you ask . . . Gaver to sign the 2008 non-compete agreement?
>
> A. So that he could receive the funds for the profit sharing.
>
> . . . .
>
> [Gaver's attorney:] Who prohibited . . . Gaver from receiving any funds in the profit sharing plan if he failed to sign the 2008 agreement?
>
> A. No one.
>
> Q. So why was it that he was required to sign the 2008 agreement?
>
> A. Because when we first established this profit sharing program it was to take the profits from the corporation and share it with the employees and then in return they sign an agreement stating that they will not take the money and compete against me in a business because I've contributed a large sum of money to them.

Bruce Schneider further testified that he sought legal advice and that a lawyer drafted the initial noncompete agreement. In answer to the question, "[H]ave [the employees] all signed a non-compete agreement?" Bruce Schneider answered, "Yes."

After trial, the district court filed its order on October 18, 2013, in which it determined that the 2003 and 2008 agreements were invalid and unenforceable. Citing *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 748 N.W.2d 626 (2008), and *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997) (superseded by statute on other grounds as stated in *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014)), the district court stated that an employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but that an employer is not entitled to protection against ordinary competition from a former employee. The court stated that the restrictive language of the 2003 and 2008 agreements was not limited to Schneider's customers with whom Gaver did business and had personal contacts, or even to Schneider's customers generally. Because the restrictive language in the agreements was not limited to those customers with whom Gaver actually did business or had personal contacts, the district court determined that the scope of the noncompete agreements was overly broad. In particular, the district court determined that Schneider's was attempting to prevent Gaver from engaging in ordinary competition with Schneider's as the owner of his own business, not just unfair competition. Accordingly, the district court stated that "the scope of the noncompete provisions are greater than reasonably necessary to protect Schneider's legitimate interest and are, as such, unreasonable and unenforceable." The district court granted declaratory judgment in favor of Gaver and against Schneider's.

Schneider's appeals.

## ASSIGNMENT OF ERROR

Schneider's claims that the district court erred when it determined that the noncompete agreements were unenforceable under Nebraska law.

## STANDARDS OF REVIEW

[1] When a declaratory judgment action presents a question of law, an appellate court decides the question independently of the conclusion reached by the trial court. *Vlach v. Vlach*, 286 Neb. 141, 835 N.W.2d 72 (2013).

[2] The interpretation of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 844 N.W.2d 806 (2014).

## ANALYSIS

Schneider's claims that the district court erred when it determined that the noncompete agreements are unreasonable and unenforceable. Schneider's argues that the restrictions in the noncompete agreements are valid and enforceable because they are no greater than reasonably necessary to protect its legitimate business interest. We reject Schneider's argument and find no error in the ruling of the district court.

[3,4] We have long recognized that at common law, all contracts in restraint of trade are against public policy and void. *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960), *modified on denial of rehearing* 171 Neb. 701, 107 N.W.2d 540 (1961). Nebraska statutes are to the same effect. See, e.g., Neb. Rev. Stat. § 59-1603 (Reissue 2010) (stating that "[a]ny contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful"). "However, while not favorites of the law, partial restraints are not deemed to be unenforcible when they are ancillary to a contract of employment and are apparently necessary to afford fair protection to the employer." *Securities Acceptance Corp. v. Brown*, 171 Neb. at 414, 106 N.W.2d at 462. Covenants not to compete, as partial restraints of trade, are enforceable if the covenants are reasonable. See *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

[5] This court has repeatedly stated that there are three considerations used to test the validity of a covenant not to compete. See *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455

N.W.2d 772 (1990). Summarizing the three requirements, we have more recently stated that

> [i]n determining whether a covenant not to compete is valid, a court considers whether the restriction is (1) reasonable in the sense that it is not injurious to the public, (2) not greater than is reasonably necessary to protect the employer in some legitimate interest, and (3) not unduly harsh and oppressive on the employee.

*Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 653, 748 N.W.2d 626, 638 (2008). We have suggested that it is often best to consider the second feature identified above and initially determine if the restraint is in aid of some legitimate interest of the employer. See *Boisen v. Petersen Flying Serv., supra*.

In the past, we have determined that covenants not to compete are valid and enforceable where they were reasonably limited to restricting the former employee from contacting customers with whom the former employee had had personal contact while employed by the former employer and where they contained reasonable temporal and geographical restrictions. See, *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004) (referring to whether restriction concerned former employer's clients with whom former employee had had personal contacts); *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001) (referring to whether restriction was limited to former employer's clients with whom former employee had had personal contacts); *Vlasin v. Len Johnson & Co., supra* (determining covenant not to compete was unreasonable because it was not limited to former employer's clients with whom former employee did business and had had personal contacts); *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986) (analyzing, inter alia, reasonableness of restrictive terms with respect to time and space); *Securities Acceptance Corp. v. Brown, supra* (stating, inter alia, that partial restraint of trade should be limited as to both time and space). In the foregoing cases, the covenants not to compete were included as part of an employment agreement and represent the common format by which covenants not to compete are presented.

However, in the past, we have been faced with determining the enforceability of provisions that are not contained in employment contracts. In analyzing the enforceability of these provisions, we have applied the same three reasonableness requirements that we apply in determining the enforceability of commonplace covenants not to compete. For example, in *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992), we applied the three reasonableness requirements to a forfeiture-for-competition clause that was contained in a deferred compensation plan. The forfeiture-for-competition clause provided that if the employee's employment was terminated and then the employee did any act or engaged "'directly or indirectly, whether as owner, partner, officer, employee or otherwise, in the operation or management of any business which shall be in competition'" with the former employer, the former employee was to forfeit any unpaid deferred payments from the plan. *Id.* at 453, 488 N.W.2d at 560.

In *Brockley*, we recognized that the forfeiture-for-competition clause was not a conventional covenant not to compete, but we nevertheless stated that in order for the forfeiture-for-competition clause to be enforceable, it needed to be reasonable. We stated that "[w]e find that forfeitures of deferred compensation are enforceable, but that they will be treated in the same manner as covenants not to compete, and therefore, the conditions making the forfeitures enforceable must be reasonable." *Brockley*, 241 Neb. at 460, 488 N.W.2d at 563.

In *Brockley*, we adopted the view set forth by the Minnesota Supreme Court in *Harris v. Bolin*, 310 Minn. 391, 247 N.W.2d 600 (1976), which had stated that while other courts had

> "attempted to distinguish between covenants not to compete in employment contracts and the penalty imposed under profit sharing plans for competing, the purpose of both arrangements is the same; therefore, under the common law, such agreements should be enforced only when they are found to be reasonable in scope after balancing the interests of the employer and employee."

*Brockley v. Lozier Corp.*, 241 Neb. at 459, 488 N.W.2d at 563, quoting *Harris v. Bolin, supra*. See, similarly, *Food Fair*

*Stores v. Greeley*, 264 Md. 105, 285 A.2d 632 (1972) (applying reasonableness standard to restrictive covenant in pension plan). See, also, *Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 905 A.2d 623 (2006) (summarizing collected cases considering variety of agreements and plans and variety of analyses used by various courts, and concluding that forfeiture provision for deferred compensation at issue was similar to covenant not to compete, therefore, restraint against competition and enforceable only if reasonable). Applying the three reasonableness requirements to the forfeiture-for-competition clause at issue in *Brockley*, we determined that the 4- to 5-year time restriction contained in the forfeiture-for-competition clause was of an unreasonably long duration and that therefore, the clause was unenforceable.

As another example, in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), we applied the three reasonableness requirements developed in the covenant not to compete area to a case involving a deferred bonus. In *Polly*, the contract between the former employer and former employee provided that if the former employee competed with the former employer within a certain area, "'all deferred bonus payments due [the former employee] shall forthwith terminate.'" 225 Neb. at 664, 407 N.W.2d at 754. We stated in *Polly* that it was unclear whether the agreement was a covenant not to compete, but we nevertheless applied the three reasonableness requirements developed in the covenant not to compete area and determined that the agreement was unreasonable.

The noncompete agreement at issue in this case is somewhat unusual and differs from a conventional covenant not to compete for at least three reasons. First, the noncompete agreement is not a part of an employment agreement. The language of the 2008 noncompete agreement states: "THIS AGREEMENT IS NOT AND SHALL NOT BE INTERPRETED AS AN EMPLOYMENT AGREEMENT . . . ." Second, the noncompete agreement makes reference to Schneider's profit-sharing plan. The noncompete agreement states that Schneider's "has established a Profit Sharing Plan for the benefit of [its] Employees" and that "in consideration

of the benefits accruing to both parties as a result of the above-mentioned Profit Sharing Plan," the parties agree to the terms of the noncompete agreement. Third, although the noncompete agreement attempts to restrict Gaver from establishing or having an ownership interest in a competing business, unlike many litigated covenants not to compete, the agreement permits Gaver to be employed by any of Schneider's competitors. The noncompete agreement provides: "THIS AGREEMENT IS NOT AND SHALL NOT BE INTERPRETED AS A RESTRICTION ON EMPLOYEE'S RIGHT TO BE EMPLOYEED [sic] IN A TRADE OR BUSINESS SIMILAR TO THE TRADE AND BUSINESS OWNED AND OPERATED BY EMPLOYED [sic]."

For completeness, we remark briefly on the fact that although the noncompete agreement refers to the profit-sharing plan, the noncompete agreement is a freestanding document which we interpret independently and is not integrated with the profit-sharing plan. See *Builders Supply Co. v. Czerwinski*, 275 Neb. 622, 748 N.W.2d 645 (2008) (discussing integration of documents). Further, the parties agree that Schneider's profit-sharing plan, which is not in the record, does not contain a noncompete provision arguably restraining trade. Thus, we interpret the noncompete agreement by reference to its terms, and as noted above, the interpretation of a contract is a question of law. See *Woodle v. Commonwealth Land Title Ins. Co.*, 287 Neb. 917, 844 N.W.2d 806 (2014).

Despite the fact that the noncompete agreement at issue in this case is somewhat unusual, we recognize that it shares a similar purpose with more commonplace covenants not to compete and other provisions partially restraining trade—namely to prevent Gaver from competing with Schneider's in certain ways. As we observed in *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992), other courts have struggled with how to characterize challenged provisions, because the characterization determines the applicable standard by which these courts measure validity. See *Deming v. Nationwide Mut. Ins. Co.*, 279 Conn. 745, 905 A.2d 623 (2006) (discussing several characterizations of allegedly anticompetitive provisions and corresponding standard to be applied as to validity).

However, we do not believe it is necessary to resolve whether to characterize the challenged document as a restraint of trade, "restrictive covenant not to compete" or other partial restraint of trade, because we rely on our Nebraska precedent, and as we did in *Brockley v. Lozier Corp., supra*, and *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 407 N.W.2d 751 (1987), we logically extend the application of the three reasonableness requirements to determine whether the noncompete agreement at issue is valid and enforceable.

[6] In applying the three reasonableness requirements, we initially focus on the second requirement: Is the restriction greater than reasonably necessary to protect the employer in some legitimate interest? See *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986). We have previously enunciated the important principle, to wit: "An employer has a legitimate business interest in protection against a former employee's competition by improper and unfair means, but is not entitled to protection against ordinary competition from a former employee." *Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. 642, 653, 748 N.W.2d 626, 638 (2008). See, also, *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 759, 472 N.W.2d 391, 399 (1991) (quoting *Boisen* and stating that "'[a] covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition'"). We have further observed that "'[a] restraint on the employee is illegal when its purpose is the prevention of competition, except when the methods of competition to be prevented are methods commonly regarded as improper and unfair.'" *Boisen v. Petersen Flying Serv.*, 222 Neb. at 245, 383 N.W.2d at 33, quoting 6A Arthur Linton Corbin, Corbin on Contracts § 1394 (1962). This principle is applicable to the instant case.

We have identified legitimate protectable business interests as including employer's goodwill, confidential information, and trade secrets. See *Boisen v. Petersen Flying Serv., supra*. It has been stated:

> Legitimate interests of an employer which may be protected from competition include: the employer's trade

> secrets which have been communicated to the employee during the course of employment; confidential information communicated by the employer to the employee, but not involving trade secrets, such as information on a unique business method; an employee's special influence over the employer's customers, obtained during the course of employment; contacts developed during the employment; and the employer business's development of goodwill.

54A Am. Jur. 2d *Monopolies and Restraints of Trade* § 906 at 208 (2009).

[7-9] Regarding an employer's goodwill, we have stated:

> To distinguish between "ordinary competition" and "unfair competition," we have focused on an employee's opportunity to appropriate the employer's goodwill by initiating personal contacts with the employer's customers. Where an employee has substantial personal contacts with the employer's customers, develops goodwill with such customers, and siphons away the goodwill under circumstances where the goodwill properly belongs to the employer, the employee's resultant competition is unfair and the employer has a legitimate need for protection against the employee's competition.

*Aon Consulting v. Midlands Fin. Benefits*, 275 Neb. at 653, 748 N.W.2d at 638. See, also, *Mertz v. Pharmacists Mut. Ins. Co.*, 261 Neb. 704, 625 N.W.2d 197 (2001); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997) (superseded by statute on other grounds as stated in *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014)). We have also recognized that an employer has a legitimate need to curb or prevent competitive endeavors by a former employee who has acquired confidential information or trade secrets pertaining to the employer's business operations. See, *Brockley v. Lozier Corp.*, 241 Neb. 449, 488 N.W.2d 556 (1992); *Boisen v. Petersen Flying Serv., supra*.

[10,11] Unlike the areas of goodwill, confidential information, and trade secrets, an employer does not ordinarily have a legitimate business interest in the postemployment preclusion

of an employee's use of some general skill. *Moore v. Eggers Consulting Co., supra*. We have stated that

> "[a] line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business." Restatement (Second) of Contracts § 188, Comment *g*. at 45 (1981). Ordinarily, an employer has no legitimate business interest in post-employment prevention of an employee's use of some general skill or training acquired while working for the employer, although such on-the-job acquisition of general knowledge, skill, or facility may make the employee an effective competitor for the former employer.

*Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 246-47, 383 N.W.2d 29, 34 (1986). In this regard, we have long observed that the law does not look with favor upon restrictions against competition, and therefore, an agreement which limits the right of a person to engage in a business or occupation will be strictly construed. *Securities Acceptance Corp. v. Brown*, 171 Neb. 406, 106 N.W.2d 456 (1960), *modified on denial of rehearing* 171 Neb. 701, 107 N.W.2d 540 (1961).

In *Boisen*, we determined that the former employer, an aerial spraying business, had not shown any special circumstance affecting a legitimate business interest to be protected by the challenged covenant not to compete. In *Boisen*, the covenant not to compete generally provided that when the former employee left his employment for any reason, he could not work for one of the employer's competitors or own his own competing business. Specifically, the contract stated that the former employee

> "shall not enter any occupation or employment, whether working for someone else or as a self-employed person, as owner, operator, employee, salesman, representative, pilot, instructor, advisor or consultant in, with or to any business which is in competition with any business presently performed or performed at any time during the employment of employee, by [the former employer], within a radius of 50 miles of Minden, Kearney County, Nebraska, for a period for 10 years from the date of this

> agreement, or from the date such employee shall leave the employment of employer, which ever is later."

*Boisen v. Petersen Flying Serv.*, 222 Neb. at 242, 383 N.W.2d at 31.

In analyzing the reasonableness of the covenant not to compete in *Boisen*, we observed that the record showed: the former employee had no personal and business-based contact with customers or prospective customers of the former employer; the former employee was not exposed to, and did not acquire, confidential information accumulated by the former employer regarding its customers or potential customers; the on-the-job training and knowledge acquired by the former employee was no different from that which he would have received from another employer engaged in the same business; and the former employer had no trade secrets, such as a significantly different technique unknown to competitors or a unique and advantageous method to conducts its business. We determined that

> [r]educed to its rudiments, [the former employer's] objective in the covenant not to compete is prevention of prospective competition consequent to another aerial spraying business' serving agricultural customers and, perhaps, ultimately causing a reduction of revenue due to competitive prices or fewer customers, available or served. A covenant not to compete, as a partial restraint of trade, is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition. Under the circumstances we conclude that the questioned covenant not to compete does not protect "some legitimate business interest" of [the former employer] and is, therefore, invalid and unenforceable.

*Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 247-48, 383 N.W.2d 29, 34-35 (1986).

As in *Boisen*, the record in this case shows that Schneider's has not demonstrated any special circumstances affecting a legitimate business interest to be protected by the noncompete agreement. There is no evidence that Gaver had any personal and business-based contact with customers or prospective

customers of Schneider's. Referring to the record, Gaver was not exposed to, and did not acquire, confidential information accumulated by Schneider's regarding its customers or potential customers, such as customer lists. There is no evidence that the on-the-job training and knowledge acquired by Gaver was any different from that which would have been received from another employer engaged in the business of automotive repairs and sales. And the record contains no evidence that Schneider's had any trade secrets regarding automotive repairs and sales.

In its appellate brief, Schneider's concedes that the purpose of the noncompete agreements was not to protect Schneider's goodwill, which, as explained above, is a recognized protectable interest. Instead, Schneider's asserts that its objective in securing the noncompete agreements was to ensure that any money distributed to Gaver from the profit-sharing plan would not later be used to establish or fund a competing business. Schneider's identifies its business interest as its "interest in preventing its earnings from directly funding a competitor." Brief for appellant at 17. In support of this assertion, Schneider's points to the paragraph in the noncompete agreement that provides "[w]hereas, Employer desires to insure [sic] that the benefits of said Profit Sharing Plan are not used by Employee to the detriment of the Employer."

We have not previously recognized a restriction on the use of earnings previously distributed, which are thereafter intended to fund the creation of the former employee's competing business, as a legitimate protectable business interest of the employer. And we are not inclined to recognize such restriction as legitimate in this case. As stated above, a covenant not to compete is available to prevent unfair competition by a former employee but is not available to shield an employer against ordinary competition. See, *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991); *Boisen v. Petersen Flying Serv., supra*. By attempting to restrict Gaver from opening or having an ownership interest in a competing business not coupled with a recognized protectable interest, Schneider's is attempting to prevent ordinary competition by a former employee, not unfair competition.

The noncompete agreement does not protect a legitimate business interest of Schneider's, such as its goodwill, confidential information, or trade secrets, but, rather, it seeks to prevent competition in general by restricting the manner in which Gaver applies funds he has already earned and received. That is, such funds have been earned and are not a gratuity, see *Halpin v. Nebraska State Patrolmen's Retirement System*, 211 Neb. 892, 320 N.W.2d 910 (1982) (discussing funds that are not gratuities), and they are not payments over which an employer retains some distributive control, see *Food Fair Stores v. Greeley*, 264 Md. 105, 285 A.2d 632 (1972) (illustrating that rules of incentive bonus retirement plan provided that funds can be withheld until former employee turns age 65). The anti-ownership restrictive language in the noncompete agreement directed to the use of funds already earned and received is not directed at a protectable legitimate business interest, and it is greater than reasonably necessary to protect the recognized interests of the employer. We therefore conclude that the noncompete agreement is invalid and unenforceable.

Notwithstanding the unacceptable breadth of the restrictions of the noncompete agreement, Schneider's nevertheless contends that the noncompete agreement is reasonable and should be enforceable, because it explicitly allows Gaver to be employed by Schneider's competitors. While it is correct that Gaver may be employed by Schneider's competitors, this does not save the noncompete agreement. The noncompete agreement contains a broad restriction prohibiting Gaver from "establish[ing] or open[ing] any trade business similar to the business owned and operated by Employer or in any manner become interested, directly or indirectly, either as an owner, partner, agent, stockholder, officer or otherwise, in any such business or trade." Indeed, the anti-ownership restriction is expanded by prohibiting the enumerated ownership interests "or otherwise." In this regard, the Court of Appeals of Maryland has stated that "'"[t]he right to labor or use one's skill, talents, or experience for one's own benefit, or furnish them to another for compensation, is a natural and

inherent right of the individual . . ." . . . .'" *Food Fair Stores v. Greeley*, 264 Md. at 116, 285 A.2d at 638, quoting *Ruhl v. Bartlett Tree Co.*, 245 Md. 118, 225 A.2d 288 (1967). We agree with other courts which have concluded not to enforce restrictive covenants if under all the circumstances, the provision is unduly restrictive of the employee's freedom. Limiting the creation of a business is a questionable restriction. When coupled with an attempt to prohibit the former employee's use of funds already earned and received, the limitations must fail. The noncompete agreement as written is an attempt to prevent ordinary competition, not improper or unjust competition, and we reject Schneider's arguments to the contrary.

[12] It is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable. *Moore v. Eggers Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997) (superseded by statute on other grounds as stated in *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014)); *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455 N.W.2d 772 (1990). We have determined above that the noncompete agreement in this case is unreasonable, and we do not reform it to make it enforceable.

## CONCLUSION

The challenged noncompete agreement is not directed at a protectable legitimate business interest, and it is greater than reasonably necessary to protect the legitimate interests of Schneider's. Therefore, the noncompete agreement is invalid and unenforceable and the district court did not err when it so determined.

AFFIRMED.

# STATE OF NEBRASKA, APPELLEE, V. SARAH E. PLANCK, APPELLANT.

856 N.W.2d 112

Filed November 14, 2014. No. S-14-151.

1. **Jury Instructions: Appeal and Error.** Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach a conclusion independent of the determination reached by the trial court.
2. **Entrapment: Estoppel: Appeal and Error.** An appellate court reviews the denial of the defense of entrapment by estoppel de novo, because it is a question of law.
3. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
4. **Jurisdiction: Words and Phrases.** Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.
5. ____: ____. Strictly speaking, "jurisdiction" refers to a court's adjudicatory authority. Accordingly, the term "jurisdictional" properly applies only to prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority.
6. **Motor Vehicles: Licenses and Permits: Revocation.** Impoundment of an operator's license is governed by a statute authorizing a court to revoke or impound a license.
7. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
8. **Criminal Law: Entrapment: Estoppel.** The elements of the defense of entrapment by estoppel are: (1) The defendant acted in good faith before taking any action; (2) an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that his or her conduct was legal; (3) the defendant actually relied on the statements of the government official; and (4) such reliance was reasonable.
9. **Courts: Jury Instructions.** A trial court need not instruct the jury on an issue where the facts do not justify such an instruction.
10. **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 Platte County, ROBERT R. STEINKE, Judge, on appeal thereto from the County Court for Platte County, FRANK J. SKORUPA, Judge. Judgment of District Court affirmed.

Nathan J. Sohriakoff, Deputy Platte County Public Defender, for appellant.

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

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

CASSEL, J.

## INTRODUCTION

Sarah E. Planck appeals from a district court judgment affirming her county court conviction and sentence for driving while her motor vehicle operator's license was administratively revoked "on points." She focuses on the trial court's refusal to give an instruction on entrapment by estoppel. To support the defense, she pointed to a different court's earlier return of her operator's license following a period of impoundment as part of a sentence for reckless driving. Because this conduct did not amount to an affirmative representation that it was legal for her to drive, the trial court correctly refused the instruction and the district court correctly affirmed on appeal.

## BACKGROUND

### NANCE COUNTY IMPOUNDMENT FOR RECKLESS DRIVING

We first summarize the facts relating to Planck's earlier conviction for reckless driving, which conviction occurred on November 5, 2012, in the county court for Nance County. In connection with that conviction, the court impounded Planck's operator's license for 60 days, beginning November 8. Planck applied for a "work permit," and the court authorized Planck to drive between her house and her place of employment during the period of impoundment.

After the period of impoundment expired, Planck received her operator's license in the mail. Although Planck testified that it was accompanied by a "handwritten letter" from "Nance County," the letter was not offered in evidence. She did not testify regarding the exact date the license was

returned; rather, she related the time to the expiration of the 60-day impoundment period, which she equated to January 7, 2013.

### Administrative Revocation on Points

We next summarize the evidence regarding the administrative revocation of Planck's motor vehicle operator's license. The Nebraska Department of Motor Vehicles (DMV) received notice from the county court for Nance County of Planck's conviction and the impoundment of her license. A court's impoundment of a license is a separate process from the DMV's administrative revocation procedure. Due to the conviction, the DMV assessed Planck 5 points under Nebraska's point system.[1] Consequently, the records of the DMV showed that Planck had accumulated 12 or more points in a 2-year period, resulting in summary revocation of her operator's license.[2]

On November 7, 2012, the DMV mailed a letter to Planck stating that her license was revoked for 6 months, from November 7 until May 7, 2013. The DMV sent the revocation letter to Planck's last known address, which was an address in Monroe, Nebraska. The letter was sent by first-class mail. It was not returned to the DMV as undelivered.

On November 26, 2012, the DMV issued a "License Pickup Order," directing the Platte County sheriff to retrieve Planck's operator's license and listing Planck's address in Monroe, which is located in Platte County. The pickup order was canceled in April 2013.

### Platte County Arrest and Conviction for Driving Under Revocation

We now turn to the events leading to the conviction and sentence before us in the instant appeal. On March 22, 2013, an officer with the Columbus Police Department stopped Planck's

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[1] See Neb. Rev. Stat. § 60-4,182(9) (Cum. Supp. 2012).

[2] See Neb. Rev. Stat. § 60-4,183 (Reissue 2010).

vehicle for a traffic violation. After Planck produced her operator's license, the officer communicated with dispatch and was advised that Planck's operator's license was revoked. The officer arrested Planck, and the State subsequently charged her with driving under revocation.

The county court for Platte County conducted a jury trial. Planck testified that she thought she had a valid operator's license at the time of her arrest. She testified that she never "officially" received the letter from the DMV stating that her license had been revoked and that the night of her arrest was the first time she was informed of her license revocation. Planck testified that when the county court for Nance County impounded her license for 60 days, a police officer came to her house to pick up the license. And after Planck's "work permit" expired, she received her operator's license in the mail at her address in Monroe along with a handwritten letter from "Nance County." Planck thought all of her driving privileges had been reinstated when her license was returned to her.

Planck testified that she would not have been driving if she knew her license was revoked. She did not recall whether the letter from Nance County stated that it was legal for her to drive. Planck testified that neither the DMV nor Nance County affirmatively communicated to her that it was legal for her to drive. But she also testified that Nance County never told her she could not drive and that she was led to believe she was free to resume driving when she received her license in the mail. Planck thought that the court had the authority to return her license and allow her to drive.

Defense counsel offered three alternative proposed jury instructions concerning entrapment by estoppel. The county court refused to give such an instruction. The court stated:

> [T]here's no evidence as to who informed [Planck] either through affirmative conduct or actual statement that she could drive. There's no evidence that there was affirmative conduct or actual statement that she could drive. There's no evidence that . . . Planck relied on that affirmative conduct or statement to drive, rather her testimony was that she did not know that [her license] was revoked.

The jury returned a verdict of guilty of driving under revocation. The court entered judgment on the verdict and subsequently imposed a sentence.

### Appeal to District Court

Planck appealed to the district court. She included as assigned errors the county court's refusal of her three proposed jury instructions and its refusal to give any instruction on the defense of entrapment by estoppel.

The district court affirmed Planck's conviction and sentence. The court determined that Planck failed to offer sufficient evidence to warrant an instruction on entrapment by estoppel, because the evidence was insufficient to show that an official from the county court for Nance County either had been made aware of all relevant historical facts or had affirmatively told Planck that she could legally drive. The court reasoned:

> [W]hen asked if Nance County told her whether it was legal or acceptable for her to drive, Planck responded "[n]ot that I recall." Further, Planck offered no evidence as to whether the Nance County Court, when forwarding back her operator's license, had been made aware of all relevant historical facts, namely, the DMV's administrative revocation of her operator's license for the accumulation of points.

Planck timely appealed to the Nebraska Court of Appeals. We moved the case to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

## ASSIGNMENT OF ERROR

Planck assigns, restated and consolidated, that the district court erred in affirming the county court's refusal to give an instruction on the defense of entrapment by estoppel.

## STANDARD OF REVIEW

[1] Whether a jury instruction is correct is a question of law, regarding which an appellate court is obligated to reach

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

a conclusion independent of the determination reached by the trial court.[4]

[2] An appellate court reviews the denial of the defense of entrapment by estoppel de novo, because it is a question of law.[5]

## ANALYSIS

### "JURISDICTION"

[3] The State purports to raise a jurisdictional issue. It questions whether the county court for Nance County had any subject matter jurisdiction to grant a "work permit." Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[6]

[4,5] Subject matter jurisdiction is a court's power to hear and determine a case in the general class or category to which the proceedings belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine.[7] Strictly speaking, "jurisdiction" refers to a court's adjudicatory authority. Accordingly, the term "jurisdictional" properly applies only to prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) implicating that authority.[8]

The issue raised by the State is not an issue of subject matter jurisdiction regarding the case before us. There is no contention that the county court for Platte County lacked subject matter jurisdiction to hear Planck's driving under revocation case.

[6] Rather, the State is arguing that the portion of the Nance County impoundment order purporting to authorize driving to and from work was unauthorized by statute and void. In that sense, it is a collateral attack upon the Nance County order.

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[4] *State v. McGuire*, 286 Neb. 494, 837 N.W.2d 767 (2013).

[5] See *U.S. v. Benning*, 248 F.3d 772 (8th Cir. 2001).

[6] *Davis v. Choctaw Constr.*, 280 Neb. 714, 789 N.W.2d 698 (2010).

[7] *Kotrous v. Zerbe*, 287 Neb. 1033, 846 N.W.2d 122 (2014).

[8] *State v. Ryan*, 287 Neb. 938, 845 N.W.2d 287 (2014).

We observe that impoundment of an operator's license is governed by a statute authorizing a court to revoke or impound a license.[9] Under the statute, if the court revokes a license, it must order the revocation of the license "to operate a motor vehicle for any purpose."[10] But if the court impounds a license, it must order the person to "not operate a motor vehicle."[11] One might argue that the absence of the limiting words "for any purpose" impliedly authorizes a court to permit a convicted person to drive to and from work during the period of impoundment.

But we need not decide this issue. It is not a matter of subject matter jurisdiction in the Platte County case. Rather, it is merely another basis for arguing that the requested instruction was not justified by the evidence. Because we rely upon a different reason for our conclusion that the instruction was not warranted, we need not further address the State's "jurisdictional" argument.

### Entrapment by Estoppel

[7] The crux of Planck's argument is that an instruction on entrapment by estoppel should have been given. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.[12] Here, the county court determined that the evidence did not warrant an instruction on entrapment by estoppel and the district court agreed.

[8] The law regarding the defense of entrapment by estoppel is relatively new in Nebraska. We recently recognized it as an available affirmative defense in *State v. Edwards*.[13] There, we noted that the defense was rooted in the Due

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[9] See Neb. Rev. Stat. § 60-496 (Reissue 2010).

[10] See *id*.

[11] See *id*.

[12] *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

[13] *State v. Edwards*, 286 Neb. 404, 837 N.W.2d 81 (2013).

Process Clause of the Fifth Amendment.[14] And we discussed *Raley v. Ohio*[15] and *Cox v. Louisiana*,[16] two cases from the U.S. Supreme Court that interpreted the defense.[17] In *State v. Edwards*, the trial court instructed the jury on the defense using the following elements: (1) The defendant acted in good faith before taking any action; (2) an authorized government official, acting with actual or apparent authority and who had been made aware of all relevant historical facts, affirmatively told the defendant that his or her conduct was legal; (3) the defendant actually relied on the statements of the government official; and (4) such reliance was reasonable.[18] We accepted this articulation, stating that "[a]lthough jurisdictions have formulated the elements of the entrapment by estoppel defense in various ways, we agree that the instruction as given accurately states the essential elements of the defense."[19] In a subsequent case,[20] we stated that the defense of entrapment by estoppel consists of the four elements that were articulated by the trial court in *State v. Edwards* and reasoned that the evidence did not warrant the giving of such an instruction.

Planck submitted three proposed jury instructions concerning entrapment by estoppel. Planck's tendered instruction No. 3 mirrored the elements set forth in *State v. Edwards*. Proposed instruction No. 1 listed the elements as follows:

> 1. An agent or entity of the Nebraska Government informed, either through affirmative conduct or an actual statement, . . . Plan[c]k that she could drive; and
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> 2. . . . Planck relied on the affirmative conduct or statement; and
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> 3. . . . Planck's reliance on the affirmative conduct or statement was reasonable; and

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[14] See *id*.

[15] *Raley v. Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L. Ed. 2d 1344 (1959).

[16] *Cox v. Louisiana*, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

[17] See *State v. Edwards, supra* note 13.

[18] *Id*.

[19] *Id*. at 414, 837 N.W.2d at 89-90.

[20] See *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

> 4. Given . . . Planck's reliance on the affirmative conduct or statement, conviction would be unfair.

Her proposed instruction No. 2 formulated the elements this way:

> 1. . . . Planck acted in good faith before driving;
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> 2. A government agent or government entity, acting with actual or apparent authority and who was aware of or should have been aware of all relevant historical facts, informed . . . Planck through statements or affirmative conduct, that she could drive;
>
> 3. . . . Planck actually relied on the information of the government agent or entity;
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> 4. . . . Planck's reliance was reasonable; and
>
> 5. Given . . . Planck's reliance[,] conviction would be unfair[.]

Each of the instructions proposed by Planck required some affirmative act by the governmental official. Proposed instruction No. 1 required that the government entity "either through affirmative conduct or an actual statement" informed Planck that she could drive. Proposed instruction No. 2 required that the government entity informed Planck that she could drive "through statements or affirmative conduct." And proposed instruction No. 3 required that Planck be "affirmatively told" that her conduct was legal.

The decisions of the U.S. Supreme Court guide us regarding the necessity of an affirmative statement or affirmative conduct. In *Raley v. Ohio*,[21] three of the defendants were specifically told by the chairman of a state commission that they had a right to refuse to testify. The fourth defendant was not affirmatively told that the privilege was available but was given the impression that it was by the chairman's behavior. The Court stated: "Here there were more than commands simply vague or even contradictory. There was active misleading."[22] In *Cox v. Louisiana*, the Court noted that the defendant and his group "were affirmatively told that they

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[21] *Raley v. Ohio, supra* note 15.

[22] *Id.*, 360 U.S. at 438.

could hold the demonstration on the sidewalk of the far side of the street."[23] And in *United States v. Pennsylvania Chem. Corp.*,[24] the Court determined that the defendant should have been permitted to present evidence that it was affirmatively misled by the longstanding official administrative construction of a statute into believing that its conduct was not criminal.

The requirement of a statement by an official or other affirmative representation is in line with formulations of the defense in the federal circuit courts. The First Circuit has rejected a claim of entitlement to the defense where there was no affirmative representation that the conduct would be legal.[25] It appears that the Second[26] and Eighth[27] Circuits require a statement by a government official. Under the formulations of the Third,[28] Fourth,[29] and Ninth Circuits,[30] a government official must tell the defendant that the conduct was legal. The Fifth Circuit requires that the government official "actively assures a defendant that certain conduct is legal."[31] The 6th[32] and 10th[33] Circuits have listed an element of the defense as being that an official actively misled the defendant. The Seventh Circuit requires that the government official affirmatively assures the defendant that the conduct is legal or that the official actively misled the defendant.[34]

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[23] *Cox v. Louisiana, supra* note 16, 379 U.S. at 571.

[24] *United States v. Pennsylvania Chem. Corp.*, 411 U.S. 655, 93 S. Ct. 1804, 36 L. Ed. 2d 567 (1973).

[25] See *U.S. v. Pardue*, 385 F.3d 101 (1st Cir. 2004).

[26] See *U.S. v. George*, 386 F.3d 383 (2d Cir. 2004).

[27] See *U.S. v. Benning, supra* note 5.

[28] See *U.S. v. West Indies Transport, Inc.*, 127 F.3d 299 (3d Cir. 1997).

[29] See *U.S. v. Clark*, 986 F.2d 65 (4th Cir. 1993).

[30] See *U.S. v. Batterjee*, 361 F.3d 1210 (9th Cir. 2004).

[31] *U.S. v. Spires*, 79 F.3d 464, 466 (5th Cir. 1996).

[32] See *U.S. v. Theunick*, 651 F.3d 578 (6th Cir. 2011).

[33] See *U.S. v. Bader*, 678 F.3d 858 (10th Cir. 2012).

[34] See *U.S. v. Baker*, 438 F.3d 749 (7th Cir. 2006).

Planck was not entitled to any of the proposed instructions, because there was no evidence of an affirmative statement or affirmative conduct that she could drive. Planck admitted that the county court for Nance County did not affirmatively communicate to her that it was legal for her to drive. Rather, she relies on the court's conduct in issuing the "work permit" and returning her license at the end of the impoundment period.

But other courts have found similar conduct to be insufficient to warrant the giving of an instruction on entrapment by estoppel. In *U.S. v. Lemieux*,[35] the defendant claimed that his purchase of a firearm from a federally licensed dealer was the equivalent to being told by federal authorities that he could legally purchase a firearm, but the appellate court determined that entrapment by estoppel was not available as a defense. The court reasoned in part that "[t]here is no allegation that a firearms dealer told [the defendant] that the purchase was legal; the dealer simply completed the sale, a distinction that makes a difference under an estoppel theory."[36] Similarly, in the instant case, the court processed Planck's request for a "work permit," but never told her that she could legally drive after the period of impoundment. That was merely an assumption on her part. And the Eighth Circuit has stated that a report generated by a background check system which permitted a firearms dealer to proceed with a firearms sale "is not the type of statement giving rise to the entrapment by estoppel defense. The [background check system] signal to proceed would at most indicate that [the defendant's] felony conviction was not listed in the federal database."[37] Likewise, the county court's issuance of the "work permit" and return of Planck's license indicates that it was unaware of the DMV's administrative license revocation.

The First Circuit has also rejected the defense of entrapment by estoppel where there was no evidence that the

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[35] *U.S. v. Lemieux*, 550 F. Supp. 2d 127 (D. Me. 2008).

[36] *Id.* at 133.

[37] *U.S. v. Hullette*, 525 F.3d 610, 612 (8th Cir. 2008).

defendant was affirmatively told that his or her conduct was legal. In *U.S. v. Sousa*,[38] the defendant was indicted for being a felon in possession of a firearm. He argued entrapment by estoppel, because a court had treated his 1977 predicate offense as a misdemeanor during a criminal proceeding in 1990. Further, in 1988, a police department issued the defendant a firearm identification permit; thus, he argued that he reasonably believed his 1977 conviction was a misdemeanor and that he could legally carry a firearm. He claimed that the police department "'told him' that possessing a firearm was legal by issuing him a firearm identification card."[39] But the appellate court observed that the defendant did not claim that an official affirmatively told him that he could legally possess a firearm, and thus, the defense was not available to him. In *U.S. v. Pardue*,[40] the First Circuit rejected the defense of entrapment by estoppel, because the defendant did not adduce evidence that a Marine Corps official affirmatively told him it was legal for him to keep ammunition in his backpack in civilian life. Despite a domestic violence misdemeanor conviction, the defendant was authorized to possess weapons while in the Marines, and he assumed it was legal for him to do so after being discharged. The court stated: "Defendant has disclosed no affirmative representation from any government official regarding the legality of possessing ammunition in civilian life. He merely assumed, without being told, that he could possess ammunition after his discharge from the Marines."[41] We are presented with a comparable situation here: an assumption by Planck that it was legal for her to drive, without her being specifically told that she could do so.

We adhere to our requirement of an affirmative statement by a government official as an element of entrapment by

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[38] *U.S. v. Sousa*, 468 F.3d 42 (1st Cir. 2006).

[39] *Id.* at 46.

[40] *U.S. v. Pardue, supra* note 25.

[41] *Id.* at 108-09.

estoppel. In *State v. Green*,[42] we concluded that based upon the record, the defendant was not entitled to an entrapment by estoppel instruction. We stated that the defendant had the burden to show that he was affirmatively told that he could possess a sword and knife collection, but that there was no such evidence in the record. We further stated that the defense was not warranted based on evidence the defendant reported the collection on paperwork filed with the probation office and assumed that it was permitted because he was not told differently. We reasoned that "this was not an affirmative statement from an authorized government official, nor can [the defendant] produce the paperwork where he allegedly disclosed this collection."[43]

[9] A trial court need not instruct the jury on an issue where the facts do not justify such an instruction.[44] Because Planck did not adduce evidence of an affirmative statement from an authorized government official that she could legally drive, the county court did not err in refusing to instruct the jury on the defense of entrapment by estoppel.

[10] We need not consider Planck's challenge to the element of the defense as set forth in *State v. Edwards*[45] requiring that the government agent be "aware of all relevant historical facts." An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[46]

## CONCLUSION

We conclude that Planck was not entitled to an instruction on the defense of entrapment by estoppel, because the evidence did not establish any affirmative statement by the county court for Nance County that it was legal for Planck to drive. Planck's assumption that she could legally drive based

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[42] *State v. Green, supra* note 20.

[43] *Id.* at 227, 842 N.W.2d at 89.

[44] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[45] *State v. Edwards, supra* note 13.

[46] *State v. Bol*, 288 Neb. 144, 846 N.W.2d 241 (2014).

on the processing of paperwork and return of her license, in the absence of being specifically told, was not sufficient to warrant the giving of the instruction. We affirm the judgment of the district court, which affirmed the judgment of the county court for Platte County.

AFFIRMED.

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ANTHONY K. AND ARVA K., INDIVIDUALLY AND AS GUARDIANS AND NEXT FRIENDS ON BEHALF OF THEIR MINOR CHILDREN, ASHLEY K. ET AL., APPELLANTS, V. STATE OF NEBRASKA ET AL., APPELLEES.

855 N.W.2d 802

Filed November 21, 2014. No. S-13-446.

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. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
3. **Motions to Dismiss: Immunity: Appeal and Error.** An appellate court reviews de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.
4. **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.
5. **Constitutional Law: States: Immunity.** The immunity of states from suit is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the federal Constitution and which they retain today.
6. **Actions: States.** It is inherent in the nature of sovereignty for a state not to be amenable to the suit of an individual without its consent.
7. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, provides that the State may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought. The State is permitted to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
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 Douglas County: J RUSSELL DERR, Judge. Affirmed.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and John L. Jelkin for appellees.

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

WRIGHT, J.

## I. NATURE OF CASE

This action was brought under 42 U.S.C. § 1983 (2012) by Anthony K. and Arva K., individually and as guardians and next friends on behalf of their seven minor children. The plaintiffs sued the State of Nebraska, the Department of Health and Human Services (DHHS), 18 DHHS employees in their official and individual capacities, and the children's guardian ad litem. The plaintiffs sought general and special damages for a violation of their constitutionally protected rights to familial integrity, due process, and equal protection. They challenged the constitutionality of Neb. Rev. Stat. §§ 43-283.01 and 43-1312 (Cum. Supp. 2012) and asked the Douglas County District Court to temporarily and permanently enjoin the application of the statutes in the State of Nebraska and strike them down. This is the first of two related cases filed by the plaintiffs.

Upon the defendants' motion to dismiss, the district court concluded that only the State had been properly served and it dismissed all the remaining defendants for lack of proper service. At that time, the court also determined that the State was entitled to sovereign immunity as to the plaintiffs' § 1983 claims that requested monetary damages. As to the plaintiffs' remaining causes of action against the State, the court sustained the State's motion for summary judgment and dismissed the plaintiffs' complaint. For the reasons discussed below, we affirm the dismissal of the plaintiffs' complaint.

## II. SCOPE OF REVIEW

[1] The question of jurisdiction is a question of law, which an appellate court resolves independently of the trial court.

*In re Estate of McKillip*, 284 Neb. 367, 820 N.W.2d 868 (2012).

[2] A district court's grant of a motion to dismiss is reviewed de novo. *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

[3] We review de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party. *Michael E. v. State*, 286 Neb. 532, 839 N.W.2d 542 (2013).

[4] 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. *Cartwright v. State*, 286 Neb. 431, 837 N.W.2d 521 (2013).

## III. FACTS

### 1. Juvenile Case

On February 12, 2000, the plaintiffs left their oldest three minor children, Ashley K.; Anthony K., Jr. (Anthony Jr.); and Ali K., unattended for 1 to 2 hours. Anthony notified authorities that the children had been left alone. Following the incident, the children were removed from the family home by police. During the pendency of the juvenile case involving Ashley, Anthony Jr., and Ali, four other children were born to the plaintiffs. None of the other children were removed from the home and were not the subjects of the juvenile case.

On February 14, 2000, a petition was filed in the Lancaster County Separate Juvenile Court alleging that Ashley, Anthony Jr., and Ali lacked proper parental care by reason of the fault or habits of the plaintiffs. Richard Bollerup was appointed as the guardian ad litem for the minor children. Eighteen DHHS caseworkers, case managers, or administrators were involved in the case at various times over the next 9 years.

As part of the reunification plan, the court ordered Anthony to undergo intensive outpatient therapy for substance abuse, ordered the family to participate in family therapy, and ordered the plaintiffs to maintain a safe and stable home for the

children. The plaintiffs were granted visitation three times a week, which included overnight visits.

On May 25, 2000, the children were placed back in the plaintiffs' home. Initial case closure was scheduled for April 2001. In March 2001, the plaintiffs were evicted from their residence. Arva temporarily separated from Anthony and moved into a city mission in Lincoln, Nebraska, with the children. DHHS staff reported at this time that the plaintiffs were not participating in services consistently, Ashley had been late or absent from school, and Anthony had not entered alcohol treatment. On March 28, a hearing was held and the juvenile court ordered that the three oldest children be removed from the home and that Anthony be subject to random alcohol screenings. The new goal for case closure was set for October 2002, but was later extended to April 2003.

The children continued to remain in out-of-home placement due to the "'lack of compliance with the plan as ordered by the Court.'" This included Anthony's failure to show completion of alcohol treatment and the plaintiffs' continued need to further demonstrate stability in their living situation. Case closure was extended to September 2003, then to February and December 2004, and finally to March 2005. Each time, the stated reasons were because Anthony failed to show completion of substance abuse treatment and the plaintiffs failed to show a stable living situation.

The plaintiffs attempted to complete the requirements DHHS set forth in its plan for reunification. Anthony completed an alcohol treatment program, but could not produce a certificate for the court because he could not afford to pay the final bill. The continued reasons for out-of-home placement of the three minor children included Anthony's failing to produce the certificate of completion for his alcohol dependency program and neither Anthony's nor Arva's having a valid driver's license, as well as the plaintiffs' not having a big enough car for all their children, not participating in therapy to DHHS' satisfaction, and not complying with the plan for reunification. Anthony continually tested negative for drugs

and alcohol, although he was cited for driving while under the influence.

In July 2005, the plaintiffs attended a meeting with Todd Reckling and Chris Peterson, administrators at DHHS. At the meeting, Reckling and Peterson apologized for the length of time for the case and informed the plaintiffs that they needed to act quickly to reunify their family or the Lancaster County Attorney was going to file a motion to terminate their parental rights. On July 14, the Lancaster County Attorney filed a motion to terminate the plaintiffs' parental rights. DHHS employees recommended that the children be returned to the family home.

In 2006, a Foster Care Review Board report recommended reunification, noting that "'case manager turnover, changes in visitation schedules and in the permanency objective being sought appear[ed] to have been more detrimental to the children than if reunification had occurred'" and that those issues had "'as much impact on the children's prolonged time in care as the parent's lack of progress.'" However, it also noted that the plaintiffs' lack of participation in services had contributed to the children's remaining in out-of-home placement.

In 2006, Ashley, Anthony Jr., and Ali were sent to South Carolina to live with their grandparents. The plaintiffs initially agreed to a guardianship with the grandparents, but later did not agree to the guardianship, stating they were pressured into agreeing to it. DHHS staff advised the plaintiffs at that time that DHHS would seek to terminate their parental rights.

On March 14, 2008, DHHS noted that the guardianship with the grandparents was no longer the permanency objective and requested that the county attorney refile for termination of parental rights as to Ashley, Anthony Jr., and Ali. The juvenile court found that grounds for termination did not exist and ordered the children returned to their parents and the case closed. The plaintiffs and their four other children moved to South Carolina to be closer to the three oldest children. In November 2008, Ashley, Anthony Jr., and Ali were formally placed in the care of the plaintiffs.

### 2. Procedural History

The plaintiffs filed the present lawsuit on February 5, 2010. In it, they named as defendants the State; DHHS; 18 DHHS employees who were assigned at various times to Ashley, Anthony Jr., and Ali's juvenile case as caseworkers, case managers, or administrators; and the children's guardian ad litem. The case was brought pursuant to 42 U.S.C. § 1983. In the complaint, they alleged six "causes of action." Those were (1) general violations of the plaintiffs' constitutional rights, including familial integrity, due process, and equal protection; (2) violation of the plaintiffs' constitutionally protected right to familial integrity, because reasonable efforts were not made by DHHS to reunify the family; (3) violation of equal protection, because the plaintiffs had to comply with arbitrary requirements established by DHHS before they were reunited as a family; (4) facial challenge of § 43-283.01, which requires reasonable efforts to preserve and reunify the family; (5) as-applied challenge of § 43-283.01; and (6) as-applied challenge of § 43-1312, which requires a plan or permanency plan for children placed in foster care. The plaintiffs requested general and special damages for the first three causes of action and temporary and permanent injunctions for the latter three causes of action.

On April 22, 2010, the plaintiffs filed 18 praecipes for summons with the clerk of the district court for service of summons upon the DHHS employees at DHHS. The plaintiffs filed a praecipe for summons via certified mail for service upon DHHS at 301 Centennial Mall South, Lincoln, Nebraska 68509, and a praecipe for service upon Attorney General Jon Bruning at 2115 State Capitol, Lincoln, Nebraska 68509. They were unable to locate the guardian ad litem and moved for alternative service. The record is unclear whether the motion for alternative service was sustained or overruled, but there is no indication that the guardian ad litem was ever served in this case, and he did not enter an appearance.

On May 3, 2010, the certified mail for DHHS and the DHHS employees was received and signed for at DHHS. The certified mail receipts were signed for by John Hayden, a DHHS employee whose duty was to sign for and receive all

certified mail addressed to DHHS. Hayden did not conduct an investigation whether each individual named on the certified mail was actually an employee of DHHS, and he had no personal knowledge whether the named individual actually received the certified mail for which he had signed a receipt. Hayden was not an agent for any of the DHHS employees, did not reside with them, and was not one of their family members.

On May 3, 2010, only 3 of the 18 DHHS employees, Kee-Sha Adams-Parks, Charlie Bennett, and Reckling, were still employed by DHHS. Adams-Parks, Bennett, and Reckling did not receive the summons and did not know they had been sued in their individual capacities.

On June 3, 2010, the State moved to dismiss all of the State defendants, including the State, DHHS, and the DHHS employees, based on lack of subject matter jurisdiction, lack of personal jurisdiction, lack of proper service of process, and failure to state a claim upon which relief could be granted.

On January 7, 2011, the district court sustained the motion to dismiss the State on causes of action one and two. It sustained the motion to dismiss DHHS and the DHHS employees in their official capacities due to lack of proper service. It sustained the motion to dismiss all the DHHS employees in their individual capacities (except Adams-Parks, Bennett, and Reckling) because they were no longer employees at DHHS.

On January 25, 2011, the district court supplemented its previous order. It determined the State was protected from suit by sovereign immunity. It found that the State and DHHS could not be liable for monetary damages under 42 U.S.C. § 1983 when the State had not waived its immunity as a sovereign. It dismissed causes of action one and two as to the State. It overruled the State's motion to dismiss as to the plaintiffs' third through sixth causes of action.

The district court then addressed DHHS' and the DHHS employees' motion to dismiss for lack of proper service. It determined it lacked jurisdiction over DHHS and the DHHS employees in their official capacities, because the plaintiffs failed to properly serve them. It concluded that the plaintiffs were required to send a summons for DHHS and each

of the DHHS employees to the Attorney General in order to gain jurisdiction over them as required by Neb. Rev. Stat. § 25-510.02 (Cum. Supp. 2014). It concluded that because the plaintiffs served only the Attorney General at his office, only the State had been properly served. Because the court lacked jurisdiction, it sustained the motion to dismiss for DHHS and the DHHS employees in their official capacities.

The district court found that it lacked jurisdiction over 15 of the DHHS employees in their individual capacities, because they no longer worked for DHHS as of May 3, 2010, the date the summons were received at DHHS. Because Hayden, the DHHS employee who signed the certified mail receipts, had no personal knowledge whether the DHHS employees named in the plaintiffs' complaint still worked at DHHS, was not a member of their personal households, did not reside with them, and had not been appointed or otherwise designated as an agent to receive personal mail for them, service by certified mail at DHHS was not proper. It dismissed the 15 DHHS employees in their individual capacities who no longer worked at DHHS. But the court withheld determination on Adams-Parks, Bennett, and Reckling pending a hearing to determine if certified mail sent to DHHS was reasonably calculated to provide them with notice that they had been sued in their individual capacities. See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

At this point, the remaining defendants were the State as to the third through sixth causes of action and Adams-Parks, Bennett, and Reckling in their individual capacities.

On June 27, 2011, the district court held a hearing to determine whether the three remaining DHHS employees had been properly served in their individual capacities. The court found that the method the plaintiffs used did not properly serve Adams-Parks, Bennett, and Reckling and was not reasonably calculated to notify them that they had been sued in their individual capacities. The court dismissed Adams-Parks, Bennett, and Reckling. At this point, only the State remained as a defendant as to causes of action three through six.

On October 31, 2012, the State moved for summary judgment on causes of action three through six. Those issues

included whether the plaintiffs had standing to challenge the constitutionality of §§ 43-283.01 and 43-1312 and whether these issues were moot. The State argued that because the plaintiffs no longer resided in Nebraska and were no longer under the jurisdiction of DHHS, they therefore lacked standing to challenge the constitutionality of the statutes. In the alternative, the State argued the issues were moot.

The district court sustained the State's motion for summary judgment. It again held that the State had not waived its sovereign immunity from suit under 42 U.S.C. § 1983 and could not be liable to the plaintiffs for monetary damages. It concluded that the plaintiffs lacked standing to challenge the constitutionality of §§ 43-283.01 and 43-1312, because they were not currently domiciled in Nebraska and had no intention of returning to Nebraska. As such, they had no personal stake in the outcome of their constitutional challenge. The court also concluded that the issues were moot and that the plaintiffs failed to show the likelihood of a similar case arising in the future in which the juvenile court would be unable to address the situation. It dismissed the plaintiffs' third through sixth causes of action against the State.

On May 17, 2013, the plaintiffs filed this timely appeal. We moved the case to our docket on our own motion. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

## IV. ASSIGNMENTS OF ERROR

The plaintiffs assign that the district court erred in (1) granting DHHS' and the DHHS employees' motion to dismiss on the basis of failure to properly serve, (2) finding that the State was entitled to sovereign immunity, (3) failing to find any exception to immunity protection, and (4) finding that they lacked standing to challenge the constitutionality of two statutes and that the issues were moot.

## V. ANALYSIS

### 1. DHHS and DHHS Employees' Motion to Dismiss

We first consider whether DHHS and the DHHS employees in their official capacities were properly served and then

discuss service upon the DHHS employees in their individual capacities.

(a) Service on DHHS and DHHS Employees in Their Official Capacities

Section 25-510.02 provides in part:

> (1) The State of Nebraska, any state agency as defined in section 81-8,210, and any employee of the state as defined in section 81-8,210 sued in an official capacity may be served by leaving the summons at the office of the Attorney General with the Attorney General, deputy attorney general, or someone designated in writing by the Attorney General, or by certified mail or designated delivery service addressed to the office of the Attorney General.

It is undisputed that the plaintiffs properly served the State by serving summons on the Attorney General by certified mail. The plaintiffs argue that by properly serving the State at the Attorney General's office, they also satisfied the statutory requirements to serve DHHS and the DHHS employees in their official capacities. The plaintiffs claim that service of one summons and one complaint on the Attorney General was sufficient to serve the State, DHHS, and the DHHS employees in their official capacities, because the statute does not require that the summons list each separately named defendant. They claim that serving the Attorney General with the complaint was sufficient notice to the State, because all the defendants were distinctly named in the complaint. And they assert that including each defendant's name in the summons would only duplicate the notice the State received. We disagree.

The plaintiffs were required to send a separate summons and complaint to the Attorney General for each party to be served. The purpose of § 25-510.02 is to give the State, its agencies, and its employees "adequate notice of the case against it" and to "eliminate ineffectual service." See *Ray v. Nebraska Crime Victim's Reparations Comm.*, 1 Neb. App. 130, 133, 487 N.W.2d 590, 592 (1992). Such purposes would not be served

if a single summons could be served on the Attorney General no matter how many State agencies or State employees were being sued. Serving the Attorney General without naming the parties to be served would require the State to ascertain parties in the lawsuit and would thereby place an unreasonable burden on the State to determine which of its numerous departments or agencies or which of its thousands of employees were being sued. Additionally, requiring separate summons for each party served through the Attorney General is consistent with Neb. Rev. Stat. § 25-502.01 (Reissue 2008), which requires a plaintiff to file the name and address "of each party to be served" with the clerk of the court and state "the manner of service for each party."

In order to properly serve DHHS and the 18 DHHS employees in their official capacities, the plaintiffs had to request a separate summons and complaint for each defendant and send all the summonses and complaints to the Attorney General. The plaintiffs did not do so. They served a single summons on Attorney General Bruning via certified mail at his office in the State Capitol. The summons was addressed only to Bruning as the Attorney General and did not list DHHS or any of the DHHS employees. No summons or complaint was served on the Attorney General for any of those defendants as required by § 25-502.01. Indeed, the proof of service showed that the plaintiffs served those defendants at DHHS, located at 301 Centennial Mall South, in Lincoln.

By failing to serve separate summons on DHHS and the DHHS employees in their official capacities through the Attorney General, the plaintiffs failed to serve those defendants. The district court correctly determined that service on DHHS and the DHHS employees in their official capacities was not proper and dismissed them from the suit.

### (b) Service on DHHS Employees in Their Individual Capacities

Eighteen DHHS employees were named in the plaintiffs' complaint. As of May 3, 2010, when the summons were received at DHHS, 15 of them no longer worked for DHHS. Only Adams-Parks, Bennett, and Reckling still worked for

DHHS. The plaintiffs served all 18 DHHS employees in their individual capacities via certified mail at DHHS.

The plaintiffs do not claim that the 15 DHHS employees who no longer worked at DHHS at the time of service were properly served. The service method would not notify them they had been sued in the underlying lawsuit. The district court did not err in dismissing these 15 DHHS employees in their individual capacities.

The question remains whether Adams-Parks, Bennett, and Reckling were properly served via certified mail at their place of employment. The plaintiffs argue that certified mail to Adams-Parks', Bennett's, and Reckling's employment address was all that was required to effectuate proper service. The State argues that serving the summons on these employees via certified mail at their place of employment was not reasonably calculated to apprise employees of the pendency of the action and that the three DHHS employees who still worked at DHHS never received the summons.

Because the DHHS employees were sued in their individual capacities, Neb. Rev. Stat. § 25-508.01(1) (Cum. Supp. 2014) governs service upon them. Section 25-508.01(1) provides that "[a]n individual party . . . may be served by personal, residence, certified mail, or designated delivery service."

Section 25-508.01(1) allowed the plaintiffs to elect the method in which they wished to have service made on the defendants. Neb. Rev. Stat. § 25-505.01(c) (Cum. Supp. 2014) governs service by certified mail. It states that certified mail service "shall be made . . . within ten days of issuance, sending the summons to the defendant by certified mail with a return receipt requested showing to whom and where delivered and the date of delivery." As we stated in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010), § 25-505.01 does not require service to be sent to the defendant's residence or restrict delivery to the addressee. But due process requires notice to be reasonably calculated to apprise interested parties of the pendency of the action and to afford them the opportunity to present their objections. *Doe v. Board of Regents, supra*.

The 18 summons were received by DHHS. Hayden, an employee of DHHS, signed the certified mail receipts for all of the DHHS employees. He did so as part of his duties to sign for certified mail addressed to DHHS. But Hayden was not an appointed agent or an otherwise designated agent of any of the defendants, was not one of their family members, and did not reside with any of the defendants. He testified that he did not know whether any of the named individuals received the mail for which he signed certified mail receipts.

Once the certified mail was signed for by Hayden, it is unclear where the mail was sent. But the evidence established that Adams-Parks, Bennett, and Reckling did not receive the certified mail and did not know about the summons until almost a year later.

We conclude that service by certified mail at DHHS was not "reasonably calculated to notify the defendants, in their individual capacities, of the lawsuit." See *Doe*, 280 Neb. at 496, 788 N.W.2d at 272. The plaintiffs elected to serve the defendants by certified mail at their place of employment. Although they were entitled to elect the method of service, they bore the risk that the method was not reasonably calculated to provide notice to the individual that he or she had been served. Hayden did not know whether Adams-Parks, Bennett, or Reckling worked for DHHS. He was not authorized to sign for their certified mail, and they did not receive the summonses. DHHS was the largest state agency of the State of Nebraska at the time the lawsuit was filed and employed nearly 6,100 employees located across the state. The method of service by certified mail at DHHS was not reasonably calculated to notify Adams-Parks, Bennett, and Reckling that they had been sued in their individual capacities. The district court properly dismissed all 18 DHHS employees in their individual capacities.

### 2. State's Motion to Dismiss

The State moved to dismiss all six of the plaintiffs' causes of action against it. The district court sustained the State's motion as to the plaintiffs' first and second causes of action, because it concluded that the State had not waived its sovereign

immunity as to § 1983 claims. But the court overruled the State's motion as to the remaining four causes of action, which it determined "state[d] a claim against the State."

We review de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party. *Michael E. v. State*, 286 Neb. 532, 839 N.W.2d 542 (2013). Upon our de novo review, we find that the district court should have dismissed all six of the plaintiffs' causes of action against the State.

(a) State Has Not Waived Sovereign Immunity

[5,6] The immunity of states from suit is a fundamental aspect of the sovereignty which the states enjoyed before ratification of the Constitution and which they retain today. *Northern Ins. Co. of N. Y. v. Chatham County, Ga.*, 547 U.S. 189, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006), citing *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). It is inherent in the nature of sovereignty for a state not to be amenable to the suit of an individual without its consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

[7] Neb. Const. art. V, § 22, provides that the State may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought. *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009). We have interpreted this provision to mean that the State is permitted to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe. *Id.*

But Nebraska has not waived its sovereign immunity with regard to § 1983 suits brought against it. See, *Stagemeyer v. County of Dawson*, 192 F. Supp. 2d 998 (D. Neb. 2002); *Winnie v. Clarke*, 893 F. Supp. 875 (D. Neb. 1995); *Shearer v. Leuenberger*, 256 Neb. 566, 591 N.W.2d 762 (1999), *disapproved on other grounds, Simon v. City of Omaha*, 267 Neb. 718, 677 N.W.2d 129 (2004); *Patteson v. Johnson*, 219 Neb. 852, 367 N.W.2d 123 (1985); *Wiseman v. Keller*, 218 Neb. 717, 358 N.W.2d 768 (1984). Neither did the enactment of

§ 1983 abrogate the State's 11th Amendment immunity by creating a remedy against the State. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), *holding limited on other grounds, Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). There is no waiver of immunity by the State that would allow the plaintiffs' suit against it.

(b) Exemption to Immunity
Protection Not Applicable

The plaintiffs argue that even though the State did not waive its sovereign immunity, it was nonetheless subject to liability in this instance because DHHS was implementing an unconstitutional "'policy statement, ordinance, regulation or decision officially adopted'" and acting "'pursuant to governmental "custom."'" Brief for appellants at 23. Their argument relies upon *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), and *Poor Bear v. Nesbitt*, 300 F. Supp. 2d 904 (D. Neb. 2004).

In *Monell*, 436 U.S. at 694, the Supreme Court held that local municipalities could be liable for damages under § 1983 if 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 the injury" on the party. The court in *Poor Bear*, 300 F. Supp. 2d at 916, similarly held that local governing bodies could be sued directly under § 1983 where "'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" Local governments could also be sued for "'constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.'" *Id.*

The plaintiffs argue that this exception to immunity applies to the State. We disagree. This exception to immunity applies only to local governments and not to State governments. The Supreme Court in *Monell* stated, "Our holding today is, of course, limited to local government units which are not

considered part of the State for Eleventh Amendment purposes." 436 U.S. at 690 n.54. The court in *Poor Bear, supra*, also limited its holding only to local governing bodies. The plaintiffs do not cite to any authority that extends this exception to state governments.

### (c) Immunity Barred All Six Causes of Action

The district court concluded that sovereign immunity barred only those causes of action against the State in which the plaintiffs requested monetary damages. This decision was consistent with *Michael E. v. State*, 286 Neb. 532, 541, 839 N.W.2d 542, 551 (2013), in which we stated that "in an action brought under 42 U.S.C. § 1983, 11th Amendment immunity does not bar an action against a state or state officials for prospective declaratory or injunctive relief."

But in the absence of a waiver, sovereign immunity bars *all* suits against the State, "regardless of the relief sought." See *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). See, also, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984) (holding limited on other grounds by *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989), and superseded by statute on other grounds as stated in *Joshua B. v. New Trier Tp. High School Dist. 203*, 770 F. Supp. 431 (N.D. Ill. 1991)). Therefore, in *Michael E., supra*, we erred in stating that sovereign immunity did not bar an action against the State for prospective relief, and such statement is expressly disapproved.

To the extent our statement in *Michael E.* can be interpreted as suggesting that the State can be sued under § 1983 for prospective declaratory or injunctive relief, that interpretation is also disapproved. The State cannot be sued under § 1983 for prospective declaratory or injunctive relief. See *Will, supra*. The State is removed from the category of possible defendants in a § 1983 action by virtue of the fact that a state is not a "person." See *id*.

The district court erred in not dismissing all of the plaintiffs' causes of action upon the State's motion to dismiss, because

they were all barred by sovereign immunity and because the State cannot be sued under § 1983. We note, however, that upon the State's motion for summary judgment, the court dismissed the causes of action that survived the State's motion to dismiss. Granting summary judgment in favor of the State accomplished the same result as sustaining the State's motion to dismiss as to all causes of action—a complete dismissal of the plaintiffs' complaint. The court reached the correct result, and we therefore affirm the dismissal of the plaintiffs' complaint.

### 4. Standing and Mootness

[8] The district court found that the plaintiffs did not have standing to bring their three causes of action challenging the constitutionality of §§ 43-283.01 and 43-1312. The court also concluded that those three causes of action were moot. The plaintiffs assign error to these determinations. However, because we have concluded that all of the plaintiffs' causes of action should have been dismissed on sovereign immunity grounds, we need not address standing or mootness. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it. *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

## VI. CONCLUSION

The district court properly dismissed DHHS and the DHHS employees in their official and individual capacities for lack of proper service of process. The court correctly determined that sovereign immunity barred the plaintiffs' claims against the State for monetary damages under 42 U.S.C. § 1983. It erred in not dismissing all of the plaintiffs' causes of action against the State upon the State's motion to dismiss. Because the court achieved the same result by dismissing all remaining causes of action against the State on summary judgment, we affirm the dismissal of the plaintiffs' complaint.

Affirmed.

Cassel, J., not participating.

# ANTHONY K. AND ARVA K., INDIVIDUALLY AND AS GUARDIANS AND NEXT FRIENDS ON BEHALF OF THEIR MINOR CHILDREN, ASHLEY K. ET AL., APPELLANTS, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLEES.

855 N.W.2d 788

Filed November 21, 2014. No. S-12-736.

1. **Motions to Dismiss: Immunity: Appeal and Error.** An appellate court reviews de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party.
2. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
3. **Actions: Immunity.** A suit against a state agency is a suit against the State and is subject to sovereign immunity.
4. **Actions: Public Officers and Employees: Pleadings.** Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.
5. **Actions: Public Officers and Employees: Immunity: Appeal and Error.** In reviewing actions against state officials, a court must determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity.
6. **Actions: Parties.** In an action for the recovery of money, the State is the real party in interest.
7. **Actions: Public Officers and Employees: Immunity: Waiver: Damages.** Sovereign immunity—if not waived—bars a claim for money even if the plaintiff has named individual state officials as nominal defendants.
8. **Actions: Parties: Public Officers and Employees.** Official-capacity actions for prospective relief are not treated as actions against the State.
9. **Public Officers and Employees: Immunity.** Where a court commands a state official to do nothing more than refrain from violating federal law, he or she is not the State for sovereign immunity purposes.
10. **Public Officers and Employees: Immunity: Declaratory Judgments: Injunction.** The State's sovereign immunity does not bar a claim against state officers which seeks only prospective declaratory or injunctive relief for ongoing violations of federal law.
11. **Actions: Guardians Ad Litem: Damages: Immunity.** A guardian ad litem is entitled to absolute immunity from any suit for damages based upon conduct within the scope of his or her judicially imposed duties as guardian ad litem.
12. **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.
13. **Limitations of Actions: Pleadings.** A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to allege sufficient facts to constitute a claim upon which relief can be granted.

14. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
15. **Motions to Dismiss: Appeal and Error.** When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.
16. **Civil Rights: Limitations of Actions: States.** The law of the state in which an action is brought under 42 U.S.C. § 1983 (2012) provides the appropriate statute of limitations.
17. **Civil Rights: Limitations of Actions.** For purposes of selecting one statute of limitations, actions brought under 42 U.S.C. § 1983 (2012) shall be characterized as personal injury actions.
18. ____: ____. In Nebraska, claims brought under 42 U.S.C. § 1983 (2012) are governed by the statute of limitations in Neb. Rev. Stat. § 25-207 (Reissue 2008).
19. **Limitations of Actions.** A statute of limitations begins to run as soon as the claim accrues.
20. **Civil Rights: Limitations of Actions: States.** Although state law determines which statute of limitations applies to a claim brought under 42 U.S.C. § 1983 (2012), the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law.
21. **Civil Rights: Limitations of Actions.** A claim brought under 42 U.S.C. § 1983 (2012) generally accrues when the plaintiff has a complete and present cause of action.
22. **Constitutional Law: Civil Rights: Pleadings.** In order to state a cause of action under 42 U.S.C. § 1983 (2012), a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States.
23. **Constitutional Law: Civil Rights: Limitations of Actions.** A claim under 42 U.S.C. § 1983 (2012) accrues when a plaintiff knows or should know that his or her constitutional rights have been violated. The plaintiff is deemed to know or have reason to know at the time of the act itself and not at the point that the harmful consequences are felt.
24. **Limitations of Actions: Torts.** The continuing tort doctrine does not delay when claims based on continuing torts accrue.
25. ____: ____. The continuing tort doctrine is not a separate doctrine, or an exception to the statute of limitations, as much as it is a straightforward application of the statute of limitations: It simply allows claims to the extent that they accrue within the limitations period.

Appeal from the District Court for Douglas County: J RUSSELL DERR, Judge. Affirmed.

Amy Sherman, of Sherman & Gilner, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and John L. Jelkin for appellees Nebraska Department of Health and Human Services et al.

Monica Green Kruger for appellee Richard Bollerup.

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

WRIGHT, J.

## I. NATURE OF CASE

This appeal involves the second of two cases brought under 42 U.S.C. § 1983 (2012) by Anthony K. and Arva K., individually and as guardians and next friends on behalf of their seven minor children. In both this and the first case, the plaintiffs alleged that over the course of the juvenile proceedings involving three of their children, the plaintiffs' constitutional and statutory rights had been violated.

The plaintiffs' claims against the State of Nebraska were determined in *Anthony K. v. State, ante* p. 523, 855 N.W.2d 802 (2014) (*Anthony K. I*), where we held that all six of the plaintiffs' causes of action against the State were barred by sovereign immunity. The instant case deals with the plaintiffs' claims against the Nebraska Department of Health and Human Services (DHHS), 18 DHHS employees in their official and individual capacities, and the children's guardian ad litem. Although premised on the same facts and arising from the same allegations as *Anthony K. I*, this case presents different issues for our resolution.

In the instant case, the plaintiffs appeal the orders of the Douglas County District Court that sustained the defendants' motions to dismiss. In particular, the plaintiffs challenge the district court's findings that the defendants were entitled to sovereign, qualified, absolute, and statutory immunities and that the plaintiffs' claims against the DHHS employees in their individual capacities were barred by the statute of limitations. For the following reasons, we affirm the dismissal of the plaintiffs' claims.

## II. SCOPE OF REVIEW

[1] We review de novo whether a party is entitled to dismissal of a claim based on federal or state immunity, drawing all reasonable inferences for the nonmoving party. *Michael E. v. State*, 286 Neb. 532, 839 N.W.2d 542 (2013).

[2] A district court's grant of a motion to dismiss is reviewed de novo. *Estate of Teague v. Crossroads Co-op Assn.*, 286 Neb. 1, 834 N.W.2d 236 (2013).

## III. FACTS

The background information in this case is discussed at length in *Anthony K. I.* In summary, three minor children of the plaintiffs, Ashley K.; Anthony K., Jr. (Anthony Jr.); and Ali K., were removed from the family home in 2000. For various reasons, the children were not returned to the care of their parents until 2008 and the juvenile case was not closed until 2009.

The plaintiffs initially filed suit against the State, DHHS, the individual DHHS employees assigned to the juvenile case, and the guardian ad litem. However, due to lack of proper service, the district court dismissed all defendants except the State. Because more than 6 months had passed from the filing of the initial lawsuit, any service of process under the plaintiffs' first complaint would have been ineffective on DHHS, the DHHS employees, and the guardian ad litem. See Neb. Rev. Stat. § 25-217 (Reissue 2008). Therefore, the plaintiffs filed the present lawsuit against these parties under a separate complaint.

The plaintiffs alleged that DHHS, the DHHS employees, and the guardian ad litem violated the plaintiffs' right to familial integrity. They claimed that Ashley, Anthony Jr., and Ali were wards of the State from 2000 to 2009 and that the family was separated for too long. They alleged that DHHS and the DHHS employees failed to make reasonable efforts to preserve or reunify the family and that they had a duty to reunify the family sooner than when it finally occurred. The plaintiffs asked for declaratory judgment, general and special damages, costs, and attorney fees. They did not seek injunctive relief.

Richard Bollerup, the guardian ad litem for the minor children, moved to dismiss for failure to state a claim upon which relief could be granted. Subsequently, DHHS and the DHHS employees in their official capacities also moved to dismiss.

On September 1, 2011, the district court determined that DHHS and the DHHS employees sued in their official capacities were shielded by sovereign immunity from an action brought under 42 U.S.C. § 1983 and could not be liable to the plaintiffs for monetary damages. It thus sustained the motions to dismiss as to the plaintiffs' § 1983 claims against DHHS and the DHHS employees in their official capacities. It sustained Bollerup's motion to dismiss based on his right to absolute immunity as the guardian ad litem. Following this order, the only defendants remaining in the action were the DHHS employees in their individual capacities.

Of the 18 DHHS employees sued by the plaintiffs, 2 were not named in their individual capacities and 10 were not properly served in that capacity. Those 12 employees were not parties to the present action in their individual capacities. Between August and October 2011, the six employees who had been properly served (David Hammer, Todd Reckling, Chris Peterson, Sandy Thompson, Jennifer Holt, and Jessica Hatfield) filed motions to dismiss the plaintiffs' claims against them in their individual capacities. They argued that these claims should be dismissed, because the claims were barred by sovereign, qualified, absolute, and statutory immunities and by the statute of limitations. Hereinafter, we refer to the six DHHS employees who were parties to the present action in their individual capacities and who filed motions to dismiss as "the six employees."

On February 3, 2012, the district court sustained the motions to dismiss filed by the six employees. It determined that they had (1) sovereign immunity for all actions performed within the scope of their duties as DHHS employees; (2) absolute immunity for any testimony given by them as witnesses in the juvenile court hearings; (3) qualified immunity, because there was no clearly established right to

familial integrity; and (4) statutory immunity under the Adult Protective Services Act.

The district court also concluded that the claims against the six employees in their individual capacities were barred by the applicable statute of limitations. It explained that even if there was a continuing pattern of tortious conduct, as the plaintiffs had argued, recovery for each injury had to be sought within 4 years. Given that the plaintiffs' complaint was filed on March 8, 2011, their "period of recovery would be limited to the four years before that date." However, the plaintiffs' complaint contained "no allegations against [the six employees], in their individual capacities, after 2005." Therefore, the court held that the statute of limitations for the plaintiffs' claims against the six employees in their individual capacities ran "sometime in 2009."

On March 5, 2012, the plaintiffs appealed the district court's decisions. The Nebraska Court of Appeals issued an order to show cause why the district court's orders were final and appealable. The record before the Court of Appeals did not include dismissal orders for the DHHS employees who had not been properly served in their individual capacities. The plaintiffs failed to respond, and on June 8, 2012, in case No. A-12-194, the appeal was dismissed without opinion.

On July 20, 2012, at the request of the plaintiffs, the district court issued an order dismissing the DHHS employees who had not been properly served in their individual capacities. On August 15, the plaintiffs timely filed the present appeal. We moved the case to our docket on our own motion. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

## IV. ASSIGNMENTS OF ERROR

The plaintiffs assign, summarized and restated, that the district court erred in (1) sustaining the defendants' motions to dismiss; (2) finding that the defendants were shielded from liability on the basis of sovereign, absolute, qualified, and statutory immunities; (3) failing to find any exception to the defendants' immunity; (4) finding that the plaintiffs failed to plead that their constitutionally protected rights were

violated; (5) finding that their claims were barred by applicable statutes of limitations; and (6) holding that their claims were based in tort.

## V. ANALYSIS

### 1. Motion to Dismiss Filed by DHHS and DHHS Employees in Official Capacities

The district court sustained the motion to dismiss filed by DHHS and the DHHS employees in their official capacities, because it concluded that they were immune from the plaintiffs' § 1983 claims.

#### (a) DHHS

[3] A suit against a state agency is a suit against the State and is subject to sovereign immunity. *Michael E. v. State*, 286 Neb. 532, 839 N.W.2d 542 (2013). "A suit generally may not be maintained directly against . . . an agency or department of the State, unless the State has waived its sovereign immunity." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684, 102 S. Ct. 3304, 73 L. Ed. 2d 1057 (1982). In *Anthony K. I*, we determined that the State had not waived its sovereign immunity as to § 1983 claims. In the absence of such a waiver, the plaintiffs' claims against DHHS in the instant case, which were brought under § 1983, are also barred by sovereign immunity.

The plaintiffs argue that even though the State did not waive its sovereign immunity, DHHS was nonetheless subject to liability, because it was implementing an unconstitutional "'policy statement, ordinance, regulation or decision officially adopted'" and acting "'pursuant to governmental "custom."'" See brief for appellants at 15. We previously addressed this argument, and dismissed it, in *Anthony K. I*. The district court did not err in sustaining DHHS' motion to dismiss.

#### (b) DHHS Employees in Official Capacities

We first clarify that sovereign immunity has potential applicability to suits brought against state officials in their official

capacities only. It does not apply when state officials are sued in their individual capacities—that is, when a suit seeks to hold state officials personally liable. See *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). This is true even when state officials are sued in their individual capacities for acts taken within the scope of their duties and authority as state officials. See *id*.

[4,5] "Official-capacity suits . . . 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Thus, in reviewing actions against state officials, "a court must determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity." *Michael E.*, 286 Neb. at 540, 839 N.W.2d at 550-51.

[6,7] In an action for the recovery of money, the State is the real party in interest. *Id*. This is because "'a judgment against a public servant "in his official capacity" imposes liability on the entity that he represents.'" See *Graham*, 473 U.S. at 169. Accordingly, "sovereign immunity—if not waived—bars a claim for money even if the plaintiff has named individual state officials as nominal defendants." *Michael E.*, 286 Neb. at 541, 839 N.W.2d at 551.

[8-10] In contrast, "official-capacity actions for prospective relief are not treated as actions against the State." *Graham*, 473 U.S. at 167 n.14. See, also, *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011). Where a court "commands a state official to do nothing more than refrain from violating federal law, he [or she] is not the State for sovereign-immunity purposes." *Stewart*, 563 U.S. at 255. Thus, the State's sovereign immunity "does not bar a claim against state officers which seeks only prospective declaratory or injunctive relief for ongoing violations of federal law." See *Doe v. Board of Regents*, 280 Neb. 492, 510, 788 N.W.2d 264, 281 (2010). See, also, *Green v. Mansour*, 474 U.S. 64, 106 S. Ct. 423, 88 L. Ed. 2d 371 (1985); *Westside Mothers v. Haveman*, 289 F.3d 852 (6th Cir. 2002); *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275 (4th

Cir. 2001); *Walker v. Livingston*, 381 Fed. Appx. 477 (5th Cir. 2010).

In the instant case, the plaintiffs sued the DHHS employees in their official capacities for general and special damages, costs, and attorney fees and for a declaratory judgment that they had violated the plaintiffs' rights. The plaintiffs did not seek injunctive relief. As we determined in *Anthony K. I*, the State has not waived its sovereign immunity as to § 1983 claims. Therefore, the plaintiffs' claims against the DHHS employees in their official capacities which were brought pursuant to § 1983 and which sought monetary damages are barred by sovereign immunity. Additionally, the plaintiffs' claims against the employees in their official capacities for declaratory judgment are barred, because they did not allege a continuing violation of federal law. Nor is there a threat of future violations—Ashley, Anthony Jr., and Ali's juvenile case is closed, and the family no longer lives in Nebraska. In the absence of such allegations, the plaintiffs' claims for declaratory judgment do not fall within the limited exception for actions seeking prospective relief for ongoing violations of federal law.

All of the plaintiffs' claims against the DHHS employees in their official capacities are barred by sovereign immunity. The district court did not err in sustaining the motions to dismiss as to the DHHS employees in their official capacities.

### 2. Motion to Dismiss Filed by Guardian Ad Litem

The district court sustained the guardian ad litem's motion to dismiss, because it concluded that he was immune from the plaintiffs' § 1983 claims. We agree.

Most public officials are entitled only to qualified immunity. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). However, certain officials are given "absolute protection from damages liability" for their performance of specific functions. See *Buckley*, 509 U.S. at 269. Such absolute immunity originated in common law and was intended to "protect the integrity of the judicial process." See *Cleavinger v. Saxner*, 474 U.S. 193, 200, 106 S. Ct. 496, 88

L. Ed. 2d 507 (1985). See, also, *Briscoe v. LaHue*, 460 U.S. 325, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983).

In the instant case, the district court determined, based on *Billups v. Scott*, 253 Neb. 287, 571 N.W.2d 603 (1997), that absolute immunity should extend to Bollerup, the children's guardian ad litem. The plaintiffs argue that it should not.

[11] In *Billups, supra*, we considered whether guardians ad litem were entitled to absolute immunity. We explained that the scope of absolute immunity was determined by "official functions performed, and not the office held." See *id*. at 290, 571 N.W.2d at 605. And we noted that in order to determine whether to grant absolute immunity, a court must "examine the nature of the functions with which a particular official . . . has been lawfully entrusted." See *id*. After examining the role of guardians ad litem, we agreed with the conclusion of a Colorado court that guardians ad litem were "adjunct[s] of the court." *Id*. at 292, 571 N.W.2d at 606. Thus, we concluded that a guardian ad litem is entitled to absolute immunity from any suit for damages based upon conduct within the scope of his or her judicially imposed duties as guardian ad litem. See *Billups, supra*.

Other courts have similarly recognized that a guardian ad litem has absolute immunity for actions that he or she takes as part of the judicial process. See, e.g., *Dahl v. Charles F. Dahl, M.D., P.C.*, 744 F.3d 623 (10th Cir. 2014); *Jones v. Brennan*, 465 F.3d 304 (7th Cir. 2006); *Dornheim v. Sholes*, 430 F.3d 919 (8th Cir. 2005); *Fleming v. Asbill*, 42 F.3d 886 (4th Cir. 1994); *Cok v. Cosentino*, 876 F.2d 1 (1st Cir. 1989); *Gardner by Gardner v. Parson*, 874 F.2d 131 (3d Cir. 1989).

The plaintiffs argue the district court incorrectly relied on *Billups* to determine that Bollerup was entitled to absolute immunity, because the guardian ad litem in *Billups* was sued under a negligence theory and not in a § 1983 action. We do not find this difference significant. In *Billups*, we determined that absolute immunity attached to the functions performed by guardians ad litem within the scope of their duties as adjuncts of a court. Under that test, the applicability of absolute immunity to any particular action depended upon whether the action was performed within the scope of the guardian ad

litem's duties and not upon the theory under which he or she was sued. Indeed, in *Billups*, we discussed with approval a case in which absolute immunity was held to protect a guardian ad litem from § 1983 claims. See *Kurzawa v. Mueller*, 732 F.2d 1456 (6th Cir. 1984). The absolute immunity recognized in *Billups* was not limited to negligence actions against guardians ad litem.

The district court did not err in relying upon *Billups, supra*, or in concluding, based upon that case, that Bollerup was absolutely immune from the plaintiffs' complaint. Bollerup was entitled to absolute immunity against any suit for damages arising from conduct within the scope of his duties as guardian ad litem. See *id*. The plaintiffs' complaint did not allege any facts which would support a finding that Bollerup acted outside of the duties assigned to him by the juvenile court. In the absence of any such allegations, absolute immunity barred the plaintiffs' claims against Bollerup.

The plaintiffs argued that Bollerup was not entitled to absolute immunity because he failed to carry out his duties as guardian ad litem on behalf of the minor children. In the plaintiffs' complaint, they alleged that he failed to carry out his duties by failing to "consult with the children . . . throughout the life of the case." The district court concluded that this allegation did not defeat Bollerup's absolute immunity, and we agree.

In *Marr v. Maine Dept. of Human Services*, 215 F. Supp. 2d 261 (D. Me. 2002), the mother of a minor child who was killed while in the state's care sued the guardian ad litem who handled her child's juvenile case. She alleged that the negligence of the guardian ad litem led to the death of her child, because the guardian ad litem did not perform any investigations into how the child was being treated, did not report that the child was being abused, and saw the child only once during the pendency of the juvenile proceedings. In finding absolute immunity, the Maine court concluded that the factual allegations of failure to perform "merely state[d] [the plaintiff's] dissatisfaction with the manner in which [the guardian ad litem] carried out his appointed duties, rather than alleging instances in which [the guardian ad litem] performed outside the scope

of his authorized duties." *Id.* at 269. The court held that dissatisfaction with the performance of a guardian ad litem's delegated duties was not enough to "remove the protections" of his or her immunity as guardian ad litem. See *id.*

We conclude this reasoning is applicable to the case at bar. The plaintiffs' claim that Bollerup failed to perform his duties did not allege that he had acted outside the scope of his duties as guardian ad litem but merely expressed dissatisfaction with how he carried out those duties. Such an allegation was not enough to overcome the absolute immunity to which Bollerup was entitled in the performance of his judicially delegated duties. See *id.*

In the absence of allegations that Bollerup acted outside the scope of his duties as guardian ad litem, absolute immunity barred the plaintiffs' claims against him. The district court did not err in sustaining his motion to dismiss.

### 3. Motions to Dismiss Filed by Six Employees in Individual Capacities

The district court provided two reasons for dismissing the plaintiffs' claims against the six employees in their individual capacities: The claims were barred (1) due to various immunities of the six employees and (2) by the statute of limitations. In their motions to dismiss, the six employees pleaded multiple grounds for dismissal, including the statute of limitations.

[12] Although the plaintiffs assign error to both aspects of the district court's decision, we address only the statute of limitations, because it is dispositive of the plaintiffs' claims against the six employees in their individual capacities. 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).

[13] The six employees raised the statute of limitations within their motions to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). A challenge that a pleading is barred by the statute of limitations is a challenge that the pleading fails to

allege sufficient facts to constitute a claim upon which relief can be granted. *Carruth v. State*, 271 Neb. 433, 712 N.W.2d 575 (2006).

[14] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013). As such, if a "complaint on its face shows that the cause of action is time barred, the plaintiff must allege facts to avoid the bar of the statute of limitations." See *Lindner v. Kindig*, 285 Neb. 386, 393, 826 N.W.2d 868, 874 (2013). See, also, *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989).

[15] To determine whether the district court erred in granting the six employees' motions to dismiss on statute of limitations grounds, the first question is whether the face of the plaintiffs' complaint shows that the claims against the six employees were time barred. If it does, we then consider whether the plaintiffs' complaint alleged facts that show the claims are not barred. When reviewing a dismissal order, the appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *White v. Kohout*, 286 Neb. 700, 839 N.W.2d 252 (2013).

(a) Face of Complaint Shows Claims Were Time Barred

[16-18] The plaintiffs sued the six employees in their individual capacities under § 1983. The law of the state in which a § 1983 action is brought provides the appropriate statute of limitations. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994). "[F]or purposes of selecting one statute of limitations, § 1983 actions shall be characterized as personal injury actions." *Bauers*, 245 Neb. at 646, 514 N.W.2d at 634. In Nebraska, § 1983 claims are governed by the statute of limitations in Neb. Rev. Stat. § 25-207 (Reissue 2008). See *Bauers, supra*. Section 25-207 requires that actions for an

injury to the plaintiff's rights be filed within 4 years from the date on which the action accrued. *Bauers, supra*.

[19-21] "[A] statute of limitations begins to run as soon as the claim accrues." *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 425, 730 N.W.2d 376, 381 (2007). Although state law determines which statute of limitations applies to § 1983 claims, "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." See *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007) (emphasis in original). The U.S. Supreme Court has stated that a § 1983 claim generally accrues "'when the plaintiff has "a complete and present cause of action."'" See *Wallace*, 549 U.S. at 388.

[22,23] In order to state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege facts establishing conduct by a person acting under color of state law which deprived the plaintiff of rights, privileges, or immunities secured by the Constitution and laws of the United States. *State ex rel. Jacob v. Bohn*, 271 Neb. 424, 711 N.W.2d 884 (2006). Therefore, "[a] § 1983 claim accrues 'when the plaintiff knows or should know that his or her constitutional rights have been violated.'" *Hileman v. Maze*, 367 F.3d 694, 696 (7th Cir. 2004). See, also, *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379 (4th Cir. 2014); *Hillcrest Property, LLC v. Pasco County*, 754 F.3d 1279 (11th Cir. 2014); *Bishop v. Children's Center for Developmental*, 618 F.3d 533 (6th Cir. 2010); *Gorelik v. Costin*, 605 F.3d 118 (1st Cir. 2010); *Douglas v. Noelle*, 567 F.3d 1103 (9th Cir. 2009); *Kripp v. Luton*, 466 F.3d 1171 (10th Cir. 2006); *Price v. City of San Antonio, Tex.*, 431 F.3d 890 (5th Cir. 2005) (abrogated on other grounds as recognized by *Vidrine v. U.S.*, No. 6:07-1204, 2008 WL 4198547 (W.D. La. Aug. 8, 2008) (unpublished opinion)); *Sameric Corp. Del., Inc. v. City of Philadelphia*, 142 F.3d 582 (3d Cir. 1998); *Veal v. Geraci*, 23 F.3d 722 (2d Cir. 1994). "'[The] plaintiff is deemed to know or have reason to know at the time of the act itself and not at the point that the harmful consequences are felt.'" *Gorelik*, 605 F.3d at 122.

In the instant case, the plaintiffs did not allege specifically when or how each of the six employees acted in a manner that violated the plaintiffs' rights. But the sole basis for the plaintiffs' claims against each of the six employees was his or her involvement in Ashley, Anthony Jr., and Ali's juvenile case as a caseworker, case management supervisor, or administrator. Consequently, the plaintiffs' claims against each of the six employees in their individual capacities accrued at some time during his or her individual involvement with the juvenile case.

The complaint sets forth when each employee was a caseworker, case management supervisor, or administrator for Ashley, Anthony Jr., and Ali's case:

> 11. During the course of the case with [DHHS], the . . . family had the following case managers/case management supervisors:
>
> a. Jennifer Holt in 2000
>
> b. Kee-Sha Adams-Parks/David Hamme[r] in 2001
>
> c. Abby Bowers/Sandy Thompson/Tonya Beckenhauer in 2001
>
> . . . .
>
> f. Jessica Hatfield/Sandy Thompson in 2002
>
> g. Charlie Bennett/Sandy Thompson in 2002, 2003 and 2004
>
> . . . .
>
> 87. In July, 2005, [the plaintiffs] meet with [DHHS] administrators, Todd Reckling and Chris Peterson and other [DHHS] staff. The [plaintiffs] are told to "drop everything" and come to this meeting. The administrators apologize to [the plaintiffs] for the fact that their case had been going on so long. The administrators tell the [plaintiffs] that they have to act quickly to reunify the children because the Lancaster County Attorney will soon file a motion to terminate parental rights.

The plaintiffs did not allege that the six employees were involved with Ashley, Anthony Jr., and Ali's juvenile case or had contact with the plaintiffs at any other time.

A § 1983 claim generally accrues when a person knows or has reason to know that he or she has been injured. See

*Gorelik v. Costin*, 605 F.3d 118 (1st Cir. 2010). Generally, a person "'is deemed to know or have reason to know at the time of the act itself.'" See *id*. at 122. The plaintiffs did not claim a failure to discover the alleged injurious conduct by the six employees. And the plaintiffs did not allege that at the time each of the six employees engaged in conduct which allegedly violated the plaintiffs' rights, they did not know or have reason to know of their injuries. Accordingly, on the face of the plaintiffs' complaint, the plaintiffs' claim against Holt accrued no later than 2000, because the complaint did not allege that she engaged in conduct which injured the plaintiffs after 2000. Similarly, the plaintiffs' claim against Hammer accrued no later than 2001, because the plaintiffs did not allege that he acted in a manner that injured the plaintiffs after 2001. The plaintiffs' claim against Hatfield accrued no later than 2002, because it was not alleged that she engaged in conduct which injured the plaintiffs after 2002. The plaintiffs' claim against Thompson accrued no later than 2004, because the complaint contained no allegations of conduct by her which injured the plaintiffs after 2004. And the plaintiffs' claims against Reckling and Peterson accrued no later than 2005, because the plaintiffs did not allege that Reckling and Peterson engaged in conduct which injured the plaintiffs after 2005.

Under the applicable statute of limitations, the plaintiffs had 4 years from the date of accrual of each claim to bring an action or until 2004, 2005, 2006, 2008, and 2009, respectively. The plaintiffs did not file their complaint until March 2011. Therefore, the face of the plaintiffs' complaint shows that the claims against the six employees were time barred.

#### (b) Complaint Failed to Allege Facts Which Show Claims Are Not Barred

Because the plaintiffs' complaint on its face showed that their claims against the six employees were time barred, the plaintiffs had the burden of alleging "facts to avoid the bar of the statute of limitations." See *Lindner v. Kindig*, 285 Neb. 386, 393, 826 N.W.2d 868, 874 (2013). The plaintiffs did not do so.

The plaintiffs argue that the continuing tort doctrine applies to make their claims against the six employees timely. They assert that there was a "continuing pattern of tortious conduct" and that as a result, their claims "did not accrue until late 2009," when Ashley, Anthony Jr., and Ali's juvenile case was finally closed. See brief for appellants at 24. This argument lacks merit.

[24,25] The plaintiffs misunderstand the continuing tort doctrine. In Nebraska, the continuing tort doctrine does not delay when claims based on continuing torts accrue. See *Alston v. Hormel Foods Corp.*, 273 Neb. 422, 730 N.W.2d 376 (2007). "[T]he 'continuing tort doctrine' is not a separate doctrine, or an exception to the statute of limitations, as much as it is a straightforward application of the statute of limitations: It simply allows claims to the extent that they accrue within the limitations period." *Id.* at 429-30, 730 N.W.2d at 383. As such, "a claim for damages caused by a continuing tort can be maintained for injuries caused by conduct occurring within the statutory limitations period." See *id.* at 429, 730 N.W.2d at 383. A claim for damages caused by conduct occurring outside the statutory period preceding the lawsuit will be barred. See *id.*

Applying the continuing tort doctrine to the plaintiffs' complaint does not make their claims against the six employees timely. Rather, it highlights that their claims against the six employees were barred, because they were based on conduct that occurred more than 4 years before the action was commenced in March 2011. The 4-year statutory period preceding their lawsuit commenced in March 2007. As explained above, the complaint shows on its face that none of the six employees engaged in conduct which allegedly injured the plaintiffs after 2005. Therefore, the claims against the six employees were based on conduct occurring outside the limitations period preceding the instant lawsuit and are consequently time barred.

It may be reasonable to infer that the "ill effects" of the actions taken by the six employees were felt until 2009, when the juvenile case was finally closed. But the continuing tort doctrine "requires that a tortious act—not simply the

continuing ill effects of prior tortious acts—fall within the limitation[s] period." See *Alston*, 273 Neb. at 426, 730 N.W.2d at 381. In the absence of any allegations that the six employees engaged in tortious conduct during the limitations period preceding the plaintiffs' lawsuit, the continuing tort doctrine does not give the plaintiffs any relief.

The plaintiffs argue that until 2009, they were "subjected to a continuing, cumulative pattern of tortious conduct" by virtue of the "conduct on the part of the Defendants." See brief for appellants at 23. Even assuming, without deciding, that there may have been other DHHS employees that engaged in a pattern of tortious conduct within the 4-year limitations period preceding the plaintiffs' lawsuit, such conduct cannot be attributed to the six employees. The face of the plaintiffs' complaint does not show that any of the six employees worked on Ashley, Anthony Jr., and Ali's case during the limitations period.

The plaintiffs did not allege facts in their complaint which would avoid the bar of the statute of limitations. They did not allege a pattern of tortious behavior by the six employees that continued within the limitations period. And the plaintiffs did not allege facts which indicate that they did not or could not have discovered the alleged wrongs when they accrued.

#### (c) Conclusion as to Statute of Limitations

The face of the plaintiffs' complaint alleged facts which show that the claims against the six employees in their individual capacities were barred by the applicable statute of limitations. The plaintiffs' complaint did not allege facts which would avoid this bar. Therefore, the district court did not err in sustaining the motion to dismiss filed by the six employees in their individual capacities.

### 4. Plaintiffs' Remaining Assignments of Error

The district court correctly determined that DHHS and the DHHS employees in their official capacities had sovereign immunity. It correctly determined that the guardian ad litem

was entitled to absolute immunity for conduct within the scope of his role in the juvenile proceedings. It correctly dismissed the six employees in their individual capacities because the plaintiffs' claims against them were barred by the statute of limitations. The remaining 12 DHHS employees sued by the plaintiffs were not parties to this action. Therefore, there are no defendants remaining in the lawsuit that could be found liable to the plaintiffs. As such, we do not need to address the remaining assignments of error.

## VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court that dismissed the plaintiffs' complaint.

AFFIRMED.

CASSEL, J., not participating.

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# CITY OF BEATRICE, STATE OF NEBRASKA, APPELLEE, V. DANIEL A. MEINTS, APPELLANT.

856 N.W.2d 410

Filed December 5, 2014. Nos. S-12-1083 through S-12-1092.

1. **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. An appellate court reviews the trial court's findings of historical facts for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court independently reviews.
2. **Search and Seizure.** Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable.
3. **Constitutional Law: Search Warrants: Property.** Probable cause, standing alone, is not an exception to the search warrant requirement of the Fourth Amendment as applied to real property.
4. **Constitutional Law: Search and Seizure.** A "search" under the Fourth Amendment occurs if a legitimate expectation of privacy is infringed.
5. ____: ____. A reasonable expectation of privacy is one with a source outside the Fourth Amendment, by reference either to concepts of real or personal property law or to understandings that society recognizes and permits.
6. ____: ____. A "search" under the Fourth Amendment occurs if the government gains evidence by physically intruding on constitutionally protected areas.

7. ____: ____. No "search" occurs under either the reasonable expectation of privacy test or the physical intrusion test if the area examined is an "open field."
8. **Search and Seizure: Words and Phrases.** "Open fields" are those unenclosed areas beyond the curtilage of a home in which the defendant has no reasonable expectation of privacy.
9. **Search and Seizure.** A person cannot have a reasonable expectation of privacy in unenclosed rural land.
10. **Search and Seizure: Words and Phrases.** An unenclosed area within an incorporated community is an "open field" if it is not curtilage and the person complaining of the intrusion does not, under the facts of the case, have a reasonable expectation of privacy in the area.

Petitions for further review from the Court of Appeals, MOORE, PIRTLE, and BISHOP, Judges, on appeal thereto from the District Court for Gage County, DANIEL E. BRYAN, JR., Judge, on appeal thereto from the County Court for Gage County, STEVEN B. TIMM, Judge. Judgments of Court of Appeals affirmed.

Terry K. Barber, of Barber & Barber, P.C., L.L.O., for appellant.

Gregory A. Butcher, Beatrice City Attorney, for appellee.

Jon Bruning, Attorney General, and James D. Smith for amicus curiae State of Nebraska.

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

CONNOLLY, J.

## SUMMARY

Daniel A. Meints owns an uninhabited, unfenced lot in the City of Beatrice, Nebraska (City), on which he kept an array of automobiles and motorcycles. In a bench trial, the county court convicted Meints of multiple violations of a municipal ordinance relating to unregistered motor vehicles. On appeal, the district court reversed Meints' convictions on 2 of the 12 counts and otherwise affirmed. The Nebraska Court of Appeals affirmed the district court's judgment,[1] and

[1] *City of Beatrice v. Meints*, 21 Neb. App. 805, 844 N.W.2d 85 (2014).

we granted Meints' petitions for further review. These appeals present the following question: Does probable cause, standing alone, justify a warrantless search of an individual's real property? We conclude that Fourth Amendment jurisprudence does not recognize a probable cause exception applicable to real property. But we also conclude that the City did not conduct a "search," because the property invaded was an "open field." Because no warrant was required, we affirm.

## BACKGROUND

The City prohibits the prolonged parking of unregistered motor vehicles on private property. Section 16-623(a) of the City's code[2] provides:

> It shall be unlawful for any person in charge or control of any private property within the city . . . to allow any motor vehicle which has been unregistered for more than twenty-one (21) days to remain upon any private property. Any motor vehicle allowed to remain on private property in violation of this subsection shall constitute a nuisance and shall be abated.

Section 16-623(b) states that persons who violate the ordinance are guilty of a misdemeanor and subject to fines, ranging from $100 to $500 each day the ordinance is violated.

In March 2011, a City code enforcement officer observed what he believed to be unregistered motor vehicles on Meints' property. The officer saw numerous motor vehicles and motorcycles without license plates or vehicles that were inoperable. The officer did not enter Meints' property. Instead, he took photographs while standing in a public street, an alley, or a neighbor's property.

On that same day, Joe McCormick, a Beatrice police officer, was dispatched to the scene. McCormick initially observed the vehicles from a public street. He did not see any fencing or closed buildings on the property. McCormick testified that he had probable cause to believe Meints was violating § 16-623 and that he entered the property without a warrant

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[2] Beatrice Mun. Code, ch. 16, art. XVII, § 16-623(a) (2002).

to investigate. While on the property, McCormick took photographs and recorded vehicle identification numbers (VINs). He testified that he did not enter any structure, open any door, or "move anything."

McCormick returned to the property on May 23, 2011, and saw that the vehicles remained. Since McCormick's first visit, Meints had attached a "no trespassing" sign to a tree. Additionally, Meints was present and told McCormick to stay off the property. But McCormick did not heed the request and entered the property without a warrant to take additional photographs and record VINs. McCormick cited Meints for violating § 16-623 and returned numerous times to issue additional citations.

The City charged Meints in county court with 12 counts of violating § 16-623. The 12 counts related to seven motorcycles and five automobiles. Meints moved to suppress the evidence and observations resulting from McCormick's warrantless entry onto the property. The court denied the motion, reasoning that the property was not entitled to Fourth Amendment protection because it was an "open field."

The county court found Meints guilty of all charges. Meints appealed to the district court, which reversed his convictions on two counts because of insufficient evidence but otherwise affirmed.

Meints assigned to the Court of Appeals that the county court erred by overruling his motion to suppress. Meints argued that the open fields doctrine did not apply to urban property. The court affirmed on a different ground: the probable cause exception to the warrant requirement.

The Court of Appeals assumed that McCormick had searched Meints' real property and noted that a warrantless search is per se unreasonable under the Fourth Amendment. But the court stated that among "the warrantless search exceptions recognized by the Nebraska Supreme Court" is an exception for "searches undertaken with consent *or with probable cause*."[3]

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[3] *City of Beatrice v. Meints, supra* note 1, 21 Neb. App. at 812, 844 N.W.2d at 92 (emphasis supplied), citing *State v. Borst*, 281 Neb. 217, 795 N.W.2d 262 (2011).

Relying on this language, the court held that the observations McCormick made while on a public street gave him probable cause to believe the vehicles were evidence of a crime and allowed him to enter Meints' property without a warrant to gather evidence.

## ASSIGNMENT OF ERROR

Meints assigns that the Court of Appeals erred by relying on "a mistaken statement of the law — with regard to 'probable cause', alone, being a recognized exception to the warrant requirement of the Fourth Amendment to the United States Constitution."

## STANDARD OF REVIEW

[1] 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.[4] We review the trial court's findings of historical facts for clear error.[5] But whether those facts trigger or violate Fourth Amendment protections is a question of law that we independently review.[6]

## ANALYSIS

### Probable Cause Exception

Meints argues that probable cause—standing alone—is not an exception to the search warrant requirement. The City succinctly responds that "the jurisprudence of the State of Nebraska for over a decade has noted that probable cause is a distinct and separate exception to a warrantless search."[7] While both statements are correct, we have been less than precise in our language and must clarify the latter.

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[4] See *State v. Knutson*, 288 Neb. 823, 852 N.W.2d 307 (2014).

[5] *Id.*

[6] *Id.*

[7] Brief for appellee in response to petition for further review at 3.

We begin with the constitutional text. The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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 amendment's language naturally divides into two parts: (1) a prescription that searches and seizures be reasonable and (2) the conditions on which a warrant may issue.[8] The relationship between these two parts is not apparent from the text, which has "'both the virtue of brevity and the vice of ambiguity.'"[9] For example, whether a search is "unreasonable" without a warrant is a question to which a "literal reading of the language of the Fourth Amendment contributes little."[10]

[2] The U.S. Supreme Court has resolved some of this ambiguity. It is now well established that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable."[11] And the Court has consistently referred to a "warrant requirement" for more than four decades.[12] If law enforcement conducts a search

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[8] See, *Kentucky v. King*, 563 U.S. 452, 131 S. Ct. 1849, 179 L. Ed. 2d 865 (2011); 2 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 3.1(a) (5th ed. 2012).

[9] 2 LaFave, *supra* note 8, § 3.1(a) at 4, quoting Jacob W. Landynski, Search and Seizure and the Supreme Court 42-43 (1966).

[10] *Id*.

[11] *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). See, also, *Thompson v. Louisiana*, 469 U.S. 17, 105 S. Ct. 409, 83 L. Ed. 2d 246 (1984).

[12] E.g., *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014); *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

without a warrant, it is reasonable only if it falls within a band of exceptions the Court has described as "specific,"[13] "'well-delineated,'"[14] "carefully delineated,"[15] "specifically established,"[16] and "narrow."[17]

The City is correct that we have "noted" that probable cause justifies a warrantless search for more than a decade. We have often prefaced our analysis of warrantless searches with a list of exceptions that includes "searches undertaken with . . . probable cause."[18] But our application of this "exception" has been less than clear.

For example, we held in *State v. Voichahoske*[19] that a warrantless strip search during intake was reasonable because the officers had probable cause to believe the defendant possessed contraband. There, the defendant was a passenger in an automobile stopped by police. After a police dog indicated that narcotics were in the vehicle, the defendant was arrested and taken to a sheriff's office. There, police strip searched the defendant and found contraband in and on his person. The defendant moved to suppress evidence stemming from the strip search "because his continued detention, arrest, and search were illegal."[20] Stating that the "warrantless search

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[13] See *Riley v. California, supra* note 12, 134 S. Ct. at 2482.

[14] See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

[15] See *United States v. United States District Court*, 407 U.S. 297, 318, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972).

[16] See *Arizona v. Gant, supra* note 11, 556 U.S. at 338.

[17] See *Flippo v. West Virginia*, 528 U.S. 11, 13, 120 S. Ct. 7, 145 L. Ed. 2d 16 (1999). See, also, *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

[18] See *State v. Borst, supra* note 3, 281 Neb. at 221, 795 N.W.2d at 267. Accord, *State v. Gorup*, 279 Neb. 841, 782 N.W.2d 16 (2010); *State v. Gorup*, 275 Neb. 280, 745 N.W.2d 912 (2008); *State v. Eberly*, 271 Neb. 893, 716 N.W.2d 671 (2006); *State v. Voichahoske*, 271 Neb. 64, 709 N.W.2d 659 (2006); *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001). See, also, *J.P. v. Millard Public Schools*, 285 Neb. 890, 830 N.W.2d 453 (2013); *State v. Smith*, 279 Neb. 918, 782 N.W.2d 913 (2010).

[19] *State v. Voichahoske, supra* note 18.

[20] *Id.* at 70, 709 N.W.2d at 668.

exceptions" included "searches undertaken . . . with probable cause,"[21] we held that the strip search was reasonable because the police "had probable cause to believe that drugs would be found on [the defendant]."[22] But it is not clear whether we reasoned that probable cause justified a warrantless search, or that probable cause justified a warrantless arrest and the narcotics were found in a subsequent search incident to arrest, or that probable cause justified a warrantless arrest and security concerns justified a warrantless strip search during intake.[23]

We considered the relationship between probable cause and the need for a warrant again in *State v. Smith*.[24] There, an officer reached into the pocket of a person not under arrest and pulled out small bags containing narcotics. We stated that "searches justified by probable cause" are one of the "warrantless search exceptions recognized by this court."[25] We considered the exception's application, but concluded that the officer did not have probable cause to believe that the defendant had narcotics on his person.

So, we have been less than precise. And our statement that probable cause, standing alone, justifies a warrantless search is out of step with the overwhelming weight of authority.[26] In *Katz v. United States*,[27] the U.S. Supreme Court explained

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[21] *Id.* at 74, 709 N.W.2d at 670.

[22] *Id.* at 77, 709 N.W.2d at 671.

[23] See, 3 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 5.3(a) and (c) (5th ed. 2012). See, also, *Florence v. Board of Chosen Freeholders*, ___ U.S. ___, 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012).

[24] *State v. Smith, supra* note 18.

[25] *Id.* at 927, 782 N.W.2d at 923.

[26] See, *Groh v. Ramirez*, 540 U.S. 551, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004); *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961); *Jones v. United States*, 357 U.S. 493, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958); *Agnello v. United States*, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925).

[27] *Katz v. United States*, 389 U.S. 347, 356-57, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967), quoting *Agnello v. United States, supra* note 26.

that probable cause is not a panacea for invasions of privacy by law enforcement:

> In the absence of [judicial] safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause[.]"

Fourth Amendment jurisprudence has not strayed from this understanding. Put simply, "[a]n officer's correct belief in the existence of probable cause does not obviate the warrant requirement."[28]

If probable cause alone justified a warrantless search of real property, it would suffocate the Fourth Amendment. "A warrantless search cannot be justified by probable cause, because that is the very determination for which the constitution requires a warrant hearing."[29] By ensuring an objective determination of probable cause, rather than one "'by the officer engaged in the often competitive enterprise of ferreting out crime,'"[30] the warrant requirement ensures that intrusions on privacy are not made by "random or arbitrary acts of government agents."[31] Reviewing a search after it has occurred is a poor substitute for a prior judicial determination:

> [A]llowing an after-the-fact analysis of the facts and circumstances to determine whether there was probable cause supporting a warrantless search or seizure "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less

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[28] *U.S. v. Carpenter*, 360 F.3d 591, 598 (6th Cir. 2004) (Gilman, Circuit Judge, concurring).

[29] *Stackhouse v. State*, 298 Md. 203, 219, 468 A.2d 333, 342 (1983).

[30] *Riley v. California*, *supra* note 12, 134 S. Ct. at 2482, quoting *Johnson v. United States*, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 2d 436 (1948).

[31] *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 622, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

> reliable procedure of an after-the-event justification for the search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."[32]

And efficiency alone is not enough to disregard the warrant requirement.[33] Obviously, the investigation of crime would always be simpler if police did not need a warrant.[34]

[3] So, we hold that probable cause, standing alone, is not an exception to the search warrant requirement of the Fourth Amendment as applied to real property. Probable cause is, of course, relevant to the reasonableness of a search under the Fourth Amendment. For example, probable cause justifies a warrantless arrest[35] and probable cause—in conjunction with other circumstances—may justify a warrantless search under the "plain view" and "plain feel" doctrines.[36] Additionally, police do not need a warrant to search an automobile if there is probable cause to believe that it contains contraband.[37] Notably, we first listed "probable cause" as one of the "recognized exceptions to the Fourth Amendment's warrant requirement *as applied to automobiles*,"[38] and occasionally, courts simply refer to a "probable cause exception" in cases involving automobiles.[39] Here, though, the Court of Appeals applied a probable cause exception to real property.

The Court of Appeals assumed that a warrantless search of Meints' real property occurred but held that the search was reasonable under the probable cause exception to the warrant requirement. As explained, probable cause does not justify a warrantless search of real property. If the City

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[32] *U.S. v. Martinez*, 686 F. Supp. 2d 1161, 1180 (D.N.M. 2009), quoting *Katz v. United States, supra* note 27.

[33] *Mincey v. Arizona*, 437 U.S. 385, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978).

[34] *Id.*

[35] See, e.g., *State v. Matit*, 288 Neb. 163, 846 N.W.2d 232 (2014).

[36] See *State v. Smith, supra* note 18.

[37] See, e.g., *State v. Dalland*, 287 Neb. 231, 842 N.W.2d 92 (2014).

[38] See *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996) (emphasis supplied).

[39] E.g., *U.S. v. Snook*, 88 F.3d 605, 608 (8th Cir. 1996).

conducted a search, it does not pass constitutional muster unless the City can identify an applicable exception to the warrant requirement.

## Open Fields Doctrine

[4,5] But we need not consider the exceptions to the warrant requirement if there was no search. Under the test outlined in Justice Harlan's concurrence in *Katz v. United States*,[40] a "search" under the Fourth Amendment occurs if a legitimate expectation of privacy is infringed.[41] Two inquiries are involved. First, an individual must have exhibited an actual (subjective) expectation of privacy.[42] Second, the expectation must be one that society is prepared to recognize as reasonable.[43] A reasonable expectation of privacy is one with a source outside the Fourth Amendment, by reference either to concepts of real or personal property law or to understandings that society recognizes and permits.[44]

[6] Recently, however, the U.S. Supreme Court has said that Fourth Amendment rights "do not rise or fall with the *Katz* formulation."[45] A "search" also occurs if "the government gains evidence by physically intruding on constitutionally protected areas."[46] When government activity crosses this "simple baseline,"[47] it is unnecessary to ask whether the government infringed the defendant's legitimate expectation of privacy because "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[48] So, a "search" occurs if

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[40] See, *Katz v. United States, supra* note 27 (Harlan, J., concurring); *U.S. v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).

[41] See, e.g., *State v. Nelson*, 282 Neb. 767, 807 N.W.2d 769 (2011).

[42] *Id.*

[43] *Id.*

[44] See *State v. Knutson, supra* note 4.

[45] *U.S. v. Jones, supra* note 40, 132 S. Ct. at 950.

[46] *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 1417, 185 L. Ed. 2d 495 (2013).

[47] *Id.*, 133 S. Ct. at 1414.

[48] *U.S. v. Jones, supra* note 40, 132 S. Ct. at 952 (emphasis in original).

either (1) the defendant's legitimate expectation of privacy is infringed or (2) the government physically intrudes on a protected area.[49]

[7] But no "search" occurs under either the reasonable expectation of privacy test[50] or the physical intrusion test[51] if the area examined is an "open field." The U.S. Supreme Court first applied the "open fields doctrine"[52] in the 1924 case *Hester v. United States*.[53] There, the defendant tossed a container of "moonshine" whiskey while being chased by revenue agents across a field. Citing only the commentator Sir William Blackstone as authority, the Court announced "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields."[54]

After the reasonable expectation of privacy test flowered in the furrow left by *Katz*, some courts questioned whether the open fields doctrine was compatible with the new understanding of Fourth Amendment rights.[55] In *Oliver v. United States*,[56] the court answered in the affirmative. *Oliver* involved two different marijuana patches, one on a farm and another "in the woods."[57] In light of *Katz*, the Court explained that the open fields doctrine "may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area

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[49] See *id*.

[50] See *Oliver v. United States*, 466 U.S. 170, 104 S. Ct. 1735, 80 L. Ed. 2d 214 (1984). See, also, *State v. Havlat*, 222 Neb. 554, 385 N.W.2d 436 (1986).

[51] See *U.S. v. Jones, supra* note 40.

[52] See *State v. Havlat, supra* note 50, 222 Neb. at 558, 385 N.W.2d at 439.

[53] *Hester v. United States*, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 2d 898 (1924).

[54] *Id*., 265 U.S. at 59, citing 4 William Blackstone, Commentaries *223, *225-26.

[55] 1 Wayne R. LaFave, Search and Seizure, A Treatise on the Fourth Amendment § 2.4(a) (5th ed. 2012).

[56] *Oliver v. United States, supra* note 50.

[57] *Id*., 466 U.S. at 174.

immediately surrounding the home."[58] The Court reasoned that cropland and other rural areas are not conducive to reasonable privacy expectations:

> [O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or "No Trespassing" signs effectively bar the public from viewing open fields in rural areas.[59]

In response to the dissent's argument that private activity in rural areas was not uncommon, the majority replied that "[o]ne need only think only of the vast expanse of some western ranches or the undeveloped woods of the Northwest to see the unreality of the dissent's conception."[60] That the defendants attempted to conceal their criminal activities was irrelevant. The Court "reject[ed] the suggestion that steps taken to protect privacy"—such as the erection of fences or "'No Trespassing'" signs—"establish that expectations of privacy in an open field are legitimate."[61] Furthermore, that the officers physically trespassed on the land did not turn their information gathering into a "search."

[8] The open fields doctrine is best understood as a facet of the reasonable expectation of privacy test. That is, "open fields" are those unenclosed areas beyond the curtilage of a home in which the defendant has no reasonable expectation of privacy. *Oliver* stated that the doctrine is also "founded upon the explicit language of the Fourth Amendment,"[62] in

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[58] *Id.*, 466 U.S. at 178.

[59] *Id.*, 466 U.S. at 179.

[60] *Id.*, 466 U.S. at 179 n.10.

[61] *Id.*, 466 U.S. at 182.

[62] *Id.*, 466 U.S. at 176.

the sense that the text does not literally include "open fields." The four items listed in the Amendment are central to its understanding,[63] but the Fourth Amendment is not limited to literal "persons, houses, papers, and effects." The Court has extended Fourth Amendment protection to areas as diverse as bathroom stalls,[64] office buildings,[65] and, famously, a telephone booth.[66] Nor is the concern in *Oliver* for the difficulties of ad hoc factual determinations the basis of the open fields doctrine. Efficiency alone is not enough to dispense with Fourth Amendment protections.[67] Instead, as we have explained, the open fields doctrine, and its attendant concept of curtilage, are "merely applications" of the rule that a search occurs when a reasonable expectation of privacy is invaded.[68] Nor was the reasonable expectation of privacy test jettisoned by the U.S. Supreme Court's renewed focus on trespass. Information gathering in "'open fields'" remains "subject to *Katz*."[69]

The statement in *Oliver* that efforts to protect privacy in an open field cannot make a privacy expectation legitimate must be understood in the context of the land involved. In both *Hester* and *Oliver*, the Court was considering rural areas. The facts in *Hester* are sparse, but it appears that when the Court referred to the land as "open fields," it literally meant an open field. At the time, the phrase "open fields" was not yet a term of art. Similarly, *Oliver* involved farmland and a densely wooded area.[70] The references in *Oliver* to "the cultivation of crops,"[71] "the vast expanse of some western ranches," "the

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[63] See *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[64] See 1 LaFave, *supra* note 55, § 2.4(c).

[65] See *id.*, § 2.4(b).

[66] See *Katz v. United States, supra* note 27.

[67] See *Mincey v. Arizona, supra* note 33.

[68] *State v. Ramaekers*, 257 Neb. 391, 395, 597 N.W.2d 608, 612 (1999).

[69] *Florida v. Jardines, supra* note 46, 133 S. Ct. at 1414.

[70] See, *Oliver v. United States, supra* note 50. See, also, *United States v. Dunn*, 480 U.S. 294, 107 S. Ct. 1134, 94 L. Ed. 2d 326 (1987).

[71] *Oliver v. United States, supra* note 50, 466 U.S. at 179.

undeveloped woods of the Northwest,"[72] "secluded land,"[73] and "the many millions of acres that are 'open fields'"[74] show that the Court "envisioned particularly rural or undeveloped land."[75] Likewise, the cases in which we have applied the open fields doctrine involved marijuana patches in cornfields or other pastoral settings.[76]

[9] Read in its context, *Oliver* categorically determined that a person cannot have a reasonable expectation of privacy in the "many millions of acres" of unenclosed rural land. As we have recognized, barbed wire fences and "no trespassing" signs are not, as a practical matter, a barrier to country trespassers:

> "In the rural areas of this state it would be difficult to find a landowner who would believe that no person would enter on his open field without permission. Hunters, fishermen, and other technical trespassers are so commonly expected in the rural areas of this state that a failure to post trespassing signs is regarded by many persons as almost an implied permission to enter."[77]

Apart from the impracticality of efforts to keep intruders out, the relative vastness of farms, ranches, and acreages makes it difficult for their owners to know if intrusions are actually occurring.

The same reasoning does not apply when we consider not the "many millions of acres," but the precious fractions. Only an eccentric farmer would erect a privacy fence around a bean field, but such measures are common in urban and suburban areas. The relative smallness of urban and suburban lots makes efforts to protect privacy practical and sometimes effective.

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[72] *Id.*, 466 U.S. at 179 n.10.

[73] *Id.*, 466 U.S. at 182.

[74] *Id.*, 466 U.S. at 182 n.12.

[75] *O'Neal v. State*, 689 So. 2d 1135, 1136 (Fla. App. 1997).

[76] See, *State v. Cody*, 248 Neb. 683, 539 N.W.2d 18 (1995); *State v. Havlat, supra* note 50; *State v. Cemper*, 209 Neb. 376, 307 N.W.2d 820 (1981); *State v. Poulson*, 194 Neb. 601, 234 N.W.2d 214 (1975).

[77] *State v. Havlat, supra* note 50, 222 Neb. at 560, 385 N.W.2d at 440, quoting *State v. Cemper, supra* note 76.

Furthermore, the urban landowner is often only yards away from the perimeter of his land, not several sections, as is sometimes the case in rural areas.

[10] We conclude that an unenclosed area within an incorporated community is an "open field" if it is not curtilage and the person complaining of the intrusion does not, under the facts of the case, have a reasonable expectation of privacy in the area. We acknowledge that some courts have taken a less nuanced view of *Oliver*. Some courts have held, for example, that vacant residential lots,[78] the front yard of an urban duplex,[79] and the backyard of a suburban house[80] are "open fields," seemingly on the narrow ground that the area was neither curtilage nor an enclosed structure. Many of these courts have particularly relied on the following oft-cited footnote in *Oliver*: "It is clear . . . that the term 'open fields' may include any unoccupied or undeveloped area outside of the curtilage. An open field need be neither 'open' nor a 'field' as those terms are used in common speech."[81] We do not read this footnote as standing for the rule that *any* unenclosed area outside the curtilage of a home is categorically without Fourth Amendment protection. We note that the Court made this statement apparently in response to the argument that a "thickly wooded area" is not, literally, an "open field."[82] Furthermore, saying that the open fields doctrine *may* include any unoccupied land outside the curtilage of a house is not equivalent to saying that the doctrine *does* include any unoccupied land outside the curtilage. We are not eager to imply so sweeping a rule from a single noncommittal footnote.

Here, we are not concerned about curtilage because no residence was on the land. Our focus is whether Meints in fact had a reasonable expectation of privacy in his urban

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[78] See, *O'Neal v. State, supra* note 75; *State v. Stavricos*, 506 S.W.2d 51 (Mo. App. 1974).

[79] See *Reeves v. Churchich*, 484 F.3d 1244 (10th Cir. 2007).

[80] See *People v. Schmidt*, 168 Ill. App. 3d 873, 522 N.E.2d 1317, 119 Ill. Dec. 458 (1988).

[81] *Oliver v. United States, supra* note 50, 466 U.S. at 180 n.11.

[82] See *id*.

lot. Meints' property is along a public street in Beatrice that comes to a "dead end" after reaching his land. Both the code enforcement officer and McCormick testified that there is no house, "closed" building, or fence on the property. A considerable number of automobiles and motorcycles sit in the dirt, obscured partially only by vegetation. The lot is strewn with smaller bits of detritus, such as sawhorses, chairs, screen doors, bicycles, woodboards, lawnmowers, fenceposts, and a basketball hoop. There are two wooden structures referred to in the record as "lean-to[s]" that are more or less enclosed on three sides. One of these structures holds about 10 motorcycles, which are visible from outside the structure. The code enforcement officer testified that while he was standing in a public street, in an alley, or on the property of one of Meints' neighbors, he could see motor vehicles without license plates or in a state of disrepair. Similarly, McCormick testified that he could see motor vehicles with no license plates or in a state of disrepair from a public street, though he could not see the VINs until he walked onto the property. At least some of the vehicles are within the line of sight of neighboring houses. The code enforcement officer estimated that he received 15 to 20 complaints from Meints' neighbors about "the junk, other expletives, and the motor vehicles." The trial court found that McCormick did not open any car doors, and McCormick testified that he did not enter any structure, or "move anything" to view the VINs while he was on the property.

We conclude that Meints did not have a reasonable expectation of privacy in his unfenced and unoccupied urban lot. The lot and its contents were visible from a public road to all who wanted to see and even to some who did not want to see (e.g., Meints' neighbors). No physical barrier obstructed entry onto the lot. Meints could not reasonably expect that tacking a "no trespassing" sign to a tree would prevent others from viewing or walking on his land. That Meints happened to be present when McCormick made one of his intrusions does not change the character of the property or ameliorate Meints' failure to make any significant efforts to ensure that it was private. McCormick did not physically manipulate items on the lot and so did not physically intrude on Meints' "effects."

Simply observing the condition of the vehicles while on the lot was not a "search"[83] and recording the VINs was not a "seizure."[84]

Because Meints did not in fact have a reasonable expectation of privacy in his urban lot, the land was an open field. Therefore, McCormick did not need a warrant because his information gathering was not a "search" under the Fourth Amendment.

## CONCLUSION

There is no "probable cause exception" to the warrant requirement. The Court of Appeals erred by assuming that a search occurred and excusing the lack of a warrant because the officer who intruded on the land had probable cause. But, under the open fields doctrine, there was no "search." So, police did not need a warrant to gather information on the property, and we affirm on that ground.

AFFIRMED.

HEAVICAN, C.J., not participating.

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[83] See *United States v. Dunn, supra* note 70, 480 U.S. at 305.

[84] See *Arizona v. Hicks*, 480 U.S. 321, 324, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987). Accord *New York v. Class*, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986).

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STATE OF NEBRASKA, APPELLEE, V.
CARLOS R. HERRERA, APPELLANT.
856 N.W.2d 310

Filed December 5, 2014. No. S-13-659.

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. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **Trial: Expert Witnesses: Appeal and Error.** An appellate court reviews the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.

4. **Trial: Expert Witnesses.** Under the principles set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.
5. **Trial: Expert Witnesses: Intent.** 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.
6. ____: ____: ____. The intent of the test under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), was to relax the traditional barriers to expert testimony by permitting courts to receive expert testimony based on "good science" even before that science became generally accepted.
7. **Pretrial Procedure: Expert Witnesses.** A challenge to the admissibility of evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should take the form of a concise pretrial motion. It should identify, in terms of the *Daubert*/*Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case. In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.
8. **Trial: Expert Witnesses.** Before admitting expert opinion testimony, the trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert.
9. ____: ____. If an expert's opinion involves scientific or specialized knowledge, a trial court considering a motion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), must determine whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be properly applied to the facts in issue. Several nonexclusive factors are considered in making this determination: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.
10. ____: ____. In addition to determining the scientific reliability of proffered expert testimony, a trial court's gatekeeping function under the standard of *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), requires that it determine whether such opinion testimony can properly be applied to the facts at issue. This inquiry, sometimes referred to as "fit," assesses

whether the scientific evidence will assist the trier of fact to understand the evidence or to determine the fact in issue by providing a valid scientific connection to the pertinent inquiry as a precondition to admissibility.

11. ____: ____. Under the analysis in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), expert testimony lacks "fit" when a large analytical leap must be made between the facts and the opinion.
12. ____: ____. A court performing an inquiry under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), should not require absolute certainty, but 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.
13. **Rules of Evidence: Hearsay: Proof.** In order for statements to be admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), the party seeking to introduce the evidence must demonstrate (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.
14. **Rules of Evidence: Hearsay.** Statements admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008), need not be made to a physician.
15. **Rules of Evidence: Hearsay: Appeal and Error.** A statement gathered for dual medical and investigatory purposes can be admissible under Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008). The question is whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment. Whether a statement was taken and given in contemplation of medical diagnosis or treatment is a factual finding by the trial court, and an appellate court reviews that determination for clear error.
16. **Evidence: Appeal and Error.** Error can be based on a ruling that admits evidence only if the specific ground of objection is apparent either from a timely objection or from the context.
17. **Pretrial Procedure: Trial: Evidence: Appeal and Error.** Where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review.
18. **Trial: Waiver: Appeal and Error.** One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed.

David S. MacDonald, Deputy Scotts Bluff 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.

STEPHAN, J.

Carlos R. Herrera and Jennifer Herrera are the biological parents of A.H. and S.H., both minor children. In 2012, Carlos and Jennifer were separately charged in the district court for Scotts Bluff County with child abuse resulting in serious bodily injury to A.H. Following a consolidated jury trial, both were convicted of the lesser-included offense of child abuse. Carlos perfected this timely direct appeal.

## I. BACKGROUND

In an information filed on November 15, 2012, Carlos was charged with one count of intentional child abuse resulting in serious bodily injury, a Class II felony.[1] The alleged victim was A.H., and the alleged abuse occurred in Scotts Bluff County between January 2007 and October 12, 2011. A.H. was born on November 1, 2005. Similar charges were filed against Jennifer, and the two cases were subsequently consolidated for trial, at which Carlos and Jennifer were represented by separate counsel.

### 1. PRETRIAL MOTIONS

#### (a) *Daubert*/*Schafersman* Hearing

Prior to trial, Carlos filed a motion requesting a *Daubert*/*Schafersman*[2] hearing on the admissibility of expert testimony related to the medical diagnosis of "psychosocial dwarfism." Jennifer joined in this motion. At this hearing, the State presented two witnesses. Dr. Bruce Buehler, a geneticist and pediatrician, testified first. He explained that psychosocial dwarfism is also known as psychosocial short stature (PSS).

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[1] Neb. Rev. Stat. § 28-707(7) (Reissue 2008 & Cum. Supp. 2010).

[2] See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993); *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

Although various witnesses used the two terms interchangeably, the district court utilized the PSS nomenclature, and we do likewise.

Buehler testified that PSS occurs when the body stops making growth hormone in response to a stressful environment. He stated that PSS can be diagnosed by measuring the body's production of growth hormone before and after changing the individual's environment. If the production increases substantially after the change, the diagnosis is made. Buehler also testified that the diagnosis can be made empirically if only one variable, the individual's environment, is changed and growth then occurs.

Buehler testified that he first saw A.H. in approximately 2011. At the time, A.H. presented with short stature, failure to thrive, and developmental delays. Buehler did a myriad of tests on A.H. in order to discover why he was not growing. These included metabolic tests, chromosomal tests, and autism tests. According to Buehler, he tested for every possible known medical reason for A.H.'s lack of growth and found nothing. After A.H. was removed from his parents' home, his growth increased substantially, without medical intervention. That growth empirically proved to Buehler that A.H.'s condition was PSS. Buehler testified that while it is rare, the diagnosis of PSS has been peer reviewed and published and is considered a medical diagnosis recognized by insurance companies.

On cross-examination, Buehler readily admitted that he did not know anything about the environment A.H. was living in and did not know whether A.H. was being abused. He also admitted that he initially thought A.H. had a genetic condition, and he acknowledged that there are genetic conditions which are currently unknown and therefore undiagnosable. But he explained that for his purposes of diagnosis, it was enough that the removal from the environment caused A.H. to grow; he did not need to pinpoint the specific factor in the environment that caused lack of growth. On redirect, Buehler clarified that a change in the environment could not cure a genetic condition and that he was 100-percent certain A.H. suffered from PSS.

Dr. Suzanne Haney, a child abuse pediatrician, also testified for the State. She testified that PSS has been a medically recognized diagnosis since 1947 and has been subjected to peer review and publication. She stated that the condition is a rare condition but is generally recognized and accepted in the scientific community. It is diagnosed by ruling out all medical and genetic reasons for lack of growth, changing the environment, and seeing growth. Unlike Buehler, Haney had reviewed records of A.H.'s history and considered the allegations of abuse and neglect when making the diagnosis of PSS. She testified that indicators of PSS are a child of short stature, no medical cause for the lack of growth, and a history of "clear neglect, abuse." She testified that PSS could not be diagnosed without knowing the child's history and that the stress to the child must be severe.

On cross-examination, Haney admitted she had reviewed the case file and reports but otherwise had no knowledge of the environment A.H. had lived in. She also admitted that it is possible A.H. has a genetic condition that is currently unknown. She testified that the stress which causes PSS must be severe, but that the medical community does not know exactly why or how the stress causes the body to stop producing growth hormone. She also testified that it was highly unlikely that an undiagnosed genetic condition was the cause of A.H.'s lack of growth, because genetic conditions do not change based on environment.

Following the hearing, the district court issued a written order in which it identified the issue before it as "whether the diagnosis of . . . PSS . . . passes muster under a *Daubert*/*Schafersman* analysis and can go to the jury by way of witnesses Dr. Buehler, and Dr. Haney." The order noted that its gatekeeping function required the court to make a preliminary assessment whether the reasoning or methodology underlying the expert testimony was valid and whether that reasoning or methodology could properly be applied to the facts in issue.[3]

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[3] See *id.*

The district court found that Buehler and Haney were both qualified experts as medical doctors and pediatricians. Buehler was additionally qualified in the areas of genetics, metabolism, endocrinology, and development. The court also found that the "'technique'" they used to conclude that A.H. suffered from PSS was a medical diagnosis, the process of determining the existence of a condition or disease that requires treatment. The technique here included obtaining a history, ruling out all other causes for the lack of growth, and monitoring A.H.'s response to his change in environment. The court also found that PSS is a generally accepted, medically recognized diagnosis in the medical community and has been for several decades. It also found that PSS has been the subject of peer review and publication and that there are standards in the medical community which must exist before a diagnosis can be made. Based on these factors, the district court determined that the reasoning and methodology used by Buehler and Haney were sound.

The district court further determined that the diagnosis of PSS was relevant to the facts at issue in the case, because it was the State's theory that PSS constituted the "serious bodily injury" charged in the information. The court specifically found that the diagnosis of PSS "can properly be applied to those facts in the course of a trial in this case."

(b) Prior Acts

Also prior to trial, the State filed a notice of its intent to present evidence of other crimes, wrongs, or acts pursuant to Neb. Evid. R. 404, Neb. Rev. Stat. § 27-404 (Cum. Supp. 2014). Carlos objected to the admission of this evidence, and an evidentiary hearing was held. The specific prior conduct at issue was that Carlos caused A.H. to suffer broken bones in 2005. The district court concluded that evidence of A.H.'s 2005 injuries was admissible against Carlos, because there was clear and convincing evidence that Carlos caused the injuries, the evidence was relevant to show stress and neglect related to PSS, and the evidence was relevant to show intent and absence of mistake or accident.

## 2. Trial

### (a) General Evidence of Abuse

Dr. William Arthur Waswick, a trauma surgeon practicing in Wichita, Kansas, testified that in December 2005, he treated A.H. in Wichita for a fractured left femur. At the time, A.H. was 7 weeks old. Waswick testified that the injury to the femur was acute, having occurred within the preceding 24 hours. He also found evidence at the time of an old elbow fracture and old rib fractures. Waswick regarded all of the fractures as consistent with nonaccidental trauma. Carlos did not make a § 27-404 objection to Waswick's testimony.

A.H.'s sister, S.H., testified at trial as a witness for the State. At the time, she was 8 years old and had completed the second grade. She stated that Carlos and Jennifer did not take care of A.H. She explained that A.H. ate at a different table than the rest of the family and that he slept in the basement in a dog kennel. She testified that Carlos and Jennifer did not feed A.H. and that they spanked him. According to S.H., Jennifer hit A.H. with a black belt and a pink "flip flop" and Carlos hit A.H. with a black belt and a brown shoe. S.H. testified that Jennifer hit A.H. in the head with the flip-flop, leaving a pink and red mark on his forehead.

Two teachers and a former paraeducator testified that when A.H. attended preschool in 2010 and 2011, they observed various cuts, bumps, and marks on his body. Two nurses who examined A.H. at an emergency room on separate occasions in October 2011 testified that they observed atypical injuries to A.H. that were suspicious for abuse; one testified that the injuries were bruises that resembled footprints or shoe marks.

A forensic scientist employed by the Nebraska State Patrol testified that he did a footwear analysis on a pair of pink flip-flops removed from the home shared by Carlos, Jennifer, A.H., and S.H., and found that the pattern on the bottom of the footwear was consistent with a pattern found on A.H.'s face and back in photographs taken in October 2011. The scientist also analyzed a sample of the carpet located on the stairs of the Herrera home in October 2011 and found the carpet could

not have caused the patterns found on A.H.'s face and back. In addition, photographs of A.H. taken by police on October 12, 2011, depict a bruise on his forehead containing what resembles a shoeprint, bruises on his body, and a rash covering most of his body.

(b) Expert Testimony Regarding PSS

Both Buehler and Haney testified about PSS at trial over renewed *Daubert*/*Schafersman* objections, which were overruled. Buehler's testimony was largely consistent with his testimony from the *Daubert*/*Schafersman* hearing. He did not opine about the specific environmental stress which caused A.H. to have PSS, but he did testify that other situations in which he had diagnosed PSS involved children being removed from war zones in Vietnam and Cambodia and noted that they had been subjected to "continuous trauma." He explained that after ruling out other causes for A.H.'s lack of growth, he asked social workers to investigate A.H.'s home environment, because environment can cause the body to stop producing growth hormone. He further testified that in the course of his examination of A.H., he had seen bruises that caused him some concern about A.H.'s environment. Buehler also testified that A.H.'s increase in growth after being removed from his home environment was "[a]mazingly significant." He clarified on cross-examination that he had never viewed A.H.'s home environment and had no information at all about it. He also stated that he did not know all of the causes of PSS, only the "end point."

Haney's trial testimony was also similar to her testimony at the *Daubert*/*Schafersman* hearing. She added at trial that normal growth for a child is 2 inches a year and that in the 7 months after he was removed from his home, A.H. grew almost 6 inches. She did not opine about any specific cause of A.H.'s PSS, but did explain that the condition is generally caused by "chronic ongoing stress" or "chronic trauma." Haney also explained that PSS is the result of "environmental abuse." She generally implied, particularly during her cross-examination, that A.H.'s PSS was caused by abuse in

his home environment, but also admitted that the "severe trauma" necessary to cause PSS could be something other than abuse. Haney explained that the long-term effects of PSS were increased risk for heart disease, lung cancer, autoimmune disease, and obesity. Buehler, on the other hand, testified that the long-term effect of PSS on A.H. would be a decrease in his adult height.

### 3. Capstone Interviews

Carlos and Jennifer called Vicki Moreno as a witness. Moreno is a special investigator for the Scotts Bluff County Attorney's office. She testified that she conducted a forensic interview of A.H. on October 13, 2011, and of S.H. on October 10, 2011. Moreno also testified that she had interviewed both A.H. and S.H. on May 5, 2009, and again on June 4, 2009. The interviews were apparently conducted at the CAPstone Child Advocacy Center in Scottsbluff, Nebraska, and are referred to by the parties as the "Capstone interviews."

Moreno explained that in 2009, she was asked to interview the children after A.H. had been seen in an emergency room with a cut on his head. Her objective was to determine whether he had been abused. At the time of the 2009 interviews, S.H. was 4 years old and A.H. was 3 years old. S.H. told Moreno that A.H. cut his head when she pushed him into a toybox. Moreno asked S.H. in 2009 whether anybody at her house got a spanking, and S.H. said no. Moreno also said to S.H., "'I was talking to another little girl and she was telling me she gets spankings do you ever get spankings.'" S.H. answered no. Moreno testified that during the 2009 interview, she received no information from S.H. that led her to believe A.H. was being abused. She further testified that during that interview, S.H. repeatedly talked about A.H.'s being in or sleeping in his bed. Moreno testified that during her 2011 interview of A.H., he told her he had fallen down the stairs and had not gotten a spanking.

Moreno testified that there is a proper way to ask children questions during a forensic interview. She admitted that some of the questions she asked A.H. and S.H. were "suggestive," but maintained they were properly designed to elicit relevant

information. She specifically testified that it was not possible that she "planted ideas in their mind."

Defense counsel called Dr. Robert Barden, a psychologist and an attorney, as an expert witness. He testified about how memories can be contaminated, especially when interviewing children. Specifically, Barden testified that the interviewer must not put facts into the questions that are asked, because there is a danger that children will incorporate those facts into their memories and later believe them to be true. Barden reviewed the Capstone interviews of A.H. and S.H. and testified that there were "many, many mistakes" made by the interviewers. In particular, he noted that S.H.'s reports of what occurred changed dramatically during the course of the interviews. He opined that one reason for this could be that S.H. felt safer as time progressed, but that another reason could be that she had developed false memories because of improper interview techniques.

Barden was asked about the May 2009 interview of S.H. and testified that her responses changed as the questions changed. He noted that early in the interview, the questions were proper, such as "'What happened?'", but that later in the interview, the questions were improper, such as "[D]oes anybody at your house get a spanking?" He specifically testified that S.H.'s testimony about A.H.'s sleeping in the dog kennel in the basement was an example of one of the "tremendous transformations" in her memory report from 2009 to 2011.

Barden testified that certain questions asked of S.H. in 2009 were particularly inappropriate, including the reference to "'another little girl'" being spanked, asking S.H. whether she had bitten A.H., and asking S.H. to "[t]ell me where daddy hits you." He explained that these were improper because they inserted facts that S.H. did not otherwise volunteer. Barden noted that in S.H.'s 2011 interview, she said that she shared her room with A.H., which differed significantly from her trial testimony. He further noted that in a subsequent interview in 2011, S.H. again said that A.H. slept in her room, and then was told by the interviewer that S.H.'s sister (who was 2 years old at the time) had said that A.H. slept in the basement.

Barden opined that this was improper because it implanted memories in S.H.

Barden further testified that even the questions asked of S.H. during trial contained improper facts, and Barden expressed concern that few of the interviewers of S.H. knew much about basic memory issues.

#### 4. Other Defense Witnesses

Two of Carlos' sisters and his father all testified that they had spent significant time with Carlos, Jennifer, and A.H., and had no concerns about child abuse. In addition, both Carlos and Jennifer testified and denied the allegations of abuse. Jennifer explained that due to his developmental disabilities, A.H. often fell and always hit the same spot on his head. She stated that in October 2011, A.H. fell down the stairs, and she denied hitting him with a shoe. Carlos also testified that A.H. fell down the stairs in October 2011, and Carlos denied ever spanking, hitting, or pushing A.H.

#### 5. Verdict and Judgment

After hearing the evidence, the jury found both Carlos and Jennifer guilty of the lesser-included offense of child abuse. Jennifer was sentenced to 12 to 24 months' imprisonment, and Carlos was sentenced to 48 to 60 months' imprisonment. Carlos filed this timely appeal, which we moved to our docket pursuant to our authority to regulate the caseloads of the appellate courts of this state.[4] Jennifer filed a separate appeal, which was argued and submitted on the same day as this appeal but not consolidated for disposition.

## II. ASSIGNMENTS OF ERROR

Carlos assigns, renumbered and partially restated, that the district court erred in (1) receiving evidence of the PSS diagnosis over his *Daubert*/*Schafersman* objection, (2) not receiving the recorded Capstone interviews of A.H. and S.H. in evidence "to show the change in the testimony of the children over the course of the case," and (3) receiving evidence relating to the injuries sustained by A.H. in 2005.

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

## III. STANDARD OF REVIEW

[1-3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[5] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[6] We review the record de novo to determine whether a trial court has abdicated its gatekeeping function when admitting expert testimony.[7]

## IV. ANALYSIS

### 1. Expert Testimony of PSS Diagnosis

The offense of child abuse carries different classifications and penalties, depending upon whether it was committed negligently, as opposed to knowingly and intentionally, and the extent of any resulting injury.[8] Carlos was charged with knowing and intentional child abuse resulting in serious bodily injury, which is a Class II felony.[9] In order to meet its burden of proving serious bodily injury, the State sought to use the expert testimony of Buehler and Haney to show that A.H. suffered from PSS as a result of the abuse. In Carlos' first assignment of error, he contends the district court erred in receiving that expert testimony over his objection.

[4-6] The Nebraska Evidence Rules provide: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[10] In *Schafersman v. Agland*

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[5] *State v. Valverde*, 286 Neb. 280, 835 N.W.2d 732 (2013); *State v. Freemont*, 284 Neb. 179, 817 N.W.2d 277 (2012).

[6] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010); *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

[7] *Id.*

[8] § 28-707.

[9] § 28-707(7).

[10] Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 2008).

*Coop*,[11] we adopted the standards which the U.S. Supreme Court set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[12] to determine whether expert testimony is admissible under § 27-702. Under the principles set forth in *Daubert/Schafersman*, the trial court acts as a gatekeeper to ensure the evidentiary relevance and reliability of an expert's opinion.[13] The purpose of this 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."[14] The intent of the *Daubert/Schafersman* test was to relax the traditional barriers to expert testimony by permitting courts to receive expert testimony based on "good science" even before that science became generally accepted.[15]

[7] A challenge to the admissibility of evidence under *Daubert/Schafersman* should take the form of a concise pretrial motion.[16] It should identify, in terms of the *Daubert/Schafersman* factors, what is believed to be lacking with respect to the validity and reliability of the evidence and any challenge to the relevance of the evidence to the issues of the case.[17] In order to preserve judicial economy and resources, the motion should include or incorporate all other bases for challenging the admissibility, including any challenge to the qualifications of the expert.[18]

Carlos filed a pretrial motion requesting a *Daubert/Schafersman* hearing on the admissibility of evidence about PSS. In the motion, he questioned whether "the theory of [PSS]" had been tested, had been subjected to peer review and

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[11] *Schafersman, supra* note 2.

[12] *Daubert, supra* note 2.

[13] *Casillas, supra* note 6; *Zimmerman v. Powell*, 268 Neb. 422, 684 N.W.2d 1 (2004).

[14] *Casillas, supra* note 6, 279 Neb. at 834, 782 N.W.2d at 896.

[15] *Casillas, supra* note 6. See *Daubert, supra* note 2.

[16] *Casillas, supra* note 6.

[17] *Id.*

[18] *Id.*

publication, had been analyzed for potential rate of error, had standards, or had attained general acceptance in the relevant scientific community. Defense counsel informed the court prior to the hearing that his intention was to challenge the "validity of a diagnosis of [PSS]."

(a) Professional Qualifications of Expert Witnesses

[8] Before admitting expert opinion testimony, the trial court must determine whether the expert's knowledge, skill, experience, training, and education qualify the witness as an expert.[19] After reviewing the professional qualifications of Buehler and Haney, the district court determined that as medical doctors who see patients regularly and teach and write in their fields, they were qualified to testify as experts. The court noted that each possessed special skill and knowledge, "particularly with children," and that "[f]ormations of judgments by them can have probative value due to this knowledge and skill, which is superior to persons in general." The court concluded that there was "no question that they can properly testify as experts in the practice of medicine regarding children."

The record fully supports this finding. The fact that neither Buehler nor Haney claimed to have any special expertise in the study of PSS does not mean that they are not qualified, as physicians, to diagnose the condition, provided that they do so in accordance with scientifically valid methodology and principles.

(b) Scientific Validity of PSS Diagnosis

[9] If an expert's opinion involves scientific or specialized knowledge, as the opinions of Buehler and Haney clearly did, a trial court must determine whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology can be properly applied to the facts in issue.[20] Several nonexclusive factors are considered

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[19] *Id.*

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

in making this determination: (1) whether a theory or technique can be (and has been) tested; (2) whether it has been subjected to peer review and publication; (3) whether, in respect to a particular technique, there is a high known or potential rate of error; (4) whether there are standards controlling the technique's operation; and (5) whether the theory or technique enjoys general acceptance within a relevant scientific community.[21]

On appeal, we understand Carlos to make two arguments regarding the scientific validity of the opinions expressed by Buehler and Haney with respect to PSS. First, he argues that the diagnosis itself is lacking in scientific validity and is, essentially, "junk science." Second, he challenges the validity of the methodology which Buehler and Haney utilized in diagnosing A.H. with this condition.

Both Buehler and Haney testified that the diagnosis of PSS has been subjected to peer review and publication and is generally accepted in the medical community as a scientifically valid diagnosis. Each produced current medical literature describing the condition. The condition is described in one medical publication as "a disorder of short stature or growth failure and/or delayed puberty of infancy, childhood, and adolescence that is observed in association with emotional deprivation, a pathologic psychosocial environment, or both." Both physicians testified that the condition is listed in a publication of diagnoses for which insurance companies will provide compensation. Both described standards by which the condition is diagnosed.

Based upon our review of the record, we agree with the district court that PSS is a "generally accepted, medically recognized diagnosis" which is based upon good science.

(c) Diagnostic Methodology

The methodology employed by Buehler and Haney in formulating their opinions that A.H. suffered from PSS is one of

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[21] *Casillas, supra* note 6; *Daly, supra* note 20.

differential diagnosis. As we noted in *Carlson v. Okerstrom*,[22] differential diagnosis is a generally accepted technique in the medical community which has been peer reviewed and "'does not frequently lead to incorrect results.'" But under the *Daubert/Schafersman* standard, the question is "whether the expert conducted a *reliable* differential diagnosis."[23] In *Carlson*, we explained that a reliable differential diagnosis involves first compiling a comprehensive list of hypotheses that might explain the condition at issue and then eliminating or ruling out potential hypotheses in a reasoned manner. In the second step of the process, the question is whether the expert had a "reasonable basis for concluding that one of the plausible causative agents was the most likely culprit for the patient's symptoms."[24]

Here, Buehler testified that when seeing a patient who is of abnormally short stature, he does an "extensive workup" consisting of multiple tests to determine whether there is a treatable medical condition which would explain the impaired growth. When he first saw A.H. and observed his abnormally short stature and other distinctive physical characteristics, Buehler suspected a metabolic disease or genetic condition was impairing A.H.'s growth. He ordered a series of approximately 500 metabolic and genetic tests to determine a cause for the lack of growth, but all of these tests were negative. Buehler testified that by this process, he eliminated all metabolic and genetic causes of impaired growth for which it was possible to test.

When Buehler saw A.H. again approximately 3 months after A.H. had been removed from his parents' home, A.H. had started to grow, despite the fact that Buehler had not prescribed any sort of medication or growth hormone

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[22] *Carlson v. Okerstrom*, 267 Neb. 397, 413, 675 N.W.2d 89, 105 (2004), quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994).

[23] *Carlson, supra* note 22, 267 Neb. at 414, 675 N.W.2d at 105.

[24] *Id.* at 414, 675 N.W.2d at 106. See, also, *Epp v. Lauby*, 271 Neb. 640, 715 N.W.2d 501 (2006).

therapy for him. Buehler explained his diagnosis of PSS as follows: "Empirically I had ruled out any of the short stature syndrome[s] I could have tested for, his environment changed and he grew; therefore, empirically, . . . he had restarted his growth hormone and that's the definition of [PSS]." Buehler testified that he reached his diagnosis of PSS with reasonable medical certainty.

Haney formulated her opinions in a similar manner, based upon her review of medical records, photographs, and other documentation pertaining to A.H. She testified that the extensive testing reflected in the medical records ruled out any underlying medical or genetic condition which could be responsible for A.H.'s abnormal growth rate while he resided with his parents, leading her to believe that some other factor must be the cause. Haney reviewed records of unexplained fractures sustained by A.H. in 2005, reports from school officials that he was excessively hungry, and photographs of A.H., which all caused her to suspect physical abuse. She testified that A.H. had a "significant growth spurt much more than would be expected of a child of that age that started shortly after he was placed in foster care and continued." Based upon all of this information, Haney opined with reasonable medical certainty that A.H. suffered from PSS.

We conclude that both experts applied scientifically valid methodology in arriving at the diagnosis of PSS.

(d) Relevance

[10,11] In addition to determining the scientific reliability of proffered expert testimony, a trial court's gatekeeping function under the *Daubert/Schafersman* standard requires that it determine whether such opinion testimony can properly be applied to the facts at issue.[25] This inquiry, sometimes referred to as "fit," assesses whether the scientific evidence will assist the trier of fact to understand the evidence or to determine the fact in issue by providing a "'valid scientific connection to the pertinent inquiry as a precondition to

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[25] *Daly, supra* note 20; *Schafersman, supra* note 2.

admissibility.'"[26] Under the *Daubert/Schafersman* analysis, expert testimony lacks "fit" when a large analytical leap must be made between the facts and the opinion.[27] For example, in *McNeel v. Union Pacific RR. Co.*,[28] we assumed without deciding that a railroad worker's diagnosis of toxic encephalopathy was the product of scientifically reliable methodology, but held that it could not have assisted the trier of fact in a case under the Federal Employers' Liability Act, because there was no evidence that the worker was exposed to a toxic agent as a result of some act or omission on the part of his employer.

Here, the district court determined that the expert testimony was relevant to the issue of whether the alleged child abuse resulted in "serious bodily injury," which was an element of the charged offense. Carlos argues that this was error because neither Buehler nor Haney had personal knowledge of any actual abuse suffered by A.H. while he lived with his parents. We find no merit in this argument. Both Buehler and Haney testified at trial that the diagnosis of PSS attributes a child's lack of growth to chronic stress in the child's environment, which disrupts the production of growth hormone. Other witnesses provided direct and circumstantial evidence from which a finder of fact could reasonably infer that A.H. was subjected to chronic environmental stress in the form of parental abuse. Unlike *McNeel*, this record reflects that A.H. was actually subjected to the factors which trigger the diagnosis reached by the expert witnesses. Thus, there was a "fit" between the facts at issue and the challenged expert testimony. The expert testimony was relevant, and its probative value was not substantially outweighed by the danger of unfair prejudice. The district court did not err in overruling objections to its admissibility.

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[26] *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 153, 753 N.W.2d 321, 330 (2008), quoting *Daubert, supra* note 2.

[27] *Id.*; *Bowers v. Norfolk Southern Corp.*, 537 F. Supp. 2d 1343 (M.D. Ga. 2007).

[28] *McNeel, supra* note 26.

(e) Resolution

[12] A court performing a *Daubert/Schafersman* inquiry should not require absolute certainty, but 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.[29] Based upon our de novo review of the record, we conclude that the district court did not abdicate its role as gatekeeper with respect to the expert testimony of Buehler and Haney. Both were qualified experts who provided rational explanation and empirical support for their opinions that A.H. suffered from PSS, a rare but generally accepted and recognized diagnosis in the medical community. The opinions of these experts were relevant to the issue of whether A.H. sustained a serious bodily injury, which was an element the State was required to prove in order to obtain a conviction on the charged offense. The probative value of the experts' opinions was not substantially outweighed by the danger of unfair prejudice. The district court did not err in permitting the experts to testify at trial over *Daubert/Schafersman* objections.

2. Capstone Interviews

During Moreno's testimony, defense counsel offered DVD recordings of the Capstone interviews. The district court sustained the State's hearsay objections to the video recordings. Carlos argues that the recordings were offered to demonstrate improper interviewing technique on the part of Moreno, the investigator employed by the Scotts Bluff County Attorney's office who conducted most of the interviews, and changes in the responses of the children over a period of time. As such, he argues that they were not hearsay as defined by Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2008), because they were not offered to prove the truth of the matters asserted. Alternatively, he argues that the recorded interviews were statements which, at least in part, were made for the purposes of medical diagnosis or treatment and therefore fall

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[29] *Daly, supra* note 20; *King v. Burlington Northern Santa Fe Ry. Co.*, 277 Neb. 203, 762 N.W.2d 24 (2009).

within the exclusion to the hearsay rule stated in Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2008).

The offer of this evidence was made during the examination of Moreno, who was called as a witness by Carlos and questioned closely by his counsel regarding the manner in which she conducted the interviews. Moreno stated she attempted to follow "all of the proper protocols" for interviewing the children. During a recess, Carlos' counsel advised the court that he intended to use the recorded interviews as extrinsic evidence of prior inconsistent statements of S.H., who had previously testified as a witness for the State. He also advised the court that the interviews needed to be in evidence so that Barden, the defense expert who had not yet testified, could analyze the propriety of the interviewing techniques. Although no formal offer had been made, the court advised counsel that he viewed the provisions of Neb. Evid. R. 613, Neb. Rev. Stat. § 27-613 (Reissue 2008), dealing with extrinsic evidence of prior inconsistent statements by a witness as controlling the admissibility of the Capstone interviews. The court advised counsel that it would permit him to utilize excerpts from the interviews dealing with questions asked of S.H., but would not permit the entire interviews to come into evidence. The court instructed counsel to mark the excerpts he intended to use as an exhibit and submit it for the court's review, and counsel agreed to do so. Moreno was then temporarily excused while defense counsel called another witness.

When Moreno's direct examination resumed, Carlos' counsel was permitted over the State's objection to utilize interview transcripts, identified as exhibits 108 and 109, to examine her about specific questions directed to S.H. and her responses. Although counsel stated that he intended to offer the transcripts into evidence, the court observed that he could attempt to do so but that there was insufficient foundation at that point. No formal offer was made before the trial recessed for the day. Exhibits 108 and 109 are not included in our bill of exceptions.

Before the trial resumed the following day, both defense counsel advised the court that Carlos' counsel would conclude his examination of Moreno and that Jennifer's counsel

would offer the entire recorded interviews to be played for the jury during his examination of Moreno. Jennifer's counsel subsequently examined Moreno about specific questions she asked the children and whether they were "highly suggestive." Moreno responded that in some instances her questions may have been suggestive but not improperly so. Jennifer's counsel then offered exhibits 111 through 113. The State objected on grounds of relevance, foundation, and hearsay. Carlos' counsel did not specifically join in the offer, but stated that he had no objection to the exhibits and argued for their admissibility. Although the record is not entirely clear in this respect, we will treat the offer of these exhibits as having been jointly made by counsel for Carlos and Jennifer.

The court sustained the hearsay objection to each exhibit. It stated that portions of the interview of S.H. may be admissible as extrinsic evidence of prior inconsistent statements, but noted that the recordings had not been submitted to him for pretrial review and concluded: "I'm not going to admit the entire tape and let the jury see the whole thing and try to figure out what it is you are talking about."

We find no abuse of discretion in this ruling. The recorded interviews contained hearsay. Specific questions or answers may have been admissible for purposes other than establishing the truth of the matters asserted, such as impeaching S.H. with prior inconsistent statements or attacking the credibility of Moreno by demonstrating improper interviewing techniques. But at the time these exhibits were offered, the jury would have had no way of determining whether Moreno's techniques were improper or not. And we agree with the district court that it was the responsibility of defense counsel to identify specific portions of the recorded interviews which were being offered for purposes other than the truth of the matter asserted. Counsel did not do so at trial or on appeal.

Moreover, Carlos was not prejudiced by the district court's ruling on the recorded interviews because of what transpired after the ruling. Barden, the defense expert, testified that he reviewed all of the interviews. He expressed his opinion that improper interviewing techniques were used, and quoting from

the interviews, he gave specific examples of what he considered unduly suggestive questioning and highlighted changes in the accounts given by the children in response to repeated questioning. In this way, Carlos placed the issue of improper interviewing techniques before the jury in a focused and intelligible manner which could not have been achieved by simply having the jury view the recorded interviews. And we note that Carlos did not reoffer all or any portions of exhibits 111, 112, or 113 during or after Barden's testimony.

[13] Nor are we persuaded by Carlos' alternative argument that the entire interviews were admissible under § 27-803(3). That rule provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations . . . as reasonably pertinent to diagnosis or treatment."[30] Section 27-803(3) is based on the notion that a person seeking medical attention will give a truthful account of the history and current status of his or her condition in order to ensure proper treatment.[31] In order for statements to be admissible under § 27-803(3), the party seeking to introduce the evidence must demonstrate (1) that the circumstances under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.[32]

[14,15] Statements admissible under § 27-803(3) need not be made to a physician.[33] A child's statements to a therapist describing sexual abuse have been found admissible under this rule.[34] So too have statements by a child's foster mother to a therapist describing unusual sexual behavior by the child.[35]

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[30] § 27-803(3).

[31] *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012).

[32] *Id.*

[33] *Id.*

[34] *In re Interest of B.R. et al.*, 270 Neb. 685, 708 N.W.2d 586 (2005).

[35] *Id.*

The statement need not be solely for the purpose of medical diagnosis or treatment; a statement gathered for dual medical and investigatory purposes can be admissible under § 27-803(3).[36] The question is whether the statement, despite its dual purpose, was made in legitimate and reasonable contemplation of medical diagnosis or treatment.[37] Whether a statement was taken and given in contemplation of medical diagnosis or treatment is a factual finding by the trial court, and we review that determination for clear error.[38]

In *State v. Vigil*,[39] a 12-year-old girl told her mother that her stepfather had been sexually abusing her for 2 years. The mother took the child to an advocacy center at a local hospital. The child was interviewed there by an interviewer whose purpose was to gather information to determine a medical or psychological diagnosis and a recommended treatment plan. We held that the details of the interview fell within § 27-803(3) even though it was for the dual purpose of investigation and medical diagnosis, because it was clear that it was legitimately used for medical treatment.

Here, the record contains very little information about how and when the interviews were conducted. Most important, there is no basis in the record to support a finding that the interviews were conducted even in part for the purpose of medical diagnosis. The district court did not abuse its discretion in ruling that the interviews were not admissible under § 27-803(3).

### 3. Evidence of Prior Acts

Carlos argues that the district court erred in receiving Waswick's testimony regarding nonaccidental injuries sustained by A.H. in 2005. He contends that this evidence was inadmissible under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2008), and § 27-404(2) of the Nebraska Evidence Rules. Although Carlos objected to this evidence at the pretrial

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[36] *Vigil, supra* note 31.

[37] *Id.*

[38] *Id.*

[39] *Id.*

hearing, he did not renew his § 27-404 objection to Waswick's testimony at trial.

[16,17] Error can be based on a ruling that admits evidence only if the specific ground of objection is apparent either from a timely objection or from the context.[40] We have interpreted this rule to mean that where there has been a pretrial ruling regarding the admissibility of evidence, a party must make a timely and specific objection to the evidence when it is offered at trial in order to preserve any error for appellate review.[41] Thus, when a motion in limine to exclude evidence is overruled, the movant must object when the particular evidence which was sought to be excluded by the motion is offered during trial to preserve error for appeal.[42] Similarly, the failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.[43]

[18] The same principles apply to pretrial rulings on the admissibility of prior acts evidence. The defendant in *State v. Trotter*[44] was convicted of child abuse resulting in serious bodily injury. On appeal, he argued that the trial court erred in refusing to suppress before trial, and admitting at trial, evidence regarding his prior abuse of the victim under §§ 27-403 and 27-404. But he did not object to the evidence at trial, and we held that his failure to do so resulted in a waiver of any claimed error. We reach the same conclusion here. As we said in *State v. Pointer*,[45] "[w]ithout an objection by defendant at trial, the trial court has no obligation to interject itself into the proceedings to make rulings not requested." And as we concluded in *Trotter*, "One may not waive an error, gamble on

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[40] Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 2008); *State v. Huston*, 285 Neb. 11, 824 N.W.2d 724 (2013).

[41] See, *Huston, supra* note 40; *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008); *State v. Pointer*, 224 Neb. 892, 402 N.W.2d 268 (1987).

[42] *Id.*

[43] *In re Interest of Ashley W.*, 284 Neb. 424, 821 N.W.2d 706 (2012).

[44] *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

[45] *Pointer, supra* note 41, 224 Neb. at 894, 402 N.W.2d at 270.

a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error."[46] This assignment of error is without merit.

## V. CONCLUSION

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

AFFIRMED.

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[46] *Trotter, supra* note 44, 262 Neb. at 467, 632 N.W.2d at 344.

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STATE OF NEBRASKA, APPELLEE, V.
ANTONIO BANKS, APPELLANT.
856 N.W.2d 305

Filed December 5, 2014. No. S-13-740.

1. **Jurisdiction: Appeal and Error.** An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law.
2. **Effectiveness of Counsel: Appeal and Error.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Postconviction: Final Orders: Appeal and Error.** An order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim, and under Neb. Rev. Stat. § 25-1912 (Reissue 2008), a notice of appeal must be filed with regard to such a claim within 30 days.
5. **Jurisdiction: Time: Appeal and Error.** Failure to timely appeal from a final order prevents an appellate court's exercise of jurisdiction over the claim disposed of in the order.
6. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the state or federal Constitution.

7. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Affirmed.

Antonio Banks, pro se.

Jon Bruning, Attorney General, and James D. Smith for appellee.

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

WRIGHT, J.

## NATURE OF CASE

Antonio Banks appeals the order of the district court which overruled his amended motion for postconviction relief without an evidentiary hearing. We affirm.

## SCOPE OF REVIEW

[1] An appellate court determines jurisdictional questions that do not involve a factual dispute as a matter of law. *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (2013).

[2] A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact. *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014). When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. *Id*. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. *Robinson, supra*.

## FACTS

In 2007, Banks was convicted of first degree murder and use of a firearm to commit a felony in connection with the

2005 shooting death of Robert Herndon. Banks was sentenced to consecutive sentences of life imprisonment for first degree murder and 20 to 30 years' imprisonment for use of a firearm to commit a felony. On direct appeal, we affirmed his convictions and sentences. See *State v. Banks*, 278 Neb. 342, 771 N.W.2d 75 (2009). The facts underlying Banks' convictions are set forth in detail in our opinion resolving his direct appeal. See *id*. He was represented by attorneys from the Lancaster County public defender's office both at trial and on direct appeal.

In 2011, Banks filed a pro se motion for postconviction relief. He alleged that his trial counsel was ineffective for failing to (1) conduct a "reasonable pretrial investigation," (2) obtain leave of court to hire an investigator, (3) "call important witnesses who would have helped the defense support the theory of self-defense," (4) "pursue an affirmative defense of self-defense and request a jury instruction on self-defense," and (5) make a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), claiming that the prosecution excluded qualified jurors on the basis of race. He also made general allegations of prejudice due to counsel's alleged ineffectiveness. The State moved to deny an evidentiary hearing and overrule Banks' motion for postconviction relief.

On March 23, 2012, the district court overruled in part and in part sustained the State's motion. The court concluded that Banks' first ineffective assistance of counsel claim regarding the alleged failure to conduct a reasonable pretrial investigation was "inadequately pled," because Banks did not "identify the witness or other exculpatory evidence that would have been discovered had his trial counsel performed the pretrial investigation [Banks] alleges was omitted." The court determined that Banks should have an opportunity to amend his motion to address the deficiency. It thus overruled the State's motion as to this claim and granted Banks leave to amend for the sole purpose of "specify[ing] the exculpatory witness or evidence that ought to have been discovered."

The district court concluded that Banks was not entitled to relief under any of the remaining ineffective assistance of

counsel claims. As to those claims, it sustained the State's motion to deny an evidentiary hearing and overruled Banks' motion. Banks did not timely appeal from the court's March 23, 2012, order.

Banks filed an amended pro se motion for postconviction relief. He alleged that his trial counsel was ineffective for failing to interview and investigate individuals named "John Ravlinson" and "Charles Bowling." Banks claimed that the testimony of Ravlinson and Bowling would have proved that Banks acted in self-defense and would have "contradicted the entire theory of the State's presumption of premeditated murder." As such, Banks argued that if his counsel had interviewed these witnesses and called them to testify at trial, several things would have been different: (1) "[A] self-defense instruction would have been submitted to the jury and Counsel would have been permitted to argue self-defense," (2) there "would have been a reasonable probability that the jury might have acquitted Banks," and (3) he "may have received a shorted [sic] prison term." In response to Banks' amended motion, the State renewed its motion to deny an evidentiary hearing.

On August 5, 2013, the district court sustained the State's motion to deny an evidentiary hearing and overruled Banks' amended motion for postconviction relief. The court concluded that Banks had "failed to state more than the mere conclusion that these witnesses would have supported a theory of self-defense." It explained that Banks failed to show how Ravlinson or Bowling could have provided any testimony in support of a theory of self-defense, because Bowling "was not present at the time of the murder" and Banks failed to explain "who . . . Ravlinson [was] or how he [was] related to the case." The court also noted that Bowling testified at Banks' trial and that Banks did not "specify what additional investigation or questioning he believes should have been conducted by his counsel with reference to . . . Bowling." Thus, the court concluded that the "records and files in this case clearly show[ed] that [Banks was] entitled to no relief," and it overruled Banks' amended motion for postconviction relief.

Banks timely appeals from the district court's August 5, 2013, order.

## ASSIGNMENTS OF ERROR

Banks assigns, consolidated and restated, that the district court erred by (1) disregarding his arguments concerning a *Batson* violation and (2) failing to grant him an evidentiary hearing.

## ANALYSIS

### JURISDICTION

[3] 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. *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014). The State argues that the district court's March 23, 2012, order dismissing four of Banks' five ineffective assistance of counsel claims was a final order; that Banks did not file a timely appeal from that order; and that as a consequence, we lack jurisdiction to consider any of the claims denied in that order. We agree.

[4,5] The district court's March 23, 2012, order was a final order as to all of Banks' claims except for the claim relating to the reasonableness of trial counsel's pretrial investigation, because it denied an evidentiary hearing on those claims. An order denying an evidentiary hearing on a postconviction claim is a final judgment as to that claim, and under Neb. Rev. Stat. § 25-1912 (Reissue 2008), a notice of appeal must be filed with regard to such a claim within 30 days. *State v. Robinson*, 287 Neb. 606, 843 N.W.2d 672 (2014). Failure to timely appeal from a final order prevents our exercise of jurisdiction over the claim disposed of in the order. *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009).

Banks did not file a notice of appeal within 30 days of the March 23, 2012, order. The only notice of appeal filed by Banks was the one relating to the court's August 5, 2013, order, which was filed well outside the 30 days that he had to appeal from the March 23, 2012, order. Therefore, we lack jurisdiction to consider any assignments of error related to the claims that were denied without a hearing in the March 23, 2012, order,

including the claim that trial counsel was ineffective for failing to raise a *Batson* challenge.

### Ineffective Assistance of Counsel in Pretrial Investigation

The remaining assignment of error is whether the district court erred by denying an evidentiary hearing on Banks' ineffective assistance of counsel claim relating to the pretrial investigation. The court denied this claim in its August 5, 2013, order, from which Banks timely appealed.

[6,7] A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the state or federal Constitution. *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013). If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing. *Id*.

Banks was not entitled to an evidentiary hearing on his ineffective assistance of counsel claim relating to the pretrial investigation, because he alleged only conclusions of fact or law. He alleged that his trial counsel was ineffective for failing to interview and investigate individuals named "John Ravlinson" and "Charles Bowling." He claimed that if his counsel had interviewed these witnesses, they could have provided testimony at trial that would have supported a defense that Banks acted in self-defense. We note that at trial, "self-defense was not Banks' theory of the case," and that he did not testify. See *State v. Banks*, 278 Neb. 342, 366, 771 N.W.2d 75, 94 (2009).

Banks did not provide factual allegations to support his claim that Ravlinson and Bowling had information on whether Banks acted in self-defense. He did not allege what information Ravlinson and Bowling would have provided or what the substance of their testimony would have been. Banks failed to explain how Ravlinson's and Bowling's testimony would have been relevant to self-defense when there was no evidence or allegation that either was present when Herndon was shot.

Banks made only conclusory allegations that they could have "shed light on what actually took place."

The conclusory nature of Banks' allegations is illustrated by *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009). In that case, the defendant, Clifford J. Davlin, alleged that his trial counsel was ineffective for failing to offer the testimony of two specific witnesses named "Guilliatt" and "Davis." He claimed those witnesses could have provided "'important exculpatory and alibi evidence.'" See *id*. at 983, 766 N.W.2d at 380. We concluded that Davlin's motion was conclusory and did not warrant an evidentiary hearing:

> There is nothing in Davlin's motion (or indeed in the record) that would suggest the nature of the exculpatory evidence to which Guilliatt and Davis would testify. Nor is there any indication what alibi either might provide Davlin. Rather than providing any detail, Davlin alleges only conclusions of fact and law. Such are insufficient to support the granting of an evidentiary hearing.

*Id*. at 984, 766 N.W.2d at 380.

Davlin was not entitled to an evidentiary hearing even though he suggested that certain witnesses, if called to testify, would have established his alibi. We found such allegations to be conclusory, because Davlin did not allege specifically what the witnesses would have said or how that evidence would have established his alibi.

Similarly, Banks' allegation that Ravlinson and Bowling would have provided support for a theory of self-defense was conclusory and did not warrant an evidentiary hearing. The district court did not err in denying Banks' amended motion without an evidentiary hearing.

## CONCLUSION

For the foregoing reasons, we affirm the district court's order which denied Banks' amended motion for postconviction relief without an evidentiary hearing.

AFFIRMED.

HEAVICAN, C.J., not participating.

# LINDA N., ON BEHALF OF A MINOR CHILD, REBECCA N., APPELLEE AND CROSS-APPELLANT, V. WILLIAM N., APPELLANT AND CROSS-APPELLEE.

856 N.W.2d 436

Filed December 5, 2014. No. S-14-152.

1. **Judgments: Injunction: Appeal and Error.** A protection order is analogous to an injunction. Accordingly, the grant or denial of a protection order is reviewed de novo on the record.
2. **Evidence: Appeal and Error.** Where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judgments: Pleadings: Affidavits.** In order to obtain a domestic abuse protection order, the petitioner must file a petition and supporting affidavit in the district court.
4. **Legislature: Courts.** The Legislature is deemed to be aware of existing Nebraska Supreme Court precedent when it enacts legislation.
5. **Legislature: Intent.** The legislative intent of the language in Neb. Rev. Stat. § 42-903 (Cum. Supp. 2014) is to allow a victim of abuse, law enforcement, and prosecutors to take steps toward preventing a threatened act of domestic abuse from actually becoming an act that leads to physical harm of the victim.
6. **Trial: Evidence: Words and Phrases.** The "credible threat" language in Neb. Rev. Stat. § 42-903 (Cum. Supp. 2014) means that the evidence at trial must include some threat of intentional physical injury or any other physical threat.
7. **Judgments.** Where there is no threat of harm to the petitioner, a domestic abuse protection order is not appropriate.
8. **Judgments: Pleadings: Courts.** A county court or district court has the statutory authority to issue a harassment protection order, where the petition was instead for a domestic abuse protection order.
9. **Actions: Parties: Appeal and Error.** An appellate court reviews a case on the theories pursued by the parties, not on a theory that the parties might have raised.
10. **Pleadings: Appeal and Error.** An appellate court is obliged to dispose of a case on the basis of the theory presented by the pleadings on which the case was tried.
11. **Appeal and Error.** A party cannot complain of error which the party has invited the court to commit.
12. ____. An appellate court will not consider an issue on appeal that the trial court has not decided.
13. ____. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

14. **Actions: Judgments.** If a judge deems appropriate, at a hearing on a domestic abuse or harassment protection order, a judge should explain the requirements for both domestic abuse and harassment protection orders and allow the petitioner to choose which theory to pursue.
15. **Judgments: Pleadings: Affidavits.** At a hearing on a domestic abuse or harassment protection order, where a petitioner decides to pursue the alternative theory to the petition and affidavit filed, the court should allow a continuance where requested and leave an ex parte protection order temporarily in place.
16. **Due Process: Words and Phrases.** While the concept of due process defies precise definition, it embodies and requires fundamental fairness.
17. **Constitutional Law: Due Process.** Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is 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.

Appeal from the District Court for Valley County: KARIN L. NOAKES, Judge. Reversed and remanded with directions.

Chris A. Johnson and Joshua A. Johnson, of Conway, Pauley & Johnson, P.C., for appellant.

Michael S. Borders, of Borders Law Office, and Brandon B. Hanson, of Hanson Law Offices, for appellee.

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

MCCORMACK, J.

## NATURE OF CASE

In early 2014, Linda N., on behalf of her minor child, filed a petition for a domestic abuse protection order against the minor child's father, William N. An ex parte domestic abuse protection order was issued by the district court, and William requested a show cause hearing on the ex parte order. The evidence against William included many text messages including vulgar language and name-calling. Upon hearing, the district court upheld its domestic abuse protection order. William appeals, stating that the district court erred in considering his

conduct "abuse" under Neb. Rev. Stat. § 42-903 (Cum. Supp. 2014). Linda maintains that William's conduct should be considered abuse. She also cross-appeals, arguing that the district court should have issued a harassment protection order instead of a domestic abuse protection order.

## BACKGROUND

A petition and affidavit to obtain a domestic abuse protection order was filed against William in the district court on January 2, 2014, by Linda on behalf of her minor child. The stated rationale for such protection order was verbal abuse of the child by William in what Linda felt to be a "threat to [the minor child]." Further, Linda states that the way William spoke to the child was "very disgusting [and] disturbing." Further, "It upsets [the minor child] and is causing her a lot of stress." Following the petition and affidavit, an ex parte domestic abuse protection order was filed on January 2. William then requested a hearing on the order.

At a show cause hearing on January 21, 2014, the minor child, who was 16 years old, testified against William, and William also testified. An exhibit was received into evidence of the text messages that had been sent between the minor child and William. The text messages showed that William repeatedly texted the minor child, stating that Linda was a "drunk" or "piece of loser shit," that the minor child's boyfriend was a "fag" and "pussy," and that William was going to file charges against Linda and the minor child's boyfriend. William called the minor child "an asshole" and told her she could "kiss [his] ass." William texted the minor child: "Im ur dad u will one day regret all of ur sick rude twisted desgusting [sic] ignorant shit. I never ever harmed u or hurt u. I love u and miss u so much u ass." Many more texts were exchanged between the minor child and William in which William continued the name-calling and vulgar language. William threatened to take Linda and the minor child to court.

At the hearing, the minor child testified that the texts from William scared and intimidated her. She further testified that she felt threatened by the texts. William testified

that the arguments between the minor child and himself were provoked by the actions of the minor child's boyfriend, with whom William had argued. William testified that he did not keep track of all of the texts between the child and himself but asserts that she had sent provoking texts to him as well, including that "[he is] not her dad anymore, [he does not] belong in her life anymore, that [he is] nothing to her anymore." William stated that he was very upset about the breakdown of his relationship with his daughter and that though his messages were not justified, he felt misunderstood.

Following the show cause hearing, the district court issued an order affirming the domestic abuse protection order. William appeals the domestic abuse protection order. Linda defends the entry of the domestic abuse protection order, but also cross-appeals, arguing that the district court erred in failing to grant a harassment protection order.

## ASSIGNMENTS OF ERROR

William contends that the district court erred in affirming a domestic abuse protection order preventing him from contacting or interacting with his daughter, because his actions did not constitute "abuse" under § 42-903(1).

On cross-appeal, Linda contends that the district court erred in issuing a domestic abuse protection order instead of a harassment protection order at the show cause hearing.

## STANDARD OF REVIEW

[1] A protection order is analogous to an injunction.[1] Accordingly, the grant or denial of a protection order is reviewed de novo on the record.[2]

[2] Where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

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[1] *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

[2] *Id.*

[3] *Torres v. Morales*, 287 Neb. 587, 843 N.W.2d 805 (2014).

## ANALYSIS

### Domestic Abuse Protection Order

The issue presented by William is whether, under § 42-903(1)(b), a domestic abuse protection order was properly sustained when the child received mean and crude texts from William, but had no threats made to her physical well-being. Phrased another way, the issue is whether verbal abuse via text message is enough to constitute "abuse" meriting a domestic abuse protection order.

[3] Nebraska's Protection from Domestic Abuse Act allows a victim of domestic abuse to obtain a protection order against a member of his or her household upon a showing of abuse before the district court.[4] In order to obtain such an order, the petitioner must file a petition and supporting affidavit in the district court.[5]

Abuse is defined under this act as

> the occurrence of one or more of the following acts between household members:
>
> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) *Placing, by means of credible threat, another person in fear of bodily injury. . .* ; or
>
> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.[6]

Under the statute, "household members" include children.[7] The statute goes on to define "credible threat" as

> a verbal or written threat, including a threat performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct that is made by a person with the apparent ability to carry out the threat so as to

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[4] Neb. Rev. Stat. § 42-924 (Cum. Supp. 2014).

[5] *Id*.

[6] § 42-903(1) (emphasis supplied).

[7] § 42-903(3).

> cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the person making the threat had the intent to actually carry out the threat.[8]

In 2012, this statute was amended. The definition of abuse under § 42-903(1)(b) was changed from "[p]lacing, *by physical menace*, another person in fear of imminent bodily injury"[9] to "[p]lacing, *by means of credible threat*, another person in fear of bodily injury."[10]

In *Cloeter v. Cloeter*,[11] the Nebraska Court of Appeals interpreted the prior version of § 42-903(1)(b) to include only a narrow definition of abuse. There, an ex-wife sought a domestic violence protection order against her ex-husband. The ex-wife submitted evidence that, over a series of weeks, she had received text messages from her ex-husband containing single letters that could potentially form the word "behead."[12] The ex-wife was frightened by this and took it as a threat.[13] In the same month, the ex-wife found a "2 by 4" board on her driveway that she understood as a threat from the ex-husband, because 2 years previously, the two corresponded about how a 2 by 4 could be used as a weapon.[14] The Court of Appeals determined that these alleged threats were not enough to constitute a "physical menace," nor were the alleged threats "imminent" enough to constitute abuse under § 42-903(1)(b).[15]

[4] Soon after the *Cloeter* decision, the Nebraska Legislature then amended § 42-903(1). The Legislature is deemed to be aware of existing Nebraska Supreme Court precedent when

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[8] § 42-903(1)(b).

[9] § 42-903(1)(b) (Reissue 2008) (emphasis supplied).

[10] § 42-903(1)(b) (Cum. Supp. 2014) (emphasis supplied).

[11] *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009).

[12] *Id.*

[13] *Id.*

[14] *Id.* at 744, 770 N.W.2d at 664.

[15] *Cloeter v. Cloeter, supra* note 11.

it enacts legislation.[16] The legislative history expressly states that the Legislature intended to overturn the language in the *Cloeter* decision.

[5] The legislative history of the amendment indicates that the Legislature wished to allow a "victim of abuse, law enforcement, and prosecutors to take steps toward preventing a threatened act of domestic abuse from actually becoming an act that leads to physical harm of the victim."[17] The Legislature believed the language of *Cloeter* almost made it such that a victim had to be presently assaulted in order to file a protective order.[18] At the legislative hearing, an attorney testified further to the purpose behind the amendment. He stated:

> The initial impetus for looking at a change to the language in 42-[903] was as a result of the Cloeter decision from the Court of Appeals in 2008. The court's interpretation of the word "imminent" was so restrictive that in order to qualify for a protection order, a petitioner would have to be basically getting assaulted at the time the application was being made. . . . So why the credible threat language? . . . By requiring the petitioner to show that the respondent has posed a credible threat, the judge has the authority to grant a protective order when that judge believes the petitioner has presented a credible case that they feel threatened. Just as importantly, though, that judge will also have the authority to deny a protective order when that judge does not believe the petitioner has presented such a credible case.[19]

Even given the broader "credible threat" language used in the newest version of § 42-903, there is no evidence that William expressed threats to harm the minor child. In the

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[16] *In re Interest of Antone C. et al.*, 12 Neb. App. 466, 677 N.W.2d 190 (2004).

[17] Introducer's Statement of Intent, L.B. 310, Judiciary Committee, 102d Leg., 1st Sess. (Jan. 26, 2011).

[18] See Judiciary Committee Hearing, L.B. 310, 102d Leg., 1st Sess. (Jan. 26, 2011).

[19] *Id.* at 35-36.

more recent case of *Torres v. Morales*,[20] the trial judge specifically asked whether there had been any "physical contact or threats of any nature made by anybody." The witness answered negatively. Because there had been none, we determined that the court was proper in determining that there had been no intentional physical injury or credible threats. The "incidents" reported were intoxicated arguments and, on several incidents, yelling matches and name-calling.[21]

[6] In comparison, William's conduct through text message in this case should not be considered abuse under § 42-903(1). No evidence of intentional physical injury or physical threats can be adduced from the evidence at trial. William admittedly sent "morally abhorrent" texts to the minor child.[22] The texts contained crude language and excessive name-calling. The minor child stated that she felt threatened by these text messages. William had asserted that she was his daughter and "none of this is over until i say its over." However, nowhere in the text messages was there any reference to physical harm by William, either occurring or threatened. Neither is there any evidence of past physical abuse. We find the "credible threat" language in § 42-903 to mean that the evidence at trial must include some threat of intentional physical injury or any other physical threat.

[7] Since there was no threat of harm to the minor child, a domestic abuse protection order would not be appropriate in these circumstances. For the reasons discussed in the next section of this opinion, we cannot consider whether a harassment protection order might have been warranted. Therefore, we reverse the decision of the district court.

## HARASSMENT PROTECTION ORDER

Linda argues on cross-appeal that the district court erred in failing to consider a harassment protection order instead of a domestic abuse protection order.

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[20] *Torres v. Morales, supra* note 3, 287 Neb. at 593, 843 N.W.2d at 811.

[21] *Torres v. Morales, supra* note 3.

[22] Brief for appellant at 5.

A harassment protection order is proper when a person has "engage[d] in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose."[23] A course of conduct is "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of . . . telephoning, contacting, or otherwise communicating with the person."[24] The stated purpose for a harassment protection order is to "protect victims from . . . individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty" and, particularly, to deal with stalking offenses.[25] We have defined stalking to mean "the extensive, ongoing, and escalating nature of . . . conduct" showing intent to intimidate the victim.[26]

The "form petition" for both a domestic abuse protection order and a harassment protection order are barely distinguishable.[27] As we have stated, the only differences between the two are that they have "different titles, that the abuse protection form asks for the relationship of the respondent, and that the abuse protection form asks the petitioner to list the most recent incidents of 'domestic abuse,' instead of the most recent incidents of 'harassment.'"[28] Further, between domestic abuse and harassment protection orders, we have held that a particular form is not required for the particular relief requested.[29] We held that it is proper for a lower court judge to look at the substance of the petitioner's actual request, instead of "simply the title of the petition."[30]

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[23] Neb. Rev. Stat. § 28-311.02(2)(a) (Reissue 2008).

[24] § 28-311.02(2)(b).

[25] § 28-311.02(1).

[26] *In re Interest of Jeffrey K.*, 273 Neb. 239, 244, 728 N.W.2d 606, 611 (2007).

[27] *Mahmood v. Mahmud, supra* note 1.

[28] *Id.* at 395, 778 N.W.2d at 431.

[29] *Id.*

[30] *Id.*

In *Mahmood v. Mahmud*,[31] a petition for a domestic abuse protection order was filed by an ex-wife against her ex-husband. The petition set forth in detail many events constituting harassment and describing a history of harassment. However, the petition set forth no alleged violence against the ex-wife. The lower court entered an ex parte harassment protection order instead of a domestic abuse protection order. The harassment protection order was upheld after a hearing. We affirmed, holding that the domestic abuse form petition was sufficient to put the ex-husband on notice that the ex-wife sought a harassment protection order and sought to enjoin the ex-husband from continuing to harass, threaten, telephone, communicate, or otherwise disturb the peace of the ex-wife.[32]

[8] We specifically held in *Mahmood* that a county court or district court has the statutory authority to issue a harassment protection order, where the petition was instead for a domestic abuse protection order.[33] We further held that "[w]hile Nebraska's § 28-311.09(6) provides that the standard forms shall be the only ones used, this does not mean that without the proper standard form, the court lacks authority to act."[34] A trial court has discretion, authority, and jurisdiction to issue a harassment protection order, even though the petitioner had filed a petition for a domestic abuse protection order.[35]

But the legal theory supporting a domestic abuse protection order is significantly different from the theory underlying a harassment protection order. As we have already explained, the former requires proof of "abuse" as specifically defined by the Legislature. The only definition of that term which could conceivably apply to the facts of the present case is provided by § 42-903(1)(b): "Placing, by means of credible threat, another person in fear of bodily injury." But the minor child was never asked whether, nor did she testify that, the text messages sent

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[31] *Mahmood v. Mahud, supra* note 1.

[32] *Id.*

[33] *Id.*

[34] *Id.* at 395, 778 N.W.2d at 431.

[35] See *id.*

by William placed her in fear of bodily injury. Thus, Linda failed to prove an essential element of the statutory claim for a domestic abuse protection order.

On cross-appeal, Linda now attempts to induce this court to allow her to change legal theories at the appellate level—a request that violates several well-settled and fundamental principles. We decline to do so.

[9,10] First, an appellate court reviews a case on the theories pursued by the parties, not on a theory that the parties might have raised. This court has repeatedly stated that an appellate court is obliged to dispose of a case on the basis of the theory presented by the pleadings on which the case was tried.[36] In this case, Linda filed a petition and affidavit for a domestic abuse protection order, an ex parte domestic abuse protection order was issued, and a show cause hearing was held on the domestic abuse protection order. At no point was the district court presented with a harassment theory.

[11] Second, a party cannot complain of error which the party has invited the court to commit.[37] In this case, Linda was represented by counsel, she chose to seek a domestic abuse order, and she did not seek to change her theory at the show cause hearing. On cross-appeal, she now assigns that the district court "erred by issuing a domestic abuse protection order instead of a harassment protection order." But any error in the district court's failure to consider a harassment protection order flowed directly from Linda's decision to pursue a theory of domestic abuse and her adherence to that theory throughout the hearing. Thus, she directly invited any error on this point.

[12,13] Third, we have consistently stated that an appellate court will not consider an issue on appeal that the trial court has not decided.[38] This flows from a related principle. When an issue is raised for the first time in an appellate court, it

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[36] See, e.g., *Robison v. Madsen*, 246 Neb. 22, 516 N.W.2d 594 (1994); *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993).

[37] *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[38] See, e.g., *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009).

will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.[39] The district court did not consider the fitness of a harassment protection order. It was not asked to do so. Its determination was strictly limited to the appropriateness of a domestic abuse order. This court's review should be similarly limited.

[14,15] Although the Court of Appeals' decision in *Sherman v. Sherman*[40] authorizes a trial court to consider both a domestic abuse protection order and a harassment protection order, if the circumstances warrant, the Court of Appeals' opinion provides no support for changing theories at the appellate level. In *Sherman*, an ex parte domestic abuse order was originally entered, but *at hearing*, the judge advised the petitioner to change her petition to a harassment protection order. The Court of Appeals held:

> [W]hen presented with a situation in which an ex parte domestic abuse protection order has been entered, but at the hearing, it becomes apparent that the matter may more properly be considered as a harassment protection order, *the judge should explain the requirements for both domestic abuse and harassment protection orders and allow the petitioner to choose which theory to pursue*. If the petitioner chooses to pursue the alternative theory to the petition and affidavit filed, and the respondent objects, the court should inquire if the respondent is requesting a continuance, which should be granted, if so requested, while leaving the ex parte protection order temporarily in place.[41]

[16,17] The key to the procedure approved by the *Sherman* court is that it occurs before the trial court, requires the petitioner to make an informed choice of legal theory, and protects the due process rights of both parties by trying the case only on the theory elected by the petitioner. While the

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[39] *Maycock v. Hoody*, 281 Neb. 767, 799 N.W.2d 322 (2011).

[40] *Sherman v. Sherman*, 18 Neb. App. 342, 781 N.W.2d 615 (2010).

[41] *Id.* at 347-48, 781 N.W.2d at 620-21 (emphasis supplied).

concept of due process defies precise definition, it embodies and requires fundamental fairness.[42] Generally, procedural due process requires parties whose rights are to be affected by a proceeding to be given timely notice, which is 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.[43] The *Sherman* court approved a procedure allowing a change of legal theories. The change must be initiated before the trial court makes a final decision. The procedure preserves the adversarial system. It requires a petitioner to make an informed choice regarding the theory to be pursued. It protects the respondent's due process rights by offering a continuance if the petitioner elects to change his or her theory. The *Sherman* court's procedure affords due process to both parties.

But the *Sherman* court's procedure simply does not apply where a petitioner, as informed by counsel, pursues a domestic abuse theory and the potential application of a harassment theory does not become "apparent" to either the petitioner or the trial court. Treating the harassment theory as "apparent" where it is first recognized at the appellate level would violate the fundamental principles of law we identified above. Ultimately, such a procedure would flout the respondent's right to due process and society's essential interest in the finality of judgments. Allowing Linda to have another chance at the harassment theory that she failed to pursue would be akin to allowing an injured person who successfully but erroneously pursued only an intentional tort theory to a final judgment to have another chance at recovery by shifting on appeal to a negligence theory. The case was tried on

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[42] *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007).

[43] *Id.*

the domestic abuse theory, and she cannot now change to a harassment theory. We conclude that Linda's cross-appeal lacks merit.

## CONCLUSION

The district court incorrectly granted a domestic abuse protection order, because William's conduct did not fit within the statutory definition of "abuse" under § 42-903(1). Allowing Linda to shift to a harassment theory on appeal would violate fundamental principles of law. We reverse the judgment of the district court and remand the cause with directions to deny the requested domestic abuse protection order.

REVERSED AND REMANDED WITH DIRECTIONS.

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PATRICIA M. DAMME, APPELLEE, V.
PIKE ENTERPRISES, INC., APPELLANT.
856 N.W.2d 422

Filed December 5, 2014. No. S-14-304.

1. **Workers' Compensation: Appeal and Error.** A judgment, order, or award of the Workers' Compensation Court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the Workers' Compensation Court's findings, an appellate court considers the evidence in the light most favorable to the successful party. The appellate court resolves every controverted fact in the successful party's favor and gives that party the benefit of every inference that is reasonably deducible from the evidence.
3. **Workers' Compensation: Appeal and Error.** The Workers' Compensation Court's factual findings have the effect of a jury verdict, and an appellate court will not disturb them unless they are clearly wrong.
4. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
5. **Workers' Compensation.** Whether to recognize a nonstatutory defense in a workers' compensation case presents a question of law.

6. **Workers' Compensation: Proof.** 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.
7. **Workers' Compensation.** A workers' compensation claimant can recover benefits when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, even if no disability would have occurred absent the preexisting condition. The "lighting up" or acceleration of a preexisting condition by an accident is a compensable injury.
8. ____. Causation of an injury or disability presents an issue of fact.
9. **Workers' Compensation: Expert Witnesses.** Unless an injury's nature and effect are plainly apparent, a workers' compensation claimant must establish the causal relationship between the employment and the injury or disability by expert opinion.
10. ____: ____. Although a claimant's medical expert does not have to couch his or her opinion in the magic words "reasonable medical certainty" or "reasonable probability," the opinion must be sufficient to establish the crucial causal link between the claimant's injuries and the accident occurring in the course and scope of the claimant's employment.
11. **Expert Witnesses: Physicians and Surgeons: Appeal and Error.** An appellate court examines the sufficiency of a medical expert's statements from the expert's entire opinion and the record as a whole.
12. **Workers' Compensation: Expert Witnesses: Physicians and Surgeons.** The Workers' Compensation Court is the sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony.
13. ____: ____: ____. Resolving conflicts within a health care provider's opinion rests with the Workers' Compensation Court, as the trier of fact.
14. **Workers' Compensation: Appeal and Error.** When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the Workers' Compensation Court.
15. **Workers' Compensation.** Under the Nebraska Workers' Compensation Act, both temporary and total disability benefits are awarded for diminished employability or impaired earning capacity and do not depend on a finding that the claimant cannot be placed with the same employer or a different one.
16. ____. The level of a worker's disability depends on the extent of diminished employability or impairment of earning capacity, and does not directly correlate to current wages.
17. **Workers' Compensation: Torts.** The Nebraska Workers' Compensation Act constitutes a compromise between the rights of employers and employees. Under the act, employees give up the right to complete compensation that they might recover under tort law in exchange for no-fault benefits that they quickly receive for most economic losses from work-related injuries.

18. **Workers' Compensation: Legislature: Public Policy.** Because the Nebraska Workers' Compensation Act reflects a legislative balancing of rights, defenses that defeat a worker's right to seek or receive disability benefits for a work-related injury are a matter of public policy that the Legislature should decide.
19. **Workers' Compensation: Prisoners: Proof.** If a workers' compensation claimant can prove a loss of earning capacity, his or her incarceration after sustaining a compensable injury is not an event that bars the claimant's receipt of disability benefits, absent a statute requiring that result.
20. **Workers' Compensation.** Total disability exists when a workers' compensation claimant is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the claimant's mentality and attainments could perform.
21. **Workers' Compensation: Testimony.** Although medical restrictions or impairment ratings are relevant in determining a claimant's disability, the Workers' Compensation Court can rely on a claimant's testimony regarding his or her own limitations to determine the extent of the claimant's disability.

Appeal from the Workers' Compensation Court: J. MICHAEL FITZGERALD, Judge. Affirmed.

Christopher A. Sievers, of Timmermier, Gross & Prentiss, for appellant.

Elaine A. Waggoner, of Waggoner Law Office, for appellee.

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

CONNOLLY, J.

## SUMMARY

This workers' compensation case presents an issue of first impression in Nebraska: whether a claimant's incarceration after sustaining a compensable injury should bar the claimant from recovering temporary total disability benefits while she is incarcerated. The appellant, Pike Enterprises, Inc. (Pike), also argues that the court erred in finding a causal connection between the appellee's alleged injury in October 2009 and her back surgery in January 2013, and in awarding future medical benefits.

We agree with the court that after a claimant sustains a compensable injury resulting in total disability, her later incarceration does not bar her receipt of benefits. The evidence sufficiently supported the court's conclusion that Pike sustained

a new injury that aggravated an existing back condition and caused her symptoms of constant pain and that her surgery in January 2013 was necessary to treat the injury. We affirm the trial court's award.

## BACKGROUND

### Historical Facts

The appellee, Patricia M. Damme, has a history of degenerative disk disease. It started in 1995, when her lower back problems required a lumbar laminectomy (removal of the spongy material between the disks) at the L4-5 level. She also has a history of mental health issues and illicit drug use, for which she has been regularly treated by a psychiatrist.

In 2001, boxes fell on her while working on a job, injuring her back and neck. This injury required a cervical diskectomy and fusion at the C5-6 level. In a lump-sum settlement, the employer agreed to pay her for an 8-percent whole-body permanent partial disability. In 2002, she began receiving disability benefits from Social Security because of her psychiatric problems. She said she continued to work because keeping busy helped her deal with her psychiatric problems.

In January 2004, a semitrailer truck hit her vehicle. At the hospital, she reported mild tenderness in her lower quadrant. The hospital physician reported mild degenerative disk disease above and below her C5-6 fusion but no complications from the accident.

In 2006, after a fall at a store, Damme experienced increased neck pain and pain in her lower back that radiated into her left thigh. An MRI of her cervical and lumbar spine showed that the cervical fusion was intact and that her lumbar spine had some degenerative disk disease, but that the spacing between the disks was within the normal range. The physician did not recommend surgical intervention but referred her to a physical therapist.

In 2008, while working for her previous employer, she tripped and fell against a wall, experiencing neck pain. About a month later, while reaching up, she experienced severe neck pain, which improved with time but remained constant and variable in intensity. The cause of her neck and shoulder pain

was not clear, and she was referred to a physical therapist and released to return to work with some restrictions. In 2009, her physician determined that she had sustained a 5-percent impairment of her right upper extremity.

In June 2009, Damme began working for Pike, which owns a McDonald's restaurant. On October 15, she hurt her back at the restaurant while carrying bags. When she bent over to put the bags on a table, she felt a pop in her back and a searing pain. At first, she could not stand up. She said she had never experienced pain like that with any of her previous back problems. She went home to apply ice to her back and went to the hospital later that night with burning pain. The hospital physician assessed her with a likely lumbosacral sprain. She was given an anti-inflammatory shot and prescribed a muscle relaxant and pain medication.

A few days later, Damme called her nurse practitioner about severe back pain and was prescribed hydrocodone. An x ray of her lumbar spine showed mild degenerative changes and a significant loss of disk height at the L4-5 level, which was a "stark progression" compared to her 2006 x rays. An MRI of the L4-5 level showed no intervertebral disk fluid. She was referred to a surgeon who noted that she was already taking a "fairly substantial dose of narcotics" and referred her to a pain consultant before investigating whether to perform surgery. On November 4, 2009, the pain consultant assessed Damme as having a herniated disk, multilevel degenerative disk disease in her lumbosacral spine, and lumbar back pain. He prescribed OxyContin for pain and physical therapy. On November 29, her primary care physician continued the OxyContin prescription for pain. On December 8, Damme returned to the pain consultant because her back pain was worse and radiating into her left buttock and thigh.

At some point, a managed care organization referred Damme to James Mayer, M.D., for a second opinion regarding her treatment. Mayer wrote a report on December 1, 2009, after examining Damme and her treatment history. In response to questions from the referring organization, Mayer reported that to the best of his medical knowledge, Damme's October 15 injury aggravated her degenerative joint disease of the spine

and that her employment was a contributing cause of her symptoms. He believed that the aggravation was temporary but that she had not yet reached maximum medical improvement. He stated that it was too early to determine whether she had sustained any permanent impairment. He also expressed concerns about the amount of narcotics she was taking and did not want to manage her care because of her "psychosocial issues" and previous history of illicit drug use. He recommended physical therapy and tapering her off narcotics.

In January 2010, the surgeon saw Damme again. He discussed his concerns about an operative fusion, but he believed a diskogram might help him to determine the source of her pain. On January 18, a different physician reviewed the surgeon's records. He believed that a lumbar fusion was a possible treatment based on the MRI results. But he first referred Damme to another physician for an assessment of nonsurgical treatments. In April, that physician recommended facet blocks, which are injections of medications that numb pain in the vertebral joints. But a facet block did not relieve Damme's pain.

In February 2010, her primary care physician dismissed her from his care because he believed she was selling her narcotic medications. She continued to see a psychiatrist. In March, she was seen by a different physician who noted that because of her low pain threshold and psychiatric problems, locating the source of her pain and treating her with injections would be difficult. He noted that these same problems, coupled with her smoking, made the outcome of a surgery unpredictable. He said he would recommend surgery only if all her previous health care providers agreed surgery was reasonable.

In May 2010, Pike had Damme examined by Michael O'Neil, M.D. O'Neil reviewed her medical records and reported to Pike's attorney that "it is more probable than not (with reasonable medical certainty) that . . . Damme did sustain an exacerbation or a temporary worsening of preexisting symptomatic degenerative lumbar disc disease at L4-L5." But he could not separate what portion of her current low-back pain was the result of the October 15, 2009, injury from the natural progression of the disease. He did not believe she had

any permanent impairment resulting solely from the injury. He stated that ordinarily, she would be a good candidate for fusion surgery. But like her other physicians, he was reluctant to recommend surgery because of her psychiatric problems and use of narcotics.

In August 2010, however, O'Neil revised his opinion. He again opined that Damme's work-related injury resulted in an exacerbation or temporary worsening of her disk disease. But he now believed it was more probable than not that her preexisting conditions had caused her pain and not a minor incident at work. He further opined that she needed narcotic medications because of her drug dependency and not because of her alleged back injury. He concluded that Damme had reached maximum medical improvement on October 15, 2009, the date of her injury.

In January 2011, Damme was arrested for unspecified reasons. She stated that she stopped taking her psychiatric medications because of the opiates she was taking, which caused her to get into trouble. She was committed to the Lincoln Regional Center for 6 months because she was not competent to stand trial. After that, she was incarcerated from June 17 to December 28, 2011. After she was released, she went to a new physician for pain management, who referred her to a new surgeon.

In July 2012, the new surgeon, H.R. Woodward, M.D., examined Damme. Woodward noted that since Damme's work injury, she had reported experiencing constant low-back pain that intermittently radiated down her left leg to her knee. He noted that her October 2009 x rays had shown nearly a complete loss of disk space at the L4-5 level. Woodward stated that Damme had "an obvious pathology at the L4-5 disc that is in all likelihood causing her present symptoms." He noted that a diskogram performed in November 2010 had shown a markedly abnormal L4-5 disk with concordant pain. He concluded that nonsurgical treatments had been unsuccessful and recommended a spinal fusion. He told Damme that he would perform the surgery if she completely stopped smoking and reduced her narcotic use.

Woodward performed the surgery in January 2013, which was a success. Within 2 months, her leg pain was completely gone, and within 3 months, her back pain was minimal and occasional. In June, Damme reported that she had no pain. She testified that her back felt as good as it had before the October 2009 injury. On June 17, 2013, Woodward released her to work without restrictions, which date the court interpreted to be when Damme reached maximum medical improvement.

## Court's Order

In its order, the court found that there was "no question that [Damme] injured her low back in the accident on October 15, 2009." The court noted that before Damme's 2009 injury, she was treated many times for her back problems but that except for one notation when she was treated in June 2006 for pain after falling, no physicians had reported prescribing her narcotic pain medications. The court implicitly found that she consistently needed such medications only after the 2009 injury and noted that the fusion surgery was a success. It extensively reviewed her medical records and concluded that all the surgeons who had examined Damme believed surgery would have been a reasonable treatment except for her psychiatric problems and use of narcotics.

Additionally, the court implicitly found that Pike delayed Damme's surgery by stopping her medical benefits after O'Neil's examination, stating that Pike "denied medical care after the examination by Dr. O'Neil. [Damme] was unable to obtain additional medical care until May of 2012 which ultimately led to a referral . . . to Dr. Woodward." The court determined that the record as a whole was sufficient to show that Damme's January 2013 surgery was reasonable and necessary to treat her 2009 injury.

The court awarded Damme temporary total disability benefits from November 9, 2009, through June 17, 2013, and future medical care as required by Neb. Rev. Stat. § 48-120 (Cum. Supp. 2014). It denied Damme's claim for penalties and credited Pike for the payments it had made to Damme. It

rejected Pike's argument that Damme could not receive benefits during her incarceration.

## ASSIGNMENTS OF ERROR

Pike assigns that the court erred in (1) finding a causal relationship between the October 2009 "incident" and the January 2013 surgery, (2) not considering whether the January 2013 surgery was fair and reasonably necessary to treat Damme, (3) awarding temporary total disability benefits, and (4) awarding nonspecified future medical benefits.

## 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]

[2-5] In testing the sufficiency of the evidence to support the Workers' Compensation Court's findings, we consider the evidence in the light most favorable to the successful party. We resolve every controverted fact in the successful party's favor and give that party the benefit of every inference that is reasonably deducible from the evidence.[2] The court's factual findings have the effect of a jury verdict, and we will not disturb them unless they are clearly wrong.[3] But we independently review questions of law decided by a lower court.[4] Whether to recognize a nonstatutory defense in a workers' compensation case presents a question of law.[5]

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[1] *Potter v. McCulla*, 288 Neb. 741, 851 N.W.2d 94 (2014).

[2] See *Pearson v. Archer-Daniels-Midland Milling Co.*, 285 Neb. 568, 828 N.W.2d 154 (2013).

[3] See *Moyera v. Quality Pork Internat.*, 284 Neb. 963, 825 N.W.2d 409 (2013).

[4] *Id.*

[5] See *Bassinger v. Nebraska Heart Hosp.*, 282 Neb. 835, 806 N.W.2d 395 (2011).

## ANALYSIS

### CAUSATION

Pike argues that the record shows the October 2009 "incident" was not an injury but a "temporary symptom aggravation" of Damme's preexisting back problems.[6] It contends that the court erred in finding that Damme sustained a work-related injury because she failed to present a medical expert's opinion establishing that the work-related event caused her injury. Alternatively, Pike contends that the court erred in failing to consider whether its evidence overcame the presumption that the treatment was reasonable. It argues that Damme obtained the surgery in an effort to obtain more narcotic prescriptions. It points out that she obtained such a prescription after her surgery and that before Woodward agreed to perform the surgery, other physicians had refused to do so because of her use of narcotics.

Damme argues that when their statements are read in context, Mayer and O'Neil both concluded that Damme had sustained an exacerbation of her preexisting degenerative disk disease on October 15, 2009, at the L4-5 level of her lumbar spine. And she argues that their opinions are sufficient to show she sustained a work-related injury to her back and that Woodward's notes are sufficient to show the surgery was necessary to treat her condition. We agree.

[6-8] 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.[7] A workers' compensation claimant can recover benefits when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, even if no disability would have occurred absent the preexisting condition. The "'lighting

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[6] Brief for appellant at 8.

[7] *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003).

up'" or acceleration of a preexisting condition by an accident is a compensable injury.[8] And causation of an injury or disability presents an issue of fact.[9]

[9-11] Unless an injury's nature and effect are plainly apparent, a workers' compensation claimant must establish the causal relationship between the employment and the injury or disability by expert opinion.[10] Although a claimant's medical expert does not have to couch his or her opinion in the magic words "reasonable medical certainty" or "reasonable probability," the opinion must be sufficient to establish the crucial causal link between the claimant's injuries and the accident occurring in the course and scope of the claimant's employment.[11] We examine the sufficiency of a medical expert's statements from the expert's entire opinion and the record as a whole.[12]

Here, both Mayer and O'Neil reported that on October 15, 2009, Damme sustained an exacerbation of a preexisting degenerative disk disease at the L4-5 level of her lumbar spine. These statements are consistent with the surgeon's findings soon after the injury that Damme's x rays showed a marked loss of disk space at the L4-5 level. Mayer explicitly stated that her employment was a contributing cause of her symptoms. O'Neil reviewed Damme's medical records and reported to Pike's attorney that "it is more probable than not (with reasonable medical certainty) that . . . Damme did sustain an exacerbation or a temporary worsening of preexisting symptomatic degenerative lumbar disc disease at L4-L5."

[12-14] O'Neil confirmed this opinion even when he later opined that Damme's pain was probably the result of her preexisting back condition and not the October 2009 "incident." And as we know, the Workers' Compensation Court is the

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[8] *Id*. at 139, 672 N.W.2d at 412.

[9] See *Potter, supra* note 1.

[10] See *id*.

[11] See *Owen v. American Hydraulics*, 258 Neb. 881, 606 N.W.2d 470 (2000).

[12] *Frank v. A & L Insulation*, 256 Neb. 898, 594 N.W.2d 586 (1999), citing *Miner v. Robertson Home Furnishing*, 239 Neb. 525, 476 N.W.2d 854 (1991).

sole judge of the credibility and weight to be given medical opinions, even when the health care providers do not give live testimony. Resolving conflicts within a health care provider's opinion also rests with the court, as the trier of fact.[13] When the record presents nothing more than conflicting medical testimony, an appellate court will not substitute its judgment for that of the compensation court.[14]

In his original opinion, O'Neil reported that he could not determine how much of Damme's symptoms could be attributed to the October 2009 injury. But a claimant is not required to prove an apportionment of symptoms to an accident if the evidence shows that the accident is a contributing cause of the injury: "'The law does not weigh the relative importance of the two causes, nor does it look for primary and secondary causes; it merely inquires whether the employment was a contributing factor. If it was, the concurrence of the personal cause will not defeat compensability.'"[15]

It is true that both Mayer and O'Neil believed that Damme's exacerbation was temporary, but Mayer also stated that Damme had not yet reached maximum medical improvement. And the record shows that Damme's medical providers could not successfully treat her constant pain symptoms without surgical intervention, because her indefinite reliance on narcotic pain medications was not a reasonable treatment plan. Damme's dependence on pain medications was the reason that a new physician referred her to Woodward in 2012 to consider surgery. And the record shows that nonsurgical treatment had been unsuccessful. In reviewing her medical records, Woodward specifically noted that after the 2009 injury, Damme's diskogram showed nearly a complete loss of disk space at the L4-5 level. He stated that she had "an obvious pathology at the L4-5 disc that is in all likelihood causing her present symptoms." He noted a markedly abnormal L4-5

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[13] See, *Swanson, supra* note 7; *Frank, supra* note 12.

[14] *Id.*

[15] *Cox v. Fagen Inc.*, 249 Neb. 677, 683, 545 N.W.2d 80, 85 (1996). Accord 1 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 4.04 (2014).

disk with concordant pain and concluded that nonsurgical treatments had been unsuccessful and that surgery was indicated. These conclusions were sufficient to link the necessity of Damme's surgery to the marked deterioration of her lumbar disk spacing that physicians noted soon after her injury.

Finally, Pike incorrectly argues that the court failed to consider whether Damme's surgery resulted from her attempts to obtain prescriptions for narcotic pain medications. The court implicitly rejected this argument. And the evidence of her postsurgery recovery supports that determination. We conclude the court was not clearly wrong in finding that Damme had shown she sustained a work-related injury that was a contributing factor to her back injury and pain symptoms. It also was not clearly wrong in finding that the January 2013 surgery was a reasonable and necessary treatment.

### Temporary Total Disability Benefits

Pike contends that the court erred in awarding Damme "healing benefits" from the time she was injured until Woodward released her to return to work. Pike argues that she had no record of work restrictions after December 2009 and that she was not entitled to benefits during her incarceration. It argues that the purpose of benefits during a healing period is to replace the claimant's wages.

Damme contends that the question is whether she sustained a loss of earning power, which is a question of fact that the court properly resolved. She testified that she unsuccessfully tried to obtain employment with Pike and other employers and that the reasonable inference from this evidence is that she could not obtain employment in any field for which she was suited. She further argues that the majority of courts have held a subsequent incarceration does not affect a claimant's eligibility for workers' compensation benefits absent a statute to the contrary. We agree.

[15] First, we clarify that no workers' compensation statute provides a defense to paying disability benefits because a claimant is incarcerated. And we reject Pike's argument

that temporary disability benefits are intended to replace a claimant's wages while they are healing from an injury. It is true that a court awards temporary disability benefits for the period during which the employee cannot work because he or she is submitting to treatment, convalescing, or suffering from the injury.[16] But under the Nebraska Workers' Compensation Act, both temporary and permanent disability benefits are awarded for diminished employability or impaired earning capacity and do not depend on a finding that the claimant cannot be placed with the same employer or a different one:

> [A] compensation court must generally determine only two issues: (1) that the employee can no longer earn wages doing the same kind of work for which he or she was trained or accustomed to performing and (2) that the employee lacks the skills needed to perform other work that is within the employee's physical limitations and for which a stable market exists. . . . [V]ocational specialists can assess an employee's loss of earning power by determining the type of work the employee would have been qualified to do before the injury and eliminating those occupations that are incompatible with the employee's postinjury restrictions. The specialist can then use market surveys to determine the employee's loss of access to jobs in a labor market based on the employee's postinjury physical restrictions and vocational impediments.[17]

[16] In short, the level of a worker's disability depends on the extent of diminished employability or impairment of earning capacity, and does not directly correlate to current wages.[18] Although showing reduced wages and shortened work hours can support a finding of diminished earning capacity, the claimant can also prove disability through impairment ratings

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[16] See *Zwiener v. Becton Dickinson-East*, 285 Neb. 735, 829 N.W.2d 113 (2013).

[17] *Moyera, supra* note 3, 284 Neb. at 976, 825 N.W.2d at 419.

[18] *Zwiener, supra* note 16.

and the claimant's lost access to jobs based on his or her physical restrictions and vocational impediments.[19]

For this reason, we have held that an alien's illegal work status does not preclude the worker from receiving permanent disability benefits. In *Moyera v. Quality Pork Internat.*,[20] we rejected an argument that permanent total disability benefits should be barred for illegal aliens because such claimants cannot legally work in the United States. Because total disability benefits do not depend on a claimant's ability to accept employment, we held that the claimant's illegal status did not bar an award of indemnity for permanent total loss of earning capacity.[21] The same reasoning applies to an award of temporary total disability benefits.[22]

[17,18] Equally important, we have explained that the Nebraska Workers' Compensation Act constitutes a compromise between the rights of employers and employees. Under the act, employees give up the right to complete compensation that they might recover under tort law in exchange for no-fault benefits that they quickly receive for most economic losses from work-related injuries.[23] This loss of remedies is why we broadly construe the act to accomplish its beneficent purpose and why we overruled an earlier case in which we had adopted a common-law misrepresentation defense.[24] That is, because the act reflects a legislative balancing of rights, defenses that defeat a worker's right to seek or receive disability benefits for a work-related injury are a matter of public policy that the Legislature should decide.[25]

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[19] See *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002), citing *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

[20] *Moyera, supra* note 3.

[21] See *id.*

[22] See *id.*, citing *Visoso v. Cargill Meat Solutions*, 18 Neb. App. 202, 778 N.W.2d 504 (2009).

[23] *Id.*

[24] See *Bassinger, supra* note 5.

[25] See *id.* (overruling *Hilt Truck Lines, Inc. v. Jones*, 204 Neb. 115, 281 N.W.2d 399 (1979)).

In sum, under Nebraska's workers' compensation statutes, an award of disability benefits does not depend upon the claimant's ability to prove he or she has lost wages because of a work-related injury. And our previous refusal to recognize a nonstatutory defense is consistent with what the majority of courts have held in considering whether incarceration bars disability benefits.[26] Workers' compensation benefits are controlled by statute. Thus far, the act does not disqualify persons who are in jail or prison from receiving these benefits. The Legislature determines the content of statutes. It could amend the statute. But unless it does, this court cannot deny workers' compensation benefits to prisoners.

[19] So we hold that if a claimant can prove a loss of earning capacity, his or her incarceration after sustaining a compensable injury is not an event that bars the claimant's receipt of disability benefits, absent a statute requiring that result. The only question is whether Damme proved her diminished earning capacity.

[20,21] Total disability exists when a workers' compensation claimant is unable to earn wages in either the same or a similar kind of work he or she was trained or accustomed to perform or in any other kind of work which a person of the claimant's mentality and attainments could perform.[27] Although medical restrictions or impairment ratings are relevant in determining a claimant's disability, the Workers'

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[26] See, *United Riggers Erectors v. Industrial Com'n*, 131 Ariz. 258, 640 P.2d 189 (Ariz. App. 1981); *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001); *Sims v R. D. Brooks, Inc*, 389 Mich. 91, 204 N.W.2d 139 (1973); *Hardin's Bakery v. Taylor*, 631 So. 2d 201 (Miss. 1994); *SIIS v. Campbell*, 109 Nev. 997, 862 P.2d 1184 (1993); *State ex rel. OmniSource v. Indus. Comm.*, 113 Ohio St. 3d 303, 865 N.E.2d 41 (2007); *Forshee & Langley Logging v. Peckham*, 100 Or. App. 717, 788 P.2d 487 (1990); *Stevenson v. Westmoreland Coal Co., Ap.*, 146 Pa. Super. 32, 21 A.2d 468 (1941); *King v. Industrial Com'n of Utah*, 850 P.2d 1281 (Utah App. 1993), *abrogated on other grounds, Murray v. Utah Labor Com'n*, 308 P.3d 461 (Utah 2013); Annot., 54 A.L.R.4th 241 (1987); 9A Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 134:29 (2005). See, also, *In re MacDonnell's Case*, 82 Mass. App. 196, 971 N.E.2d 836 (2012).

[27] E.g., *Kim v. Gen-X Clothing*, 287 Neb. 927, 845 N.W.2d 265 (2014).

Compensation Court can rely on a claimant's testimony regarding his or her own limitations to determine the extent of the claimant's disability.[28]

Here, the record shows that Damme's nurse practitioner, who was her primary health care provider in October 2009, wrote work release notes for Damme at least through December 2009 and, in 2010, recommended home health care services for her. Damme said that in December 2009, she tried to return to work for Pike to keep herself "out of trouble," but she could not because of her work restrictions. She testified that she also had work release notes after December 2009, which is consistent with the nurse practitioner's recommendation of home health care. Damme testified that before her surgery in 2013, she required home health care because she had trouble toileting and doing simple household chores by herself. She said she later reapplied twice to Pike and at other places of employment, despite knowing that she could not perform the work. But she received no job offers. The record is sufficient to support the court's finding of total disability from the date of Damme's injury to the date that Woodward released her to return to work.

## CONCLUSION

We conclude that the court did not err in finding that Damme proved she sustained a work-related injury in October 2009 that was a contributing factor to her temporary total disability. Nor did the court err in determining that Damme's 2013 surgery was reasonably necessary to treat her physical condition and pain symptoms.

We conclude that evidence sufficiently supported the court's finding that after her injury, Damme could not work until June 2013, when Woodward, the surgeon who performed her spinal fusion, released her to return to work. The court correctly determined that Damme's incarceration was not an event that barred her receipt of disability benefits.

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[28] See, *Manchester v. Drivers Mgmt.*, 278 Neb. 776, 775 N.W.2d 179 (2009), citing *Luehring v. Tibbs Constr. Co.*, 235 Neb. 883, 457 N.W.2d 815 (1990); *Frauendorfer, supra* note 19, citing *Cords, supra* note 19.

Finally, we find no merit to Pike's argument that the court erred in awarding future medical benefits to Damme.

AFFIRMED.

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# ROBERT O'BRIEN, APPELLEE, V. BELLEVUE PUBLIC SCHOOLS, APPELLANT.

856 N.W.2d 731

Filed December 12, 2014. No. S-12-843.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
4. ____. In the summary judgment context, a fact is material only if it would affect the outcome of the case.
5. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
6. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
7. **Termination of Employment: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
8. **Termination of Employment: Proof.** The plaintiff in a retaliatory discharge action retains the ultimate burden of persuading the fact finder that he or she has been the victim of intentional impermissible conduct.
9. **Employer and Employee: Proof.** To establish a prima facie case of unlawful retaliation, an employee must show (1) that he or she participated in a protected activity, (2) that the employer took an adverse employment action against him or her, and (3) that a causal connection existed between the protected activity and the adverse employment action.
10. **Employer and Employee: Termination of Employment: Circumstantial Evidence.** Because an employer is not apt to announce retaliation as its motive, an employee's prima facie case in a retaliatory discharge action is ordinarily proved by circumstantial evidence.

11. **Termination of Employment: Time: Proof.** In a retaliatory discharge action, proximity in time between an employee's protected activity and discharge of the employee is a typical beginning point for proof of a causal connection.
12. **Termination of Employment: Words and Phrases.** In employment law involving alleged impermissible termination, a "pretext" is found when the court disbelieves the reason given by an employer, allowing an inference that the employer is trying to conceal an impermissible reason for its action.

Petition for further review from the Court of Appeals, IRWIN, PIRTLE, and BISHOP, Judges, on appeal thereto from the District Court for Sarpy County, WILLIAM B. ZASTERA, Judge. Judgment of Court of Appeals affirmed.

Jeremy C. Jorgenson for appellant.

Laura K. Essay, Kevin R. McManaman, and Michael W. Khalili, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

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

MILLER-LERMAN, J.

## NATURE OF CASE

Robert O'Brien, the appellant, filed a complaint in the district court for Sarpy County against Bellevue Public Schools (BPS), the appellee, alleging that he was wrongfully discharged from his employment as a carpenter with BPS because he reported the presence, demolition, and disposal of asbestos and asbestos-containing materials to his superiors at BPS. BPS moved for summary judgment. After a hearing, the district court granted summary judgment in favor of BPS. O'Brien appealed, and in a memorandum opinion, the Nebraska Court of Appeals affirmed the judgment of the district court. We granted O'Brien's petition for further review. Because we determine that BPS is entitled to judgment as a matter of law, we affirm.

## STATEMENT OF FACTS

O'Brien was an at-will employee of BPS from 2006 to 2009. He filed a complaint against his former employer in the district court on November 24, 2010, in which he generally alleged

he was fired in retaliation for reporting to his superiors the presence and removal of asbestos at the middle school where he worked.

BPS filed a motion for summary judgment, which the district court sustained. In its order filed August 14, 2012, the district court summarized the evidence and stated:

> [I]n his deposition, [O'Brien] admits that he reported the suspected presence of asbestos to his supervisor on two occasions, but that he never reported violations of state and federal regulations. Morever [sic], the record reflects that there was documentation to show that [O'Brien's] work performance was not adequate. Based on the evidence, this Court finds that [BPS] terminated [O'Brien] for a legitimate, non-retaliatory reason unrelated to his reports of the suspected presence of asbestos. [O'Brien] was terminated from his position for his inability to cooperate with supervisors, inefficient work performance, and lack of punctuality. See, Exhibit #7. [O'Brien] stated in his deposition that during the meeting held to discuss his performance, he quickly became frustrated and stated that he believed he was going to be terminated for his aggression. [O'Brien] admitted that the topic of asbestos was not mentioned during the meeting, and that his frustration did not have anything to do with alleged reports he made to his supervisor regarding his asbestos concerns. Based on the aforementioned, this Court finds that [BPS] has met its burden to show that there are no genuine issues of material fact, and that summary judgment is appropriate.

O'Brien appealed to the Court of Appeals. O'Brien assigned as error on appeal that

> the district court erred when it sustained BPS' motion for summary judgment because (1) the court's order was unclear whether it found (a) that O'Brien never reported to BPS that its demolition and disposal of asbestos was in violation of state and federal regulations, or (b) that O'Brien never reported to state and federal authorities those alleged violations, and that neither finding is sufficient to dismiss on summary judgment; and (2) a material

> issue of fact exists as to whether BPS' reasons for terminating O'Brien's employment was pretextual.

*O'Brien v. Bellevue Public Schools*, No. A-12-843, 2014 WL 1673287 at *4 (Neb. App. Apr. 29, 2014) (selected for posting to court Web site).

In its memorandum opinion affirming the order of the district court, the Court of Appeals recited the facts of the case, which we quote at length and for which we find support in the summary judgment record. The Court of Appeals stated:

> O'Brien was employed by BPS as a carpenter from 2006 to July 2009. Sometime between May and June 2009, he reported in one instance to his immediate supervisor and in another instance to the vice principal of the middle school in which he was working that he believed that floor tiles and countertops he had been ordered to demolish and remove contained asbestos.
>
> In July 2009, O'Brien's supervisors completed an annual performance review and found O'Brien "[N]ot [A]dequate" in the areas of teamwork, quantity of work, punctuality/attendance, reliability/dependability, conscientiousness, initiative, and cooperation.
>
> On July 7, 2009, a meeting was held to discuss O'Brien's review and job performance. The purpose of the meeting was not to terminate O'Brien's employment. O'Brien attended, along with Mike Potter (O'Brien's immediate supervisor) and Matt Blomenkamp (the coordinator for buildings and grounds and Potter's immediate supervisor). When Potter and Blomenkamp expressed their concerns about O'Brien's job performance, O'Brien repeatedly raised his voice and behaved in an agitated and aggressive manner. At no time during the meeting did O'Brien mention asbestos. O'Brien was dismissed from work for the day, and a formal letter of reprimand was given to O'Brien summarizing that meeting. O'Brien signed that letter on July 12.
>
> On July 13, 2009, O'Brien attended an informal meeting with Jim McMillan, a BPS administrator, and Blomenkamp. At the meeting, O'Brien admitted to poor performance in the areas of reliability, punctuality, and

getting along with coworkers. He also apologized for his behavior at the July 7 meeting, acknowledging that he had "butted heads with Potter a few times" and that he should not have told Blomenkamp that he "wasn't one of the kids in the school district, not to speak to me like that." O'Brien did not mention asbestos during the July 13 meeting.

Blomenkamp sent O'Brien a letter, dated July 13, 2009, which stated: "This letter is in regard to your recent evaluation and past and present behavior as an employee for [BPS]. Your inability to cooperate with your supervisors, poor work performance, and refusal to be formally evaluated show a lack of judgment, respect and conscientiousness, all of which are essential functions of your position." The letter indicated that a meeting was scheduled for July 16 and that O'Brien would have an opportunity to be heard concerning his employment status.

On July 16, 2009, a final meeting was held. O'Brien, Blomenkamp, and an assistant superintendent attended. At the meeting, O'Brien admitted that reliability and punctuality were his "biggest downfalls" and that he had "butted heads" with Potter. O'Brien was informed that the meeting was his opportunity to address anything related to his employment. O'Brien did not mention asbestos during the meeting.

In a letter dated July 17, 2009, BPS terminated O'Brien's employment for his inability to cooperate with supervisors, inefficient work performance, and lack of punctuality.

On November 24, 2010, O'Brien filed a complaint claiming "wrongful discharge in violation of public policy including, but not limited to, the right to be free from retaliatory discharge for reporting violations of state and federal regulations pertaining to the demolition and disposal of asbestos and asbestos containing materials." O'Brien alleged that BPS retaliated against him after he reported actions by BPS which were unlawful under state or federal law and "which violations imperiled the health,

safety and welfare of [O'Brien], [O'Brien's] co-workers, and students and other employees of [BPS]."

In a deposition taken in May 2012, O'Brien testified, "I believe I was terminated because I raised to the attention of [BPS] administration that I was carrying out work orders that were HAZMAT related. When I made [the] complaints, I believe I was fired for making those complaints." O'Brien clarified that by "HAZMAT," he meant asbestos. O'Brien acknowledged that BPS had an asbestos policy and that he understood the policy to require employees to stop work and report to a supervisor if they saw asbestos. When asked if there was anything wrong with that policy, O'Brien answered, "No." O'Brien understood that after reporting asbestos, he was to let his immediate supervisor handle it, and then he would wait until he was given the next project. It was also O'Brien's belief that small amounts of asbestos, less than 3 square feet, could be removed without contacting a supervisor.

O'Brien further testified in his May 2012 deposition that in the summer of 2007, he complained to Potter that "we" had been removing asbestos countertops and that he had received another work order to remove asbestos flooring. According to O'Brien, Potter put his fingers to his mouth and told him to "shush," and Potter later told O'Brien that Potter himself had removed the flooring later that night. O'Brien did not observe Potter remove anything, but "[i]t was gone the next day." O'Brien testified that he believed he had committed an unlawful act by removing the countertops that contained asbestos, although he also acknowledged that he did not know they contained asbestos until told that by another employee. O'Brien testified that on another occasion in the summer of 2007, O'Brien realized that he was removing asbestos flooring. He reported it to a vice principal who happened to pass by the room, and he was instructed to stop work on the project. The flooring was later removed by asbestos abatement professionals. It should be noted that although O'Brien testified repeatedly during his deposition that

his reports about asbestos were made in the summer of 2007, he at one point indicates that he was terminated from employment shortly after making his last report, which suggests the reports about asbestos were made in 2009. During oral arguments before this court, counsel confirmed the reports were made in 2009.

In his deposition, O'Brien acknowledged that he had never been forced to remove asbestos against his will, nor was he asked to remove asbestos after reporting its presence. O'Brien denied ever being reprimanded or disciplined for reporting the presence of asbestos or suspected presence of asbestos or for not removing asbestos. O'Brien acknowledged that he was subject to annual reviews, and the "guys [he] worked with," were also subject to such reviews. However, according to O'Brien, this was the first negative annual performance review he had received during his 3½ years of employment at BPS. O'Brien stated that after his July 7, 2009, evaluation, "I thought I was on my way out . . . [b]ecause of the conversation I had with the contractor that I worked with on my last project with BPS . . . Blomenkamp had told [the contractor] that they had pulled me off that project, my last project was a Nature Outdoor Explore Classroom because of my — that I was aggressive, my attitude, aggressive attitude." O'Brien stated that he took a couple vacation days after he was pulled from that project, noting, "I got pulled off two projects right in a row and then I took two days vacation, day and half vacation, and when I came back there was a meeting on protocols of taking vacation." In discussing the July 7 evaluation meeting, O'Brien noted that Potter claimed that O'Brien "came across the room at him aggressively and he was in fear for his life," but O'Brien stated that all he did was turn toward him to ask him if he wrote "these things" in his evaluation. O'Brien acknowledged that Blomenkamp told him to calm down, and the evaluation was discussed. When told that he did not get along with supervisors or coworkers, O'Brien noted that he always helped his coworkers and that "[t]he only person

I didn't get along with was my supervisor." O'Brien confirmed that concerns were expressed regarding the efficiency and quality of his work, and punctuality, and he became frustrated "because I was being told I didn't get along with my co-workers, my quality of work." There was no mention of asbestos or reports of asbestos during this evaluation meeting, and O'Brien affirmed that his frustrations at the meeting had nothing to do with asbestos. He acknowledged receiving a formal letter of reprimand after this meeting. O'Brien had a subsequent meeting with McMillan and Blomenkamp, which meeting O'Brien recorded without their knowledge. O'Brien confirmed that he had stated during the recorded meeting that he needed to work on punctuality, reliability, and getting along with his peers better.

In the meeting on July 16, 2009, O'Brien stated he met with Blomenkamp and Doug Townsend, an administrator "right [beneath]" the superintendent of schools. O'Brien also recorded that meeting without the knowledge of other persons present. O'Brien stated that he took to the meeting his laptop with pictures documenting the work he had done over a 6- to 7-month period and that he had written a response to the written reprimand and "was going to present that and they said I didn't need to." O'Brien claimed he asked twice if he could read it and was told he did not need to do so. The following colloquy then took place:

"[Counsel for BPS:] I'm going to read a [transcribed] quote that was stated on the recording No. 2 at 2720, quote, I know that me and [Potter] have butted heads a few times along the way. Those are areas I need to work on for sure as well as I believe reliability that goes along with punctuality are my biggest downfalls I believe as an employee for [BPS] that I need to address.

"[O'Brien:] That sounds right, yes.

"[Counsel:] Do you think you were being disciplined due to asbestos at this point?

"[O'Brien:] Yes.

> "[Counsel:] Did you bring any asbestos issues up at this point?
>
> "[O'Brien:] It was in my letter that day. I never got to read it.
>
> "[Counsel:] Did you say anything verbally regarding asbestos?
>
> "[O'Brien:] Yes, to Mike Potter.
>
> "[Counsel:] At this meeting?
>
> "[O'Brien:] No, not at that meeting. He wasn't at that meeting."

*O'Brien v. Bellevue Public Schools*, No. A-12-843, 2014 WL 1673287 at *1-3 (Neb. App. Apr. 29, 2014) (selected for posting to court Web site).

In addition to the facts recited in the Court of Appeals' opinion quoted above, we note that at the hearing on the motion for summary judgment, BPS offered and the court received the affidavit of Mike Potter, O'Brien's immediate supervisor, to which BPS' policy regarding the abatement of asbestos was attached. The policy, labeled an "Operational Procedure," was issued by the "Assistant Superintendent for Buildings and Grounds." Under the general heading "**Toxic Substances Control Act - Asbestos Abatement**," the policy stated:

> The purpose of this operational procedure is to state the district's philosophy or approach to meeting the requirements of the aforementioned act and to identify the specific duties to be performed by selected members of the administrative staff in meeting the requirements of the act and the district's philosophy.

The policy outlines BPS' approach to asbestos abatement, and then states that to effectively implement the general approach, responsibilities are grouped into seven areas. Under the area of "***Asbestos Abatement***," the policy provides:

> Personnel in the district who have disturbed asbestos containing material or who need to disturb asbestos containing material are to contact the building principal. The building principal or his/her designee shall be responsible for contacting the district's "designated person"

> before continuing. All asbestos incidences are to be under the supervision of the "designated person."

Regarding O'Brien's assignment of error regarding reporting, the Court of Appeals stated:

> The record is clear that O'Brien did not report violations of state and federal regulations either to BPS or to state and federal authorities. Rather, O'Brien simply reported the suspected presence of asbestos to his supervisor and to a building administrator, which he was expected to do pursuant to a school policy regarding asbestos.

*O'Brien v. Bellevue Public Schools*, 2014 WL 1673287 at *4.

The Court of Appeals then stated that O'Brien appeared to be arguing on appeal that

> he did not need to report *actual* violations of state and federal regulations related to asbestos for his wrongful discharge claim to survive; rather, he only needed to report a *potential* violation or *potential* asbestos hazard. And if he was fired for reporting a potential violation or potential asbestos hazard, [O'Brien claims] that violates public policy and qualifies as an exception to the at-will employment doctrine.

*Id.* at *5 (emphasis in original). The Court of Appeals recognized that O'Brien did not specifically assign the position reflected in this argument as error in his appellate brief, but his complaint raised the issue of wrongful discharge based on public policy, and because a summary judgment decision is based upon the pleadings and admitted evidence, the Court of Appeals reviewed the proceeding for plain error.

The Court of Appeals reviewed the jurisprudence regarding at-will employees, retaliatory discharge, and the public policy exceptions to the at-will employment doctrine, which we recite later in our analysis. In its opinion, the Court of Appeals treated O'Brien's claim as involving the reporting of the presence of asbestos, not irregularity in removal, and we agree that only reporting is relevant on appeal.

Although O'Brien did not plead any specific statutory or public policy exceptions in his complaint, the Court of Appeals noted that O'Brien argued in his brief on appeal that

certain federal statutes should be considered as providing a clear mandate of public policy. The three statutes cited to by O'Brien were from the following acts: (1) the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641 et seq. (2012); (2) the Asbestos School Hazard Abatement Act of 1984, 20 U.S.C. § 4011 et seq. (2012); and (3) the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601 et seq. (2012). The Court of Appeals stated that

> for the sake of completeness under our plain error review of the public policy exception to at-will employment, we have reviewed the federal statutes [to which O'Brien refers on appeal] to determine whether they apply to the reporting of the presence of asbestos or in any way support a clear mandate of public policy related to the reporting of the presence of asbestos. We find that they do not.

*O'Brien v. Bellevue Public Schools*, No. A-12-843, 2014 WL 1673287 at *6 (Neb. App. Apr. 29, 2014) (selected for posting to court Web site).

The Court of Appeals concluded that no public policy exception to the at-will employment doctrine was available to an employee reporting the potential presence of asbestos in the workplace and that "O'Brien's employment termination falls under the employment at-will doctrine," meaning BPS could terminate O'Brien's employment at any time with or without reason. *Id.* at *8. The Court of Appeals therefore affirmed the determination of the district court, which had granted summary judgment in favor of BPS.

We granted O'Brien's petition for further review.

## ASSIGNMENT OF ERROR

On further review, O'Brien claims generally that the Court of Appeals erred when it affirmed the grant of summary judgment in favor of BPS.

## STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as

to any material facts or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Gaytan v. Wal-Mart, ante* p. 49, 853 N.W.2d 181 (2014). In reviewing a summary judgment, the court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id*.

## ANALYSIS

O'Brien claims that the Court of Appeals erred when it affirmed the district court's order granting summary judgment in favor of BPS. O'Brien was an at-will employee at BPS, which generally means he could be terminated at any time for any reason, subject to certain public policy exceptions. Although the Court of Appeals examined certain federal statutes and concluded that they did not provide a public policy exception to the at-will employment doctrine, our disposition of this case does not depend on such analysis. For the purposes of this opinion, we will assume but not decide that an action may be brought under the public policy exception to the at-will employment doctrine based on the federal asbestos statutes and that O'Brien satisfactorily proved a prima facie case of retaliatory discharge. However, as reflected below, BPS produced undisputed evidence articulating a legitimate, permissible reason to discharge O'Brien, and even granting O'Brien all favorable inferences from the undisputed evidence, O'Brien presented no evidence that BPS' articulated explanation was pretextual and not the true reason for its decision. Accordingly, BPS was entitled to judgment as a matter of law and the Court of Appeals did not err when it affirmed the district court's order granting summary judgment in favor of BPS.

[3-5] Because this case was decided on a motion for summary judgment, we set forth legal principles applicable to a motion for summary judgment. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute. *Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014). In the summary judgment context, a fact is material only if it would

affect the outcome of the case. *Id*. If a genuine issue of fact exists, summary judgment may not properly be entered. *Id*. As noted above, on appeal, we give O'Brien as the nonmoving party the benefit of all reasonable inferences. See *Gaytan v. Walmart, supra*.

[6,7] It is undisputed that O'Brien was hired on an at-will basis. The general rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason. *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014). However, we have recognized a public policy exception to the at-will employment doctrine. *Id*. Under the public policy exception, an employee may claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Id*. Regarding the public policy exception, we have stated that

> it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated.

*Ambroz v. Cornhusker Square Ltd*., 226 Neb. 899, 905, 416 N.W.2d 510, 515 (1987). We have applied the public policy exception in various contexts. See *Jackson v. Morris Communications Corp*., 265 Neb. 423, 657 N.W.2d 634 (2003) (discussing cases where we have applied public policy exception and determining in that case that public policy exception applied when employee had been discharged for filing workers' compensation claim).

[8] In cases involving allowable claims of retaliatory discharge, we have applied the three-tiered burden-shifting analysis that originated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See *Riesen v. Irwin Indus. Tool Co*., 272 Neb. 41, 717 N.W.2d 907 (2006) (collecting cases). The cases sometimes use the language of alleged "discrimination" interchangeably with the language of "impermissible conduct." Regarding this burden-shifting analysis, we have stated:

> The following procedure is utilized under the three-tiered allocation of proof standard: First, the plaintiff has the burden of proving a prima facie case of discrimination. See [*Father Flanagan's Boys' Home v.*] *Goerke*[, 224 Neb. 731, 401 N.W.2d 461 (1987)]. Second, if the plaintiff succeeds in proving that prima facie case, the burden shifts to the defendant-employer to articulate some legitimate, nondiscriminatory reason for the plaintiff's rejection or discharge from employment. See *id*. This burden is a burden of production, not of persuasion. See *Lincoln County Sheriff's Office v. Horne*, 228 Neb. 473, 423 N.W.2d 412 (1988). The employer need only explain what has been done or produce evidence of a legitimate, nondiscriminatory reason for the decision. *Id*. It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the employee. *Id*. "'"If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted" . . . and "drops from the case . . . ."'" (Citation omitted.) [*Father Flanagan's Boys' Home v.*] *Agnew*, 256 Neb. [394,] 402, 590 N.W.2d [688,] 694 [(1999)], quoting *St. Mary's Honor Center* [*v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)].
>
> Third, assuming the employer establishes an articulated nondiscriminatory reason for disparate treatment of an employee, the employee maintains the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision; i.e., that the disparate treatment would not have occurred but for the employer's discriminatory reasons. *Lincoln County Sheriff's Office, supra*.

*Riesen v. Irwin Indus. Tool Co.*, 272 Neb. at 47-48, 717 N.W.2d at 914. At all times, the plaintiff retains the ultimate burden of persuading the fact finder that he or she has been the victim of intentional impermissible conduct. See *Helvering v. Union Pacific RR. Co.*, 13 Neb. App. 818, 703 N.W.2d 134 (2005). See, also, *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985).

We have not previously determined whether to allow an action for retaliatory discharge under the public policy exception to the at-will employment doctrine when an employee alleges that he or she has been discharged for internally reporting the presence or suspected presence of asbestos. O'Brien urges us to recognize a public policy exception to the at-will employment doctrine under such circumstances, and in support of his argument, he points to three federal statutes that he asserts support a manageable and clear mandate of public policy related to the reporting of the presence of asbestos. See, Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641 et seq.; Asbestos School Hazard Abatement Act of 1984, 20 U.S.C. § 4011 et seq.; and Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. § 3601 et seq.

We need not decide whether there is a public policy regarding internally reporting the presence or suspected presence of asbestos pursuant to an employer's policy in this case because, even assuming the existence of such policy and taking all inferences in favor of O'Brien, BPS is entitled to judgment as a matter of law.

*O'Brien's Prima Facie Case.*

[9] To establish a prima facie case of unlawful retaliation, an employee must show (1) that he or she participated in a protected activity, (2) that the employer took an adverse employment action against him or her, and (3) that a causal connection existed between the protected activity and the adverse employment action. *Trosper v. Bag 'N Save*, 273 Neb. 855, 734 N.W.2d 704 (2007).

With respect to the first element of a prima facie case, as stated above, we will assume without deciding for the purposes of this opinion that O'Brien was engaged in a protected activity when he reported the presence or suspected presence of asbestos to his employer, as he was required to do under his employer's policy. With respect to the second element, it is undisputed that O'Brien suffered an adverse employment decision when he was terminated on July 16, 2009.

[10,11] With respect to the third element of a prima facie case, a causal connection, we have recognized that because an employer is not apt to announce retaliation as its motive, an employee's prima facie case is ordinarily proved by circumstantial evidence. See *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). The Eighth Circuit Court of Appeals discussed the possibility that temporal proximity between protected activity and an adverse employment action can be sufficient to circumstantially demonstrate causality. See *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827 (8th Cir. 2002). Proximity in time between the protected activity and discharge is a typical beginning point for proof of a causal connection. See *Riesen v. Irwin Indus. Tool Co., supra*.

Reviewing the evidence favorably to O'Brien, we examine the temporal proximity between O'Brien's reports of the presence or suspected presence of asbestos and his termination of employment. O'Brien made his first report of asbestos in May 2009, and he made the second report in the second week of June. O'Brien's annual written evaluation is dated July 6, 2009, and he had a meeting regarding his evaluation with Matt Blomenkamp, Potter's immediate supervisor, and Potter on July 7. Another meeting was held on July 13, with Blomenkamp and James McMillan, a BPS administrator, regarding O'Brien's conduct at the July 7 meeting. After the July 13 meeting, Blomenkamp sent a letter dated July 13, 2009, to O'Brien stating that he was being placed on administrative leave. A final meeting was held on July 16, with Blomenkamp and Doug Townsend, a BPS assistant superintendent, and after this meeting, Blomenkamp sent O'Brien a letter informing him that he was terminated from his employment. For purposes of summary judgment, we consider the interval between O'Brien's second report of potential asbestos in the second week of June and his termination of employment to be sufficient for summary judgment purposes to establish a causal connection between his reports of suspected asbestos and his termination of employment. Thus, O'Brien successfully proved a prima facie case of impermissible termination of employment.

*BPS' Justification for Discharge.*

The burden shifted to BPS to articulate some legitimate, permissible reason for O'Brien's discharge from employment. See *Riesen v. Irwin Indus. Tool Co., supra*. In order to meet the requisite burden, the employer need only explain what has been done or produce evidence of a legitimate, permissible reason for the decision. *Id.*

BPS offered evidence to show that it terminated O'Brien's employment due to his poor job performance. As an employee of BPS, O'Brien was subject to annual evaluations, and the July 7, 2009, meeting was set as the yearend evaluation. From the time that O'Brien was employed by BPS from 2006 to July 2009, O'Brien had received three annual evaluations. O'Brien's written evaluation was dated July 6, 2009, and it covered the period from June 30, 2008, to June 30, 2009. It was the periodic yearend evaluation, not triggered by any event. The written evaluation stated that O'Brien was "Not Adequate" in the areas of teamwork, quantity of work, punctuality and attendance, reliability and dependability, conscientiousness, initiative, and cooperation.

On July 7, 2009, a meeting was held to discuss O'Brien's annual evaluation and job performance. O'Brien attended the meeting, along with Potter and Blomenkamp. The purpose of the July 7 meeting was not to terminate O'Brien's employment. However, when Potter and Blomenkamp expressed their concerns about O'Brien's job performance, O'Brien grew frustrated and raised his voice. O'Brien was dismissed from work for the day. The topic of asbestos was not mentioned by O'Brien or BPS at the July 7 meeting.

O'Brien was given a formal letter of reprimand dated July 7, 2009, from Blomenkamp summarizing the July 7 meeting. The formal letter of reprimand stated:

> Tuesday, July 07, 2009 a meeting was scheduled in . . . Potter's office to discuss your year-end evaluation. After reading the form you became upset. You started to criticize . . . Potter, raising your voice and stepping toward him aggressively. I asked you to calm down and to lower your voice. You ignored my request and continued

> to speak to . . . Potter in an inappropriate manner. Again, I asked you to calm down. At that time you directed your argument towards me. I tried to explain to you that you were not being fired, but that this meeting was to address areas of concern . . . Potter and I had with your job performance, including efficiency, quality of work, and being punctual. In each instance, you argued that . . . Potter wasn't doing his job, you were in no way in the wrong, and that I didn't have the experience or expertise to evaluate your job performance. As we continued to talk, you again became agitated, raising your voice and approaching . . . Potter in an aggressive manner. Again, I told you to sit down and act appropriately or you would be sent home. You didn't follow my direction. I asked you a second time to calm down. You again ignored me. At that time I told you to go home and that you'd be paid for the day. As you walked out of the office, you continued to speak to both [Potter] and I inappropriately. A few minutes later, you returned to the office and tried to quarrel with the both of us. I again told you to go home. After an array of inappropriate comments and criticisms I asked you to leave for a third time. You then left the transportation building.

Although there is evidence in the record that O'Brien behaved in an aggressive manner toward Potter, there is also evidence in the record tending to minimize the encounter. On July 12, O'Brien signed the letter indicating that he was aware that a copy would be placed in his file.

On July 13, 2009, O'Brien attended a meeting with Blomenkamp and McMillan. At the July 13 meeting, O'Brien admitted to poor performance in the areas of reliability, punctuality, and getting along with coworkers. He also apologized for his behavior at the July 7 meeting. O'Brien did not mention asbestos during the July 13 meeting.

After the July 13, 2009, meeting, Blomenkamp sent O'Brien a letter dated July 13, 2009, which stated in part:

> This letter is in regard to your recent evaluation and past and present behavior as an employee for [BPS]. Your

> inability to cooperate with your supervisors, poor work performance and refusal to be formally evaluated showed a lack of judgment, respect and conscientiousness; all of which are essential functions of your position.

The letter informed O'Brien that another meeting would be held on July 16 and that at the meeting, O'Brien would have the opportunity to be heard regarding his employment status. O'Brien was also placed on administrative leave on July 13.

On July 16, 2009, a final meeting was held. O'Brien, Blomenkamp, and Townsend attended the meeting. At the July 16 meeting, O'Brien admitted that reliability and punctuality were his "biggest downfalls" and that he had "butted heads" with Potter. O'Brien was informed that the July 16 meeting was his opportunity to address anything related to his employment, but he did not mention asbestos at this meeting. After the meeting, O'Brien was sent a letter stating that his employment was terminated. The letter stated that his "inability to cooperate with [his] supervisors, inefficient work performance and lack of punctuality show poor judgment, respect and conscientiousness; all of which are essential functions of [his] position."

Based on the above evidence presented by BPS, we determine that BPS articulated a legitimate reason for terminating O'Brien's employment based on his poor job performance. BPS met its burden.

*O'Brien's Failure to Present Evidence of Pretext.*

Once BPS articulated a legitimate and permissible reason for terminating O'Brien's employment, the burden shifted back to O'Brien, and O'Brien was required to present evidence showing that BPS' proffered explanation for firing him was merely pretextual. See *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006). Because the case was decided on summary judgment, we give O'Brien the favorable inferences from the evidence, and we must determine whether O'Brien presented evidence to create a genuine issue of fact for the fact finder. O'Brien's evidence, when viewed

in the light most favorable to him as the nonmoving party, needed to create an inference in reasonable minds that BPS had retaliatory motives for firing him and that the explanation for terminating O'Brien was pretextual. O'Brien presented no such evidence.

[12] In employment law involving alleged impermissible termination, a "pretext" is found when the court disbelieves the reason given by an employer, allowing an inference that the employer is trying to conceal an impermissible reason for its action. See *Riesen v. Irwin Indus. Tool Co., supra*, citing *Ryther v. KARE 11*, 108 F.3d 832 (8th Cir. 1997). In *Smith v. Allen Health Systems, Inc.*, 302 F.3d 827 (8th Cir. 2002), involving alleged discrimination, the Eighth Circuit Court of Appeals stated that although strong evidence of a prima facie case of discrimination can also be considered to establish pretext, proof of pretext or actual discrimination requires more substantial evidence. The rationale expressed in *Smith* applies to the instant case decided on summary judgment. In the present case involving an alleged impermissible termination, O'Brien offered no material evidence supporting an inference of pretext in his prima facie case or in his rebuttal.

The appellate courts in Nebraska have previously considered pretext, and we refer to them for guidance. In *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 587, 546 N.W.2d 827, 830 (1996), a retaliatory discharge case, an African-American employee, who was not in proper uniform, was asked by a manager, "'Where's your smock at, boy?'" The employee claimed that calling him "'boy' was 'a polite way of calling me a nigger.'" *Id.* The next day, the employee called the employer's headquarters and registered a complaint. The employee was fired 2 weeks later for reporting to work 3 hours late. The employee filed a claim with the Nebraska Equal Opportunity Commission (NEOC) based on having been fired allegedly in retaliation for complaining to headquarters or otherwise opposing an unlawful practice. The NEOC dismissed the claim, and the district court affirmed the NEOC's ruling. On appeal, the Court of Appeals determined that the district court did not err when it determined that the employee's complaint was properly dismissed by the NEOC. Despite the temporal proximity

between the complaint regarding the statement and the termination, the NEOC had determined that even if the employee established a prima facie case, the explanation given by the employer was not pretextual. The evidence showed that the employee had arrived at work 3 hours late, was fired by an individual not involved in the incident, and had been late on other occasions. The employee did not present evidence tending to negate the employer's evidence.

Unlike the outcome in *Rose*, in *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006), we considered an appeal which had been decided on summary judgment and determined that the inferences from an employer's action terminating the employment of its employee was potentially a pretext for impermissible termination precluding summary judgment. In *Riesen*, the employee filed an action against his former employer alleging that he was fired in retaliation for filing a workers' compensation claim. The employer claimed the employee was terminated for misrepresenting his past employment on his employment application. The employee presented evidence showing that there had been no similar disciplinary actions for other employees. Additionally, we noted evidence of statements allegedly made by the employer which tended to support an inference that the employer's proffered reason for the employee's termination was pretextual. The employer's several negative comments regarding the employee included: "'The little son of a bitch is faking and he only did this to get his raise'"; "'it would be a lot easier on all of [them] if [the employee would] just quit'"; and "'"[y]ou *finally* messed up . . . you lied on your *work comp* application."'" *Id.* at 54-55, 717 N.W.2d at 918-19 (emphasis in original). Viewing the evidence in a light most favorable to the employee, we determined that a genuine issue of material fact existed as to whether the reason proffered by the employer for the termination of the employee's employment was a pretext for an impermissible termination.

In the present case, O'Brien contends that BPS' reasons for firing him are pretextual. In this regard, he points to two factors: (1) the temporal proximity between reporting suspected asbestos and being fired and (2) his suggestion that in prior

years, his work was satisfactory. As to temporal proximity, O'Brien relies on the period between his reports of potential asbestos and his termination and contends that such proximity "alone should be enough to generate a material issue of material fact as to the issue of pretext." Memorandum brief for appellant in support of petition for further review at 8. We do not agree. Just as in *Rose v. Vickers Petroleum*, 4 Neb. App. 585, 546 N.W.2d 827 (1996), the mere temporal proximity between O'Brien's reports of suspected asbestos and his firing does not overcome BPS' specific, direct, and considerable evidence regarding poor job performance. Unlike *Riesen v. Irwin Indus. Tool Co., supra*, where the employee pointed to several negative statements regarding the employee made by the employer, O'Brien has presented no such evidence, circumstantial or direct, and he further acknowledges that asbestos was not mentioned in the meetings with BPS prior to his firing.

O'Brien also contends that a genuine issue of material fact exists as to whether BPS' explanation was pretextual, because he claims that he performed his job in a positive manner in the years prior to his termination of employment. O'Brien indicates that he received three annual evaluations during the time he was employed by BPS from 2006 to July 2009. O'Brien stated that he had received positive annual evaluations regarding his job performance until the yearend review in July 2009, although the prior evaluations are not in the record.

Viewing the evidence in the light most favorable to O'Brien, and even assuming his annual evaluations prior to July 2009 were satisfactory in the sense that his employment was not terminated earlier, it does not necessarily follow that his yearend evaluation covering June 30, 2008, to June 30, 2009, which is squarely at issue in this case, must also be positive. In fact, the evidence and O'Brien's admissions regarding the current year are to the contrary.

In his deposition, O'Brien admitted that reliability and punctuality were his "biggest downfalls" and that he believed he was being fired for his aggressive behavior. O'Brien's deposition with respect to the July 7, 2009, meeting regarding his evaluation contains the following colloquy:

> [Counsel for BPS:] Did you believe you were being terminated at that interview — I mean evaluation?
>
> [O'Brien:] Did I believe I was being terminated?
>
> [Counsel for BPS:] At that evaluation on July 7th, 2009.
>
> [O'Brien:] Yes. I thought I was on my way out.
>
> [Counsel for BPS:] And why was that?
>
> [O'Brien:] Because of the conversation I had with the contractor that I worked with on my last project with BPS.
>
> . . . .
>
> [Counsel for BPS:] And what did that contractor tell you?
>
> [O'Brien:] That . . . Blomenkamp had told him that they had pulled me off that project, my last project was a Nature Outdoor Explore Classroom because of my — that I was aggressive, my attitude, aggressive attitude.

O'Brien testified that he recorded the July 16, 2009, meeting with Blomenkamp and Townsend without their knowledge. O'Brien's deposition contains the following colloquy with respect to the July 16 meeting:

> [Counsel for BPS:] I'm going to read a [transcribed] quote that was stated on the recording No. 2 at 2720, quote, I know that me and [Potter] have butted heads a few times along the way. Those are areas I need to work on for sure as well as I believe reliability that goes along with punctuality are my biggest downfalls I believe as an employee for [BPS] that I need to address.
>
> [O'Brien:] That sounds right, yes.

We also note that asbestos was not mentioned by O'Brien or BPS representatives at any of the July meetings prior to his termination.

In sum, O'Brien did not present any evidence the inference from which created a genuine issue as to whether BPS' evidence articulating the permissible reason of poor job performance was a pretext for an impermissible termination. Thus, the district court did not err when it granted summary judgment in favor of BPS, and the Court of Appeals did not err when it affirmed this ruling.

## CONCLUSION

For the reasons explained above, O'Brien failed to present evidence of a genuine issue of material fact that the permissible reason of poor job performance articulated by BPS for his termination was a pretext; therefore, BPS is entitled to judgment as a matter of law. The Court of Appeals did not err when it affirmed the district court's order granting summary judgment in favor of BPS.

AFFIRMED.

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## STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. JAMES E. CONNOR, RESPONDENT.

856 N.W.2d 570

Filed December 12, 2014. No. S-13-963.

1. **Disciplinary Proceedings: Appeal and Error.** In attorney discipline and admission cases, the Nebraska Supreme Court reviews recommendations de novo on the record, reaching a conclusion independent of the referee's findings.
2. **Disciplinary Proceedings.** To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
3. ____. Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances. In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.

Original action. Judgment of suspension.

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

Thomas J. Anderson, of Thomas J. Anderson, P.C., L.L.O., and Tim J. Kielty for respondent.

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

PER CURIAM.

## I. NATURE OF CASE

The issue presented in this attorney discipline proceeding is what discipline should be imposed on James E. Connor, respondent, for violating certain provisions of the Nebraska Rules of Professional Conduct and his oath of office as an attorney. These violations occurred while respondent was serving as guardian and conservator for Geraldine Dell and as attorney for the personal representative of her estate.

The referee recommended a 90-day suspension of respondent's license to practice law without any subsequent period of probation. Respondent does not challenge the factual findings of the referee or the allegations in the formal charges, but takes two exceptions to the referee's report. Respondent takes exception to the referee's finding that posttraumatic stress disorder (PTSD) was not a mitigating factor and to the recommendation of a 90-day suspension of respondent's license to practice law.

Respondent's violations are undisputed, and in light of the various factors present in this case, we suspend respondent for a period of 30 days with a subsequent 1-year period of monitored probation.

## II. FACTS

On September 12, 1979, respondent was admitted to practice law in Nebraska, and he engaged in the private practice of law in Omaha, Nebraska, at all times relevant to this case. This disciplinary proceeding relates to formal charges originally filed on November 1, 2013, by the Counsel for Discipline of the Nebraska Supreme Court, relator, and amendments filed on December 26, 2013, and April 24, 2014.

Relator alleged that certain conduct by respondent from approximately 2005 to 2012 violated respondent's oath of office as an attorney and the Nebraska Rules of Professional Conduct. Count I alleged that respondent's acts and omissions during his guardianship and conservatorship of Dell violated Neb. Ct. R. of Prof. Cond. §§ 3-501.1 (competence), 3-501.3 (diligence), and 3-508.4 (misconduct). Count II alleged that respondent's acts and omissions during his

legal representation of the personal representative and residual beneficiary of Dell's estate, Thomas J. Hurst, violated §§ 3-501.1, 3-501.3, and 3-508.4, as well as Neb. Ct. R. of Prof. Cond. § 3-501.15 (safekeeping property).

The referee's hearing was held on February 27 and March 12, 2014. Testimony was offered from respondent, Hurst, Hurst's new attorney, and respondent's secretary, and a total of 56 exhibits were admitted into evidence. The substance of the referee's findings based on evidence adduced at the hearing and respondent's admissions of the allegations contained in the formal charges may be summarized as follows:

### 1. Count I

On January 24, 2003, respondent caused to be filed in the Douglas County Court a petition to appoint himself as temporary and permanent guardian and conservator for Dell, his cousin. The appointment came after Dell was found unconscious on the floor of her home and was hospitalized. Dell had never married and had no children. On February 28, the court appointed respondent as guardian and conservator for Dell. Following her hospitalization, Dell resided in several assisted living facilities and never again resided in her home. Respondent had authority to sell Dell's home in Omaha.

Respondent, as guardian and conservator, was ordered to file an inventory with the court within 90 days of his appointment. Respondent failed to file an inventory within the 90 days. In response, the court issued an order to show cause directing respondent to file the inventory by July 15, 2003. Respondent filed an inventory on July 25, which listed Dell's home at a value of $28,600, together with bonds, mutual funds, mortgages, notes, cash, and insurance totaling nearly $220,000. He failed to timely file annual accountings of the estate assets and annual reports of Dell's condition.

Dell died on February 5, 2006, but respondent did not file an application to terminate the guardianship and conservatorship until August 12, 2009. He did not timely file his final accounting, and over a period of several years, respondent repeatedly requested continuances of court hearings related to closing the estate.

### 2. Count II

Subsequent to Dell's death, respondent located her "Last Will and Testament," and on September 14, 2006, he filed an "Application for Informal Probate" in Douglas County Court. The will nominated Dell's friend, Margaret Fogerty, to serve as personal representative of the estate, and on September 21, Fogerty was so appointed by the court.

Respondent did not file an inventory for the estate until March 8, 2007. On the inventory, respondent again listed the estate's assets, including the house in Omaha, at approximately $220,000. Respondent and Fogerty opened an account for the estate at a bank in Omaha.

On April 25, 2007, Fogerty died, but respondent did not learn of her death for several months. After Fogerty's death, the successor personal representative named in Dell's will refused to serve. Respondent persuaded Hurst to serve as personal representative of the estate. Hurst accepted only on the condition that respondent assume all the duties and responsibilities of the personal representative and that Hurst not be required to write a "whole bunch of checks." Hurst is a second cousin to both Dell and respondent and is the residual beneficiary of Dell's estate. The court appointed Hurst as personal representative, and Hurst retained respondent as his attorney.

After respondent failed to appear at a scheduled hearing to close the estate on July 2, 2008, the court issued a show cause order directing respondent to close the estate by August 26. Respondent admitted that he repeatedly asked for continuances throughout 2008 and 2009 because he and Hurst were trying to renovate Dell's house for sale. Respondent admitted that he did not seriously turn his attention to the house until the spring of 2009.

By 2009, the house had become rundown and had severely depreciated in value. Realtors who appraised the house opined that it would take $35,000 to $45,000 to renovate and restore the property to a potential market value of $75,000 to $80,000. At respondent's suggestion, Hurst agreed to undertake renovations in preparation for sale. The project started in the summer of 2009 and was completed in May 2011, at which time the house sold for $72,000. Personal property was

removed from the house and placed in storage. Storage fees totaled $2,825.

Respondent used cash drawn from the estate checking account to pay for much of the renovation. When he prepared an accounting after the house was sold, he discovered an apparent shortfall between cash expenditures and receipts that he had obtained from the contractor.

Respondent failed to file an "Inheritance Tax Worksheet" until August 3, 2012, and the inheritance tax was not paid until September 6. The accrued penalty interest on the tax was $2,057.34. Respondent reimbursed the penalty interest when the estate was finally closed.

On October 8, 2012, Hurst dismissed respondent as his attorney, and in a December 18 grievance letter to relator, Hurst complained that it had taken more than 6½ years to close the estate, which had still not been closed at the time Hurst filed the complaint.

Hurst filed a "Petition for Surcharge and Judgment" against respondent in Douglas County Court on January 31, 2013. Hurst retained an attorney to represent him, and the attorney performed an accounting that showed an apparent shortfall of $13,893.54. It was not until the hearing on February 27, 2014, that respondent was finally able to account for nearly all the cash expenditures he made as Hurst's attorney.

Relator filed formal charges against respondent on November 1, 2013. A hearing before the referee was held on February 27 and March 12, 2014.

### 3. Referee's Findings

On count I, the thrust of which was a lack of competence and diligence while serving as Dell's guardian and conservator, the referee found that respondent's conduct violated his oath of office. The referee found by clear and convincing evidence that respondent failed to timely file the initial inventory, as well as annual accountings and reports, causing the court to repeatedly issue orders to show cause. He also failed to file his final accounting and to terminate the guardianship and conservatorship until 3 years after Dell's death. The referee found

those actions to be a failure to provide competent representation and reasonable diligence and promptness.

The referee rejected relator's claims that respondent's actions in failing to sell Dell's home amounted to incompetence, because many of the delays were outside respondent's control or were a simple matter of judgment. He rejected the allegation that respondent misled the court in requesting continuances, noting that "[t]here is not clear and convincing evidence that respondent gave false reasons in support of his requests for continuance or that he misled the Court in any way." The referee found that there was no evidence of dishonesty, but that the length of time to close the estate exhibited a lack of competence, diligence, and promptness.

On count II, regarding respondent's handling of Dell's estate, the referee also determined that respondent's actions violated his oath of office. The referee found that some of the initial delays resulted from Fogerty's reclusiveness and inaccessibility during her time as personal representative, compounded by her subsequent death, as well as the successor personal representative's refusal to serve and, finally, Hurst's grudging acceptance of the responsibility. Moreover, the contractor's slow progress in making renovations and the slow housing market during the winter of 2010-11 caused further delay. Ultimately, the referee determined that respondent's "inability to account for all of the cash expenditures prevented him from completing the accounting and closing the estate" and that clear and convincing evidence showed that "respondent was, in large part, responsible for the fact that the estate of Geraldine Dell was not closed for more than seven years from the day she died."

The referee determined that respondent lacked competence and diligence in not attempting to sell or otherwise dispose of the estate's personal property. The personal property that respondent caused to be stored was of little or no value and was eventually abandoned by Hurst after storage fees in the amount of $2,825 had been incurred.

Regarding allegations relating to the safekeeping of estate funds, the parties did not dispute that respondent had Hurst sign numerous blank checks in advance to avoid trips to

Gretna, Nebraska, where Hurst resided. Moreover, the contractor performing the renovations insisted on being paid in cash. Although respondent initially inspected the invoices and receipts from the contractor, he gradually began to simply place the receipts in a folder at his office without inspecting them. Many of the receipts and invoices were merely informal, handwritten notes from the contractor rather than official receipts.

Respondent withdrew large amounts of cash from the estate's bank account instead of writing separate checks to the contractor. He kept the cash in an envelope at his office and used it to pay the contractor's invoices. The referee found that respondent "grossly mishandled" the funds from Dell's estate. Although not "client funds, they were funds for which respondent's client . . . was responsible and accountable."

We find that the evidence is clear and convincing that respondent failed to maintain complete and accurate records of such account funds in violation of § 3-501.15(a). However, we also note that respondent never comingled the estate cash with other cash, and eventually, respondent was able to account for the discrepancies and apparent shortcomings in the estate's funds.

### 4. Sanctions

The referee did not find any aggravating circumstances in respondent's actions. The referee recommended a 90-day suspension of the respondent's license to practice law, due in large part to the various mitigating factors that existed in the case. The referee noted that "the evidence is persuasive that [respondent's] intentions were honest and that he was motivated by a strong feeling of obligation to a family member."

The referee succinctly summarized the additional mitigating factors as follows: (1) Respondent did not misappropriate estate funds; (2) the violations represented an isolated incident rather than a pattern of misconduct; (3) respondent had an unblemished disciplinary record over the entire length of his legal career, which spanned 35 years; (4) respondent was fully cooperative with the referee's office during his investigation of the grievance; (5) the record contained numerous

letters from active and retired judges and lawyers attesting to respondent's honesty, integrity, professionalism, and compassion for his clients, his pro bono work, and his overall competence as an attorney; (6) the letters also attested to the fact that respondent is a valued member of the bar, particularly with respect to his work with the Nebraska Lawyers Assistance Program.

Respondent is a Vietnam War veteran who was wounded during his service, but the referee rejected respondent's contention that PTSD contributed to his conduct in the case. The referee noted a letter from respondent's psychiatrist that stated: "[I]t is possible that the type of stress from this probate could have impacted [respondent's] dealing with his responsibility. But I am not aware of any major PTSD symptoms occurring during this time, and he took no medicine to deal with PTSD." There was no additional evidence that PTSD caused or was connected with respondent's failure to provide diligent and competent representation in this case.

## III. ASSIGNMENTS OF ERROR

Respondent takes two exceptions to the report of the referee filed on April 28, 2014. Respondent takes exception to the report's finding that PTSD was not a mitigating factor. Respondent also takes exception to the report's recommendation of a 90-day suspension of his license.

In all other respects, respondent does not challenge or contest the truth of the findings of fact by the referee.

## IV. STANDARD OF REVIEW

[1] In attorney discipline and admission cases, we review recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[1]

## V. ANALYSIS

Under Neb. Ct. R. § 3-304, 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

[1] *State ex rel. Counsel for Dis. v. Smith*, 287 Neb. 755, 844 N.W.2d 318 (2014).

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."

[2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, we consider the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.[2]

[3] Each attorney discipline case must be evaluated individually in light of its particular facts and circumstances.[3] In addition, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[4]

### 1. Posttraumatic Stress Disorder

We first address respondent's exception regarding the referee's refusal to consider PTSD as a mitigating factor. We see no indication in the record that PTSD played a role in the admitted violations. On the contrary, the referee considered a letter from respondent's psychiatrist that indicated PTSD in no way affected respondent's actions or ability to represent the interests of his clients or otherwise perform his duties. Accordingly, we also decline to consider PTSD as a mitigating factor.

### 2. Conclusion as to Discipline

#### (a) Count I: Diligence and Competence

With regard to respondent's misconduct involving the lack of diligence and competence, which was due in large part

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[2] *State ex rel. Counsel for Dis. v. Barnes*, 275 Neb. 914, 750 N.W.2d 668 (2008).

[3] *State ex rel. Counsel for Dis. v. Pivovar*, 288 Neb. 186, 846 N.W.2d 655 (2014).

[4] *State ex rel. Counsel for Dis. v. Beltzer*, 284 Neb. 28, 815 N.W.2d 862 (2012).

to his inexperience with probate cases, we find our decision in *State ex rel. Counsel for Dis. v. Seyler*[5] to be relevant. In *Seyler*, we determined that a 30-day suspension was appropriate where an attorney who normally worked in the area of estate planning accepted representation of a plaintiff in a personal injury case despite having very little litigation experience. The attorney in *Seyler* failed to respond to discovery requests and court orders, failed to attend hearings, and failed to keep his clients reasonably informed about developments in the case. All the mitigating factors present in *Seyler* are present in this case to a greater extent, and none of the aggravating factors were present.

In *State ex rel. Counsel for Dis. v. Barnes*,[6] we found a 30-day suspension appropriate for an attorney who was retained to help an organization obtain nonprofit corporation status, even though he primarily practiced in the areas of domestic relations and criminal law. The attorney's inexperience in *Barnes* led to various mistakes in the nonprofit's application for tax-exempt status. In *Barnes*, the attorney contended with personal and family health issues during the representation that caused him mental and financial stress. Additionally, like respondent, the attorney in *Barnes* cooperated with the Counsel for Discipline, admitted most of the allegations in the formal charges, and acknowledged responsibility for his actions, and there was no record of other complaints against the attorney. We find the scope of aggravating and mitigating circumstances in *Barnes* to be analogous to the present case.

Both relator and respondent cite to our decision in *State ex rel. Counsel for Dis. v. Holthaus*[7] because of its factual similarity to these proceedings. Similar to respondent, the attorney in *Holthaus* did not challenge the truth of the allegations of his violations in the underlying probate case that led to sanctions. He took upon himself all the duties and responsibilities

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[5] *State ex rel. Counsel for Dis. v. Seyler*, 283 Neb. 401, 809 N.W.2d 766 (2012).

[6] *Barnes, supra* note 2.

[7] *State ex rel. Counsel for Dis. v. Holthaus*, 268 Neb. 313, 686 N.W.2d 570 (2004).

of personal representative while serving as an attorney for the personal representative. Thereafter, he failed to timely file pleadings and tax returns, did not communicate with the residual beneficiary of the estate, and improperly handled estate assets. We determined that the violations warranted a 6-month suspension of his license to practice law.

We distinguish this case from *Holthaus* insofar as the various mitigating factors that exist in the present case did not exist in *Holthaus*. For example, in the present case, respondent's violations were isolated incidents rather than a pattern of misconduct. Respondent was candid in his admissions and expressions of remorse. Respondent had a 35-year legal career without prior misconduct. Numerous retired and active judges and lawyers wrote letters on respondent's behalf attesting to respondent's good reputation and his work with the Nebraska Lawyers Assistance Program. No such mitigating factors were present in *Holthaus*.

The referee found that respondent's intentions were honest and that he was motivated by a feeling of obligation to help a family member whom he believed had no one else to assist her in these matters. Respondent has stated numerous times that this was the only probate case he had ever taken, and he intends to decline to accept representation on any probate or estate cases in the future.

(b) Count II: Safekeeping Client Funds

Respondent cites to our decision in *State of Nebraska ex rel. NSBA v. Abrahamson*[8] to support his exception to a 90-day suspension. Indeed, we find our decision in that case to be helpful in considering respondent's violations. In *Abrahamson*, we concluded that a 90-day suspension was appropriate for an attorney who failed to maintain complete and accurate records of client funds coming into his possession and failed to render appropriate accounts of client funds. During the hearing in that case, the attorney's own accountant

[8] *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

testified that "on a scale of 1 to 10, with 10 being good bookkeeping practices, [the attorney's] accounting practices merited a grade of 1."[9]

As in *Abrahamson*, respondent's actions in handling the estate funds were neither intentionally deceptive nor were they deliberate attempts to misappropriate client funds. Instead, we find that his actions are more adequately characterized as gross mishandling or "negligent ineptitude."

In *Abrahamson*, we also considered various mitigating factors, including the attorney's cooperation during the disciplinary proceedings, the correction of his flawed accounting practices, and his continuing commitment to the legal profession and the community. Those mitigating factors are present in this case to an even greater extent, as noted above.

(c) Discipline

The diligent and observant handling of client funds is among the most important safeguards against the appearance of misconduct and is fundamental to maintaining the client's confidence in the legal representation and the public's perception of the legal profession. Although respondent's actions in handling the estate funds were inadvertent, our decision here is instructive in preventing similar scenarios by other members of the bar in the future.

Based on a review of prior cases involving similar violations, and upon due consideration of the record, we find that a 30-day suspension with a 1-year period of probation is appropriate. After said suspension is served, respondent shall automatically be reinstated to practice law provided that relator has not notified this court of further violations during that time period.

Upon reinstatement, respondent shall complete 1 year of monitored probation, which shall include but not be limited to the following:

(1) On a monthly basis, respondent shall provide the monitoring attorney that has been approved by relator with a list of all cases for which respondent is then currently responsible,

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[9] *Id.* at 636, 634 N.W.2d at 465.

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) 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.

(3) 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

This court finds by clear and convincing evidence that respondent has violated his oath of office and §§ 3-501.1, 3-501.3, and 3-501.15 of the Nebraska Rules of Professional Conduct. Respondent is suspended from the practice of law for 30 days, effective immediately, and is subject to probation with monitoring for 1 year immediately following the 30-day suspension. At the end of the 30-day suspension, respondent shall automatically be reinstated to the practice of law, provided that relator has not notified this court that respondent has violated a disciplinary rule during his suspension.

Respondent is ordered to obtain an attorney approved by relator who shall monitor respondent's cases and legal activity in accordance with the requirements set forth in this opinion. Respondent is directed to pay the 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) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

# In re Estate of Edward J. Stuchlik, Jr., deceased, and In re Trust Created by Edward J. Stuchlik, Jr., deceased. John E. Stuchlik, appellant, v. Margaret Stuchlik, Personal Representative and Cotrustee, and Kenneth Stuchlik, Cotrustee, appellees.

857 N.W.2d 57

Filed December 12, 2014. No. S-13-1118.

1. **Decedents' Estates: Appeal and Error.** In reviewing a judgment of the probate court in a law action, the Supreme Court does not reweigh evidence, but considers 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.
2. ____: ____. The probate court's factual findings have the effect of a verdict, and an appellate court cannot set those findings aside unless they are clearly erroneous.
3. **Judgments: Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Fraud: Judgments.** The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.
5. **Wills: Contracts.** Oral testimony as to a contract for wills is allowed only where the will itself references the contract.
6. **Decedents' Estates: Wills: Contracts: Breach of Contract.** The effect of a valid contract for wills is not to create a cause of action against the decedent's estate, but instead is to create a cause of action for breach of contract.
7. **Wills: Contracts.** Even where a valid contractual will exists, that existence does not make the surviving party's will irrevocable.
8. **Decedents' Estates: Wills: Contracts: Breach of Contract.** If a surviving party revokes or breaches a mutual contractual will, an action lies for a breach of contract against the estate of the survivor.
9. **Decedents' Estates: Jurisdiction.** County courts have exclusive jurisdiction over all matters relating to decedents' estates, including the probate of wills and construction thereof.
10. **Decedents' Estates: Jurisdiction: Equity.** In exercising exclusive original jurisdiction over estates, county courts may apply equitable principles to matters within probate jurisdiction.
11. **Decedents' Estates: Jurisdiction: Wills: Trusts: Minors: Mental Competency.** County courts have jurisdiction over all subject matter relating to estates of decedents, including construction of wills and determination of heirs and successors of decedents, estates of protected persons, protection of minors and incapacitated persons, and trusts.
12. **Courts: Jurisdiction.** County courts have full power to make orders, judgments, and decrees and to take all other actions necessary and proper to administer justice in the matters which come before them.

13. **Trusts: Property.** A trust creates a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.
14. **Trusts.** Trustees owe the beneficiaries of a trust duties that include loyalty, impartiality, prudent administration, protection of trust property, proper record-keeping, and informing and reporting.
15. ____. The duty of loyalty requires a trustee to administer the trust solely in the interests of the beneficiaries.
16. ____. In exercising powers of control over interests in an enterprise held by a trust, a trustee shall act in the best interests of the trust beneficiaries.
17. ____. If a trust has two or more or more beneficiaries, a trustee has a duty of impartiality among beneficiaries.
18. **Trusts: Words and Phrases.** Impartiality means that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries.
19. **Trusts: Conflict of Interest.** A cause for removal is appropriate for the best interests of the trust estate where hostile relations exist between a trustee and beneficiaries of such a nature as to interfere with proper execution of the trust, particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his or her duties as trustee under the terms of the trust.
20. ____: ____. When an entity is held by a trust, and particularly where a controlling share of that entity is exercised against the best interests of any trust beneficiary, it is a breach of the duty of loyalty.
21. **Trusts: Attorney Fees: Costs.** Attorney fees and expenses will ordinarily be allowed to a trustee where they were incurred for the benefit of the estate.
22. ____: ____: ____. If a fiduciary's defense of his or her acts is fully successful, he or she is entitled to recover the reasonable costs necessarily incurred in preparing his or her final account and in successfully defending it against objections.
23. ____: ____: ____. A fiduciary's defense must be only substantially successful, not 100 percent successful, in order for the fiduciary to be entitled to recover costs and attorney fees.
24. **Courts: Trusts: Attorney Fees: Costs: Appeal and Error.** The county court or district court on appeal has discretionary power and authority to order payment out of the trust estate for costs of litigation and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a trustee in good faith.

Appeal from the County Court for Saunders County: PATRICK R. MCDERMOTT, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Paul R. Elofson, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellant.

Richard L. Rice and Andrew C. Pease, of Crosby Guenzel, L.L.P., for appellees.

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

MCCORMACK, J.

## I. NATURE OF CASE

This matter involves petitions filed by John E. Stuchlik seeking removal of the personal representative of the Edward J. Stuchlik, Jr., estate and removal of the cotrustees of the Edward J. Stuchlik, Jr., Family Trust. The personal representative and one of the cotrustees is John's mother and the spouse of the decedent. The other cotrustee is John's brother. The probate dispute involves assets held in a testamentary trust established by the last will and testament of the decedent.

## II. BACKGROUND

On March 22, 2012, Edward J. Stuchlik, Jr. (Stuchlik), died testate. He was survived by his wife, Margaret L. Stuchlik, and his five children, John, Edward J. Stuchlik II, LeAnne M. Bullock, Linda M. Voboril, and Kenneth G. Stuchlik. This action is by John against Margaret as both personal representative and cotrustee and Kenneth as cotrustee. John filed a petition in the probate proceedings to remove Margaret as personal representative. John also asked for trust administration and to have Margaret and Kenneth removed as cotrustees. Among other things, John alleged that Margaret was managing trust assets against the will of Stuchlik and harming John's interests as a beneficiary. John asked the court to appoint him as personal representative and trustee in their place.

### 1. REAL ESTATE AND PARTNERSHIP

Before Stuchlik's death, Stuchlik and Margaret formed a limited partnership in the name of Stuchlik Farms Ltd. in the course of their tax and estate planning. They conveyed into the partnership all of the farm real estate that they owned.

Originally, Stuchlik and Margaret were the general partners and owners of 100 percent of the general partnership interests. Eventually, Stuchlik and Margaret gifted equal limited partnership interests to John, Edward, and Kenneth. Currently, the partnership is owned 22.1888 percent by John as a limited

partner. Edward and Kenneth each also own a 22.1888-percent limited partnership interest in his own name. Margaret holds a 16.7168-percent limited partnership interest and a 1-percent general partnership interest in her own name. Margaret and Kenneth hold a 16.7168-percent interest as cotrustees of the family trust, including the 1-percent general partnership interest originally held by Stuchlik. The farm real estate is the only asset held by the partnership.

### 2. Stuchlik Family and Family Trust

Stuchlik left a will executed on February 8, 2011. Stuchlik's will provided that, aside from certain personal items that were bequeathed to Margaret, all assets were to be transferred to the family trust. The terms of the trust stated that the income and assets were to be expended as needed to support Margaret during her lifetime and that, upon her death, the assets were to be distributed according to certain provisions.

The provisions of the trust are set forth in the fifth article of Stuchlik's will. The terms state:

> Upon the death of my spouse . . . the trustee shall distribute all of my estate and trust estate as follows:
>
> 1) [personal property items to be designated according to safe deposit box list].
>
> 2) . . . trucks, pickups or machinery and grain shall be sold and the proceeds thereof divided equally to [Kenneth, John, and Edward], share and share alike.
>
> 3) I acknowledge that a portion or all of my farm real estate may be titled in Stuchlik Farms, Ltd. . . . but it is my desire and request that my sons as a condition of their inheritance, exchange deeds so as to divide my farm real estate [such that each of the sons would receive a specified parcel or parcels of farm real estate.]
>
> . . . .
>
> (h) I devise all the rest, residue and remainder of my estate and trust estate to [Kenneth, John, and Edward], share and share alike.

The parcel specifically set aside for John included the "home place." John and his family have lived at the home place

sporadically for over 20 years, with some absences while John was working out of state.

Margaret was named as personal representative of the estate, and Margaret and Kenneth were named cotrustees of the family trust.

Margaret stated in an affidavit to the court that all estate assets were moved into the family trust, and this evidence was corroborated by her attorney at oral argument. Thus, the estate is ready to be closed.

### 3. Alleged Contract for Wills or Oral Trust

John argues that there was either a contract for wills or an oral trust between Margaret and Stuchlik. He asserts as evidence the language of the will indicating Stuchlik's "desire and request that my sons[,] as a condition of their inheritance, exchange deeds so as to divide my farm real estate as follows."

As further evidence of the contract for wills or an oral trust, John produced a document handwritten by Margaret to the couple's attorney, Curtis Bromm. The letter states that "[i]n case of our death Dad & I want the land and our possessions divided this way," and it then devises part of their land to John. The letter was signed by both Margaret and Stuchlik on March 1, 2009.

At a deposition on July 15, 2013, Margaret engaged in the following dialog with counsel:

> [Q:] Did you and [Stuchlik] sit down and talk about how . . . you're going to make distribution of your estate?
>
> [A]: It's in the will.
>
> [Q:] And you discussed it, and then you — either with . . . Bromm or in his presence and discussed that issue or with — you went to . . . Bromm and told him what you wanted to do; is that correct?
>
> [A]: That's what [Stuchlik] did.
>
> [Q]: All right. And were you present?
>
> [A]: I was present.
>
> [Q:] And so . . . Bromm drafted a will consistent with your husband's wishes and understandings, and he drafted

> a will that was consistent with your wishes and understandings. And those two wills, based upon what you've shared with me, were based upon an agreement between you and [Stuchlik] about how your joint assets would be conveyed; is that correct?
>
> [A]: Yes.
>
> . . . .
>
> [Q:] So do I understand that your will and [Stuchlik's] will as of February 2011 were identical in terms of how they transferred property?
>
> [A]: Explain "identical."
>
> [Q:] Other than the name changes, the dispositive provisions about how property was to be dissolved, distributed, they were identical in format; is that correct?
>
> [A]: Yes.

Margaret later testified at trial that she did not make any contract for wills with Stuchlik.

At trial, Bromm was also called as a witness. The court allowed John's counsel to inquire into the making of Stuchlik's will, but only to the extent that Bromm felt he was within his ethical boundaries. The court stated, "I think it's going to have to be done kind of question by question because some questions may not be ones that I would feel interfere with the attorney-client privilege with [Margaret] and there will be some that may very directly bear on her privilege with . . . Bromm." Eventually, John's counsel asked the court to review Bromm's file on the Stuchliks. The court declined to review the case file in camera. The court allowed in evidence only the letter from Margaret and Stuchlik containing directives for their will.

### 4. Activities of Cotrustees

After Stuchlik's death, Margaret conveyed the home place owned by the partnership to Edward, Voboril, and Kenneth as tenants in common, subject to a life estate granted to Margaret. As the warranty deed states, "[Margaret], a single person, Grantor, in consideration of One Dollar ($1.00) and other good and valuable consideration, conveys to Grantees, [Edward, Voboril, and Kenneth], as tenants-in-common, an undivided

one-half interest in and to the following described real estate . . . .” The warranty deed then purports to convey the home place from Margaret to Edward, Voboril, and Kenneth.

In January 2013, Margaret, Kenneth, and Edward entered the home place premises without the consent of John. They were accompanied by a county sheriff’s deputy who testified that he did so “through a civil standby that [he] was requested to do sometime at the beginning of this year.” The county sheriff’s deputy testified that he was directed by the sheriff to accompany Margaret and her two children “to make sure that there’s no sort of altercation between the two parties.” Margaret, Kenneth, and Edward entered the residence and changed the locks. A propane tank was removed from the home place residence, which caused the home to go without heat for several days and subsequently caused damage from frozen pipes. Since the retaking of the home place, Margaret, Kenneth, and Edward have indicated to John that they intend to demolish the residence. John alleges that Margaret’s and Kenneth’s treatment of his personal property in the residence constituted a conversion.

It is alleged that the partnership entered into leases with members of the family that were below fair market value. John alleges the leases are below fair market value because they are 10-year crop share leases, and he believes Margaret’s life expectancy is less than 10 years. Therefore, it would result in John’s share being burdened by the lease. However, the evidentiary rulings of the county court limited the record in regard to these allegations.

### 5. County Court Proceedings

In this action, John filed a petition in the probate proceedings to remove Margaret as a personal representative. John also asked for trust administration and to have Margaret and Kenneth removed as cotrustees. John asked the court to appoint him as personal representative and trustee in their place.

The matters were heard in August 2013, and on September 13, the county court entered an order on John’s petitions. The court stated that there were three main issues it needed

to resolve: (1) the extent of its jurisdiction in this matter; (2) whether there was a contract for wills between Margaret and Edward and, if so, whether it had any bearing on this proceeding; and (3) whether the actions of which John complained were taken by Margaret and/or Kenneth in their capacities as personal representative and cotrustees.

(a) County Court Jurisdiction

The court concluded that its jurisdiction extended only to matters related to the property of the estate and to the corpus of the family trust and that any claim related to the operation and assets of the limited partnership (including all of the real estate involved) was outside of the court's probate jurisdiction. The court emphasized that issues pertaining to the home place were related to the partnership, and not to Stuchlik's estate, and that therefore, any claim relating to John's ouster from the home place was outside of the county court's limited jurisdiction.

The argument over the scope of the court's jurisdiction in the matter led to discovery disputes between the two parties. Midway through the proceedings, the disputes led the court to issue an order limiting the scope of discovery to "discovery relevant to administration of the estate of the decedent and to property of the estate." Even after the discovery order, John continued to solicit evidence along the lines of his broader view of the court's jurisdiction. He was allowed several times to make offers of proof. The court ruled again during trial:

> We are not going into any more about the partnership. I think the ouster of [John] was a partnership action. They removed him from partnership property. I can't fix that as a probate judge. And I have — I've been ruling that way since the first protective order in discovery that I put out. And that's my ruling. It's not probate property.

(b) Existence of Contract for Wills

The court concluded that there was insufficient evidence of a contract for wills between Margaret and Stuchlik and,

instead, found the estate plan consistent with a mutual will arrangement.

### (c) Fiduciary Duties With Respect to Estate Property

The court found that actions taken by Margaret and Kenneth in their capacities as personal representative and cotrustees did not show evidence of mismanagement under the statutory definition. The court therefore dismissed John's petition to remove Margaret as personal representative. With respect to the family trust, the court granted the request for trust administration, but only to the extent that the court granted registration of the family trust, and denied all other relief, including the request to remove the cotrustees.

### (d) Posttrial Motions and Orders

John moved for a new trial at the end of the proceedings. Both parties moved for attorney fees. John's motion for a new trial was denied. Margaret and Kenneth were awarded attorney fees.

## III. ASSIGNMENTS OF ERROR

John's assignments of error, consolidated and restated, are the following: (1) failing to find that a contract for wills existed between Margaret and Stuchlik; (2) failing to admit evidence and allow discovery which could have led the court to find that a contract for wills existed; (3) finding that the county court lacked jurisdiction over matters pertaining to the farm real estate held by the partnership, reasoning that Margaret's activities as general partner had no bearing on her fitness as a personal representative and cotrustee of the family trust; (4) failing to find that Margaret's and Kenneth's activities warranted removal as personal representative and cotrustees; (5) failing to award John his attorney fees and costs, and awarding Margaret and Kenneth attorney fees to be paid from the estate; and (6) overruling John's motion for a new trial.

## IV. STANDARD OF REVIEW

[1,2] In reviewing a judgment of the probate court in a law action, the Supreme Court does not reweigh evidence,

but considers 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.[1] The probate court's factual findings have the effect of a verdict, and an appellate court cannot set those findings aside unless they are clearly erroneous.[2]

[3,4] However, on a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.[3] The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.[4]

## V. ANALYSIS

As will be explained in more detail below, we affirm in most respects, but reverse, and remand for the limited purpose of reviewing Margaret's and Kenneth's activities in regard to the partnership as evidence of any potential breach of fiduciary duties as cotrustees.

Margaret has already completed her duties as personal representative and is waiting to be discharged pending the result of this action. Therefore, any action for her removal as personal representative is without merit.

With regard to John's petition to remove Margaret and Kenneth as cotrustees, much of John's argument is based on a theory of a contract for wills or an oral trust between Margaret and Stuchlik. We find these arguments wholly irrelevant to the petition to remove a cotrustee. An action to remove cotrustees of a trust must center on any serious breaches by the cotrustees.[5] Therefore, the emphasis on the real estate and partnership property is misplaced.

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[1] See *In re Estate of Lamplaugh*, 270 Neb. 941, 708 N.W.2d 645 (2006).

[2] See *id.*

[3] *Id.*

[4] *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[5] See Neb. Rev. Stat. § 30-3862 (Reissue 2008).

However, to the extent Margaret's and Kenneth's activities as general partners of the partnership relate to their fitness as cotrustees, the court erred in concluding that it lacked jurisdiction to consider any evidence pertaining to those allegations. We remand the cause for a determination of whether the partnership activities related back to their fiduciary duties as cotrustees.

### 1. Removal as Personal Representative

The county court was correct in its finding that Margaret had not breached any of her duties as personal representative, because her duties in that capacity were completed when the estate property was transferred into the family trust. All estate assets are now in the family trust. The estate's closure is awaiting the end of this action. Accordingly, the only issue left is Margaret's and Kenneth's actions as cotrustees of the family trust.

### 2. Removal as Cotrustees

Removal of a cotrustee is proper under § 30-3862 where (1) the trustee has committed a serious breach of trust; (2) the trustee fails to cooperate among fellow cotrustees; (3) the trustee is unfit, unwilling, or persistently fails to administer the trust effectively, and the court determines that removal would best serve the interests of the beneficiaries; and (4) there has been a substantial change in circumstances or removal is requested by all of the qualified beneficiaries and the court finds removal would best serve these interests. John alleges that Margaret should be removed as cotrustee for failing to abide by a contract for wills or an oral trust between herself and Stuchlik. This cannot be the case, because a failure to abide by a contract for wills or an oral trust is not a basis for removing a cotrustee under this removal statute. However, evidence of Margaret's and Kenneth's activities as general partners of the partnership may be relevant to determine whether there is a basis for their removal as cotrustees under this statute.

### (a) Contract for Wills or Oral Trust

#### *(i) Contract for Wills*

The county court was correct in finding that there was not enough evidence to support a contract for wills and that even if there was, such a contract was not relevant to this action. John argues that Margaret had entered into a contract for wills with Stuchlik before his death and that the two had contracted to equally divide the trust between their three sons. However, there is no evidence of such a contract. Further, the proper case for a breach of a contract for wills is not a probate action against the decedent's estate, but, rather, is an action for breach of contract or an action against the breaching party's estate. Therefore, a contract for wills is wholly irrelevant to this action to remove cotrustees.

[5] In Nebraska, a contract for wills "can be established only by (1) provisions of a will stating material provisions of the contract; (2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or (3) a writing signed by the decedent evidencing the contract."[6] "The execution of a joint will or mutual wills *does not create a presumption* of a contract not to revoke the will or wills."[7] The comments to the Uniform Trust Code, as adopted by Nebraska, allow oral testimony only if the will references the contract.[8]

The county court found that the evidence of a letter from Margaret and Stuchlik directing Bromm on the division of the estate was merely the evidence of an intent to have mutual wills, and not an agreement to will. The court correctly found that the language in the will did not raise a presumption of a contract for wills. We agree.

[6-8] Even if such a contract for wills existed, the proper action for enforcement would not be a probate action for removal of a cotrustee. The effect of a valid contract for wills

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[6] Neb. Rev. Stat. § 30-2351 (Reissue 2008).

[7] *Id.* (emphasis supplied).

[8] See *Johnson v. Anderson*, 278 Neb. 500, 771 N.W.2d 565 (2009).

is not to create a cause of action against the decedent's estate, but instead is to create a cause of action for breach of contract.[9] In *Pruss v. Pruss*,[10] beneficiaries filed an action seeking relief that would compel the distribution of a wife's estate under the terms of a mutual contractual will, rather than under a subsequent will executed after the death of the husband. There, we held that even where a valid contractual will existed, that existence did not make a will irrevocable. Wills by their nature are ambulatory and may be revoked at any time.[11] Instead, if the surviving spouse revokes or breaches the mutual contractual will, an action may lie for breach of contract *against the estate of the survivor*.[12] Therefore, in the present case, the cause of action was improperly brought as an action for the removal of the personal representative and cotrustees, and instead should have been brought as a breach of contract action against Margaret, as the surviving spouse, by the supposed beneficiaries.

*(ii) Oral Trust*

John asks this court to find, as an alternative to the contract for wills, that an oral trust had been established through the evidence at trial. Neb. Rev. Stat. § 30-3833 (Reissue 2008) states that "a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms . . . may be established only by clear and convincing evidence."

The county court found that there was no evidence of such an oral trust. Given our standard of review in these proceedings, we must give weight to the court's evidentiary findings. We do not reweigh evidence, but consider evidence in the light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party.[13] We find no clear error in the county court's finding.

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[9] *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994).

[10] *Id.*

[11] See *id.*

[12] See *id.*

[13] *In re Estate of Lamplaugh, supra* note 1.

Because we find that the county court was correct in finding that there was no contract for wills or an oral trust, and because an existence of such a contract would be irrelevant to the removal of a trustee, we find no merit to John's arguments that the court erred in not allowing discovery on the matter, erred in granting attorney-client privilege, or erred in failing to review Bromm's testimony in camera for relevancy.

(b) Jurisdiction Over Partnership Actions

Finally, John asserts that the court erred in failing to find that Margaret's conduct as a general partner warranted her removal as cotrustee. The county court concluded that it could not base Margaret's removal on any conduct pertaining to the partnership. The court reasoned that it lacked jurisdiction over matters to do with the partnership and the real estate held by the partnership. However, 16.7168 percent of the partnership, including a 1-percent general partnership interest, is held in the family trust. To the extent that the cotrustees' activities toward this partnership are relevant to their fitness as cotrustees, the court erred in concluding it lacked jurisdiction. Therefore, the court erred in denying discovery and in refusing to consider whether partnership actions reflected on the propriety of Margaret and Kenneth as cotrustees of the family trust.

[9-12] Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 2012) states that the county court shall have exclusive jurisdiction over all matters relating to decedents' estates, including the probate of wills and construction thereof. In exercising exclusive original jurisdiction over estates, county courts may apply equitable principles to matters within probate jurisdiction.[14] We have held that county courts have jurisdiction over all subject matter relating to estates of decedents, including construction of wills and determination of heirs and successors of decedents, estates of protected persons, protection of minors and incapacitated persons, *and trusts*.[15] Such courts have full power to make

[14] Neb. Rev. Stat. § 30-2211 (Cum. Supp. 2014).

[15] See, *id.*; *In re Estate of Layton*, 207 Neb. 646, 300 N.W.2d 802 (1981).

orders, judgments, and decrees and to take all other actions necessary and proper to administer justice in the matters which come before them.[16]

The county court here reasoned that "[m]erely because the matter raised relates in some manner to an estate or a trust does not turn the county court into a court of general equitable jurisdiction as [the partnership] is the exclusively [sic] purview of the district court." The court was correct to decline adjudication of partnership disputes. A probate action is not the proper forum for resolving issues concerning any possible conversion or disputes regarding the real estate. But, John is asking for Margaret and Kenneth to be removed as cotrustees of the family trust due to a breach of their fiduciary duties. That trust holds over 16 percent of the partnership, as well as a general partnership interest. The 1-percent general partnership interest held by the family trust, with Margaret and Kenneth as cotrustees, combined with Margaret's personal 1-percent general partnership interest, effectively gives Margaret 100 percent of the general partnership power.

Assuming John's allegations are true, under Nebraska's common definitions of a trustee's fiduciary duties, Margaret and Kenneth may have breached fiduciary duties to John as a beneficiary of the trust through their management of the partnership. In particular, John argues that the cotrustees are engaged in self-dealing, actions of personal animus and friction that interfered with the proper administration of the estate and trust, and failing to abide by the terms of the trust. If so, actions taken with regard to the real estate (held by the partnership) may be relevant evidence of a breach of fiduciary duties.

[13,14] A trust creates a fiduciary relationship in which one person holds a property interest subject to an equitable obligation to keep or use that interest for the benefit of another.[17] A trustee has the duty to "administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform

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[16] *Id.*

[17] *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992).

Trust Code."[18] The Nebraska Uniform Trust Code, in turn, states that trustees owe the beneficiaries of a trust duties that include loyalty, impartiality, prudent administration, protection of trust property, proper recordkeeping, and informing and reporting.[19]

[15,16] The duty of loyalty requires a trustee to administer the trust solely in the interests of the beneficiaries.[20] As § 30-3867(c) states, "A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with . . . (2) the trustee's descendants, siblings, parents, or their spouses." Further, the statute states, "A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust."[21] Particularly pertinent is the following section of the duty of loyalty statute:

> In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, *the trustee shall act in the best interests of the beneficiaries*. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise *in the best interests of the beneficiaries*.[22]

Nebraska's statutes are derived from the Restatement (Third) of Trusts.[23] The comments in the Restatement state that the policy behind this law is to prevent trustees' placing themselves in positions in which they may be tempted to act for

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[18] Neb. Rev. Stat. § 30-3866 (Reissue 2008).

[19] See Neb. Rev. Stat. §§ 30-3866 through 30-3870 (Reissue 2008). See, also, *In re Estate of Robb*, 21 Neb. App. 429, 839 N.W.2d 368 (2013).

[20] § 30-3867(a).

[21] § 30-3867(d).

[22] § 30-3867(f) (emphasis supplied).

[23] Restatement (Third) of Trusts (2007).

reasons other than the best interests of the beneficiaries.[24] "This policy of strict prohibition also provides a reasonable circumstantial assurance . . . that beneficiaries will not be deprived of a trustee's disinterested and objective judgment."[25]

[17-19] If a trust has two or more beneficiaries, a trustee has a duty of impartiality among beneficiaries.[26] This includes a duty to "act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests."[27] Comments in the Restatement suggest that the duty of impartiality includes a duty to conform to the settlor's intentions and the terms of the trust instrument.

> It is not only appropriate but required by the duty of impartiality that *a trustee's treatment of beneficiaries, and the balancing of their competing interests, reasonably reflect any preferences and priorities that are discernible from the terms . . . , purposes, and circumstances of the trust and from the nature and terms of the beneficial interests*. Thus, unfortunately, *it is often the case* that the implications of the duty of impartiality are complicated by the difficulties of determining, and the vagueness of, some *relevant aspects of the settlor's intentions and objectives*—much of which is left to interpretation and inference.[28]

Impartiality means that a trustee's treatment of beneficiaries or conduct in administering a trust is not to be influenced by the trustee's personal favoritism or animosity toward individual beneficiaries.[29] As we have held:

> "A court of equity has power and authority to remove a trustee from his office, when any substantial personal disability exists in the trustee, when he fails to perform the duties of his position, when he has misconducted

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[24] See *id.*, § 78.

[25] *Id.*, comment *b*. at 96.

[26] § 30-3868.

[27] *Id.*

[28] Restatement, *supra* note 23, § 79 at 129 (emphasis supplied).

[29] *Id.*

> himself in office, *when hostile relations exist between the trustee and his beneficiaries of such a nature as to interfere with the proper execution of the trust*, or under any other conditions which render his removal necessary for the best interests of the trust estate, *particularly where it appears that the trustee's personal interests conflict with, or are antagonistic to, his duties as trustee under the terms of his trust*."[30]

[20] Nebraska law states that when an entity is held by a trust, and particularly where a controlling share of that entity is exercised against the best interests of any trust beneficiary, it is a breach of the duty of loyalty.[31] That is exactly what is purported to have happened in this case. Margaret and Kenneth control the partnership through the general partnership interest held in the family trust. The partnership interest is the largest holding of the family trust. Though Margaret has a lifetime interest, her children have equal interests in the remainder. John alleges that the cotrustees are acting adversely to his interests as a beneficiary. He alleges that through Margaret's actions as a general partner, she has caused assets of the partnership to be sold or leased at below market value, presumably causing the partnership interest held by the family trust to decrease in value. We do not know if these allegations have any truth, but the court had jurisdiction to consider these allegations and any evidence relevant thereto. It is conceivable that an examination into the actions of the partnership may have revealed evidence that Margaret and Kenneth were violating their duty of loyalty and against self-dealing.

Further, Nebraska law states that a trustee must act impartially between two or more beneficiaries.[32] It violates a trustee's duty of impartiality to administer a trust with personal favoritism or animosity toward a beneficiary.[33] Through the general partnership held in trust, Margaret and Kenneth have

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[30] *Reed v. Ringsby*, 156 Neb. 33, 39-40, 54 N.W.2d 318, 322 (1952) (emphasis supplied). See, also, § 30-3862.

[31] § 30-3867(f).

[32] § 30-3868.

[33] Restatement, *supra* note 23, § 79.

a management interest in the partnership. It is arguable that they may have managed the partnership in such a way as to treat John's interest in the trust unfairly. Since Margaret and Kenneth have shown John disfavor, it may be relevant to examine the actions of the partnership in order to determine if the cotrustees intended to treat John unfairly in regard to his beneficial trust interest. The actions of Margaret and Kenneth in their capacities as partners may be evidence as to a breach of the duty of impartiality.

In sum, the county court was correct that it is not a proper forum for a partnership action. Most of the issues in this action pertain to the real estate held by the partnership, and for resolution of any of those issues, the county court was correct to decline jurisdiction. However, the county court does have jurisdiction over testamentary trusts and, in this case, the family trust. All parties must bear in mind that any evidence regarding the partnership must pertain to the cause for removal of a cotrustee and any breach of fiduciary duties by Margaret and Kenneth, in their capacities as cotrustees, not in their capacities as general partners. The county court may find that much evidence regarding partnership disputes is not relevant to the action for removal of the cotrustees.

### (c) Attorney Fees

[21-24] Finally, we address the issue of attorney fees. Attorney fees and expenses will ordinarily be allowed to a trustee where they were incurred for the benefit of the estate.[34] We have stated that to make a trustee personally responsible for all reasonably incurred attorney fees for the successful defense of his or her actions as a fiduciary would impose an unconscionable burden on fiduciary service without justification.[35] And, if the fiduciary's defense of his or her acts is fully successful, he or she is entitled to recover the reasonable costs necessarily incurred in preparing his or her final account and in successfully defending it against objections.[36] We have

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[34] *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997).

[35] *Id.*

[36] See *id.*

stated that the standard is "substantially successful" and that the fiduciary's defense does not have to be 100 percent successful in order for the fiduciary to be entitled to recover costs including attorney fees.[37] Similarly, the county court or district court on appeal has discretionary power and authority to order payment out of the trust estate for costs of litigation and, in proper cases, to order payment of reasonable fees to attorneys for services rendered to a trustee in good faith.[38]

Pending the county court's determinations on remand, we leave the issue of attorney fees to be decided pursuant to these rules.

## VI. CONCLUSION

For the foregoing reasons, we find that a contract for wills or an oral trust between Margaret and Stuchlik is irrelevant to an action to remove a personal representative or a cotrustee and that thus, any discovery or evidentiary objections are irrelevant to this ruling. We also find that removal of a personal representative is not proper in this case, because the personal representative properly transferred all estate assets into the family trust pursuant to the will, and that thus, all duties as personal representative have been completed. We affirm the rulings of the county court in these respects. We in part reverse the judgment and remand the cause to the county court in order to determine if any evidence of the cotrustees' actions with regard to the partnership are relevant to their fiduciary duties as cotrustees, potentially warranting removal.

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

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[37] *Id.* at 345, 562 N.W.2d at 362.

[38] See *id.*

# IN RE GUARDIANSHIP OF BENJAMIN E., AN ALLEGED INCAPACITATED PERSON. RHONDA P., APPELLANT, V. BENJAMIN E., APPELLEE.

856 N.W.2d 447

Filed December 12, 2014. No. S-14-030.

1. **Guardians and Conservators: Appeal and Error.** An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Attorney and Client.** A lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.
4. ____. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
5. **Attorney and Client: Mental Competency.** In representing a client with diminished capacity, a lawyer may take reasonably necessary protective action if the lawyer believes that the client is at risk of substantial physical, financial, or other harm unless action is taken and the client cannot adequately act in his or her own interest.
6. **Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.
7. ____. A capricious decision is one guided by fancy rather than by judgment or settled purpose.
8. **Decedents' Estates: Guardians and Conservators: Legislature: Intent.** Neb. Rev. Stat. § 30-2627(b)(4) (Reissue 2008) evidences a legislative preference that a parent of an incapacitated person be appointed guardian over a person with no priority.
9. **Evidence: Records: Appeal and Error.** A bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.

Appeal from the County Court for Lancaster County: THOMAS W. FOX, Judge. Reversed and remanded for further proceedings.

Steffanie Garner Kotik, of Kotik & McClure Law, for appellant.

Chris Blomenberg, and Michael Milone, Senior Certified Law Student, of McHenry, Haszard, Roth, Hupp, Burkholder & Blomenberg, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Cassel, J.

## INTRODUCTION

Rhonda P., the mother of an incapacitated adult, appeals from an order of the county court appointing an unrelated individual as the adult's guardian. Although we find no merit to her contention that the incapacitated adult's court-appointed attorney committed professional misconduct, we agree that the county court erred in passing over her statutory priority for appointment.[1] Without specific findings, any meaningful explanation, or a record establishing any apparent basis for deviating from the statutory priority, the appointment was arbitrary and capricious. We reverse the judgment and remand the cause for further proceedings.

## BACKGROUND

### Incapacitated Adult

Benjamin E. is a 22-year-old incapacitated adult. He was born with a genetic condition, apparently relating to his chromosomes, and is unable to hear or speak. According to Rhonda, he is in need of "24-hour watch." At the guardianship hearing, the parties stipulated that Benjamin was in need of a guardian.

### Petition for Appointment of Guardian

On July 1, 2013, Rhonda filed a petition for the appointment of a guardian for Benjamin. In the petition, she alleged that an emergency existed because Benjamin would turn 21 years old in mid-July and she feared he would leave his group home without a guardianship in place. Rhonda nominated

[1] See Neb. Rev. Stat. § 30-2627 (Reissue 2008).

herself as guardian. She was Benjamin's sole surviving parent, because his father had passed away in November 2006.

The county court appointed Douglas Hand to act as guardian ad litem for Benjamin. Hand recommended that the court appoint an attorney to represent Benjamin's interests. Although no order of appointment appears within the record, an attorney represented Benjamin at the guardianship hearing.

### Evidence at Guardianship Hearing

At the guardianship hearing, much of the testimony concerned Benjamin's former placement in the home of Sharmon Shireman. Benjamin was placed in Shireman's home when he was 16 years old and remained in her care for 5 years. He was removed from Shireman's home in July 2013. At the time of Benjamin's removal, Shireman was an extended family home provider through Region V Services (Region V).

Rhonda testified that Benjamin's removal was prompted by an allegation of abuse made by a friend of Shireman's. Specifically, the friend alleged that Benjamin was being left in his "pull-up" for 12 or 24 hours at a time. However, Rhonda refuted the allegation. She explained that she had unlimited access to Shireman's home and that she never observed any concerns. And Rhonda stated that if Benjamin was left in his pull-up for extended periods of time, she would have noticed because his skin would have turned red and raw. Additionally, she testified that she was informed by Region V that the allegation was unfounded.

Leslie Walters, Benjamin's community support coordinator with Region V, testified that the allegation against Shireman was made by Shireman's daughter and her daughter's "life partner." Walters was not permitted to testify as to the specific allegation of abuse. Benjamin was removed from Shireman's care and placed into a group home with an available bedroom. Region V terminated its contract with Shireman the next day.

Walters further testified as to other concerns regarding Shireman's care of Benjamin. During Benjamin's placement with Shireman, she relocated to four different locations.

And it was always unclear to Walters who was residing in Shireman's home. Shireman's son was in and out of her home at various times. And a grandson resided with Shireman for a period of time when she was living in a mobile home. Additionally, Walters recalled a girl living with Shireman that she claimed to be caring for. Walters further suggested that criminal charges had been filed against Shireman or someone residing in her home, although Walters and Region V had not been made aware of the charges.

Walters was also asked if she had any concern whether Shireman had provided adequate clothing for Benjamin. Walters replied that Benjamin was always appropriately dressed for the weather, but that Shireman would complain of not receiving sufficient funds to buy clothing or to pay for Benjamin's room and board. Walters explained that funds for Benjamin's clothing and room and board came from his Social Security benefits, of which Rhonda was the payee. And since Benjamin began residing in the group home, Region V had requested additional clothing from Rhonda, which it had not yet received.

However, Walters' knowledge of Rhonda and Benjamin's relationship was limited. She testified that she had observed Rhonda and Benjamin interact only a couple of times at meetings. Walters recalled one particular meeting during which Rhonda attempted to encourage Benjamin to stay on task and the two hugged. Regarding her own relationship with Rhonda, Walters described their communication as tense and limited. However, Walters affirmed that an ongoing relationship with Rhonda could be maintained if Benjamin remained in Region V's care.

As to Benjamin's progress in the group home, Walters testified that she had observed improvement in several areas. Benjamin had experienced success with toilet training and bathing and had developed a strong connection with one of his roommates. Walters summarized his improvement by stating, "He's just done a lot of things that I guess I wasn't aware that he had done ever before." Walters opined that a group home setting was appropriate for Benjamin and recommended that he continue in such a setting.

Rhonda's testimony, however, was less favorable of Region V and Benjamin's experience in the group home. Rhonda testified that Benjamin had sustained an injury to his toe, rendering it "about ready to fall off," and numerous "scrapes" to his knees. She iterated that she had never received as many accident reports within the 5 years that Benjamin lived with Shireman as she had received recently. She further claimed that Region V failed to undertake required monthly "book works and stuff" while Benjamin lived with Shireman and that Walters was rude to her, would not call her, and contacted her only through text messages sent late at night.

Rhonda testified that based upon her concerns, she planned to remove Benjamin from Region V's care if appointed guardian. She stated that she would maintain his placement in a group home, but with a service provider other than Region V. However, during cross-examination, Rhonda was asked if she would return Benjamin to Shireman's care if such an option were available. Rhonda replied: "If [Shireman] passed one of the other [service providers] and they thought she was good enough, yes." But she later testified that if the service provider believed a group home was better for Benjamin, she would maintain him in such a setting.

Rhonda was further asked if she had ever discussed returning Benjamin to Shireman's care with Benjamin's service coordinator with the Department of Health and Human Services. Rhonda confirmed that such a discussion had taken place. However, she claimed that the service coordinator informed her that there was no reason Shireman could not be approved to care for Benjamin.

As to Rhonda's fitness to be Benjamin's guardian, she testified that she would be the best guardian because she had been "his voice since the day he was born." She was familiar with his moods and had taken care of him since birth. She also "made sure nothing's ever happened to him," and she was there for him if something went wrong. And in her rebuttal testimony, she affirmed that she understood the concerns regarding Shireman and that she would take those concerns into consideration. She further stated that she would work with

the group of people providing care for Benjamin and consider their concerns as well.

Kendra Augustine was called to testify by Benjamin's appointed attorney and affirmed that she was willing to serve as Benjamin's guardian. Augustine explained that she was familiar with Benjamin because she had been employed as his support worker with Region V for 5 years, ending in 2009. During her employment with Region V, Augustine had frequent contact with Benjamin. She was with him in the morning Monday through Friday and picked him up from school three to four times per week. She also provided respite care one weekend per month, which lasted from Friday through Monday.

As to Rhonda's interaction with Benjamin, Augustine testified that the nature of the interaction depended upon the day. Some days there would be "really good interaction," and other days, Rhonda would be "stressed." Augustine described that Rhonda had "a lot going on" with her other children and that "she kind of would do her own thing," knowing that Benjamin was with Augustine. When asked whether she had ever been concerned for Benjamin's safety with Rhonda, Augustine responded that there were two occasions when Benjamin's shoes needed to be refitted and that it seemed to take Rhonda "a very long time" to get Benjamin into the necessary appointments.

Augustine also described one occasion when she went to Shireman's home in January 2009. Augustine observed that there were several people and two pit bull dogs in the home. She further observed that there were not many items in Benjamin's bedroom, but that he had a bed, a dresser, and clothing. When asked whether she saw any concerns in Shireman's home, Augustine responded that she did not.

Lastly, the county court received testimony from Hand, Benjamin's guardian ad litem. Hand testified that he met with Benjamin on one occasion in Shireman's residence in order to ascertain whether he needed a guardian. But Hand was unable to communicate with him. Both Rhonda and Shireman were present, and Rhonda informed him that she wanted to

be Benjamin's guardian and to maintain his placement with Shireman. At that time, Hand determined that Rhonda would be an appropriate guardian.

However, Hand was later contacted by Region V and the Department of Health and Human Services with concerns regarding Benjamin's living arrangement. And Hand's opinion as to an appropriate guardian subsequently changed. He testified that his current preference was for an independent third party to serve as guardian. He further opined that Benjamin should remain in a group home setting. And he recommended that if Rhonda were appointed guardian, she be restricted from placing Benjamin in Shireman's care.

### County Court's Order

The county court entered an order finding that Benjamin was an incapacitated person and in need of a full guardianship. The court appointed Augustine as guardian. But it neither made findings nor provided an explanation for passing over Rhonda.

Rhonda filed a timely notice of appeal, and the case was assigned to the Nebraska Court of Appeals' docket. We moved the case to our docket pursuant to statutory authority.[2]

## ASSIGNMENTS OF ERROR

Rhonda assigns as error, reordered and restated, (1) alleged professional misconduct committed by Benjamin's appointed attorney in his representation of Benjamin and (2) the county court's appointment of Augustine as Benjamin's guardian over Rhonda's statutory priority.

## STANDARD OF REVIEW

[1,2] An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court.[3] When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported

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

[3] *In re Conservatorship of Gibilisco*, 277 Neb. 465, 763 N.W.2d 71 (2009).

by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[4]

## ANALYSIS

We first address Rhonda's allegation that the attorney appointed to represent Benjamin committed professional misconduct. Finding this allegation to be without merit, we then turn to her assertion that the county court erred in appointing Augustine as Benjamin's guardian over Rhonda's statutory priority.

### Professional Misconduct

Rhonda asserts that Benjamin's appointed attorney violated applicable rules of professional conduct by nominating Augustine to be Benjamin's guardian. She claims that Benjamin's attorney was not representing Benjamin's wishes and direction in making the nomination, in violation of Neb. Ct. R. of Prof. Cond. § 3-501.2(a) (rev. 2008). Rhonda further asserts that Benjamin's attorney consulted with Region V in nominating Augustine, but that Region V had a financial incentive to prevent Rhonda from being appointed Benjamin's guardian.

[3] Section 3-501.2(a) provides, in pertinent part, that "a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued." This case presents our first opportunity to examine § 3-501.2(a) in the context of a client who is an incapacitated adult clearly in need of a guardian.

Although Rhonda asserts that Benjamin's attorney failed to follow his wishes and direction, she acknowledges in her brief that Benjamin was unable to communicate his wishes and direction to his appointed attorney. Recognizing this problem, she shifts her argument. She argues that because Benjamin's attorney was unable to ascertain Benjamin's wishes and direction, the rule prohibited his attorney from taking any action on his behalf. We disagree.

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[4] *Id.*

[4,5] Rhonda's argument is contrary to the spirit and intent of our rules of professional conduct. Section 3-501.2(a) also states that "[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." And Neb. Ct. R. of Prof. Cond. § 3-501.14(b) states that in representing a client with diminished capacity, a lawyer may take reasonably necessary protective action if the lawyer believes that the client is at risk of substantial physical, financial, or other harm unless action is taken and the client cannot adequately act in his or her own interest.

Further guidance is provided by the Restatement (Third) of the Law Governing Lawyers. The Restatement provides that a lawyer representing a client with diminished capacity must act in the best interests of the client and pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.[5] There is nothing in the record indicating that Benjamin's appointed attorney was motivated by anything other than Benjamin's best interests in nominating Augustine. And there is no indication that Augustine's nomination was contrary to Benjamin's wishes or direction, had Benjamin been able to communicate with his attorney.

We also reject Rhonda's assertion that Benjamin's appointed attorney committed professional misconduct by consulting with Region V in his representation of Benjamin. As Benjamin's caregiver, Region V had particular knowledge of his circumstances and needs. Although Region V may have possessed a financial incentive for Benjamin to remain in its care, there is no evidence that such incentive influenced Benjamin's attorney in his nomination of Augustine. This assignment of error is wholly without merit.

### Appointment of Guardian

Rhonda asserts that the county court erred in appointing Augustine as Benjamin's guardian, because it passed over

[5] See Restatement (Third) of the Law Governing Lawyers § 24(1) and (2) (2000).

Rhonda's statutory priority. Rhonda argues that the appointment of Augustine was arbitrary because there was no basis to support a finding that it was in Benjamin's best interest to pass over her statutory priority. She further points to the county court's failure to make any specific finding that such action was in Benjamin's best interest.

Section 30-2627 sets forth the requisites for who may serve as guardian for an incapacitated person. With certain exceptions not relevant here, § 30-2627(a) provides: "Any competent person . . . may be appointed guardian of a person alleged to be incapacitated . . . ." Subsection (b) of § 30-2627 sets forth the priority for appointment for persons who are not disqualified and "exhibit the ability to exercise the powers to be assigned by the court." As Benjamin's mother, Rhonda fell within the category of persons having fourth priority—"[a] parent of the incapacitated person . . . ."[6] It is undisputed that Augustine had no priority under § 30-2627(b). However, § 30-2627(c) provides in part that "[t]he court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority."

To the extent that Rhonda's argument may be understood as asserting that the county court was required to make a specific finding as to Benjamin's best interest, we reject her argument. We do not interpret § 30-2627(c) as requiring a specific finding that it is in the best interest of the incapacitated person to pass over a person with priority. The plain language of that subsection does not require any specific finding as to the best interest of the incapacitated person.[7] Rather, it permits a court to pass over a person with priority when the best interest of the incapacitated person requires such a result. And we

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[6] See § 30-2627(b)(4).

[7] Compare *State ex rel. Amanda M. v. Justin T.*, 279 Neb. 273, 777 N.W.2d 565 (2010) (holding that court was not required to make specific finding as to best interests in creating parenting plan under Parenting Act), with *Zahl v. Zahl*, 273 Neb. 1043, 736 N.W.2d 365 (2007) (finding abuse of discretion when court failed to make specific finding that joint custody was in child's best interests when specific finding was required by Neb. Rev. Stat. § 42-364(5) (Cum. Supp. 2006)).

further construe the county court's order as implicitly finding that passing over Rhonda's priority was in Benjamin's best interest.

[6,7] However, we agree that the appointment of Augustine as Benjamin's guardian was arbitrary and capricious. A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis which would lead a reasonable person to the same conclusion.[8] A capricious decision is one guided by fancy rather than by judgment or settled purpose.[9]

[8] Section 30-2627(b)(4) evidences a legislative preference that a parent of an incapacitated person be appointed guardian over a person with no priority. But the county court neither made specific findings nor provided explanation for its deviation from this preference. And the record provides no basis which would lead a reasonable person to conclude that passing over Rhonda's statutory priority was in Benjamin's best interest.

At the guardianship hearing, Benjamin's appointed attorney argued that an independent third party should be appointed Benjamin's guardian because Rhonda had permitted Benjamin to remain in Shireman's care. But no evidence was presented at the hearing establishing that any harm came to Benjamin while in Shireman's care. Rhonda refuted the allegation of abuse made against Shireman and testified that Region V informed her that the allegation was unfounded. And she further testified that she was informed by a service coordinator with the Department of Health and Human Services that there was no reason Shireman could not be approved to care for Benjamin.

Although Walters indicated that Shireman made multiple moves and appeared to have several people residing in her home, Augustine testified that she did not observe any concerns when she visited Shireman's home in 2009. Although Walters testified that Region V had not been notified of "some charges" regarding Shireman or other occupants of Shireman's home,

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[8] *In re Water Appropriation A-4924*, 267 Neb. 430, 674 N.W.2d 788 (2004).

[9] *Id.*

this did not warrant passing over Rhonda's priority. Walters did not specify the nature of the charges or against whom the charges were made. Nor did she indicate that Rhonda was aware of the charges.

Further, we do not construe Rhonda's testimony as indicating an unequivocal intent to return Benjamin to Shireman's care. Rhonda responded affirmatively when asked if she would return Benjamin to Shireman's care, but she explained that she would place Benjamin with Shireman only if the service provider approved the placement. And she later testified that she would maintain Benjamin's placement in a group home if the service provider believed a group home was better for him. Additionally, she testified that she understood the concerns regarding Shireman and that she would take those concerns into consideration.

Similarly, Rhonda's intention to remove Benjamin from Region V's care did not warrant passing over her priority. Although Walters testified that she had observed Benjamin improve in several areas, no evidence was presented linking such improvement to Region V or Benjamin's placement in the group home. On cross-examination, Walters admitted that she did not know why Benjamin was "acting the way he was acting or is acting how he's acting now." Thus, Walters could not attribute Benjamin's improvements to his residence in the group home rather than in Shireman's care.

And we see no evidence in the record establishing that Rhonda was unfit to serve as Benjamin's guardian. Rhonda testified that she had been Benjamin's voice and protector since his birth and understood his moods. Walters and Augustine each described positive interaction between Rhonda and Benjamin. While Walters and Augustine indicated that Rhonda had delayed in responding to requests for clothing or footwear, such testimony was insufficient to establish that Rhonda was unfit to be Benjamin's guardian.

In summary, without specific findings, a meaningful explanation, or a record demonstrating grounds to support the appointment of Augustine as guardian in derogation of Rhonda's priority, the appointment was arbitrary and capricious. Rhonda was granted priority to be Benjamin's guardian by § 30-2627(b).

The record fails to disclose any basis which would lead a reasonable person to conclude that deviating from the statutory priority was in Benjamin's best interest.

[9] We acknowledge that the county court may have taken reports from Hand into consideration in appointing Augustine, but such reports were not offered into evidence at the guardianship hearing. And contrary to Rhonda's assertion at oral argument, we find nothing in the bill of exceptions to indicate that the reports compose a part of the evidentiary record on appeal. We have consistently stated that a bill of exceptions is the only vehicle for bringing evidence before an appellate court; evidence which is not made a part of the bill of exceptions may not be considered.[10]

## CONCLUSION

We reject Rhonda's allegation of professional misconduct, but we agree that the county court erred in appointing Augustine as Benjamin's guardian without specific findings, any explanation for bypassing Rhonda's statutory priority, or any reason readily apparent in the evidentiary record. Therefore, we reverse the appointment of Augustine as guardian and remand the cause for further proceedings. We recognize that the parties may have erroneously assumed that materials otherwise available to the court were part of the evidentiary record. And we acknowledge that § 30-2627(c) empowers the court, "acting in [Benjamin's] best interest," to pass over Rhonda's priority. Thus, on remand, the county court may expand the evidentiary record. Upon either the existing or an expanded record, the court shall enter an order appointing a guardian for Benjamin in conformity with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[10] *Ottaco Acceptance, Inc. v. Huntzinger*, 268 Neb. 258, 682 N.W.2d 232 (2004).

STEPHAN, J., concurring.

I agree that the county court erred in bypassing Rhonda's statutory priority without articulating any reasons for doing

so. I write separately, however, to emphasize certain factors which I believe the court should consider when determining whether there is a "basis which would lead a reasonable person to conclude that deviating from the statutory priority was in Benjamin's best interest."

Neb. Rev. Stat. § 30-2627 (Reissue 2008) clearly gives Rhonda, as the "parent of the incapacitated person," statutory priority to be appointed as Benjamin's guardian. It authorizes the court to "pass over" Rhonda and appoint a guardian having lower priority or no priority only when the court is "acting in the best interest of the incapacitated person." Section 30-2627 does not offer any guidance on how a court is to determine what the "best interest of the incapacitated person" is.

It is undeniable that Benjamin's welfare is the paramount consideration in the selection and appointment of his guardian.[1] But § 30-2627 gives Rhonda priority, and that priority should not be lightly disregarded. Historically, persons with familial ties to an incapacitated person were given priority as guardians, because it was presumed that such persons were more likely to be solicitous of the incapacitated person's welfare than would someone else.[2] That historical presumption seems particularly apt in the circumstances of this case, where the record shows that Rhonda has been Benjamin's primary caregiver and support since birth. I would argue that absent a showing that Rhonda is less likely to be solicitous of Benjamin's needs than someone with lower or no priority, the statutory priority should be recognized.

Rhonda's statutory right to priority also has constitutional underpinnings. In guardianship proceedings involving minor children, we recognize and apply the parental preference principle.[3] The parental preference principle arises from the substantive component of the Due Process Clause of the

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[1] See, *In re Guardianship of Lyon*, 140 Neb. 159, 299 N.W. 322 (1941); 57 C.J.S. *Mental Health* § 146 (2007).

[2] See, *Matter of Conservatorship of Browne*, 54 Ill. App. 3d 556, 370 N.E.2d 148, 12 Ill. Dec. 525 (1977); *Arthur's Case*, 136 Pa. Super. 261, 7 A.2d 55 (1939).

[3] See *In re Guardianship of D.J.*, 268 Neb. 239, 682 N.W.2d 238 (2004).

14th Amendment, which protects the "fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'"[4] The U.S. Supreme Court has recognized that "[t]he liberty interest . . . of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests . . . ."[5] The parental preference principle is based on an acknowledgment that parents and their children have a recognized unique and legal interest in, and a constitutionally protected right to, companionship and care as a consequence of the parent-child relationship, a relationship that, in the absence of parental unfitness or a compelling state interest, is entitled to protection from intrusion into that relationship.[6] The parental preference principle protects the parent's right to the companionship, care, custody, and management of his or her child and the child's reciprocal right to be raised and nurtured by a biological or adoptive parent.[7] We have even stated that establishment and continuance of the parent-child relationship is the most fundamental right a child possesses.[8]

Here, of course, Benjamin is not a minor, and thus our prior decisions regarding the constitutional protections of the parental preference doctrine are not directly applicable to the question of how to treat Rhonda's statutory priority. Notably, however, other courts have examined whether the parental preference principle should extend to protect the relationship between parents and their adult children. A number of federal circuit courts have addressed the issue in the context of § 1983 actions brought by parents of adult children wrongfully killed by state action (such as a shooting by a police officer).[9] The

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[4] *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

[5] *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000).

[6] *In re Guardianship of D.J., supra* note 3.

[7] *Id.*

[8] *Id.*

[9] See, *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005) (surveying cases); 42 U.S.C. § 1983 (2012).

issue presented in these cases is whether a parent can receive compensation for the wrongful loss of a relationship with an adult child. Courts have declined to extend the parental preference principle and recognize a compensable right to a continued relationship with an adult child in these cases based on two reasons: (1) The state action at issue was not deliberately directed at severing the parent-child relationship, and (2) a parent's right to make critical child-rearing decisions concerning the care, custody, and control of minors necessarily ends when the child begins to assume critical decisionmaking responsibility for himself or herself.[10]

Here, the state action of appointing a guardian other than Rhonda is more deliberately directed at affecting the parent-child relationship. And at least one circuit court has questioned whether a parent's right to make critical child-rearing decisions ever ends when the child is chronologically an adult but remains dependent upon parents or other caregivers for his or her physical and emotional needs.[11] I therefore do not think these cases are dispositive on the issue of whether the parental preference principle applies when considering the scope of Rhonda's statutory priority to be appointed Benjamin's guardian.

I am aware of only one case that has directly addressed whether the parental preference principle applies when a parent wishes to be appointed the guardian of an adult child who is incapacitated. In *In re Tammy J.*,[12] a lower court appointed a public guardian the legal guardian of an adult woman who was developmentally disabled and functioned at the level of an 8- or 9-year-old. The woman's parents argued the appointment was improper absent a finding that they were unfit to be her guardians, because it violated the parental preference principle and their constitutional right to a continued relationship with their daughter. As in Nebraska, the relevant statute gave the parents priority to be appointed guardians, but the priority

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[10] *Russ, supra* note 9; *McCurdy v. Dodd*, 352 F.3d 820 (3d Cir. 2003).

[11] See *McCurdy, supra* note 10.

[12] *In re Tammy J.*, 270 P.3d 805 (Alaska 2012).

could be disregarded by the court "[w]hen in the best interest of the incapacitated person . . . ."[13]

The Alaska court recognized that the U.S. Supreme Court has never taken a position on whether the substantive due process rights of parents extend to relationships with adult children and that the Court has been historically reluctant to expand the concept of substantive due process. It further recognized the federal circuit courts that have refused to expand the parental preference principle in the context of § 1983 actions, as noted above. It distinguished those cases easily, however, reasoning that "the factual and procedural surroundings of these cases are distant from those of the present case."[14] It recognized that the issue before it was "more challenging": Does a parent have a constitutionally protected right to make decisions regarding the care, custody, and control of an adult child who, due to developmental disabilities, possesses the general competencies of a young minor?[15]

In wrestling with this question, the Alaska court reasoned that caring for a developmentally disabled adult is not a form of "'child rearing'" and that there is less risk of preventing the passing on of family heritage by interfering in a relationship with a developmentally disabled adult than when interfering in decisions about the upbringing of a minor child.[16] It further found that the rights of minor children are generally subject to the wishes of their parents, but that adult individuals with disabilities have independent rights to equality of opportunity, independent living, and personal and economic self-sufficiency. It reasoned that when tension exists between the parental interest in maintaining control over the care and custody of a developmentally disabled adult and that adult's interest in maximum participation in society and maximum self-sufficiency, the adult's interest must be paramount. Based on this rationale, it declined to extend the parental preference

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[13] Alaska Stat. § 13.26.145(f) (2004).

[14] *In re Tammy J., supra* note 12 at 814.

[15] *Id.*

[16] *Id.* at 815.

doctrine to invalidate the appointment of the public guardian instead of the parents.

I do not quarrel with the result reached by the Alaska court. It is right and just that our state's goals regarding individuals with disabilities should be to promote maximum equality of opportunity, participation in society, independent living, and self-sufficiency. Individuals with disabilities are not perpetual children, and thus direct application of the parental preference principle and its requirement that the parental relationship be protected absent a showing of unfitness of the parent is not proper in the circumstances of this case, where Benjamin is an adult.

Nevertheless, some of the basic concepts underlying the parental preference doctrine continue to apply in a situation where an adult child is incapacitated and someone has to make continuing decisions about his or her everyday care and living situations.[17] This is particularly so here, where the record demonstrates that Rhonda has been Benjamin's caregiver and has provided for his special needs his entire life. She, simply stated, has a unique and special relationship with him. In my view, the uniqueness of this relationship should be considered in determining the scope of her statutory priority and in considering the best interest of Benjamin.

Given the nature of the relationship between Rhonda and Benjamin and the historical fact that next of kin are presumed to act in the best interest of an incapacitated person, I do not think the court should pass over Rhonda's statutory priority absent a showing that her desires or wishes for Benjamin will significantly hinder his ability to participate in society, live independently, or maximize his self-sufficiency. Without such a showing, the simple fact that another person, without statutory priority, may be slightly better at developing and maintaining Benjamin's best interest should not be enough to trump the statutory priority based on the parental relationship.

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[17] See *McCurdy, supra* note 10.

# In re Interest of Nedhal A., a child under 18 years of age. State of Nebraska, appellee, v. Nedhal A., appellant.

856 N.W.2d 565

Filed December 12, 2014. No. S-14-217.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law, which an appellate court resolves independently of the trial court.
3. ____: ____. When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result.

Appeal from the Separate Juvenile Court of Lancaster County: Toni G. Thorson, Judge. Reversed and remanded for further proceedings.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew Meyerle for appellant.

Lory Pasold, Deputy Lancaster County Attorney, for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Wright, J.

## NATURE OF CASE

Nedhal A. (Appellant) was charged with criminal mischief and disturbing the peace while residing at Cedars Teaching, Learning, & Connecting group home (Cedars Home). While the charges were pending final disposition, Appellant went "on [the] run" several times at other placements. Although another group home accepted Appellant at its location in Omaha, Nebraska, the juvenile court ordered intensive supervised probation at the Youth Rehabilitation and Treatment Center (YRTC) in Geneva, Nebraska, pursuant to Neb. Rev. Stat. § 43-286(1)(b)(ii) (Supp. 2013). The court found that all levels of probation supervision and options for community-based services had been exhausted and further determined that placing Appellant at YRTC was a matter of immediate and urgent necessity.

This case involves the interpretation of § 43-286(1)(b)(ii). We must decide in the context of this statute what constitutes the exhaustion of "all levels of probation supervision and options for community-based services" before a court may order a juvenile committed to a YRTC. See *id*. For the reasons stated herein, we reverse the judgment of the juvenile court and remand the cause for further proceedings.

## SCOPE OF REVIEW

[1,2] We review juvenile cases de novo on the record and reach our conclusions independently of the juvenile court's findings. *In re Interest of Kodi L.*, 287 Neb. 35, 840 N.W.2d 538 (2013). Statutory interpretation is a question of law, which we resolve independently of the trial court. *In re Interest of Marcella G.*, 287 Neb. 566, 847 N.W.2d 276 (2014).

## FACTS

On September 19, 2013, a petition was filed in the Lancaster County Separate Juvenile Court alleging Appellant had committed criminal mischief causing damage less than $200 and had disturbed the peace. The petition alleged that Appellant had damaged the property of Cedars Home on June 6 while she was a participant in its program. The petition further alleged that she had knowingly disturbed the peace at a high school in Lincoln in 2013.

On December 10, 2013, Appellant appeared before the juvenile court and admitted to the charge of criminal mischief in exchange for a dismissal of the charge of disturbing the peace. Upon her admission, the court set disposition for February 4, 2014.

Following her discharge from Cedars Home, Appellant resided at Youth Care and Beyond, a group home in Omaha. On Friday, December 20, 2013, the Nebraska Department of Health and Human Services (DHHS) provided transportation for Appellant to visit her family. During the course of that visit, Appellant left and did not return. On December 25, Appellant was picked up by the Lincoln Police Department. DHHS arranged for Appellant to be returned to Youth Care and Beyond on December 27.

On December 28, 2013, Youth Care and Beyond reported that Appellant left the group home around 5:25 p.m., but she was returned by the Omaha Police Department around 9 p.m. Youth Care and Beyond further indicated that Appellant refused to follow instructions in reporting her whereabouts in order to take medications on both December 27 and 28. On December 29, Appellant again left Youth Care and Beyond. On January 9, 2014, while Appellant was missing, the Lancaster County Attorney filed a motion for a detention order because Appellant had left her placement at Youth Care and Beyond.

Appellant was not located by Omaha police until January 15, 2014. Once Appellant was located, she was transported to the Douglas County Youth Center and later to the Lancaster County Youth Services Center. Appellant was then discharged from Youth Care and Beyond.

A detention hearing was held on January 27, 2014, to determine whether a less restrictive alternative was available for Appellant. At the hearing, the parties produced testimony and evidence pertaining to Appellant's family and behavioral background. The evidence included testimony from Appellant's caseworker that Appellant had previously been placed at Cedars Home in Lincoln, Nebraska. Appellant had unsuccessful placements in foster homes and would leave those homes without reporting her whereabouts or activities.

Child and Family Services specialist Angela Miles, who had been Appellant's DHHS caseworker for the 3 years prior to the detainment hearing, testified that Appellant told her that while she was on the run, Appellant and her 17-year-old boyfriend stayed at a friend's parents' house. Miles indicated that Appellant associated with unapproved individuals and placed herself in potentially dangerous situations. At the conclusion of the detention hearing, the juvenile court determined that there was no less restrictive alternative to continued placement at the Lancaster County Youth Services Center and ordered a psychological evaluation of Appellant.

At the disposition hearing on the criminal charges, Mark Hickson, a probation officer who completed Appellant's predisposition report, testified that this was Appellant's first

adjudicated law violation and that Appellant had never been subjected to conditions of liberty or other supervision. Hickson noted that Appellant had an extensive history of placements and services by DHHS, including at least 24 different placements. Hickson did not know whether Appellant had been subjected to electronic tracking or day reporting.

The juvenile court again heard testimony from Miles that after Youth Care and Beyond discharged Appellant, DHHS sent referrals to out-of-home placements that could meet Appellant's various placement history, behavioral problems, and educational and therapeutic needs. In response to the referral, Salvation Army Cares group home (Salvation Army Cares) informed DHHS that it would accept Appellant after reviewing Appellant's placement history, educational needs, and therapeutic needs. Salvation Army Cares offered a program similar to the program Appellant went through at Cedars Home. Miles testified that despite Appellant's acceptance into Salvation Army Cares, Miles believed a group home placement was inappropriate because of Appellant's history of running away from her placements.

Appellant argued that the evidence did not establish that she had exhausted all levels of probation supervision or options for community-based resources. Based on Appellant's psychological evaluation and behavioral history, the juvenile court found that intensive supervised probation was appropriate. It concluded that Appellant had exhausted all other levels of care available to the court within the meaning of § 43-286(1)(b)(ii) and ordered Appellant to be placed at YRTC, despite her acceptance into Salvation Army Cares.

## ASSIGNMENTS OF ERROR

Appellant assigns as error the following: (1) The juvenile court erred in placing Appellant on intensive supervised probation at YRTC, because placement on intensive supervised probation was contrary to the statutory requirements of § 43-286(1)(b)(ii), and (2) there was insufficient evidence for the juvenile court to find that all levels of probation supervision and options for community-based resources

had been exhausted prior to placement on intensive supervised probation.

## ANALYSIS

[3] In reviewing questions of law arising under the Nebraska Juvenile Code, we review the cases de novo and reach conclusions independently of the lower court's ruling. See *In re Interest of Marcella G.*, 287 Neb. 566, 847 N.W.2d 276 (2014). Statutory interpretation is a question of law, which we must resolve independently of the trial court. *In re Interest of Violet T.*, 286 Neb. 949, 840 N.W.2d 459 (2013). When possible, an appellate court will try to avoid a statutory construction that would lead to an absurd result. *In re Interest of Marcella G., supra*.

At all times relevant, § 43-286(1)(b)(ii) provided:

> Unless prohibited by section 43-251.01, the court may commit such juvenile to the Office of Juvenile Services for placement at a youth rehabilitation and treatment center as a condition of an order of intensive supervised probation *if all levels of probation supervision and options for community-based services have been exhausted and placement of such juvenile is a matter of immediate and urgent necessity for the protection of such juvenile or the person or property of another or if it appears that such juvenile is likely to flee the jurisdiction of the court*.

(Emphasis supplied.)

### Interpretation of § 43-286

The question presented is what is required to "exhaust" all levels of probation supervision and options for community-based services in the context of § 43-286. When 2013 Neb. Laws, L.B. 561, § 1, was introduced on January 23, 2013, the bill stated that one of its purposes was to "prevent further penetration of such juveniles into the juvenile justice system." (Similar language was included by the Legislature in Neb. Rev. Stat. § 43-4101 (Cum. Supp. 2014).)

Stated simply, the Legislature intended the placement of a juvenile at YRTC to be a last resort. The plain language of

§ 43-286 and the broader statutory scheme of the Nebraska Juvenile Code reinforce this interpretation. Merriam-Webster's Collegiate Dictionary 405 (10th ed. 2001) defines "exhaust" as "to develop (a subject) completely[;] to try out the whole number of <[*exhaust*]*ed* all the possibilities>." We use this definition in the case at bar.

Applying the principles of statutory interpretation, we conclude that § 43-286 requires that before a juvenile is placed in YRTC, the Office of Probation Administration must review and consider thoroughly what would be a reliable alternative to commitment at YRTC. Upon reviewing the juvenile's file and record, the Office of Probation Administration shall provide the court with a report stating whether any such untried conditions of probation or community-based services have a reasonable possibility for success or that all levels of probation and options for community-based services have been studied thoroughly and that none are feasible.

We do not imply that a juvenile court must ensure that every conceivable probationary condition has been tried and failed before it may place a juvenile at YRTC. Nor do we interpret § 43-286 to require that supervisory conditions of a juvenile previously classified as a neglect case under Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2013) must "start over" when the matter becomes a delinquency case and subject to the Office of Juvenile Services.

The review should consider the success or failure of prior supervisory conditions, even if the conditions were imposed by some other agency responsible for the child's care, such as DHHS. We decline to impose an interpretation of § 43-286 that would require repetition of ineffective measures or require the Office of Juvenile Services to provide services that have already been proved to be unsuccessful. The Legislature did not intend such a result.

## Application

In our application of § 43-286 to the present case, we find that Appellant's placement at YRTC was premature, because there had not been a thorough review of all levels of probation that could be applied. The offenses were Appellant's first

adjudicated law violations, and the Appellant had no prior involvement with the Office of Probation Administration. In its determination whether all levels of probation supervision had been exhausted, the juvenile court should have required a review by the Office of Probation Administration concerning what levels of probation and options for community-based services, if any, could be used in Appellant's case. The parties agree that Appellant has not been subject to any level of electronic monitoring or surveillance, nor has she been faced with the consequences of her subsequent action if she does not comply with the conditions of her probation.

We find it particularly important that the Office of Probation Administration review and report whether other less-restrictive alternatives to YRTC are available and feasible. Before Appellant's criminal activity, she was considered a neglected child and ward of the State under § 43-247(3)(a). The transition directly from a case under § 43-247(3)(a) to YRTC without a report from the Office of Probation Administration that all levels of probation and options for community-based service have been exhausted does not conform to the requirements of § 43-286. We cannot determine which possible probationary conditions, if any, could be successful. However, the record must establish that all levels of probation and options for community-based services have been thoroughly considered before the court may commit Appellant to YRTC.

A review by the Office of Probation Administration may determine that there are no less restrictive alternatives to confinement at YRTC, but until this has been established, all levels of probation pursuant to § 43-286 have not been exhausted.

## CONCLUSION

For the reasons stated above, we reverse the judgment of the juvenile court placing Appellant at YRTC and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

# MILLENNIUM LABORATORIES, INC., ET AL., APPELLANTS, V. BRIAN WARD, AN INDIVIDUAL, APPELLEE.

857 N.W.2d 304

Filed December 19, 2014. No. S-13-826.

1. **Res Judicata: Appeal and Error.** The applicability of the doctrine of res judicata is a question of law, as to which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
2. **Res Judicata: Collateral Estoppel.** The applicability of claim and issue preclusion is a question of law.
3. **Pleadings: Appeal and Error.** An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim.
4. **Jurisdiction: Appeal and Error.** Generally, once an appeal has been perfected, the trial court no longer has jurisdiction.
5. **Res Judicata: Judgments.** The doctrine of res judicata provides that a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.
6. **Res Judicata.** For res judicata to apply, there must be (1) a final judgment on the merits that is, (2) based on proper jurisdiction, (3) between the same parties or their privies, and (4) based on the same claims or causes of action.
7. **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: WILLIAM B. ZASTERA, Judge. Reversed and remanded for further proceedings.

James P. Fitzgerald and Patrick E. Brookhouser, Jr., of McGrath, North, Mullin & Kratz, P.C., L.L.O., and Lance A. Etcheverry and Jessica N. Walker, of Skadden, Arps, Slate, Meagher & Flom, L.L.P., for appellants.

Michael T. Hilgers and Carrie S. Dolton, of Gober Hilgers, P.L.L.C., and Heather A. Boice and Michael R. Osterhoff, of Perkins Coie, L.L.P., for appellee.

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

WRIGHT, J.

## I. NATURE OF CASE

In 2013, as part of ongoing litigation between Ameritox, Ltd., and Millennium Laboratories, Inc. (Millennium), a U.S. district court in Florida (Florida court) denied Millennium's

motion for leave to amend its second amended counterclaims to Ameritox's third amended complaint. Subsequently, Millennium and two of its employees sued Brian Ward, one of Ameritox's employees, in the district court for Sarpy County, Nebraska (district court). Ward moved to dismiss for failure to state a claim. He specifically alleged that the complaint against him was barred under the doctrine of res judicata, or claim preclusion.

The district court determined that the Florida court's denial of Millennium's motion to amend its counterclaims barred the claims against Ward filed in Nebraska and sustained Ward's motion to dismiss. Because we find that the district court erred in concluding that the Florida court's order denying leave to amend barred the action against Ward, we reverse the judgment of the district court and remand the cause for further proceedings.

## II. SCOPE OF REVIEW

[1] The applicability of the doctrine of res judicata is a question of law, as to which we are obligated to reach a conclusion independent of the determination reached by the court below. *In re Interest of D.H.*, 281 Neb. 554, 797 N.W.2d 263 (2011).

[2] The applicability of claim and issue preclusion is a question of law. *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014).

[3] An appellate court reviews de novo a lower court's dismissal of a complaint for failure to state a claim. *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007).

## III. FACTS

### 1. Parties

Millennium is a California corporation with its principal place of business in that state. It provides urine and saliva testing services to physicians and other health care professionals. Amos Burdine and Jackson Benefield are employed as sales representatives for Millennium in Nebraska and Iowa. Burdine and Benefield are residents of Nebraska and Iowa, respectively.

Ameritox provides similar services and is in direct competition with Millennium. Ameritox is a Texas limited partnership with its principal place of business in Maryland. Ward, a Nebraska resident, is employed as a sales representative for Ameritox in Nebraska.

### 2. Florida Litigation

In 2011, Ameritox sued Millennium in the Florida court. The record does not tell us the nature of Ameritox's claims against Millennium. In August 2012, Millennium filed its second amended counterclaims in response to Ameritox's third amended complaint. Millennium raised counterclaims under state unfair trade practices laws in Florida, California, Texas, and New York; common-law unfair competition; and common-law tortious interference with business relationships.

As part of its counterclaims, Millennium alleged that Ameritox had "engaged in unlawful schemes designed to maintain and enlarge its business . . . at the expense of Millennium and the American public." It alleged that Ameritox did the following to gain customers and increase its sales:

- Encouraged health care providers using Ameritox's services to order medically unnecessary tests and panels of tests rather than individual tests so as to maximize insurance payments;
- Placed Ameritox employees in the offices of health care providers as specimen collectors or processors on the condition that the health care providers would submit a certain number of tests to Ameritox; and
- Offered improper financial inducements and kickbacks in exchange for referrals.

After the Florida court's deadline for amending pleadings, Millennium moved for leave to amend its second amended counterclaims to Ameritox's third amended complaint. Millennium's proposed third amended counterclaims alleged that Ameritox engaged in deceptive trade practices through the same general conduct alleged in Millennium's second amended counterclaims. The proposed third amended counterclaims added allegations that Ameritox disseminated false and misleading statements to "health care providers across

the country" on the subjects of (1) the federal investigation of Millennium in Massachusetts, (2) the legality of Ameritox's kickbacks and financial inducements, (3) the propriety of making testing recommendations based on insurance coverage, and (4) the in-network status of insurance providers.

As "proof of Ameritox's false and misleading statements," Millennium's proposed third amended counterclaims described actions taken by Ward:

> In or around November 2012, . . . Ward, an Ameritox sales representative in Nebraska and Iowa (among other states), visited a Millennium customer located in Iowa, and sought to convince it to stop doing business with Millennium and to refer future business to Ameritox. In making his sales pitch, Ward provided Millennium's customer with . . . a document that made a series of false and misleading statements about the Massachusetts Investigation.
>
> . . . .
>
> . . . Ameritox has widely disseminated the foregoing false and misleading representations, and statements similar to them, to a substantial portion of health care providers nationwide.

The proposed third amended counterclaims described one other example of the ways in which Ameritox disseminated false information about Millennium, but this second example did not involve Ward.

Based on these new factual allegations, Millennium proposed to add a counterclaim against Ameritox under the Lanham Act, 15 U.S.C. § 1051 et seq. (2012). It also sought to add new counterclaims based on unfair trade practices laws in Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Mexico, Nevada, North Carolina, South Carolina, and Washington and to remove the counterclaims relating to Texas state law. All of the new state law counterclaims that Millennium sought to add were based on conduct relating to the provision of kickbacks and improper financial inducements.

The Florida court overruled Millennium's motion for leave to amend its second amended counterclaims, because the

motion was filed after the deadline to amend pleadings and Millennium had not shown good cause to set aside that deadline. The record does not contain any information about the Florida litigation following the denial of Millennium's motion for leave to amend.

### 3. Current Lawsuit

On February 27, 2013, Millennium, Burdine, and Benefield (collectively appellants) sued Ward in the district court for tortious interference with prospective economic relations, violations of Nebraska's Uniform Deceptive Trade Practices Act and Consumer Protection Act, slander, and libel. They alleged that Ward had "engaged in a scheme of illegal and deceptive sales practices" and disseminated "false and misleading statements . . . among Millennium's current and potential customers" in both oral and written form.

As a "specific example" of Ward's conduct, appellants alleged that

> in or around November 2012, . . . Ward entered a health clinic in Iowa that was a Millennium customer and sought to convince the clinic to drop Millennium as a service provider and to refer future business to Ameritox. . . . Ward sought to mislead the clinic regarding an investigation by the United States Attorney's Office in the District of Massachusetts . . . . In addition to making untruthful oral statements, Ward provided the clinic with a type-written document that contained a series of false and misleading statements about the Massachusetts Investigation.

Appellants alleged that Ward made similar oral and written statements to health care providers throughout Nebraska and Iowa with the intent of inducing such providers to become Ameritox customers and that as a result, appellants lost business and "suffered other damages and irreparable injury, to . . . their reputations and goodwill."

Ward moved to dismiss appellants' complaint for failure to state a claim and for failure to join a necessary party. He alleged that the claims were "barred under the doctrines of res judicata, collateral estoppel, judicial estoppel, and/or

issue preclusion." Ward's motion to dismiss did not identify which prior action would have preclusive effect. The brief in support of his motion to dismiss included as attachments Millennium's proposed third amended counterclaims in the Florida litigation and the Florida court's order that denied leave to amend.

The district court determined that res judicata applied to bar appellants' complaint, because (1) the Florida court's order denying leave to amend "constitute[d] a final judgment on the merits," (2) the Florida court had jurisdiction to rule on Millennium's motion for leave to amend, (3) the instant case involved "the same parties (or those in privity with them)" as the Florida litigation, and (4) appellants' complaint "[arose] out of the same nucleus of operative facts as the amendments Millennium sought to include in the Florida Litigation." (Emphasis in original.) It concluded that the Florida court's order denying leave to amend "has a res judicata effect and bars [appellants] from suing Ameritox, or . . . Ward, on the same set of operative facts." It dismissed appellants' complaint with prejudice.

Appellants timely appealed to the Nebraska Court of Appeals. After the appeal was filed, Ward filed a motion with the district court to amend the bill of exceptions to include Millennium's proposed third amended counterclaims and the Florida court's order denying leave to amend. The district court sustained the motion. Thereafter, we moved the appeal to our docket. See Neb. Rev. Stat. § 24-1106(3) (Reissue 2008).

In April 2014, a supplemental transcript and amended bill of exceptions were filed with the Clerk of the Nebraska Supreme Court. The supplemental transcript included Millennium's proposed third amended counterclaims and the Florida court's order that denied leave to amend. These documents were also included in the amended bill of exceptions as exhibits to the hearing on Ward's motion to amend.

## IV. ASSIGNMENTS OF ERROR

Appellants assign, summarized and restated, that the district court erred in (1) relying on documents not entered into the record, (2) finding that the Florida court's order denying

leave to amend constituted a final judgment on the merits of the claims in this action, and (3) granting Ward's motion to dismiss.

## V. ANALYSIS

### 1. Appellate Record

We first examine what is included in the record before this court. After appellants perfected their appeal, Ward filed a motion in the district court to amend the bill of exceptions. While the appeal was still pending, the district court held a hearing and sustained the motion. The clerk of the district court prepared and filed an amended bill of exceptions and a supplemental transcript. Appellants claim that these additions to the appellate record are not properly before us. We do not agree.

#### (a) Amended Bill of Exceptions

[4] "[G]enerally, once an appeal has been perfected, the trial court no longer has jurisdiction." *Spady v. Spady*, 284 Neb. 885, 895, 824 N.W.2d 366, 374 (2012). However, under Neb. Ct. R. App. P. § 2-105(B)(5) (rev. 2010), a district court has the authority to order amendments to the bill of exceptions in an appeal that has already been perfected. Section 2-105(B)(5) allows the bill of exceptions in an appeal to be amended by agreement of the parties so long as that agreement is "attached to the bill of exceptions at any time prior to the time the case is submitted to the Supreme Court." In the case of disagreement between the parties, the bill of exceptions can be amended by order of the district court, provided that the order is "attached to the bill of exceptions prior to the time the case is submitted to the Supreme Court." See *id*. Neb. Ct. R. App. P. § 2-111(A) (rev. 2014) states that a case is "eligible for submission at any time after the appellee's brief has been filed." Submission can be accomplished in one of two ways: oral argument or submission without oral argument. See § 2-111(B).

At the time Ward filed his motion to amend the bill of exceptions, the instant appeal had not been submitted to

this court. Therefore, under § 2-105(B)(5), the district court could hear the motion and order that the bill of exceptions be amended. When the amended bill of exceptions was filed with and accepted by this court, it became part of the appellate record.

(b) Supplemental Transcript

Under Neb. Ct. R. App. P. § 2-104(C), a party may request a supplemental transcript "without leave of court" and file it with this court at any time "prior to the day the case is submitted to the court." The supplemental transcript in the instant case was filed prior to submission. As such, it is properly before us on appeal.

(c) Conclusion as to Appellate Record

The amended bill of exceptions and the supplemental transcript are part of our record. This record contains Millennium's proposed third amended counterclaims in the Florida litigation and the Florida court's order that denied leave to amend. The record does not include any other pleadings or orders from the Florida litigation. In particular, it does not contain Ameritox's operative complaint, any of Ameritox's superseded complaints, or any information about the content of Ameritox's claims against Millennium.

2. Res Judicata

Appellants allege that the district court erred in its application of the doctrine of res judicata, or claim preclusion. When considering the application of this doctrine in the instant case, we apply federal law. The federal law of res judicata "is to be examined and applied when a state court is faced with the issue of determining the preclusive effect of a federal court's judgment." See *Vandewalle v. Albion Nat. Bank*, 243 Neb. 496, 502, 500 N.W.2d 566, 571 (1993). Some courts and commentators have moved away from the terminology of "res judicata" and now use the term "claim preclusion." Our use of the term "claim preclusion" is explained in *Hara v. Reichert*, 287 Neb. 577, 843 N.W.2d 812 (2014). However, because the federal courts still refer to res judicata and

because we must apply federal law in the instant case, we use the term "res judicata."

[5,6] "The doctrine of *res judicata* provides that 'a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.'" *Carlisle Power Transmission Products v. The Union*, 725 F.3d 864, 867 (8th Cir. 2013). For res judicata to apply, there must be (1) a final judgment on the merits that is, (2) based on proper jurisdiction, (3) between the same parties or their privies, and (4) based on the same claims or causes of action. *Id.*

(a) Final Judgment on Merits

As authority for its conclusion that the Florida court's denial of leave to amend was a judgment on the merits, the district court relied upon *King v. Hoover Group, Inc.*, 958 F.2d 219 (8th Cir. 1992). *King* is one of several cases in which the Eighth Circuit has discussed the preclusive effect of the denial of leave to amend. See, *Professional Management Associates v. KPMG LLP*, 345 F.3d 1030 (8th Cir. 2003); *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678 (8th Cir. 1997); *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368 (8th Cir. 1997). We examine these cases and their application to the case at bar.

In *King*, Alan King sued his employer and a union in federal district court. After summary judgment was entered against King and his complaint was dismissed, he moved to file an amended complaint. He was denied leave to do so. Thereafter, King brought a second action against the same defendants in state court. The action was transferred to federal court and then dismissed as barred by res judicata. The Eighth Circuit affirmed, finding that King's second suit was barred by the entry of summary judgment in the first. At the end of its res judicata analysis, after it had concluded that the entry of summary judgment in the first case was a judgment on the merits, the court made the following statement: "It is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were the subject

of the proposed amended pleading." See *King*, 958 F.2d at 222-23.

Subsequent Eighth Circuit cases have repeated this broad statement regarding the res judicata effect of the denial of leave to amend. See, *Professional Management Associates, supra*; *Landscape Properties, Inc., supra*. However, despite the potential breadth of application of the statement in *King*, the Eighth Circuit has never determined that the denial of leave to amend was a judgment on the merits in a case with circumstances comparable to the instant case.

The Eighth Circuit has held that the denial of leave to amend was a judgment on the merits in three cases. See, *Professional Management Associates, supra*; *Landscape Properties, Inc., supra*; *King, supra*. In two of these, the trial court denied leave to amend because there was a prior judgment on the merits of the pleading sought to be amended. See, *Professional Management Associates, supra*; *King, supra*. In *King*, the court denied leave to file an amended complaint, because it had previously entered summary judgment against the plaintiff, King, on his original complaint. The same was true in *Professional Management Associates*. The plaintiff was denied leave to file a second amended complaint, because its first amended complaint had been dismissed for failure to state a claim under the Securities Litigation Uniform Standards Act of 1998.

Under such circumstances, the denial of leave to amend functioned as a judgment on the merits of the proposed amendments. In *King* and *Professional Management Associates*, the plaintiffs were not permitted to file amended complaints, because there had been a judgment on the original complaints. The lower courts denied leave to amend, because the claims sought to be added should have been brought before the final judgment in the case. Effectively, the lower courts said that the proposed amendments were futile—they lacked merit given the prior adjudication in the case. Thus, in both *King v. Hoover Group, Inc.*, 958 F.2d 219 (8th Cir. 1992), and *Professional Management Associates v. KPMG LLP*, 345 F.3d 1030 (8th Cir. 2003), the denial of leave to amend reflected upon the merits of the proposed amendments.

In *Kulinski v. Medtronic Bio-Medicus, Inc.*, 112 F.3d 368 (8th Cir. 1997), the Eighth Circuit recognized that the existence of a judgment on the merits of the pleading sought to be amended was a significant factor in *King*. In *Kulinski*, the plaintiff moved for leave to amend his complaint after the complaint had been dismissed for lack of subject matter jurisdiction. Relying on *King*, the defendant argued that the denial of leave to amend had "preclusive effect as to claims in the amended complaint." See *Kulinski*, 112 F.3d at 373. But the court declined to follow *King*, because *King* "included an adjudication of the first complaint on the merits," whereas in *Kulinski*, the plaintiff's complaint was dismissed "only for lack of subject matter jurisdiction." See *Kulinski*, 112 F.3d at 373. The court did not consider such dismissal to be a judgment on the merits. Thus, the court "decline[d] to contort the district court's denial of [the plaintiff's] proposed amended complaint into a denial on the merits." See *id*.

In *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678 (8th Cir. 1997), there was not a prior judgment on the merits of the pleading sought to be amended. However, the reason for denying leave to amend was directly tied to the merits of the proposed amended pleading. The plaintiff's proposed amended complaint would have changed the remedy sought from damages to avoidance of sale. Because under the relevant statute, avoidance of sale and damages were alternative remedies, the plaintiff could not ask for avoidance of sale once he had requested damages in his initial complaint. The plaintiff was not entitled to the relief requested in the amended complaint, and the court denied leave to amend for that reason. Such denial was a judgment on the merits.

In each case where the Eighth Circuit held that the denial of leave to amend was a judgment on the merits, the denial either was directly tied to the merits of the proposed amended pleading or reflected that the proposed amendments were futile because there was a prior judgment on the merits in the case. Our research does not disclose any case in which the Eighth Circuit has concluded that the denial of leave to amend was a judgment on the merits where leave to amend was denied for reasons apart from the merits, such as timeliness. Indeed, in

*Kulinski*, where leave to amend was denied for a reason that did not reflect upon the merits, the Eighth Circuit found that the denial of leave to amend was not a judgment on the merits for purposes of res judicata. Because in the instant case, the denial of Millennium's motion for leave to amend its second amended counterclaims was denied as untimely, *King* and its progeny do not support a finding that the Florida court's order denying leave to amend was a judgment on the merits.

The approach taken by the court in *Curtis v. Citibank, N.A.*, 226 F.3d 133 (2d Cir. 2000), is more applicable to our determination whether the Florida court's denial of Millennium's motion to amend its second amended counterclaims was a judgment on the merits. In *Curtis*, 226 F.3d at 139, the court stated that the reason for denying leave to amend determined whether such denial was a judgment on the merits: "[D]enial of a motion to amend will not inevitably preclude subsequent litigation of those claims set out in a proposed new complaint. . . . Only denial of leave to amend *on the merits* precludes subsequent litigation of the claims in the proposed amended complaint." (Citation omitted.) (Emphasis in original.) The court held that where leave to amend was denied "on the procedural ground of untimeliness," the fact of such denial did not bar the plaintiff's second action. See *id*.

In the case at bar, Millennium's motion to amend its second amended counterclaims was not decided on the substance of the proposed counterclaims or their merits. The Florida court denied leave to amend, because Millennium's proposed third amended counterclaims were not timely filed and good cause had not been shown for the untimeliness. We thus conclude that the denial of leave to amend was not a judgment on the merits for purposes of res judicata and did not bar Millennium's claims against Ward in the district court.

(b) Remaining Elements

[7] We decline to consider the remaining elements of res judicata. Because the first element of res judicata has not been met, it is not necessary to consider the remaining elements. And the record does not contain enough information about the Florida litigation for us to consider those elements.

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).

## VI. CONCLUSION

The district court erred in concluding that the Florida court's order denying leave to amend precluded appellants' complaint against Ward. We reverse the judgment of the district court that sustained Ward's motion to dismiss, and we remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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## JENNIFER VAN KLEEK, APPELLANT, V. FARMERS INSURANCE EXCHANGE, DOING BUSINESS AS FARMERS INSURANCE GROUP, ALSO KNOWN AS "FARMERS," APPELLEE.

857 N.W.2d 297

Filed December 19, 2014. No. S-13-1006.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy presents a question of law that an appellate court decides independently of the trial court.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in 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.
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.
4. **Insurance: Contracts: Appeal and Error.** An insurance policy is a contract, and an appellate court construes it like any other contract, according to the meaning of the terms that the parties have used.
5. ____: ____: ____. An appellate court gives terms in an insurance policy that are clear their plain and ordinary meaning as a reasonable person in the insured's position would understand them.
6. ____: ____: ____. An appellate court construes ambiguous terms in an insurance policy in favor of the insured.

7. **Insurance: 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 meanings.
8. ____: ____: ____. In the context of homeowner's insurance policies, coverage for a person "legally responsible" for designated property extends to those under a duty to use or operate the designated property properly and who would be liable and answerable for a failure to do so.
9. **Insurance: Contracts: Animals: Negligence: Liability.** In addition to an owner's liability under Neb. Rev. Stat. § 54-601 (Reissue 2010) and common-law liability for known vicious propensities, the keeper of a dog can be liable to injured third parties on a negligence theory.
10. **Animals: Negligence: Liability.** Once a person has possession or control of a dog, that person owes a duty of care to prevent unreasonable risks of harm posed by the foreseeable actions of the dog.

Appeal from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Affirmed.

Richard J. Rensch and Sean P. Rensch, of Rensch & Rensch Law, P.C., L.L.O., for appellant.

Daniel P. Chesire and Anastasia Wagner, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

CONNOLLY, J.

## SUMMARY

Jennifer Van Kleek agreed to watch Walter and Janet Chapman's dog while the Chapmans were out of town. While Van Kleek was caring for the dog, it bit her on her lower lip. Van Kleek filed a claim with the Chapmans' homeowner's insurer, Farmers Insurance Exchange (Farmers). Farmers rejected the claim because Van Kleek was also an insured and the policy excludes coverage for bodily injuries to insureds. The policy defines "**insured**" to include "any person . . . legally responsible" for covered animals. Van Kleek filed an action for declaratory judgment against Farmers, seeking a determination that the policy covered her claim. Farmers moved for summary judgment, and the district court sustained Farmers' motion, reasoning that Van Kleek was "legally responsible" for the dog because she fed and watered the dog

and let it out of the house while the Chapmans were away. We affirm.

## BACKGROUND

The Chapmans planned to take a trip from July 2 to 12, 2011, and asked Van Kleek, a family friend, to watch their dog. The dog, D.J., was a "Chow" weighing about 60 pounds. Walter Chapman testified that chows are "territorial" and that D.J. was not allowed out in public. Unless the Chapmans were home, they confined D.J. to the basement. When he needed to be outside, the Chapmans let D.J. into a fenced-in area behind their house.

Van Kleek and Walter Chapman both testified that the Chapmans instructed Van Kleek to feed, water, and let D.J. into the backyard while the Chapmans were gone. Van Kleek testified that she "assume[d]" that she "would have to go find [D.J.]" if he got loose or take him to a veterinarian if he became ill. Van Kleek had permission to stay at the Chapmans' house to make caring for D.J. more convenient, but the Chapmans did not compensate Van Kleek.

Van Kleek stayed at the Chapmans' house from July 2, 2011, to the morning of July 5. She was the only person in the house during this period. On July 5, Chapman let D.J. into the enclosed backyard. After she let D.J. back into the house, she bent over to give D.J. a biscuit, "just showing him affection." Van Kleek testified that D.J. "lunged" or "charge[d]" at her as she was bent over and bit her lip. The bite removed the "fatty part" of Van Kleek's lower lip, requiring reconstructive surgery.

The Chapmans are the named insureds on a homeowner's policy issued by Farmers. The policy has two sections: In section I, "Property Coverage," Farmers indemnifies insureds for losses to covered real and personal property. In section II, "Liability Coverage," Farmers promises to "pay those damages which an **insured** becomes legally obligated to pay because of . . . **bodily injury** . . . or . . . **property damage** resulting from an **occurrence**." Farmers also promises to pay for "necessary medical services" to a person with a bodily injury covered under section II. In addition to the named

insureds and certain other individuals, the policy defines "**insured**"—for purposes of section II only—as

> any person or organization legally responsible for animals or watercraft covered under Section II - Liability Coverage which are owned by you, or [another insured]. Any person or organization using or having custody of these animals or watercraft in the course of any **business** or without permission of the owner is not an **insured**[.]

The policy also includes a number of exclusions from coverage under section II, including bodily injury to "any **insured**." Courts sometimes refer to exclusions withholding coverage for bodily injury to an insured as "intra-insured exclusions."[1]

Van Kleek sent a claim to Farmers for her injuries from the bite, asserting that Walter Chapman was liable and that his liability was covered under section II of the policy. Farmers denied the claim because Van Kleek was "legally responsible" for D.J. and, therefore, the intra-insured exclusion applied to her claim. In a denial letter sent to Van Kleek, Farmers stated that she was "clearly in a position of responsibility with regard to the ongoing care and protection" of D.J. and that had D.J. bitten someone else, "the injured party could have potentially recovered for his/her damages from [Van Kleek] to the extent of [her] negligence."

After Farmers denied her claim, Van Kleek filed a complaint for declaratory judgment. Van Kleek alleged that she "owed no legal duty to any third party or third-party's property" while feeding and watering D.J. because D.J. was "confined in the Chapmans' home" and not in her custody. Van Kleek requested a judgment declaring that she was not an insured; that section II of the policy covered her claim against Walter Chapman; and that, as a beneficiary of the Chapmans' policy, she was entitled to attorney fees and costs.

Farmers moved for summary judgment, arguing that Van Kleek was "legally responsible" for D.J. and that the intra-insured exclusion barred her claim. Van Kleek also moved for summary judgment, asserting that there was no

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[1] See, e.g., *Malik v. American Family Mut. Ins. Co.*, 243 Wis. 2d 27, 625 N.W.2d 640 (Wis. App. 2001).

genuine issue of material fact that the policy covered her claim against Walter Chapman.

The district court granted Farmers' motion for summary judgment. The court concluded that "legally responsible" is not ambiguous and framed the issue as whether Van Kleek had "legal control" over D.J. when the dog bit her. Emphasizing that Van Kleek was the only person responsible for feeding, watering, and letting D.J. into the backyard while the Chapmans were gone, the court determined that she was "legally responsible" for the dog. The court concluded that the policy did not cover her bodily injury because of the intra-insured exclusion.

## ASSIGNMENTS OF ERROR

Van Kleek assigns, restated, that the district court erred by (1) granting Farmers' motion for summary judgment and (2) overruling her motion for summary judgment.

## STANDARD OF REVIEW

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

[2,3] 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.[3] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[4]

## ANALYSIS

Van Kleek argues that she was not "an insured" because she was not "legally responsible" for D.J. Initially, she asserts

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[2] *American Family Mut. Ins. Co. v. Regent Ins. Co.*, 288 Neb. 25, 846 N.W.2d 170 (2014).

[3] *Id.*

[4] *Id.*

that the term "'legally responsible for'" animals is ambiguous because it might refer to a relationship between herself and D.J., but she admits that this is not the "most logical" reading of the language.[5] The thrust of Van Kleek's argument is that she is "legally responsible" only if "a third party is exposed to the dangers of DJ while she is DJ's handler."[6] Because she did not let D.J. into "the public domain where third parties reside,"[7] Van Kleek concludes that no third party was "exposed to the dangers of DJ" and that therefore, she was not an insured. Farmers responds that Van Kleek was "legally responsible" for D.J. because "[s]he was the person responsible for maintaining the dog's well-being and ensuring he was fed, watered, and allowed in the back yard to relieve himself."[8]

[4-7] We begin by reciting some principles of insurance policy interpretation. An insurance policy is a contract, and we construe it like any other contract, according to the meaning of the terms that the parties have used.[9] We give terms that are clear their plain and ordinary meaning as a reasonable person in the insured's position would understand them.[10] But we construe ambiguous terms in favor of the insured.[11] A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting meanings.[12]

Courts have generally interpreted "legally responsible" to mean a legal duty created by custody, control, or possession of the designated property.[13] For example, in *Security*

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[5] Brief for appellant at 15.

[6] *Id.* at 20.

[7] *Id.* at 17.

[8] Brief for appellee at 11-12.

[9] *American Fam. Mut. Ins. Co. v. Wheeler*, 287 Neb. 250, 842 N.W.2d 100 (2014).

[10] *Id.*

[11] See *id.*

[12] See *id.*

[13] See, *Boettger v. Early American Ins. Co.*, 469 So. 2d 495 (La. App. 1985); *Burglass v. U.S. Fidelity and Guar. Co.*, 427 So. 2d 596 (La. App. 1983).

*National Insurance Co. v. Sequoyah Marina*,[14] a boat owner asked a mechanic to repair the motor. After the mechanic put some oil into the engine and replaced the spark plugs, he pressed the starter button and the boat exploded. The plaintiffs, individuals near the boat who suffered property damage, brought actions against the boat owner, the mechanic, and the insurer that issued the boat owner a homeowner's policy. The boat owner's policy defined "insured" as, "'with respect to animals and watercraft owned by an insured, any person or organization legally responsible therefor.'"[15] The boat owner's insurer sought a declaratory judgment that the mechanic was not an insured.

The court reasoned that whether the mechanic was "legally responsible" for the boat depended on whether he owed duties or was open to liability arising from his dominion over the craft:

> We think "responsible" as here used means [that the mechanic was] under a duty to use or operate the boat or the power plant and equipment thereof properly and [would be] liable and answerable for a failure so to do. It may be implied from the physical possession of the boat by [the mechanic] and his authority and power to act with respect thereto.[16]

Under this definition, the court held that the mechanic was "legally responsible" for the boat when it exploded. The mechanic was "in possession, charge and control of the boat" and was authorized to exercise his "independent judgment with respect to what was necessary to be done."[17] Of particular importance was the mechanic's "implied authority" to take the boat on a test run.[18] The court had "no doubt" that the mechanic would have been liable for any accident during a test

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[14] *Security National Insurance Co. v. Sequoyah Marina*, 246 F.2d 830 (10th Cir. 1957).

[15] *Id.* at 832.

[16] *Id.*

[17] *Id.* at 832-33.

[18] *Id.* at 833.

run.[19] That the mechanic never had an opportunity to operate the boat did not matter, since it was "the existence of the power and not its exercise which determines the relationship of [the mechanic] to the boat."[20]

Similarly, a court determined that a person was "legally responsible" for an animal because he had the power to exercise control over it, even if he did not intend to exercise control. In *United Services Auto. Ass'n v. State Farm*,[21] a grandfather came to his son and daughter-in-law's house to help babysit his grandchild. His daughter-in-law kept horses inside a gated area in the yard. Asked whether he had received any horse-related instructions, the grandfather testified "'it was just expected'" that he would look after them or call his daughter-in-law "'if things needed to be done or if one of the animals was causing a ruckus.'"[22] After spending some time in the house, the grandfather opened the gate and drove his car into the yard. A horse escaped through the opening and was involved in a collision with a third party. The daughter-in-law was the named insured in a homeowner's policy issued by the defendant insurer, which policy defined "insured" as, "'[w]ith respect to animals or watercraft to which this insurance applies, the person or organization legally responsible for them.'"[23] The issue on appeal was whether the grandfather was "legally responsible" for the horse.

The insurer argued that the grandfather was not an insured because he was on the premises to watch his grandchild, not care for the horses. The court disagreed, reasoning that the grandfather's general responsibility over the premises extended to the animals corralled outside the house:

> [The grandfather] had the responsibility or the "duty" to avoid the real possibility of a horse escaping if he opened

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[19] *Id.*

[20] *Id.*

[21] *United Services Auto. Ass'n v. State Farm*, 110 P.3d 570 (Okla. Civ. App. 2004).

[22] *Id.* at 572.

[23] *Id.* at 571 n.2.

> the gate. He was in charge of the household during the time he was babysitting and had the power to act to prevent the escape of the horse. . . . Therefore, [the grandfather] was "legally responsible" for [his daughter-in-law's] horse during the time he was on the property.[24]

So, despite the lack of a "purpose" to exercise control over the horse, the court held that the grandfather was "legally responsible" for the animal.

In a case with facts analogous to those before us, the Wisconsin Court of Appeals held that a person was "legally responsible" for a dog she was caring for as a favor to vacationing friends. In *Malik v. American Family Mut. Ins. Co.*,[25] Christina Malik brought the Matthew and Patricia Herman's springer spaniel to her home to care for it while the Hermans were on vacation. The dog bit Malik, and she sued the Hermans and their homeowner's insurer. The policy issued to the Hermans defined "insured" to include "'any person or organization legally responsible for a watercraft or animal owned by [an insured] to which Section II Coverages apply.'"[26] Under the "'**Intra-insured Suits**'" exclusion in section II of the policy, "'**bodily injury** to any **insured**'" was not covered.[27] The Hermans' insurer refused to defend or indemnify them from Malik's suit on the ground that Malik herself was an insured.

Similar to Van Kleek's argument, Malik argued that a reasonable insured would understand the "legally responsible" language to extend coverage "so that if a person who is legally responsible for the Hermans' dog becomes liable to a third person, the person responsible for the dog, as well as the Hermans, is covered under the policy."[28] Malik contended that a reasonable insured would not expect the expanded definition of "insured" to limit the Hermans' coverage for injuries

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[24] *Id.* at 573.

[25] *Malik v. American Family Mut. Ins. Co., supra* note 1.

[26] *Id.* at 33, 625 N.W.2d at 643.

[27] *Id.* at 34, 625 N.W.2d at 643.

[28] *Id.* at 35, 625 N.W.2d at 644.

caused by their dog. But the court concluded that "[b]ased on the undisputed facts, Malik was legally responsible for an animal owned by the Hermans at the time she was injured," and that therefore, she was an insured under the policy issued to the Hermans.[29] Notably, a Wisconsin statute imposed strict liability for damages caused by a dog on "'any person who owns, harbors or keeps'" the dog.[30] Malik did not dispute that she was a "keeper" of the dog.[31]

[8-10] We conclude that Farmers is entitled to summary judgment because there is no genuine issue that Van Kleek was "legally responsible" for D.J. In the context of homeowner's insurance policies, coverage for a person "legally responsible" for designated property extends to those "under a duty to use or operate the designated property properly and who would be liable and answerable for a failure to do so."[32] In addition to an owner's liability under Neb. Rev. Stat. § 54-601 (Reissue 2010) and common-law liability for known vicious propensities, the keeper of a dog can be liable to injured third parties on a negligence theory.[33] Once a person has possession or control of a dog, that person owes a duty of care to prevent unreasonable risks of harm posed by the foreseeable actions of the dog.[34]

The control Van Kleek exercised over D.J. obligated her to exercise care to prevent unreasonable risks of harm to third parties from D.J.'s behavior. Van Kleek testified that she was responsible for feeding, watering, and letting D.J. in and out of the house while the Chapmans were away. She also assumed that if D.J. got loose, she "would have to go find him," and

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[29] *Id.* at 39, 625 N.W.2d at 646.

[30] *Id.* at 40, 625 N.W.2d at 646.

[31] *Id.*

[32] 9 Steven Plitt et al., Couch on Insurance § 126:7 at 126-23 (2008).

[33] 4 Am. Jur. 2d *Animals* § 72 (2007). See, also, *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996); *Morgan v. Marquis*, 50 A.3d 1 (Me. 2012); Jonathan R. Shulan, Note, *Animal Law—When Dogs Bite: A Fair, Effective, and Comprehensive Solution to the Contemporary Problem of Dog Attacks*, 32 U. Ark. Little Rock L. Rev. 259 (2010).

[34] See *Fields v. Hayden*, 81 A.3d 367 (Me. 2013).

she testified that she would have sought veterinary care if D.J. became sick. Van Kleek alone exercised control over D.J.'s position relative to the outside world. That she did not breach a duty of care by, for example, carelessly leaving the gate open or bringing D.J. into "the public domain where third parties reside,"[35] does not mean that she owed no duty.

## CONCLUSION

Van Kleek was an insured under the policy because she was "legally responsible" for the Chapmans' dog. As an insured, the unambiguous terms of the policy exclude coverage of her injury. Accordingly, Farmers is entitled to summary judgment.

AFFIRMED.

[35] Brief for appellant at 17.

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# DELORES SHAFFER, AS GUARDIAN AND NEXT FRIEND OF BRIAN SHAFFER, AN INCAPACITATED PERSON, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES AND VIVIANNE M. CHAUMONT, DIRECTOR, DIVISION OF MEDICAID AND LONG-TERM CARE, APPELLEES, AND COVENTRY HEALTH CARE OF NEBRASKA, INC., APPELLANT.

857 N.W.2d 313

Filed December 19, 2014. No. S-14-165.

1. **Administrative Law: Final Orders: 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. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
3. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.

4. **Administrative Law: Statutes: Appeal and Error.** The meaning and interpretation of statutes and regulations are questions of law for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
5. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent of the decisions made by the lower court.
6. **Actions: Parties: Standing.** To have standing, a litigant must have a legal or equitable right, title, or interest in the subject matter of the controversy.
7. **Parties: Judgments: Appeal and Error.** An appeal is generally available only to persons who were parties to the case below, although in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it.
8. **Parties: Jurisdiction: Waiver.** The presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest that would be affected by the judgment.
9. **Administrative Law: Words and Phrases.** An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.
10. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral factfinding body.
11. ____: ____. An administrative agency that is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is more than a neutral factfinding body.

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

Thomas J. Kenny, Kathryn E. Jones, and Edward M. Fox II, of Kutak Rock, L.L.P., for appellant.

Alan E. Peterson and Thomas J. O'Neill for appellee Delores Shaffer.

On brief, Douglas J. Peterson, of Keating, O'Gara, Nedved & Peter, L.L.O., for appellee Delores Shaffer.

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

STEPHAN, J.

This is an appeal from an order of the district court for Lancaster County which reversed a determination by the

Nebraska Department of Health and Human Services (the Department) that Brian Shaffer was ineligible for certain Medicaid benefits. The appellant, Coventry Health Care of Nebraska, Inc. (Coventry), participated in the administrative proceedings and advocated the determination eventually reached by the Department, but it was not named as a party in the appeal to the district court. Coventry contends that it was a necessary party to the district court appeal and that because it was not joined, the district court was without jurisdiction to reverse the Department's determination in its favor. We conclude that Coventry has standing to appeal and was a necessary party in the appeal to the district court.

## I. BACKGROUND

Shaffer is a 33-year-old man with severe autism and chemical sensitivities. He has many environmental, food, and drug allergies. He resides with his mother, Delores Shaffer, who is a licensed practical nurse.

Coventry is a managed care organization (MCO) which contracts with the Department to provide Medicaid services.[1] Coventry receives a capitation payment, which is a fee "paid by Medicaid to an MCO on a monthly basis for each client enrolled with the physical health or behavioral health plan. The fee covers all services required to be provided by the MCO to the client, regardless of whether the client receives services or not."[2] This type of care program is different from a fee-for-service program in that Coventry receives from the Department a set rate for each person enrolled in its program.[3] Coventry then provides the requested services.[4]

Until October 2011, Delores was paid to provide 18 hours a day of private duty nursing (PDN) care to Shaffer. This payment came from a Medicaid provider other than Coventry. In October 2011, Shaffer's Medicaid coverage was then transferred to Coventry. In April 2012, Delores asked Coventry

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[1] See 471 Neb. Admin. Code App. 471-000-122 (2010).

[2] 482 Neb. Admin. Code, ch. 1, § 002 (2013).

[3] *Id.*

[4] 482 Neb. Admin. Code, ch. 4, § 001 (2012).

to approve her to continue to provide PDN to Shaffer for 18 hours each day. Coventry denied this request after determining the nursing services were not medically necessary. Shaffer filed a first-level appeal with Coventry, which was denied. Shaffer then filed a second-level appeal with Coventry, which was also denied. Shaffer then requested a State fair hearing with the Department pursuant to 482 Neb. Admin. Code, ch. 7, § 003 (2010).

The fair hearing was held on January 22, 2013, before a hearing officer. Shaffer was represented by legal counsel. Teresa Engel, Coventry's supervisor of the appeals department, appeared for Coventry. At the commencement of the hearing, the hearing officer asked the "parties" to enter into a stipulation regarding the redaction of certain information from the exhibits which were to be offered. Engel and Shaffer's counsel agreed to the stipulation, which was made a part of the record. Engel also acknowledged that Coventry had received copies of all exhibits "from the State."

The hearing officer noted it was customary to "have the Department or its representative or contractor in this case, Coventry, put on [its] testimonial evidence first." Shaffer's counsel indicated he had no objection to this procedure, and both Engel and Shaffer's counsel declined the hearing officer's invitation to make opening statements. Engel was then sworn as Coventry's first witness. Engel presented narrative testimony explaining Coventry's reasons for denying the requested Medicaid benefits and describing the first- and second-level appeal determinations made by Coventry. She was cross-examined by Shaffer's counsel, after which she stated Coventry was resting its case but "may . . . pose additional questions at the end."

Shaffer's counsel then called both Delores and Shaffer's allergist. Both testified that in their opinion, continuation of the PDN care which Delores had been providing to Shaffer was medically necessary. The hearing officer permitted both Engel and Dr. Debra Esser, Coventry's vice president of medical affairs, to cross-examine both witnesses. On behalf of Coventry, Engel made a relevancy objection during Delores' direct examination, which the hearing officer overruled.

After Delores and Shaffer's allergist concluded their testimony, Esser was sworn and testified on behalf of Coventry, apparently as a rebuttal witness. Esser, a board-certified family practice physician, stated in response to questions posed by Engel that the PDN services for Shaffer were not medically necessary. She was cross-examined by Shaffer's counsel.

The hearing officer asked both Engel and Shaffer's counsel if they wished to offer any additional evidence, and when they responded in the negative, the hearing officer announced, "[b]oth parties have rested." Shaffer's counsel made a closing statement, to which Engel responded.

On April 9, 2013, Vivianne M. Chaumont, who was then the director of the Division of Medicaid & Long-Term Care of the Department, entered an order based upon the record made at the State fair hearing. The order noted that Engel and Esser had appeared at the fair hearing on behalf of Coventry, that "[t]he parties" had entered into a stipulation regarding exhibits, and that "[a]ll parties were provided proper notice of the administrative hearing." After discussing the evidence adduced at the fair hearing, the order concluded the PDN services at issue were not medically necessary.

Delores, as Shaffer's guardian and next friend, filed a petition in the district court for Lancaster County seeking judicial review of this order pursuant to the Administrative Procedure Act (APA).[5] The petition named the Department and Chaumont in her official capacity as respondents, but did not name Coventry. The district court conducted a de novo review of the administrative record and reversed the order of the Department, finding the PDN services which Delores provided to Shaffer were medically necessary, because there was a significant probability that Shaffer could develop medical complications "virtually immediately" without such services.

The Department did not appeal, but Coventry did. We moved the appeal to our docket on our own motion pursuant to our

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[5] See Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2014).

statutory authority to regulate the caseloads of the appellate courts of this state.[6]

## II. ASSIGNMENTS OF ERROR

Coventry assigns, consolidated and restated, that the district court erred in (1) failing to find Coventry was a necessary party to the district court appeal; (2) failing to join Coventry as a necessary party, because the Department was statutorily precluded from being a party; and (3) finding the PDN services were medically necessary.

## III. STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record.[7] When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.[8] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.[9]

[4] The meaning and interpretation of statutes and regulations are questions of law for which an appellate court as an obligation to reach an independent conclusion irrespective of the decision made by the court below.[10]

[5] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which

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

[7] *Holmes v. State*, 275 Neb. 211, 745 N.W.2d 578 (2008); *Stejskal v. Department of Admin. Servs.*, 266 Neb. 346, 665 N.W.2d 576 (2003).

[8] *Id.*

[9] *Id.*

[10] *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007).

requires an appellate court to reach a conclusion independent of the decisions made by the lower court.[11]

## IV. ANALYSIS

### 1. Coventry's Standing to Appeal

[6] A threshold issue in this case is whether Coventry has standing to bring this appeal from the order of the district court, despite the fact that it did not participate in the district court proceedings. The APA provides that an "aggrieved party" may seek appellate review of a district court's order or judgment in an appeal from an administrative agency.[12] Because the phrase "aggrieved party" is not defined by the APA, we have addressed the issue as a matter of standing.[13] To have standing, a litigant must have a legal or equitable right, title, or interest in the subject matter of the controversy.[14] The "party aggrieved" concept must be given a practical rather than hypertechnical meaning.[15]

[7] An appeal is generally available only to persons who were parties to the case below, although in a proper case a nonparty may be sufficiently interested in a judgment to permit him or her to take an appeal from it.[16] Here, Coventry successfully contested Shaffer's claim at the fair hearing. Coventry contends it has a financial interest in the outcome of this litigation and that as an MCO, it was a necessary party to the APA appeal under federal Medicaid regulations.[17] The district court's order acknowledges that "[Shaffer's] coverage with [Coventry] became effective on October 1, 2011,"

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[11] *Id.*

[12] § 84-918(1).

[13] See, *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998).

[14] See *In re Application of Metropolitan Util. Dist., supra* note 13.

[15] *Id.*

[16] *Rozmus v. Rozmus*, 257 Neb. 142, 595 N.W.2d 893 (1999).

[17] See 42 C.F.R. § 438.408(f)(2) (2013).

and it utilized the definition of "medical necessity" set out in Coventry's "Handbook of Covered Services" in reaching its determination. We are satisfied that Coventry has alleged a sufficient legal right and interest in the matter in controversy to confer standing to appeal from the final order of the district court.

### 2. Necessary Parties

[8] Generally, the presence of necessary parties to a suit is a jurisdictional matter that cannot be waived by the parties; it is the duty of the plaintiff to join all persons who have or claim any interest that would be affected by the judgment.[18] Here, Shaffer's petition for review filed in the district court named only the Department and the Medicaid director as respondents. Coventry contends there was a defect of parties before the district court for two reasons: (1) the Department was not a proper party to the appeal and (2) Coventry was a necessary party that was not joined.

Our resolution of both contentions begins with the provision of the APA which requires that in proceedings for judicial review of a final decision by an administrative agency in a contested case,

> [a]ll parties of record shall be made parties to the proceedings for review. If an agency's only role in a contested case is to act as a neutral factfinding body, the agency shall not be a party of record. In all other cases, the agency shall be a party of record.[19]

#### (a) The Department

[9-11] Coventry contends that the Department was not a proper party to the district court appeal because it served only as a "neutral factfinding body" in the contested case. Recently, in *McDougle v. State ex rel. Bruning*,[20] we summarized the principles which guide the determination of whether an administrative agency acts solely as a neutral factfinding

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[18] *Pestal v. Malone*, 275 Neb. 891, 750 N.W.2d 350 (2008).

[19] § 84-917(2)(a)(i).

[20] *McDougle v. State ex rel. Bruning*, *ante* p. 19, 853 N.W.2d 159 (2014).

body, or serves a broader role. An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.[21] In contrast, when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral factfinding body.[22] Also, an administrative agency that is charged with the responsibility of protecting the public interest, as distinguished from determining the rights of two or more individuals in a dispute before such agency, is more than a neutral factfinding body.[23]

We have not previously addressed the nature of the Department's role in a contested case involving eligibility for Medicaid benefits. We have held that in other contexts, the Department or its predecessor served in a broader role and was therefore a "party of record" in judicial review proceedings under the APA. *McDougle* involved a proceeding to revoke the license of a mental health practitioner and alcohol and drug counselor. We held the Department's Division of Public Health acted as more than a neutral factfinder, because it was the primary civil enforcement agency for credentialing violations pertaining to the health care professions and possessed broad statutory powers to protect the public and regulate the professions. Similarly, in *Beatrice Manor v. Department of Health*,[24] we held that the Department of Health was a necessary party in proceedings to review its determination, through the Nebraska Health Care Certificate of Need Appeal Panel, to deny a health care facility permission to add more beds, given its responsibility for protecting the public interest as distinguished from determining the rights of two or more individuals in a dispute before the agency.

Applying these principles, we conclude that the Department was a party of record in this case. The Department has broad regulatory power, oversight of the Medicaid program, and

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[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985).

a stake in the contract with Coventry. It is charged with administering the Nebraska Medicaid program.[25] The purpose of the program is to provide medical assistance to eligible residents.[26] Pursuant to this authority, the Department is authorized to "adopt and promulgate rules and regulations."[27] This is comparable to the Division of Public Health in *McDougle,* which also had broad powers to establish rules and regulations.[28]

Additionally, the Department is authorized to provide medical assistance for eligible recipients by utilizing managed care contracts.[29] The Department is responsible for processing and determining the eligibility of each applicant for medical assistance.[30] It is also responsible for establishing "premiums, copayments, and deductibles," as well as limits on those services.[31] Clearly, it is charged with protecting the public interest with respect to Medicaid, which it accomplishes in part by contracting with and paying MCO's such as Coventry. Because of the Department's broad authority and responsibility for administering the Medicaid program in Nebraska, its role at a State fair hearing is far more expansive than simply adjudicating disputes between parties regarding Medicaid eligibility. Thus, in this case, it was a "party of record" within the meaning of § 84-917(2)(a)(i).

(b) Coventry

Whether Coventry was a necessary party to the district court appeal is likewise dependent upon whether it was a "party of record" at the State fair hearing.[32] Coventry contends that it was not a "party of record," but should have been. We

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[25] Neb. Rev. Stat. § 68-908(1) (Cum. Supp. 2014).

[26] Neb. Rev. Stat. § 68-905 (Reissue 2009).

[27] § 68-908(2)(b).

[28] *McDougle, supra* note 20.

[29] Neb. Rev. Stat. § 68-910(2) (Reissue 2009).

[30] Neb. Rev. Stat. § 68-914(1) (Cum. Supp. 2014).

[31] Neb. Rev. Stat. § 68-912(1)(a) (Cum. Supp. 2014).

[32] See § 84-917(2)(a)(i).

conclude that the question of whether Coventry was a "party of record" at the State fair hearing and thus a necessary party in the district court appeal is a jurisdictional issue which does not involve a factual dispute; thus, we must resolve the question independently on the basis of the record and applicable law.[33]

The bill of exceptions from the State fair hearing proceedings does not specifically identify any "parties of record." While this creates some ambiguity on the point, the failure of the Department to make this important determination on the record in the administrative proceeding does not resolve the jurisdictional issue. As we noted in *McDougle*,[34] there is no statutory directive that the phrase "parties of record" for purposes of judicial review of an administrative determination is limited to those parties named in the underlying administrative proceeding.

This position is consistent with holdings by other state courts. In an Oklahoma case, the court found that even though two entities were not named and joined as parties in the caption of the administrative action, they both appeared, participated, and were entitled by law to participate; thus, they were parties of record and failure to join them on appeal was a jurisdictional defect.[35] Similarly, a Washington court defined a party of record as a person "'to whom the agency action is specifically directed,'" or a person "'named as a party to the agency proceeding or allowed to intervene or *participate as a party in the agency proceeding*.'"[36]

For two principal reasons, we conclude Coventry was a "party of record" at the State fair hearing. First, as an MCO, Coventry was required by federal law to be a party to the State fair hearing. Because Nebraska has elected to participate in the

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[33] See *McDougle*, *supra* note 20.

[34] *Id.*

[35] *Oklahoma Foundation v. Dept. of Central*, 180 P.3d 1 (Okla. Civ. App. 2007).

[36] *Litowitz v. Growth Management Bd.*, 93 Wash. App. 66, 69, 966 P.2d 422, 423 (1998) (emphasis supplied). See Wash. Rev. Code Ann. § 34.05.010(12)(a) and (b) (West Cum. Supp. 2015).

federal Medicaid program, it must comply with standards and requirements imposed by federal statutes and regulations.[37] A federal Medicaid regulation governing resolution of grievances and appeals specifically provides: "The parties to the State fair hearing include the MCO . . . as well as the enrollee and his or her representative . . . ."[38]

Second, it is clear from the administrative record that Coventry participated in the State fair hearing and was treated as a party by the hearing officer. Pursuant to § 84-909, the Department has adopted rules and regulations governing the appeals process in Medicaid cases.[39] Pursuant to these regulations, a Medicaid client may request a State fair hearing after denial or limitation of an authorization,[40] as Shaffer did in this case. The parties to the fair hearing include "the petitioner or person by whom a contested case is brought and the Department or other decision maker whose decision is subject to appeal or a person or party granted leave to intervene."[41] The "decision . . . subject to appeal" was Coventry's decision to deny Shaffer's request for coverage of PDN care to be provided by Delores. Coventry appeared at the fair hearing to explain and defend its decision. Its representatives presented evidence, cross-examined witnesses, entered into stipulations, and presented arguments. At the beginning and conclusion of the hearing, the hearing officer referred to Shaffer and Coventry as the "parties."

We conclude as a matter of law that Coventry was a "party of record" at the State fair hearing and therefore a necessary party pursuant to § 84-917(2)(a)(i) in the subsequent appeal to the district court. Coventry prevailed at the administrative proceeding, but was not given an opportunity to participate in or be heard in the district court appeal that resulted in a reversal

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[37] See, *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007); Neb. Rev. Stat. § 68-906 (Cum. Supp. 2014).

[38] 42 C.F.R. § 438.408(f)(2).

[39] 465 Neb. Admin. Code, ch. 6 (1995); 482 Neb. Admin. Code, ch. 7 (2010).

[40] 482 Neb. Admin. Code § 7-003(2).

[41] 465 Neb. Admin. Code § 6-004.02.

of the administrative decision. Because the presence of a necessary party is jurisdictional, the failure to make Coventry a party to the appeal deprived the district court of jurisdiction. In light of this determination, we are required to vacate the judgment of the district court and therefore do not address Coventry's third assignment of error.

## V. CONCLUSION

For the foregoing reasons, we vacate the order of the district court and dismiss the appeal.

VACATED AND DISMISSED.

MILLER-LERMAN, J., not participating.

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JACQUELYN STICK, APPELLANT, V.
CITY OF OMAHA, APPELLEE.
857 N.W.2d 561

Filed January 2, 2015. No. S-13-797.

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. **Political Subdivisions Tort Claims Act.** Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act is a question of law.
4. **Political Subdivisions Tort Claims Act: Appeal and Error.** An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the Political Subdivisions Tort Claims Act independent from the conclusion reached by the trial court.
5. **Political Subdivisions Tort Claims Act: Immunity: Waiver.** The Political Subdivisions Tort Claims Act provides limited waivers of sovereign immunity which are subject to statutory exceptions. If a statutory exception applies, the claim is barred by sovereign immunity.
6. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

7. **Statutes.** It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.
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. 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.
9. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are read in pari materia, and therefore they are conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
10. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless.

Appeal from the District Court for Douglas County: W. Russell Bowie III, Judge. Affirmed.

Mandy L. Strigenz, of Sibbernsen, Strigenz & Sibbernsen, P.C., for appellant.

Alan M. Thelen, Deputy Omaha City Attorney, for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Miller-Lerman, J.

## NATURE OF CASE

Jacquelyn Stick appeals the order of the district court for Douglas County which granted summary judgment in favor of the City of Omaha (City) and dismissed her complaint brought under the Political Subdivisions Tort Claims Act (PSTCA). The court concluded, inter alia, that Stick's claim for injuries she sustained in a slip-and-fall accident was barred by the "snow or ice" exception in the PSTCA. We affirm.

## STATEMENT OF FACTS

On the morning of January 19, 2010, Stick attended a fitness class that began at 5:30 a.m. at the Montclair Community Center (Center), which is owned and operated by the City. When she left the building at approximately 6:30 a.m., Stick

slipped on ice that had formed on the sidewalk outside the Center. Stick fell onto her left knee and broke her patella, which required her to have surgery.

Stick filed this action against the City under the PSTCA, Neb. Rev. Stat. § 13-901 et seq. (Reissue 2007 & Cum. Supp. 2010), pursuant to which political subdivisions have generally waived their sovereign immunity except as specified in the PSTCA. She alleged that the City was responsible for maintenance of the sidewalk and that her fall and the damages resulting therefrom were caused by the negligence of the City's employees. She specifically alleged the City was negligent in (1) allowing ice to accumulate, creating an unsafe and dangerous condition; (2) failing to inspect the sidewalk to determine whether it was safe for pedestrian travel; (3) failing to remove the accumulation of ice; and (4) failing to apply sand, salt, melting chemicals, or other safety coating to the accumulation of ice. In its answer, the City alleged affirmative defenses, including the assertion that Stick's claim was barred under the PSTCA, specifically § 13-910(10), which provides in part that the PSTCA shall not apply to "[a]ny claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway as defined in section 60-624, bridge, public thoroughfare, or other public place due to weather conditions."

The City moved for summary judgment. At a hearing on the motion, the court received evidence including depositions and affidavits of Stick and of employees of the City, as well as certified weather records. Evidence indicated that there was no overnight precipitation in the early hours of January 19, 2010.

In her deposition, Stick stated that there had been no snow or rain but that there was fog when she drove to the Center. She parked in the Center's parking lot and walked on the sidewalk to the building. The sidewalk was wet with "winter condensation" but not slippery when she arrived and entered the building. When she left the building, there was a slight drizzle and heavier fog than when she had entered. She did not notice icy conditions until she fell. Stick stated that icy conditions had arisen during the time that she was in the Center. She observed

that the concrete where she fell was newer and less worn than the surrounding concrete.

In an affidavit, a maintenance foreman responsible for the City's community centers stated that his crew's normal procedure for snow and ice removal in January 2010 was to arrive at the Center shortly after 7 a.m. The crew would perform snow and ice removal earlier if there had been overnight precipitation. He stated that temperatures hovering around freezing with fog but without precipitation would not have prompted him to call crews in earlier than 7 a.m., because such conditions would not have created a need for snow and ice removal. He stated that this was true whether or not there were early morning activities at the Center.

The district court granted summary judgment in the City's favor. In its order filed August 26, 2013, the court first considered the City's argument that Stick's claim was barred under § 13-910(10), which exempts claims arising out of snow or ice conditions in a public place due to weather. The court stated that it must determine, under § 13-910(10), whether (1) the sidewalk on which Stick slipped was a "public thoroughfare" or a "public place" and (2) the icy condition was caused by nature. The court first concluded that the sidewalk was not a "public thoroughfare," because although this court has held that sidewalks adjoining a street are part of the public thoroughfare, the sidewalk did not adjoin a street but instead led from a parking lot to the building. The court concluded, however, that the sidewalk was a "public place." The court reasoned that the sidewalk in this case is maintained by the City for the use of the public and that it therefore is included in the list of exemptions as an "other public place" under § 13-910(10). The court further determined that there was no genuine issue of material fact the icy condition was caused by nature and that there was no meaningful evidence to the contrary. The court finally noted that although Stick commented that the portion of the sidewalk on which she slipped was newer and slicker, her complaint made no claim based on the materials used or the manner in which the sidewalk was constructed and there were no facts to support such a claim. The court concluded that Stick's claim was barred under

§ 13-910(10) and that the City's motion for summary judgment should be sustained.

Although its conclusion regarding § 13-910(10) resolved the motion, the court analyzed the City's additional contention that Stick's claim would also fail under common-law negligence principles regarding lack of notice. After reviewing precedent and the evidence in this case, the court determined that there was no evidence the City had actual or constructive notice of the icy condition of the sidewalk and that such lack of notice was an additional basis to sustain the City's motion for summary judgment.

The court stated that because it found no genuine issue of material fact with respect to two of the City's defenses, it did not need to address the City's affirmative defense based on § 13-910(12), regarding notice of insufficiency or want of repair of a public thoroughfare. Because the City was entitled to judgment and Stick's evidence did not raise a genuine issue of material fact, the court sustained the City's motion for summary judgment and dismissed Stick's complaint with prejudice.

Stick appeals.

## ASSIGNMENTS OF ERROR

Stick claims that the district court erred when it (1) determined that the sidewalk was a "public place" under § 13-910(10), (2) determined that the "snow or ice" exception under § 13-910(10) barred her claim, (3) failed to consider her testimony regarding the condition of the sidewalk, and (4) determined that the City did not have notice of the icy condition of the sidewalk.

## 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. *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (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.*

[3,4] Whether the allegations made by a plaintiff present a claim that is precluded by exemptions set forth in the PSTCA is a question of law. See *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014). An appellate court has an obligation to reach its conclusion on whether a claim is precluded by exemptions set forth in the PSTCA independent from the conclusion reached by the trial court. *Id.*

## ANALYSIS

Stick claims that the district court erred when it determined that her claim was barred under § 13-910(10). We conclude that Stick's claim fell within the meaning of § 13-910(10), that it was barred, and that the district court did not err in so ruling.

[5] The PSTCA provides limited waivers of sovereign immunity which are subject to statutory exceptions. *Hall v. County of Lancaster, supra*. If a statutory exception applies, the claim is barred by sovereign immunity. *Id.*

In its answer to Stick's complaint, the City alleged affirmative defenses, including an assertion that Stick's claim was barred under § 13-910(10). The focus of our analysis is § 13-910(10), which provides in part that the PSTCA shall not apply to "[a]ny claim arising out of snow or ice conditions or other temporary conditions caused by nature on any highway as defined in section 60-624, bridge, public thoroughfare, or other public place due to weather conditions."

In reaching its decision that Stick's claim was barred by § 13-910(10), the court concluded that the sidewalk where Stick fell was a "public place" within the meaning of § 13-910(10) and that the icy condition was caused by nature and was due to weather conditions. We note for completeness that the exemption provided in § 13-910(10) refers to "temporary conditions" and that there is no dispute in this case that the icy condition of the sidewalk was a temporary condition.

Stick claims on appeal that the district court erred when it concluded that the "snow or ice" exception applied in this

case and barred her suit. Stick's primary argument is that the court erred when it found that the sidewalk where she fell was a "public place" within the meaning of § 13-910(10). She also contends that the court erred when it failed to consider her comment regarding the condition of the sidewalk, because such observation could serve to show that the icy condition of the sidewalk was not due only to weather conditions but perhaps to other factors under the control of the City.

With regard to the determination that the sidewalk where Stick fell was a public place, Stick argues that "public place" as used in § 13-910(10) should be read to mean a street or other area traveled by motor vehicles and that therefore the exception does not apply to her claim that arose from conditions on the sidewalk. She urges us to apply the canon of ejusdem generis in our construction of § 13-910(10). Ejusdem generis is a canon which provides that a general word or phrase that follows a list of specific items is to be interpreted as including only items of the same type as those previously listed. See *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009). Stick contends that because the list in § 13-910(10) includes specific references to highways, bridges, and public thoroughfares, the phrase "other public place[s]" should be construed to refer only to places upon which motor vehicles travel and not to places such as sidewalks where pedestrians travel.

In its order, the district court noted that there were no Nebraska cases construing the phrase "public place" as used in § 13-910(10). The court, however, referred to two cases from other jurisdictions for guidance: *Kluver v. City of Hinton*, 924 P.2d 306 (Okla. App. 1996), and *Porter v. Grant County Bd. of Educ.*, 219 W. Va. 282, 633 S.E.2d 38 (2006).

In *Kluver*, the Court of Appeals of Oklahoma examined a statute similar to § 13-910(10) and concluded that a city was exempt from a claim that arose when the plaintiff slipped on ice on the sidewalk outside the city offices. We note, however, that the statute at issue in *Kluver* referred only to "'any public way or other public place,'" 924 P.2d at 307, without specifically listing locations such as highways or bridges, and that the

opinion did not explicitly analyze whether the sidewalk was a "public place."

In *Porter*, the Supreme Court of Appeals of West Virginia examined a statute similar to § 13-910(10) and concluded that a county board of education was exempt from a claim that arose when one of the plaintiffs slipped on snow and ice on a sidewalk on school grounds. We note that, similar to *Kluver*, the statute at issue in *Porter* referred to "'any public way or other public place,'" 219 W. Va. at 285, 633 S.E.2d at 41, without specifically listing locations such as highways or bridges, and that the opinion did not explicitly analyze whether the sidewalk was a "public place."

In its analysis, the district court noted that Black's Law Dictionary defines "public place" as "[a]ny location that the local, state, or national government maintains for the use of the public, such as a highway, park, or public building." Black's Law Dictionary 1426 (10th ed. 2014). The court concluded that the sidewalk in this case, which led from the Center to the parking lot, was a "public place" within the meaning of § 13-910(10), because it was maintained by the City for the use of the public.

[6,7] We conclude that the district court did not err when it construed § 13-910(10) and ruled that the sidewalk where Stick fell was a "public place" within the meaning of § 13-910(10). We start with the rule of construction that statutory language is to be given its plain and ordinary meaning, and this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Taylor*, 286 Neb. 966, 840 N.W.2d 526 (2013). It is not within the province of this court to read a meaning into a statute that is not warranted by the legislative language. *Id.* The phrase "public place" has a plain and ordinary meaning as set forth in Black's Law Dictionary, quoted above, and such meaning includes a publicly owned building and its grounds when the governmental entity maintains such location for the use of the public.

[8] It is well settled that 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. *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013). A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction. *Id.* We have specifically stated that we strictly construe the PSTCA in favor of the political subdivision and against the waiver of sovereign immunity. *McKenna v. Julian*, 277 Neb. 522, 763 N.W.2d 384 (2009). As a corollary to these propositions, in order to strictly construe against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity. See *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998). With these principles in mind and given the plain meaning of "public place," we strictly construe the PSTCA in favor of the political division and against waiver, and we therefore read "public place" in § 13-910(10) as referring to the generally understood meaning of the phrase rather than the more limited reading urged by Stick. Given our reading of the statute, Stick's claim is barred.

[9] Section 13-910(10) is found in a series of statutes, § 13-910(9) through and including § 13-910(12). We read components of a series or collection of statutes pertaining to a certain subject matter in pari materia, and therefore they are conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible. See *Blaser v. County of Madison*, 285 Neb. 290, 826 N.W.2d 554 (2013). In this series of statutes, other exemptions surround subsection (10). Specifically, subsections (9), (11), and (12) contain exemptions concerning roads, highways, bridges, and other places upon which motor vehicles travel. The inclusion of subsection (10) among these other exemption statutes would tend to support Stick's reading of it. However, these related statutes explicitly limit the scope of their exemptions to highways, bridges, and public thoroughfares and do not expand the breadth of their exemptions by adding the phrase "other public place" as does § 13-910(10).

[10] 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. *Johnson v. City of Fremont*, 287 Neb. 960, 845 N.W.2d 279 (2014). Stick urges us to read "other public place" as referring to a location traversed only by vehicular traffic. To read § 13-910(10) as urged by Stick would render the phrase "other public place" superfluous, particularly where the list in subsection (10) already refers to "public thoroughfare," which would itself appear to refer to locations upon which motor vehicles travel. To read "other public place" to be similarly limited, as urged by Stick, would render the additional phrase at issue superfluous, because such locations would already be encompassed in the phrase "public thoroughfare." We do not accept Stick's suggested reading.

We conclude that the district court did not err when it read "other public place" in § 13-910(10) to include the location where Stick fell, which was the sidewalk leading from the Center to the parking lot. Such location was on the grounds of a public building and was maintained by the City for public use, and it was therefore a "public place" within the meaning of § 13-910(10). The accident upon this sidewalk under the undisputed conditions was exempt from suit based on the plain language of the statute as written by the Legislature.

As an additional basis for her appeal, Stick claims that the court erred when it failed to consider her testimony regarding the condition of the sidewalk. Stick asserts that such testimony suggests that the icy condition of the sidewalk was due to factors under the control of the City. In her deposition, Stick observed that the portion of the sidewalk on which she slipped was newer and slicker than other portions of the sidewalk. She asserts on appeal that her comment created a genuine issue of material fact as to whether the City's actions combined with the weather conditions to cause her injuries.

Contrary to Stick's assertion, the district court acknowledged this portion of her deposition in its order ruling on the motion for summary judgment. In this regard, the court noted that her complaint made no allegation or claim based on the materials used or the manner in which the sidewalk

was constructed and that no meaningful evidence had been produced to show that such factors contributed to the fall in this case.

The pleadings frame the issues to be considered on a motion for summary judgment, see *Andres v. McNeil Co.*, 270 Neb. 733, 707 N.W.2d 777 (2005). The complaint filed by Stick in this case includes no allegation regarding the construction of the sidewalk or the materials used in such construction or their connection to the icy condition of the sidewalk. The evidence on the issue was limited to Stick's comment regarding how the sidewalk looked. Even viewing the evidence in the light most favorable to Stick, as we must, see *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014), this evidence did nothing to indicate that the construction or materials contributed to the icy condition on the day of the accident. We agree with the district court that Stick did not plead such a claim and did not present evidence that would create a genuine issue of material fact with respect to such a claim.

The district court did not err when it concluded that Stick's claim was barred under § 13-910(10) and that therefore the City was entitled to summary judgment in its favor. Because we conclude that Stick's claim was barred under § 13-910(10), we need not consider Stick's assignment of error regarding the district court's alternate conclusion that the City did not have notice of the icy condition of the sidewalk.

## CONCLUSION

Given the language of § 13-910(10) as written by the Legislature, we agree with the district court that Stick's claim was barred under § 13-910(10). The district court did not err when it sustained the City's motion for summary judgment and dismissed Stick's complaint. We affirm the judgment of the district court.

AFFIRMED.

# In re Interest of Zachary D. and Alexander D., children under 18 years of age. Nebraska Department of Health and Human Services, appellant, v. Zachary D. and Alexander D., appellees.

857 N.W.2d 323

Filed January 2, 2015. No. S-14-263.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Courts: Contempt.** Nebraska's courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice. This authority includes the power to punish for contempt which should be used sparingly, but is incident to every judicial tribune.
3. **Courts: Constitutional Law: Contempt.** The power to punish for contempt is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.
4. **Juvenile Courts.** Separate juvenile courts and county courts sitting as juvenile courts are courts of record.
5. **Courts: Contempt.** Neb. Rev. Stat. § 25-2121 (Reissue 2008) provides that every court of record shall have the power to punish by fine or imprisonment actions that are in contempt of court.
6. **Contempt: Words and Phrases.** When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily civil contempt, which requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
7. **Contempt: Proof.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence.
8. **Evidence: Words and Phrases.** Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
9. **Contempt.** The collateral bar rule requires that a party may not, as a general rule, violate a court order and raise the issue of its unconstitutionality collaterally as a defense in a contempt proceeding.

Appeal from the Separate Juvenile Court of Douglas County: Christopher Kelly, Judge. Affirmed.

Marcie Bergquist, Special Assistant Attorney General, of Department of Health and Human Services, for appellant.

Patrick A. Campagna, Britt H. Dudzinski, and A. Jill Stigge, Senior Certified Law Student, of Lustgarten & Roberts, P.C., L.L.O., for appellees.

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

HEAVICAN, C.J.

## INTRODUCTION

The separate juvenile court of Douglas County found the Department of Health and Human Services and Nebraska Families Collaborative (NFC) in contempt of court. The department appeals. We affirm.

## FACTUAL BACKGROUND

In April 2005, Zachary D. and Alexander D. were adjudicated in Greeley County, Nebraska, as juveniles under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2004) and removed from their mother's care and custody. Parental rights as to Zachary and Alexander were terminated in October 2006. Zachary was eventually adopted, apparently by his grandmother, but Alexander remained in foster care.

Alexander has been diagnosed with attention deficit hyperactivity disorder, oppositional defiance disorder, and posttraumatic stress disorder. In addition, Alexander has borderline intellectual functioning and suffers from the effects of fetal alcohol syndrome. Alexander was 3 years old when he was removed from his mother's care; at the time of the hearing in this case, he was 12 years old. According to the record, Alexander has been placed in at least 17 different foster placements with 12 different families, and additionally has been hospitalized six times for a total of 73 days and has spent a year in a day treatment program, 18 months in two different residential treatment centers, and over 6 months in a group home. As such, it has been difficult to find placements for Alexander.

Alexander's case was eventually moved to the Douglas County Separate Juvenile Court. In Douglas County, the department contracts with NFC for case management services.

On or around September 18, 2012, after his case was moved to Douglas County, Alexander was placed in a program with Envisions of Norfolk, Inc. (Envisions), located in Norfolk, Nebraska. At this facility, Alexander was provided one-on-one care. According to Alexander's NFC caseworker, locating this facility and program for Alexander took a "substantial" amount of time. The juvenile court ordered that Alexander remain in the Envisions program until further order of the court. The record suggests that Alexander was doing well in this program.

However, in late September or early October 2013, Alexander's caseworker became aware that NFC and Envisions were involved in licensing negotiations. Though not entirely clear from the record, it appears that NFC's contract with the department required these programs to be licensed as foster care placements, but none of the programs were actually licensed as such.

In any event, Alexander's caseworker did not alert the guardian ad litem, the county attorney, or the juvenile court of these ongoing negotiations. At some point in early October, NFC began contacting other foster care providers to look for placements for Alexander in the event that he was removed from his Envisions placement. Again, neither the caseworker, nor anyone else from NFC, alerted any of the stakeholders that other providers were being contacted. According to the caseworker, she made an "oversight" that was not "malicious" and explained that she did not contact anyone at first, because the move to find other providers was "Plan B" and there were no plans to change Alexander's placement.

A meeting with the caseworker, guardian ad litem, and other stakeholders was held on October 18, 2013. The caseworker did not inform anyone at the meeting of the ongoing negotiations or NFC's ongoing search for another placement. The caseworker testified that she did not do so because at that time, Alexander's placement was not "in jeopardy."

On October 21, 2013, Envisions informed NFC that it did not wish to pursue licensure as a foster care placement. In addition, Envisions noted that the daily rate being offered it for Alexander's care was inadequate, because it provided less than a one-half staffing position, when Alexander required one-on-one care. As such, Envisions gave notice that it was terminating its services to Alexander on November 1. Though the caseworker was informed of this development, she did not notify any of the stakeholders that Alexander's placement at Envisions was to end.

Negotiations continued between NFC and Envisions, and originally a plan was in place for Alexander to continue at Envisions until November 30, 2013. But this plan fell through, apparently due to NFC's failure to pay Envisions in a timely manner. On October 29, Envisions reaffirmed that Alexander would need to be removed from the program on November 1. It was only then that the caseworker notified the guardian ad litem and the county attorney of the impending move.

Alexander was moved into a new foster home on November 1, 2013. The guardian ad litem filed an application for contempt against the department and NFC on October 30. Alexander's new placement was approved by the juvenile court on November 4.

Following a hearing on the contempt application, the juvenile court found the department and NFC in contempt and ordered them to pay a fine of $5,000 or purge the contempt by (1) preparing and distributing "a written policy providing that it initiate and have immediate contact with the children's Guardians ad Litem, the Deputy County Attorney, as well as all case professionals, whenever a child's placement is threatened by disruption for any reason," and (2) preparing and distributing

> a written policy which prohibits the deletion or destruction of email and/or hard copy correspondence between case managers, their supervisors, utilization management personnel, and placement providers for minor children, while a case is open and pending before the Juvenile Court and for no less than six months following case closure and termination of the Court's jurisdiction.

The basis for this second policy was the deletion by Alexander's caseworker of e-mails relating to Alexander and his change in placement.

The department appeals.

## ASSIGNMENTS OF ERROR

On appeal, the department assigns, restated and consolidated, that the juvenile court erred in (1) finding clear and convincing evidence to hold the department in contempt and (2) sentencing the department on the contempt finding, because the court's sentence was a violation of the separation of powers doctrine.

## STANDARD OF REVIEW

[1] In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.[1]

## ANALYSIS

*Contempt.*

In its first assignment of error, the department contends that the juvenile court erred in finding it to be in contempt of court. The department argues that there was no evidence to show that its violation of the court's order was willful and that, moreover, the evidence showing contempt was not clear and convincing.

[2-5] We have held that Nebraska's courts, through their inherent judicial power, have the authority to do all things necessary for the proper administration of justice.[2] This authority includes the power to punish for contempt which

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[1] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012).

[2] *In re Interest of Samantha L. & Jasmine L.*, 284 Neb. 856, 824 N.W.2d 691 (2012).

should be used sparingly,[3] but is incident to every judicial tribune.[4] It is derived from a court's constitutional power, without any expressed statutory aid, and is inherent in all courts of record.[5] Separate juvenile court and county courts sitting as juvenile courts are courts of record.[6] And Neb. Rev. Stat. § 25-2121 (Reissue 2008) further provides that "[e]very court of record shall have power to punish by fine or imprisonment" actions that are in contempt of court.

[6] When a party to an action fails to comply with a court order made for the benefit of the opposing party, such act is ordinarily civil contempt, which requires willful disobedience as an essential element.[7] "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[8]

[7,8] Outside of statutory procedures imposing a different standard, it is complainant's burden to prove civil contempt by clear and convincing evidence.[9] Clear and convincing evidence means that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.[10]

Initially, we reject the department's assertion that the juvenile court's failure to specifically use the term "willful" is relevant. While it is true that the court did not use that term, it did make oral findings that clearly indicated its belief that NFC's actions were intentional and, thus, willful.

The department directs us to the statement of the juvenile court made in open court wherein the court noted that it did

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[3] See *State ex rel. Collins v. Beister*, 227 Neb. 829, 420 N.W.2d 309 (1988), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[4] See *In re Interest of Samantha L. & Jasmine L., supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[8] *Id.*

[9] *Id.*

[10] *R & B Farms v. Cedar Valley Acres*, 281 Neb. 706, 798 N.W.2d 121 (2011).

not "think that the Department or NFC acted with the intention to lose that placement or that they concocted some scheme to not have the left hand understand what the right hand was doing within the agency so that the placement was lost." But this shows only that the juvenile court did not believe that the department acted maliciously or with a bad motive. Such a showing is not required to find contempt; rather, the violation need only be intentional.

We also conclude that there was clear and convincing evidence to support the juvenile court's contempt finding. Neb. Rev. Stat. § 43-285(3) (Cum. Supp. 2012) provides in part that the department

> shall file a report and notice of placement change with the court and shall send copies of the notice to all interested parties at least seven days before the placement of the juvenile is changed from what the court originally considered to be a suitable family home or institution to some other custodial situation.

The court's September 10, 2013, order provided that Alexander "shall remain as placed in the Envisions Program, until further Order of the Court." Yet, Alexander was moved on November 1, 2013, without further order of the court. The juvenile court's order approving the emergency placement was not entered until November 4. The evidence plainly shows that without notice or permission, Alexander was moved on November 1, in violation of the court's order and without the notice required by § 43-285(3).

Moreover, if the guardian ad litem, county attorney, and juvenile court had been notified in a timely manner, the juvenile court could have approved a change in placement prior to the date set by Envisions to move Alexander. And, though speculative, it is possible that such notification and possible intervention by the guardian ad litem or others could have prevented or delayed yet another move for a child who has already been in so many different placements. In the end, we agree with the guardian ad litem's observation that, apparently, the department felt it was easier to beg for forgiveness than to ask for permission.

We review the juvenile court's factfinding for clear error, and we find none. We further find no abuse of discretion in the juvenile court's finding of contempt. The department's first assignment of error is without merit.

*Sentence.*

The department also assigns that the juvenile court erred in its sentence for contempt. The department and NFC were ordered to prepare and distribute to all departmental and NFC employees a written policy regarding notifications in the event of a possible change in placement, and also to prepare and distribute a written policy regarding the retention of electronic records. The department argues that such was in violation of the doctrine of separation of powers, because by so ordering, the judicial branch has infringed upon the executive branch's ability to administer itself, and further argues that if the coercive part of the sentence fails, the remaining sanction is punitive, which is impermissible.

[9] As an initial matter, the guardian ad litem argues that the collateral bar rule prevents this court from considering the department's constitutional argument. That rule requires that "a party may not, as a general rule, violate a court order and raise the issue of its unconstitutionality collaterally as a defense in a contempt proceeding."[11] But on these facts, we find the collateral bar rule inapplicable. The department has preserved its constitutional argument by appealing from the order which it contends is unconstitutional.

Still, we find no merit to the department's contention. The crux of the department's argument is that the doctrine of separation of powers is violated when the judicial branch imposes an order on the executive branch requiring it to institute and distribute a particular policy, because such a policy amounts to a rule or regulation and it is solely the function of the executive branch to promulgate its own rules and regulations.

But the policies which the juvenile court has ordered the department and NFC to create are not rules and regulations.

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[11] *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 733, 559 N.W.2d 740, 748 (1997).

Rules and regulations are defined by Neb. Rev. Stat. § 84-901(2) (Reissue 2014) as

> any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure. Rule or regulation shall not include . . . rules and regulations concerning the internal management of the agency not affecting private rights, private interests, or procedures available to the public . . . .

The two policies at issue here are akin to those that concern "the internal management of the agency." Moreover, while these policies certainly relate to statutes governing the juvenile court process, they are not "designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure." Rather, these policies are intended to provide notice to all departmental and NFC employees of certain requirements of state law relating to notice of changes in placement and records review and retention policies.

For example, the first notice referenced by the juvenile court in its purge plan—regarding notification to be given to the stakeholders in the event of a threatened change in placement—in part refers to § 43-285(3), which provides that the department must "file with the court a report stating the location of the juvenile's placement and the needs of the juvenile" at least every 6 months, and shall also file a report and notice of placement change with the court and "all interested parties at least seven days before the placement of the juvenile is changed from what the court originally considered to be a suitable family home or institution."

In addition, the failure of the department to notify stakeholders that Alexander might be moved could interfere with the guardian ad litem's ability to carry out his or her powers and duties. A guardian ad litem is to

> make every reasonable effort to become familiar with the needs of the protected juvenile which (i) shall include consultation with the juvenile within two weeks after

> the appointment and once every six months thereafter and inquiry of the most current caseworker, foster parent, or other custodian and (ii) may include inquiry of others directly involved with the juvenile or who may have information or knowledge about the circumstances which brought the juvenile court action or related cases and the development of the juvenile, including biological parents, physicians, psychologists, teachers, and clergy members [and is also]
>
> . . . responsible for making recommendations to the court regarding the temporary and permanent placement of the protected juvenile.[12]

And the second notice referenced in the juvenile court's purge plan—regarding records retention—is necessitated both by the specifics of the juvenile code, which define confidential records and allow access to those records by order of the court,[13] and by more general state law, which states that such records should not be "mutilated, destroyed, transferred, removed, damaged, or otherwise disposed of, in whole or in part, except as provided by law."[14]

Given the specific and narrow reach of the notices ordered by the juvenile court, we find no abuse of discretion in the sanction imposed and, thus, find no error. The department's second assignment of error is without merit.

## CONCLUSION

The juvenile court's finding of contempt and sanction is affirmed.

AFFIRMED.

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[12] Neb. Rev. Stat. § 43-272.01(d) and (f) (Cum. Supp. 2014).

[13] Neb. Rev. Stat. § 43-2,108 (Reissue 2008).

[14] Neb. Rev. Stat. § 84-1213 (Reissue 2014).

STEPHAN, J., dissenting.

I respectfully dissent. While I do not condone the actions of the department or NFC in this case, I cannot agree with the majority that those actions constituted civil contempt.

As the majority correctly notes, willful disobedience of a court order is an essential element of civil contempt.[1] To establish this element, it must be shown by clear and convincing evidence that the party acted intentionally and with knowledge that the act was in violation of a court order.[2] The starting point of the analysis should be the language of the order allegedly violated. Here, the guardian ad litem alleged that the department and NFC were in contempt for violating two provisions of the juvenile court's September 10, 2013, order. The first provision stated: "IT IS HEREBY ORDERED that the minor child is to remain in the custody of the . . . department . . . for adoption planning and placement consistent with the Court's permanency objective. Alexander . . . shall remain as placed in the Envisions Program, until further Order of the Court." The second provision stated: "IT IS FURTHER ORDERED that the . . . department [and NFC] shall secure and present to all parties a list of all medical, mental health, educational and therapeutic services required by the minor child, Alexander . . . ." I note that when the application for contempt was filed on October 30, Alexander remained in the placement ordered by the court; he was not removed from the Envisions program until November 1, when the program would no longer keep him.

In its contempt order, the juvenile court found a violation of only that part of its prior order which required Alexander to remain as placed in the Envisions program until further order of the court. The court found this directive was violated, "due solely to financial dealings and misdealings by [NFC]," by delaying a payment which would have enabled Alexander's placement in the Envisions program to continue until the end of November. It further found that the department and NFC

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[1] See, *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012); *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini, supra* note 1.

[2] See, *Hossaini, supra* note 1; *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997), *overruled on other grounds, Smeal Fire Apparatus Co., supra* note 1.

"failed to keep a critical party, the child's Guardian ad Litem, apprised of developments as the situation, and the child's placement, unraveled."

The record certainly reflects that the circumstances which led to the termination of the placement could have been managed in a more efficient and effective manner by the department and NFC. When NFC first learned on October 21, 2013, that Envisions had decided to terminate the placement because of ongoing payment and licensing issues, it did not immediately notify the guardian ad litem. However, the NFC caseworker specifically denied that NFC formulated any plan to move Alexander without court approval and testified that the "plan all along" was for him to remain at Envisions. As of October 25, NFC believed it had negotiated for Alexander to remain at Envisions at least until the end of November. When that agreement collapsed on October 29, because "internal hiccups" within NFC delayed payment to Envisions, the NFC caseworker contacted the guardian ad litem and informed him of the situation. On the same date, internal correspondence between NFC employees noted that "Alex is court ordered to be at Envisions" and that it would be necessary to secure "a new order to move him." In the end, it was clearly Envisions, not the department or NFC, which made the decision that Alexander would no longer be allowed to remain in the placement after November 1.

It is clear from the record that mistakes were made. But that does not mean that there was a willful violation of the placement order by either the department or NFC.[3] I find no clear and convincing evidence in the record that either the department or NFC took any action, or refrained from taking some action, with the knowledge that by doing so, they were violating the placement order. And, apparently, neither did the juvenile court. It made no specific finding of willful disobedience of the placement order. The majority acknowledges this, but concludes that such a finding was unnecessary in light of "oral findings" made by the juvenile court.

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[3] *See Klinginsmith, supra* note 2.

As to whether a specific finding of willful disobedience is required, we have said that "[t]o find a party in contempt in juvenile court, there must be a finding of willful violation of a juvenile court's order."[4] This record contains no such finding, either written or oral. The oral finding to which the majority apparently refers is the following comment by the juvenile court at the sentencing hearing:

> I don't think that the Department or NFC acted with the intention to lose that placement or that they concocted some scheme to have the left hand not understand what the right hand was doing within the agency itself so that the placement was lost. You had somebody from the agency work with the placement and reach some type of an accord contingent on money being paid. The other hand and the agency did not get the money paid, and the placement came back and said, it's over, and that was it. And all of a sudden the agency itself, NFC, [the department], the guardian ad litem, and the Court were faced with a situation where we had a child who needed services who was out on the street, so to speak. All of that could have been avoided.

This is a finding of bureaucratic malfeasance, but not willful disobedience of a court order. Any doubt on that point is dispelled by the actual language of the contempt order, to which the majority does not refer. Specifically, the juvenile court found that the department, "*through its lack of supervision of its contracted agent*, [*NFC*], is in direct violation of the Court's September 10, 2013 Court Order affecting the child's Placement, and is therefore in contempt of Court." (Emphasis supplied.)

While I do not take issue with the factual finding of the department's "lack of supervision," I think the juvenile court's conclusion that failure to supervise constitutes civil contempt is incorrect as a matter of law. The placement order in question is silent with respect to the department's responsibility to supervise NFC, and thus a failure to supervise would not

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[4] See *In re Interest of Thomas M.*, 282 Neb. 316, 325, 803 N.W.2d 46, 54 (2011).

itself violate any provision of the order. A court cannot hold a person or party in contempt unless the order or consent decree gave clear warning that the conduct in question was required or proscribed.[5] A fair inference can be drawn that had the department supervised NFC more diligently, or notified the guardian ad litem of the problems with the placement at an earlier date, the decision of Envisions to terminate the placement might have been averted or delayed. But that is not the issue. Rather, the question is whether the department intentionally took or refrained from taking some action with the knowledge that its conduct would violate the court order. While the department's failure to supervise NFC may have been careless or negligent, there is nothing in the record to suggest the department acted intentionally and with knowledge that its conduct would violate the placement order.

The majority attempts to buttress its position by observing that the department did not file a report and notice of placement change in the time period required by Neb. Rev. Stat. § 43-285(3) (Cum. Supp. 2012). While that may be true, the statute is not incorporated in the placement order and the juvenile court made no reference to a violation of this specific statute in its contempt order. More important, there is no evidence that the department's delay in giving statutory notice was an intentional act done in knowing violation of the placement order. To the contrary, the record reflects that up until October 29, 2013, when negotiations between NFC and Envisions broke down and NFC notified the guardian ad litem that the placement would end on November 1, the department and NFC believed that the placement would continue at least through the end of November.

Because the essential element of willfulness was not proved, the department's failure to properly supervise NFC or its failure to give the guardian ad litem earlier notice of the dispute with Envisions could not constitute civil contempt as a matter of law. I would, therefore, reverse, and vacate the contempt order.

CONNOLLY, J., joins in this dissent.

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[5] *Smeal Fire Apparatus Co., supra* note 1.

# STATE OF NEBRASKA, APPELLEE, V. PETER FRANCIS DRAPER, APPELLANT.

857 N.W.2d 334

Filed January 9, 2015. No. S-13-991.

1. **Constitutional Law: Witnesses: Appeal and Error.** An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.
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. **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.
4. **Motions for New Trial: Appeal and Error.** A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.
5. **Trial: Prosecuting Attorneys: Witnesses: Self-Incrimination: Appeal and Error.** Under *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963), when a prosecutor calls a witness to the stand with the knowledge that the witness will invoke the privilege against self-incrimination, reversible error exists either when the prosecution makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege or when inferences from a witness' refusal to answer adds critical weight to the prosecution's case in a form not subject to cross-examination.
6. **Trial: Courts: Witnesses: Self-Incrimination.** Absent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege.
7. **Constitutional Law: Criminal Law: Trial: Witnesses.** The Confrontation Clauses of U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her.
8. ____: ____: ____: ____. The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, means more than being allowed to confront the witness physically.
9. **Constitutional Law: Witnesses.** The purpose of the right of confrontation is primarily to guarantee a right for the accused to cross-examine witnesses against him or her.
10. **Constitutional Law: Testimony: Evidence.** The Confrontation Clause was designed to prevent depositions or ex parte affidavits from being used against a prisoner in lieu of a personal examination and cross-examination of the witness, and courts must interpret the Sixth Amendment with this focus in mind.
11. **Trial: Courts: Witnesses.** Pursuant to Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 2008), courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness.

12. **Criminal Law: Appeal and Error.** Not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result.
13. **Appeal and Error.** When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case.
14. **Convictions: Appeal and Error.** It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside.
15. **Courts: Trial: Witnesses: Evidence.** *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963), instructs courts to consider the invocation of a privilege within the entire context of the case and other evidence presented to the jury.
16. **Constitutional Law: Trial: Witnesses.** The right to cross-examine a witness is critical for ensuring the integrity of the factfinding process and is an essential requirement for a fair trial.
17. **Trial: Motions to Strike: Jury Instructions: Presumptions.** An objection followed by an admonition or instruction is typically presumed to be sufficient to dispel prejudice.
18. **New Trial: Appeal and Error.** While any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish that a defendant did not receive a fair trial, a new trial must be granted.
19. **Appeal and Error.** An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it.
20. **Criminal Law: Evidence: New Trial: Appeal and Error.** Upon finding reversible error in a criminal trial, an appellate court must determine whether the total evidence admitted by the district court, erroneously or not, was sufficient to sustain a guilty verdict.
21. **Evidence: New Trial: Double Jeopardy: Appeal and Error.** If evidence is not sufficient to sustain a verdict after an appellate court finds reversible error, then double jeopardy forbids a remand for a new trial.

Appeal from the District Court for Franklin County: STEPHEN R. ILLINGWORTH, Judge. Reversed and remanded for a new trial.

Charles D. Brewster, of Anderson, Klein, Swan & Brewster, for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

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

HEAVICAN, C.J.

## NATURE OF CASE

Peter Francis Draper was convicted in the district court for Franklin County, Nebraska, of intentional child abuse resulting in death and intentional child abuse resulting in serious bodily injury. Draper appeals his convictions. Because of cumulative error concerning both the Confrontation Clause under the Sixth Amendment and Neb. Evid. R. 513, Neb. Rev. Stat. § 27-513 (Reissue 2008), we reverse the convictions and remand the cause for a new trial.

## BACKGROUND

This case involves the alleged abuse and subsequent death of 2-year-old Joseph Rinehart, Jr. (Joe Jr.). Draper was Joe Jr.'s maternal grandfather. Laura Rinehart, Joe Jr.'s mother, and Nancy Draper (Nancy), Draper's wife and Joe Jr.'s grandmother, were also both charged and convicted of related crimes.

The Drapers lived in a three-bedroom mobile home in Naponee, Franklin County, Nebraska. In March or April 2011, Rinehart and her husband, along with their four children, moved from Racine, Wisconsin, to Naponee. The Rineharts moved into the Drapers' residence. At the time of trial, the Rineharts' surviving three children ranged in age from 2 to 6 years old. In June or July, Rinehart's husband moved out of the house, and at the time of trial, Rinehart and her husband were "going through a separation" but were not yet divorced.

In exchange for a lighter sentence, Rinehart agreed to testify against Draper and Nancy. At trial, Rinehart gave accounts of various times Draper allegedly abused Joe Jr. This abuse purportedly resulted in several different severe injuries to Joe Jr. over the year prior to his death. According to Rinehart, the discipline administered by Draper that eventually caused Joe Jr.'s death occurred on April 25, 2012. Rinehart testified that she saw Draper "pin" Joe Jr. down on a bed with his knee in Joe Jr.'s stomach and groin area. Rinehart testified that she saw Draper do this three different times.

After this incident, Joe Jr.'s condition began to deteriorate. Rinehart and Nancy took Joe Jr. to the hospital at

approximately 6 p.m. on Monday, April 30, 2012. Rinehart told hospital staff that Joe Jr. had diarrhea and had been vomiting for the last several days. When the doctor on call for the hospital arrived, he ordered an x ray of Joe Jr.'s abdomen. The x ray came back negative for injuries, and Joe Jr. was treated for constipation. He was given fluids, mineral oil, and a glycerin suppository. He was then discharged from the hospital.

Rinehart testified that on the ride home from the hospital, Joe Jr. started to breathe strangely and became nonresponsive. After they arrived home, Joe Jr. started having what Rinehart described as a seizure and eventually he stopped breathing. Joe Jr. was brought back to the hospital at approximately 7:55 p.m. Joe Jr. was not breathing when he arrived at the hospital and staff attempted to perform cardiopulmonary resuscitation. Joe Jr. was declared deceased at 8:41 p.m.

After Joe Jr.'s death, hospital staff contacted the Franklin County sheriff's office. Investigators from the Nebraska State Patrol, along with a deputy from the Franklin County sheriff's office, interviewed Draper, Nancy, and Rinehart at the Draper residence the night of Joe Jr.'s death. Draper told law enforcement that Joe Jr. and his brother had a "bone disease." Draper denied that Joe Jr.'s death was caused by physical violence. He did admit that he, Rinehart, and Nancy were the only people who looked after Joe Jr.

An autopsy was performed shortly after Joe Jr.'s death. The cause of death was determined to be multiple blunt force trauma of the head, trunk, and extremities. The manner of death was ruled to be homicide. Post mortem CT scans on Joe Jr. revealed numerous injuries, including a lateral skull fracture, a perforated bowel, a fractured pelvic bone, and healed-over rib fractures. The skull fracture and pelvic bone fracture appeared to have occurred within the previous 2 weeks. The skull fracture was likely caused by "direct, broad force against the skull." Several bruises on Joe Jr.'s body were documented and were determined to have developed within 24 hours of his death. There was also severe swelling of Joe Jr.'s brain and an excessive amount of bleeding in his abdominal cavity.

After the autopsy, on May 2, 2012, all three adults were interviewed by law enforcement again at separate locations. Rinehart described how Draper put his knee in Joe Jr.'s abdomen, but did not offer any other instances of potential abuse by Draper. After this second round of interviews, all three were arrested. On May 3, while in custody, both Rinehart and Nancy were interviewed again. This time, Rinehart gave a full account of the alleged abuse committed by Draper against Joe Jr. and the other children. Nancy stated that she felt safer telling the truth knowing that Draper had been arrested.

On June 21, 2012, Draper was charged with committing, on or between April 23 and 30, intentional child abuse resulting in death. On January 22, 2013, the State filed a second-amended complaint which, in addition to the original count, also charged Draper with committing, on or between July 12, 2011, and April 22, 2012, intentional child abuse resulting in serious bodily injury. A jury trial began on May 6, 2013.

In his testimony at trial, Draper denied all the allegations of abuse against him. He stated that he did not handle the majority of the discipline and that it was Rinehart who primarily disciplined the children. Draper argued that because he had multiple sclerosis, he would not have been able to press his knee into Joe Jr. on the bed the way Rinehart described. Draper could not provide any explanation as to how Joe Jr. received his injuries.

At trial, the State intended to call Nancy to testify for the State's case in chief. The record on appeal indicates that counsel for Nancy informed both the trial court and the State that Nancy intended to exercise her Fifth Amendment privilege against self-incrimination if she were to be called as a witness.

Immediately prior to Nancy's testimony, the trial court, the attorney for Draper, and the attorney for the State had a sidebar. Draper's counsel stated that it was his "understanding that Nancy . . . intends to invoke the Fifth Amendment." Draper's counsel argued that having the jury hear her invoke the Fifth Amendment, considering her relationship to Draper, would have an unfairly prejudicial effect on the jurors. In response, the State informed the judge that it planned to offer use

immunity to Nancy pursuant to Neb. Rev. Stat. § 29-2011.02 (Reissue 2008), which provides that a court may grant a witness use immunity "[w]henever a witness refuses . . . to testify . . . ." The State argued that it could do so only after Nancy claimed the privilege and that it needed to be done in the presence of the jury.

After the trial court took a recess to review § 29-2011.02, counsel for Draper again warned the trial court that after speaking with Nancy's counsel, he believed that Nancy "intends to plead the Fifth Amendment." Draper's counsel again reiterated that Nancy's claims of privilege would be prejudicial toward Draper, "especially if she decides she's not going to testify after she's offered immunity by the State." The trial court ruled that Nancy must first assert her right not to testify before immunity could be granted. The trial court stated that he "d[id]n't see" Nancy's invoking the privilege in the presence of the jury "as being inflammatory on that basis." The trial court allowed the State to call Nancy as a witness.

Nancy was then called to testify in the presence of the jury. After Nancy invoked her privilege against self-incrimination, the State made a motion asking the trial court to confer immunity. The trial court informed Nancy that none of her testimony could be used against her in another court proceeding. After this, Nancy continued to refuse to testify and only responded by again reasserting her privilege against self-incrimination. The trial court then proceeded to allow the State to treat Nancy as a hostile witness and ask her leading questions. After each refusal, the trial court ordered Nancy to testify, but never held her in contempt.

In total, the State asked four leading questions which essentially amounted to repeating inculpatory statements against Draper that Nancy had made in her confession to investigators. Draper's counsel objected multiple times to the continued questioning of Nancy. After Nancy continued to refuse to testify, the trial court excused the witness. Draper's counsel did not request to cross-examine the witness or object to her being excused. Draper's counsel requested that the trial court admonish the jury "to disregard what the State's attorney said to her

that she wouldn't answer." The trial court overruled Draper's motion and did not so admonish the jury.

In its opposition to Draper's motion for new trial and in its brief on appeal, the State argues that Draper procured Nancy's refusal to testify. In support of its opposition to Draper's motion, the State produced a letter written by Draper to Nancy before she was to give her testimony. In the letter, Draper reminds Nancy of a conversation their attorneys had with each other in which Nancy's attorney notified Draper's attorney of Nancy's intention to assert her Fifth Amendment privilege if she were called to testify.

The State referred to Nancy's refusal to testify twice during its closing argument. The State asked the jury how the injuries could have occurred to Joe Jr. in a way other than how Rinehart explained them, suggesting that there was no other credible explanation for the origin of the injuries. The State said that "he [Draper] denies it. Nancy . . . won't tell you." Later during the State's rebuttal argument, the State even more directly referenced Nancy's testimony: "Why do you think [Draper] on May 2 sent a letter to Nancy . . . , his wife, reminding her not to testify? Encouraging her not to testify at his trial? Think about that." Draper did not object to either statement.

After the close of evidence, Draper requested the trial court to instruct the jury to disregard Nancy's testimony. The proposed instruction informed the jury that it was "not to consider this act by this witness as evidence against [Draper], or any of the questions asked of the witness as evidence against [Draper]." The trial court rejected the proposed instruction.

The jury returned a verdict of guilty on both counts. After the verdict, Draper filed a motion for new trial. He argued that the trial court erred in (1) allowing the State to call Nancy as a witness with the knowledge that she was going to invoke her Fifth Amendment privilege against self-incrimination; (2) allowing the State to continue to ask Nancy leading questions, in spite of her refusal to answer; and (3) refusing to give Draper's proposed jury instruction regarding Nancy's testimony. The trial court denied Draper's motion. Draper was

sentenced to 60 years' to life imprisonment for child abuse resulting in death and to 49 to 50 years' imprisonment for child abuse resulting in serious bodily injury, the sentences to be served consecutively. Draper appeals.

## ASSIGNMENTS OF ERROR

Draper assigns as error, consolidated, restated, and reordered, that the trial court (1) erred in allowing the State to call Nancy to testify in the presence of the jury, knowing she would invoke her Fifth Amendment privilege against self-incrimination; (2) erred in allowing the State to treat Nancy as a hostile witness and continue to ask leading questions even after she refused to testify; (3) erred in violating the Confrontation Clause of the Sixth Amendment by dismissing Nancy as a witness without giving Draper an opportunity to cross-examine her; (4) erred when it failed to admonish the jury, both during trial and after the close of evidence, to draw no inference from Nancy's invocation of her right against self-incrimination; (5) erred in overruling Draper's motion for new trial; (6) erred in finding sufficient evidence to support Draper's convictions; and (7) erred by sentencing Draper to an excessive sentence, contrary to Nebraska law.

## STANDARD OF REVIEW

[1] An appellate court reviews de novo a trial court's determination of the protections afforded by the Confrontation Clause of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and reviews the underlying factual determinations for clear error.[1]

[2] Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.[2]

[3] Whether jury instructions are correct is a question of law, which an appellate court resolves independently of the lower court's decision.[3]

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[1] *State v. Kitt*, 284 Neb. 611, 823 N.W.2d 175 (2012).

[2] *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

[3] *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014).

[4] A trial court's order denying a motion for new trial is reviewed for an abuse of discretion.[4]

## ANALYSIS

Draper's primary argument on appeal concerns Nancy's testimony. Draper assigns that the trial court erred in allowing Nancy to be called to testify in the presence of the jury, knowing that she would invoke her Fifth Amendment privilege against self-incrimination; in allowing the State to continue to question Nancy while she refused to testify; in denying Draper the right to conduct cross-examination; and in failing to admonish or instruct the jury not to draw an inference from Nancy's refusal to testify. Draper also assigns that the trial court abused its discretion in denying Draper's motion for new trial on substantially these same grounds.

*Constitutional Background.*

Two different U.S. Supreme Court opinions are relevant to Draper's claim. Taken together, *Namet v. United States*[5] and *Douglas v. Alabama*[6] provide the framework for our analysis of Draper's assigned errors under the Confrontation Clause of the Sixth Amendment. The two opinions address different, but related, factual scenarios relevant to Draper's assigned errors. The Court in *Namet* addressed when and under what circumstances a witness' invocation of a privilege in the presence of the jury would constitute reversible error. Applying the principles of *Namet*, the Court in *Douglas* then addressed when a witness' refusal to give any testimony, by invoking a privilege, may deprive the defendant of his or her rights under the Confrontation Clause.

Our analysis begins with *Namet*. In that case, the defendant was accused of operating a gambling ring.[7] The prosecution's

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[4] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

[5] *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963).

[6] *Douglas v. Alabama*, 380 U.S. 415, 85 S. Ct. 1074, 13 L. Ed. 2d 934 (1965).

[7] *Namet, supra* note 5.

theory was that the gambling took place at several stores and that the defendant went to each store every day to collect the bets and pay off the winners. One of the stores in question was owned by a husband and wife, both of whom were also charged in relation to the gambling ring. On the day of the defendant's trial, both the husband and wife pleaded guilty to their charges, and both were called to testify at the defendant's trial. Both witnesses gave extensive testimony. The husband testified that he did have dealings with the defendant and had accepted wagers in the store. Although the two witnesses invoked their privileges against self-incrimination multiple times, the defendant did not object to any of the questions or request any curative instructions.

[5] In its decision in *Namet*, the U.S. Supreme Court described two circumstances when the prosecutor's calling a witness to the stand with the knowledge that the witness would invoke the privilege against self-incrimination constituted reversible error.[8] The first category, based upon prosecutorial misconduct, involved situations when the prosecution "makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege."[9] The second category involves cases in which "inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant."[10]

The Court, in *Namet*, quickly determined that the case did not constitute prosecutorial misconduct under the first prong, and primarily addressed the case through the "critical weight" analysis. Under the second prong of *Namet*, reversible error does not exist when the inferences are "'no more than minor lapses through a long trial.'"[11] The Court held that the defendant's "substantial rights" were not impacted by the

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[8] *Id.*

[9] *Id.*, 373 U.S. at 186.

[10] *Id.*, 373 U.S. at 187.

[11] *Id.* (quoting *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950)).

witnesses' refusals to testify.[12] The prosecutor had a legitimate reason for calling the witnesses, because they possessed substantial nonprivileged information. The Court also determined that the "lengthy nonprivileged testimony" the witnesses gave minimized the prejudicial nature of the few times the witnesses invoked the privilege.[13] In the context of the testimony of the two witnesses, the limited instances when the witnesses refused to testify were not the "chief source" of the inference that they had engaged in criminal activity with the defendant.[14] According to the Court, the nonprivileged testimony given by the two witnesses was already sufficient to create that inference.

Also important to the Court's decision in *Namet* was that instructions or other curative devices would or should have been available had the defendant requested them at trial. Not only did the defendant fail to request a curative instruction, he actually relied on the invocation of the privilege in his argument to the jury. The Court declined to hold that the trial court must, sua sponte, take some action to remedy the invocation of the privilege in the presence of the jury. But the Court suggested that a proper instruction to the jury to disregard a witness' invocation of any testimonial privilege would be sufficient to cure what would otherwise be a prejudicial error.

Although the U.S. Supreme Court in *Namet* did not expressly mention the Confrontation Clause, the Court subsequently acknowledged and applied the constitutional foundation of that case in *Douglas*.[15] In *Douglas*, the State called a codefendant to testify at trial. Because the codefendant had already been convicted, but planned to appeal the case, his attorney advised him to invoke his privilege against self-incrimination when asked any questions. The judge told the witness that he could

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[12] *Id.*, 373 U.S. at 191.

[13] *Id.*, 373 U.S. at 189.

[14] *Id.*

[15] *Douglas, supra* note 6.

not invoke his privilege because he was already convicted and ordered him to testify. The judge declared him a hostile witness and permitted the State to read from a confession made by the witness, pausing every so often to ask the witness if he made the statement the prosecutor just read. The witness continued to assert his privilege not to testify. Through this method, the State read the entire confession into evidence, even though the confession itself was inadmissible under state law.

The Court held that because the prosecutor "was not a witness, the inference from his reading that [the witness] made the statement could not be tested by cross-examination."[16] Likewise, the statements imputed to the witness were not subject to cross-examination, because the witness never admitted to making them. The defendant was deprived of his Sixth Amendment right to confront the witness through cross-examination, because the witness gave no testimony upon which a cross-examination could be based. Because the jury was still exposed to the statements allegedly made by the witness, the prosecutor was effectively able to circumvent the requirements of the Confrontation Clause.

Relying on *Namet*, the Court considered the weight the statements made by the prosecutor played in the case. The alleged statements by the witness were the only pieces of direct evidence linking the defendant to the crime. The statements also provided "a crucial link in the proof both of petitioner's act and of the requisite intent to murder."[17] The Court found that the statements "clearly bore on a fundamental part of the State's case" and, quoting *Namet*, determined that "[t]he circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.'"[18] With this background in mind, we will next address each error Draper has assigned.

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[16] *Id.*, 380 U.S. at 419.

[17] *Id.*

[18] *Id.*, 380 U.S. at 420.

*Allowing Nancy to Assert Her Privilege in Jury's Presence.*

[6] Draper assigns that the trial court erred when it permitted Nancy to assert her privilege against self-incrimination in the presence of the jury. Consistent with *Namet* and its progeny, the Nebraska Evidence Rules, contained in chapter 27 of the Nebraska Revised Statutes, as well as our case law interpreting those rules, direct trial courts to avoid a jury's exposure to a witness' claim of privilege whenever possible. Section 27-513(2) provides that "proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury." "'[A]bsent extraordinary circumstances, trial courts should exercise their discretion to forbid parties from calling witnesses who, when called, will only invoke a privilege.'"[19]

The State acknowledges that Nancy did assert her Fifth Amendment privilege before the jury and that the jury was aware Nancy intended to do so before Nancy ever took the witness stand. The State nevertheless argues that because it had offered Nancy immunity, § 27-513(2) was no longer applicable, and that there was no error in the district court's actions.

But the State's offer of immunity did not override the purpose of § 27-513(2). The purpose of that subsection is to prevent the jury from drawing an unfavorable inference from a witness' assertion of a privilege. Such purpose applied notwithstanding the State's intent to offer immunity. Nancy was called to testify when all parties knew that she would, before being granted immunity, invoke her privilege against self-incrimination. And the record fails to establish any basis justifying the assertion of that privilege in front of the jury.

The evidence in the record on appeal in this case does not rise to the level of "extraordinary circumstances" that would make it impracticable for the privilege to be asserted outside the jury's presence.[20] Nancy and her counsel were available,

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[19] *State v. Robinson*, 271 Neb. 698, 725, 715 N.W.2d 531, 556 (2006).

[20] See, *id.*; § 27-513(2).

as well as Draper and his counsel. All parties knew of Nancy's likely refusal to testify and could have been prepared for a determination outside the presence of the jury. The remaining question would have been whether Nancy would continue to refuse to testify after she was granted use immunity. A determination outside the presence of the jury would have provided the opportunity to answer that question.

Section 27-513(2) requires only that the privilege must be claimed, absent extraordinary circumstances, "without the knowledge of the jury." Although trial courts in Nebraska have had witnesses assert a privilege at a hearing outside the jury's presence,[21] a hearing is not absolutely required to comply with § 27-513(2). In jurisdictions that do mandate such a hearing, we note that the basic requirements are quite simple.[22] The witness must be given the opportunity to either testify or invoke a privilege. The State may then request the trial court to offer the witness immunity. The trial court is then able to determine whether the witness intends to continue to refuse to testify and must decide whether it would be prejudicial to the defendant for the witness to be called in front of the jury. At the same time, the trial court may also consider whether the failure to call the witness, despite the refusal to testify, would unfairly prejudice the State.[23]

Section 27-513(2) makes it clear that courts must avoid having witnesses claim privileges in the presence of the jury whenever practicable. And § 29-2011.02 contains no requirement that a witness first invoke a privilege in front of the jury in order for immunity to be provided. In this case, all parties knew, at the very least, that Nancy would invoke the privilege before being granted use immunity. The trial court failed to fully comply with the requirements of § 27-513(2) and allowed Nancy to assert her Fifth Amendment privilege without giving Nancy the opportunity to assert her privilege outside the presence of the jury.

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[21] *Robinson, supra* note 19.

[22] See *id.*

[23] See *United States v. Vandetti*, 623 F.2d 1144 (6th Cir. 1980).

*Deprivation of Draper's Right to Confront Nancy.*

[7-10] Draper assigns that the trial court erred when it did not allow Draper to cross-examine Nancy. The Confrontation Clauses of U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee the right of an accused in a criminal prosecution to be confronted with the witnesses against him or her. "The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings . . . , 'means more than being allowed to confront the witness physically.'"[24] The purpose of the right of confrontation is primarily to guarantee a right for the accused to cross-examine witnesses against him or her.[25] In particular, the Confrontation Clause was designed "'to prevent depositions or *ex parte* affidavits [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness . . . .'"[26] We must interpret the Sixth Amendment "'with this focus in mind.'"[27]

The State argues that Draper waived this argument when he failed to object or request cross-examination at trial. However, as in *Douglas*, the nature of the State's questioning itself left no meaningful opportunity for cross-examination. Recall that in *Douglas*, the Court determined that the witness was not available for cross-examination, because the witness actually gave no testimony.

[11] In the same way, Draper was not afforded the right to cross-examine the witness, because Nancy did not actually testify at all. Pursuant to Neb. Evid. R. 611, Neb. Rev. Stat. § 27-611 (Reissue 2008), courts limit cross-examination of witnesses to the subject matter of the direct examination and matters affecting the credibility of the witness.[28] The scope of

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[24] *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (citation omitted).

[25] *Id.*

[26] *Douglas, supra* note 6, 380 U.S. at 418-19. See, also, *State v. Leibel*, 286 Neb. 725, 838 N.W.2d 286 (2013).

[27] *Leibel, supra* note 26, 286 Neb. at 731, 838 N.W.2d at 293.

[28] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds, State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

cross-examination was limited to Nancy's answers, of which there were none, and would not extend to the prosecutor's statements. Draper was already deprived of his rights under the Confrontation Clause when the prosecutor was allowed, through leading questions, to read statements in front of the jury that Nancy had made during her confession, while Nancy continued to refuse to testify.

Additionally, a defendant's rights under the Confrontation Clause do not turn upon the validity of the asserted privilege. The Court in *Douglas* did not reach the question of whether the witness properly invoked his privilege, because "[i]t is sufficient for the purposes of deciding petitioner's claim under the Confrontation Clause that no suggestion is made that [the witness'] refusal to answer was procured by the petitioner . . . ."[29] Since *Douglas*, courts appear to be in agreement that the principal inquiry is whether the defendant had a meaningful opportunity for cross-examination, not whether the witness made a valid assertion of a privilege.[30]

The State, in its brief, argues that Draper is responsible for Nancy's refusal to testify. In *Douglas*, the Court noted that the witness was acting in his own self-interest not to testify, and not out of a desire to protect the defendant.[31] The State alleges that Draper convinced or coerced Nancy into not testifying against him through a letter written by Draper to Nancy before she was to give her testimony at his trial. But the record shows that the letter was written after Nancy's lawyer had already informed Draper's attorney that Nancy intended to invoke the privilege at Draper's trial. In the letter, Draper is essentially just reminding Nancy about the conversation between their attorneys. It is unclear from the letter what initially led to her decision not to testify, but it appears that Nancy and her attorney had already made the decision by the time Draper wrote his letter. Considering the entire letter and

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[29] *Douglas, supra* note 6, 380 U.S. at 420.

[30] See, e.g., *U.S. v. Torrez-Ortega*, 184 F.3d 1128 (10th Cir. 1999).

[31] *Douglas, supra* note 6.

the facts before us, the record is insufficient to establish that Draper was responsible for Nancy's refusal to testify.

Although this case is not as extreme as *Douglas*—when the prosecutor essentially read a witness' entire confession—Draper was nevertheless deprived of his right to cross-examine the witness. Allowing the State to read statements allegedly made by the witness on a prior occasion over that witness' refusal to testify is a violation of the Confrontation Clause. The trial court erred when it allowed the State to continue to question Nancy using leading questions while she insisted on refusing to testify after being granted use immunity.

We note that the trial court's error does not automatically constitute reversible error. The Court in *Douglas* still applied the *Namet* critical weight analysis to determine whether reversible error existed. We will follow the same approach.

*Trial Court's Failure to Instruct Jury Pursuant to § 27-513(3).*

Draper assigns that the trial court erred when it failed to admonish the jury after Nancy left the stand and failed to instruct the jury not to draw an inference from Nancy's refusal to testify after the close of evidence. Arguably, either an admonishment or a curative instruction would have been sufficient, under *Namet*, to cure any prejudice to Draper through Nancy's assertion of privilege and refusal to testify.[32] Nebraska law directs trial courts to give curative instructions in cases such as these. Section 27-513(3) provides that "[u]pon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom." And the ability of the trial court to admonish the jury as to the proper or improper use of evidence is well settled.[33]

Draper's requested instruction would have met the requirements of § 27-513(3). Even though Draper's requested

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[32] See *Namet, supra* note 5.

[33] See, e.g., *Wamsley v. State*, 171 Neb. 197, 106 N.W.2d 22 (1960); *Grandsinger v. State*, 161 Neb. 419, 73 N.W.2d 632 (1955).

instruction does not mention the term "inference," Draper's instruction accomplished the same thing when it directed the jury "not to consider this act by the witness as evidence against [Draper]." The trial court erred when it failed to either admonish the jury or comply with § 27-513(3) by providing a curative instruction regarding Nancy's assertion of privilege and testimony, or lack thereof.

*Reversible Error.*

[12-14] We must finally determine whether the errors by the trial court constitute reversible error. "Not all trial errors, even trial errors of constitutional magnitude, entitle a criminal defendant to the reversal of an adverse trial result."[34] "When determining whether an alleged error is so prejudicial as to justify reversal, courts generally consider whether the error, in light of the totality of the record, influenced the outcome of the case."[35] "It is only prejudicial error, that is, error which cannot be said to be harmless beyond a reasonable doubt, which requires that a conviction be set aside."[36]

We begin with the first prong of the *Namet* analysis—situations involving prosecutorial misconduct. There is nothing in the record to suggest that the State made a conscious and flagrant attempt to build its case out of inferences arising from Nancy's use of the privilege. While it is true that the State knew Nancy was likely to invoke the privilege, as the Court noted in *Namet*, the State "need not accept at face value every asserted claim of privilege."[37] The fact that the State actually requested the trial court to grant Nancy immunity for her testimony suggests the State's intent in calling her was to elicit nonprivileged testimony. And the State may have called Nancy so that the district court would hold her in contempt for refusing to testify despite the provision of immunity. The State's

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[34] *State v. Lara*, 258 Neb. 996, 1002, 607 N.W.2d 487, 491 (2000).

[35] *Robinson, supra* note 19, 271 Neb. at 710, 715 N.W.2d at 547.

[36] *State v. Aguilar*, 264 Neb. 899, 910-11, 652 N.W.2d 894, 904 (2002).

[37] *Namet, supra* note 5, 373 U.S. at 188.

purpose in calling Nancy was not solely for her to invoke the privilege in the jury's presence. Therefore, this case does not fall under the first prong of *Namet*.

[15] The Court's analysis in *Namet*, under the second prong, instructs us to consider the invocation of the privilege within the entire context of the case and other evidence presented to the jury. Since *Namet*, courts have distilled the Court's "critical weight" analysis into several factors: whether the State knew the witness would invoke the privilege, the number of questions that elicit an assertion of the privilege, whether the inferences are merely cumulative of other evidence, whether the inferences relate to central or collateral matters, whether either side attempted to draw adverse inferences in closing argument or at any other time during trial, and whether the jury was instructed not to draw an inference from the witness' refusal to testify.[38] We concur with the reasoning of these courts and analyze accordingly.

In this case, the substance and manner of the State's examination following Nancy's refusal to testify establish that Draper was unfairly prejudiced. The subject of the State's questioning directly related to matters central to Draper's guilt or innocence. The statements read by the State corroborated Rinehart's testimony and filled an obvious gap in the State's case. Even though the State presented a litany of experts and other witnesses for its case in chief, Rinehart was the only witness to give an account of who actually injured Joe Jr. Without Nancy's statements, the case largely came down to Draper's word against Rinehart's.

[16] Draper was no doubt prejudiced when the trial court allowed the State to continue to question Nancy using leading questions after Nancy refused to testify. Draper was denied the right to cross-examine the statements read by the State. And we have stated that the right to cross-examine a witness is "'critical

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[38] See, e.g., *U.S. v. Victor*, 973 F.2d 975 (1st Cir. 1992); *Rado v. State of Conn.*, 607 F.2d 572 (2d Cir. 1979); *Fletcher v. United States*, 332 F.2d 724 (D.C. Cir. 1964).

for ensuring the integrity of the factfinding process'"[39] and is "'"an essential requirement for a fair trial."'"[40]

Further, the facts of this case also depart from *Namet* in several key aspects. Nancy did not give any nonprivileged testimony at all, unlike in *Namet*, where the witnesses gave ample nonprivileged testimony to offset their refusals to testify.[41] Here, the only exposure the jury had to Nancy was through her refusal to testify. Also in *Namet*, the prosecutors made no reference to the witnesses' invocation of the privilege for the duration of the trial, and the defense actually relied upon the witnesses' refusal to testify in its argument.[42] But here, the State made two references to Nancy's refusal to testify during its closing arguments, whereas Draper did not reference Nancy's testimony at all for the duration of the trial.

Despite the prejudicial nature of the State's examination of Nancy, the trial court failed to admonish the jury or provide a curative instruction. The Court in *Namet* emphasized how a curative instruction has the potential to remove any prejudice from a witness who invokes a privilege in the presence of the jury.

[17] Draper requested both an admonition and a jury instruction, and the trial court failed to give either. We cannot discount the possibility that Nancy's assertion of privilege and insistence in refusing to testify stuck in the minds of the jurors. An admonishment immediately following Nancy's examination or the giving of Draper's requested jury instruction after the close of evidence was critical to ensure a fair trial and to eliminate the risk of prejudice. "An objection followed by an admonition or instruction is typically presumed to be sufficient to dispel prejudice."[43] Without an admonishment or curative instruction, Nancy's refusal to testify cannot be considered merely a "minor lapse" under the *Namet* framework. The trial

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[39] *State v. Hartmann*, 239 Neb. 300, 313, 476 N.W.2d 209, 217 (1991).

[40] *State v. Johnson*, 255 Neb. 865, 873, 587 N.W.2d 546, 552 (1998).

[41] See *Namet, supra* note 5.

[42] *Id.*

[43] *State v. Gartner*, 263 Neb. 153, 162, 638 N.W.2d 849, 858 (2002).

court erred when it failed to either admonish after Nancy's testimony or instruct the jury at the close of evidence not to draw any inferences from Nancy's refusal to testify.

[18] Based on all the circumstances of the case, we conclude that the inferences derived from Nancy's refusal to testify and the statements read by the State added "critical weight" to the State's case in a form not subject to cross-examination. We are careful to point out that all of the errors, taken together, amount to reversible error. "[W]hile any one of several errors may not, in and of itself, warrant a reversal, if all of the errors in the aggregate establish that a defendant did not receive a fair trial, a new trial must be granted."[44] We cannot say that the sum of all the errors in this case is harmless beyond a reasonable doubt.

*Remaining Assignments of Error.*

[19] Because we reverse Draper's convictions, we need not address his remaining assignments of error. "An appellate court is not obligated to engage in an analysis that is not needed to adjudicate the controversy before it."[45]

*Double Jeopardy.*

[20,21] Having found reversible error, we must determine whether the totality of the evidence admitted by the trial court was sufficient to sustain Draper's conviction. 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.[46] If it was not, then double jeopardy forbids a remand for a new trial.[47] We find that the evidence was sufficient to sustain a guilty verdict, and thus, double jeopardy does not bar a new trial.

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[44] *State v. Jacob*, 253 Neb. 950, 980, 574 N.W.2d 117, 141 (1998), *abrogated on other grounds, State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

[45] *State v. Rogers*, 277 Neb. 37, 72-73, 760 N.W.2d 35, 63 (2009).

[46] *State v. McCave*, 282 Neb. 500, 805 N.W.2d 290 (2011).

[47] *Id.*

## CONCLUSION

We conclude that the cumulative errors of failing to comply with the provisions of § 27-513, the continued questioning of Nancy after she refused to testify, and the trial court's refusal to either admonish or instruct the jury not to draw an inference from the invocation of the privilege constitute reversible error. Because the evidence presented by the State was sufficient to sustain Draper's convictions, we reverse the convictions and remand the cause for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

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# RANDY THOMPSON ET AL., APPELLEES AND CROSS-APPELLANTS, V. DAVE HEINEMAN, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEBRASKA, ET AL., APPELLANTS AND CROSS-APPELLEES.

857 N.W.2d 731

Filed January 9, 2015. No. S-14-158.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Judgments: Jurisdiction.** A jurisdictional question which does not involve a factual dispute presents a question of law.
3. **Constitutional Law: Statutes.** The constitutionality of a statute presents a question of law.
4. **Standing: Jurisdiction: Parties.** Standing is a jurisdictional component of a party's case. Only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.
5. **Standing: Proof.** Common-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent.
6. **Taxation: Standing.** Taxpayer standing is an exception to the injury-in-fact requirement for standing.
7. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
8. **Taxation: Standing: Public Purpose.** As a limited exception to the injury-in-fact requirement for standing, taxpayers may raise a matter of great public concern.
9. **Mandamus: Public Purpose: Words and Phrases.** The "great public concern" exception is another name for the "public interest" exception in early mandamus cases to enforce a public right.

10. **Actions: Taxation: Standing: Public Purpose.** In taxpayer actions raising a matter of great public concern, there is no requirement that the taxpayer show the alleged unlawful act would otherwise go unchallenged because no other potential party is better suited to bring the action.
11. **Constitutional Law: Statutes: Presumptions.** A court presumes that statutes are constitutional and will not strike down a statute unless its unconstitutionality is clearly established.
12. **Constitutional Law: Administrative Law: Public Service Commission.** The Public Service Commission is not a statutorily created state agency. It is an independent regulatory body for common carriers created by Neb. Const. art. IV, § 20.
13. **Public Service Commission.** The Public Service Commission has independent legislative, judicial, and executive or administrative powers over common carriers, which powers are plenary and self-executing. Absent specific legislation, the commission's enumerated powers over common carriers are absolute and unqualified.
14. **Constitutional Law: Legislature: Public Service Commission.** In any field where the Legislature has not acted, the Nebraska Constitution authorizes the Public Service Commission to exercise its plenary powers over common carriers.
15. ____: ____: ____. Under Neb. Const. art. IV, § 20, the Legislature can restrict the Public Service Commission's plenary powers only through specific legislation.
16. **Constitutional Law: Legislature: Public Service Commission: Jurisdiction: Words and Phrases.** Under Neb. Const. art. IV, § 20, the term "specific legislation" means specific restrictions. It does not include general legislation to divest the Public Service Commission of its jurisdiction and transfer its powers to another governmental entity or official besides the Legislature.
17. **Constitutional Law: Legislature: Public Service Commission: Jurisdiction.** Under Neb. Const. art. IV, § 20, the Legislature can divest the Public Service Commission of jurisdiction over a class of common carriers by passing specific legislation that occupies a regulatory field, thereby preempting the commission's control.
18. ____: ____: ____: ____. Under Neb. Const. art. IV, § 20, if the Legislature passes specific legislation to divest the Public Service Commission of jurisdiction in a regulatory field, the Legislature cannot abandon control over the common carriers in that field. Regulatory control over common carriers must reside either in the commission or in the Legislature.
19. **Constitutional Law: Legislature: Public Service Commission.** Unless the Legislature enacts legislation to specifically restrict the Public Service Commission's authority and retains control over that class of common carriers, it cannot constitutionally deprive the commission of its regulatory powers.
20. ____: ____: ____. The Public Service Commission's constitutional authority to regulate "common carriers" is limited to the common-law meaning of that term unless the Legislature has authorized the commission to exercise control over carriers that are outside of that meaning.

21. **Words and Phrases.** A carrier refers to an individual or organization that contracts to transport passengers or goods for a fee. The common law recognizes only two types of carriers: common carriers and private carriers.
22. **Contracts: Words and Phrases.** A private carrier is one that, without being in the business of transporting for others or holding itself out to the public as willing to do so, undertakes only by special agreement to transport property, either gratuitously or for a consideration.
23. **Public Purpose: Words and Phrases.** Any person, corporation, or association holding itself out to the public as offering its services to all persons similarly situated and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire, is a common carrier in the particular spheres of such employment.
24. ____: ____. A carrier is a common carrier if its vocation is of a public nature, although limited to the transportation of certain classes or kinds of freight, and it may be of service to a limited few who by their peculiar situation or business may have occasion to employ it. Transporting commodities for others is a vocation of a public nature even if the service is not available to the public at large.
25. **Oil and Gas: Words and Phrases.** An oil pipeline carrier is a common carrier if it holds itself out as willing to transport oil products for a consideration to all oil producers in the area where it offers its transportation services.
26. **Constitutional Law: Statutes: Proof.** A plaintiff can succeed in a facial challenge only by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.
27. **Oil and Gas: Legislature: Intent.** Neb. Rev. Stat. § 75-501 (Reissue 2009) does not define the whole field of pipeline common carriers. Its historical context shows that the Legislature intended only to ensure that intrastate carriers are regulated.
28. **Constitutional Law: Courts: Public Service Commission.** A court liberally construes the constitutional provision creating the Public Service Commission and delineating its powers.
29. **Constitutional Law: Statutes.** A canon of statutory construction must yield to constitutional requirements governing the same subject matter.
30. **Public Utilities: Rates.** The public nature of a corporate utility's operations and the public franchise that authorizes its operations justify government regulation of its rates.
31. **Eminent Domain.** The reason common carriers can exercise the right of eminent domain lies in their quasi-public vocation of transporting passengers or commodities for others.
32. **Constitutional Law: Eminent Domain: Taxation: Public Purpose.** A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain, both of which must be for a public purpose.
33. **Eminent Domain: Public Purpose: Words and Phrases.** Eminent domain is the State's inherent power to take private property for a public use.

34. **Constitutional Law: Eminent Domain: Legislature: Statutes.** The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution. But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments.
35. **Constitutional Law: Eminent Domain: Public Purpose.** Under Neb. Const. art. I, § 21, the State can take private property only for a public use and only if it pays just compensation.
36. **Eminent Domain: Legislature.** Only the Legislature can authorize a private or public entity to exercise the State's power of eminent domain.
37. **Eminent Domain: Legislature: Public Purpose.** Because a common carrier performs a public transportation service, the Legislature can grant it the sovereign power to take private property for a public use and the State can control its operations, to the extent that the regulation is not precluded by federal law.
38. **Constitutional Law: Property.** The Nebraska Constitution prohibits the taking of private land for a private purpose.
39. **Constitutional Law: Eminent Domain: Public Purpose: Oil and Gas.** Under the Nebraska Constitution's limitation on the power of eminent domain, common carriers can take private property only for a public use. That minimally means that a pipeline carrier must be providing a public service by offering to transport the commodities of others who could use its service, even if they are limited in number.
40. **Constitutional Law: Public Service Commission: Oil and Gas.** The Public Service Commission's constitutional powers over common carriers include routing decisions for pipeline common carriers.

Appeal from the District Court for Lancaster County: STEPHANIE F. STACY, Judge. Judgment vacated.

Jon Bruning, Attorney General, Katherine J. Spohn, Ryan S. Post, and Blake E. Johnson for appellants.

David A. Domina, Brian E. Jorde, and Megan N. Mikolajczyk, of Domina Law Group, P.C., L.L.O., for appellees.

Richard Klingler, Kathleen Mueller, and Lauren C. Freeman, of Sidley Austin, L.L.P., and James G. Powers and Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for amicus curiae TransCanada Keystone Pipeline, LP.

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

CONNOLLY, J.

## I. NATURE OF THE DECISION

The State appeals from the district court's judgment that determined L.B. 1161,[1] which the Legislature passed in 2012, was unconstitutional.

Neb. Const. art. V, § 2, in relevant part, requires that a supermajority of this court's members concur before it can strike down legislation as unconstitutional: "No legislative act shall be held unconstitutional except by the concurrence of five judges."

Four judges of this court have determined that the appellees (the landowners), who challenged the constitutionality of L.B. 1161, have standing to raise this issue and that the legislation is unconstitutional. Three judges of this court conclude that the landowners lacked standing and decline to exercise their option to address the constitutional issues.

The majority's opinion that the landowners have standing controls that issue. But because there are not five judges of this court voting on the constitutionality of L.B. 1161, the legislation must stand by default. Accordingly, we vacate the district court's judgment.

The following judges are of the opinion that the landowners have standing and that the challenged legislation is unconstitutional: Justices Connolly, McCormack, and Miller-Lerman, and Judge Riedmann.

## II. SUMMARY

L.B. 1161 allows "major oil pipeline" carriers to bypass the regulatory procedures of the Public Service Commission (PSC). As an alternative to obtaining approval from the PSC—a constitutional body charged with regulating common carriers—L.B. 1161 permits these pipeline carriers to obtain approval from the Governor to exercise the power of eminent domain for building a pipeline in Nebraska. The district court ruled that the Legislature had unconstitutionally divested the PSC of its regulatory authority over common carriers. On appeal, the

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[1] 2012 Neb. Laws, L.B. 1161.

State contends that the landowners lacked standing to sue and that L.B. 1161 is constitutional.

## III. BACKGROUND

L.B. 1161 has its origins in the controversial Keystone XL oil pipeline proposed in 2008 by TransCanada Keystone Pipeline, LP (TransCanada). TransCanada wanted to construct its pipeline to carry crude oil products from Canada to the Texas coastline. By executive order, the construction of a pipeline that crosses an international border requires a permit from the President of the United States.[2] Executive Order No. 13337 delegates to the U.S. Secretary of State the authority to "receive all applications for Presidential permits . . . for the construction, connection, operation, or maintenance, at the borders of the United States, of facilities for the . . . exportation or importation of petroleum [or] petroleum products . . . to or from a foreign country."[3] In 2008, TransCanada applied for a presidential permit to construct its proposed pipeline.

As originally proposed, the pipeline would have passed directly through Nebraska's Sandhills, raising considerable public concern about environmental damage to a sensitive ecosystem and the region's high water table. In 2008, the statute that governs eminent domain power for oil pipelines imposed no standards on carriers for the right to exercise eminent domain power.[4] In October 2011, the Governor called a special session of the Nebraska Legislature to determine whether siting legislation could be enacted.

### 1. Legislative Background

In the 2011 special session, the Legislature amended § 57-1101 by enacting L.B. 1, a legislative bill called the Major Oil Pipeline Siting Act (MOPSA).[5] MOPSA required

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[2] See, Exec. Order No. 13337, 69 Fed. Reg. 25,299 (Apr. 30, 2004); Exec. Order No. 11423, 33 Fed. Reg. 11,741 (Aug. 16, 1968).

[3] See Exec. Order No. 13337, *supra* note 2, § 1(a).

[4] See Neb. Rev. Stat. § 57-1101 (Reissue 2010).

[5] See 2012 Neb. Laws, L.B. 1, § 2, 1st Spec. Sess.

a major oil pipeline carrier to apply for and obtain approval from the PSC before it could exercise eminent domain power to build a pipeline.[6] Section 5(2) of MOPSA defines a major oil pipeline as a pipeline larger than 6 inches in diameter that is built to transport any petroleum product "within, through, or across Nebraska."[7]

In passing MOPSA, the Legislature recognized[8] that federal law preempts state regulation of safety issues related to oil pipelines.[9] But it asserted the State's authority to regulate the siting of pipelines to protect the economic and aesthetic value of Nebraska's land and natural resources.[10] In determining whether to approve a proposed route, MOPSA required the PSC to consider several economic, environmental, and social factors, including whether another corridor could be feasibly and beneficially used.[11] Two of MOPSA's stated purposes were to ensure the protection of Nebraskans' property rights and the State's natural resources.[12] The Legislature did not appropriate funds to the PSC to carry out these duties. Instead, MOPSA authorized the PSC to assess the costs of its regulatory investigation and the application process to the applicant.[13] It set out an appeal process for any party aggrieved by the PSC's final order.[14] The Legislature enacted MOPSA with an emergency clause so that it became effective on November 23, 2011.[15]

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[6] *Id.*, § 1.

[7] See *id.*, § 5(2) (codified at Neb. Rev. Stat. § 57-1404(2) (Cum. Supp. 2014)).

[8] *Id.*, §§ 3(2) and 4(1) (codified at Neb. Rev. Stat. §§ 57-1402(2) and 57-1403 (Cum. Supp. 2014)).

[9] See 49 U.S.C. § 60104(c) (2012).

[10] See, 49 U.S.C. § 60104(e); Hazardous Liquid Pipeline Safety Act of 1979, Pub. L. 96-129, § 202(4), 93 Stat. 1003 (1979); *Texas Midstream Gas Serv. v. City of Grand Prairie*, 608 F.3d 200 (5th Cir. 2010).

[11] See L.B. 1, § 8 (codified at Neb. Rev. Stat. § 57-1407 (Cum. Supp. 2014)).

[12] See *id.*, § 3 (codified at § 57-1402).

[13] See *id.*, § 7 (codified at Neb. Rev. Stat. § 57-1406 (Cum. Supp. 2014)).

[14] See *id.*, § 10 (codified at Neb. Rev. Stat. § 57-1409 (Cum. Supp. 2014)).

[15] See *id.*, § 23.

But MOPSA contained a significant exemption to its requirement that major oil pipeline carriers comply with the PSC procedures: MOPSA did not apply to TransCanada. It excluded any major pipeline carrier that had submitted an application to the U.S. Department of State "pursuant to Executive Order 13337" before MOPSA became effective.[16] The parties stipulated that TransCanada filed its application in 2008. The district court found that when the Legislature enacted MOPSA, TransCanada's Keystone XL pipeline was the only major oil pipeline that satisfied the requirements for MOPSA's exemption.

### 2. Legislature Passes L.B. 4 for TransCanada's Pipeline

In the same special session, the Legislature enacted separate legislation—L.B. 4—for TransCanada's pipeline.[17] L.B. 4 did not specifically refer to TransCanada or its previously submitted application under the exemption from MOPSA (for pending applications). But because L.B. 4 did not contain an exemption, it was the only bill that applied to TransCanada's proposed pipeline by default. And unlike MOPSA, L.B. 4 did not require a pipeline carrier to obtain the PSC's approval before exercising eminent domain power under § 57-1101. Instead, § 3 of L.B. 4 authorized the Department of Environmental Quality (DEQ) to collaborate with any federal agency that was conducting a supplemental environmental impact review for Nebraska under the National Environmental Policy Act of 1969.[18]

The National Environmental Policy Act of 1969 requires federal agencies to determine the environmental impact of significant federal actions. When making this determination, a federal agency must request the comments of appropriate state and local agencies.[19] In collaborating with federal

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[16] See *id.*, § 3(3).

[17] See 2012 Neb. Laws, L.B. 4, 1st Spec. Sess.

[18] See *id.*, § 3(1). See, also, Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (codified at 42 U.S.C. §§ 4321 to 4335 and 4341 to 4347 (2012)).

[19] See, 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1503.1(a)(2) (2013).

agencies to produce an environmental impact statement for Nebraska, L.B. 4 authorizes the DEQ to hire outside vendors.[20] But § 3(2) stated that to ensure an objective report and avoid the appearance of any conflicts of interest, no costs would be assessed to the applicant.[21] Instead, the Legislature appropriated $2 million from the State's general fund to a DEQ cash fund to carry out the requirements of L.B. 4.[22] After the DEQ prepares the supplemental statement, L.B. 4 requires it to submit its evaluation to the Governor, who then has 30 days to inform the responsible federal agency whether he or she approves the route.[23] Unlike MOPSA, L.B. 4 does not provide an appeal procedure. Like MOPSA, the Legislature provided for an emergency clause for L.B. 4 and it became effective on November 23, 2011, the same date that MOPSA became effective.[24]

On January 18, 2012, the President of the United States denied TransCanada's application. Because TransCanada no longer had an active application pending with the U.S. Department of State, it was subject to the PSC regulatory procedures under MOPSA if it reapplied for a presidential permit or route through Nebraska.

### 3. Legislature Passes L.B. 1161 Giving Major Oil Pipeline Carriers a Procedural Choice

On January 19, 2012, during the regular session, Senator Jim Smith introduced L.B. 1161, which amended the statutory changes to § 57-1101 enacted by MOPSA and § 3 of L.B. 4.[25] As explained, under MOPSA, the Legislature had previously amended § 57-1101 to provide that a pipeline carrier had to

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[20] See L.B. 4, § 3(2) (codified at Neb. Rev. Stat. § 57-1503(2) (Cum. Supp. 2014)).

[21] See *id.*

[22] See 2012 Neb. Laws, L.B. 4A, 1st Spec. Sess.

[23] See L.B. 4, § 3(4) (codified at § 57-1503(4)).

[24] See *id.*, § 8.

[25] See Legislative Journal, 102d Leg., 2d Sess. 292 (2012).

apply for and obtain the PSC's approval before exercising eminent domain power to build a pipeline—unless it had a pending application for a presidential permit. L.B. 1161 eliminated this statutory exemption.[26] But the Legislature also enacted a regulatory choice for major oil pipeline carriers seeking to exercise eminent domain power. Under § 1 of L.B. 1161, a pipeline carrier had two choices: It could comply with § 3 of L.B. 4, as amended by L.B. 1161, "and receive the approval of the Governor for the route," or it could comply with the MOPSA approval process through the PSC.[27]

Originally, § 3 of L.B. 4 did not require a pipeline carrier to apply for approval from the DEQ or the Governor. As noted, it authorized the DEQ to collaborate with federal agencies in producing a supplemental environmental impact statement for Nebraska and authorized the Governor to approve that statement.[28] But L.B. 1161 amended § 3 of L.B. 4 so that the DEQ had two options. It could still collaborate with federal agencies on preparing a supplemental environmental impact statement. But instead of collaborating with federal agencies, the DEQ could now choose to independently evaluate a proposed route submitted by a pipeline carrier for being included in a federal review process to determine the environmental impact of an oil pipeline.[29]

Senator Smith testified at the committee hearing that L.B. 1161 was intended to decouple the DEQ's efforts from those of the U.S. Department of State under federal law and to allow the DEQ to continue with its review of an alternative route for the Keystone XL pipeline.[30] This decoupling was necessary because TransCanada did not have a permit request pending with the U.S. Department of State. And after the President denied TransCanada's application for a permit,

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[26] See L.B. 1161, § 4.

[27] See *id.*, § 1 (codified at § 57-1101 (Cum. Supp. 2014)).

[28] See L.B. 4, § 3.

[29] See L.B. 1161, § 7 (codified at § 57-1503(1)(a)).

[30] See Natural Resources Committee Hearing, L.B. 1161, 102d Leg., 2d Sess. 3 (Feb. 16, 2012).

the DEQ had discontinued its review of a pipeline route in Nebraska. A representative of TransCanada testified in support of L.B. 1161 and stated that the company planned to reapply for a presidential permit.[31] In response to concerns that other pipeline carriers could use L.B. 1161's provisions in the future, TransCanada's representative assured senators that this scenario was unlikely and that no other pipeline carrier was currently seeking to cross Nebraska.[32]

In conducting an independent review of a proposed route, L.B. 1161 requires the DEQ to analyze the "environmental, economic, social, and other impacts associated with the proposed route and route alternatives in Nebraska."[33] Under § 1, after the DEQ evaluates the impact of a pipeline carrier's proposed route and submits its report to the Governor, the carrier can then seek the Governor's approval of the route.

The DEQ's final report on TransCanada's proposed route shows that it makes no recommendations to the Governor whether to approve a proposed route. And L.B. 1161 does not require a carrier to have approval from the DEQ for its proposed route. If the Governor approves a route, § 1 implicitly gives a pipeline carrier the power of eminent domain in Nebraska: "If condemnation procedures have not been commenced within two years after the date the Governor's approval is granted or after the date of receipt of an order approving an application under [MOPSA], the right under this section expires."[34] In sum, when a carrier elects to proceed under the DEQ procedures, the Governor has sole authority to approve the route and thereby bestow upon the carrier the power to exercise eminent domain.

Under L.B. 1161, if a pipeline carrier submits a route for evaluation by the DEQ, the carrier must reimburse the DEQ for the cost of the evaluation.[35] Yet, the Legislature reappropriated

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[31] *Id.* at 18-19 (testimony of Robert Jones).

[32] *Id.* at 20.

[33] L.B. 1161, § 3.

[34] *Id.*, § 1; § 57-1101.

[35] *Id.*, § 7 (codified at § 57-1503(1)(b)).

$2 million to the DEQ to carry out its duties under L.B. 1161.[36] Finally, if the Governor does not approve the DEQ's reviewed routes, he or she must notify the pipeline carrier that it must obtain route approval from the PSC.[37] The Legislature did not appropriate any funds to the PSC to carry out the MOPSA requirements. L.B. 1161 did not provide for a right of appeal from the DEQ procedures, so the only appeal procedure is limited to final orders issued by the PSC under MOPSA.[38] The Legislature enacted L.B. 1161 with an emergency clause; it became effective on April 18, 2012.[39]

### 4. The State's Actions in Response to TransCanada's Proposed Pipeline Route

On April 18, 2012, TransCanada submitted for the DEQ's review its preferred alternative route, which it revised to avoid the Sandhills. On May 4, TransCanada filed a new application with the U.S. Department of State to construct the Keystone XL pipeline. On May 24, the DEQ entered into a memorandum of understanding with the U.S. Department of State to collaborate on an environmental review of potential pipeline routes in Nebraska. About 8 weeks later, the DEQ issued a "Feedback Report" after holding public meetings along the corridor of TransCanada's proposed new route. This report identified Nebraskans' concerns, summarized the DEQ's review efforts, and disclosed its concerns to TransCanada to give TransCanada an opportunity to address these concerns in its routing decision.

In September 2012, TransCanada submitted a report to the DEQ entitled "Supplemental Environmental Report for the Nebraska Reroute." In this report, TransCanada stated that it had revised its preferred reroute in response to the DEQ's feedback report and comments from landowners that the pipeline

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[36] *Id.*, § 8.

[37] *Id.*, § 3(4) (codified at § 57-1503(4)).

[38] See § 57-1409.

[39] See L.B. 1161, § 11.

would still cross fragile land areas with high water tables. The extensive report comprised TransCanada's evaluation of the review factors required by L.B. 1161: "The analysis presented in this [Supplemental Environmental Report] supports [the] DEQ's review and approval of a preferred route in Nebraska." The parties stipulated that if built, the proposed pipeline would cross Nebraska's border with South Dakota in Keya Paha County and continue to Nebraska's Kansas border in Jefferson County. In October, the DEQ issued its "Draft Evaluation Report" for public comment.

On January 3, 2013, the DEQ submitted its final evaluation report to the Governor. On January 22, the Governor approved TransCanada's proposed route and asked the President and the U.S. Secretary of State to include Nebraska's evaluation in the U.S. Department of State's supplemental environmental impact statement.

### 5. Procedural History

In March 2013, the landowners filed their operative complaint against the Governor, the DEQ's director, and the State Treasurer. They sought a declaratory judgment that L.B. 1161 is unconstitutional. They alleged that the bill violated the Nebraska Constitution's equal protection, due process, and separation of powers provisions, and its prohibition of special legislation. They alleged that the bill unconstitutionally delegated to the Governor powers over a common carrier that exclusively belong to the PSC and unconstitutionally delegated to the Governor plenary authority over the exercise of eminent domain power that exclusively belongs to the Legislature. Finally, they alleged that the bill unlawfully allocated $2 million to the DEQ to implement unconstitutional laws and unlawfully pledged the State's funds and credit to a pipeline applicant that repays the funds in the future. In support of this claim, they alleged that the DEQ had advanced more than $5 million in public funds to TransCanada under L.B. 1161.

In its answer, the State denied the landowners' allegations that L.B. 1161 was unlawful legislation. It affirmatively

alleged that the landowners lacked standing to bring the action; their claims were not ripe for judicial review; their claims, in part, were moot; they failed to state a claim upon which relief could be granted; and the court lacked subject matter jurisdiction over the action.

The court tried the case on stipulated facts and exhibits. At the hearing, the landowners specifically stated that they were asserting a facial challenge to L.B. 1161. Regarding the landowners' standing, the State contended that they lacked standing because they could not show an injury in fact. Regarding the due process claim, the State argued that if a pipeline carrier initiated a condemnation proceeding, a landowner could thereafter contest the fair market value of the property and whether the taking of his or her private property served a public purpose. The State also disputed the landowners' position that their claim fell into the standing exception for taxpayers to challenge illegal expenditures by governmental bodies and officials. It argued that TransCanada was required to reimburse the State for all the costs incurred by the DEQ and that TransCanada had reimbursed the State for costs that included the DEQ employees' overtime and benefits and the DEQ's consultant fees.

### 6. Court's Order

The court stated that because it could not determine from the landowners' affidavits whether their property was located in the path of the proposed pipeline, they had failed to establish traditional standing. But the court concluded that they had established taxpayer standing to challenge L.B. 1161 and that the legislation was unconstitutional. Regarding standing, the court rejected the State's arguments that our case law required the landowners to show that there was no better suited party to bring the action and that no illegal expenditure existed because TransCanada had reimbursed the State for all of the DEQ's expenditures.

The court concluded that in the case on which the State was relying, this court's holding regarding "better suited" parties was limited to the claims dealing with a governmental body or

official's failure to assess taxes.[40] It determined that the requirement did not apply to illegal expenditure cases and that even if it did, we had also held there that no party is better suited than a taxpayer to challenge a failure to tax if the persons or entities directly and immediately affected by the omission have benefited from the act.[41] The court concluded that under our case law, the landowners had standing because the case raised matters of great public concern and the group directly affected by L.B. 1161—pipeline carriers—had benefited from the act and had no incentive to challenge it. The court noted that the evidence showed a representative of TransCanada, the only pipeline carrier to invoke L.B. 1161's provisions, testified for its passage.

The court rejected the State's argument that the landowners had lost standing to challenge an illegal expenditure after TransCanada reimbursed the State for the DEQ's costs. The court noted that this argument was more properly characterized as a mootness challenge, but concluded that taxpayer standing should not turn on a manipulable factor like the repayment of public funds: "Nor should courts, in analyzing taxpayer standing, be required to resort to forensic accounting methods to determine whether all public expenditures have been reimbursed." The court found that in response to the State's invoices, TransCanada had reimbursed the State for over $5 million in costs. It concluded that our case law conferred standing on taxpayers to challenge illegal appropriations and that reimbursements do not divest them of standing.

Regarding the landowners' constitutional challenges, the court rejected all their arguments except one. It concluded that pipeline carriers are common carriers and that absent specific legislation, the PSC's authority over them is absolute. It

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[40] See *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[41] See *id.*

concluded that the Legislature had unconstitutionally divested the PSC of control over pipeline common carriers and had delegated the routing decisions for them to the DEQ and the Governor. It rejected the State's argument that routing decisions are not within the PSC's constitutionally enumerated powers.

The court also rejected the State's argument that because a pipeline carrier could choose to comply with the PSC's regulatory procedures, L.B. 1161 was not unconstitutional in every circumstance, which would defeat the landowners' facial challenge. The court reasoned that the landowners' challenge was limited to that part of L.B. 1161 that allows pipeline carriers to choose the DEQ's review process and the Governor's approval of a route. It concluded that L.B. 1161 completely divested the PSC of authority over carriers that make this election and thus violated article IV, § 20, of the Nebraska Constitution. It concluded that L.B. 1161 must be declared void, as well as the Governor's approval of TransCanada's route, because it was premised on an unconstitutional statute.

## IV. ASSIGNMENTS OF ERROR

The State assigns that the court erred in (1) determining that the landowners had taxpayer standing, (2) determining that an environmental review by the DEQ and approval by the Governor for proposed oil pipelines that are not intrastate common carriers divests the PSC of its authority, in violation of Neb. Const. art. IV, § 20; and (3) considering an exhibit that was not admitted into evidence.

On cross-appeal, the landowners assign that the court erred in failing to hold that L.B. 1161 is unconstitutional and void because it (1) fails to provide for judicial review and violates due process; (2) confers upon the Governor the authority to grant a private entity the power to exercise eminent domain; (3) lacks a legal standard against which to test applications for authority to act as a common carrier; and (4) involves an unlawful pledge of the State's credit to a private entity.

## V. STANDARD OF REVIEW

[1-3] We independently review questions of law decided by a lower court.[42] A jurisdictional question which does not involve a factual dispute presents a question of law.[43] The constitutionality of a statute also presents a question of law.[44]

## VI. ANALYSIS

### 1. Standing

#### (a) Common-Law Requirements and Relevant Exceptions

[4,5] Standing is a jurisdictional component of a party's case.[45] Only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.[46] Common-law standing usually requires a litigant to demonstrate an injury in fact that is actual or imminent.[47]

[6-8] But taxpayer standing is an exception to the injury-in-fact requirement. Here, the district court determined that the landowners had taxpayer standing for two reasons. First, taxpayers have an equitable interest in public funds, including state public funds.[48] So a resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.[49] Additionally, a taxpayer's action sometimes raises matters of great public concern that far exceed the type of injury in fact an individual could normally assert in an

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[42] See *Kelliher v. Soundy*, 288 Neb. 898, 852 N.W.2d 718 (2014).

[43] See *id.*

[44] See *J.M. v. Hobbs*, 288 Neb. 546, 849 N.W.2d 480 (2014).

[45] *Butler Cty. Sch. Dist. v. Freeholder Petitioners*, 283 Neb. 903, 814 N.W.2d 724 (2012).

[46] *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012).

[47] *Project Extra Mile, supra* note 40.

[48] See *id.*

[49] *Id.*

action against government officials or entities.[50] So we have recognized a limited exception for taxpayer actions that raise such matters.[51] The district court determined that both of these exceptions applied.

(b) Parties' Contentions

The State argues that the court erred in concluding the landowners had taxpayer standing based solely on a challenged appropriation. It contends that no illegal expenditure occurred because L.B. 1161 requires a pipeline carrier to reimburse the State for the DEQ's regulatory costs in evaluating a proposed route. It also argues that the landowners failed to show there is no better suited plaintiff to bring the action as required by *Project Extra Mile v. Nebraska Liquor Control Comm*.[52]

The landowners argue that this case illustrates why taxpayers have an interest in challenging unlawful appropriations, regardless of whether the legislation requires reimbursement of the expenditures. They point to evidence that TransCanada has reimbursed the State for over $5 million in costs, despite a legislative appropriation to the DEQ of only $2 million.

The landowners contend that they made a prima facie showing there is no better party to bring the challenge and that the State adduced no evidence to refute their position. The landowners also argue that it is irrelevant whether TransCanada reimbursed the State. They argue that they are challenging the facial validity of L.B. 1161, not whether an illegal expenditure occurred in this particular case.

Neither party, however, has addressed the court's determination that this case raises a matter of great public concern. But we agree with that determination.

(c) Analysis

We adopted the "great public concern" exception in *Cunningham v. Exon*.[53] There, the plaintiff, a citizen taxpayer,

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[50] See *id*.

[51] See *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

[52] *Project Extra Mile, supra* note 40.

[53] See *Cunningham, supra* note 51.

brought a declaratory judgment action against the State. The taxpayer challenged the validity of two constitutional amendments to article VII, § 11, which governs public funding of schools. The voters had adopted one of the Legislature's proposed amendments but rejected a second one. Because of the way the proposals were presented, the vote had the effect of omitting language that restricted the State from accepting "money or property to be used for sectarian purposes," unless the sole source of money was a federal grant and it was distributed according to the terms of the grant. The plaintiff challenged the presentation to the voters. He argued that the restriction had been inadvertently omitted because the Legislature had not explained the effect of voting for the first proposal and against the second. The district court dismissed the action, concluding that the plaintiff lacked standing.

We had previously recognized that a taxpayer, without showing an injury peculiar to himself, has standing to challenge an unlawful governmental expenditure or appropriation, or an unlawful increase in the burden of taxation.[54] Yet, the challenged act in *Cunningham* involved neither circumstance. The State argued that the only persons who could have standing to challenge the amendments were the potential recipients of federal funds who were affected by the amendments. We rejected that argument and adopted a standing exception "where matters of great public concern are involved and a legislative enactment may go unchallenged unless plaintiff has the right to bring the action."[55] We quoted the Colorado Supreme Court's holdings regarding a taxpayer's standing to obtain a declaratory judgment even if the taxpayer's interest was no different from that of any other taxpayer:

> "[*W*]*e can conceive of no greater interest a taxpayer can have than his interest in the form of government under which he is required to live, or in any proposed change thereof*. In the last analysis, this interest may well exceed any pecuniary interest he may have. The interest and

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[54] See, e.g., *Niklaus v. Miller*, 159 Neb. 301, 66 N.W.2d 824 (1954); *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952).

[55] *Cunningham, supra* note 51, 202 Neb. at 567, 276 N.W.2d at 215.

> concern of plaintiff as a taxpayer is not primarily confined to himself alone, but is of 'great public concern'. . . . If a taxpayer and citizen of the community be denied the right to bring such an action under the circumstances presented by this record, then the wrong must go unchallenged, and the citizen and taxpayer reduced to mere spectator without redress."[56] . . . The Colorado Supreme Court later reaffirmed [this] holding . . . with respect to statutory provisions involving a reorganization of state government and said: "The rights involved extend beyond self-interest of individual litigants and are of 'great public concern.'"[57]

In *Cunningham*, we concluded that this exception, which permitted citizens to challenge unlawful statutes and ordinances, applied even more strongly to an action challenging the validity of a constitutional amendment:

> There can be no doubt that the amendment . . . raises issues of great public interest and concern . . . . It is also obvious that if the amendment . . . cannot be challenged by a citizen and taxpayer unless and until he has a special pecuniary interest or injury different from that of the public generally, it is entirely possible that no one may have standing to challenge it. An amendment which changes the provisions of a state constitution as to the use of public funds for sectarian and educational purposes is of such great public interest and concern that a citizen taxpayer should have standing sufficient to maintain an action for a declaratory judgment . . . *without the necessity of showing that he has sustained some special injury peculiar to himself and distinct from that of the public generally*.[58]

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[56] *Id*. (emphasis supplied), quoting *Howard v. Boulder*, 132 Colo. 401, 290 P.2d 237 (1955).

[57] *Id*. at 567-68, 276 N.W.2d at 215, quoting *Civil Serv. Emp. v. Love*, 167 Colo. 436, 448 P.2d 624 (1968), and citing *Portmann v. Board of Elections*, 60 Ohio App. 54, 19 N.E.2d 531 (1938), and *Abbott v. Iowa City*, 224 Iowa 698, 277 N.W. 437 (1938).

[58] *Cunningham, supra* note 51, 202 Neb. at 568-69, 276 N.W.2d at 216 (citation omitted) (emphasis supplied).

[9] The "great public concern" exception is another name for the "public interest" exception[59] that we recognized in our early mandamus cases. That is, in our early mandamus cases, we distinguished between private rights and the public's interest and held that a plaintiff has standing to enforce a public right. Our earliest decision regarding standing to raise a public interest was *State, ex rel., Ferguson v. Shropshire*.[60] There, the Legislature had passed a law that a justice of the peace could hold court in any precinct of a city regardless of where he lived, despite a constitutional provision that such officials shall reside in the precinct where they were elected. We held that the statute was unconstitutional. We determined that the plaintiff need not show an interest peculiar to himself to seek a writ of mandamus to compel the defendant to comply with this duty:

> "Where the question is one of public right, and the object of the mandamus is to procure the enforcement of a public *duty*, the people are regarded as the real party, and the relator, at whose instigation the proceedings are instituted, need not show that he has any legal or special interest in the result, it being sufficient to show that he is a citizen, and as such interested in the execution of the laws."[61]

Contrary to the dissent, we do not conclude that our early mandamus cases are distinguishable because the landowners sought a declaratory judgment here instead of a writ of mandamus. In either case, a plaintiff's standing rests upon a public interest, not a private one. The primary difference between our early mandamus cases and more recent cases lies in our narrowing of the public interest that is sufficient to invoke taxpayer standing, and in *State ex rel. Reed v. State*,[62] we implicitly recognized the commonality in these lines of cases.

In *State ex rel. Reed*, we stated that the exception in our early mandamus cases to permit citizens to enforce a public

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[59] See 81A C.J.S. *States* § 457 at 679 (2004).

[60] *State, ex rel., Ferguson v. Shropshire*, 4 Neb. 411 (1876).

[61] *Id.* at 413-14. See, also, *Van Horn v. State*, 51 Neb. 232, 70 N.W. 941 (1897).

[62] *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

right had been clarified in *Cunningham*. And we noted that since *Cunningham*, we have declined to find an exception to the requirement that the plaintiff have a personal stake in the outcome of the controversy. Specifically, we declined to extend *Cunningham* when the plaintiff claimed that (1) city officials had unlawfully entered into a cable television contract for the residents[63] and (2) commissioners of the Nebraska State Racing Commission had exceeded their statutory authority in approving license applications for simulcast racing.[64] We distinguished *Cunningham* as involving a constitutional issue.

In another case, *Ritchhart v. Daub*,[65] the plaintiff conceded that she had not alleged a taxpayer's action and she did not raise the exception for a matter of great public concern. We held she lacked standing to seek a declaratory judgment that a mayor's hiring agreements with two city officials violated the city's charter. The officials had agreed that if the mayor discharged them, they would not appeal to the personnel board. We recognized a trend to expand standing requirements, but concluded that the trend rested on concerns that if the plaintiff were denied standing, no party could represent the public's interest: "The threshold question, then, when a party attempts to base standing on an injury common to the general public, has been whether or not there exists another party whose interests are more at issue in the action, and who is thus more appropriately entitled to present the claim."[66] We concluded that the officials who signed the agreements would be the more appropriate plaintiffs to challenge the mayor's authority if he ever attempted to enforce their waivers.

We summarized our public interest case law in *State ex rel. Reed*:

> Exceptions to the rule of standing must be carefully applied in order to prevent the exceptions from

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[63] *Green v. Cox Cable of Omaha*, 212 Neb. 915, 327 N.W.2d 603 (1982).

[64] *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000).

[65] *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[66] *Id.* at 808, 594 N.W.2d at 293.

> swallowing the rule. Other than for challenges to the unauthorized or illegal expenditure of public funds, our more recent cases have narrowed such exceptions to situations where matters of great public concern are involved and a legislative enactment may go unchallenged unless the plaintiff has the right to bring the action.[67]

In *State ex rel. Reed*, we concluded the plaintiff's claim that state officials had violated their duties was really his attempt to impose his opinions on *how* they should exercise their duties. He lacked standing to try to influence state officials' discretionary duties through a legal action. But we clearly recognized that taxpayers could have standing to challenge unlawful governmental acts involving a matter of great public concern. And we have more recently suggested that one of our illegal expenditure cases should be treated as raising a matter of great public concern.

In *Chambers v. Lautenbaugh*,[68] the illegal expenditure case, the plaintiff alleged that the Douglas County election commissioner had illegally redrawn the district boundary lines for the election of city council members. We concluded that the plaintiff had standing because he had alleged an illegal expenditure of public funds. Our conclusion rested on the plaintiff's allegations that the commissioner's office had spent and would continue to spend public money and public employees' time to implement the allegedly illegal boundary lines.

Under *Chambers*, preventing the use of public time and money to implement and enforce allegedly invalid rules is a sufficient interest to confer taxpayer standing to challenge the rules.[69] That holding would have obvious application here. But in *Project Extra Mile*,[70] we recognized a tension between *Chambers* and other cases in which we had held that a claim of unauthorized government action was insufficient to confer

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[67] *State ex rel. Reed, supra* note 62, 278 Neb. at 571, 773 N.W.2d at 355.

[68] *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

[69] See *Project Extra Mile, supra* note 40.

[70] *Id.*

standing absent an individualized injury in fact. We suggested that *Chambers* should be treated as a case raising a matter of great public concern:

> This conflict [in our case law] occurs because of the competing considerations frequently presented by taxpayer actions. Primarily, government officials must perform their duties without fear of being sued whenever a taxpayer disagrees with their exercise of authority. But courts also recognize that a taxpayer may be the only party who would challenge an unlawful government action because the persons or organizations directly affected by the government action have benefited from it. Additionally, a taxpayer's action sometimes raises matters of great public concern that far exceed the type of injury in fact that an individual could normally assert in an action against government officials or entities.
>
> These competing concerns explain the tension between *Chambers* and our cases holding that an allegation of unlawful government action is insufficient to show an illegal expenditure of public funds. *Arguably,* Chambers *would have been more correctly presented as raising a matter of great public concern: If true, the county election commissioner's alleged statutory violation would have unlawfully altered the way that the city's residents elected their city council representatives*.[71]

Our suggestion in *Project Extra Mile* that *Chambers* should be treated as raising a matter of great public concern is consistent with our reasoning in *Cunningham*. That is, a citizen taxpayer's interest in his or her form of government exceeds any pecuniary interests he or she may have in other types of government action. In both *Chambers* and *Cunningham*, because all citizens had an interest in their representatives' obeying the law, no resident taxpayer could have claimed a greater interest than any other to challenge the alleged violations. Of course, that was also true in cases decided after *Cunningham*. But *Cunningham* involved a claim that the Legislature had unlawfully changed the constitution,

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[71] *Id*. at 389-90, 810 N.W.2d at 159-60 (emphasis supplied).

and *Chambers* involved a claim that an election commissioner had unlawfully changed the way citizens elected their local representatives.

Like claims involving the election of representatives and the way the constitution can be changed, the claims here also involve the citizens' interest in their form of government. Specifically, the landowners alleged violations of the constitutionally required distribution of political powers in this state. The substantive issues are whether the Legislature (1) unlawfully delegated a duty constitutionally conferred on the PSC to the Governor and (2) unlawfully delegated to the Governor the Legislature's power to bestow the State's right of eminent domain on private organizations. These issues necessarily involve the delegation of powers under the Nebraska Constitution, which are fundamental matters of great public concern to all resident taxpayers.

In deciding this appeal, we are cognizant that our standing rules are circumscribed by case law. Unlike federal courts, we are not bound by the strictures of constitutional standing requirements.[72] Nebraska, like most state courts, has no constitutional "case" or "controversy" requirement that has resulted in the federal courts' strict application of standing rules. For example, unlike taxpayer standing in state courts, this concept is almost nonexistent in federal courts.[73] Our common-law standing rules, like all doctrines of justiciability, arise out of prudential considerations of the proper role of the judiciary in a democratic government with coequal branches of government.[74] Thus, in the vast majority of cases, we will not determine whether the Legislature has exceeded its powers unless the issue is raised by a party who is entitled to judicial resolution of a dispute involving his or her interests.

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[72] See, e.g., *Susan B. Anthony List v. Driehaus*, ___ U.S. ___, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014); *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

[73] 13B Charles Alan Wright et al., Federal Practice and Procedure § 3531.10.1 (2008 & Supp. 2014).

[74] See *Nebraska Coalition for Ed. Equity v. Heineman*, 273 Neb. 531, 731 N.W.2d 164 (2007).

But without an exception for matters of great public concern, elected representatives could flout constitutional violations with impunity. As we explained in *Project Extra Mile*, we have recognized taxpayer standing because "[a] good deal of unlawful government action would otherwise go unchallenged"[75] and "following the law would be 'irrelevant to those entrusted to uphold it.'"[76] The same reasoning applies here. The exception for matters of great public concern ensures that no law or public official is placed above our constitution.

So when a taxpayer claims that the Legislature enacted a law that undermines the fundamental limitations on government powers under the Nebraska Constitution, this court has full power and the responsibility to address the public rights raised by a challenge to that act. Without the prudent exercise of such judicial responsibility, the Legislature might successfully define the role of all government bodies. Where, as here, the Governor and the current members of the PSC have acquiesced in the Legislature's disregard of the Nebraska Constitution's distribution of powers,[77] the need for citizens to have standing to raise a matter of great public concern is apparent. How could a taxpayer show a direct injury if the Legislature statutorily abolished the PSC? Which taxpayer does not have a right to the PSC's continued existence under the Nebraska Constitution? Additionally, the landowners have alleged that the Legislature has unconstitutionally authorized the Governor to decide who can exercise the power of eminent domain in Nebraska. These claimed violations of constitutional law, if true, undermine the structure of state government. Thus, the issues raised here "far exceed the type of injury in fact that an

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[75] *Project Extra Mile, supra* note 40, 283 Neb. at 390, 810 N.W.2d at 160.

[76] *Id.* at 388, 810 N.W.2d at 158.

[77] See, Nebraska Public Service Commission, No. 183, Order Releasing Third Set of Proposed Rules and Seeking Comment (Aug. 21, 2012) (proposing rules to define "pipeline," "pipeline carrier," and "major oil pipeline" in title 291, ch. 9; promulgating § 023 to govern routing of "major oil pipelines" *if* Governor has not approved route under L.B. 4); 291 Neb. Admin. Code, ch. 9, §§ 001 and 023 (2013).

individual could normally assert in an action against government officials or entities."[78]

So we reject the State's argument that recognizing taxpayer standing in this case would essentially eliminate any standing requirements for taxpayers. As we stated in *Project Extra Mile*, public officials must be free to perform their duties without fear of being sued whenever a citizen disagrees with their exercise of authority. But there is a critical distinction between exercising legitimate authority and a claim that public officials ignored constitutional constraints on that authority.

This does not mean that taxpayers may challenge any legislation that allegedly violates a constitutional provision without the need to show an injury in fact. Legislative missteps often will not raise a matter of great public concern. But when a taxpayer's action raises every citizen's interest in the Legislature's obedience to the fundamental distribution of power in this state, the public interest necessarily rises to the level of a "great public concern." If the exercise of eminent domain over private property and the constitutional requirements for the organization of state government do not raise matters of great public concern, then no issue could be sufficiently potent to give citizens the right to challenge an unlawful government action. So to deny standing here would likely slam the courthouse doors on future taxpayer actions raising a public interest.

The inscription above the main entrance to this Capitol proclaims that the "Salvation of the State is Watchfulness in the Citizen." For that inscription to have meaning, someone must have standing to defend the Nebraska Constitution, regardless of whether a direct injury can be shown.

Finally, the State argues that under *Project Extra Mile*, any taxpayer who cannot show a direct injury should be required to show that there is no better suited party to bring the action. We disagree. As noted, in *Cunningham*, the State specifically

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[78] See *Project Extra Mile, supra* note 40, 283 Neb. at 390, 810 N.W.2d at 159-60.

argued that the only persons who had standing to challenge the constitutional amendments were those persons who could lose federal funding because of the change. And we rejected that argument.

[10] The State misconstrues *Project Extra Mile* by omitting a crucial limitation on the holding that a taxpayer must show there is no better suited party to bring the action:

> We hold that a taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax. But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action. . . . *We further hold that no other potential parties are better suited than a taxpayer to claim that a state agency or official has violated a statutory duty to assess taxes when the persons or entities directly and immediately affected by the alleged violation are beneficially, instead of adversely, affected*.[79]

This discussion was obviously directed at cases involving an unlawful failure to assess or collect taxes. And the italicized holding was clearly intended to preclude the argument that a plaintiff must rule out every other possible plaintiff. Instead, under *Project Extra Mile*, a plaintiff satisfies the burden to show that there is no better party to bring the action if the plaintiff shows that persons or entities directly and immediately affected by the unlawful act are beneficially affected by it.

So even if we extended *Project Extra Mile* to other types of taxpayer actions, the burden would be met here. TransCanada, in particular, and all major pipeline carriers, benefited from having a procedural choice. First, the Governor's approval of a route under the DEQ procedures was not subject to judicial review. Second, even if the Governor denied approval of a

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[79] *Id*. at 391, 810 N.W.2d at 160-61 (emphasis supplied).

route, a major oil pipeline carrier could seek PSC approval. These two advantages alone are sufficient to show that major oil pipeline carriers benefited from the passage of L.B. 1161.

More important, the exception for matters of great public concern, by definition, must involve an issue that affects many citizens. Obviously, the plaintiff in *Cunningham* could not have satisfied a burden to show there was no better suited party if that phrase is interpreted to mean that a taxpayer has the burden to demonstrate and rule out all those persons who might sustain a more direct injury. So *Cunningham* clearly shows that either there is no such requirement for this exception or there is no better suited party to challenge an allegedly unconstitutional legislative act when every citizen has an equal interest in the Legislature's compliance with the constitution.

Similarly, the State argued to the district court that the only persons who should have standing to challenge L.B. 1161 are those facing a condemnation proceeding when TransCanada exercises the power of eminent domain. But the challenge here is that the Governor has no constitutional authority to decide whether TransCanada can exercise that power. A challenge in which every citizen has an interest should not hinge upon whether any particular landowner in an approved pipeline route has the resources and ability to resist a condemnation proceeding on constitutional grounds. Equally important, any landowner resisting condemnation would be required to challenge the legislation as unconstitutional for the same issues that are presented here. Given the widespread significance of these constitutional issues, we will not deny standing on the chance that a different citizen could raise the issue. We conclude that the holding in *Project Extra Mile*—that a taxpayer must show an alleged unlawful act would otherwise go unchallenged because no other potential party is better suited to bring the action—has no application to taxpayer actions raising a matter of great public concern.

Before concluding our standing analysis, we address some of the dissent's comments. The dissent erroneously asserts

that the division of opinion regarding standing creates an "impasse" that prevents its consideration of the constitutional claims. There is no impasse. The four judges of this court who have concluded that the landowners have standing are not a "plurality," as the dissent asserts. We are the majority on the issue of standing, and our decision controls. That is, our decision is the court's decision on standing and the law governing this case.

The dissent correctly notes that "[j]urisdictional requirements apply equally to all cases." In this seven-member court, it takes only four judges to determine if the case meets the jurisdictional requirements for this court to consider the merits. We apply this rule of majority "equally to all cases," including the one before us.

The dissent incorrectly claims that five votes are required to determine standing and hence jurisdiction. The dissent cites no constitutional provision and no authority to support this imaginative assertion. Neb. Const. art. V, § 2, in relevant part, provides the following:

> A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges.

While the supermajority provision in this passage clearly requires five judges to concur on the conclusion that a legislative act is unconstitutional, the dissent reads into this provision the additional requirement that five judges concur on the conclusion that this court has jurisdiction to decide the question. The dissent, however, does not have four votes for its constitutional interpretation, and we, the majority, conclude that the dissent's interpretation is not warranted and, in any event, not controlling.

The quorum provision in article V, § 2, sets the minimum number of judges who must sit before this court can decide a case. Quorum provisions ensure that a case is not decided by

one or two judges on a court.[80] In contrast, minimum concurrence and supermajority requirements are intended to ensure deference to legislative enactments.[81] And unlike the quorum provision in article V, § 2, the supermajority provision is a voting requirement on the resolution of the case—as distinguished from a preliminary requirement that merely determines whether the court can take action.[82] The supermajority requirement comes into play only after this court determines that quorum requirements and jurisdictional requirements are satisfied.

The plain language of the supermajority requirement in article V, § 2, applies only to our voting on the merits of the constitutional challenge. That is, it is limited by its terms to requiring five votes to hold that an enactment is unconstitutional. We have never held that this provision requires five votes to decide any procedural or jurisdictional issue in a case presenting a constitutional challenge to a statute.

So we reject the dissent's interpretation of the supermajority requirement and the dissent's assertion that our approach would yield "absurd" results. It is true that this provision can lead to unusual results. But the dissent's hypothetical voting outcomes are not absurd results. They simply flow from the Nebraska Constitution's unusual supermajority requirement.[83] The only "absurd" result would be for a minority of judges, who disagree with the court's decision on standing, to control whether the court can consider the constitutionality of a legislative enactment.

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[80] See Jonathan Remy Nash, *The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements*, 58 Emory L.J. 831, 839-50 (2009).

[81] See Jonathan L. Entin, *Judicial Supermajorities and the Validity of Statutes: How* Mapp *Became a Fourth Amendment Landmark Instead of a First Amendment Footnote*, 52 Case W. Res. L. Rev. 441, 450, 473 (2001).

[82] See Nash, *supra* note 80.

[83] See *id*. at 851 n.75 (stating that "[c]urrently two states—Nebraska and North Dakota—have constitutional requirements for the invalidation of statutes on state constitutional grounds by the state supreme court").

We note that there are numerous examples of judges who dissented on a jurisdictional matter *and* reached the merits of the appeal, if only to express his or her disagreement.[84] It is true that other appellate judges who dissented on a jurisdictional issue limited their opinion to that issue.[85] These cases may reflect a tension between a judge's desire to be consistent with his or her opinion that jurisdiction is lacking and a court's duty to decide cases. But they also illustrate that whether a judge reaches the merits of an appeal when he or she is outvoted on a jurisdictional issue is a matter of discretion with each judge. Moreover, in those cases, whether the dissenting judges reached the merits of the appeal or not, their opinion on those issues was not dispositive. That is not true here. By declining to participate in deciding the merits of this appeal, the three justices dissenting on standing have effectively prevailed without providing a rationale which is due the parties and citizens of Nebraska.

In sum, although the dissent disagrees with the court's decision on standing, there is no constitutional or jurisprudential barrier that precludes the dissenting judges from proceeding to decide the landowners' constitutional challenge to L.B. 1161. And because the case presents a matter of great public concern, the citizens of this state deserve a decision on the merits.

Clearly, the dissent would narrow *Cunningham*'s standing exception for matters of great public concern to the point that the exception is nonexistent. But *Cunningham* is not an outlier case; it is consistent with our early mandamus cases.

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[84] See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (Scalia, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed. 2d 257 (2003) (Souter, J., dissenting); *Hammer v. Sam's East, Inc.*, 754 F.3d 492 (8th Cir. 2014) (Riley, Chief Judge, dissenting); *Patel v. U.S. Citizenship and Immigration Services*, 732 F.3d 633 (6th Cir. 2013) (Daughtrey, Circuit Judge, dissenting); *Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401 (7th Cir. 1991) (Easterbrook, Circuit Judge, dissenting).

[85] See, e.g., *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531, 171 L. Ed. 2d 424 (2008) (Roberts, C.J., dissenting); *EPA, supra* note 84 (Roberts, C.J., dissenting).

More important, *Cunningham* is the law of this jurisdiction. Obviously, *Cunningham* did not require the plaintiff to show an injury in fact or to rule out potential parties who would have a more direct interest in the controversy to establish standing. And that conclusion was correct.

*Cunningham*'s great public concern exception to traditional standing exists for a reason. The primary hurdle for application of the great public concern exception, as we have narrowed it, is the existence of a great public concern—not the availability of a perfect plaintiff with injury-in-fact standing. The dissent's reasoning on standing would so limit the pool of effective plaintiffs as to render taxpayers mere spectators without a forum to challenge a perceived manipulation by the Legislature of the fundamental limits on political power in Nebraska. This we will not do.

### 2. L.B. 1161 Unconstitutionally Delegates the PSC's Regulatory Authority to the Governor

The landowners contend that the court correctly ruled that L.B. 1161 violates article IV, § 20, because it divests the PSC of its control over a class of common carriers and transfers its powers to the Governor.

The State counters that because the landowners presented a facial challenge to L.B. 1161, they must show that the legislation is invalid in every circumstance. They conclude that the court erred in determining that L.B. 1161 is facially unconstitutional for three reasons. First, the State contends that under Nebraska's statutes, only intrastate pipeline carriers—and not interstate pipeline carriers—transporting oil products are common carriers subject to the PSC's regulatory control. It argues that the court should have interpreted L.B. 1161 as applying only to interstate carriers, which would be constitutional. Second, the State contends that because private pipeline carriers could validly seek the Governor's approval of their routes, L.B. 1161 is not invalid in every circumstance. Finally, the State contends that even if the PSC has exclusive control over pipeline carriers, routing decisions are not within its enumerated powers.

[11] The landowners have the burden of establishing that L.B. 1161 is unconstitutional.[86] We presume that statutes are constitutional and will not strike down a statute unless its unconstitutionality is clearly established.[87] But the State devotes much of its brief to arguing that L.B. 1161 is distinguishable from other legislation that we have previously struck down as unconstitutional. So before discussing the parties' arguments, we set out the relevant laws underlying their arguments.

### (a) The PSC's Powers and the Legislature's Power to Restrict Them

[12] The PSC is not a statutorily created state agency. Until 1972, it was called the State Railway Commission (Commission).[88] It is an independent regulatory body for common carriers[89] created by the Nebraska Constitution in article IV, § 20:

> There shall be a Public Service Commission . . . . The powers and duties of such commission shall include the regulation of rates, service and general control of common carriers as the Legislature may provide by law. But, in the absence of specific legislation, the commission shall exercise the powers and perform the duties enumerated in this provision.

We have previously explained the historical facts leading up to the voters' adoption in 1906 of article IV, § 20.[90] In short, state voters rejected three legislative proposals to create a regulatory body over common carriers that was part of the executive branch of government. It was not until the Legislature proposed a permanent and independent commission—limited only as the Legislature may provide by specific legislation—that the voters approved an amendment to the constitution.

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[86] See *Big John's Billiards v. State*, 288 Neb. 938, 852 N.W.2d 727 (2014).

[87] *Hobbs, supra* note 44.

[88] See 1972 Neb. Laws, L.B. 347.

[89] See, e.g., *Swanson v. Sorenson*, 181 Neb. 312, 148 N.W.2d 197 (1967).

[90] See *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

[13] Consistent with this constitutional history, we have held that the PSC has "independent legislative, judicial, and executive or administrative powers" over common carriers,[91] which powers are plenary and self-executing.[92] Absent specific legislation, the PSC's enumerated powers over common carriers are absolute and unqualified.[93]

[14-18] Later, in *State ex rel. Spire v. Northwestern Bell Tel. Co.*,[94] we summarized our case law in five rules that govern the PSC's regulatory authority and the Legislature's power to restrict it:

- First, in any field where the Legislature has not acted, the constitution authorizes the PSC to exercise its plenary powers over common carriers.[95]
- Second, under article IV, § 20, the Legislature can restrict the PSC's plenary powers only through specific legislation.[96]
- Third, the term "specific legislation" means specific restrictions. It does not include general legislation to divest the PSC of its jurisdiction and transfer its powers to another governmental entity or official besides the Legislature: "The Legislature cannot constitutionally divest the PSC of jurisdiction over a class of common carriers by vesting a governmental agency, body of government, or branch of government, *except the Legislature*, with control over the class of common carriers."[97]
- Fourth, the Legislature can divest the PSC of jurisdiction over a class of common carriers by passing specific legislation

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[91] *Swanson, supra* note 89, 181 Neb. at 316, 148 N.W.2d at 200.

[92] See, e.g., *Myers v. Blair Tel. Co.*, 194 Neb. 55, 230 N.W.2d 190 (1975).

[93] *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

[94] *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

[95] *Id.*

[96] *Id.*, citing *Chicago & N. W. Ry. Co. v. County Board of Dodge County*, 148 Neb. 648, 28 N.W.2d 396 (1947).

[97] *Id.* at 276, 445 N.W.2d at 294 (emphasis supplied).

that occupies a regulatory field, thereby preempting the PSC's control.[98]

- Fifth, if the Legislature passes specific legislation to divest the PSC of jurisdiction in a regulatory field, the Legislature cannot abandon control over the common carriers in that field. Under article IV, § 20, regulatory control over common carriers must reside either in the PSC or in the Legislature.[99]

[19] Specifically, because of the Commission's constitutional jurisdiction over common carriers, we have held that a party cannot initiate an action in district court to enforce a statute requiring a common carrier to provide reasonable accommodations.[100] And in *State ex rel. State Railway Commission v. Ramsey*,[101] we held that the Legislature has no power to divest the Commission of its constitutional jurisdiction to regulate and control common carriers by transferring its power to a statutorily created agency. Although statutes are presumed to be constitutional, we concluded that the controlling principles were the Constitution's supremacy and this court's duty to "trace the line which marks the limit of power, and to cause compliance with it."[102] So unless the Legislature enacts legislation to specifically restrict the PSC's authority and retains control over that class of common carriers, it cannot constitutionally deprive the PSC of its regulatory powers.

### (b) The Meaning of a "Common Carrier" in Nebraska

[20,21] The PSC's constitutional authority to regulate "common carriers" is limited to the common-law meaning of that term unless the Legislature has authorized the PSC to exercise

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[98] See *State ex rel. Spire, supra* note 94, citing *Rodgers v. Nebraska State Railway Commission*, 134 Neb. 832, 279 N.W. 800 (1938), and *State v. Chicago & N. W. Ry. Co.*, 147 Neb. 970, 25 N.W.2d 824 (1947).

[99] See *id.*

[100] *Rivett Lumber & Coal Co. v. Chicago & N. W. R. Co.*, 102 Neb. 492, 167 N.W. 570 (1918).

[101] *Ramsey, supra* note 90.

[102] *Id.* at 347, 37 N.W.2d at 510.

control over carriers that are outside of that meaning.[103] A carrier refers to an "individual or organization . . . that contracts to transport passengers or goods for a fee."[104] The common law recognizes only two types of carriers: common carriers and private carriers,[105] although the terms "private carrier" and "contract carrier" are used interchangeably.[106]

[22,23] In *City of Bayard v. North Central Gas Co.*,[107] we set out definitions for both private carriers and common carriers. We defined a private carrier as one that, without being in the business of transporting for others or holding itself out to the public as willing to do so, undertakes only by special agreement to transport property, either gratuitously or for a consideration.[108] In contrast, under our case law,

> any person, corporation, or association holding itself out to the public as offering its services to *all persons similarly situated* and performing as its public vocation the services of transporting passengers, freight, messages, or commodities for a consideration or hire, is a common carrier in the particular spheres of such employment.[109]

In *City of Bayard*, the evidence showed that the defendant gas company was using its own pipelines and distribution systems to transport gas it purchased to consumers in cities that had granted it a franchise by contract. No evidence showed that it transported gas for others, gratuitously or for a consideration. We held that the company was not a common carrier and could not be subjected to the Commission's control.[110]

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[103] *Nebraska Pub. Serv. Comm., supra* note 93.

[104] Black's Law Dictionary 256 (10th ed. 2014).

[105] *State v. Union Stock Yards Co.*, 81 Neb. 67, 115 N.W. 627 (1908).

[106] See Black's Law Dictionary, *supra* note 104 at 256-57.

[107] *City of Bayard v. North Central Gas Co.*, 164 Neb. 819, 83 N.W.2d 861 (1957).

[108] See *id.*

[109] *Id.* at 830, 83 N.W.2d at 867.

[110] See *City of Bayard, supra* note 107. See, also, *The Pipe Line Cases*, 234 U.S. 548, 34 S. Ct. 956, 58 L. Ed. 1459 (1914).

[24] As the above definition of common carrier implies, under Nebraska's common law, whether a carrier offers its services to the general public—like a passenger carrier, for example—is not always relevant to determining whether it is a common carrier. Instead, a carrier is a common carrier if its "vocation is of a public nature, although limited to the transportation of certain classes or kinds of freight, and it may be of service to a limited few who by their peculiar situation or business may have occasion to employ it."[111] Under the *City of Bayard* definition, transporting commodities for others is a vocation of a public nature even if the service is not available to the public at large. We have specifically held that a railyard switching company, which served a limited number of railroads, was a common carrier because it held itself out as willing to transport goods for all railroads entering the railyard.[112]

[25] Under our definition of a common carrier, an oil pipeline carrier is a common carrier if it holds itself out as willing to transport oil products for a consideration to all oil producers in the area where it offers its transportation services. The State does not dispute the landowners' contention that TransCanada is a common carrier, and a Texas case supports that conclusion.[113] For this appeal, we assume that this is true.

As stated, the landowners contend that the court correctly ruled that L.B. 1161 violates article IV, § 20, because it divests the PSC of its control over a class of common carriers and transfers its powers to the Governor. The rules that we have set out above clearly support that contention. We therefore turn to the State's arguments that L.B. 1161 is not facially unconstitutional in every circumstance.

First, the State argues that the court erred in concluding that all oil pipeline carriers are common carriers. It claims that interstate pipeline carriers are not common carriers under

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[111] *Union Stock Yards Co., supra* note 105, 81 Neb. at 75, 115 N.W. at 631 (citations omitted).

[112] See *Union Stock Yards Co., supra* note 105.

[113] See *Crawford Family v. TransCanada Keystone*, 409 S.W.3d 908 (Tex. App. 2013).

Nebraska's statutes and that the court erred in failing to interpret L.B. 1161 as applying to only interstate pipeline carriers.

(c) Analysis

[26] The State correctly contends that a plaintiff can succeed in a facial challenge only by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications.[114] But it incorrectly argues that because some Nebraska statutes distinguish between interstate and intrastate oil pipelines, the court should have relied on these statutes to conclude that L.B. 1161 applies only to interstate pipeline carriers. The State argues that interstate carriers are not common carriers subject to the PSC's control. The State points to no statute that explicitly restricts the PSC's powers, but it argues that courts must try to interpret statutes to be constitutional.

*(i) Nebraska's Statutes Are Not Specific Legislation to Restrict the PSC's Regulatory Powers*

As stated, unless the Legislature enacts legislation to specifically restrict the PSC's authority and retains control over that class of common carriers, it cannot constitutionally deprive the PSC of its regulatory powers. The State points to Neb. Rev. Stat. § 75-501 (Reissue 2009), which provides that pipeline carriers transporting oil for hire in Nebraska intrastate commerce "shall be a common carrier subject to commission [the PSC] regulation." It contends that this statute defines a pipeline common carrier as one that transports oil for hire only in intrastate commerce (i.e., only within Nebraska's borders). The State also relies on Neb. Rev. Stat. § 75-502 (Cum. Supp. 2014), which was amended by L.B. 1[115] to provide the following underlined text: "Pipeline carriers <u>which are declared common carriers under section 75-501, pipeline carriers approved under [MOPSA], and pipeline carriers for which the Governor approves a route under section 57-1503</u> may store, transport,

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[114] See *Lindner v. Kindig*, 285 Neb. 386, 826 N.W.2d 868 (2013).

[115] See L.B. 1, § 20.

or convey any liquid or gas [and] may lay down, construct, maintain, and operate pipelines . . . ." The State contends that the delineation of different types of carriers in § 75-502 shows that the Legislature did not intend for all pipeline carriers to be considered common carriers.

The State's reliance on these statutes is misplaced. Although it argues that interstate carriers are not common carriers under Nebraska law, it does not argue that they are private carriers. It appears to argue that interstate pipeline carriers of oil are a class by themselves—neither common nor private carriers. But under Nebraska common law, there are only two classes of carriers: private and common. "Interstate" is not a class by itself. Interstate pipeline carriers under federal law are also classified as private or common, and pipeline carriers transporting oil in interstate commerce are subject to federal regulation as common carriers.[116] So we will not interpret § 75-502's mere description by statute of the carriers that can lay pipelines in this state as a legislative declaration—contrary to federal law—that interstate carriers are not common carriers when they cross Nebraska.

We also reject the State's argument that § 75-501 defines the term "common carrier" for persons transporting oil products. Section 75-501 provides:

> Any person who transports, transmits, conveys, or stores liquid or gas by pipeline for hire in Nebraska intrastate commerce shall be a common carrier subject to commission regulation. The commission [PSC] shall adopt, promulgate, and enforce reasonable rules and regulations establishing minimum state safety standards for the design, construction, maintenance, and operation of pipelines which transport liquefied petroleum gas or anhydrous ammonia in intrastate commerce by common carriers. *Such rules and regulations, and the interpretations thereof, shall conform with the rules, regulations, and interpretations of the appropriate federal agencies with authority to regulate pipeline common carriers in interstate commerce*. Any person may determine the

[116] See *The Pipe Line Cases, supra* note 110.

> validity of any such rule or regulation in such manner as provided by law.

(Emphasis supplied.)

[27] Section 75-501 does not explicitly state that it is defining a term or limiting the PSC's authority to intrastate carriers. Interpreting § 75-501 to define the whole field of pipeline common carriers would be an expansive reading and contrary to the statute's historical context. The statute explicitly acknowledges that federal agencies regulate interstate pipeline carriers, and it is this tension that explains why the statute's reach is limited to intrastate pipeline carriers. Section 75-501's historical context shows that the Legislature intended only to ensure that intrastate carriers are regulated.

In 1906, Congress amended the federal Interstate Commerce Act (ICA) to make interstate oil transporters common carriers subject to federal regulation.[117] In 1914, the U.S. Supreme Court held that Congress could require federal regulation of interstate pipeline carriers that were operating as common carriers.[118] But the ICA, both before and after the 1906 amendment, included an exception for common carriers engaged in the transportation of passengers or property "wholly within one State."[119]

In 1903, the Nebraska Legislature passed the first law giving pipeline carriers an unconditional right to exercise the power of eminent domain in Nebraska to construct a pipeline.[120] The law did not distinguish between interstate and intrastate carriers and imposed no regulatory control over carriers. In 1903, the Commission did not exist.

In 1917, the Legislature repealed the 1903 law and replaced it with a statute declaring that pipelines transporting oil products or gases from one point in Nebraska to another point for a consideration are common carriers. These carriers could

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[117] See *id.*

[118] See *id.*

[119] See Interstate Commerce Act, 24 Stat. 379 (1887) and 34 Stat. 584 (1906).

[120] See 1903 Neb. Laws, ch. 67, § 1, p. 364.

exercise the power of eminent domain but were subject to the Commission's control and regulation.[121] Because the Legislature repealed the 1903 law, no statute authorized interstate carriers to exercise eminent domain. But that omission is not surprising. In 1917, Nebraska's lawmakers would have understood that they had authority to regulate intrastate common carriers and that the Commerce Clause prohibited them from burdening interstate commerce.[122]

It is true that absent preemptive federal laws, the Legislature probably could have enacted siting laws to protect the health of its citizens if those laws did not unnecessarily impede interstate commerce.[123] But in 1917, the law defining the limits of a state's power over interstate carriers was not clear. So viewed through the prism of federal law, Nebraska's 1917 enactment was not a *limitation* of the Commission's power to regulate only intrastate carriers. It was an *assertion* of the Commission's power to regulate such carriers.

In 1923, the Legislature passed a bill giving *interstate* pipeline carriers an unconditional right to exercise eminent domain.[124] The statute did not declare interstate carriers to be common carriers or subject them to the Commission's control.

In 1963, the Legislature enacted comprehensive legislation to reorganize statutes related to the Commission's powers.[125] The reorganization resulted in a separation of the eminent domain statute for pipelines from the statutes dealing with the Commission's powers over pipelines. One bill authorized both interstate and intrastate pipeline carriers to exercise eminent domain under the same procedures.[126] Another bill,

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[121] See 1917 Neb. Laws, ch. 112, § 1, p. 284.

[122] See, e.g., *The Pipe Line Cases, supra* note 110.

[123] See, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945).

[124] See 1923 Neb. Laws, ch. 173, § 1, p. 409; Neb. Rev. Stat. § 75-609 (Reissue 1958).

[125] See 1963 Neb. Laws, L.B. 82, ch. 425, p. 1354.

[126] See 1963 Neb. Laws, L.B. 789, ch. 323, p. 979 (codified at Neb. Rev. Stat. §§ 57-1101 to 57-1106 (Reissue 2009 & Cum. Supp. 2014)).

governing the Commission's regulatory powers, reasserted its powers over intrastate carriers, but did not make any substantive changes to the 1917 statute.[127] Again, the Legislature did not assert any regulatory power over interstate pipeline carriers. But states' power to regulate the siting of interstate pipelines was unclear before 1979.

Current federal law expressly preempts state regulation of safety issues related to interstate oil pipelines.[128] But since Congress enacted the Hazardous Pipeline Safety Act of 1979, federal law does not preempt a state's right to determine the siting of an interstate pipeline if the state laws are unrelated to safety.[129] Before 1979, however, there was no federal statute expressly stating that states had this right. So in 1963, the Legislature could have justifiably concluded that the Commerce Clause precluded state laws governing the location or siting of interstate pipelines that were inconsistent with the laws of other states or that imposed unnecessary costs on interstate carriers.[130]

Given this history, we do not interpret the Legislature's silence on the State's regulation of interstate carriers as its determination that the Commission could have no regulatory powers over interstate carriers to the extent state regulation is permitted by federal law. Notably, when the Legislature restricted the PSC's authority to regulate some natural gas utilities, the restriction was explicit.[131]

[28,29] It is true that we will interpret a statute to be constitutional if we can do so reasonably.[132] But we liberally

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[127] See 1963 Neb. Laws, L.B. 82, ch. 425, art. V, p. 1416-17.

[128] See 49 U.S.C. § 60104(c).

[129] See sources cited *supra* note 10.

[130] See, e.g., *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052 (9th Cir. 1987); *Chicago, B. & Q. R. Co. v. Illinois Commerce Commission*, 82 F. Supp. 368 (N.D. Ill. 1949).

[131] See Neb. Rev. Stat. § 66-1803(1) (Reissue 2009).

[132] *Traveler's Indem. Co. v. Gridiron Mgmt. Group*, 281 Neb. 113, 794 N.W.2d 143 (2011).

construe the constitutional provision creating the PSC and delineating its powers.[133] And a canon of statutory construction must yield to constitutional requirements governing the same subject matter. We conclude that none of the statutes cited by the State constitute a "definite restriction" on the PSC's powers.[134] That is, they are not specific legislation to restrict the PSC's regulatory powers over interstate carriers. But the State makes another argument that L.B. 1161 does not apply to all pipeline carriers.

### *(ii) Only Common Carriers Can Constitutionally Exercise the State's Power of Eminent Domain*

The State argues that the court erred in implicitly assuming that all pipeline carriers operate on a "for hire" basis. It contends that L.B. 1161 could be facially unconstitutional only if every pipeline carrier satisfied the "for hire" requirement for common carriers. In that same vein, it argues that the court erred in determining that a state's authority for a carrier to exercise the power of eminent domain is the essential characteristic of common carrier status. In effect, the State argues that L.B. 1161 is not facially invalid because some of the carriers seeking the Governor's authorization to exercise eminent domain could be private carriers. We disagree that a private carrier serving no public purpose could exercise the power of eminent domain.

The State relies on *City of Bayard*[135] to support its argument that a private carrier could exercise the right of eminent domain. As explained, we held there that a natural gas company was not a common carrier. The Wyoming company had built two pipelines to deliver gas to consumers in Nebraska

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[133] *Myers, supra* note 92; *In re Yellow Cab & Baggage Co.*, 126 Neb. 138, 253 N.W. 80 (1934).

[134] *State ex. rel. Spire, supra* note 94, 233 Neb. at 276, 445 N.W.2d at 294, quoting *Ramsey, supra* note 90.

[135] *City of Bayard, supra* note 107.

cities that had granted it a franchise by contract. An interstate pipeline was connected to a gas field in Wyoming where it purchased natural gas, and an intrastate pipeline was connected to a gas field in Nebraska where it purchased natural gas. In reaching our conclusion that the company was not a common carrier, we rejected the city's contention that the gas company was a common carrier because it had exercised the right of eminent domain:

> First, [the company] does not render the service of transporting gas for a consideration. Second, [the company] exercised the right of eminent domain as an interstate pipe line, as distinguished from an intrastate pipe line, under the provisions of section 75-609, . . . which it concededly had a right to do.[136]

It is true that § 75-609 granted interstate pipeline carriers the right to exercise eminent domain without declaring them common carriers or imposing any regulatory control. But as explained above, in 1957, when *City of Bayard* was decided, Congress had not passed any law clarifying that states could regulate interstate pipeline carriers. More important, our holding in *City of Bayard* rested on the lack of evidence that the company transported gas for others. We assumed for the analysis that the company could be a common carrier if it had held itself out as transporting gas for hire, but concluded there was no evidence that it had done so.[137] So our reliance there on the absence of any regulation of interstate carriers exercising eminent domain was dicta, because it was unnecessary to the holding.

[30] Equally important, the company was transporting natural gas for a public purpose. We specifically noted that the city had statutory authority[138] to renew the gas company's franchise *and* to regulate the company's rates. It is the public nature of a corporate utility's operations and the public franchise that authorizes its operations which justify government

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[136] *Id.* at 829, 83 N.W.2d at 867.

[137] See *City of Bayard, supra* note 107.

[138] See Neb. Rev. Stat. § 17-528.02 (Reissue 2012).

regulation of its rates.[139] So the statement the State relies on is not persuasive authority for the State's implicit argument that a private carrier could exercise the right of eminent domain in this state for a nonpublic purpose. That argument is simply wrong.

[31-33] As our definition of common carriers suggests, the reason common carriers can exercise the right of eminent domain lies in their quasi-public vocation of transporting passengers or commodities for others. A citizen's property may not be taken against his or her will, except through the sovereign powers of taxation and eminent domain, both of which must be for a public purpose.[140] Eminent domain is the State's inherent power to take private property *for a public use*.[141]

[34-36] The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution.[142] But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments.[143] Under Neb. Const. art. I, § 21, the State can take private property only for a public use and only if it pays just compensation.[144] Only the Legislature can authorize a private or public entity to exercise the State's power of eminent domain.[145] But it obviously

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[139] See, *City of University Place v. Lincoln Gas & Electric Light Co.*, 109 Neb. 370, 191 N.W. 432 (1922) (cited in *City of Bayard, supra* note 107); 12 Eugene McQuillin, The Law of Municipal Corporations §§ 34:2, 34:107 (3d ed. 2006).

[140] See, *Burlington Northern Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001); *Burger v. City of Beatrice*, 181 Neb. 213, 147 N.W.2d 784 (1967).

[141] See *Fulmer v. State*, 178 Neb. 20, 131 N.W.2d 657 (1964).

[142] See, *Burger, supra note* 140; *Burnett v. Central Nebraska Public Power and Irrigation District*, 147 Neb. 458, 23 N.W.2d 661 (1946); *Consumers Public Power District v. Eldred*, 146 Neb. 926, 22 N.W.2d 188 (1946).

[143] See *id.*

[144] See *Burlington Northern Santa Fe Ry. Co., supra* note 140.

[145] See *Burlington Northern Santa Fe Ry. Co., supra* note 140, *citing SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998).

cannot confer a power that it does not possess under the constitution.[146]

[37] In short, because a common carrier performs a public transportation service, the Legislature can grant it the sovereign power to take private property for a public use and the State can control its operations, to the extent that the regulation is not precluded by federal law.[147] As early as 1908, this court stated that the State's power to regulate common carriers, especially those that were authorized to exercise the power of eminent domain, was firmly established.[148]

[38] But the Nebraska Constitution prohibits the taking of private land for a private purpose.[149] The Texas Supreme Court has addressed this issue in the context of pipeline carriers.[150] It reversed a court of appeals' decision that a property owner could not challenge a common carrier certification by a public service commission. Like the Nebraska Constitution, the Texas Constitution restricts the exercise of eminent domain to a public use. And like this court, Texas courts strictly construe statutes delegating the power of eminent domain. The court held that the commission's certification did not conclusively establish the applicant's common carrier status because the commission undertook no inquiry to confirm that the applicant's pipeline would be for a public purpose. And it held that Texas statutes authorizing eminent domain power for common carriers do not include the owner of a pipeline built for the owner's exclusive use.

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[146] See, *Burger, supra* note 140; *Fulmer, supra* note 141.

[147] See *Edholm v. Missouri P. R. Corporation*, 114 Neb. 845, 211 N.W. 206 (1926). See, also, *Krauter v. Lower Big Blue Nat. Resources Dist.*, 199 Neb. 431, 259 N.W.2d 472 (1977); *Van Patten v. City of Omaha*, 167 Neb. 741, 94 N.W.2d 664 (1959).

[148] *State v. Pacific Express Co.*, 80 Neb. 823, 115 N.W. 619 (1908).

[149] See, e.g., *Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist.*, 218 Neb. 777, 359 N.W.2d 100 (1984); *Burger, supra* note 140; *Vetter v. Broadhurst*, 100 Neb. 356, 160 N.W. 109 (1916).

[150] See *Texas Rice Land v. Denbury Green Pipeline*, 363 S.W.3d 192 (Tex. 2012).

[39] We agree with this reasoning, which is consistent with our holding in other cases prohibiting the use of eminent domain for a private purpose.[151] Under the Nebraska Constitution's limitation on the power of eminent domain, pipeline carriers can take private property only for a public use. That minimally means that a pipeline carrier must be providing a public service by offering to transport the commodities of others who could use its service, even if they are limited in number. So we reject the State's argument that L.B. 1161 is not facially invalid in every circumstance because a private carrier could possibly seek the Governor's approval to exercise the right of eminent domain. The Legislature's authorization of that act would also be unconstitutional.

*(iii) Routing Decisions Are Within the PSC's Enumerated Powers*

The State argues that even if the PSC has exclusive regulatory control over pipeline carriers, an environmental review of a pipeline route is not one of its enumerated powers over common carriers: i.e., the PSC's regulation of their rates and service, or exercise of "general control."[152] But the State's argument ignores the Governor's designation under L.B. 1161 as the final arbitrator who approves a pipeline route and our case law that supports the PSC's authority to make this regulatory decision. "[U]nlike some public service commissions, the [PSC], in the different aspects of its constitutional functions, exercises legislat[ive], administrative, and judicial powers."[153] As relevant here, in *In re Application of Chicago, Burlington & Quincy Railroad Co.*,[154] we held that the commission had jurisdiction to decide a dispute over the location of a railway

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[151] See cases cited *supra* note 149.

[152] See Neb. Const. art. IV, § 20.

[153] *Myers, supra* note 92, 194 Neb. at 62, 230 N.W.2d at 196. Accord *Ramsey, supra* note 90.

[154] *In re Application of Chicago, Burlington & Quincy Railroad Co.*, 152 Neb. 352, 41 N.W.2d 157 (1950).

service, an issue that requires weighing the carrier's profitability against public necessity. Similarly, we have held that only the Commission could decide a request to compel a railroad company to build a branch to service the petitioners.[155] And we have stated that the Commission, "under the Constitution, has original jurisdiction and sole power to grant, deny, amend, revoke, or transfer common carrier certificates of convenience and necessity."[156]

[40] These decisions refute the State's arguments that routing decisions are not part of the PSC's constitutional powers. Furthermore, the Legislature's requirement that the PSC approve the routes for some pipelines confirms that the PSC has such powers. So, although the Legislature could validly authorize the DEQ to assist the PSC in determining whether to approve the siting of a pipeline carrier's proposed route, L.B. 1161 unconstitutionally allows the Governor to approve the route. This is a regulatory decision that the constitution reserves to the PSC.

## VII. CONCLUSION

This appeal is not about the wisdom or necessity of constructing an oil pipeline but instead is limited to the issues of great public concern raised here: which entity has constitutional authority to determine a pipeline carrier's route and whether L.B. 1161 comports with the Nebraska Constitution's provisions controlling this issue.

Four members of this court, a majority of its seven members, conclude that the district court correctly ruled the landowners have standing to challenge the constitutionality of L.B. 1161. Because their complaint alleged that the act violated limits on political power under the Nebraska Constitution, it raised matters of great public concern. Under our established case law, such matters are an exception to the injury-in-fact requirement for standing. Thus, contrary to the dissent, we hold that the landowners had standing before the district court and this court.

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[155] See *Rivett Lumber & Coal Co., supra* note 100.

[156] *Ramsey, supra* note 90, 151 Neb. at 340, 37 N.W.2d at 507.

The same four members of this court conclude that the court correctly determined that L.B. 1161 is unconstitutional. L.B. 1161 unconstitutionally transfers to the Governor the PSC's enumerated constitutional powers over common carriers. When a common carrier seeks the Governor's approval of a pipeline route under the DEQ procedures, L.B. 1161 unconstitutionally gives the Governor the authority to approve the route and bestow the power of eminent domain on the carrier. The Nebraska Constitution prohibits this transfer of power. Because we conclude that L.B. 1161 is facially unconstitutional for this reason, we do not address the landowners' other claims.

No member of this court opines that the law is constitutional. But the four judges who have determined that L.B. 1161 is unconstitutional, while a majority, are not a supermajority as required under the Nebraska Constitution. Neb. Const. art. V, § 2, in relevant part, provides that "[n]o legislative act shall be held unconstitutional except by the concurrence of five judges." We reject the dissent's interpretation of this provision as requiring five of the seven members of this court to concur on jurisdictional requirements to hear a case, *in addition to* requiring five judges to concur that a legislative enactment is unconstitutional.

As explained, the supermajority requirement is a voting requirement on the disposition of a constitutional challenge to a statute. It is not a requirement that must be satisfied in order for a court to determine if it may proceed to take action in a case and has no application to jurisdictional decisions. Having been outvoted on the issue of standing, the dissent compounds its error by declining to exercise its option to decide the substantive issues.

Under these circumstances, the constitutional supermajority provision controls the outcome. Although four members of the court conclude that L.B. 1161 violates fundamental constitutional limits on government power in Nebraska, our power is also limited by article V, § 2. We believe that Nebraska citizens deserve a decision on the merits. But the supermajority requirement of article V, § 2, coupled with the dissent's refusal to reach the merits, means that the citizens

cannot get a binding decision from this court. Although we have four judges who conclude that L.B. 1161 is unconstitutional, we do not have five judges voting on the constitutionality of this enactment. Accordingly, we vacate the district court's judgment.

JUDGMENT VACATED.

WRIGHT, J., not participating.

HEAVICAN, C.J., and STEPHAN and CASSEL, JJ., dissenting in part, and in part concurring in the result.

According to the plurality, all that is now required for standing to challenge the constitutionality of a statute is a tax receipt and a cause. To reach the merits of this case, the plurality expands an exception to the general rule of common-law standing that has been employed only once before in the history of this court. Although this exception was not briefed by the parties and was mentioned only in passing by the district court, the plurality concludes that the appellees, solely in their capacities as citizen taxpayers, have standing to challenge the constitutionality of L.B. 1161 because it presents "a matter of great public concern." But the plurality ignores the requirement that in order for this exception to apply, it must be shown that the legislative enactment at issue may go unchallenged unless the taxpayer has the right to bring the action. That requirement has not been and cannot be met in this case.

And the plurality is in fact a plurality. While it represents the larger numerical block of votes, that number is insufficient under our constitution to declare a statute unconstitutional.

## STANDING

Courts are obligated to decide the merits of cases which are properly before them, but they have an equally important obligation to refrain from deciding matters over which they lack jurisdiction. A ruling made in the absence of subject matter jurisdiction is a nullity.[1] It is not the office of this court to

[1] *Spady v. Spady*, 284 Neb. 885, 824 N.W.2d 366 (2012); *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001); *In re Estate of Andersen*, 253 Neb. 748, 572 N.W.2d 93 (1998).

render advisory opinions.[2] Our responsibility to avoid such rulings is the reason for the oft-cited proposition that before reaching the legal issues presented for review, it is the power and *duty* of an appellate court to determine whether it has jurisdiction over the matter before it.[3] When a lower court lacks the authority to exercise its subject matter jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.[4] Jurisdictional requirements apply equally to all cases, large or small, high profile or obscure. We have properly declined to reach even constitutional issues where all jurisdictional prerequisites are not met.[5] Strict adherence to jurisdictional requirements is not a device by which judges avoid making difficult decisions; rather, it is a recognition that judicial authority, like any other form of governmental authority, is subject to certain limitations.

One long-honored limitation on judicial power is the principle of standing. Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.[6] Standing is a component of jurisdiction; only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.[7] Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of

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[2] *Kramer v. Miskell*, 249 Neb. 662, 544 N.W.2d 863 (1996).

[3] *In re Estate of Potthoff*, 273 Neb. 828, 733 N.W.2d 860 (2007); *In re Estate of Rose*, 273 Neb. 490, 730 N.W.2d 391 (2007); *In re Interest of Sean H.*, 271 Neb. 395, 711 N.W.2d 879 (2006); *Malolepszy v. State*, 270 Neb. 100, 699 N.W.2d 387 (2005).

[4] *Engler v. State*, 283 Neb. 985, 814 N.W.2d 387 (2012).

[5] See, e.g., *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

[6] *Field Club v. Zoning Bd. of Appeals of Omaha*, 283 Neb. 847, 814 N.W.2d 102 (2012).

[7] *Id.*

third parties.[8] We have often referred to this as common-law standing.[9] And we have explained that under traditional, common-law standing, the persons seeking court action must show some special injury peculiar to themselves aside from a general injury to the public, and it is not sufficient that they have merely a general interest common to all members of the public.[10]

A party invoking a court's or a tribunal's jurisdiction bears the burden of establishing the elements of standing.[11] At one point in these proceedings, the appellees claimed that their interests in the siting of the proposed pipeline were distinct from the interests of the general public, because they owned lands which "'w[ere], or still [are], in the path of one or more proposed pipeline routes suggested by a pipeline carrier applicant who has invoked [L.B.] 1161.'"

But there was a failure of proof. The district court concluded that it was "unable to determine, from the evidence presented, whether the [appellees'] property sits on the current pipeline route . . . or instead sits on a route previously proposed." As such, the district court was "unable to determine whether [the appellees'] alleged injury—as it regards land in the path of the pipeline—is actual and imminent, or merely conjectural and hypothetical." Accordingly, the district court found that the appellees had failed to establish "traditional standing."

The appellees did not cross-appeal from this determination, and as all members of this court agree, they have not established traditional common-law standing to challenge the constitutionality of the legislation at issue here. Thus, their ability to invoke the jurisdiction of a court to adjudicate the constitutionality of L.B. 1161 depends upon whether they fall within one of the exceptions to the common-law standing requirement.

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[8] *Id.*

[9] See, e.g., *Project Extra Mile v. Nebraska Liquor Control Comm.*, 283 Neb. 379, 810 N.W.2d 149 (2012).

[10] See *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[11] *Field Club v. Zoning Bd. of Appeals of Omaha, supra* note 6.

This court has recognized very limited exceptions to the standing requirement that a litigant have a personal stake in the outcome of a controversy. Our approach in this regard has been careful and conservative. We have specifically rejected invitations to liberalize our standing requirements.[12] And we have noted that exceptions to the general rule of standing should be "carefully applied"[13] in order to "prevent the exceptions from swallowing the rule."[14] We have recognized three exceptions to traditional standing, stated in the chronological order of their development in our case law:

- Enforcement of a public duty by a mandamus action of a citizen interested in the execution of the laws.[15]
- Action by a resident taxpayer to prevent or recover an illegal expenditure of public funds or to prevent an increase in the burden of taxation.[16]
- Matters of "great public concern" that otherwise would likely go unchallenged.[17]

There is one characteristic shared by all of the exceptions—scarcity of application. The traditional, common-law rule dominates our jurisprudence. The exceptions are few, and resort to them is rare.

### Mandamus to Enforce Public Duty

The first exception to develop has nearly been lost in antiquity. As this court recently summarized,

> In the 19th and early 20th centuries, this court discussed an exception to the requirement that a litigant have a personal stake in the outcome of the controversy. We stated that if the question was one of a public right and the object of mandamus was to procure the enforcement of a public duty, the people were regarded as the

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[12] See, e.g., *Ritchhart v. Daub*, 256 Neb. 801, 594 N.W.2d 288 (1999).

[13] *State ex rel. Reed v. State, supra* note 10, 278 Neb. at 571, 773 N.W.2d at 355.

[14] *Id.*

[15] See, e.g., *The State v. Stearns*, 11 Neb. 104, 7 N.W. 743 (1881).

[16] See, e.g., *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004).

[17] See *State ex rel. Reed v. State, supra* note 10.

> real party in interest. In that situation, the individual bringing the action, the relator, did not need to show that he [or she] had any legal or special interest in the result.[18]

We need not consider this exception further, because the appellees sought a declaratory judgment rather than proceeding for a writ of mandamus. We focus instead on the remaining two exceptions, both of which involve actions brought by persons who have no interest in the subject matter of the suit distinct from that of the general public.

### Resident Taxpayer Exception

The resident taxpayer exception, though rare in comparison to traditional, common-law standing, is much more common than either of the other exceptions.[19] The district court relied on this exception in concluding that the appellees had standing to challenge the constitutionality of L.B. 1161.

Under this exception, a resident taxpayer, without showing any interest or injury peculiar to himself or herself, may bring an action to (1) enjoin the illegal expenditure of public funds raised for governmental purposes[20] or (2) restrain the act of a public board or officer which would increase the burden of taxation without an actual illegal expenditure of public

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[18] *Id.* at 568, 773 N.W.2d at 354, citing *City of Crawford v. Darrow*, 87 Neb. 494, 127 N.W. 891 (1910); *Van Horn v. State*, 51 Neb. 232, 70 N.W. 941 (1897); *State, ex rel., Ferguson v. Shropshire*, 4 Neb. 411 (1876).

[19] See, *Rath v. City of Sutton, supra* note 16; *Wasikowski v. Nebraska Quality Jobs Bd.*, 264 Neb. 403, 648 N.W.2d 756 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002); *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001); *Ritchhart v. Daub, supra* note 12; *Fitzke v. City of Hastings*, 255 Neb. 46, 582 N.W.2d 301 (1998); *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986); *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth.*, 220 Neb. 504, 371 N.W.2d 258 (1985); *Haschke v. School Dist. of Humphrey*, 184 Neb. 298, 167 N.W.2d 79 (1969); *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952).

[20] *Martin v. City of Lincoln, supra* note 19.

funds.[21] To plead a resident taxpayer's action, the plaintiff must allege a demand made upon the municipal or public corporation and a refusal by the corporation to bring the action itself, or facts which show that such a demand would be useless.[22]

In *Project Extra Mile v. Nebraska Liquor Control Comm.*,[23] standing was based on a challenger's status as a taxpayer. This court held the taxpayer was also required to show the unlawful action would otherwise go unchallenged:

> We hold that a taxpayer has standing to challenge a state official's failure to comply with a clear statutory duty to assess or collect taxes—as distinguished from legitimate discretion to decide whether to tax. *But the taxpayer must show that the official's unlawful failure to comply with a duty to tax would otherwise go unchallenged because no other potential party is better suited to bring the action*. In an action brought under [Neb. Rev. Stat.] § 84-911 [(Reissue 2008)], this rule means a taxpayer has standing to challenge an agency's unlawful regulation that negates the agency's statutory duty to assess taxes. We further hold that no other potential parties are better suited than a taxpayer to claim that a state agency or official has violated a statutory duty to assess taxes when the persons or entities directly and immediately affected by the alleged violation are beneficially, instead of adversely, affected.[24]

In its analysis of taxpayer standing in this case, the district court erroneously concluded that *Project Extra Mile* "does not require [the appellees] to show [L.B.] 1161 would otherwise go unchallenged unless taxpayers have the right to bring the action." In *Project Extra Mile*, we concluded that the taxpayer had met her "burden" of establishing standing to challenge the Nebraska Liquor Control Commission's classification of

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[21] See *Rath v. City of Sutton, supra* note 16.

[22] *Nebraska Sch. Dist. No. 148 v. Lincoln Airport Auth., supra* note 19.

[23] *Project Extra Mile v. Nebraska Liquor Control Comm., supra* note 9.

[24] *Id.* at 391, 810 N.W.2d at 160-61 (emphasis supplied).

malt beverages as beer for purposes of taxation by showing that the only parties directly affected by the classification were sellers of malt liquor who were beneficially affected by the classification and thus had no incentive to challenge it. If it had been unnecessary for the taxpayer to show that there was no one better suited to maintain the action challenging the classification, we would not have characterized such a showing as a component of the taxpayer's burden to establish standing.

### Exception for Matters of Great Public Concern

The exception for matters of "great public concern" appears to have entered our jurisprudential lexicon in 1979 via this court's opinion in *Cunningham v. Exon*.[25] Drawing on cases from other jurisdictions, this court recognized an exception "where matters of great public concern are involved and a legislative enactment may go unchallenged unless [the] plaintiff has the right to bring the action."[26] In that case, a constitutional amendment changed the provisions regarding the use of public funds for sectarian and educational purposes. The question was whether a portion of the Nebraska Constitution had been omitted inadvertently when the Secretary of State printed the constitution following an election of the people to amend the constitution. The *Cunningham* court recognized that without an exception to the general rule, no person was likely to have a special injury peculiar to himself and distinct from that of the public generally.

*Cunningham* is the only case in which we have applied this exception to the general rule of common-law standing before today. Perhaps that is because *Cunningham* provides no objective basis for determining whether a particular issue is one of "great public concern." Moreover, the issue in *Cunningham* involved the structural integrity of the state Constitution itself, not whether one of hundreds of laws enacted by the Legislature violated a constitutional provision, as is the claim here. As the

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[25] *Cunningham v. Exon*, 202 Neb. 563, 276 N.W.2d 213 (1979).

[26] *Id.* at 567, 276 N.W.2d at 215.

plurality correctly notes, we have specifically declined to apply the exception in similar contexts.[27]

At this point, it is worth noting that the appellees have never claimed standing based upon this exception. Instead, they alleged that they had standing as "taxpayers with interests in unlawful expenditure of state funds as required by [L.B.] 1161." Not surprisingly, the only exception to the traditional standing requirement analyzed by the district court was "taxpayer standing." At one point in that analysis, the district court noted that "[t]he issues involved in this case are of great public concern . . . ." But it did not cite *Cunningham* or specifically analyze the exception which that case recognized. And there is no reference to *Cunningham* or its holding in any of the appellate briefs.

Nevertheless, the plurality invokes the holding of *Cunningham*, which until now has been limited to the specific facts of that case. First, it observes that the "great public concern" exception recognized in *Cunningham* is "another name for the 'public interest' exception that we recognized in our early mandamus cases." But our opinion in *Cunningham* makes no reference to any mandamus cases decided by this court. It adopts the "great public concern" exception from the law of other jurisdictions, primarily Colorado. In an attempt to make the connection between the early mandamus cases and *Cunningham*, the plurality reads too much into our recent case law, which simply does not link the two lines of authority.

Next, the plurality attempts to identify the issue of "great public concern" presented in this case. As the district court correctly and properly observed in the first paragraph of its order, the issue in this case is not whether the proposed pipeline approved by the Governor should be built, but only whether L.B. 1161, which authorized such approval, is constitutional. The plurality elevates this rather narrow and straightforward separation of powers issue into an issue of "great public

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[27] See *Green v. Cox Cable of Omaha, Inc.*, 212 Neb. 915, 327 N.W.2d 603 (1982). See, also, *Neb. Against Exp. Gmblg. v. Neb. Horsemen's Assn.*, 258 Neb. 690, 605 N.W.2d 803 (2000).

concern" by characterizing the challenge to L.B. 1161 as one involving "the citizens' interest in their form of government" and "fundamental limitations on government powers under the Nebraska Constitution."

Any challenge to the constitutionality of a statute can be characterized as involving the "fundamental limitations on government," because by enacting an unconstitutional statute, the Legislature necessarily exceeds its lawful authority. For the same reason, it could always be said that an allegedly unconstitutional statute would fall within "the citizens' interest in their form of government." But we have never held that any citizen has standing to challenge the constitutionality of any statute. The plurality attempts to limit the scope of its reasoning but provides no objective basis for doing so. It observes that "the exception for matters of great public concern, by definition, must involve an issue that affects many citizens," but does not explain how approval of a pipeline route by the Governor instead of the Public Service Commission would affect anyone other than the pipeline company and the owners of property in the path of the approved pipeline route.

Even if we could accept this reasoning and agree an issue of "great public concern" is presented, the plurality's analysis would still fail. *Cunningham* requires not only that the issue presented be of "great public concern," but also that the "legislative enactment may go unchallenged unless [the] plaintiff has the right to bring the action."[28] This second requirement was not simply a throwaway line in the opinion. Rather, it is an important and necessary counterbalance to the exception to the general rule that a party must have a personal stake in a controversy in order to have standing. As we stated in *Ritchhart v. Daub*,[29] "[t]he threshold question, . . . when a party attempts to base standing on an injury common to the general public, has been whether or not there exists another party whose interests are more at issue in the action, and who is thus more appropriately entitled to present the claim." It is not a question of whether this principle should be imported from *Project Extra*

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[28] *Cunningham v. Exon, supra* note 25, 202 Neb. at 567, 276 N.W.2d at 215.

[29] *Ritchhart v. Daub*, *supra* note 12, 256 Neb. at 808, 594 N.W.2d at 293.

*Mile*, as the plurality suggests, because it has always been an integral part of the holding in *Cunningham*.

In *Cunningham*, we rejected an argument that the only persons who would have standing to challenge the constitutional amendment were "potential" recipients of federal funds who "may have been" affected by the amendment.[30] We reasoned that if the amendment could not be challenged by a citizen and taxpayer "unless and until he [or she] has a special pecuniary interest or injury different from that of the public generally, it is entirely possible that no one may have standing to challenge it."[31]

But that cannot be said here. When the Governor signed the pipeline siting authorization pursuant to the authority conferred by L.B. 1161, every owner of real property which became subject to condemnation for the pipeline acquired a special pecuniary interest or injury different from that of the public generally, and thus had traditional standing to challenge L.B. 1161. Anyone mildly familiar with Nebraska geography would understand that the route approved by the Governor measures in the hundreds of miles. There must be dozens, if not hundreds, of potential plaintiffs who own property along the proposed pipeline route who would have traditional, common-law standing to bring a declaratory judgment action to challenge the constitutionality of L.B. 1161, or to assert the constitutional issue in condemnation proceedings. Indeed, one or more of the appellees may have a direct interest sufficient to establish traditional standing but simply failed to prove it.

The plurality states that "the landowners have alleged that the Legislature has unconstitutionally authorized the Governor to decide who can exercise the power of eminent domain in Nebraska." Certainly a "landowner" whose property was subject to condemnation for a pipeline route approved by the Governor would have standing to assert this claim. But the appellees did not establish that *their* property was subject to condemnation for the pipeline. For purposes of standing, they

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[30] *Cunningham v. Exon, supra* note 25, 202 Neb. at 567, 276 N.W.2d at 215.

[31] *Id.* at 568, 276 N.W.2d at 216.

are no different than the owner of an office building in downtown Omaha.

It is true, as the plurality states, that a pipeline company whose proposed route was approved by the Governor would have no incentive to challenge L.B. 1161. But it cannot be seriously contended that property owners facing condemnation of large swaths of their farmland to make way for the pipeline were "beneficially affected" by L.B. 1161 so as to have no incentive to challenge it. Also, if the Public Service Commission believed that its constitutional jurisdiction were threatened by L.B. 1161, it would have traditional standing to challenge it.[32] This is simply not a case where a legislative enactment is likely to go unchallenged unless a taxpayer or other citizen who lacks traditional standing is permitted to mount the challenge. And because of that, the very narrow exception to the general rule of standing recognized in *Cunningham* is not applicable.

In support of its reasoning, the plurality asks, "How could a taxpayer show a direct injury if the Legislature statutorily abolished the [Public Service Commission]?" If those were the facts before us, we might agree that the *Cunningham* exception applied. Legislative abolition of a constitutional agency would be a structural alteration of the state Constitution which would not produce an immediate adverse impact on any specific citizen, as was the case in *Cunningham*. But here, the Legislature did not abolish the Public Service Commission or take away any of its powers. Instead, it conferred alternative jurisdiction on the executive to approve the site of a proposed pipeline. The Governor's actions based on that authority had a direct impact on owners of property in the path of the pipeline and, arguably, the Public Service Commission itself. Those parties have traditional standing, and are thus better suited than a citizen or taxpayer who is not directly affected by L.B. 1161 to challenge its constitutionality.

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[32] See, e.g., *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Ritums v. Howell*, 190 Neb. 503, 209 N.W.2d 160 (1973); *State ex rel. State Railway Commission v. Ramsey*, 151 Neb. 333, 37 N.W.2d 502 (1949).

This court has in the past carefully applied exceptions to the traditional, common-law rule of standing in order to "prevent the exceptions from swallowing the rule."[33] The plurality's new and expansive interpretation of the exception for matters of great public concern consumes the time-honored common-law rule in a single gulp. Under its reasoning, *any* resident taxpayer or citizen has standing to challenge *any* public act which can be subjectively characterized as a matter of "great public concern," despite the fact that the would-be plaintiff can demonstrate no personal stake in the matter, and regardless of the existence of other persons who can.

Whether or not it constitutes a matter of "great public concern," the constitutional challenge to L.B. 1161 is a legitimate issue which should be decided by a court as expeditiously as possible. But it must be decided by a court with jurisdiction to do so, or the entire judicial process is for naught. Courts cannot choose to overlook jurisdictional defects; we are obligated to resolve cases on the basis of how they are actually brought to us, not on the basis of how they should have been brought to us. With due respect to our colleagues, we are unwilling to rewrite the law of standing in order to reach the merits of this case. Because these appellees did not meet their burden of establishing that they had standing when the suit was commenced, the district court did not have jurisdiction to decide the constitutional issue, and neither does this court.

## JUDICIAL RESTRAINT

Because we believe that we lack jurisdiction to do so, we express no opinion as to the constitutionality of L.B. 1161, and we see no purpose to be served by the plurality's willingness to do so. Given this court's division on the issue of standing in this case, there is neither a five-member supermajority to hold that L.B. 1161 is unconstitutional nor a three-member minority which could uphold its constitutionality. Due to this impasse, the constitutional challenge to L.B. 1161 cannot be resolved one way or the other in this case.

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[33] *State ex rel. Reed v. State, supra* note 10, 278 Neb. at 571, 773 N.W.2d at 355.

Contrary to the view of the plurality, we do not have an "option" to opine on the merits after concluding that we lack jurisdiction to do so. The plurality cites to case law from other jurisdictions, including the U.S. Supreme Court, for the proposition that a judge may dissent on a jurisdictional issue and simultaneously reach the merits of the appeal. But as the plurality itself acknowledges, none of the cited law involves the dissenting judge's issuing an opinion on the merits having precedential value. In other words, while the judges opined on the merits even after finding the court lacked jurisdiction, their opinions did not affect the ultimate resolution of the case by the court.

But as the plurality acknowledges, that is not the situation here. Instead, it invites us to reach the merits in order to resolve the constitutional issue. Apparently, the plurality believes that the constitutional supermajority requirement could be achieved in this fashion. We do not share that view.

Our constitution provides: "A majority of the members [of the Supreme Court] sitting shall have authority to pronounce a decision *except in cases involving the constitutionality of an act of the Legislature*. No legislative act shall be held unconstitutional except by the concurrence of five judges."[34] Where four members of the court conclude that a statute is unconstitutional, a contrary conclusion by the remaining three members is sufficient to affirm the constitutionality of the statute.[35] The plurality announces that it is a "majority" on the issue of jurisdiction. That would be true only if its decision were to uphold the constitutionality of L.B. 1161.

We understand the constitutional supermajority requirement to mean a statute cannot be declared unconstitutional unless at least five members of this court (1) conclude that they have jurisdiction to decide the case and (2) determine on the merits that the statute is unconstitutional. Otherwise, a statute could be declared unconstitutional by four judges who believe they have jurisdiction to decide the issue and one who does not.

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[34] Neb. Const. art. V, § 2 (emphasis supplied).

[35] See, e.g., *State v. Cavitt*, 182 Neb. 712, 157 N.W.2d 171 (1968).

Or, under the plurality's reasoning, the constitutionality of a statute could be upheld by three judges who do not believe they have jurisdiction to decide the issue but address the merits anyway, if there were four judges who held opposing views as to jurisdiction and constitutionality. Surely, the framers of the constitution did not intend such absurd results.

In our view, participating in what could be a binding opinion on the merits of a constitutional issue while at the same time opining that the court lacks jurisdiction to reach the constitutional issue would be judicially irresponsible and cast grave doubt upon the constitutional validity of the decision of the court. To the extent that the plurality analyzes the merits of the constitutional issue which it lacks the votes to resolve, its opinion is merely advisory. A more prudent course, and the one that we follow, is to refrain from addressing the constitutional issues which cannot be decided in this case because of our division on the jurisdictional issue of standing.

## CONCLUSION

In summary, we disagree with the plurality that the appellees, having failed to establish that they have traditional standing, may nevertheless have standing as resident taxpayers asserting a matter of "great public concern" without a showing that there are no better suited parties to assert such claims. Our established case law requires such a showing. In this case, it was not and cannot be made.

We conclude that the district court erred by not dismissing the action for lack of jurisdiction due to the failure of the plaintiffs below, the appellees herein, to establish standing. For the foregoing reasons, we respectfully dissent from the plurality's analysis of standing but concur in the result vacating the judgment of the district court.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. DANIEL O. MINGUS, RESPONDENT.

861 N.W.2d 366

Filed January 16, 2015. No. S-12-1044.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by Daniel O. Mingus, respondent, on October 31, 2014. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on April 23, 1987. Formal charges were filed against respondent on November 8, 2012. On December 12, respondent was placed on disability inactive status pursuant to Neb. Ct. R. § 3-311, and consequently, the pending disciplinary proceeding was held in abeyance. On December 14, a trustee was appointed pursuant to Neb. Ct. R. § 3-328.

On October 31, 2014, respondent filed a voluntary surrender of his license, in which he stated that he does not challenge or contest the truth of the allegations being made against him. He further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a

> member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

# David Leon Frederick, appellee, cross-appellee, and cross-appellant, v. City of Falls City, a city and political subdivision of the State of Nebraska, appellee and cross-appellant, and Falls City Economic Development and Growth Enterprise, Inc., appellant and cross-appellee.

857 N.W.2d 569

Filed January 16, 2015. No. S-13-275.

1. **Judgments: Statutes: Appeal and Error.** Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.
2. **Mandamus: Proof.** A party seeking a writ of mandamus under Neb. Rev. Stat. § 84-712.03 (Reissue 2008) has the burden to satisfy three elements: (1) that the requesting party is a citizen of the state or other person interested in the examination of the public records, (2) that the documents sought are public records as defined by Neb. Rev. Stat. § 84-712.01 (Reissue 2014), and (3) that the requesting party has been denied access to the public records as guaranteed by Neb. Rev. Stat. § 84-712 (Cum. Supp. 2012).
3. **Administrative Law: Pretrial Procedure: Records.** A four-part functional equivalency test is the appropriate analytical model for determining whether a private entity which has an ongoing relationship with a governmental entity can be considered an agency, branch, or department of such governmental entity within the meaning of Neb. Rev. Stat. § 84-712.01(1) (Reissue 2014), such that its records are subject to disclosure upon request under Nebraska's public records laws. The factors to be considered in applying this test are (1) whether the private entity performs a governmental function, (2) the level of governmental funding of the private entity, (3) the extent of government involvement with or regulation of the private entity, and (4) whether the private entity was created by the government.
4. **Pretrial Procedure: Evidence: Proof.** In applying the functional equivalency test to determine whether a private entity is the equivalent of a public agency, branch, or department, it is not necessary that an entity strictly conform to each factor, but the factors should be considered and weighed on a case-by-case basis.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge. Vacated and reversed, and remanded with directions.

Jerald L. Rauterkus and Bonnie M. Boryca, of Erickson & Sederstrom, P.C., L.L.O., for appellant.

Michael R. Dunn, of Halbert, Dunn & Halbert, L.L.C., for appellee City of Falls City.

Stephen D. Mossman, J.L. Spray, and Joshua E. Dethlefsen, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee David Leon Frederick.

David J.A. Bargen, of Rembolt Ludtke, L.L.P., for amicus curiae League of Nebraska Municipalities.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

Stephan, J.

The issue presented in this appeal is whether certain documents in the possession of a private corporation which has an ongoing contractual relationship with a city are "public records" within the meaning of Neb. Rev. Stat. §§ 84-712 (Cum. Supp. 2012) and 84-712.01 (Reissue 2014). Falls City Economic Development and Growth Enterprise, Inc. (EDGE), a Nebraska nonprofit corporation, provides economic development services to the City of Falls City, Nebraska, and other entities. A Nebraska citizen asked EDGE to produce documents relating to a specific economic development project, and EDGE denied the request on the ground that the requested documents were not public records as defined by § 84-712.01(1). The citizen then brought this action for a writ of mandamus pursuant to Neb. Rev. Stat. § 84-712.03 (Reissue 2008) to compel production of the requested documents. Except for certain documents which it determined to be privileged, the district court granted the writ. EDGE appealed, and Falls City cross-appealed, aligning itself with EDGE. The citizen also cross-appealed, contending the district court erred in not requiring production of all of the requested documents. We vacate and reverse the writ of mandamus and the order awarding attorney fees, and remand the cause with directions to dismiss.

## I. BACKGROUND

### 1. Parties

David Leon Frederick is a Nebraska citizen and a resident of Richardson County, Nebraska. EDGE is a mutual benefit corporation incorporated under the Nebraska Nonprofit Corporation Act[1] in 2006 by eight private individuals, none of whom are employed by Falls City. According to its articles of incorporation, EDGE was formed "[t]o operate as a nonprofit corporation for the purpose of encouraging economic development and growth and improving business conditions" in Falls City, Nebraska, and the surrounding area, and to "engage in any lawful activity permitted under the Nebraska Nonprofit Corporation Act." EDGE employs an executive director and one part-time assistant. Neither are employees of Falls City.

EDGE is governed by a 21-member board of directors, which includes the mayor of Falls City and one member of the city council. The Falls City administrator is an ex-officio member of EDGE's board. Each director is required to sign a confidentiality agreement which provides that he or she

> shall keep confidential all information obtained as a result of the performance of duties as a Director of EDGE, including but not limited to all information obtained regarding the identity or characteristics of prospects, contracts, terms of any agreements, terms or existence of any proposals, financial matters, and the subject matter and contents of any Board or Committee meetings.

Directors do not have access to all information maintained by the corporation.

EDGE receives both public and private funding. During the first 9 months of 2012, it received $85,840.23 from Falls City, $20,000 from Richardson County, and $77,215 from private entities.

EDGE performs services for Falls City and Richardson County which include hosting, communicating with, and

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[1] See Neb. Rev. Stat. §§ 21-1901 to 21-19,177 (Reissue 2012 & Cum. Supp. 2014).

negotiating with business development prospects; encouraging development activities of existing and new businesses; and promoting the image of the city and county regionally and nationally. EDGE also performs services that benefit its private investors, such as workforce training workshops, hosting business prospects, and arranging meetings between investors and business prospects and leaders from other communities.

EDGE and Falls City have entered into various agreements, including a memorandum of understanding dated December 19, 2011. This document recites that Falls City and EDGE "desire to work together to implement an aggressive, targeted approach to creating a positive image of Falls City and marketing the community as a preferred business location that will generate new wealth and create quality employment opportunities." This document defines the relationship between Falls City and EDGE as serving

> the purpose of undertaking the planning and implementation of the City's economic development marketing and new business development recruitment, the retention and expansion of existing businesses and entrepreneurial development as well as other economic development services designed to strengthen the competitiveness of the business climate and expand economic development in the City.

The memorandum of understanding specifies the services which EDGE agreed to provide in furtherance of this objective and is revocable by either party giving 60 days' written notice.

EDGE maintains a separate Web site which can be accessed through a link on the Falls City Web site. It retains its own accountant for preparation of payroll, taxes, and financial statements. EDGE's offices are in a building located in Falls City which is not part of any municipal or governmental building. In addition to its activities within Falls City, EDGE has been involved with economic development projects outside the city limits, including the Missouri River bridge at Rulo, Nebraska, and a wind farm.

### 2. CGB Development Project

CGB Enterprises, Inc. (CGB), a national grain processing and transportation company, contacted EDGE in April 2012 regarding the proposed development of a large grain terminal and transportation facility on a site in Richardson County, Nebraska. This site is located near an existing grain elevator co-owned by Frederick.

According to EDGE's executive director, EDGE's investors supported the development and encouraged EDGE to "provide assistance to CGB as much as possible." This included serving as a liaison between CGB and various local, state, and private business entities. EDGE signed a confidentiality agreement with CGB to protect "confidential and proprietary information" with respect to the project.

### 3. Public Records Requests

On August 29, 2012, Frederick sent a public records request to the Falls City administrator. The request sought records in the physical custody of Falls City and EDGE relating to CGB. The administrator responded with a letter providing the requested documents which were in the physical custody of Falls City. He also sent a copy of his letter and the public records request to EDGE's executive director. On September 7, EDGE's president told the Falls City administrator that EDGE had already declined a similar public records request which it had received directly. On September 24, Falls City asked EDGE to provide the city with all public records concerning the CGB project which were the subject of the request. EDGE denied this request on the basis that it was not a public entity and that its records were not public records.

### 4. Mandamus Proceeding

Frederick subsequently filed a verified complaint and motion for a writ of mandamus, naming only Falls City as the respondent. The court issued an alternative writ of mandamus directing Falls City to either produce the requested records or file an answer to the verified complaint and show cause why it did not produce them. Falls City filed an answer in which it denied that records in the possession of EDGE were public

records and alleged that it did not have access to such records. Falls City further alleged that it had produced all requested records which were in its possession and that Frederick had failed to join EDGE as a necessary party.

After conducting an evidentiary hearing, the district court found that Falls City had delegated its economic development goals to EDGE and that therefore, the requested records in the possession of EDGE were public records subject to disclosure. The court also determined that EDGE was a necessary party to the mandamus proceeding and ordered that EDGE be joined as a party and be given an opportunity to appear and "show cause why [it] should not be held in contempt." The court stated that no further evidence would be received from Falls City and that the requested records "are public records and should be disclosed to [Frederick], subject to [EDGE's] opportunity to show cause why they are exempt from public disclosure."

Frederick filed an amended verified complaint joining EDGE as a party, and the court issued an alternative writ to Falls City and EDGE. EDGE filed an answer asserting several defenses, including (1) that the requested documents were not public records and (2) that they were exempt from disclosure under Neb. Rev. Stat. § 84-712.05 (Cum. Supp. 2012). EDGE also alleged that "its economic development activities do not constitute a government function" and that "there has been no delegation of a government function to EDGE by [Falls City]."

After conducting another evidentiary hearing, the district court entered an order determining the documents at issue were public records subject to disclosure. Applying the test utilized by this court in *Evertson v. City of Kimball*,[2] the court determined that Falls City had delegated its "economic development goals" to EDGE, that EDGE had prepared the records under this delegation of authority, that the City was entitled to possess the materials to monitor the performance of EDGE, and that the records were used to make a decision affecting the public interest. Based upon its in camera review, the court

[2] *Evertson v. City of Kimball*, 278 Neb. 1, 767 N.W.2d 751 (2009).

determined that some of the requested records were exempt from disclosure pursuant to § 84-712.05(3) and (4) or the attorney-client privilege.

In a subsequent order entered on March 6, 2013, the district court ordered Falls City and EDGE, jointly and severally, to pay Frederick's attorney fees and costs in the amount of $17,109.59, pursuant to Neb. Rev. Stat. § 84-712.07 (Reissue 2014). The court also stayed the issuance of a writ of mandamus pending appeal, conditioned upon the filing of a supersedeas bond, which was subsequently filed. EDGE perfected this timely appeal. We moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state.[3]

## II. ASSIGNMENTS OF ERROR

EDGE assigns, restated, that the district court erred in (1) holding that its records are public records subject to disclosure pursuant to § 84-712 and (2) holding EDGE jointly and severally liable for attorney fees and costs in the amount of $17,109.59.

On cross-appeal, Falls City assigns, restated and consolidated, that the district court erred in finding (1) that there was a clear duty existing on the part of Falls City to provide the records of EDGE; (2) that Falls City, through a delegation of authority to perform a governmental function, contracted with a private party to carry out a governmental function; (3) that EDGE prepared records under Falls City's delegation of authority; (4) that Falls City was entitled to possess the materials to monitor EDGE's performance; (5) that the records of EDGE are used by Falls City to make a decision affecting public interest; and (6) that Falls City was jointly and severally liable for attorney fees and costs in the amount of $17,109.59. Falls City also assigns error to the district court's initial determination that the records in question were public records, because EDGE had not been made a party to the case at the time of that determination.

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

On cross-appeal, Frederick assigns, restated and consolidated, that the district court erred by finding EDGE did not waive the statutory disclosure exemptions by failing to follow the procedures set forth in Neb. Rev. Stat. § 84-712.04 (Reissue 2014).

## III. STANDARD OF REVIEW

[1] Questions of law and statutory interpretation require an appellate court to reach a conclusion independent of the decision made by the court below.[4]

## IV. ANALYSIS

### 1. Legal Principles

[2] This case involves a citizen's statutory right, as articulated in § 84-712(1), to examine public records. In seeking a writ of mandamus to enforce this right under § 84-712.03, Frederick had the burden to satisfy three elements: (1) that he is a citizen of the state or other person interested in the examination of the public records, (2) that the documents sought are public records as defined by § 84-712.01, and (3) that he has been denied access to the public records as guaranteed by § 84-712.[5]

The disputed issue in this case involves the second element, i.e., whether the records Frederick requested from EDGE are "public records" as defined by § 84-712.01(1). According to that statute, public records are "all records and documents, regardless of physical form, of or belonging to this state, any county, city, village, political subdivision, or tax-supported district in this state, or any agency, branch, department, board, bureau, commission, council, subunit, or committee of any of the foregoing."[6] The fact that the requested documents are in the possession of a private entity is not determinative. We held in *Evertson* that the phrase "of or belonging

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[4] *Davis v. Davis*, 275 Neb. 944, 750 N.W.2d 696 (2008).

[5] See, *Evertson, supra* note 2; *State ex rel. Neb. Health Care Assn. v. Dept. of Health*, 255 Neb. 784, 587 N.W.2d 100 (1998).

[6] § 84-712.01(1).

to" in § 84-712.01(1) should be construed liberally to include documents or records that a public body is entitled to possess, regardless of whether the public body actually has possession of the documents.[7] We reasoned that the public's right of access should not depend on where the records are physically located.

But we also recognized in *Evertson* that public records laws should not permit scrutiny of all of a private party's records simply because it contracts with a government entity to provide services.[8] In *Evertson*, a city's mayor commissioned an investigation in response to complaints of racial profiling by a city police officer. The mayor retained a private attorney from another state who hired a private investigative firm to assist him. Based on a verbal report of the results of the investigation, the city terminated the police officer's employment. Two citizens sought disclosure of a written report in the possession of the investigative firm, and a district court held that the document was a public record which must be disclosed, even though the city never physically possessed it.

On appeal, we examined case law from other jurisdictions addressing when documents in the possession of a private party constitute public records. We recognized that many courts have adopted functional equivalency tests which focus on whether the documents are in the possession of a "hybrid public/private entity: an entity created by, funded by, and regulated by the public body."[9] We noted that such tests "appear appropriate when a private entity performs an ongoing government function."[10] But recognizing that the facts in *Evertson* did not involve an ongoing relationship between the city and the private entity, we observed that a functional equivalency test would not be appropriate because "requiring citizens to show that a private party functions as a hybrid government entity creates a loophole that would often allow public bodies

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[7] *Evertson, supra* note 2.

[8] *Id.*

[9] *Id.* at 11, 767 N.W.2d at 761.

[10] *Id.*

to evade public records laws."[11] So instead of utilizing a functional equivalency test in *Evertson*, we fashioned a test adapted from Ohio law[12] and held that requested materials in a private party's possession are public records if: (1) The public body, through a delegation of its authority to perform a government function, contracted with a private party to carry out the government function; (2) the private party prepared the records under the public body's delegation of authority; (3) the public body was entitled to possess the materials to monitor the private party's performance; and (4) the records are used to make a decision affecting public interest.[13]

*Evertson* involved a document prepared in the course of a single investigation which the city contracted with a private entity to perform, and the test we applied focused on the requested document. But in this case, Frederick sought multiple documents prepared over a period of time by an entity which had an ongoing relationship with Falls City. He argues all of the documents in the possession of EDGE relating to the CGB project are public records because EDGE is a hybrid public/private entity in that it functions as the economic development "agency," "branch," or "department" of Falls City within the meaning of § 84-712.01(1). As we noted in *Evertson*, in similar factual circumstances where there is an ongoing relationship between the public body and the private entity, other courts have applied a functional equivalency test.

Courts in Connecticut, Tennessee, Ohio, Oregon, and Maine utilize a similar test to determine whether a private entity is the functional equivalent of a public or governmental agency within the meaning of the public records laws of those states.[14]

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[11] *Id.*

[12] See *State ex rel. v. Krings*, 93 Ohio St. 3d 654, 758 N.E.2d 1135 (2001).

[13] *Evertson, supra* note 2.

[14] *State ex rel. Oriana House v. Montgomery*, 110 Ohio St. 3d 456, 854 N.E.2d 193 (2006); *Dow v. CCCI*, 884 A.2d 667 (Me. 2005); *Memphis Publishing v. Cherokee Children*, 87 S.W.3d 67 (Tenn. 2002); *Marks v. McKenzie High School Fact-Finding Team*, 319 Or. 451, 878 P.2d 417 (1994); *Connecticut Humane Soc. v. FOIC*, 218 Conn. 757, 591 A.2d 395 (1991).

As originally formulated by the Supreme Court of Connecticut, the functional equivalency test considers (1) whether the private entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the private entity was created by the government.[15] This test is applied on a case-by-case basis, with no single factor being dispositive.[16] Whether an entity meets the statutory definition of a public or governmental agency under a functional equivalency test presents a question of law.[17]

[3] We conclude that the four-part functional equivalency approach is the appropriate analytical model for determining whether a private entity which has an ongoing relationship with a governmental entity can be considered an agency, branch, or department of such governmental entity within the meaning of § 84-712.01(1), such that its records are subject to disclosure upon request under Nebraska's public records laws. The *Evertson* test is better suited to documents prepared in the course of an isolated transaction between a public body and a private entity. Utilizing separate tests, depending upon whether the entity's relationship with government is ongoing as in this case or limited to a single transaction as in *Evertson*, is consistent with the statutory directive that our public records law be "liberally construed" so that citizens "shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them."[18] We also note that Ohio, the state from which we adopted the *Evertson* test, applies a functional equivalency test in circumstances involving ongoing relationships between public bodies and private entities.[19]

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[15] *Board of Trustees v. Freedom of Information Commission*, 181 Conn. 544, 436 A.2d 266 (1980).

[16] *State ex rel. Oriana House, supra* note 14; *Memphis Publishing, supra* note 14; *Marks, supra* note 14; *Connecticut Humane Soc., supra* note 14.

[17] *Connecticut Humane Soc., supra* note 14.

[18] § 84-712.01(3).

[19] *State ex rel. Oriana House, supra* note 14.

### 2. Application to Facts

#### (a) Governmental Function

The first factor to be considered in determining whether EDGE is the functional equivalent of a city agency, branch, or department is whether it performs a governmental function. The function at issue here is the promotion of economic development. A Nebraska statute, now codified at Neb. Rev. Stat. § 13-315 (Reissue 2012), authorizes counties, cities, and villages to expend public funds "for the purpose of encouraging immigration, new industries, and investment" and to conduct and carry out a "publicity campaign" for the purposes of "exploiting and advertising the various agricultural, horticultural, manufacturing, commercial, and other resources" of the county, city, or village. The statute caps this expenditure at "four-tenths of one percent of the taxable valuation of the city, village, or county" and further provides that such sum

> may be expended directly by the city, village, or county or may be paid to the chamber of commerce or other commercial organization . . . or local development corporation to be expended for the purposes enumerated in this section under the direction of the board of directors of the organization.[20]

This court upheld the constitutionality of a prior codification of these statutory provisions in *Chase v. County of Douglas*,[21] reasoning that "municipal publicity and the general encouragement of growth and industry [are] public purposes" which "may be accomplished by expending the funds through the private organizations specified in the statute." Based on § 13-315 and our decision in *Chase*, the Nebraska Court of Appeals held that a city's allocation of funds to a chamber of commerce, which in turn transferred the funds to a museum foundation, fell "within the public purpose of the general encouragement of growth and industry."[22]

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[20] § 13-315.

[21] *Chase v. County of Douglas*, 195 Neb. 838, 846, 241 N.W.2d 334, 339 (1976).

[22] *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 20 Neb. App. 541, 552, 826 N.W.2d 589, 598 (2013).

From this authority, we conclude that promoting economic development is a governmental function. But it is permissive, not mandatory. We find no provision of law requiring a city to engage in promotion of economic development, either directly through its own employees or indirectly through an expenditure of public funds to a private entity such as a chamber of commerce or development corporation.

(b) Level of Government Funding

EDGE receives approximately 63 percent of its revenue from public sources, including Falls City and Richardson County, with the remainder coming from private sources. In *Dow v. CCCI*,[23] the Maine Supreme Court held that receipt by a private development corporation of at least 60 percent of its annual revenue from a city did not support a conclusion that it was the functional equivalent of a city agency. But in *State v. Beaver Dam Area Development Corp.*,[24] the Wisconsin Supreme Court considered the fact that a development corporation was "almost entirely taxpayer funded" to be a significant factor in its determination that the entity was a "quasi-governmental corporation" subject to state open meetings and public records statutes.

(c) Extent of Government Involvement or Regulation

The statute which permits a city to expend funds to a private entity engaged in economic development does not require the city to retain control over the specific expenditure of such funds by the entity.[25] To the contrary, it provides that such funds are "to be expended for the purposes enumerated in this section under the direction of the board of the organization."[26] Of the 21 voting members of EDGE's board of directors, two are city officials. The city administrator is an ex-officio

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[23] *Dow, supra* note 14.

[24] *State v. Beaver Dam Area Development Corp.*, 312 Wis. 2d 84, 110, 752 N.W.2d 295, 308 (2008).

[25] § 13-315.

[26] *Id.*

member with no voting powers. All three Falls City representatives on the board are subject to confidentiality agreements. Thus, the city has representation on EDGE's board of directors, but not control.[27] EDGE's employees are not employed by Falls City. EDGE maintains its financial records separately from Falls City, and does not occupy city offices.

In contrast, in *Meri-Weather v. Freedom of Info. Com'n*,[28] a nonprofit economic development corporation formed by a city agency was determined to be subject to the control of the city for purposes of the functional equivalency test. There, the city agency appointed a majority of the corporation's board of directors, employed its executive director, and maintained its financial records.

(d) Creation of Entity

EDGE was incorporated by several private individuals, none of whom were employed by Falls City. In this sense, it is dissimilar to the entity determined to be the functional equivalent of the city in *Meri-Weather*, and similar to the chamber of commerce which the Maine Supreme Court held in *Dow*[29] was not the functional equivalent of the city.

(e) Resolution

[4] We agree with other courts that in applying the functional equivalency test to determine whether a private entity is the equivalent of a public agency, branch, or department, it is not necessary that an entity strictly conform to each factor, but the factors should be considered and weighed on a case-by-case basis.[30] Here, the strongest factor supporting Frederick's argument that EDGE is the functional equivalent of a city agency, branch, or department is the fact that it performs a governmental function, i.e., the promotion of economic development. But as we have noted, a city does not

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[27] See *Dow, supra* note 14.

[28] *Meri-Weather v. Freedom of Info. Com'n*, 47 Conn. Supp. 113, 778 A.2d 1038 (Conn. Super. 2000).

[29] See *Dow, supra* note 14.

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

have a duty or responsibility to promote economic development, it simply has the authority to do so if it chooses. And unlike essential governmental functions such as building and maintaining streets and highways and providing for public health and safety, private entities are free to engage in economic development activities without any involvement of public bodies. Indeed, private entities have their own distinct interests in economic development. As the court noted in *Dow*, "Chambers of Commerce are traditionally nongovernmental entities that are in the business of promoting economic development,"[31] and while it may be in the interest of a city to promote economic development, it is also in the interest of chamber of commerce members who have no relationship to the city.

The fact that EDGE receives 63 percent of its funding from public sources lends some support to Frederick's argument that it is the equivalent of a public agency, branch, or department. But we agree with the observation of the Maine Supreme Court in *Dow* that the fact that a private entity received substantial financial support from public entities is not by itself sufficient to render it a public agency, because if that were so, "any private organization that received grant money, for example, could arguably be deemed a public agency."[32]

The remaining factors lend no support to a determination that EDGE is the functional equivalent of a city agency, branch, or department. EDGE was formed by private parties. Its employees are not Falls City employees, its offices are not housed in city buildings, and its financial and other records are kept separately from those of Falls City. The city does not control EDGE's board.

Weighing the various factors, we conclude as a matter of law that EDGE is not the functional equivalent of an agency, branch, or department of Falls City and that therefore, EDGE's records requested by Frederick are not "public records" as defined by § 84-712.01(1). Because of this determination, we do not reach EDGE's assignment of error with respect

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[31] *Dow, supra* note 14, 884 A.2d at 671.

[32] *Id.*

to attorney fees or the issues raised in the cross-appeals of Frederick and Falls City. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[33]

## V. CONCLUSION

For the foregoing reasons, we vacate and reverse the writ of mandamus and the order awarding attorney fees to Frederick, and we remand the cause to the district court with directions to dismiss.

VACATED AND REVERSED, AND REMANDED WITH DIRECTIONS.

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[33] *Conroy v. Keith Cty. Bd. of Equal.*, 288 Neb. 196, 846 N.W.2d 634 (2014); *Holdsworth* v. *Greenwood Farmers Co-op*, 286 Neb. 49, 835 N.W.2d 30 (2013).

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# BRADLY BROTHERS, APPELLANT, V. KIMBALL COUNTY HOSPITAL, DOING BUSINESS AS KIMBALL HEALTH SERVICES, ET AL., APPELLEES.

857 N.W.2d 789

Filed January 16, 2015. No. S-13-725.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **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.
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. **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.

6. **Counties: Health Care Providers: Political Subdivisions.** A county hospital is not merely an agency of the county, but, rather, is a separate and independent political subdivision.
7. **Appeal and Error.** Error without prejudice provides no ground for relief on appeal.
8. **Motions to Dismiss: Rules of the Supreme Court: Summary Judgment: Pleadings.** When matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the motion shall be treated as a motion for summary judgment and the parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by statute.
9. **Courts: Appeal and Error.** Upon further review from a judgment of the Nebraska Court of Appeals, the Nebraska Supreme Court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.
10. **Political Subdivisions Tort Claims Act: Jurisdiction.** The filing of presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
11. **Political Subdivisions Tort Claims Act: Time.** Neb. Rev. Stat. § 13-919(3) (Reissue 2012) does not extend the time for filing a claim under the Political Subdivisions Tort Claims Act against a different or additional political subdivision after one political subdivision denies the claim.
12. **Political Subdivisions Tort Claims Act: Notice.** A notice of claim filed only with one unauthorized to receive a claim pursuant to Neb. Rev. Stat. § 13-905 (Reissue 2012) does not substantially comply with the notice requirements of the Political Subdivisions Tort Claims Act.

Petition for further review from the Court of Appeals, MOORE, PIRTLE, and RIEDMANN, Judges, on appeal thereto from the District Court for Kimball County, DEREK C. WEIMER, Judge. Judgment of Court of Appeals affirmed.

Sterling T. Huff, of Island & Huff, P.C., L.L.O., for appellant.

Mark A. Christensen, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellees Kimball County Hospital and Trevor W. Bush, M.D.

Vincent Valentino and Brandy Johnson for appellee Kimball County.

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

CASSEL, J.

## INTRODUCTION

After receiving treatment at a county hospital, a patient filed a tort claim pursuant to the Political Subdivisions Tort Claims Act (Act) and later filed suit against the county, the hospital, and a physician. The district court dismissed the county and entered summary judgment in favor of the hospital and the physician. The Nebraska Court of Appeals affirmed.

We conclude that as a matter of law, a county hospital is a separate and distinct political subdivision from the county. Because the county could have no liability under the facts alleged, any error in failing to allow the patient to present evidence on the county's motion to dismiss was harmless. And because the patient did not file his tort claim with the statutorily designated individual, he failed to comply with notice requirements of the Act. We therefore affirm the decision of the Court of Appeals.

## BACKGROUND

### MEDICAL TREATMENT AND TORT CLAIM

On December 18, 2010, Bradly Brothers suffered injuries in a single-vehicle accident. As a result of his injuries, Brothers received medical treatment at Kimball County Hospital on December 18, 20, and 30. Brothers continued to suffer pain, and one of his fingers was visibly bent. A chiropractor subsequently took an x ray of Brothers' finger and discovered multiple fractures. On April 5, 2011, Brothers filed a tort claim pursuant to the Act with the Kimball County clerk, the chairperson of the Kimball Health Services Board of Trustees, and the chief executive officer (CEO) of Kimball Health Services.

### PLEADINGS IN LAWSUIT

On July 6, 2012, Brothers filed a complaint against Kimball County (County); the Kimball Health Services Board of Trustees; Kimball Health Services; Trevor W. Bush, M.D.; and another employee of the hospital. His complaint set forth causes of action for medical malpractice, for violation of his

right to privacy under certain statutes or "false light" violation of privacy, and for breach of contract.

The County filed a motion to dismiss, alleging that the complaint failed to state a claim upon which relief could be granted, that the County was not the employer of personnel at Kimball Health Services, and that the County was not involved in the health care services provided to Brothers. The County also filed a motion for protective order, asking that no discovery against it be allowed for the same reasons contained in the motion to dismiss.

Kimball County Hospital and Bush filed an answer to Brothers' complaint. The answer stated that Kimball County Hospital had been erroneously referred to as "Kimball Health Services" and that there was no legal entity named "'Kimball Health Services Board of Trustees.'" The answer admitted that Kimball County Hospital was a county hospital and a political subdivision and that Bush was an employee of Kimball County Hospital. Brothers thereafter moved to file an amended complaint to add Kimball County Hospital as a defendant.

Brothers later filed a second amended complaint against "Kimball County Hospital, d/b/a Kimball Health Services," and Bush. He alleged that Bush was an employee of Kimball County Hospital. In the responsive pleading of Kimball County Hospital and Bush, they asserted, among other things, that Brothers failed to comply with the notice requirements of the Act.

### District Court's Disposition

In the analysis section of this opinion, we provide more detail regarding the procedures followed in disposing of the County's motion to dismiss. The court's first order treated it as a motion for summary judgment and granted the motion. Upon Brothers' motion to alter or amend the judgment, the court "clarif[ied]" that it granted the County's motion to dismiss and overruled Brothers' "request" to submit additional evidence.

Kimball County Hospital and Bush subsequently moved for summary judgment. The evidence established that under the bylaws of Kimball County Hospital, the secretary "shall act as

custodian of all records and reports of the Board of Trustees" and "shall be responsible for the keeping and reporting of adequate records of all transactions and of the minutes of all meetings of the Board of Trustees." Despite the bylaws' allocation of responsibility, the CEO of Kimball County Hospital testified in a deposition that he was the custodian of legal documents for the hospital, that he received Brothers' tort claim in April 2011, and that he discussed the tort claim with members of the board of trustees, including the secretary. The district court found that Brothers did not file a copy of his tort claim with the secretary of the board of trustees for Kimball County Hospital and entered summary judgment in favor of Kimball County Hospital and Bush.

## Court of Appeals' Decision

Upon Brothers' appeal, the Court of Appeals affirmed in a memorandum opinion filed on July 1, 2014. The Court of Appeals first determined that the district court did not err in failing to allow Brothers to present evidence to oppose the County's motion to dismiss and in granting the motion.

Regarding the summary judgment granted to Kimball County Hospital and Bush, the Court of Appeals reasoned that Brothers did not timely file his claim with the secretary of the board of trustees—the person "designated by Kimball County Hospital to receive tort claims"—and thereby failed to comply with the filing requirements of the Act. Accordingly, the court rejected Brothers' argument that by filing the tort claim with the person who actually maintained the official records, he had complied with the statute.

We granted Brothers' petition for further review.

## ASSIGNMENTS OF ERROR

Brothers assigns, consolidated and restated, that the Court of Appeals erred by (1) finding that the County was properly dismissed and failing to reverse and remand for a summary judgment hearing at which Brothers would have the opportunity to present evidence and (2) determining that Kimball County Hospital and Bush were properly dismissed based on lack of service of the tort claim pursuant to the Act.

## STANDARD OF REVIEW

[1,2] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2]

[3] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.[3]

[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.[4]

[5] 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]

## ANALYSIS

### Whether County Hospital Is Separate Legal Entity From County

Kimball County Hospital is a county-owned hospital created under Neb. Rev. Stat. §§ 23-3501 to 23-3527 (Reissue 2012 & Cum. Supp. 2014) (county hospital statutes). At oral argument, all parties agreed that the county hospital statutes control. But the parties interpret them differently. Brothers contends that the hospital is not a separate legal entity from the county. The other parties disagree.

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[1] *Bruno v. Metropolitan Utilities Dist.*, 287 Neb. 551, 844 N.W.2d 50 (2014).

[2] *Id.*

[3] *Rice v. Bixler*, 289 Neb. 194, 854 N.W.2d 565 (2014).

[4] *SID No. 424 v. Tristar Mgmt.*, 288 Neb. 425, 850 N.W.2d 745 (2014).

[5] *Rodgers v. Nebraska State Fair*, 288 Neb. 92, 846 N.W.2d 195 (2014).

Brothers conceded at argument that resolution of this dispute is the "linchpin" to our decision. Thus, we must first decide whether a county hospital is a separate political subdivision from the county such that the county could have no liability for the acts of the hospital and its employees. The issue has not been squarely addressed in our case law, so we begin by examining our statutes.

A county hospital is not explicitly identified as a political subdivision, either in the Act or in the county hospital statutes. The Act's definition of "[p]olitical subdivision" itemizes "villages, cities of all classes, counties, school districts, learning communities, [and] public power districts."[6] Obviously, a county hospital is not included in this list. But the County correctly argues that the Act's definition also includes a catchall—"all other units of local government."[7] Thus, a county hospital could fall within the catchall. And where it was not disputed, we have accepted both a county and a county-owned hospital as political subdivisions subject to the Act.[8] Similarly, the county hospital statutes do not include express language classifying a county hospital as a body corporate and politic. In numerous instances, the Legislature has characterized a particular public entity as either a "body corporate and politic" or a "body politic and corporate."[9] But the absence of this language in the county hospital statutes does not settle the

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[6] See Neb. Rev. Stat. § 13-903(1) (Reissue 2012).

[7] *Id.*

[8] See *Jessen v. Malhotra*, 266 Neb. 393, 665 N.W.2d 586 (2003).

[9] See, e.g., Neb. Rev. Stat. §§ 2-224(2)(g) (Reissue 2012) (elected county fair board); 3-611 (Reissue 2012) (board of airport authority); 13-1303 (Reissue 2012) (public building commission); 13-2519 (Reissue 2012) (joint public agency); 23-3533 (Reissue 2012) (hospital district); 23-3588 (Reissue 2012) (hospital authority); 31-369 (Reissue 2008) (drainage district); 31-505 (Reissue 2008) (sanitary district); 31-732 (Reissue 2008) (sanitary and improvement district); 39-868 (Reissue 2008) (bridge commission); 39-1606(3) (Reissue 2008) (road improvement district); 46-1005 (Reissue 2010) (rural water district); 70-608 (Reissue 2009) (public power and irrigation district); 70-805 (Reissue 2009) (rural power district); 70-1406(4) (Reissue 2009) (joint public power authority); and 71-1575(16) (Reissue 2009) (local housing agency).

question. To do so, we must examine the county hospital statutes in detail.

In order to predict the outcome of this examination, the district court reviewed two of our decisions. In one case, we concluded that a city airport authority was an independent political subdivision.[10] Because of the subsidiary's independent status, the parent municipal corporation was not liable for torts of the airport authority. In the other decision, we determined that a municipal utility was not a separate entity but only an agency or department of the city.[11] Thus, the utility's liability for a workers' compensation claim barred a separate tort action against the city. While these cases provide some assistance, our decision requires a close examination of the structure and content of the county hospital statutes.

Under the county hospital statutes, the county makes an initial decision whether to establish or acquire a hospital facility. The Legislature authorized a county board to issue and sell bonds for the construction of a hospital after the question of the issuance of the bonds had been submitted to the voters of the county.[12] The county board appoints a board of trustees for the hospital[13] and establishes the salary of the members of the board of trustees.[14] The county board may remove a member of the board of trustees for any reason and is responsible for filling the vacancy of any member.[15] In this sense, the county board's relationship with the hospital board of trustees resembles the relationship that existed at the time of the original enactment of the county hospital statutes between a general corporation's stockholders and its board of directors.[16]

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[10] See *Lock v. City of Imperial*, 182 Neb. 526, 155 N.W.2d 924 (1968).

[11] See *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

[12] See § 23-3501.

[13] See § 23-3502(1).

[14] See § 23-3503.

[15] See § 23-3502(6).

[16] See, e.g., Neb. Rev. Stat. §§ 21-105 (stock requirements); 21-111 (general powers of board of directors); 21-113 (directors' term of office); 21-135 (stockholder election of directors); and 21-168 (displacement of directors) (Reissue 1943).

In effect, the hospital is the corporation, the county board comprises its "stockholders," and the hospital board of trustees operates as the hospital's "board of directors."

The county hospital statutes specify that a few major decisions require the county board's approval. If the board of trustees proposes to dispose of "all or substantially all of the facility or property," the county board must approve.[17] Similarly, county board approval is required to issue revenue bonds for which the revenue of the facility has been pledged.[18] And county board approval must be secured for an improvement or addition to the hospital that costs more than 50 percent of the hospital's replacement cost.[19] But these are the exceptions. Except for these major decisions, complete control is vested in the board of trustees. And this also parallels the statutory requirements of the general corporation law for stockholders' approval at the time of enactment of the county hospital statutes.[20]

Under the county hospital statutes, the board of trustees is responsible for the operation of the hospital. The board of trustees is charged with adopting rules for its own guidance and for governance of the hospital.[21] It has "the authority to pay all bills and claims due and owing by the facility."[22] The board of trustees also has "exclusive" control over "expenditures of all money collected to the credit of the fund for any such facility,"[23] "all improvements or additions to the facility and equipment,"[24] and "supervision, care, and custody of the grounds, rooms, buildings, and other property purchased,

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[17] See § 23-3504(3).

[18] See § 23-3504(4).

[19] See § 23-3504(6).

[20] See, e.g., Neb. Rev. Stat. §§ 21-151 (amendment of articles of incorporation); 21-158 (reduction of capital); 21-183 (dissolution); 21-1,104 (merger); and 21-1,113 (disposition of all or substantially all property and assets) (Reissue 1943).

[21] See § 23-3505(2).

[22] § 23-3504(8).

[23] § 23-3504(5).

[24] § 23-3504(6).

constructed, leased, or set apart for the purposes set forth under [§] 23-3501."[25]

The board of trustees is also responsible for the staff of the hospital. The board of trustees shall adopt bylaws that govern the hospital's medical staff, approve the appointment of such staff, and supervise the quality of medical care and services provided at the hospital.[26] The board of trustees has the authority to pay the salaries of all hospital employees[27] and to establish and fund a retirement plan for the benefit of its full-time employees.[28] Thus, the hospital's board of trustees, not the county board, is responsible for the hospital's employees.

The county hospital statutes also contain provisions regarding fees for services. The governing board of each hospital is responsible for establishing rates and fees to be charged.[29] Any person to whom care and services have been rendered is liable for the costs and fees of such care and services to the appropriate county which maintains and operates the hospital.[30] But if suit is necessary to recover such costs and fees, it is to be brought in the name of the board of trustees of the facility.[31]

Section 23-3523 was recently amended, and Brothers attributes significance to its former language. At the time Brothers' claim arose, the statute required suit to recover costs and fees for services to be brought in the name of the *county* maintaining and operating the hospital.[32] Effective April 6, 2012[33] (shortly before the hearing on the County's

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[25] § 23-3504(7).

[26] See § 23-3505(4).

[27] *Id.*

[28] § 23-3526(1).

[29] See § 23-3521.

[30] See § 23-3522.

[31] See § 23-3523.

[32] See § 23-3523 (Reissue 2007).

[33] See 2012 Neb. Laws, L.B. 995.

motion to dismiss), the statute was amended to require such a suit to be brought in the name of the hospital's board of trustees.[34]

But Brothers' reliance on the previous language of this section is misplaced. This action is not one brought on behalf of the hospital to recover costs and fees for care and services. And because of the nearly complete authority given to the board of trustees throughout the county hospital statutes, we do not attribute any special significance to the statute's former language.

[6] Considering the county hospital statutes as a whole, we conclude that a county hospital is a separate legal entity from the county. The hospital's governing body is responsible for formulating rules to guide itself. Further, it is the board of trustees—not the county—that has the authority to pay claims against the hospital. We conclude that a county hospital is not merely an agency of the county, but, rather, is a separate and independent political subdivision.

One caveat should be noted. The parties do not dispute that Kimball County has a population of fewer than 200,000 inhabitants and, thus, falls within the first subsection mandating that the county board appoint a separate board of trustees.[35] The second subsection governs counties having 200,000 or more inhabitants, and permits the county board, "in lieu of appointing a board of trustees," to "elect to serve as the board of trustees of [the hospital]."[36] Our conclusion is limited to the situation governed by the first subsection, and we express no opinion regarding the legal status of a county hospital where the county board may and does elect to serve as the board of trustees.

Because the county hospital is a separate legal entity and control of the hospital's employees is entrusted to that entity, it necessarily follows that the county has no liability for the acts of a county hospital's employees. With that understanding

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[34] See § 23-3523 (Reissue 2012).

[35] See § 23-3502(1).

[36] See § 23-3502(2).

in place, we turn to the issues raised in Brothers' petition for further review.

## Procedure Concerning Motion to Dismiss

Brothers contends that a lack of procedural process by the district court concerning the County's motion to dismiss is the crux of this case, because he was never given an opportunity to present his evidence in opposition to the motion to dismiss once it was converted to a motion for summary judgment. Although we do not approve of the procedure undertaken by the district court, we find no reversible error.

During the August 2012 hearing, the district court first considered the County's motion to dismiss and the County offered evidence in support of its motion. Brothers objected to the receipt of the exhibits and requested a continuance in order to conduct discovery and prepare further affidavits. The court stated that it would treat the motion as one for summary judgment, and it set a further hearing for September 4. But before that date arrived, the parties filed a stipulation to continue the hearing until the court ruled on the motion for protective order, and the court adopted the stipulation.

Without holding a further hearing or receiving any evidence from Brothers, the district court later granted the County's motion to dismiss, which it continued to treat as a motion for summary judgment. The court also determined that the County's motion for protective order was moot.

After the district court granted the County's motion, Brothers filed a timely motion to alter or amend the order, pointing out that the court approved the stipulation of the parties to continue the hearing on the motion to dismiss until the court ruled on the motion for protective order. The motion asked the court to set aside its order and to permit him to obtain affidavits. In response to Brothers' motion, the court stated that "to clarify the record," it had granted the County's motion for protective order and motion to dismiss. In a footnote, the court overruled Brothers' request to submit additional evidence, stating that it ruled on the motion to dismiss by reviewing the

pleadings and the law and that the evidence submitted by the County was "largely irrelevant to the question of law raised in the [m]otion."

[7,8] Although the procedure used by the district court is not ideal, error without prejudice provides no ground for relief on appeal.[37] Brothers correctly points out that when matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the motion "shall be treated" as a motion for summary judgment and the parties shall be given a reasonable opportunity to present all material made pertinent to such a motion by statute.[38] But we have previously determined that where a court received evidence which converted a motion to dismiss into a motion for summary judgment, but did not give a party notice of the changed status of the motion, "there was no prejudice, because the motions presented an issue of law of which [the party] was notified in the motions to dismiss."[39] Because we have already determined that as a matter of law, a county hospital is a legal entity and political subdivision separate from the county itself, the County could have no liability under the facts alleged by Brothers. Accordingly, any error by the district court in failing to allow Brothers an opportunity to present evidence on the issue was harmless.

[9] Although our reasoning differs to some degree from that of the Court of Appeals, we reach the same result; i.e., the matter does not need to be reversed and remanded to allow Brothers an opportunity to present evidence. Upon further review from a judgment of the Court of Appeals, this court will not reverse a judgment which it deems to be correct simply because its reasoning differs from that employed by the Court of Appeals.[40]

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[37] See *In re Interest of Tyler F.*, 276 Neb. 527, 755 N.W.2d 360 (2008).

[38] See *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

[39] *Corona de Camargo v. Schon*, 278 Neb. 1045, 1050, 776 N.W.2d 1, 7 (2009).

[40] *State v. Moore*, 276 Neb. 1, 751 N.W.2d 631 (2008).

### Filing of Tort Claim

Brothers also argues that the Court of Appeals erred in determining that Kimball County Hospital and Bush were properly dismissed due to Brothers' failure to meet the Act's filing requirements. Within 1 year of the accrual of Brothers' claim, he submitted a written claim to the Kimball County clerk, the chairperson of the Kimball Health Services Board of Trustees, and the CEO of Kimball Health Services. The Court of Appeals determined that because Brothers did not file the claim with the secretary of the Kimball County Hospital board of trustees, he did not satisfy the filing requirements. We agree.

[10] The filing of presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Act.[41] Neb. Rev. Stat. § 13-905 (Reissue 2012) provides:

> All tort claims under the . . . Act . . . shall be filed with the clerk, secretary, or other official whose duty it is to maintain the official records of the political subdivision, or the governing body of a political subdivision may provide that such claims may be filed with the duly constituted law department of such subdivision.

Brothers makes three arguments that he sufficiently complied. We find no merit to any of these arguments.

First, Brothers maintains that he satisfied the Act because he filed his original claim with the county clerk. But because Kimball County Hospital is a distinct legal entity from the County and the County could have no liability under the facts alleged, service on the Kimball County clerk did not suffice to comply with § 13-905 as to Kimball County Hospital.

Second, Brothers asserts that his amended tort claim met the filing requirement. On August 30, 2012, Brothers filed an amended tort claim with a number of individuals, including the secretary of the Kimball County Hospital/Kimball Health Services Board of Trustees. According to the bylaws of Kimball County Hospital, the secretary was the person

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[41] See *Jessen v. Malhotra, supra* note 8.

whose duty it was to maintain the official records of Kimball County Hospital. However, the amended tort claim was not filed within 1 year after Brothers' claim accrued, as the Act required.[42] Thus, the amended tort claim failed to timely comply with the Act.

Brothers attempts to avoid the time bar by relying on § 13-919. He claims that the statute "grant[s] relief to re-file when it comes to the attention of a party that there was an alleged service problem."[43] Brothers does not identify the subsection that he claims is applicable. We assume that he is relying on § 13-919(3), which provides:

> If a claim is made or a suit is begun under the act and a determination is made by the political subdivision or by the court that the claim or suit is not permitted under the act for any other reason than lapse of time, the time to make a claim or to begin a suit under any other applicable law of this state shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim or begin the suit under such other law would otherwise expire before the end of such period.

[11] But § 13-919(3) does not save Brothers' amended tort claim. After Brothers commenced suit under the Act, the County responded that it was not the employer of personnel at Kimball Health Services and Kimball County Hospital asserted that it had been erroneously referred to as "Kimball Health Services" and that there was no legal entity named "'Kimball Health Services Board of Trustees.'" Thus, Brothers seems to argue that the political subdivision determined that "suit [was] not permitted under the act for any other reason than lapse of time."[44] But Brothers continued to assert a claim under the

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[42] See Neb. Rev. Stat. § 13-919(1) (Reissue 2012).

[43] Memorandum brief for appellant in support of petition for further review at 9.

[44] See § 13-919(3).

Act and did not "make a claim or . . . begin a suit under any other applicable law of this state."[45] Section 13-919(3) does not extend the time for filing a claim under the Act against a different or additional political subdivision after one political subdivision denies the claim.[46] We conclude that Brothers' amended claim was time barred.

Finally, Brothers contends that he satisfied the filing requirement by filing the tort claim with the person who actually maintains the records of the political subdivision. Although the secretary of the board of trustees of Kimball County Hospital had the duty to maintain the records of the hospital under the bylaws, it was the CEO of Kimball County Hospital who actually maintained the records. And Brothers filed his initial tort claim with the CEO.

[12] But filing the tort claim with an official who does not have the duty to maintain the official records of the political subdivision does not satisfy the statute. As the Court of Appeals recognized, "The statute focuses on who has the duty to keep the records, not on who may actually do so." Although the CEO maintained the official records of Kimball County Hospital, under the bylaws, it was not his duty to do so. A notice of claim filed only with one unauthorized to receive a claim pursuant to § 13-905 does not substantially comply with the notice requirements of the Act.[47]

We addressed a similar situation in *Estate of McElwee v. Omaha Transit Auth*.[48] In that case, a tort claim regarding a personal injury was filed with the political subdivision's director of administration and human resources (administrator) and the evidence established that the administrator was responsible for overseeing claims for personal injury. The evidence showed that the administrator had acknowledged claims in

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[45] See *id*.

[46] *Mace-Main v. City of Omaha*, 17 Neb. App. 857, 773 N.W.2d 152 (2009).

[47] *Willis v. City of Lincoln*, 232 Neb. 533, 441 N.W.2d 846 (1989). See, also, *Woodard v. City of Lincoln*, 256 Neb. 61, 588 N.W.2d 831 (1999); *Lowe v. Lancaster Cty. Sch. Dist. 0001*, 17 Neb. App. 419, 766 N.W.2d 408 (2009).

[48] *Estate of McElwee v. Omaha Transit Auth.*, 266 Neb. 317, 664 N.W.2d 461 (2003).

other cases and had at least once settled a claim rather than asserting lack of notice as a defense. However, the evidence did not contain any documentation conferring upon the administrator the duties set forth in § 13-905. Rather, the evidence showed that the executive director of the political subdivision's board of directors was responsible for keeping the official records. We stated:

> Nor has the plaintiff presented any evidence that [the administrator] was a de facto clerk, secretary, or official recordkeeper for [the political subdivision]. There is no evidence that [the administrator] was appointed to an office named in § 13-905, or was acting in such a capacity in a way calculated to induce people, without inquiry, to suppose her to be the occupant of one of those offices.[49]

Similarly, the evidence in the case before us does not establish that the CEO was a de facto clerk, secretary, or official recordkeeper. Nor does the evidence show that the CEO or Kimball County Hospital misrepresented to Brothers that the CEO was the person designated by statute to receive claims. Because the CEO did not have any of the duties set forth in § 13-905, the tort claim filed with him was not effective notice under the plain language of the Act.

We recognize that the result is harsh, particularly where the purpose of the written notice requirement has been satisfied. The evidence showed that the governing body—the board of trustees—was aware of and discussed Brothers' claim shortly after his treatment at Kimball County Hospital. However, Brothers' claim was not filed with the statutorily designated person. If the Legislature wishes to allow for substantial compliance in such a situation, it has the power to amend the statute. It is not our province to do so.

## CONCLUSION

We determine that a county hospital is a legal entity and political subdivision separate from the county itself and that, under the facts alleged in this case, the County could have

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[49] *Id.* at 324, 664 N.W.2d at 467.

no liability as a matter of law. Thus, Brothers suffered no prejudice when he was not allowed an opportunity to present evidence regarding the County's motion to dismiss. We further conclude that Brothers failed to comply with the notice provisions of the Act, because he did not file his tort claim with the statutorily designated individual. We therefore affirm the decision of the Court of Appeals.

AFFIRMED.

WRIGHT, J., not participating.

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STATE OF NEBRASKA, APPELLEE, V.
JONATHON L. ARMENDARIZ, APPELLANT.
857 N.W.2d 775

Filed January 16, 2015. No. S-13-998.

1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
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: Pleas: Effectiveness of Counsel.** In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.
4. **Postconviction: Effectiveness of Counsel: Appeal and Error.** Although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the defendant has the burden, in accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the

defendant must show that counsel's deficient performance prejudiced the defense in his or her case.

6. **Convictions: Effectiveness of Counsel: Pleas: Proof.** When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.
7. **Effectiveness of Counsel: Appeal and Error.** The two prongs of the ineffective assistance of counsel test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), deficient performance and prejudice, may be addressed in either order.
8. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.
9. **Criminal Law: Intoxication: Jury Instructions.** Evidence of excessive intoxication by which the defendant is wholly deprived of reason may be submitted to the jury for it to consider whether in fact a crime has been committed, or to determine the degree of the crime when the offense consists of several degrees.
10. **Postconviction: Intoxication: Pleas.** When a defendant alleges in a postconviction action that he or she would have insisted on going to trial if counsel had informed him or her of an intoxication defense, a court need not take the self-serving declaration on its face. Rather, the court can consider other factors, such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.
11. **Pleas.** In order for a defendant to knowingly and voluntarily enter a guilty plea, a court must inform the defendant of the following: (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.
12. ____. When a guilty plea is entered, the record must establish a factual basis for the plea.
13. **Effectiveness of Counsel.** The failure to anticipate a change in existing law does not constitute deficient performance.
14. **Postconviction: Right to Counsel: Appeal and Error.** Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.
15. **Postconviction: Justiciable Issues: Right to Counsel.** When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.
16. **Pleadings.** An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.

Appeal from the District Court for Sarpy County: DAVID K. ARTERBURN, Judge. Affirmed.

Jonathon L. Armendariz, pro se.

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

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

STEPHAN, J.

Jonathon L. Armendariz pled guilty to an amended information charging one count of second degree murder and one count of use of a firearm to commit a felony. The Nebraska Court of Appeals summarily affirmed a direct appeal filed by his trial counsel. Armendariz then filed this action seeking postconviction relief. The district court denied relief without conducting an evidentiary hearing, and Armendariz filed this timely appeal. We affirm the judgment of the district court.

## I. FACTS

Armendariz was originally charged with one count of first degree murder, one count of use of a firearm to commit a felony, and one count of robbery. In July 2011, he pled guilty to an amended information charging one count of second degree murder and one count of use of a firearm to commit a felony. At the time the pleas were entered, Armendariz informed the court that there had been no promises or threats made to him in exchange for his pleas and that he was acting freely and voluntarily. Armendariz also told the court that he understood the proceedings and that he knew what he was doing.

Before accepting the pleas, the court advised Armendariz of his constitutional and statutory rights, and cautioned Armendariz to ask any questions he had during the advisement. The court advised Armendariz that he had a right to be represented by an attorney at all stages of the proceedings, including sentencing; that he had the right not to incriminate himself, which included the right to remain silent at any hearing or trial; that he was presumed innocent; that he had the right to a speedy and public trial before a jury; that he had the right to confront his accusers at trial; that he had the right to cross-examine his accusers at trial; and that he had the right at trial to call witnesses on his own behalf. Armendariz was also advised that if he went to trial, a jury would have to find him

guilty beyond a reasonable doubt; that he had a right to challenge any search or seizure and contest the use of evidence obtained during them; and that because he was 17 years old when the crimes were committed, he had the right to seek transfer to juvenile court. He was also advised that he had the right to appeal any final order of the court.

The court then advised Armendariz that if he entered a guilty plea, he was waiving most of the rights he had just been advised of. He was specifically advised that he retained the right to have his attorney represent him and retained the right to appeal, but that by pleading guilty, he was waiving many appeal issues.

Armendariz was advised by the court that to prove the charge of second degree murder, the State would have to prove beyond a reasonable doubt that he intentionally, but without premeditation, killed the victim. Armendariz acknowledged his understanding that by entering the pleas, he was relieving the State of its trial burden and would be found guilty based on the pleas and the factual basis provided by the State. He was advised that the possible penalty for second degree murder was a minimum of 20 years' imprisonment and a maximum of life imprisonment. He informed the court he understood the possible penalties. Armendariz stated he had reviewed the facts of the case and explained his story to his attorney, had explored possible defenses with his attorney, and had discussed the possible penalties with his attorney. He stated he was satisfied with the services and advice received from his counsel.

The State then gave a factual basis for the pleas. Summarized, it was that the victim was found in his bedroom and had died of a single gunshot wound to the back of his head, which shot was fired at close range. A 9-mm shell casing and a spent bullet were found at the crime scene. Investigators discovered that the last cell phone call to the victim had been placed by Armendariz, and when they searched Armendariz' residence, they discovered a 9-mm handgun and two cell phones that had belonged to the victim. The handgun was tested and found to be the weapon that had fired the bullet that matched the shell casing found at the

crime scene. A witness was located and informed police that he had gone with Armendariz to the victim's home the morning of the crime in order to rob the victim and had stayed in the car while Armendariz went inside.

In response to this, Armendariz' attorney informed the court that "[t]he actual facts would not support that there was going to be or that there was a robbery, but we don't dispute that the State has a witness that would testify to that." He otherwise agreed with the factual basis as presented by the State.

Armendariz' guilty pleas were accepted by the court. At sentencing, he informed the court, "I know I'm going to prison, and I have come to terms with that. I just hope it's not for life. . . . Whether I do life or 20 years in prison, everything happens for a reason . . . ." He ultimately was sentenced to 80 years' to life imprisonment on the murder charge and 10 to 20 years' imprisonment on the firearm charge. His trial counsel filed a direct appeal, assigning as error that the sentences imposed were excessive. The Court of Appeals summarily affirmed.

Armendariz subsequently filed this action for postconviction relief, alleging ineffective assistance of trial and appellate counsel. After allowing Armendariz leave to amend his original postconviction motion, the district court denied relief without conducting an evidentiary hearing. Armendariz filed this timely appeal.

## II. ASSIGNMENTS OF ERROR

Armendariz broadly assigns that the district court erred in not granting him an evidentiary hearing on the claims of ineffective assistance of counsel that he asserted in his amended motion for postconviction relief. Arguments in support of each of these claims are scattered throughout his pro se brief. In addition to this broad assignment of error and related arguments, he specifically assigns and argues that he was entitled to an evidentiary hearing, because his trial counsel (1) failed to transfer or move to transfer his case to juvenile court, (2) failed to have him evaluated prior to entering his guilty pleas, (3) failed to prepare an adequate defense, (4) failed to create a

record of the factual basis of the crimes, (5) failed to move to suppress his statements, (6) misadvised him prior to the entry of his pleas, (7) failed to challenge information in the presentence investigation report, and (8) failed to object during the colloquy when he entered his guilty pleas.

Armendariz also assigns that the district court erred in not combining his original postconviction motion with his amended motion and in not appointing him counsel to assist him with his postconviction claims.

## III. STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.[1]

[2] 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.[2]

## IV. ANALYSIS

Armendariz' pro se amended motion for postconviction relief contains numerous allegations of ineffective assistance of counsel. Summarized, the amended motion alleged Armendariz' counsel was ineffective for (1) failing to provide effective assistance before the guilty pleas were entered; (2) failing to object to the court's improper rights advisory at the time the pleas were entered; (3) failing to object or advise

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[1] *State v. Baker*, 286 Neb. 524, 837 N.W.2d 91 (2013); *State v. Marks*, 286 Neb. 166, 835 N.W.2d 656 (2013).

[2] *State v. Golka*, 281 Neb. 360, 796 N.W.2d 198 (2011); *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

Armendariz not to plead guilty, due to an insufficient factual basis to support the pleas at the plea hearing; (4) failing to object at the plea hearing, because Armendariz was not fully advised of the charges against him; (5) failing to file a motion to withdraw the pleas prior to or at sentencing; and (6) failing to raise the invalidity of the pleas on direct appeal. Armendariz' brief to this court challenges the district court's findings on all of the allegations he made in the amended motion for postconviction relief.

### 1. Ineffective Assistance of Counsel in General

[3] None of the claims Armendariz made in his amended motion are waived or procedurally barred. He did enter guilty pleas, and normally, a voluntary guilty plea waives all defenses to a criminal charges.[3] But the claims he is asserting are not direct defenses to the criminal charges. Instead, they are framed as ineffective assistance of counsel claims. In a postconviction action brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[4]

[4] In addition, although a motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal, when a defendant was represented both at trial and on direct appeal by the same lawyer, the defendant's first opportunity to assert ineffective assistance of counsel is in a motion for postconviction relief.[5] Armendariz was represented by the same lawyer at trial and on direct appeal, and therefore his claims are not procedurally barred.

[5-8] In order to establish a right to postconviction relief based on a claim of ineffective assistance of counsel, the

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[3] *State v. Glover*, 278 Neb. 795, 774 N.W.2d 248 (2009).

[4] *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009); *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007).

[5] *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013); *State v. McKinney*, 279 Neb. 297, 777 N.W.2d 555 (2010).

defendant has the burden, in accordance with *Strickland v. Washington*,[6] to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case.[7] When a conviction is based upon a guilty plea, the prejudice requirement for an ineffective assistance of counsel claim is satisfied if the defendant shows a reasonable probability that but for the errors of counsel, the defendant would have insisted on going to trial rather than pleading guilty.[8] The two prongs of this test, deficient performance and prejudice, may be addressed in either order.[9] The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable.[10]

Here, we focus on whether Armendariz alleged sufficient facts in his amended motion which, if true, would entitle him to postconviction relief. If so, he is entitled to an evidentiary hearing on the claim, unless the files and records affirmatively show that he is not.[11]

### 2. Allegations in Amended Motion

#### (a) Pre-plea Hearing Issues

##### *(i) Evaluation*

Armendariz alleged his trial counsel should have had him evaluated before he entered his pleas to determine his ability to form the specific intent necessary to commit murder. The sole basis for this allegation was that he was only 17 years old at the time the crimes were committed. He made no allegation that he was otherwise unable to form the necessary intent or

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

[7] See *State v. Glover, supra* note 3.

[8] *Id.*

[9] See, *State v. Robinson, supra* note 5; *State v. Glover, supra* note 3.

[10] *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[11] See, *State v. Golka, supra* note 2; *State v. McGhee, supra* note 2.

otherwise incompetent. Instead, he referenced general studies that have been done on juvenile brain development.

There is no legal requirement that a juvenile be evaluated to determine his or her ability to form specific intent. There is no allegation or even an indication that there was any question about Armendariz' competency or sanity. Trial counsel therefore did not perform deficiently in this regard.

*(ii) Intoxication Defense*

Armendariz alleged that his trial counsel did not advise him that if he had gone to trial, the jury could have considered the fact that he was under the influence of marijuana at the time of the crime in determining whether he had the requisite intent to commit murder. He alleged that there was insufficient evidence of premeditation to support a first degree murder charge and that had he known there was a chance of fighting the second degree murder charge, he would have proceeded to trial.

[9,10] Evidence of excessive intoxication by which the defendant is wholly deprived of reason may be submitted to the jury for it to consider whether in fact a crime has been committed or to determine the degree of the crime when the offense consists of several degrees.[12] When a defendant alleges in a postconviction action that he or she would have insisted on going to trial if counsel had informed him or her of an intoxication defense, a court need not take the self-serving declaration on its face.[13] Rather, the court can consider other factors, such as the likely penalties the defendant would face if convicted at trial, the relative benefit of the plea bargain, and the strength of the State's case.[14]

Here, Armendariz has failed to allege sufficient facts to make the baseline showing of excessive intoxication. He alleges he was under the influence of marijuana, but does not allege how much he had consumed, in what amount of time it was consumed, or how the consumption impacted him. The

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[12] See *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011).

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

[14] See *id.*

mere allegation that he was intoxicated is not sufficient to support an obligation on the part of trial counsel to inform him of the defense, which by definition is available only when the intoxication was so great that it "wholly deprived" the defendant of reason.[15] This allegation is without merit.

*(iii) Promise of 50-Year Sentence*

In his amended motion, Armendariz asserted that his trial counsel "advised him that if he pleaded guilty he would have . . . gotten not more than fifty years." He further alleged that when the court asked him prior to accepting the pleas whether anyone had made any promises to him about the sentences, he answered no because he was under the impression the court already knew the deal was to sentence him to no more than 50 years' imprisonment. He generally alleges that if he had been aware the sentence could have been greater than 50 years' imprisonment, he would not have entered his guilty pleas.

The files and records affirmatively disprove this assertion. Armendariz was specifically advised by the court that the possible penalty for second degree murder was a minimum of 20 years' imprisonment and a maximum of life imprisonment. He was further advised that the possible penalty for use of a weapon to commit a felony was a minimum of 5 years' imprisonment and a maximum of 50 years' imprisonment. He informed the court that he understood both. At sentencing, Armendariz spoke for himself, stating, "I know I'm going to prison, and I have come to terms with that. I just hope it's not for life. . . . Whether I do life or 20 years in prison, everything happens for a reason . . . ." This record, and in particular Armendariz' statements at sentencing, affirmatively refutes Armendariz' allegation that he relied on a promise of a sentence no greater than 50 years' imprisonment when entering his pleas. This allegation is without merit.

*(iv) Ballistics Expert*

Armendariz alleged that trial counsel was ineffective for failing to hire a ballistics expert to examine whether the gun

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[15] See *State v. Hotz, supra* note 12.

used in the killing was the type of gun that accidentally discharges. He contended that if trial counsel had taken this step to help support Armendariz' theory of the crime, he would have chosen to proceed to trial and give his account of how the killing occurred.

The evidence showed the gun was fired at close range to the back of the victim's head. There is a strong inference of an intentional, execution-style killing, and very little evidentiary support for an accidental killing. Moreover, the mere fact that this type of gun could be fired accidentally does not necessarily support a finding that it was not intentionally fired. Trial counsel was not deficient in failing to engage a ballistics expert to show that this gun could have been fired accidentally.

*(v) Combination of Pre-plea Hearing Ineffectiveness*

Armendariz' amended motion also generally alleged that the combination of all of the foregoing actions or inactions amounted to ineffective assistance of counsel. Restated, the combined effect of no evaluation of his ability to form the intent to kill, no advisement of the intoxication defense, the promise of no more than 50 years' imprisonment, and the failure to pursue the gun expert all resulted in his deciding to accept the plea instead of going to trial. Because counsel was not deficient in any of the alleged areas, no combined ineffective assistance of counsel occurred.

(b) Plea Hearing Issues

*(i) Rights Advisory Given by Trial Court*

In his amended motion, Armendariz claimed that the rights advisory given by the trial court at the time he entered his pleas was improper and that his trial counsel was ineffective for failing to object to it. Specifically, he alleged the rights advisory did not adequately inform him (1) of his right against self-incrimination or (2) that by entering the pleas, he was admitting to the facts alleged by the State as the factual basis of his pleas.

[11] In order for a defendant to knowingly and voluntarily enter a guilty plea, a court must inform the defendant of the following: (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.[16] Here, the record shows Armendariz was properly advised of all of the foregoing. His assertion that he did not fully understand the advisements does not and cannot negate the fact that they were properly given. Moreover, the record shows that at the time they were given, Armendariz acknowledged that he understood the charges and his rights. Trial counsel did not perform deficiently in failing to object, because the advisements given by the court were not improper.

### *(ii) Lack of Factual Basis for Pleas*

[12] When a guilty plea is entered, the record must establish a factual basis for the plea.[17] Armendariz alleges there was no factual basis for the pleas, because he did not admit that he went to the home to commit a robbery, and he contends his trial counsel was ineffective for failing to advise the court that he was not admitting to the robbery facts.

The record shows that trial counsel informed the court that Armendariz' position was that "[t]he actual facts would not support that there was going to be or that there was a robbery," even though he conceded the State had a witness that would testify about the robbery plan. Thus, trial counsel did inform the court Armendariz was not admitting there was a plan to rob the victim.

Moreover, there was a sufficient factual basis to support the charge of second degree murder. To support the charge of second degree murder, the factual basis had to show that the killing was done intentionally. Here, part of the factual basis was that the victim died of a single gunshot wound inflicted to the back of his head at close range. While there was no

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[16] See *State v. Watkins, supra* note 4.

[17] *State v. Lassek*, 272 Neb. 523, 723 N.W.2d 320 (2006).

direct evidence of the details of the killing, the location of the gunshot wound itself supports a reasonable inference that the killing was intentional. There is no merit to this allegation of ineffective assistance of counsel.

*(iii) Advisement of Charges*

Armendariz alleged in his postconviction motion that he was not advised by the court that he (1) had to have the specific intent to kill and (2) was entitled to effective assistance of counsel. He asserts that had he known either of those things, he would not have listened to his counsel and would not have entered his guilty pleas.

We have repeatedly articulated what rights a defendant has to be advised of in order to make the entry of a plea knowing and voluntary.[18] The record affirmatively shows that Armendariz was advised of those rights. This allegation is without merit.

(c) Sentencing Issues

Armendariz alleged that his trial counsel should have moved to withdraw the pleas before his sentences were imposed. In support of this allegation, he again asserts there was no factual basis for the pleas. He also asserts that, at sentencing, the State changed its theory of the case from one based on robbery to one based on an intentional killing, and that his trial counsel should have moved to withdraw the pleas after realizing the State's theory of the case had changed.

As noted, there was a factual basis for the pleas. Although that basis referenced a robbery plan, it also at least implicitly demonstrated that the killing was done intentionally. Further, the record shows that the State argued at sentencing consistent with the factual basis that was provided at the plea hearing. These allegations are without merit.

Armendariz also alleged that his trial counsel performed deficiently at sentencing by failing to advise the court of Neb. Rev. Stat. § 29-2204(3) (Reissue 2008). That statute provides in relevant part that except when a term of life is required by law, whenever the defendant is less than 18 years old at the

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[18] See *State v. Watkins, supra* note 4.

time of the crime, the court has the discretion to make a disposition under the juvenile code instead of imposing the statutory penalty for the crime. Armendariz was 17 years old at the time the crimes were committed.

Trial counsel did not raise § 29-2204(3) at sentencing. Assuming counsel was deficient in failing to so advise the court, there was no prejudice to Armendariz as a matter of law. In light of Armendariz' age, his prior criminal history, and the nature of the crimes at issue, there is no reasonable probability that the district court would have exercised its discretion to sentence Armendariz under the juvenile code instead of sentencing him as an adult offender.

(d) Appeal Issues

*(i) Failure of Trial Court to Properly Advise of Rights*

Armendariz alleged that his counsel was ineffective for failing to argue on appeal that the trial court failed to properly advise him of his rights at the plea hearing. This allegation is without merit, because the files and records affirmatively show that Armendariz was properly advised.

*(ii)* State v. Smith *and Sudden Quarrel*

Armendariz alleged that his appellate counsel was ineffective in failing to argue on appeal that his advice to Armendariz to plead guilty was poor, because it was based on an incorrect understanding of the difference between second degree murder and voluntary manslaughter. This argument is based on our decision in *State v. Smith*,[19] where we clarified the difference between second degree murder and voluntary manslaughter.

Armendariz entered his plea on July 26, 2011. *Smith* was decided on November 18, 2011. The district court reasoned that because the plea was entered prior to the time *Smith* was decided, trial counsel could not have been ineffective at the time he advised Armendariz to enter the plea.

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[19] *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011).

While this is true, it mischaracterizes the nature of Armendariz' claim. He asserts that his counsel was ineffective in failing to raise the *Smith* issue on appeal. The brief in Armendariz' direct appeal was filed on December 14, 2011, after *Smith* had been decided. Armendariz alleges that *Smith* was the law at the time of his direct appeal; that his appellate counsel was ineffective for failing to argue on direct appeal that had he known of *Smith*, he would not have advised Armendariz to enter the plea to second degree murder; and that therefore, Armendariz should be allowed to withdraw his plea in order to avoid a manifest injustice.

Armendariz has failed to allege facts that, if true, would show his appellate counsel was ineffective. In his amended motion, Armendariz alleges that the victim angered him when he refused to pay a debt. And "[t]hen, in a sudden motion and without saying anything," the victim "dove toward the drawers in front of him, where Armendariz knew [the victim] kept his gun, upon which Armendariz panicked and unknowingly fired his gun . . . ." Panic does not equal provocation, and therefore these allegations do not support a finding that there was provocation that excited Armendariz' passion and obscured his power of reasoning to the extent that he acted rashly and from passion, without due deliberation and judgment.[20] And because there are no facts alleged to support that the killing was the result of a sudden quarrel, appellate counsel could not have been deficient in failing to raise the possible applicability of *Smith* on direct appeal.

*(iii)* Miller v. Alabama

In *Miller v. Alabama*[21] the U.S. Supreme Court held that a juvenile cannot be subject to a mandatory sentence of life imprisonment without parole for a homicide. If applied to Armendariz, who was 17 years old at the time of the murder, *Miller* would have eliminated the possibility of mandatory life

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[20] See *id.*

[21] *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

imprisonment for a first degree murder charge. *Miller* was decided after Armendariz entered his plea. Because of this timing, the district court reasoned *Miller* could not be the basis of Armendariz' ineffective assistance of counsel claim.

But Armendariz did not allege that trial counsel was ineffective in failing to anticipate *Miller* at the time he advised Armendariz to enter the plea. Instead, he argues that his counsel was ineffective for failing to raise an appellate argument based on *Miller*.

Armendariz acknowledges that *Miller* was not actually decided until after his direct appeal was completed. He argues, however, that the U.S. Supreme Court had granted certiorari in *Miller* before counsel submitted his direct appeal brief. Armendariz alleges that his counsel acted in a deficient manner because he should have been aware of the potential impact of *Miller* on his case and should have asked that the appeal be stayed pending the outcome of *Miller*.

[13] Appellate counsel did not perform in a deficient manner by failing to ask that the appeal be stayed pending the outcome of *Miller*. The failure to anticipate a change in existing law does not constitute deficient performance.[22]

(e) Failure to Appoint Counsel

[14,15] Armendariz assigns that the district court erred in failing to appoint counsel to represent him in his postconviction action. Failure to appoint counsel in postconviction proceedings is not error in the absence of an abuse of discretion.[23] When the assigned errors in a postconviction petition before the district court contain no justiciable issues of law or fact, it is not an abuse of discretion to fail to appoint counsel for an indigent defendant.[24] Because the district court correctly found no justiciable issues, it did not abuse its discretion in failing to appoint counsel.

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[22] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[23] *State v. McGhee, supra* note 2; *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

[24] *State v. McGhee, supra* note 2; *State v. McLeod, supra* note 4.

### 3. Allegations in Brief

Armendariz makes various allegations of ineffective assistance of counsel in his brief that were not made in his amended motion. These include not filing a motion to transfer the case to juvenile court; failing to object to certain testimony at the preliminary hearing; not considering that he had been on drugs, drinking alcohol, and smoking marijuana the day of the crime; not investigating or challenging crime scene photographs; not preparing a transcript of the preliminary hearing; not filing any pleadings on his behalf; not moving to suppress evidence; and not challenging information in the presentence investigation report. Because these allegations were not raised in the amended motion, the district court could not have erred in failing to grant an evidentiary hearing on them, and we need not consider them on the merits.[25]

### 4. Allegations in Original Motion

[16] Armendariz alleges that the district court erred in not considering his original motion for postconviction relief in combination with his amended motion for postconviction relief. This argument is based on a fundamental misunderstanding of the nature of an amended pleading or motion. An amended pleading supersedes the original pleading, whereupon the original pleading ceases to perform any office as a pleading.[26] It is clear the district court did not err in limiting its analysis to the motion that was before it—the amended motion.

## V. CONCLUSION

For the foregoing reasons, the judgment of the district court denying postconviction relief without an evidentiary hearing is affirmed.

Affirmed.

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[25] See, *State v. Vanderpool*, 286 Neb. 111, 835 N.W.2d 52 (2013); *State v. Yos-Chiguil, supra* note 13.

[26] *In re Interest of Rondell B.*, 249 Neb. 928, 546 N.W.2d 801 (1996).

# Sanitary and Improvement District No. 1, Butler County, Nebraska, on behalf of itself and all others similarly situated, appellant and cross-appellee, v. Karey Adamy, county treasurer of Butler County, Nebraska, et al., appellees and cross-appellants.

# Sanitary and Improvement District No. 1, Butler County, Nebraska, on behalf of itself and all others similarly situated, appellant and cross-appellee, v. Beverly Davis, county treasurer of Adams County, Nebraska, et al., appellees and cross-appellants.

858 N.W.2d 168

Filed January 16, 2015. Nos. S-13-1091, S-13-1092.

1. **Motions to Dismiss: Appeal and Error.** A district court's grant of a motion to dismiss is reviewed de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.
3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
4. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
5. **Constitutional Law: Immunity: Waiver.** Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.
6. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature. As such, it acts purely as an agent of the state and is entitled to immunity from suit.
7. **Constitutional Law: Immunity: Waiver.** Neb. Const. art. V, § 22, provides that the state may sue and be sued and that the Legislature shall provide by law in what manner and in what courts suits shall be brought. This allows the state to lay aside its sovereignty if the Legislature should so choose.
8. **Statutes: Immunity.** Statutes authorizing suits against the state are to be strictly construed because such statutes are in derogation of the state's sovereign immunity.

9. **Immunity: Waiver.** Waiver of sovereign immunity will be found only where stated by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.
10. **Public Officers and Employees: Immunity.** Sovereign immunity has potential applicability to suits brought against state officials in their official capacities only. It does not apply when state officials are sued in their individual capacities—that is, when a suit seeks to hold state officials personally liable.
11. **Complaints: Public Officers and Employees.** In order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the complaint; otherwise, it will be assumed that the defendant is being sued only in his or her official capacity.
12. **Actions: Public Officers and Employees: Immunity: Appeal and Error.** In reviewing actions against state officials, a court must determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity.
13. **Actions: Parties.** In an action for the recovery of money, the state is the real party in interest.
14. **Actions: Parties: Public Officers and Employees.** Official-capacity actions for prospective relief are not treated as actions against the state.
15. **Sanitary and Improvement Districts: Legislature: Political Subdivisions.** A sanitary and improvement district is a legislative creature, a political subdivision of the State of Nebraska.

Appeals from the District Court for Cass County: JEFFREY J. FUNKE, Judge, and RANDALL L. REHMEIER, District Judge, Retired. Reversed and remanded with directions.

Raymond E. Baker, of Law Offices of Raymond E. Baker, P.C., Jacqueline M. De Wispelare, of Law Office of Jacqueline M. De Wispelare, L.L.C., and Michael W. Heavey, of Colombo & Heavey, P.C., for appellant.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellees Karey Adamy et al.

Donald W. Kleine, Douglas County Attorney, and Malina Dobson for appellees John Ewing et al.

Edmond E. Talbot III, Deputy Washington County Attorney, for appellees Marjorie Hoier and Washington County.

Joe Kelly, Lancaster County Attorney, and Brittany L. Behrens for appellees Andy Stebbing and Lancaster County.

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

HEAVICAN, C.J.

## INTRODUCTION

Sanitary and Improvement District No. 1, Butler County, Nebraska (SID #1), filed two class action lawsuits, both in Cass County, Nebraska. Both suits alleged that defendant county treasurers unlawfully deducted an incorrect percentage of assessments collected on behalf of SID #1 as well as other similarly situated sanitary and improvement districts. Defendant county treasurers in each suit filed motions to dismiss for failure to state a claim. Those motions were granted, and the complaints were dismissed. SID #1 appeals. We consolidated these appeals for oral argument and disposition. We reverse, and remand with directions.

## FACTUAL BACKGROUND

These appeals involve two class action lawsuits, both filed in Cass County. Each will be discussed in turn.

*Appeal in Case No. S-13-1091.*

SID #1 filed its first class action complaint on December 21, 2012, against various county treasurers. In that complaint, SID #1 alleged that the county treasurers collected assessments of municipal improvements on behalf of SID #1 and

> collected, for their services rendered, a sum of money equal to two percent (2%) of the funds they received on such special assessments, rather than a sum equal to one and one half percent (1 ½ %) of the special assessments collected, as is provided by Neb. Rev. Stat. §33-114[(4) (Reissue 2008)].

In its complaint, SID #1 sought damages, attorney fees, and costs. SID #1 also sought class action status, alleging that other sanitary and improvement districts had also been subjected to similar unlawful deductions and that the number of the proposed class was so numerous as to make it impracticable to bring each class member before the court. SID #1 further alleged that the assessments at issue were made for the

purposes listed in Neb. Rev. Stat. § 31-744 (Reissue 2008) and that such constituted "municipal improvements."

*Appeal in Case No. S-13-1092.*

SID #1 filed its second class action complaint on March 28, 2013. This complaint alleged that defendant county treasurers collected municipal taxes on behalf of SID #1 and "collected, for their services rendered, a sum of money equal to two percent (2%) of the funds they received on such taxes, rather than a sum equal to one percent (1%) of the taxes, as is provided by Neb. Rev. Stat. §33-114(3)." This complaint sought the same relief as the appeal in case No. S-13-1091, including class action status.

The various defendant county treasurers filed motions to dismiss. Those motions were granted, with the district court similarly concluding in two separate orders that (1) the counties had waived sovereign immunity and (2) SID #1 was not a municipal corporation and thus could not make assessments for municipal improvements or municipal taxes. As such, the district court concluded that SID #1 failed to state a claim upon which relief could be granted. SID #1 appeals. Defendant county treasurers cross-appeal.

## ASSIGNMENTS OF ERROR

In case No. S-13-1091, SID #1 assigns, restated and consolidated, that the district court erred in finding that (1) the sanitary and improvement districts are not municipal corporations and therefore do not create municipal improvements and (2) the statutes creating sanitary and improvement districts do not provide for the authority to enact legislation.

Defendant county treasurers cross-appeal and assign that the district court erred in (1) rejecting their claim of sovereign immunity and (2) failing to dismiss for lack of subject matter jurisdiction and personal jurisdiction.

In case No. S-13-1092, SID #1 assigns, again restated and consolidated, that the district court erred in finding that (1) the sanitary and improvement districts are not municipal corporations and that therefore their assessments do not

constitute municipal taxes and (2) the statutes creating sanitary and improvement districts do not provide for the authority to enact legislation.

On cross-appeal, defendant county treasurers assign that the district court erred in (1) rejecting their claim of sovereign immunity and (2) failing to dismiss for lack of subject matter jurisdiction and personal jurisdiction.

## STANDARD OF REVIEW

[1-3] A district court's grant of a motion to dismiss is reviewed de novo.[1] When reviewing an order dismissing a complaint, the appellate court accepts as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusion.[2] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[3]

[4] To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.[4]

## ANALYSIS

*Immunity.*

We turn first to the county treasurers' cross-appeal. In that cross-appeal, the county treasurers allege the district court

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[1] *Bruno v. Metropolitan Utilities Dist.*, 287 Neb. 551, 844 N.W.2d 50 (2014).

[2] *Id.*

[3] *Id.*

[4] *Id.*

erred in finding that under *Hoiengs v. County of Adams*,[5] "the respective counties' sovereign immunity ha[d] been waived."

We recently clarified the principles of sovereign immunity in suits against the state and in official-capacity suits against state agents in *Anthony K. v. State*[6] and *Anthony K. v. Nebraska Dept. of Health & Human Servs.*[7] "The immunity of states from suit is a fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution and which they retain today."[8]

[5,6] Thus, under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.[9] A county is a political subdivision of the state and has subordinate powers of sovereignty conferred by the Legislature.[10] As such, it acts purely as an agent of the state[11] and is entitled to immunity from suit.[12]

[7] But Neb. Const. art. V, § 22, provides: "The state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought." This allows the state to lay aside its sovereignty if the Legislature should so choose.[13]

The district court relied upon *Hoiengs*, wherein this court noted that the state's immunity was waived by Neb. Rev. Stat. § 25-21,206 (Reissue 1989),[14] which allowed the state to be sued in any matter "'founded upon or growing out of a contract, express or implied, originally authorized or

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[5] *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

[6] *Anthony K. v. State, ante* p. 523, 855 N.W.2d 802 (2014).

[7] *Anthony K. v. Nebraska Dept. of Health & Human Servs., ante* p. 540, 855 N.W.2d at 788 (2014).

[8] *Anthony K. v. State, supra* note 6, *ante* at 536, 855 N.W.2d at 812.

[9] *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010).

[10] *State ex rel. Steinke v. Lautenbaugh*, 263 Neb. 652, 642 N.W.2d 132 (2002).

[11] *Id.*

[12] *Anthony K. v. Nebraska Dept. of Health & Human Servs., supra* note 7.

[13] See *Hoiengs v. County of Adams, supra* note 5.

[14] See § 25-21,206 (Reissue 2008).

subsequently ratified by the Legislature, or founded upon any law of the state.'"[15]

[8,9] Statutes authorizing suits against the state are to be strictly construed because such statutes are in derogation of the state's sovereign immunity.[16] Waiver of sovereign immunity will be found only where stated "'"by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."'"[17]

In part, SID #1 seeks declaratory relief, but we have held that the declaratory judgment statutes are insufficient to waive the state's immunity.[18] As such, another source of waiver, if any, must be found.

SID #1 argues that contract theory presented in *Hoiengs* is applicable here. We disagree. The contract in *Hoiengs* was based upon the employment relationship, which is plainly a contractual one. The provisions of Neb. Rev. Stat. § 33-114 (Reissue 2008) at issue here simply allow county treasurers a fee in exchange for collecting certain assessments and taxes. We find no merit to SID #1's contention. To find a contract here would potentially result in the finding of a contract, and a waiver of immunity, with every statutory duty created. Such would clearly not be in keeping with the proposition that statutes authorizing waiver be strictly construed and found only when expressly stated.

Beyond this contract theory, SID #1 directs us to no other provision of law which would show any waiver, let alone the express language of waiver required under Nebraska law. We conclude there has been no waiver of the counties' sovereign immunity in these cases.

[10] In addition to filing suit against the individual counties, SID #1 filed suit against the county treasurers of those

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[15] *Hoeings v. County of Adams, supra* note 5, 245 Neb. at 890, 516 N.W.2d at 235.

[16] *Hoeings v. County of Adams, supra* note 5.

[17] *Wiseman v. Keller*, 218 Neb. 717, 720, 358 N.W.2d 768, 770 (1984).

[18] *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993).

counties. As we recently noted in *Anthony K. v. Nebraska Dept. of Health & Human Servs.*, "sovereign immunity has potential applicability to suits brought against state officials in their official capacities only. It does not apply when state officials are sued in their individual capacities—that is, when a suit seeks to hold state officials personally liable."[19]

[11] SID #1 did not explicitly state whether those suits were filed against the county treasurers in their official capacities or individual capacities. This court has held that in order to sue a public official in his or her individual capacity, a plaintiff must expressly and unambiguously state so in the complaint; otherwise, it will be assumed that the defendant is being sued only in his or her official capacity.[20] We therefore conclude that the county treasurers have been sued in their official capacities.

[12] "'Official-capacity suits . . . "generally represent only another way of pleading an action against an entity of which an officer is an agent."'"[21] As such, in reviewing actions against state officials, we must "'determine whether an action against individual officials sued in their official capacities is in reality an action against the state and therefore barred by sovereign immunity.'"[22]

[13] In an action for the recovery of money, the state is the real party in interest, because "'"a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents."'"[23] As such, if not waived, sovereign immunity bars claims for money damages even where

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[19] *Anthony K. v. Nebraska Dept. of Health & Human Servs., supra* note 7, *ante* at 546-47, 855 N.W.2d at 795.

[20] *Holmstedt v. York Cty. Jail Supervisor*, 275 Neb. 161, 745 N.W.2d 317 (2008). See *Johnson v. Outboard Marine Corp.*, 172 F.3d 531 (8th Cir. 1999).

[21] *Anthony K. v. Nebraska Dept. of Health & Human Servs., supra* note 7, *ante* at 547, 855 N.W.2d at 795.

[22] *Id.*

[23] *Id.*

the plaintiff has named, as nominal defendants, individual state officials.[24]

[14] Official-capacity actions for prospective relief are treated differently, and are not treated as actions against the state.[25] "Where a court 'commands a state official to do nothing more than refrain from violating [the] law,'" the state official is not the state for purposes of sovereign immunity.[26]

The counties in this case are protected from suit by sovereign immunity. To the extent SID #1 seeks money damages from the county treasurers acting in their official capacities, those suits are also viewed as against the county and are barred by sovereign immunity.

SID #1 also seeks prospective relief in the form of a declaration that the county treasurers have been incorrectly interpreting and applying § 33-114. To the extent this prospective relief is sought, it is not barred by principles of immunity.

We also note that we have considered, but reject, SID #1's contention that the counties are not entitled to immunity from suit against SID #1 because both entities are political subdivisions. SID #1 cites to no authority on this point which we find persuasive.

*Assessments for Municipal Purpose or Municipal Taxes.*

We therefore turn to the merits of this litigation: whether the county treasurers correctly deducted a 2-percent fee from assessments collected on behalf of SID #1. These appeals center on the correct interpretation of the term "municipal" as used in § 33-114(3) and (4). Section 33-114 provides:

> Each county treasurer shall receive for and on behalf of the county for services rendered to other governmental subdivisions and agencies, when fees for services rendered by him or her are not otherwise specifically provided, the following fees: (1) On all sums of money

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[24] *Id.*

[25] *Id.*

[26] *Id.* See *Doe v. Board of Regents, supra* note 9.

> collected by him or her for each fiscal year, two percent of the sums so collected; (2) for the collection of all sums of money, general or bonded, of drainage, irrigation, or natural resources districts, one percent of the sums so collected; (3) for the collection of all sums of money for municipal taxes, general or special, including money for bond sinking fund or bond interest fund and school money, one percent of the sums so collected; and (4) for the collection of all sums of money for special assessments for municipal improvements, one and one-half percent of the sums so collected.

Here, the county treasurer deducted a 2-percent fee under § 33-114(1), but SID #1 argues that the appropriate fee was actually 1 percent for municipal taxes under § 33-114(3) and 1½ percent for municipal assessments under § 33-114(4). The district court concluded that the 2-percent fee was appropriate, because SID #1 was not a municipal corporation and that thus, its taxes and assessments were not municipal for purposes of § 33-114(3) and (4). These appeals present the question of whether taxes and improvements by a sanitary and improvement district are municipal under § 33-114.

[15] A sanitary and improvement district is a legislative creature, a political subdivision of the State of Nebraska.[27] Sanitary and improvement districts have been termed "quasi-municipal corporations" by some commentators and courts.[28] In fact, this court just recently referenced a sanitary and improvement district's status as a limited-purpose, quasi-municipal corporation when considering whether an interlocal agency was a quasi-municipal corporation or a private corporation.[29] Nevertheless, this court has concluded that for certain limited purposes involving the payment of warrants under

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[27] *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986). See, also, *S.I.D. No. 95 v. City of Omaha*, 221 Neb. 272, 376 N.W.2d 767 (1985).

[28] *Rexroad, Inc. v. S.I.D. No. 66, supra* note 27.

[29] *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

statute, a sanitary and improvement district was a municipal corporation.[30]

But a determination of whether a sanitary and improvement district is a municipal corporation is not necessary to our disposition of these appeals. Rather, § 33-114 requires not that the assessments or taxes be assessed by a municipal corporation, but only that those assessment or taxes be "municipal."

Black's Law Dictionary defines "municipal" as "[o]f, relating to, or involving a city, town, or local governmental unit."[31] This definition suggests that if a tax or improvement is "municipal" in nature, it must be made by a city, town, or local government.

A sanitary and improvement district is clearly not a city or town, but it is a local governmental unit. Contrary to the district court's conclusion, the board of trustees of a sanitary and improvement district has the "power to pass all necessary ordinances, orders, rules, and regulations for the necessary conduct of its business and to carry into effect the objects for which the sanitary and improvement district was formed."[32]

Sanitary and improvement districts have other powers that suggest they are local governmental units. Sanitary and improvement districts have the power to acquire property by purchase or condemnation, though that power is tempered by the need to gain approval for the acquisition by the municipality or county having zoning jurisdiction over the subject property.[33] Members of the board of trustees for any given sanitary and improvement district are elected by special election,[34] which is held by the election commissioner or county clerk of the local county.[35] As noted above, sanitary

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[30] *In re Application of S.I.D. No. 65*, 219 Neb. 647, 365 N.W.2d 456 (1985).

[31] Black's Law Dictionary 1175 (10th ed. 2014).

[32] Neb. Rev. Stat. § 31-733(3) (Reissue 2008). See, also, Neb. Rev. Stat. § 31-742 (Reissue 2008).

[33] Neb. Rev. Stat. § 31-736 (Reissue 2008); Neb. Rev. Stat. § 31-737 (Reissue 2008).

[34] Neb. Rev. Stat. § 31-735(1) (Cum. Supp. 2014).

[35] § 31-735(3).

and improvement districts have the power to levy taxes and issue bonds[36] and to enter into contracts.[37]

We noted in *Hollstein v. First Nat. Bank of Aurora*[38] that the primary function of a sanitary and improvement district is to install and maintain public improvements such as streets, sewers, utility lines, and other improvements associated with residential or commercial subdivisions. The statutes allowing for the creation and procedures surrounding sanitary and improvement districts clearly provide such districts with the ability to make such improvements.[39]

A sanitary and improvement district has many of the powers typically associated with a local governmental unit. If a city or town made the same improvements or levied the same tax alleged in these cases, such would undoubtedly be considered municipal in nature.

Moreover, as noted above, there is nothing in the plain language of § 33-114 that requires these improvements to be made or taxes to be levied by a municipal corporation. Rather, the statute simply requires the tax or improvement to be "municipal." This language is plain and unambiguous, and not open to further interpretation.[40]

## CONCLUSION

A sanitary and improvement district can levy municipal taxes and make municipal improvements. As such, we conclude that SID #1 has stated a cause of action under § 33-114. We reverse, and remand with directions to grant prospective declaratory relief.

REVERSED AND REMANDED WITH DIRECTIONS.

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[36] Neb. Rev. Stat. § 31-739 (Reissue 2008). See, also, Neb. Rev. Stat. §§ 31-755 to 31-759 (Reissue 2008).

[37] Neb. Rev. Stat. § 31-740 (Reissue 2008).

[38] *Hollstein v. First Nat. Bank of Aurora*, 231 Neb. 711, 437 N.W.2d 512 (1989).

[39] § 31-740; § 31-744.

[40] *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014).

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

861 N.W.2d 681

Filed January 16, 2015. No. S-14-089.

Original action. Judgment of disbarment.

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

PER CURIAM.

## INTRODUCTION

This case is before the court on the voluntary surrender of license filed by Douglas D. White, respondent, on October 31, 2014. The court accepts respondent's voluntary surrender of his license and enters an order of disbarment.

## STATEMENT OF FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 20, 2001. Formal charges were filed against respondent on January 31, 2014.

On October 31, 2014, respondent filed a voluntary surrender of his license, in which he stated that he has received the formal charges that have been filed against him. He also stated that he is currently an inactive member of the Nebraska State Bar Association and that he has not paid his mandatory dues for 2014. In the voluntary surrender, respondent stated that he does not challenge or contest the truth of the allegations being made against him. He further stated that he freely, knowingly, and voluntarily waived his right to notice, appearance, or hearing prior to the entry of an order of disbarment and consented to the entry of an immediate order of disbarment.

## ANALYSIS

Neb. Ct. R. § 3-315 of the disciplinary rules provides in pertinent part:

> (A) Once a Grievance, a Complaint, or a Formal Charge has been filed, suggested, or indicated against a

> member, the member may voluntarily surrender his or her license.
>
> (1) The voluntary surrender of license shall state in writing that the member knowingly admits or knowingly does not challenge or contest the truth of the suggested or indicated Grievance, Complaint, or Formal Charge and waives all proceedings against him or her in connection therewith.

Pursuant to § 3-315 of the disciplinary rules, we find that respondent has voluntarily surrendered his license to practice law and knowingly does not challenge or contest the truth of the allegations made against him. Further, respondent has waived all proceedings against him in connection therewith. We further find that respondent has consented to the entry of an order of disbarment.

## CONCLUSION

Upon due consideration of the court file in this matter, the court finds that respondent has stated that he freely, knowingly, and voluntarily admits that he does not contest the allegations being made against him. The court accepts respondent's voluntary surrender of his license to practice law, finds that respondent should be disbarred, and hereby orders him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent shall forthwith comply with all terms of Neb. Ct. R. § 3-316 (rev. 2014) of the disciplinary rules, and upon failure to do so, he shall be subject to punishment for contempt of this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and Neb. Ct. R. §§ 3-310(P) (rev. 2014) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

# MATTHEW M. STEINHAUSEN, DOING BUSINESS AS STEINHAUSEN HOME INSPECTIONS LLC, APPELLANT, V. HOMESERVICES OF NEBRASKA, INC., ET AL., APPELLEES.

857 N.W.2d 816

Filed January 23, 2015. No. S-13-1103.

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. **Attorney and Client: Actions.** A legal proceeding in which a party is represented by a person not admitted to practice law is a nullity and is subject to dismissal.
4. **Attorneys at Law: Attorney and Client.** A licensed member of the Nebraska bar must represent a limited liability company in the courts of this state.
5. **Attorney and Client: Parties: Appeal and Error.** When a layperson appeals both in his own behalf and on behalf of a business entity, an appellate court dismisses the appeal as to the entity but considers the merits of the appeal as to the errors assigned by the layperson in his own behalf.
6. **Actions: Pleadings: Parties.** The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.
7. **Courts: Actions: Parties: Complaints: Pleadings: Records.** If the capacity in which a party sues is doubtful, a court may examine the complaint, the pleadings as a whole, and even the entire record.
8. **Actions: Pleadings: Parties.** When the pleadings show a cause of action by a person in his individual capacity, a court may reject words indicating representative capacity.
9. **Libel and Slander: Negligence.** A defamation claim has four elements: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.
10. **Libel and Slander.** A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.
11. **Libel and Slander: Proof.** The threshold question in a defamation suit is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion.
12. **Constitutional Law: Libel and Slander.** To distinguish fact from opinion in a defamation claim, courts apply a totality of the circumstances test. Relevant

factors include (1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false.

13. **Actions: Libel and Slander.** Rhetorical hyperbole—language that, in context, is obviously understood as an exaggeration rather than as a statement of literal fact—is not actionable.
14. ____: ____. If a plaintiff asserts claims of both libel and false light invasion of privacy based on the same statement, the false light claim is subsumed within the defamation claim and is not separately actionable.
15. **Torts: Intent: Proof.** To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
16. **Torts: Corporations.** Members of a limited liability company cannot, in their own behalf, maintain a claim for tortious interference with the business relationships or expectancies of the company.
17. **Trial: Evidence: Appeal and Error.** In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.
18. ____: ____: ____. The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed in part, and in part reversed and remanded with directions.

Matthew M. Steinhausen, pro se.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellee Shelly J. Nitz.

Michael D. Reisbig and Brian D. Nolan, of Nolan, Olson & Stryker, P.C., L.L.O., for appellees HomeServices of Nebraska, Inc., and Woods Brothers Realty.

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

CONNOLLY, J.

## I. SUMMARY

Shelly J. Nitz is a real estate agent affiliated with HomeServices of Nebraska, Inc. (HomeServices). Matthew M.

Steinhausen is a home inspector who inspected a house that one of Nitz' clients owned. More than 2 years after the inspection, Nitz sent an e-mail to HomeServices real estate agents and employees stating that Steinhausen was a "[t]otal idiot." Steinhausen, proceeding pro se, sued Nitz and HomeServices, alleging claims of libel, false light invasion of privacy, and tortious interference with a business relationship or expectancy. The district court sustained Nitz' and HomeServices' motions for summary judgment, reasoning that a qualified privilege protected the e-mail and that the evidence failed to show that Steinhausen had a business relationship or expectancy with Nitz or HomeServices. We affirm the court's judgment as it relates to the claims asserted by Steinhausen in his personal capacity. Because Steinhausen's attempt to also prosecute this action for a business entity is a nullity, we reverse, and remand with directions to vacate the judgment as it relates to claims brought for the entity.

## II. BACKGROUND

### 1. Factual Background

HomeServices is a brokerage firm whose business includes real estate sales. HomeServices does business as HOME Real Estate and Woods Brothers Realty, both of which are trade names owned by HomeServices and "not corporate entities." Nitz is a real estate agent affiliated with HomeServices.

Steinhausen began performing home inspections in 1999. After operating the business as a sole proprietorship, Steinhausen formed Steinhausen Home Inspections LLC (SHI) in 2004. Steinhausen is the sole member of SHI and its registered agent. SHI's primary business is home inspections, but it also performs commercial property inspections and offers consulting services.

In 2008, Nitz represented the seller of a home in Seward, Nebraska. A potential buyer exercised her right to a home inspection, and Steinhausen performed the inspection. Nitz testified that some of the items in Steinhausen's report "were unquestionably beyond the scope of a typical home inspection." Nitz felt that Steinhausen's comments on "non-condition related items" were "likely to tear apart transactions when

property condition was not a real issue, to the detriment of a seller."

HomeServices provides its real estate agents with access to a company e-mail network. The network uses "group email lists," or listservs, including the "HRE-HOTSHEET" and "WBR-HOTSHEET" lists (collectively the Hotsheets). The Hotsheets include the e-mail addresses of current HomeServices real estate agents and employees and are accessed through their individual e-mail accounts.

HomeServices' vice president stated that agents use the Hotsheets as a forum to share information and opinions on topics related to the real estate business:

> It is common for HomeServices Sales Associates to use the Hotsheets to send emails to other HomeServices Sales Associates to obtain information, market properties, and discuss current issues or questions on which they share a common interest, for example, questions or comments about particular aspects of real estate transactions, availability of properties and developments, real estate rules, regulations and practices and how they relate to real estate transactions, or questions or comments about vendors who work in the real estate sales community.

Nitz averred that, in her experience, HomeServices agents use the Hotsheets to communicate amongst themselves their opinions of other Realtors and vendors in the real estate business.

On January 14, 2011, Nitz posted a reply to an e-mail on the Hotsheets with the subject "RE: Steinhausen inspections." Nitz' e-mail stated in its entirety: "He did an inspection in Seward for the agent that sold one of my listings. I will never let him near one of my listings ever again!!! Total idiot."

The record shows that at least two other HomeServices agents sent e-mails on the same subject to the Hotsheets before Nitz sent her e-mail. The author of the first e-mail stated, "IN MY OPINION," Steinhausen was not qualified to inspect residential structures. The author of the second e-mail stated that inspections performed by Steinhausen were poor and that Steinhausen addressed issues unrelated to structural soundness.

After Nitz sent her e-mail, another HomeServices agent replied that Steinhausen was "not professional."

Nitz stated that she "did not have any specific facts in mind" when she wrote her e-mail. Nitz did "recall[] having a generally negative impression of . . . Steinhausen and the inspection he conducted" and used the phrase "'total idiot'" to "express that generally negative opinion."

At some point in January 2011, Steinhausen received an anonymous letter in the U.S. mail that included a copy of Nitz' e-mail. Steinhausen testified that the letter had no return address and that he did not know who had sent the letter.

After requesting a retraction from Nitz, Steinhausen filed a complaint with the State Real Estate Commission in February 2011 alleging that Nitz' e-mail violated Neb. Rev. Stat. § 81-885.24(22) and (29) (Cum. Supp. 2010). Section 81-885.24 authorizes the commission to discipline real estate brokers who commit certain unfair trade practices, including, under subsection (22), "[m]aking any substantial misrepresentations" and, under subsection (29), "[d]emonstrating negligence, incompetency, or unworthiness to act as a broker . . . ." Nitz signed a consent order with the commission that determined that she had violated § 81-885.24(29). The commission ordered Nitz to complete 6 hours of ethics courses.

Steinhausen claimed that Nitz' January 14, 2011, e-mail interfered with his business relationships with HomeServices, agents of HomeServices, and prospective clients. In particular, Steinhausen testified that several HomeServices agents dissuaded their clients from contracting with SHI. Steinhausen estimated that he suffered $30,000 per year in lost business following Nitz' e-mail and would continue to suffer the same losses for the next 25 years.

Steinhausen testified that Nitz' e-mail and its aftermath also weighed on him personally. According to Steinhausen, he "was physically ill" after learning about Nitz' e-mail and "went through a period of depression, anger, [and] sadness." Steinhausen testified that he had trouble sleeping but that he had not visited a medical doctor or been diagnosed with depression.

### 2. Procedural Background

Steinhausen—who testified that he was not represented by a lawyer—filed a "Pro Se Civil Complaint" in January 2012, identifying himself as the "Owner / Operator" of "Steinhausen Home Inspections." The caption identified the plaintiff as "MATTHEW M. STEINHAUSEN D/B/A STEINHAUSEN HOME INSPECTIONS, LLC," and the defendants as "HOMSERVICES OF NEBRASKA, INC. and SHELLY J. NITZ and WOODS BROTHERS REALTY." The complaint—stating claims of libel, false light invasion of privacy, and tortious interference with a business relationship or expectancy—appears to allege wrongs committed against both Steinhausen and SHI. For example, the opening sentence states that the "Plaintiff" is "Matthew M. Steinhausen, a small business owner residing in rural Lincoln," and alleges that the defendants "publicly placed the Plaintiff in a false light." The same paragraph, however, contains allegations that Nitz "defamed Steinhausen Home Inspections" and that HomeServices and Woods Brothers Realty "creat[ed] an environment of discrimination towards Steinhausen Home Inspections, LLC." The requested relief includes damages for "economic loss" and "emotional suffering" and an injunction prohibiting HomeServices "from discrimination of Steinhausen Home Inspections."

The defendants filed a joint answer that generally denied the allegations in the complaint. The defendants affirmatively alleged that Nitz' statement was opinion, Nitz' statement was protected by a qualified privilege, and Woods Brothers Realty is a trade name owned by HomeServices and, therefore, not a proper party.

The trial court sustained the motions of Nitz and HomeServices for summary judgment against each of the claims in the complaint. The court noted that Woods Brothers Realty is a "trade name[] and not [a] corporate entit[y]." As to the libel claim, the court held that a qualified privilege protected Nitz' e-mail and that she had not abused the privilege. The court held that the false light claim based on the same e-mail was "'subsumed within the defamation claim.'" For the claimed interference with business relationships or expectancies, the court held that the evidence showed that

Steinhausen did not have a valid business relationship or expectancy with either Nitz or HomeServices.

Steinhausen appealed, and the caption on the cover of his brief identified the appellant as "MATTHEW M. STEINHAUSEN; D/B/A Steinhausen Home Inspections, LLC." The notice of appeal states that the party appealing is "Plaintiff, Matthew M. Steinhausen." The Nebraska Court of Appeals ordered the "Appellant" to show cause why it should not dismiss the appeal because SHI had not appeared by an attorney licensed to practice law in Nebraska. After the parties submitted responsive briefs, the court determined that cause had been shown and that the appeal could proceed. But the court cautioned that Steinhausen "may only proceed 'pro se' with regard to claims on his own behalf as an individual, and not on behalf of Steinhausen Home Inspections, LLC." After the Court of Appeals' order, we moved the appeal to our docket under our statutory authority to regulate the caseloads of the appellate courts of the state.

## III. ASSIGNMENTS OF ERROR

Steinhausen assigns, restated, that the district court erred by determining that (1) Nitz' e-mail was privileged, (2) the privilege was not abused by actual malice, (3) Steinhausen had no valid business relationship or expectancy, (4) the false light invasion of privacy claim was subsumed within the libel claim, and (5) certain exhibits offered by Steinhausen were not admissible. Steinhausen also assigns that the court erred by "not properly applying the tests or elements of 'protected opinion,'" although the court did not decide whether Nitz' e-mail was capable of defamatory meaning.

## IV. STANDARD OF REVIEW

[1,2] We will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from the facts and that the moving party is entitled to judgment as a matter of law.[1] In

[1] *deNourie & Yost Homes v. Frost, ante* p. 136, 854 N.W.2d 298 (2014).

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

## V. ANALYSIS

### 1. Steinhausen's Capacity to Appeal

HomeServices argues that "Steinhausen's appeal was made on behalf of only one appellant, the business, as opposed to the business and himself individually."[3] HomeServices concedes that Steinhausen could raise on appeal "claims which he holds on behalf of himself individually," but contends that "[h]is Complaint alleges no harm against him personally . . . ."[4] Because Steinhausen is not licensed to practice law in Nebraska, HomeServices concludes that the "appeal is a nullity and should be dismissed."[5] Steinhausen states in his response to the show cause order that he, and not SHI—which he refers to as "the professional identity for individual home inspector Matthew M. Steinhausen"—is the sole party to the appeal. Steinhausen explains that he merely "included his business name on the complaint to clarify his position as the individual owner / operator of Steinhausen Home Inspections, LLC."[6]

#### (a) Representation of a Business Entity by a Layperson

Persons not licensed to practice law in Nebraska are prohibited from prosecuting an action or filing papers in the courts of this state on behalf of another. Neb. Rev. Stat. § 7-101 (Reissue 2012) provides:

> [N]o person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or

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[2] *Id.*

[3] Brief for appellee HomeServices at 35.

[4] *Id.*

[5] *Id.*

[6] Reply brief for appellant at 14.

> subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding.

But, under Neb. Rev. Stat. § 7-110 (Reissue 2012), "[p]laintiffs shall have the liberty of prosecuting, and defendants shall have the liberty of defending, in their proper persons." We have explained that the phrase "'in their proper persons'" means "in their own persons."[7]

The prohibition of the unauthorized practice of law is not for the benefit of lawyers.[8] Prohibiting the unauthorized practice of law protects citizens and litigants in the administration of justice from the mistakes of the ignorant on the one hand and the machinations of the unscrupulous on the other.[9]

[3] A legal proceeding in which a party is represented by a person not admitted to practice law is a nullity and is subject to dismissal.[10] An individual can represent himself in legal proceedings in his own behalf, but one who is not an attorney cannot represent others.[11] And the rule that a layperson cannot appear in court in a representative capacity cannot be circumvented by subterfuge.[12]

The prohibition on representation by a layperson applies to entities. For example, we have held that a corporation,[13] a

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[7] *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 849, 83 N.W.2d 904, 909 (1957).

[8] *State ex rel. Comm. on Unauth. Prac. of Law v. Hansen*, 286 Neb. 69, 834 N.W.2d 793 (2013).

[9] *Id.*

[10] *Id.*

[11] *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992).

[12] *Niklaus v. Abel Construction Co., supra* note 7, citing *Bay Bar Ass'n v. Finance System, Inc.*, 345 Mich. 434, 76 N.W.2d 23 (1956).

[13] See *Niklaus v. Abel Const. Co., supra* note 7.

partnership,[14] and a trust[15] must be represented by a member of the bar. We have never addressed whether the same rule applies to a limited liability company (LLC), which is "a hybrid of the partnership and corporate forms."[16] But other courts have held that LLC's must also be represented in court by a licensed attorney,[17] including LLC's with a single member.[18]

[4] We conclude that a licensed member of the Nebraska bar must represent an LLC in the courts of this state. An LLC is an entity distinct from its members.[19] It has the capacity to sue and be sued in its own name,[20] but like a corporation, an LLC is an abstraction, and "abstractions cannot appear pro se."[21] Furthermore, the right to conduct business as an LLC confers a significant privilege on its members: limited liability.[22] The Legislature's grace "'carries with it obligations one of which is to hire a lawyer if you want to sue or defend on behalf of the entity.'"[23]

We decline to recognize an exception for LLC's with a single member. Because Steinhausen is the sole member of

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[14] *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996).

[15] *Black Acres Pure Trust v. Fahnlander*, 233 Neb. 28, 443 N.W.2d 604 (1989). See, also, *Turbines Ltd. v. Transupport, Inc.*, 19 Neb. App. 485, 808 N.W.2d 643 (2012); *Goodwin v. Hobza*, 17 Neb. App. 353, 762 N.W.2d 623 (2009); *Galaxy Telecom v. SRS, Inc.*, 13 Neb. App. 178, 689 N.W.2d 866 (2004); *Waite v. Carpenter, supra* note 11.

[16] *Lattanzio v. COMTA*, 481 F.3d 137, 140 (2d Cir. 2007).

[17] E.g., *Smith v. Rustic Home Builders, LLC*, 826 N.W.2d 357 (S.D. 2013).

[18] See, *Lattanzio v. COMTA, supra* note 16; *Dutch Village Mall v. Pelletti*, 162 Wash. App. 531, 256 P.3d 1251 (2011). See, also, *U.S. v. Hagerman*, 545 F.3d 579 (8th Cir. 2008); *U.S. v. High Country Broadcasting Co., Inc.*, 3 F.3d 1244 (9th Cir. 1993); *National Ind. Theatre v. Buena Vista Distribution*, 748 F.2d 602 (11th Cir. 1984); *Capital Group, Inc. v. Gaston & Snow*, 768 F. Supp. 264 (E.D. Wis. 1991).

[19] Neb. Rev. Stat. § 21-104(a) (Reissue 2012).

[20] Neb. Rev. Stat. § 21-105 (Reissue 2012).

[21] *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1427 (7th Cir. 1985). See, also, *U.S. v. Hagerman, supra* note 18.

[22] See Neb. Rev. Stat. § 21-129(a) (Reissue 2012).

[23] *Smith v. Rustic Home Builders, LLC, supra* note 17, 826 N.W.2d at 360.

SHI, it might be true that no other person's financial interest in SHI would be harmed by Steinhausen's lay representation. But a layperson's lack of professional skills and ethical obligations "imposes undue burdens on opposing parties and the courts," and "[t]hese considerations are just as important when the LLC has only one owner."[24] And the limited liability Steinhausen enjoys is no less limited because he is the sole member of SHI.[25] Put simply, having called into being a new juridical person, Steinhausen cannot ignore SHI's separate existence when it suits him.

(b) Parties to the Appeal

[5] To the extent that Steinhausen appeals on behalf of SHI, the appeal is a nullity. But Steinhausen has the right to prosecute an appeal in his own behalf.[26] When a layperson appeals both in his own behalf and on behalf of a business entity, we have dismissed the appeal as to the entity but considered the merits of the appeal as to the errors assigned by the layperson in his own behalf.[27] So, we must determine whether Steinhausen's appeal is solely for SHI.

Confusion as to the identity of the plaintiff (or plaintiffs) below and the appellant (or appellants) on appeal is apparent on the face of the pleadings and briefs. As noted above, the caption of the "Pro Se Civil Complaint" labeled the plaintiff "MATTHEW M. STEINHAUSEN D/B/A STEINHAUSEN HOME INSPECTIONS, LLC." Steinhausen signed the complaint as the "Owner / Operator" of "Steinhausen Home Inspections." Similarly, the cover of the appellate brief filed by Steinhausen—again identifying himself as the "owner / operator" of "Steinhausen Home Inspections, LLC"—labels the appellant "MATTHEW STEINHAUSEN; D/B/A Steinhausen Home Inspections, LLC." Generally, the designation "[d]oing

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[24] *Dutch Village Mall v. Pelletti, supra* note 18, 162 Wash. App. at 534, 256 P.3d at 1252. See, also, Annot., 8 A.L.R.5th 653 (1992).

[25] See *Dutch Village Mall v. Pelletti, supra* note 18.

[26] See § 7-110.

[27] See *Anderzhon/Architects v. 57 Oxbow II Partnership, supra* note 14. See, also, *Goodwin v. Hobza, supra* note 15.

business as," or "d/b/a," "precedes a person's or business's assumed name."[28]

[6-8] But we do not restrict our inquiry to the titles of the complaint and the appellant's brief. The character in which one is a party to a suit, and the capacity in which a party sues, is determined from the allegations of the pleadings and not from the caption alone.[29] If the capacity in which a party sues is doubtful, a court may examine the complaint, the pleadings as a whole, and even the entire record.[30] And, when the pleadings show a cause of action by a person in his individual capacity, a court may reject words indicating representative capacity.[31]

Here, Steinhausen argues that he is the sole appellant whereas the defendants argue that SHI is the sole appellant. Both Steinhausen and HomeServices note that the pleadings and briefs have consistently referred to a single "plaintiff" or "appellant." But the relief requested in the complaint is inconsistent with a reading that there is a single plaintiff. For example, the complaint prays for an injunction preventing discrimination against SHI and, three paragraphs later, damages for emotional distress. Steinhausen argues that "[l]ibel, libel per se and false light invasion of privacy are all torts affecting individual persons, not businesses."[32] As such, Steinhausen contends that "[t]he claims . . . regarding these aspects of his case are obviously related to his status as an individual, not a business."[33] Steinhausen is correct that a business entity, like an LLC, cannot maintain an action for

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[28] Black's Law Dictionary 481 (10th ed. 2014).

[29] See *State on behalf of Dunn v. Wiegand*, 2 Neb. App. 580, 512 N.W.2d 419 (1994). See, also, 59 Am. Jur. 2d *Parties* § 14 (2012).

[30] 67A C.J.S. *Parties* § 177 (2013). See, also, *Niklaus v. Abel Construction Co., supra* note 7; *Burke v. Unique Printing Co.*, 63 Neb. 264, 88 N.W. 488 (1901).

[31] 67A C.J.S., *supra* note 30, § 178. See, also, *Andres v. Kridler*, 47 Neb. 585, 66 N.W. 649 (1896); *Thomas v. Carson*, 46 Neb. 765, 65 N.W. 899 (1896).

[32] Reply brief for appellant at 14.

[33] *Id.*

invasion of privacy.[34] But a business entity may maintain a defamation action if the publication directly relates to its business, property, or credit.[35] Furthermore, the same communication might in some cases defame both the business entity and an individual owner.[36]

After examining the pleadings, briefs, and record as a whole, we conclude that Steinhausen has prosecuted this action and attempted to appeal for both himself and SHI. Because his appeal on behalf of SHI is a nullity, we dismiss it. We will consider only the errors assigned by Steinhausen as they relate to claims he could make in his own behalf.

### 2. Defamation

On appeal, Nitz argues that the court should have determined whether her statement was capable of defamatory meaning before deciding whether it was privileged. Nitz contends that "[i]n today's parlance, 'idiot' is merely a subjective pejorative term."[37] Nitz argues that in the context of the Hotsheets—which she refers to as a place for HomeServices agents to "express their opinions without pulling punches"[38]—the phrase "total idiot" is not "a factual statement that [Steinhausen] is mentally defective."[39] Steinhausen responds that "[i]diocy is verifiable" and "can be defined and proved."[40] He notes that "idiot" is defined in one dictionary as "a stupid person or a mentally handicapped person" and asserts that he "is neither stupid nor mentally handicapped."[41]

[9,10] In the ordinary case, a defamation claim has four elements: (1) a false and defamatory statement concerning the

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[34] See, 77 C.J.S. *Right of Privacy and Publicity* § 43 (2006). See, also, Neb. Rev. Stat. § 20-201 (Reissue 2012).

[35] 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 172 (2005).

[36] See *id*.

[37] Brief for appellee Nitz at 26.

[38] *Id*. at 21.

[39] *Id*. at 26.

[40] Reply brief for appellant at 6.

[41] *Id*. at 7.

plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[42] A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.[43]

[11,12] The threshold question in a defamation suit is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion.[44] Statements of fact can be defamatory whereas statements of opinion—the publication of which is protected by the First Amendment—cannot.[45] Put another way, "subjective impressions" cannot be defamatory, as contrasted with objective "expressions of verifiable facts."[46] Distinguishing the two presents a question of law for the trial judge to decide.[47] In making this distinction, courts apply a totality of the circumstances test.[48] Relevant factors include (1) whether the general tenor of the entire work negates the impression that the defendant asserted an objective fact, (2) whether the defendant used figurative or hyperbolic language, and (3) whether the statement is susceptible of being proved true or false.[49]

And context is important to whether an ordinary reader would view a statement as one of fact or opinion.[50] In addition

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[42] See *Moats v. Republican Party of Neb.*, 281 Neb. 411, 796 N.W.2d 584 (2011).

[43] *Id.*

[44] *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

[45] See *Moats v. Republican Party of Neb., supra* note 42.

[46] *K Corporation v. Stewart*, 247 Neb. 290, 297, 526 N.W.2d 429, 435 (1995).

[47] *Moats v. Republican Party of Neb., supra* note 42.

[48] *Wheeler v. Nebraska State Bar Assn., supra* note 44.

[49] See *Moats v. Republican Party of Neb., supra* note 42.

[50] See *K Corporation v. Stewart, supra* note 46.

to the content of the communication, a court looks to the knowledge, understanding, and reasonable expectations of the audience to whom the communication was directed, taking cues from "the broader setting in which the statement appears."[51] Words, particularly the pejorative ones, often have both a literal and figurative meaning.[52] Whether the statement is capable of being defamatory depends on which meaning was used, which can be answered only by examining the context in which the language appears.[53]

[13] As noted, whether the language is hyperbolic is relevant to distinguishing fact from opinion. Rhetorical hyperbole—"language that, in context, was obviously understood as an exaggeration, rather than a statement of literal fact"—is not actionable.[54] In particular, "[t]he ad hominem nature of abusive epithets, vulgarities, and profanities,"[55] which some writers "use to enliven their prose,"[56] indicates that the statement is hyperbole.

Exercises in "name calling"[57] generally fall under the category of rhetorical hyperbole.[58] For example, courts have held that "'idiot,'"[59] "'raving idiot,'"[60] "'[i]diots [a]float,'"[61] and more vulgar variants[62] were rude statements of opinion,

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[51] *Id.* at 296, 526 N.W.2d at 435. See 50 Am. Jur. 2d *Libel and Slander* § 111 (2006).

[52] See *Dilworth v. Dudley*, 75 F.3d 307 (7th Cir. 1996).

[53] *Id.*

[54] 50 Am. Jur. 2d, *supra* note 51, § 110 at 466.

[55] *Id.*, § 111 at 466-67.

[56] *Id.*, § 110 at 466.

[57] See *Chang v. Cargill, Inc.*, 168 F. Supp. 2d 1003, 1011 (D. Minn. 2001).

[58] See, e.g., *Blomberg v. Cox Enterprises, Inc.*, 228 Ga. App. 178, 491 S.E.2d 430 (1997).

[59] *Robel v. Roundup Corp.*, 148 Wash. 2d 35, 56, 59 P.3d 611, 622 (2002). Accord *Blouin v. Anton*, 139 Vt. 618, 431 A.2d 489 (1981).

[60] *DeMoya v. Walsh*, 441 So. 2d 1120, 1120 (Fla. App. 1983).

[61] *Cowan v. Time, Inc.*, 41 Misc. 2d 198, 198, 245 N.Y.S.2d 723, 725 (N.Y. Sup. 1963).

[62] See *Chang v. Cargill, Inc., supra* note 57.

rather than lay diagnoses of mental capacity. Similarly, courts have held that statements calling the plaintiff "'stupid,'"[63] a "'moron,'"[64] and a "'nincompoop'"[65] were not actionable. Courts have also held that statements potentially referring to the plaintiff's mental health, such as "'raving maniac'"[66]; "'pitiable lunatics'"[67]; "wacko," "nut job," and "'hysterical'"[68]; "'crazy'"[69]; and "crank,"[70] were statements of opinion.

To analyze Nitz' communication, we begin with the context in which it was made. Nitz sent the e-mail to the Hotsheets, which the evidence shows are accessed by HomeServices real estate agents and used, among other purposes, as a forum to express their thoughts on vendors in the real estate community. The reasonable expectations of the audience of Nitz' e-mail (members of the Hotsheets) depend on how members used the forum, particularly whether the Hotsheets were a "place[] that invited exaggeration and personal opinion."[71] At least two other e-mails on the subject of "Steinhausen inspections" preceded Nitz' e-mail. The first, prefaced by "IN MY OPINION," suggested that Steinhausen "should never be allowed to inspect even a dog house." The second called inspections performed by Steinhausen "horrendous."

We next turn to the language of Nitz' e-mail itself. To recap, Nitz stated: "He did an inspection in Seward for the agent that sold one of my listings. I will never let him near

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[63] *Id.* at 1011.

[64] *Purcell v. Ewing*, 560 F. Supp. 2d 337, 343 (M.D. Pa. 2008).

[65] *Stepien v. Franklin*, 39 Ohio App. 3d 47, 49, 528 N.E.2d 1324, 1327 (1988).

[66] *DeMoya v. Walsh, supra* note 60, 441 So. 2d at 1120.

[67] *Thomas v. News World Communications*, 681 F. Supp. 55, 64 (D.D.C. 1988).

[68] *Lapine v. Seinfeld*, 31 Misc. 3d 736, 752, 754, 918 N.Y.S.2d 313, 326, 327 (N.Y. Sup. 2011).

[69] *Stepien v. Franklin, supra* note 65, 39 Ohio App. 3d at 49, 528 N.E.2d at 1327.

[70] *Dilworth v. Dudley, supra* note 52, 75 F.3d at 310.

[71] *Robel v. Roundup Corp., supra* note 59, 148 Wash. 2d at 56, 59 P.3d at 622.

one of my listings ever again!!! Total idiot." The word "total" means "complete in extent or degree" or "absolute."[72] In some contexts, "idiot" might refer to an objective state of mental capacity and particularly to a person "lacking the capacity to develop beyond the mental age of three or four years."[73] But "idiot" can also refer to "an utterly foolish or senseless person,"[74] and we conclude that Nitz used this meaning. The broad setting of Nitz' statement—along with the superfluous exclamation marks and the adjective "[t]otal"—shows that the statement was hyperbolic rhetoric rather than a reference to arrested intellectual development. Whether a person is "foolish" or "senseless" is a "subjective impression[]" and not an objective "expression[] of verifiable facts."[75] Nitz' e-mail might have been distasteful, but it was a statement of opinion and, therefore, not defamatory.

### 3. False Light Invasion of Privacy

Steinhausen argues that his false light invasion of privacy claim is not subsumed into his libel claim because he "clearly separated libel from false light in his arguments."[76] Nitz and HomeServices respond that Steinhausen cannot maintain a false light invasion of privacy claim in addition to libel because both claims are based on the same statement.

Invasion of privacy as a common-law tort has evolved over the years into several separate torts, one of which is placing a person before the public in a false light. The contours of the tort are now governed by Neb. Rev. Stat. § 20-204 (Reissue 2012), which provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a natural person that places

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[72] Webster's Encyclopedic Unabridged Dictionary of the English Language 1497 (1989).

[73] *Id.* at 708.

[74] *Id.*

[75] *K Corporation v. Stewart, supra* note 46, 247 Neb. at 297, 526 N.W.2d at 435.

[76] Reply brief for appellant at 9.

> that person before the public in a false light is subject to liability for invasion of privacy, if:
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> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

[14] We have held that if a plaintiff asserts claims of both libel and false light invasion of privacy based on the same statement, the false light claim is subsumed within the defamation claim and is not separately actionable.[77] Steinhausen argues that Nitz' e-mail was both a libel and a false light invasion of privacy. The district court did not err by concluding that the claim for the latter was subsumed within the claim for the former.

### 4. Tortious Interference With a Business Relationship or Expectancy

The district court entered summary judgment against Steinhausen's tortious interference with a business relationship or expectancy claim because the record showed that Steinhausen did not have a business relationship or expectancy with Nitz or HomeServices. On appeal, Steinhausen contends that "[t]he business relationship to which [he] is claiming interference is the relationship between [him] and his home inspection clients being discouraged by Nitz and other HomeServices associates not to use [Steinhausen]."[78]

[15] To succeed on a claim for tortious interference with a business relationship or expectancy, a plaintiff must prove (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or

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[77] *Moats v. Republican Party of Neb.*, *supra* note 42.

[78] Brief for appellant at 18.

expectancy was disrupted.[79] The interference must impact a valid business relationship or expectancy,[80] and the relationship or expectancy interfered with "must belong to the party asserting the claim."[81]

[16] Members of an LLC cannot, in their own behalf, maintain a claim for tortious interference with the business relationships or expectancies of the LLC.[82] Only the parties to the relationship or expectancy interfered with may bring a tortious interference claim.[83] That a member of an LLC might experience reduced distributions from the LLC if the entity's relationships are interfered with does not convert the claim to one in behalf of the member personally.[84]

Here, the evidence shows that any relationships or expectancies with Nitz, HomeServices, or prospective buyers of home inspection services are the relationships and expectancies of SHI, and not Steinhausen personally. Steinhausen formed SHI in 2004, aware that doing so would allow him to "limit[] [his] liability to the outside world." All of the home inspection reports in the record show that the business relationship was between SHI and the individual home buyers. For example, each report contains a "Home Inspection

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[79] *Professional Mgmt. Midwest v. Lund Co.*, 284 Neb. 777, 826 N.W.2d 225 (2012).

[80] *Huff v. Swartz*, 258 Neb. 820, 606 N.W.2d 461 (2000).

[81] *Pinnacle Fitness v. Jerry and Vickie Moyes*, 844 F. Supp. 2d 1078, 1098 (S.D. Cal. 2012) (applying Arizona law).

[82] See, *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342 (4th Cir. 2013); *Pinnacle Fitness v. Jerry and Vickie Moyes, supra* note 81; *Baron Financial Corp. v. Natanzon*, 471 F. Supp. 2d 535 (D. Md. 2006). See, also, *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183 (S.D. Cal. 2008); *Picture Lake Campground v. Holiday Inns, Inc.*, 497 F. Supp. 858 (E.D. Va. 1980); *First Commercial Bank, N.A. v. Walker*, 333 Ark. 100, 969 S.W.2d 146 (1998); *Benton v. Kennedy-Van Saun Mfg. & Eng. Corp.*, 145 N.Y.S.2d 703 (N.Y. Sup. 1955); *Waller v. Waller*, 187 Md. 185, 49 A.2d 449 (Md. 1946); *Sutter v. General Petroleum Corp.*, 28 Cal. 2d 525, 170 P.2d 898 (1946). But see *Resonant Sensors, Inc. v. SRU Biosystems, Inc.*, 651 F. Supp. 2d 562 (N.D. Tex. 2009).

[83] See, e.g., *Baron Financial Corp. v. Natanzon, supra* note 82.

[84] See, e.g., *Painter's Mill Grille, LLC v. Brown, supra* note 82.

Agreement" stating that "Steinhausen Home Inspections LLC, DBA Steinhausen Home Inspections," or simply "Steinhausen Home Inspections," "agrees with customer to provide services related to the review and subsequent inspection report of home and property as requested by customer." In response to Nitz' request for "[a]ll federal and state income tax returns filed by Matthew M. Steinhausen since the creation of [SHI]," Steinhausen produced only the Schedule C or Schedule C-EZ he filed for tax years 2007 to 2012. Steinhausen stated that the request was "overly broad" to the extent it requested "all tax returns filed by Matthew M. Steinhausen, rather than the returns that relate to [SHI]." The sole "Business name" on each of the Schedule C or Schedule C-EZ's is SHI.

Put simply, while there might be evidence of interference with SHI's business relationships or expectancies, the record lacks any evidence that Steinhausen himself had any business relationships or expectancies. As the sole member of SHI, Steinhausen might have experienced reduced distributions from SHI if SHI's business was interfered with. But this does not permit him to maintain an action for interference with SHI's business relationships and expectancies. Steinhausen failed to produce evidence creating a genuine factual dispute regarding the first element of a tortious interference with a business relationship or expectancy claim: A valid business relationship or expectancy.

### 5. Evidence

Steinhausen argues that the court erred by excluding certain exhibits offered by him and a portion of Nitz' deposition. The court sustained the defendants' objections to exhibits 11 through 16 offered by Steinhausen on the ground that they were not among the types of evidence that may be received on a motion for summary judgment under Neb. Rev. Stat. § 25-1332 (Reissue 2008). The court also sustained the defendants' form and foundation objections to a portion of Nitz' deposition. In a footnote to its order, however, the court stated that "[t]he majority of the documents contained in Exhibits 11 through 16 are contained in other exhibits received by the court and have been considered accordingly."

[17,18] In a civil case, the admission or exclusion of evidence is not reversible error unless it unfairly prejudiced a substantial right of the complaining party.[85] The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.[86] In particular, where the information contained in an exhibit is, for the most part, already in evidence from the testimony of witnesses, the exclusion of the exhibit is not prejudicial.[87]

We conclude that the exclusion of exhibits 11 through 16 did not unfairly prejudice a substantial right of Steinhausen. The court received the documents comprising exhibits 11, 12, 13, 15, and 16 elsewhere in the same form or with immaterial formatting differences. Exhibit 14 is the consent order issued by the State Real Estate Commission and signed by Nitz. Witnesses testified as to the type of order issued by the commission, the findings of the commission, and the discipline Nitz received. The handful of facts contained in the "stipulations" portion of the consent order are reflected elsewhere in the evidence.

We also conclude that the exclusion of a portion of Nitz' deposition did not unfairly prejudice a substantial right of Steinhausen. The court excluded 23 lines of Nitz' deposition, in which Steinhausen asked Nitz whether any information in the report for the 2008 Seward inspection was inaccurate or whether he "overlooked or missed" anything. Nitz replied that she did not know. In a portion of Nitz' deposition that the court received, Steinhausen asked Nitz whether she "kn[e]w of any problems with the [Seward property] that were overlooked or unreported by [Steinhausen]." Nitz testified that she did not know. Because the court received substantially similar evidence, the exclusion of a portion of Nitz' deposition did not unfairly prejudice a substantial right of Steinhausen.

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[85] *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014). See Neb. Rev. Stat. § 27-103(1) (Reissue 2008).

[86] See *Livingston v. Metropolitan Util. Dist.*, 269 Neb. 301, 692 N.W.2d 475 (2005).

[87] *Durrett v. Baxter Chrysler-Plymouth, Inc.*, 198 Neb. 392, 253 N.W.2d 37 (1977).

## VI. CONCLUSION

Steinhausen has attempted to appeal for both himself and SHI, the LLC of which he is the sole member. Because Steinhausen is not licensed to practice law in Nebraska, his appeal for SHI is a nullity.

As to the errors assigned by Steinhausen in his own behalf, we conclude that the e-mail sent by Nitz stated an opinion and, therefore, was not actionable as libel. The false light invasion of privacy claim was subsumed within the libel claim because both claims were based on the same statement. Finally, Steinhausen's tortious interference claim fails because he did not produce evidence that he, personally, had a valid business relationship or expectancy that could have been interfered with.

In its order sustaining the defendants' motions for summary judgment, the district court stated that "[t]he Plaintiff's complaint is dismissed with prejudice." Steinhausen attempted to prosecute this action both in his own behalf and on behalf of SHI, but his attempt to do so on behalf of SHI was a nullity. Therefore, the judgment as it relates to SHI must be vacated. We affirm the judgment as to Steinhausen in his personal capacity.

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

WRIGHT, J., not participating.

# GIBBONS RANCHES, L.L.C., APPELLANT, V. JOEL D. BAILEY AND JAIMEE BAILEY, HUSBAND AND WIFE, APPELLEES.

# GIBBONS RANCHES, L.L.C., APPELLANT, V. CIRCLE B FARMS, INC., DOING BUSINESS AS CIRCLE B FARMS, A NEBRASKA CORPORATION, AND TOM BAILEY, APPELLEES.

857 N.W.2d 808

Filed January 23, 2015. Nos. S-14-109, S-14-110.

1. **Leases: Judgments: Appeal and Error.** The interpretation of a lease is a question of law that an appellate court decides independently of the district court.
2. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion.
3. **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.
4. ____: ____: ____. A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
5. **Contracts: Parties.** When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.
6. ____: ____. A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract.
7. **Statute of Frauds: Contracts: Evidence.** The written evidence required by the statute of frauds must contain the essential terms of the contract.
8. **Leases.** When an express lease agreement contemplates the payment of rent in money, the amount of rent is an essential term of the agreement.
9. ____. Because rent is an essential term in a lease agreement, an agreement to agree on it in the future is not enforceable.
10. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
11. **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.
12. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.
13. ____. The fact that the parties have suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
14. ____. A contract is viewed as a whole in order to construe it.

15. **Parol Evidence: Contracts.** The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms.
16. **Contracts: Intent.** An unambiguous contract is not subject to interpretation or construction, and in such a contract, the intention of the parties must be determined from its contents alone.

Appeals from the District Court for Custer County: KARIN L. NOAKES, Judge. Affirmed as modified.

Bradley D. Holbrook and Nicholas A. Buda, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellant.

Christopher P. Wickham, of Sennett, Duncan, Jenkins & Wickham, P.C., L.L.O., for appellees.

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

CASSEL, J.

## I. INTRODUCTION

A landlord leased separate properties to different tenants using nearly identical written documents. The parties dispute whether the leases were enforceable for their stated 5-year terms or whether a clause providing for "annual review of rental rates" resulted in unenforceable "agreements to agree." In the landlord's appeals from declaratory judgments for the tenants, we conclude that the leases unambiguously contemplated only an annual "review" and did not require annual agreement. With a minor modification, we affirm the judgments.

## II. BACKGROUND

### 1. PARTIES

Gibbons Ranches, L.L.C., is a ranching entity in Custer County, Nebraska. For many years, it leased its farm ground to Joel D. Bailey and Jaimee Bailey, husband and wife, and to B Agri-Services, Inc., doing business as Circle B Farms (Circle B). We refer to the Baileys and Circle B collectively as "the tenants."

### 2. LEASES

On March 7, 2011, Gibbons Ranches and Circle B entered into a 5-year lease agreement retroactive to March 1. Later in

March and April, Gibbons Ranches and the Baileys entered into 5-year lease agreements with the same beginning date as the Circle B lease.

For convenience, we quote from the Circle B lease. We have italicized the numbers which were different from those in the Bailey leases. Otherwise, the language in each lease was identical. With this understanding, the provisions concerning rent stated:

> 1. The term of this lease shall be five (5) years. An annual review of rental rates and terms will be completed in January of each year. The final year of this contract will be 2015. Less[o]r hereby leases to Lessee to occupy and use for agricultural purposes only during the crop year (year one) March 1, 2011 to March 1, 2012, the land of Less[o]r in Custer County, Nebraska, consisting of approximately *561* (190$) acres irrigated and *240* (80$) acres of dry land and grass as described on Exhibit "A" attached hereto (hereinafter referred to as the "Property"). Rental agreement also includes full use of the Quonset and grain bins located on said property.
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> 2. Lessee agrees to pay Less[o]r as rent for said land the annual sum of *$125,790.00*, which shall be paid in two installments as follows: first half *$62,895.00*, due April 15 and second half, *$62,895.00*, due November 1st. The consideration for this lease is cash in the amount of *$125,790.00* regardless of the correct number of acres and the price assigned to each acre. Delinquent payment shall bear interest at the rate of 10% per annum until paid.

During the winter of 2011-12, Gibbons Ranches and Circle B's president reviewed and negotiated a modification of the rental rates for the 2012 crop year. The Baileys agreed to the same new rates and signed a new lease in April 2012 which reflected the new rental amount. A new lease with the modified rental rates for irrigated acres and for dryland acres was prepared for Circle B, but Circle B's president refused to sign it. Despite the absence of a revised lease for Circle B, all of the tenants paid rent in accordance with the new rates.

The parties did not reach an agreement on rental rates for the 2013 crop year. The tenants submitted checks based on the 2012 rental rates and proceeded to farm Gibbons Ranches' land.

### 3. Lawsuits

In June 2013, Gibbons Ranches sued the tenants in separate actions. In the complaints, Gibbons Ranches sought, among other things, a declaratory judgment to determine its rights under the leases, including the rental rates and terms for the 2013 crop year. Gibbons Ranches alleged that the tenants refused to negotiate in good faith the terms of the leases for the 2013 crop year and that the tenants farmed its ground for the 2013 crop year at rental rates that were less than what was fair and reasonable. The tenants alleged in their respective answers that Gibbons Ranches' rights, status, and legal relations were sufficiently stated in the leases.

### 4. District Court Judgment

After a consolidated trial, the district court entered a declaratory judgment in each case. The court found that the leases were valid and enforceable agreements through 2015. The court determined that the tenants were not under an obligation to agree to alter the terms, that the leases were unambiguous, and that the parol evidence rule applied to exclude extrinsic evidence from being considered to interpret the parties' respective rights and obligations under the leases.

Gibbons Ranches moved for a new trial in each case, and the district court overruled the motions. Gibbons Ranches timely appealed, and we moved the cases to our docket under our statutory authority to regulate the caseloads of the appellate courts of this state.[1] The cases were consolidated for briefing, argument, and disposition.

## III. ASSIGNMENTS OF ERROR

Gibbons Ranches assigns that the district court erred in (1) determining that the leases were valid and enforceable through 2015; (2) determining that the leases were unambiguous as

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

a matter of law; (3) determining that the parol evidence rule applied to exclude extrinsic evidence to interpret the parties' intent in entering into the leases, including the annual review provision; (4) failing to determine the parties' respective rights and duties under the leases, including the amount of fair and reasonable rent to be paid by the tenants to Gibbons Ranches for the 2013 crop year and who had the right to retain possession of the roughage; and (5) overruling Gibbons Ranches' motions for new trial.

## IV. STANDARD OF REVIEW

[1] The interpretation of a lease is a question of law that an appellate court decides independently of the district court.[2]

[2] An appellate court reviews a denial of a motion for new trial for an abuse of discretion.[3]

## V. ANALYSIS

### 1. Validity and Enforceability of Leases

The central issue on appeal is whether the leases were valid if the parties did not agree to a rental rate after the second year. The district court determined that the leases were valid and enforceable through 2015. But Gibbons Ranches asserts that the leases were not valid, because they did not include the amount of rent to be paid after the second year or a method by which to definitively calculate it.

#### (a) General Principles of Law

[3-5] The law regarding contractual agreements, such as a lease, is well established. 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.[4] A contract is not formed if the parties contemplate that something remains to be done to

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[2] See *Beveridge v. Savage*, 285 Neb. 991, 830 N.W.2d 482 (2013).

[3] See *Hike v. State*, 288 Neb. 60, 846 N.W.2d 205 (2014).

[4] *City of Scottsbluff v. Waste Connections of Neb.*, 282 Neb. 848, 809 N.W.2d 725 (2011).

establish contractual arrangements or if elements are left for future arrangement.[5] When an agreement stipulates that certain terms shall be settled later by the parties, such terms do not become binding unless and until they are settled by later agreement.[6]

(b) Essential Terms

[6,7] A fundamental and indispensable basis of any enforceable agreement is that there be a meeting of the minds of the parties as to the essential terms and conditions of the proposed contract.[7] Under the statute of frauds, "[e]very contract for the leasing for a longer period than one year . . . shall be void unless the contract . . . be in writing and signed by the party by whom the lease . . . is to be made."[8] And the written evidence required by the statute of frauds must contain the essential terms of the contract.[9]

The case law in Nebraska is not clear regarding whether rent is an essential term in a lease agreement. The Nebraska Court of Appeals recently stated in an unpublished memorandum opinion that the monthly rent to be paid was an essential term of an alleged lease extension.[10] But the tenants point to *Folden v. State*,[11] where we long ago made a statement to the effect that rent is not essential to a valid lease of land. However, our statement must be put in context. The agreement in *Folden* provided in part that the lessor leased the premises "'in consideration of the covenants'" of the lessee.[12] We then

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[5] *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001), *abrogated in part on other grounds, Sutton v. Killham*, 285 Neb. 1, 825 N.W.2d 188 (2013).

[6] *Id.*

[7] *Peters v. Halligan*, 182 Neb. 51, 152 N.W.2d 103 (1967).

[8] Neb. Rev. Stat. § 36-105 (Reissue 2008).

[9] See *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

[10] *Zeeck v. Starman*, No. A-11-1056, 2012 WL 3870307 (Neb. App. Sept. 4, 2012) (selected for posting to court Web site).

[11] *Folden v. State*, 13 Neb. 328, 14 N.W. 412 (1882).

[12] *Id.* at 330, 14 N.W. at 413.

stated: "While it is true that the consideration mentioned does not fall within what is commonly understood by the term rent, that is not at all important. Rent, properly speaking, is not essential to a valid lease of land."[13] In that context, we interpret our statement to be that monetary rent is not necessary. Some 20 years later, citing *Folden*, we stated that "[r]ent is not essential to a valid lease of land."[14] But that case involved a situation in which the tenant remained in possession of the leased premises even though his term had expired, and we reasoned that even if no definite agreement as to the amount of rent had been reached, the law would imply a promise to pay a reasonable rent.

[8,9] To clarify the law in Nebraska, we now hold that when an express lease agreement contemplates the payment of rent in money, the amount of rent is an essential term of the agreement. This conclusion appears to be generally accepted elsewhere.[15] And because rent is an essential term, an agreement to agree on it in the future is not enforceable.[16]

(c) Ambiguous Contracts

[10-13] In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.[17] 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.[18] When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them.[19] The fact that the parties have

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[13] *Id*.

[14] *Schickendantz v. Rincker*, 75 Neb. 312, 315, 106 N.W. 441, 442 (1905).

[15] See, 49 Am. Jur. 2d *Landlord and Tenant* § 22 (2006); 37 C.J.S. *Frauds, Statute of* § 135 (2008).

[16] See, e.g., *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

[17] *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011).

[18] *Beveridge v. Savage*, *supra* note 2.

[19] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

suggested opposing meanings of a disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.[20]

(d) Application

Gibbons Ranches argues that the district court erred in determining that the leases were unambiguous. According to Gibbons Ranches, the provision requiring the parties to conduct an annual review of the rental rates and terms in January of each year is ambiguous. We disagree.

The rental rates and terms of the leases were subject to an annual "review." A definition of "review" is "a looking over or examination with a view to amendment or improvement."[21] By definition, a "review" is an examination. The examination may lead to an agreement, but a requirement that the parties reach a new agreement is not part of the commonly accepted meaning of the term. We find no ambiguity in this regard.

Gibbons Ranches asserts that the annual review provision is ambiguous because it does not specify the consequence of the parties' failure to reach an agreement on the rental rates and terms. But because a new agreement is not a necessary result of the review, the rate currently in effect would continue in the absence of an agreement to modify it. The absence of a specific provision addressing the effect of a review without any change to the contract did not introduce ambiguity.

Gibbons Ranches also relies upon an opinion of this court finding ambiguity in the word "financing," which Gibbons Ranches argues is comparable to "review." In *Quinn v. Godfather's Investments*,[22] the lease authorized the tenant to terminate the contract if the tenant was unable to obtain "'financing'" for construction of contemplated improvements. Although this court affirmed the trial court's finding

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[20] *Bedore v. Ranch Oil Co., supra* note 17.

[21] Webster's Third New International Dictionary of the English Language, Unabridged 1944 (1993).

[22] *Quinn v. Godfather's Investments*, 213 Neb. 665, 667, 330 N.W.2d 921, 923 (1983).

that "financing" was ambiguous, our decision ultimately turned upon the trial court's alternative finding that even if a valid contract existed, the tenant made a good faith effort to accomplish financing for construction of the improvements. Gibbons Ranches' reliance on the *Quinn* decision is misplaced.

The leases here bear similarities to the lease in *T.V. Transmission v. City of Lincoln*.[23] In that case, a contract for a term of 20 years set forth a rental rate of $3 per pole per year. The contract provided for adjustment of the rent:

> "The annual rental and/or expense deposit payable by [the lessee] under this agreement may be adjusted at any time after five (5) years from the date of this agreement upon the written request of any party hereto. In case of adjustment any new rental or expense deposit agreed upon shall continue in effect for five (5) years thereafter, at which time such rental and/or expense deposit shall again be subject to review and readjustment upon the written request of any party thereto."[24]

Over 10 years into the contract, the lessor notified the lessee that it wished to establish a new rental charge, but the parties were unable to agree on a new rate. This court observed that the contract did not specify what would happen if agreement could not be reached on a new rental rate. We stated that the modification provision was "nothing more than an agreement to agree in the future" and that "[i]n the absence of such a future agreement, the provision is of no effect and is therefore unenforceable."[25] We stated that if there was no future agreement, the contract would "continue for at least 20 years at the $3 rental specified upon execution."[26] We reasoned that "[a]ny other interpretation would completely ignore the clause providing for a minimum 20-year duration,

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[23] *T.V. Transmission v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49 (1985).

[24] *Id.* at 888-89, 374 N.W.2d at 52.

[25] *Id.* at 892, 374 N.W.2d at 53-54.

[26] *Id.* at 892, 374 N.W.2d at 54.

as well as the default provision which specifically enumerates when the contract can be terminated before the expiration of that period."[27]

Similarly, the lease agreements in the instant appeals were for 5-year terms and the specified rent was to apply to the entire lease term, unless the parties agreed to modify the rent. The leases set forth the rental rate for the first year, March 2011 to March 2012, and were clearly valid for that year. The leases were also valid and enforceable for the 2012 crop year, despite the change in rental rates, because the parties agreed to a new rental rate for that year. But because the parties' "review" did not result in an agreement on a new rate for 2013, the leases continued at the last agreed-upon rate.

[14] A reading of the contract as a whole supports our conclusion that the contract was for a 5-year term rather than an annual lease. A contract is viewed as a whole in order to construe it.[28] Although section 1 specified the initial rent for a particular crop year, that section explicitly stated that the term was for 5 years and that the final year of the contract would be 2015. Further, section 2 identified a set amount of "annual" rent to be paid in two installments on "April 15" and "November 1" without any reference to a particular year. We conclude that the rent specified in section 2 and all of the other terms in the leases were to apply to the entire 5-year term unless the parties agreed to alter the terms.

We agree with the district court that the leases were for terms of 5 years, but we make a slight modification to its judgments. The district court adjudged that the "Farm Lease Agreement is valid and enforceable through 2015." However, that statement did not take into account the possibility of changed circumstances after the date of judgment. For example, if the tenants later defaulted in the payment of rent, Gibbons Ranches would have grounds to terminate the leases. Because the record on appeal discloses the situation concerning enforcement of the leases from 2011 to 2013 only,

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[27] *Id.*

[28] *Gridiron Mgmt. Group v. Travelers Indemnity Co.*, 286 Neb. 901, 839 N.W.2d 324 (2013).

our decision regarding the enforceability of the leases does not take into account any circumstances that may have changed and that are not contained in our record.

### 2. Parol Evidence

Gibbons Ranches also claims that the district court erred in determining that the parol evidence rule applied to exclude extrinsic evidence. It argues that the court should have considered trial testimony to ascertain the intent of the parties. We disagree.

[15,16] The general rule is that unless a contract is ambiguous, parol evidence cannot be used to vary its terms.[29] An unambiguous contract is not subject to interpretation or construction, and in such a contract, the intention of the parties must be determined from its contents alone.[30] Because the contract was not ambiguous, the district court did not err in disregarding the testimony at trial.

### 3. Motions for New Trial

Finally, Gibbons Ranches argues that the district court erred in overruling its motions for new trial. It asserts that the court's declaratory judgments were contrary to the law and evidence for the same reasons set forth in its previous arguments. Because we conclude that the district court did not err with respect to those issues, the court did not abuse its discretion in overruling the motions for new trial.

## VI. CONCLUSION

We hold that rent is an essential term in an express lease which contemplates the payment of monetary rent and that the leases in the case before us specified an amount of rent for the 5-year term of the leases—an amount that could be modified by further agreement of the parties. Because the terms of the leases were clear and unambiguous, the court properly excluded parol evidence regarding the intentions of the parties. We modify a sentence in each of the district court's

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[29] See *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[30] See *T.V. Transmission v. City of Lincoln, supra* note 23.

declaratory judgments by adding a clause at the beginning of the sentence, such that the modified sentence states, "Except for a change in circumstances arising after the date of this judgment, this Farm Lease Agreement is valid and enforceable through 2015." As so modified, we affirm the judgments of the district court.

AFFIRMED AS MODIFIED.

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PAUL M. SCHWARZ, APPELLANT, V. KRISTI L. SCHWARZ, NOW KNOWN AS KRISTI L. HENDRICKSON, APPELLEE.

857 N.W.2d 802

Filed January 23, 2015. No. S-14-122.

1. **Modification of Decree: Child Support.** Modification of child support is entrusted to the discretion of the trial court.
2. **Modification of Decree: Child Support: Appeal and Error.** An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Child Support: Rules of the Supreme Court.** Interpretation of the Nebraska Child Support Guidelines presents a question of law.
5. **Judgments: Appeal and Error.** An appellate court resolves questions of law independently of the lower court's conclusion.
6. **Courts: Child Support.** The trial court has discretion to choose whether and how to calculate a deduction for subsequent children.
7. **Child Support.** No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other.
8. **Modification of Decree: Child Support: Proof.** The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child.
9. **Child Support: Appeal and Error.** A party may raise two separate issues on appeal when a trial court allows a deduction for the obligor's support of subsequent children: (1) whether the court abused its discretion by allowing a deduction and (2) whether the court's method of calculation was an abuse of discretion.

10. **Child Support: Rules of the Supreme Court.** Under the Nebraska Child Support Guidelines, only the cost of health insurance that is actually ordered by the court must be added to the monthly support and only the parent who is ordered to provide coverage for the child is entitled to a credit.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS, Judge. Reversed and remanded with directions.

Derek L. Mitchell for appellant.

Bradley D. Holbrook and Nicholas A. Buda, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

## SUMMARY

The district court dissolved the marriage of Paul M. Schwarz and Kristi L. Schwarz, now known as Kristi L. Hendrickson, and gave Paul custody of their minor child Paul Caleb Schwarz (Caleb). Paul later moved to modify the amount of child support Kristi paid, alleging that the parties' income had materially increased. The court increased Kristi's support obligation after applying a deduction for her subsequent child and a credit for the amount she paid for health insurance that covered Caleb. On appeal, Paul argues that Kristi did not present sufficient evidence to allow a deduction for her subsequent child and that she should not have received a credit for health insurance. We affirm the deduction for Kristi's subsequent child but conclude that the court abused its discretion by giving Kristi a credit for the cost of health insurance.

## BACKGROUND

In 2001, the court entered a decree dissolving the marriage of Kristi and Paul. The court gave custody of their minor child Caleb to Paul in 2006 and ordered Kristi to pay child support. The court ordered Paul to maintain health insurance for the benefit of Caleb. The court allocated nonreimbursed

necessary health care costs for Caleb in excess of $480 per year to Kristi and Paul in proportion to their contributions to Caleb's support. In 2011, the court reduced Kristi's support obligation for Caleb to $250 per month.

Paul moved to modify the decree in 2013, alleging that the parties' income had changed and that the change would increase the support paid by Kristi by more than 10 percent. Kristi denied that a material change of income had occurred and affirmatively alleged that she had an "after born child" who may be raised as a defense to Paul's motion to increase child support.

At trial, Paul testified about his employment and the amount of his income. Paul also testified that he maintains health insurance that covers Caleb through his employer.

Like Paul, Kristi produced evidence of her current employment and income. Kristi testified that she is married to Dan Hendrickson and that they have a daughter, Makayla Hendrickson. Kristi testified about Dan's employment and income, and the court received a copy of Dan's direct deposit receipt from his employer. Kristi testified that she provides health and dental insurance coverage for her "family" through her employer. Dan, Makayla, and Caleb are covered by the policy, in addition to Kristi. Kristi pays about $342 more per month for "Employee + Family" coverage compared to "Employee Only" coverage.

The court concluded that there was a material change of circumstances and increased Kristi's monthly support obligation for Caleb to $293. The court "incorporated . . . by reference" the worksheet 1 prepared by Kristi. The worksheet gave Kristi a $297 deduction for "[c]hild regular support for other children," which the court stated was in accordance with the "use [of] an after-born child as a partial defense to a request to raise child support." To the amount of Kristi and Paul's monthly support for Caleb, the court added $342 under Kristi's column for "[h]ealth insurance premium . . . as ordered." The court then gave Kristi a $342 credit for "health premium actually paid." After application of this credit, Kristi's final share of the obligation was $293.

## ASSIGNMENTS OF ERROR

Paul assigns that the district court erred by giving Kristi (1) a deduction for a subsequent child and (2) a credit for the cost of health insurance premiums.

## STANDARD OF REVIEW

[1–3] Modification of child support is entrusted to the discretion of the trial court.[1] An appellate court reviews proceedings for modification of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.[2] A judicial abuse of discretion exists when reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[3]

[4,5] Interpretation of the Nebraska Child Support Guidelines presents a question of law.[4] We resolve questions of law independently of the lower court's conclusion.[5]

## ANALYSIS

### Subsequent Child

Paul argues that Kristi did not present sufficient evidence to support a deduction for Makayla, her subsequent child. Specifically, Paul contends that because Kristi does not incur a "separate insurance expense" for Makayla and because Kristi's current husband, Dan, also has an income used to support Makayla, the evidence did not show that Makayla was an "additional financial burden to Kristi."[6] Kristi argues that there was sufficient evidence of her obligation to support Makayla.

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[1] *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009) (per curiam).

[2] *Id.*

[3] *Id.*

[4] *Mamot v. Mamot*, 283 Neb. 659, 813 N.W.2d 440 (2012).

[5] See *id.*

[6] Brief for appellant at 6.

In some circumstances, the Nebraska Child Support Guidelines permit a court to deduct a parent's obligation to support subsequent children from his or her monthly income. Neb. Ct. R. § 4-205(E) provides that "[s]ubject to § 4-220, credit may be given for biological or adopted children for whom the obligor provides regular support." The applicability of the deduction under § 4-205(E) is limited by Neb. Ct. R. § 4-220:

> An obligor shall not be allowed a reduction in an existing support order solely because of the birth, adoption, or acknowledgment of subsequent children of the obligor; however, a duty to provide regular support for subsequent children may be raised as a defense to an action for an upward modification of such existing support order.

So, in cases seeking an upward modification of an existing support award, the guidelines allow the obligor a deduction for her obligation to support a subsequent child.

[6–8] The trial court has discretion to choose whether and how to calculate a deduction for subsequent children.[7] When the court decides to allow a deduction, the calculation is left to its discretion so long as it considers the obligations to both families and the income of the subsequent child's other parent.[8] No precise mathematical formula exists for calculating child support when subsequent children are involved, but the court must perform the calculation in a manner that does not benefit one family at the expense of the other.[9] The party requesting a deduction for his or her obligation to support subsequent children bears the burden of providing evidence of the obligation, including the income of the other parent of the child.[10]

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[7] See *Wilkins v. Wilkins*, 269 Neb. 937, 697 N.W.2d 280 (2005).

[8] See, *id.*; *Emery v. Moffett*, 269 Neb. 867, 697 N.W.2d 249 (2005).

[9] See, *Wilkins v. Wilkins, supra* note 7; *Emery v. Moffett, supra* note 8.

[10] See, *Wilkins v. Wilkins, supra* note 7; *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001). See, also, *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002).

[9] A party may raise two separate issues on appeal when a trial court allows a deduction for the obligor's support of subsequent children: (1) whether the court abused its discretion by allowing a deduction and (2) whether the court's method of calculation was an abuse of discretion.[11] Here, Paul has specifically assigned and argued only the first issue, contending that Kristi "did not meet her burden to use the after-born child [Makayla] as a defense to the increase in child support sought by Paul."[12] Paul does not specifically argue that the method the court used to calculate the amount of the deduction was an abuse of discretion, and we therefore do not address this issue.[13]

We conclude that the trial court did not abuse its discretion by allowing Kristi a deduction for her obligation to support Makayla. Kristi produced evidence of her obligation to support a subsequent child, her income, and the income of the other parent of the subsequent child. Using this information, Kristi prepared worksheet 1, calculating her and Dan's respective shares of their support obligation for Makayla. Kristi sought a deduction in response to Paul's application to upwardly modify an existing support award, which is the application contemplated by §§ 4-205(E) and 4-220. Kristi presented sufficient evidence to warrant a deduction for her support obligation to Makayla.[14]

### Health Insurance

Paul argues that the court erred by giving Kristi a credit for premiums she paid for health insurance that covered Caleb, because the addition or deletion of Caleb's coverage to or from Kristi's plan would not affect the amount of her premium. Additionally, Paul notes that the court did not order Kristi to provide health insurance coverage for Caleb. Kristi responds

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[11] See, *Wilkins v. Wilkins, supra* note 7; *Brooks v. Brooks, supra* note 10.

[12] Brief for appellant at 6.

[13] See *deNourie & Yost Homes v. Frost, ante* p. 136, 854 N.W.2d 298 (2014).

[14] See *Wilkins v. Wilkins, supra* note 7. See, also, *Brooks v. Brooks, supra* note 10.

that it was in Caleb's best interests to have secondary health insurance coverage.

The guidelines require a child support order to address how the parents will provide for the child's health care.[15] The "[c]hildren's health care needs are to be met by requiring either parent to provide health insurance as required by state law."[16] The guidelines require the "increased cost to the parent for health insurance" to be added to the monthly support in worksheet 1 and permit the "parent paying the premium" a credit against his or her share of the monthly support.[17]

[10] Whereas here, Paul was ordered to pay health insurance premiums in the initial decree, we conclude that the court abused its discretion by allowing Kristi a credit under § 4-215(A) for the cost of health insurance coverage for Caleb because there is no evidence that the court ordered Kristi to provide coverage. In 2006, the court ordered Paul to maintain coverage for Caleb, and so far as the record shows, this requirement was never altered. Even though Kristi was not ordered to provide coverage for Caleb, the court added $342 to the monthly support total in worksheet 1 as "[h]ealth insurance premium . . . as ordered," and then gave Kristi a credit for the same amount. Under § 4-215(A), only the cost of health insurance that is actually ordered by the court must be added to the monthly support in worksheet 1 and only the parent who is ordered to provide coverage for the child is entitled to a credit.[18]

## CONCLUSION

The court did not abuse its discretion by allowing Kristi a deduction for her support obligation for a subsequent child. But the court did abuse its discretion by adding the amount that Kristi pays for family health insurance coverage to the

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[15] Neb. Ct. R. § 4-215 (rev. 2011). See, also, Neb. Rev. Stat. § 42-369(2)(a) (Cum. Supp. 2014); *Bussell v. Bussell*, 21 Neb. App. 280, 837 N.W.2d 840 (2013).

[16] § 4-215(B).

[17] § 4-215(A).

[18] See *McDonald v. McDonald*, 21 Neb. App. 535, 840 N.W.2d 573 (2013).

monthly support total in worksheet 1 and giving Kristi a credit for the same amount. We reverse the judgment of the trial court and remand the cause for a calculation of child support consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

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STATE OF NEBRASKA, APPELLEE, V.
ANOROY Y. LOYUK, APPELLANT.
857 N.W.2d 833

Filed January 30, 2015. No. S-13-806.

1. **Constitutional Law: Statutes: Jury Instructions: Appeal and Error.** Statutory interpretation, the constitutionality of a statute, and whether jury instructions are correct are questions of law, which an appellate court resolves independently of the trial court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.
3. **Criminal Law: Statutes: Legislature: Intent.** In reading a penal 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.
4. **Statutes: Legislature: Intent: Appeal and Error.** An appellate court will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.
5. **Administrative Law: Public Officers and Employees: Prisoners.** The control requirement in Neb. Rev. Stat. § 28-322(2)(a) (Reissue 2008) applies only to those nonemployees or noncontractors to whom the Department of Correctional Services has authorized or delegated control over an inmate or an inmate's activities.
6. **Sexual Assault: Prisoners: Words and Phrases.** Under Neb. Rev. Stat. § 28-322.02 (Reissue 2008), the word "subject" means to cause to undergo the action of something specified.
7. **Constitutional Law: Statutes.** An attack on a statute's overbreadth is a claim that it impermissibly infringes on a constitutionally protected right.
8. ____: ____. A statute is unconstitutionally overbroad only if its overbreadth is substantial, i.e., when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
9. **Constitutional Law: Statutes: Appeal and Error.** When a defendant challenges both the overbreadth and vagueness of a law, an appellate court analyzes overbreadth first.
10. **Due Process.** The Due Process Clause contains a substantive component that relates to the content of the statute specifying when a right can be lost or impaired.

11. ____. Under the Due Process Clause, a statute that infringes upon a "fundamental liberty interest" must be narrowly tailored to serve a compelling state interest.
12. ____. Under the Due Process Clause, a statute that infringes upon a liberty interest that is not fundamental must only be rationally related to a legitimate state purpose.
13. **Constitutional Law: Assault.** A court applies strict scrutiny to a "direct and substantial interference" with intimate associations, while lesser intrusions are subject only to rational basis review.
14. ____: ____. A direct and substantial interference with intimate associations exists if a large portion of those affected by the rule are absolutely or largely prevented from forming such associations or if those affected by the rule are absolutely or largely prevented from forming intimate associations with a large portion of the otherwise eligible population.
15. **Criminal Law: Sexual Assault: Prisoners.** The statutes defining the crime of sexual abuse of an inmate or parolee do not directly and substantially interfere with the right to intimate association.
16. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
17. **Constitutional Law: Statutes: Legislature: Notice.** The more important aspect of the void-for-vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.
18. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute.
19. **Equal Protection: Statutes.** Under the Equal Protection Clause, legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.
20. **Equal Protection.** The initial inquiry in an equal protection analysis is whether the challenger is similarly situated to another group for the purpose of the challenged government action.
21. **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.
22. **Jury Instructions: Proof: Appeal and Error.** The appellant has the burden to show that a questioned jury instruction prejudiced him or otherwise adversely affected his substantial rights.
23. **Arrests.** Whether an individual is in custody depends on all the circumstances surrounding the interrogation.
24. ____. The test for whether an individual is in custody is whether a reasonable person in the defendant's position would have felt free to leave.
25. **Arrests: Police Officers and Sheriffs.** In determining whether an individual is in custody, circumstances relevant to whether a reasonable person in the defendant's position would have felt free to leave include the location of the

interrogation, whether the defendant initiated contact with the police, and whether the police told the defendant he was free to terminate the interview and leave at any time.

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

Dennis R. Keefe, Lancaster County Public Defender, Valerie McHargue, and Paul E. Cooney for appellant.

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

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

PER CURIAM.

## I. SUMMARY

A jury convicted Anoroy Y. Loyuk of first degree sexual abuse of an inmate or parolee. First degree sexual abuse of an inmate or parolee involves a statutorily defined "person" associated with the Department of Correctional Services (DCS) who subjects an inmate or parolee to sexual penetration with or without the inmate or parolee's consent. Witnesses testified, and Loyuk admits, that while employed as an officer by the DCS, Loyuk had sex with R.S., a parolee. Loyuk argues that the evidence was insufficient to support his conviction because it did not show that he had control over R.S. If the State did not have to prove such control, Loyuk argues that the statutes are unconstitutionally vague and violate his rights to intimate association and equal protection. We conclude that the evidence was sufficient to support Loyuk's conviction and that the statutes did not violate his constitutional rights.

## II. BACKGROUND

### 1. FACTUAL BACKGROUND

The DCS employed Loyuk as a corporal at the Community Corrections Center—Lincoln (CCCL). The CCCL is a transitional facility where inmates from more secured facilities serve time before being released on parole. As a corporal, Loyuk's responsibilities included manning the control center,

transporting inmates, conducting searches, and maintaining the "overall security of the facility."

From September 2011 to January 2012, R.S. was an inmate at the CCCL. While incarcerated, R.S. had contact with Loyuk while she was "in chow" or as Loyuk delivered mail. R.S. testified that Loyuk, who she identified as a "guard," was "one of the nice guys" but denied that they developed a friendship or romantic interest during her incarceration.

R.S. was paroled on January 25, 2012, and moved to a halfway house. Her parole officer was not Loyuk or any other person employed at the CCCL. Loyuk had no authority to punish R.S. for parole violations or other misconduct.

A month after she was paroled, R.S. had a chance encounter with Loyuk in a Lincoln grocery store. While shopping, R.S. spotted Loyuk, who was wearing jeans and a T-shirt. R.S. started a conversation, and the two chatted about "how things were going." The conversation lasted for 30 minutes to an hour and concluded with an exchange of mailing addresses. A correspondence later developed.

Eventually, Loyuk revealed to R.S. that "he was having more feelings for [her] than just a friendship," and R.S. testified that the feeling was mutual. They had sex several times at Loyuk's house and later at two motels in March and April 2012.

R.S. testified that Loyuk did not pressure or coerce her into having sex with him. If anything, R.S. said that "I was probably the one pressuring him most of the time." R.S. testified that she and Loyuk were engaged at the time of trial.

After his relationship with R.S. became intimate, Loyuk approached Ross Peterson, a lieutenant at the CCCL, and said he wanted to talk. Loyuk told Peterson that an inmate assigned to the CCCL had given him information about misconduct committed by other inmates. After questioning by Peterson, Loyuk reluctantly identified the informant as R.S. Peterson had concerns and contacted the CCCL's warden. A Nebraska State Patrol officer interviewed Loyuk, and he admitted to having sex with R.S. about 15 times while she was on parole and he was employed at the CCCL. Loyuk was arrested after the interview concluded.

### 2. Procedural Background

The State charged Loyuk with first degree sexual abuse of an inmate or parolee. The district court entered a not guilty plea after Loyuk stood mute at the arraignment.

Loyuk moved to quash, arguing that the definition of "person" in Neb. Rev. Stat. § 28-322(2)(a) (Reissue 2008) was vague and overbroad, and that a conviction would violate his "rights to freedom of intimate association, due process, privacy, and Equal Protection under the First, Fifth, and Fourteenth Amendments." The court determined that § 28-322(2)(a) was not vague and that it applied to any DCS employee—not just those who had control over an inmate or parolee. Any imposition on Loyuk's right to intimate association, the court reasoned, was justified by the State's interest in protecting inmates and parolees from sexual intercourse with DCS employees. The court concluded that Loyuk's equal protection claim was meritless because there was a rational basis to distinguish married from unmarried couples.

After the trial concluded, Loyuk offered a number of proposed jury instructions. Loyuk submitted that the jury had to find that R.S. "was an inmate or parolee under the control of . . . Loyuk" and that "person" should be defined as an employee of the DCS who had control over an inmate or an inmate's activities. Loyuk proposed that the word "subject" be defined as to "bring under control or dominion," "subjugate," "make (as oneself) amenable to the discipline and control of a superior," "make liable," "predispose," and "to cause or force to undergo or endure." Loyuk also argued the court should instruct the jury that under Neb. Rev. Stat. § 29-4504 (Reissue 2008), it could draw an adverse inference from the lack of an electronic recording of his interview with the Nebraska State Patrol officer. Rejecting Loyuk's proposals, the court instructed the jury that the following were the elements of the offense: (1) Loyuk "intentionally subjected [R.S.] to sexual penetration"; (2) Loyuk was "employed by the [DCS]"; (3) R.S. was "under parole supervision"; and (4) the events occurred during March and April 2012 in Lancaster County. The court declined to instruct the jury that it could draw an adverse inference from the absence of an

electronic recording because Loyuk was not in custody when law enforcement interviewed him.

The jury found Loyuk guilty of first degree sexual abuse of an inmate or parolee. The court sentenced Loyuk to 18 months' probation.

## III. ASSIGNMENTS OF ERROR

Loyuk assigns, renumbered and restated, that (1) the evidence was insufficient; (2) the statutes defining first degree sexual abuse of an inmate or parolee are "overbroad, vague and generally violative of [his] rights to freedom of intimate association, due process, privacy and Equal Protection under the First, Fifth and Fourteenth Amendments"; and (3) the district court incorrectly or inadequately instructed the jury on the elements of the offense, the definition of "person," the definition of "subject," and the permissibility of an adverse inference based on the absence of an electronic recording of his interview with law enforcement.

## IV. STANDARD OF REVIEW

[1] Statutory interpretation, the constitutionality of a statute, and whether jury instructions are correct are questions of law, which an appellate court resolves independently of the trial court.[1]

[2] A statute is presumed to be constitutional, and all reasonable doubts are resolved in favor of its constitutionality.[2]

## V. ANALYSIS

### 1. Sufficiency of the Evidence

Loyuk argues that the evidence is insufficient because it did not show that he had control over R.S. or her activities at the time sexual penetration occurred. Additionally, Loyuk argues that he did not "subject" R.S. to sexual penetration because her participation was voluntary. The State does not dispute that Loyuk lacked control over R.S. when their relationship

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[1] See, *Rodgers v. Nebraska State Fair*, 288 Neb. 92, 846 N.W.2d 195 (2014); *State v. Ely*, 287 Neb. 147, 841 N.W.2d 216 (2014); *Banks v. Heineman*, 286 Neb. 390, 837 N.W.2d 70 (2013).

[2] *Banks v. Heineman, supra* note 1.

began, and there is no evidence that Loyuk coerced R.S. So, Loyuk's sufficiency assignment raises issues of statutory interpretation.

[3,4] In reading a penal 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.[3] We will not look beyond a statute to determine the legislative intent when the words are plain, direct, or unambiguous.[4]

Under Neb. Rev. Stat. § 28-322.02 (Reissue 2008), "[a]ny person who subjects an inmate or parolee to sexual penetration is guilty of sexual abuse of an inmate or parolee in the first degree." The term "inmate or parolee" is defined in § 28-322(1) as "any individual confined in a facility operated by the [DCS] or a city or county jail facility or under parole supervision." Section 28-322(2)(a) defines "person" as

> an individual employed by the [DCS] or by the Office of Parole Administration, including any individual working in central administration of the department, any individual working under contract with the department, and any individual, other than an inmate's spouse, to whom the department has authorized or delegated control over an inmate or an inmate's activities.

Loyuk does not dispute that he sexually penetrated R.S. when she was a parolee and he was an employee of the DCS. But he contends that the control requirement in the last clause of § 28-322(2)(a) applies to all the "persons" listed under § 28-322(2)(a). Because he did not have control over R.S., he argues that the statute does not include him. We disagree.

In § 28-322(2)(a), the participle "including" modifies the noun phrase "individual employed" by the DCS or the Office of Parole Administration. But a plain reading of the statute shows that "including" is only used to clarify that individuals working in the DCS' central administration are employees subject to criminal liability under § 28-322.02.

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[3] *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

[4] *Coffey v. Planet Group*, 287 Neb. 834, 845 N.W.2d 255 (2014).

Although the phrase "any individual working under contract with the department" also follows the word "including," contractors are clearly not DCS employees. And if the other individuals listed in the third item were DCS employees, the Legislature would not have listed them separately. So, in § 28-322(2)(a), the Legislature obviously set out three different groups of individuals who are subject to criminal liability for having sexual contact with an inmate or parolee: (1) any employee of the DCS or the Office of Parole Administration, including individuals working in central administration; (2) any individual working under contract with the DCS; and (3) any individual, other than an inmate's spouse, to whom the DCS has authorized or delegated control over an inmate or an inmate's activities.

[5] In short, the control requirement in § 28-322(2)(a) applies only to those nonemployees or noncontractors to whom the DCS has authorized or delegated control over an inmate or an inmate's activities. It does not apply to DCS employees.

[6] Nor does Loyuk's argument persuade us that he did not "subject" R.S. to sexual penetration. Loyuk seems to argue that the word "subjects," as used in § 28-322.02, has an element of coercion. The definitions he proposes include "'bring under control or dominion'" or "'force to undergo or endure.'"[5] These definitions cannot be squared with the statement in Neb. Rev. Stat. § 28-322.01 (Reissue 2008) that the consent of the inmate or parolee is not a defense. The plain meaning of "subject" is "to cause to undergo the action of something specified."[6] Here, the thing specified is sexual penetration and Loyuk caused R.S. to undergo this action by participating in the sexual act.

### 2. Constitutionality

Loyuk argues that the statutes defining the offense of sexual abuse of an inmate or parolee are unconstitutional on three

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[5] Brief for appellant at 30-31.

[6] Webster's Encyclopedic Unabridged Dictionary of the English Language 1415 (1989).

different grounds. First, Loyuk argues that they are overbroad because they burden the "fundamental right to intimate association that is rooted in the First, Third, Fourth, Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution and their state counterparts."[7] Second, Loyuk argues that the definition of "person" in § 28-322(2)(a) is unconstitutionally vague because it is not clear whether the requirement of control in the last clause of that subsection applies to all persons. Finally, Loyuk argues that the statutes violate his right to equal protection because the State infringed his fundamental right to intimate association and because § 28-322(2)(a) draws a classification between married and unmarried individuals. We conclude that each of these arguments is without merit.

(a) Overbreadth

[7-9] An attack on a statute's overbreadth is a claim that it impermissibly infringes on a constitutionally protected right.[8] A statute is unconstitutionally overbroad only if its overbreadth is substantial, i.e., when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.[9] When, as here, a defendant challenges both the overbreadth and vagueness of a law, we analyze overbreadth first.[10]

[10-12] Although Loyuk urges us to find a right to intimate association emanating from the penumbras of the Bill of Rights, this is a claim to liberty that turns on the substantive guarantees of the Due Process Clause of the 14th Amendment.[11] The Due Process Clause contains a substantive component[12] that relates to the content of the statute specifying when a right can be lost or impaired.[13] Under the Due Process Clause, a statute

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[7] Brief for appellant at 15.

[8] See *State v. Green*, 287 Neb. 212, 842 N.W.2d 74 (2014).

[9] See *id.*

[10] See *State v. Scott*, 284 Neb. 703, 824 N.W.2d 668 (2012).

[11] See *Flaskamp v. Dearborn Public Schools*, 385 F.3d 935 (6th Cir. 2004).

[12] See, e.g., *State v. Wiedeman*, 286 Neb. 193, 835 N.W.2d 698 (2013).

[13] *Staley v. City of Omaha*, 271 Neb. 543, 713 N.W.2d 457 (2006).

that infringes upon a "fundamental liberty interest" must be narrowly tailored to serve a compelling state interest.[14] A statute that infringes upon a liberty interest that is not fundamental must only be rationally related to a legitimate state purpose.[15] Fundamental liberties recognized by the U.S. Supreme Court include the right to marry, have children, direct the education and upbringing of one's children, marital privacy, contraception, and bodily integrity.[16]

[13,14] Assuming that the federal Constitution protects Loyuk's relationship with R.S., the State argues that rational basis review applies unless Loyuk's conviction "'directly and substantially'" interfered with his right to intimate association.[17] A court applies strict scrutiny to a "'direct and substantial interference'" with intimate associations, while lesser intrusions are subject only to rational basis review.[18] A direct and substantial interference with intimate associations exists if "a large portion of those affected by the rule are absolutely or largely prevented" from forming such associations or if those affected by the rule are "'absolutely or largely prevented from [forming intimate associations] with a large portion of the otherwise eligible population . . . .'"[19]

In analogous circumstances, courts have held that the intimate association rights of police officers are not directly and substantially interfered with by policies prohibiting intimate contact with certain individuals. For example, in *Anderson v. City of LaVergne*,[20] the plaintiff, a police officer, had a romantic relationship with an administrative assistant for the police department. Department policy prohibited intraoffice

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[14] *Citizens for Eq. Ed. v. Lyons-Decatur Sch. Dist.*, 274 Neb. 278, 293 739 N.W.2d 742, 756 (2007).

[15] See, e.g., *id.*

[16] See *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).

[17] Brief for appellee at 14.

[18] *Anderson v. City of LaVergne*, 371 F.3d 879, 882 (6th Cir. 2004), quoting *Akers v. McGinnis*, 352 F.3d 1030 (6th Cir. 2003).

[19] *Id.* (alteration in original).

[20] *Anderson v. City of LaVergne, supra* note 18.

dating between employees of different ranks. After the plaintiff refused to end the relationship, the chief of police initially terminated the plaintiff's employment before permitting him to resign. The court held that the policy did not directly and substantially interfere with the plaintiff's right to intimate association because he "continued to enjoy the ability to form intimate associations with anyone other than fellow police department employees of differing rank."[21]

[15] We conclude that the statutes defining the crime of sexual abuse of an inmate or parolee do not directly and substantially interfere with Loyuk's right to intimate association. Loyuk's freedom to intimately associate with prisoners and parolees was curtailed, but he was not largely or absolutely prevented from forming intimate associations with the otherwise eligible population. For a "person" under § 28-322(2)(a), the dating pool has not been substantially reduced. Accordingly, rational basis review applies even if Loyuk's relationship with R.S. has a constitutional dimension.

The statutes at issue here survive rational basis review. There can be little question that the State has a legitimate interest in protecting inmates and parolees from sexual abuse. And prohibiting sexual contact between these individuals and employees of the DCS is rationally related to this interest.

(b) Void for Vagueness

[16,17] Loyuk also argues that § 28-322(2)(a) is void for vagueness. The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.[22] The more important aspect of the void-for-vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.[23]

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[21] *Id.* at 882. See, also, *Bautista v. County of Los Angeles*, 190 Cal. App. 4th 869, 118 Cal. Rptr. 3d 714 (2010).

[22] *State v. Green, supra* note 8.

[23] *Id.*

[18] To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute.[24] A litigant cannot maintain that the statute is vague when applied to the conduct of others.[25] We will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.[26]

Loyuk's vagueness argument centers on the definition of "person" in § 28-322(2)(a). By its plain language, that statute defines "person" to include any employee of the DCS. There is no question that Loyuk was an employee of the DCS. Because his conduct was clearly prohibited, Loyuk is without standing to assert a vagueness claim.

(c) Equal Protection

[19,20] Loyuk argues that his conviction violated his right to equal protection because (1) a fundamental liberty interest was involved and (2) § 28-322(2)(a) draws a classification between married and unmarried individuals. Under the Equal Protection Clause, legislative classifications involving either a suspect class or a fundamental right are analyzed with strict scrutiny, and legislative classifications not involving a suspect class or fundamental right are analyzed using rational basis review.[27] The initial inquiry in an equal protection analysis is whether the challenger is similarly situated to another group for the purpose of the challenged government action.[28] Absent this threshold showing, there is not a viable equal protection claim.[29] In other words, dissimilar treatment of dissimilarly situated persons does not violate equal protection rights.[30]

We conclude that § 28-322(2)(a) did not violate Loyuk's right to equal protection. As discussed above, Loyuk was

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[24] See *State v. Scott, supra* note 10.

[25] *Id.*

[26] *Id.*

[27] See *Sherman T. v. Karyn N.*, 286 Neb. 468, 837 N.W.2d 746 (2013).

[28] See *id.*

[29] See *id.*

[30] See *id.*

not deprived of a fundamental right. And, to the extent § 28-322(2)(a) draws a marital status classification, Loyuk does not have a viable equal protection claim because he is not similarly situated to married individuals.[31] Unlike Loyuk and R.S.' informal sexual relationship, marriage requires the competence[32] and consent[33] of the parties—a key consideration because the Legislature was concerned that inmates and parolees are "not legally empowered to give 'consent.'"[34] Persons who marry enter into a new social status,[35] and the State is an implied party to their union.[36] In this context, the legislative calculus does not need to be the same for married and unmarried individuals.

### 3. Jury Instructions

[21,22] Loyuk argues that the district court incorrectly instructed the jury on the elements of the offense. He also argues that the court erred by not giving separate instructions for the definition of "person," the definition of "subject," and the permissibility of an adverse inference based on the absence of an electronic recording of Loyuk's statement to the State Patrol officer. We read all the jury instructions together,[37] 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.[38] The appellant has the burden to show that a questioned jury instruction prejudiced him or otherwise adversely affected his substantial rights.[39]

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[31] See, e.g., *State ex rel. Jarvela v. Burke*, 678 N.W.2d 68 (Minn. App. 2004).

[32] See Neb. Rev. Stat. § 42-103 (Reissue 2008).

[33] See, e.g., *Zutavern v. Zutavern*, 155 Neb. 395, 52 N.W.2d 254 (1952).

[34] Introducer's Statement of Intent, L.B. 511, Judiciary Committee, 96th Leg., 1st Sess. (Jan. 28, 1999).

[35] See *Edmunds v. Edwards*, 205 Neb. 255, 287 N.W.2d 420 (1980).

[36] See *Weber v. Weber*, 200 Neb. 659, 265 N.W.2d 436 (1978).

[37] *State v. Merchant*, 288 Neb. 439, 848 N.W.2d 630 (2014).

[38] *Id.*

[39] *Id.*

The State did not need to prove that Loyuk controlled R.S. or her activities, and we have rejected Loyuk's interpretation of the word "subject." The instructions proposed by Loyuk were not an accurate statement of the law, and he was not entitled to have them given to the jury. Nor was it error for the district court to decline to give the jury a verbatim copy of § 28-322(2)(a). Taken as a whole, the court's instructions adequately stated the elements of the offense.

Regarding Loyuk's argument about the lack of an electronic recording, Neb. Rev. Stat. § 29-4503 (Reissue 2008) generally requires that statements made during a "custodial interrogation" that relate to crimes involving sexual assault must be electronically recorded. If a law enforcement officer does not comply with this mandate, § 29-4504 provides that "a court shall instruct the jury that they may draw an adverse inference for the law enforcement officer's failure to comply with such section."

[23-25] The phrase "custodial interrogation," under Neb. Rev. Stat. § 29-4502(1) (Reissue 2008), "has the meaning prescribed to it under the Fourth and Fifth Amendments to the Constitution of the United States and Article I, sections 3 and 7, of the Constitution of Nebraska, as interpreted by the United States Supreme Court and the Nebraska Supreme Court." We have said that whether an individual is in custody depends on all the circumstances surrounding the interrogation.[40] In making that determination, the test is whether a reasonable person in the defendant's position would have felt free to leave.[41] If not, then a defendant is in custody.[42] Circumstances that are relevant to this inquiry include the location of the interrogation, whether the defendant initiated contact with the police, and whether the police told the defendant he was free to terminate the interview and leave at any time.[43]

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[40] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

[41] See *id.*

[42] See *id.*

[43] *Id.*

A Nebraska State Patrol officer interviewed Loyuk in an administrative building on the Lincoln Regional Center campus. The officer testified that the building was "a strictly administrative building" and did not have holding facilities for inmates. The officer, dressed in plainclothes, interviewed Loyuk alone in a conference room. After identifying himself as a sergeant with the Nebraska State Patrol and reading a *Miranda* warning,[44] he proceeded to interview Loyuk without recording the conversation. Loyuk was not handcuffed or otherwise restrained during the interview, and the officer advised him that he did not have to answer questions and "didn't have to be there with [him]."

We agree with the district court that Loyuk was not entitled to an instruction under § 29-4504 because he was not in custody. The interview occurred in an administrative building, and the officer told Loyuk that he could end the interview and leave. Loyuk did not initiate contact with the Nebraska State Patrol, but he did initiate a conversation about R.S. with a corrections officer at the CCCL. Considering all the circumstances involved, a reasonable person in Loyuk's position would have felt free to leave.

## VI. CONCLUSION

We conclude that the evidence was sufficient to support Loyuk's conviction, that his constitutional rights were not violated, and that the district court adequately instructed the jury. Accordingly, we affirm.

AFFIRMED.

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

# MARION'S QUALITY SERVICES, INC., DOING BUSINESS AS IT'S A KIDZ WORLD CHILD CARE CENTER AND AS DEB'S LEARNING PLACE FAMILY CHILD CARE HOME II, A NEBRASKA CORPORATION, APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, REGULATION AND LICENSURE/LICENSURE UNIT AND DIVISION OF PUBLIC HEALTH, ET AL., APPELLEES.

858 N.W.2d 178

Filed January 30, 2015. No. S-13-834.

1. **Administrative Law: Final Orders: 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. **Administrative Law: Judgments: Appeal and Error.** 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.** Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
4. **Administrative Law: Evidence.** The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it.
5. **Administrative Law: Words and Phrases.** Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable person to the same conclusion.

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

James R. Place, of Place Law Office, for appellant.

Jon Bruning, Attorney General, Michael J. Rumbaugh, and James D. Smith for appellees.

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

WRIGHT, J.

## NATURE OF CASE

Marion's Quality Services, Inc. (Marion's), is a Nebraska corporation doing business as It's a Kidz World Child Care

Center (Center) and as Deb's Learning Place Family Child Care Home II (Home). In 2012, the Nebraska Department of Health and Human Services (DHHS) revoked Marion's licenses to operate the Center and the Home.

Following an appeal hearing, DHHS upheld the revocation of the Home's license but reversed the revocation of the Center's license, instead imposing additional probation and a civil penalty.

This appeal is governed by the Administrative Procedure Act, and Marion's appeals from the judgment of the district court which affirmed DHHS' disciplinary actions. For the reasons discussed below, we affirm the judgment of the district court.

## SCOPE OF REVIEW

[1-3] 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. *Kerford Limestone Co. v. Nebraska Dept. of Rev.*, 287 Neb. 653, 844 N.W.2d 276 (2014). See, also, Neb. Rev. Stat. § 84-918 (Reissue 2014). 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. *Betterman v. Department of Motor Vehicles*, 273 Neb. 178, 728 N.W.2d 570 (2007). Deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007).

## FACTS

Marion's is owned by Richard Marion and Angela Marion, a married couple. The Center has been licensed since May 23, 2006, for up to 123 children. The Home has been licensed since August 28, 2002, for up to 12 children, but it has not been in operation for some years. DHHS is a state agency responsible for the enforcement of the Child Care Licensing Act.

On July 21, 2008, DHHS placed the Center on probation for 1 year and imposed a civil penalty for various violations relating to the responsibilities of the director and licensing process, child-staff ratio, and infant care and supervision. On April 10, 2009, DHHS extended the Center's probation another year (until July 21, 2010) because a busdriver had left two children in a van in subzero temperatures for approximately 10 minutes. Despite a citation for child abuse/neglect, the Center allowed the driver to transport children the following day.

On or about May 26, 2010, childcare inspection specialist Susanne Schnitzer conducted an onsite investigation of allegations of improper discipline at the childcare center of Marion's on West Dodge Road in Omaha (Dodge Center), which has since closed. Schnitzer found that one of the Dodge Center's staff members, Carla Marion, had inappropriately disciplined children by "thumping, kicking and purposely tripping along [with] throwing an object at a child and twisting the cheek of . . . another child." Carla Marion, Richard Marion's sister, resigned before the investigation concluded.

On March 14, 2011, the Center was placed on probation for another year based on various violations, including misbehavior by a member of the Center's staff and the director's failure to supervise and correct the behavior, despite several complaints from parents. During the investigation of the complaints, the Center was found to have violated a regulation requiring it to obtain additional background information from the appropriate law enforcement agency regarding one of its staff members.

On April 11, 2011, DHHS received a request to conduct a check for Cristina Carrizales on the Nebraska Central Registry of Child Abuse and Neglect and the Nebraska Adult Protective Services Central Registry, which is required for any prospective employee prior to beginning work at a licensed childcare. Although Carrizales did not have a criminal history, the Center's timecard records showed that Carrizales had begun working 2 weeks prior to the registry checks being completed.

On May 24, 2011, DHHS issued a "Notice of Revocation" to the Center. The notice was issued following DHHS' investigation into a complaint concerning events that took place on March 29, only 2 weeks after the Center had been placed on probation on March 14. The Center had employed two incarcerated felons who were on work release, Shannon Tays and Greta Johnson. Both women failed to completely and accurately disclose their criminal histories.

Despite being incarcerated, both Tays' and Johnson's "Felony/Misdemeanor Statements" provided incomplete information, and one indicated that she had no prior law enforcement contacts. Marion's did not request additional information from any law enforcement agency to verify those statements. Marion's had been aware that Tays and Johnson were incarcerated on theft by deception charges. On various occasions, it had provided the women rides from a correctional facility to the Center. Tays had five previous convictions for felony forgery and one for possession of methamphetamine.

On June 3, 2011, DHHS issued to the Home a "Notice of Revocation and Denial" of the Home's application to amend its license. DHHS issued the notice because the Home did not conduct background checks for three staff members listed on the application to ensure that the criminal history disclosures were accurate. On the application, Marion's listed as prospective employees both Carla Marion and Shonae Doremus. Doremus disclosed various misdemeanor tickets and convictions for possession of marijuana, flight to avoid arrest, and several theft offenses. She did not disclose contacts with law enforcement for operating a vehicle under suspension, furnishing tobacco to a minor, and failure to appear.

Marion's submitted an administrative appeal of both notices, and the cases were combined for purposes of conducting a DHHS administrative appeal hearing. The hearing was commenced on December 5, 2011; continued on February 27, 2012; and concluded on May 15.

On October 3, 2012, DHHS issued an order upholding the denial and revocation of the license for the Home for the following reasons: hiring without investigating three new

employees who had not fully disclosed their criminal histories, past violations regarding previously investigated and substantiated allegations of inappropriate discipline by one of the staff members, and history of noncompliance by Marion's at other licensed locations.

DHHS did not revoke the license of Marion's to operate the Center. But in lieu of revocation of the license, DHHS imposed an alternative penalty in the form of additional probation and a civil sanction of $615. This action resulted from the hiring of Tays and Johnson by Marion's without conducting a background check. Tays and Johnson are felons. DHHS found that hiring two felons with convictions of crimes of moral turpitude and possession of methamphetamine was against DHHS regulations and therefore violated the Center's probation.

Marion's appealed DHHS' order to the Lancaster County District Court, which reviewed the case de novo. On August 26, 2013, the district court affirmed DHHS' decision. It found that the Center had violated the terms of its probation by failing to request additional information about employees that were hired as staff. The court concluded that the regulations impose a duty to request additional information from law enforcement agencies and that Marion's neglected its responsibility by relying solely on employee self-reporting. The court rejected the claim of Marion's that it lacked knowledge about the employees' dishonesty in reporting their criminal histories. The court found that Marion's had demonstrated it was either unable or unwilling to comply with DHHS regulations at its childcare centers and therefore upheld DHHS' sanctions. Marion's appealed.

## ASSIGNMENTS OF ERROR

Marion's assigns two errors: (1) The district court's ruling upholding DHHS' findings regarding the Center's license did not conform to law, was not supported by competent evidence, and was arbitrary, capricious, and not reasonable, and (2) the district court's ruling upholding DHHS' findings regarding the Home's license did not conform to law, was not supported by competent evidence, and was arbitrary, capricious, and not reasonable.

## ANALYSIS

Our inquiry is whether the order of the district court conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable. See *Belle Terrace v. State*, 274 Neb. 612, 742 N.W.2d 237 (2007). DHHS had the authority to deny a license or take disciplinary action against a licensee pursuant to the Child Care Licensing Act for any of the following reasons:

> (1) Failure to meet or violation of any of the requirements of the Child Care Licensing Act or the rules and regulations adopted and promulgated under the act;
>
> (2) Violation of an order of [DHHS] under the act;
>
> . . . .
>
> (4) Conduct or practices detrimental to the health or safety of a person served by or employed at the program . . . .

Neb. Rev. Stat. § 71-1919 (Reissue 2009).

The Legislature has authorized DHHS to make various rules and regulations necessary for the care and protection of children. That authorization extends to making rules for childcare providers and facilities. Although DHHS' rules have been revised and recodified, those revisions became operative on May 20, 2013, after the revocations in this case occurred, so we will refer to the rules in effect at the time of the revocations in May and June 2011. One such rule is 391 Neb. Admin. Code, ch. 8, § 006 (1998), which provided the following: "Candidates being considered for employment . . . shall submit a signed 'Felony/Misdemeanor Statement' to the licensee or director. *The licensee or director shall request additional information from the appropriate law enforcement agency as needed to comply with* [*DHHS*] *regulations*." (Emphasis supplied.)

The prospective employee's "Felony/Misdemeanor Statement" must report any arrests, misdemeanor tickets, pending criminal charges, and/or convictions. See 391 Neb. Admin. Code, ch. 8, § 007 (1998). Additionally, the administrative code provides: "The licensee and the director shall not knowingly allow any person . . . who has been convicted of . . . crimes involving the illegal use of a controlled substance, or

crimes involving moral turpitude to be on the center premises." 391 Neb. Admin. Code, ch. 8, § 002 (1998).

Under the Nebraska Administrative Code, a license may be denied based upon "[t]he applicant's unwillingness or inability to comply with regulations." 391 Neb. Admin. Code, ch. 3, § 001.12(1) (1998). Regarding penalties for violations, DHHS is empowered to

> initiate suspension or revocation proceedings under any of the following circumstances:
>
> 1. When a licensee has shown a history of repeated violations of regulations;
>
> 2. When a licensee has violated a regulation(s) so as to create a situation which places children at substantial risk; [or]
>
> 17. When a licensee has violated any regulation[.]

391 Neb. Admin. Code, ch. 4, § 001.04 (1998).

[4,5] In interpreting administrative agency regulations, deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *Belle Terrace, supra*. The evidence is sufficient, as a matter of law, if an administrative tribunal could reasonably find the facts as it did on the basis of the testimony and exhibits contained in the record before it. *Fleming v. Civil Serv. Comm. of Douglas County*, 280 Neb. 1014, 792 N.W.2d 871 (2011). Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable person to the same conclusion. See *Hickey v. Civil Serv. Comm. of Douglas Cty.,* 274 Neb. 554, 741 N.W.2d 649 (2007).

From our review of the record, we conclude that the district court's findings were supported by competent evidence and were not arbitrary, capricious, or unreasonable.

### Sanctions Against Center

The Center was on probation effective March 14, 2011, and was required to maintain compliance with all DHHS regulations as part of its probation. The district court was presented with sufficient evidence to find that Marion's violated its probation by allowing persons convicted of crimes of moral

turpitude and controlled substance possession on the Center's premises and by failing to request additional information from law enforcement agencies about the criminal histories of its newly hired employees.

On March 29, 2011, only 2 weeks after the Center began its probation, the Center was subject to another complaint leading to an investigation. That investigation revealed that the Center failed to verify the criminal backgrounds of several employees before hiring them. Those employees had numerous felony convictions, including theft by deception and fraud. One of the employees had a conviction for possession of methamphetamine.

Prior to being hired, all applicants being considered for employment were required to submit a signed "Felony/Misdemeanor Statement" to the licensee or director. See 391 Neb. Admin. Code, ch. 8, § 006. "*The licensee or director shall request additional information from the appropriate law enforcement agency as needed to comply with* [*DHHS*] *regulations*." *Id*. (Emphasis supplied.)

Despite the plain language of chapter 8, § 006, Marion's insists that "[n]o other criminal background check(s) are required by the [regulations]" unless the prospective employee indicated that he or she had contacts with law enforcement. See brief for appellant at 33. Stated simply, the approach of Marion's was to rely solely on the prospective employee's truthfulness in reporting his or her criminal history without further investigation. This position is misguided.

This interpretation of Marion's as to the regulation contradicts both the plain language and the underlying purpose and intent of the regulation. Failing to request additional information from law enforcement agencies is particularly troubling given that Marion's knew both Tays and Johnson were incarcerated for theft by deception. We find that the district court's finding that Marion's failed to comply with all DHHS rules was supported by sufficient evidence. Under chapter 8, § 002, childcare centers are prohibited from knowingly allowing a person who has been convicted of crimes involving the use of a controlled substance or crimes involving moral turpitude to be on the Center's premises.

Marion's contends that theft by deception is not an automatic bar to employment. It references DHHS employee Schnitzer's "admission" to that effect. But our reading of the record concludes that Schnitzer merely indicated that whether such an offense would disqualify a prospective staff member depends on several factors, such as how long ago the offense occurred, whether it resulted in a conviction, and whether the offense was a misdemeanor or a felony. This court has held that "'[i]t is generally accepted that larceny . . . and theft are crimes that involve moral turpitude.'" *Hruby v. Kalina*, 228 Neb. 713, 716, 424 N.W.2d 130, 132 (1988).

We reject the contention of Marion's that it cannot violate the rule because it did not *technically* know of Tays' and Johnson's criminal histories. But ignorance of their employees' criminal records is not an excuse and would sanction an employer's lack of proper investigation of its employees. It is undisputed that Marion's knew at the time it hired Tays and Johnson that each had been convicted of theft by deception. Marion's was aware that Tays and Johnson were incarcerated at the Omaha Correctional Center and were participating in the work release program. Angela Marion gave Tays and Johnson rides from the facility on 10 to 12 occasions. This knowledge alone should have been sufficient for Marion's to be on notice that these employees had lied on their "Felony/Misdemeanor Statements." One stated that she had no law enforcement contacts. However, being a felon on work release, she had daily contact with law enforcement. The district court had sufficient evidence to find that Marion's had violated chapter 8, § 002.

The record contains sufficient evidence to sustain the district court's finding that Marion's had a duty under chapter 8, § 006, to request additional information from the relevant law enforcement agencies about prospective staff members and employees and that it violated that duty. The district court had sufficient evidence to find that Marion's had violated chapter 8, § 002, by knowingly allowing persons who had been convicted of crimes involving the illegal use of a controlled substance and crimes of moral turpitude to be employed by the

Center. Consequently, we find no error on the record regarding the sanctions against the Center for violating its terms of probation.

### Sanctions Against Home

The Home is licensed as a different type of childcare center than the Center and was inactive at the time of most of the violations noted in the record. However, the failure of Marion's to comply with DHHS regulations on its application to amend the Home's license and violations at its other childcare centers supports our determination that the district court's ruling was not arbitrary, capricious, or unreasonable. Our review of the record shows a substantial history of complaints, investigations, sanctions, and other actions against childcare providers at the Center and the now-closed Dodge Center.

DHHS regulations impose a duty on the childcare provider to report to DHHS the criminal history of its employees. See 391 Neb. Admin. Code, ch. 6, § 004.03 (1998). The record shows that on its application to amend the Home's license, Marion's included Carla Marion and Shantee Richardson, both of whom claimed not to have had prior law enforcement contacts or criminal history. Carla Marion, Richard Marion's sister, had resigned from the now-closed Dodge Center in the midst of allegations of improper discipline. Carla Marion had a number of misdemeanor driving offenses. Richardson had convictions for carrying a concealed weapon and possession of a controlled substance.

Marion's also included Doremus on its application, despite her disclosure of misdemeanor tickets, possession of marijuana, flight to avoid arrest, and several theft charges. Doremus did not disclose convictions for driving during suspension, furnishing tobacco to a minor, and failure to appear. Marion's did not attempt to confirm any of the employees' backgrounds.

DHHS regulations support sanctions against the Home for violations that occurred at the other childcare centers owned by Marion's. Sanctions and penalties in the regulations are directed at the owners and operators of childcare centers

in addition to the individual childcare centers. The regulations contemplate denying a license application based on the *applicant's* unwillingness or inability to comply with DHHS regulations. See 391 Neb. Admin. Code, ch. 3, § 001.12(1). Although the Home had not been in operation for some time when it submitted its application, there was sufficient evidence for the district court to determine that Marion's was either unwilling or unable to comply with DHHS regulations based on its conduct and numerous other violations at its other childcare centers.

In its brief, Marion's states, "No injuries or damages were incurred as a result of the alleged violations. No children were hurt . . . as a result of any of the alleged violations." Brief for appellant at 19. This argument fails to recognize the preventative purpose of the regulations and the prospective deterrent effect of sanctions. We reject the suggestion that DHHS or a court must wait until a child is physically injured before taking action.

From our review of the record and applicable statutes and regulations, we conclude that the district court's finding that Marion's failed to adhere to DHHS regulations was supported by competent evidence, conformed to the law, and was not arbitrary, capricious, or otherwise unreasonable. Consequently, we find no error on the record.

## CONCLUSION

For the above reasons, we affirm the judgment of the district court.

AFFIRMED.

# Board of Trustees of the City of Omaha Police and Fire Retirement System, appellee, v. City of Omaha, Nebraska, a municipal corporation, et al., appellants.

858 N.W.2d 186

Filed January 30, 2015. No. S-13-956.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.
4. **Declaratory Judgments: Justiciable Issues.** Declaratory judgments are available when a present actual controversy exists, all interested persons are parties to the proceedings, and a justiciable issue exists for resolution.
5. **Justiciable Issues.** A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.
6. **Declaratory Judgments: Justiciable Issues.** A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain.
7. ____: ____. At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.
8. **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.
9. **Trusts.** Trustees are generally required to exercise reasonable effort and diligence in administering and monitoring a trust, with due attention to the trust's objectives and the interests of the beneficiaries. This may include obtaining competent guidance and assistance, depending upon the circumstances.
10. **Statutes: Words and Phrases.** As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.
11. **Statutes: Intent: Words and Phrases.** While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed as modified in part, and in part reversed and vacated.

John P. Passarelli and Matthew S. Noren, of Kutak Rock, L.L.P., for appellants.

John R. Douglas and David A. Blagg, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

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

STEPHAN, J.

The City of Omaha's home rule charter authorizes the city council to establish a "pension and retirement system or systems" for city employees.[1] The charter provides that the assets and reserves of any such system shall constitute a "separate and independent trust fund," title to which shall be vested in a board of trustees to be created by ordinance.[2] Pursuant to this authority, the Omaha City Council created the City of Omaha Police and Fire Retirement System (the System) which is administered by a board of trustees.[3] The issues in this declaratory judgment action brought by the board against the City of Omaha and its mayor and city council (collectively the City) are whether the board has authority to retain an actuarial consultant and private legal counsel at city expense. The district court for Douglas County determined the board had such authority, and the City perfected this timely appeal and petitioned to bypass the Nebraska Court of Appeals. We granted the petition.

## BACKGROUND

Pursuant to Omaha's home rule charter,[4] the Omaha City Council enacted an ordinance creating

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[1] Omaha City Charter, art. VI, § 6.09 (1994).

[2] *Id.*, § 6.10.

[3] Omaha Mun. Code, ch. 22, art. III, §§ 22-61, 22-62, and 22-72 (2001).

[4] Omaha City Charter, *supra* note 1, §§ 6.09 and 6.10.

> a separate and independent trust fund to be known as the [S]ystem trust fund, title to which shall be vested in the board of trustees and into which shall be paid all contributions made under the [S]ystem by the members and the city after the date of establishment of such fund, and from which shall be paid all benefits provided by the [S]ystem, including benefits to retired members, widows or widowers, and children who began receiving benefits prior to establishment of such fund.[5]

The ordinance authorizes the board to maintain a portion of the fund in cash for the "payment of benefits and investment expenses" and requires it to "invest and reinvest" all remaining assets of the fund with "all investment income and losses being credited to such fund."[6] The ordinance further provides that the city finance director "shall make or approve all investments for the board."[7]

The board consists of seven members. Three members are elected from Omaha's police and firefighter unions; three members are representatives of the City, including the finance director, the human resources director, and a member of the city council; and the seventh member is not associated with the City or the unions and is elected by the other six members.

Under the Omaha home rule charter, the board "shall formulate policy for the [S]ystem and shall supervise its operation."[8] Also pertinent to the issues presented in this case is § 22-69 of the Omaha Municipal Code,[9] which provides:

> Subject to the board of trustees, the management of the [S]ystem shall be directed by the following officers, to whom shall be delegated the indicated responsibilities:
>
> (a) The city finance director shall be the administrative head of the [S]ystem and shall approve all investments of the retirement fund.

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[5] Omaha Mun. Code, *supra* note 3, § 22-72.

[6] *Id.*

[7] *Id.*

[8] Omaha City Charter, *supra* note 1, § 6.10.

[9] Omaha Mun. Code, ch. 22, art. III, § 22-69 (2002).

> (b) The city attorney shall be the legal advisor to the board.
>
> (c) The county treasurer shall be the treasurer of the [S]ystem.
>
> (d) The board, subject to applicable personnel regulations, may employ an actuary. The actuary shall act as technical advisor to the board on matters regarding operation of the [S]ystem, and shall recommend mortality tables, interest rates, discontinuance tables, and any other tables necessary for any investigation or valuation to be made of the [S]ystem, which tables and interest rates shall be subject to the approval of the board. The actuary shall make such investigation and valuation at such times as may be requested by the board, but at least once in each five-year period. The actuary shall act at all times as technical advisor to the board in such matters as it may request.
>
> (e) The board, in administering the [S]ystem, may utilize the services of existing city departments and personnel as are required for the proper operation of the [S]ystem.

In September 2011, the board voted to retain a private law firm to research whether the board had an "obligation to retain counsel separate from the Omaha City Attorney's office for advice when the City or Unions are involved." Subsequently, the city attorney sent a memorandum to the board, stating that because the city attorney is designated by § 22-69 as its legal advisor, the board lacked authority to retain outside counsel unless the city attorney had a conflict of interest. The city attorney further advised the board that in the absence of a conflict, any costs incurred in retaining outside counsel would not be considered an appropriate administrative expense payable from the City's general fund.

At a June 2012 meeting, the board considered two law firms and selected one of them as "the Board's potential outside counsel." The city finance director was present at this meeting and opined that based upon the city attorney's memorandum, no money from the City's general fund could be used to pay outside legal counsel retained by the board.

At the same meeting, the board discussed hiring the board's actuarial consultant to conduct a study of disability benefits paid by the System. The board believed this study was necessary because the System was "underfunded" and seemed to be paying out disproportionately higher disability benefits than other pension funds of comparable size. The board wanted the study to help determine whether it should "petition the [C]ity or the units to change the contract or the statutes." One member noted the recommendation of the city finance director that the City would not pay for the study. Nevertheless, on a 4-to-2 vote with one abstention, the board voted to hire its actuary "in order to conduct an investigation/best practices review of our disability benefits and component and the administration and policies to compare them to other comparable police and fire pension plans."

The board then commenced a declaratory judgment action against the City in which it asked the district court to (1) construe Omaha's home rule charter and applicable ordinances to authorize the board to retain consultants and independent legal counsel and (2) declare that the expenses associated with such retention would be administrative expenses payable from the City's general fund. After the City filed an answer asserting various defenses, the board moved for summary judgment.

The district court sustained the board's motion. It determined there was a justiciable controversy in that there was an actual dispute between the parties which could be resolved by construction of applicable city ordinances. The court determined the board was authorized under § 22-69 to hire outside consultants and independent legal counsel. It reasoned that to fulfill its fiduciary duties to the beneficiaries of the fund, the board had "the discretion to hire outside consultants to the extent that such consultants are necessary for the Board to effectively 'formulate policy for' and 'supervise' the 'operation' of the System." The court qualified its holding by stating that in the exercise of this discretionary authority, the board "may not act in a manner that is unreasonable, arbitrary, capricious, or motivated by anything other than an obligation to faithfully perform its fiduciary duties to the beneficiaries of the System."

The court also determined the board was authorized to hire independent legal counsel to the extent such counsel is necessary to "formulate policy for" and "supervise" the "operation" of the System, so long as the board does not operate in a manner that "is unreasonable, arbitrary, capricious, or motivated by anything other than an obligation to faithfully perform its fiduciary duties." The court based this determination on the board's fiduciary duties to the beneficiaries of the System and concluded the language of § 22-69 did not limit the board's discretionary authority to retain outside counsel.

Finally, the court determined the costs associated with hiring outside counsel and consultants were administrative expenses under § 22-71 of the Omaha Municipal Code.[10] The district court reasoned the City had an obligation to pay for consultants and legal counsel retained by the board based on the plain and unambiguous language of the ordinance stating that "'[a]ll costs and expenses incurred in the administration of the [S]ystem shall be paid by the [C]ity by appropriation from the general fund . . . .'"[11] It reasoned that these would not be administrative expenses if the City showed that "the Board acted in a manner that was unreasonable, arbitrary, capricious, or motivated by anything other than an obligation to faithfully perform its fiduciary duties to the beneficiaries of the System."

## ASSIGNMENTS OF ERROR

The City assigns, restated and consolidated, that the district court erred in (1) finding that Omaha City Charter § 6.10 and Omaha Mun. Code §§ 22-69 and 22-72 grant the board discretion to hire outside consultants and independent legal counsel and (2) finding that Omaha Mun. Code § 22-71 requires the City to pay expenses incurred by the board in hiring outside consultants and independent legal counsel without the City's prior authorization.

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[10] Omaha Mun. Code, ch. 22, art. III, § 22-71 (2001).

[11] *Id.*

## STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[12] In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[13]

[3] When a declaratory judgment action presents a question of law, an appellate court has an obligation to reach its conclusion independently of the conclusion reached by the trial court with regard to that question.[14]

## ANALYSIS

### Justiciable Controversy

[4-7] Declaratory judgments are available when a present actual controversy exists, all interested persons are parties to the proceedings, and a justiciable issue exists for resolution.[15] A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.[16] A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain.[17] At the time that the declaration is sought,

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[12] *City of Omaha v. City of Elkhorn*, 276 Neb. 70, 752 N.W.2d 137 (2008); *Hofferber v. City of Hastings*, 275 Neb. 503, 747 N.W.2d 389 (2008).

[13] *Id.*

[14] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010); *Berens & Tate v. Iron Mt. Info. Mgmt.*, 275 Neb. 425, 747 N.W.2d 383 (2008).

[15] See *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

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

[17] *Boyles, supra* note 15.

there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.[18]

The parties do not dispute the determination of the district court that this case presents a justiciable controversy which is capable of judicial resolution in the form of a declaratory judgment. We agree that a justiciable controversy exists, but we view it as being narrower than characterized by the parties and the district court. The district court defined the legal issue as whether the board has authority "to hire outside consultants and independent legal counsel" at the City's expense. The phrase "outside consultants" could encompass a wide variety of professional disciplines. But the actual dispute between the parties is more narrowly focused on (1) the authority of the board to retain an actuarial consultant to undertake a study of disability benefits paid by the System and retain independent legal counsel and (2) whether the costs of such actions are administrative expenses. We therefore address only those issues.

## Nature of Entity

It is first necessary to determine the nature of the board as an entity. We agree with the City that the board is not a separate and distinct political subdivision. But we cannot agree with its argument that the board is "merely an administrative agent of the City."[19]

The Omaha home rule charter provides that the assets and reserves of a pension and retirement system established by the City shall be a "separate and independent trust fund" and that the board "shall formulate policy for the [S]ystem and shall supervise its operation."[20] From this language, it is clear that the board serves as a trustee of the assets of the System. Its responsibility, fiduciary in nature, is owed to current and former city employees who are beneficiaries of the trust fund, not to the citizenry as a whole, as would be the case if it were an administrative agency.[21] Yet the board is not entirely

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[18] *Id.*

[19] Reply brief for appellants at 4.

[20] Omaha City Charter, *supra* note 1, § 6.10.

[21] See, generally, Neb. Rev. Stat. § 30-3867(a) (Reissue 2008).

independent of the City, because the scope of its responsibilities are defined by the City's charter provisions and ordinances applicable to the System.

### Authority to Retain Actuarial Consultant

Section 22-42(f) of the Omaha Municipal Code specifically authorizes the board to "employ an actuary" who "shall act as a technical advisor to the board on matters regarding the operation of the [S]ystem." Section 22-42(f) describes specific functions to be performed by the actuary, and then states that "[t]he actuary shall act at all times as technical advisor to the board on such matters as it may request."

[8] 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.[22] Reading the ordinance based on these principles, we conclude it authorizes the board to seek technical assistance from an actuary on matters which are not specifically enumerated. But we agree with the district court that the board's utilization of an actuary must be necessary for the board to effectively perform its duties under the Omaha home rule charter to "formulate policy for" and "supervise [the] operation" of the System.[23] Likewise, we agree with the holding of the district court that in requesting technical assistance from an actuary, "the Board may not act in a manner that is unreasonable, arbitrary, capricious, or motivated by anything other than an obligation to faithfully perform its fiduciary duties to the beneficiaries of the System."[24]

The record reflects that the System was underfunded and that the board perceived it was its duty as a fiduciary of the System to monitor unfunded liabilities. The board had information that unusually high disability payments, compared to other pension funds of similar size, could be contributing to the problem. As one board member explained,

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[22] *Fisher v. PayFlex Systems USA*, 285 Neb. 808, 829 N.W.2d 703 (2013).

[23] Omaha City Charter, *supra* note 1, § 6.10.

[24] See *Bass v. County of Saline*, 171 Neb. 538, 106 N.W.2d 860 (1960).

> We had more officers and fire personnel out on disability pensions than other similarly-sized funds. We wanted to find out whether it was a problem with our statutory scheme or the contracts that were being negotiated between the city and the unions.
>
> But we wanted to figure out why our disability payments were so high. Did we need to be doing something to see if officers or fire personnel could go back to work after they went out on a disability pension?
>
> That's why we wanted to retain our actuary, to do this analysis, and get back to us so that we could then as a board petition the city or the units to change the contract or the statutes. We don't participate in those negotiations, except as an independent body. We could petition for a change.

[9] We conclude this proposed utilization of an actuarial consultant fell within the scope of the board's obligation to formulate policy and supervise the operation of the fund. Certainly, the future financial viability of the fund was a matter of legitimate concern to the board, and it was reasonable for it to request an actuarial analysis of a specific aspect of the System's operation which could affect such viability. It was also reasonable for the board to seek the assistance of an actuary in order to have an accurate and complete understanding of the potential problem before recommending any contractual or legislative solutions. Trustees are generally required "to exercise reasonable effort and diligence" in administering and monitoring a trust, with "due attention to the trust's objectives and the interests of the beneficiaries."[25] This may include "obtaining competent guidance and assistance," depending upon the circumstances.[26]

The City argues that if the board has authority to retain an actuarial consultant, the board must pay for the consultant, because the retention is an investment expense, not an administrative expense. The City relies on § 22-71, which states: "All costs and expenses incurred in the administration of the

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[25] Restatement (Third) of Trusts § 77, comment *b*. at 82 (2007).

[26] *Id*. at 83.

[S]ystem shall be paid by the [C]ity by appropriation from the general fund; provided, however, that investment expenses may be charged to income or principal of the retirement fund in accordance with accepted general accounting princip[le]s for such funds."

We agree with the district court that the cost associated with the actuarial study sought by the board is an administrative expense, not an investment expense. As we have noted, the study falls within the board's responsibility under the home rule charter to "formulate policy for the [S]ystem" and "supervise its operation."[27] We agree with the district court that "the City cannot refuse to pay such expenses absent a showing that the Board acted in a manner that was unreasonable, arbitrary, capricious, or motivated by anything other than an obligation to faithfully perform its fiduciary duties to the beneficiaries of the System."[28]

### Authority to Retain Counsel

The question whether the board has discretionary authority to retain outside legal counsel turns on language in § 22-69, which provides that "[*s*]*ubject to* the board of trustees . . . [t]he city attorney *shall* be the legal advisor to the board." (Emphasis supplied.) The district court found that "subject to" gave the board discretion to use the city attorney. The court reasoned that "shall" was a mandate requiring the city attorney to provide legal advice to the board, subject to the board's discretion, not a mandate that the board use the city attorney as a legal advisor.

The City argues that "subject to" should not be construed to give the board absolute discretion to use the city attorney as a legal advisor. Instead, the City argues the more sensible construction of "subject to" in this case is that the city attorney shall provide legal advice to the board under the general direction and control of the board.

We have held that the expression "subject to" is a term of qualification which acquires its meaning from the context in

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[27] Omaha City Charter, *supra* note 1, § 6.10.

[28] See *Bass, supra* note 24.

which it appears.[29] In *State, ex rel. Johnson, v. Tilley*,[30] we held that "subject to" in the context of approval of expenditures meant the attorney general had the discretionary power to approve the expenditure of the fund. We defined "subject to" as being "'dependent upon; . . . limited by; . . . under the control, power, or dominion of.'"[31]

[10,11] As a general rule, in the construction of statutes, the word "shall" is considered mandatory and inconsistent with the idea of discretion.[32] While the word "shall" may render a particular provision mandatory in character, when the spirit and purpose of the legislation require that the word "shall" be construed as permissive rather than mandatory, such will be done.[33]

An Illinois appellate court construed a similar provision in *People ex rel. Todd v. Board of Education*.[34] There, a school board and its attorney disputed the meaning of a statute which provided that the school board shall appoint "'an attorney, who shall have general charge and control, subject to the approval of the board, of the law department and the employees therein.'"[35] The court rejected the school board's argument that the phrase "'subject to'" gave the board absolute and uncontrolled power to manage the law department over the objections of the attorney.[36] The court concluded the attorney's authority to manage the law department in accordance with the general policies of the board was not subject to the absolute control and direction of the board.

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[29] *Bulger v. McCourt*, 179 Neb. 316, 138 N.W.2d 18 (1965).

[30] *State, ex rel. Johnson, v. Tilley*, 137 Neb. 173, 288 N.W. 521 (1939).

[31] *Id.* at 178, 288 N.W.2d at 523.

[32] *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002); *State on behalf of Minter v. Jensen*, 259 Neb. 275, 609 N.W.2d 362 (2000).

[33] *State ex rel. Parks v. Council of City of Omaha*, 277 Neb. 919, 766 N.W.2d 134 (2009); *Troshynski v. Nebraska State Bd. of Pub. Accountancy*, 270 Neb. 347, 701 N.W.2d 379 (2005); *State on behalf of Minter, supra* note 32.

[34] *People ex rel. Todd v. Board of Education*, 258 Ill. App. 271 (1930).

[35] *Id.* at 276.

[36] *Id.* at 279.

Although this case presents a different context, we reach a similar result. Section 22-69 is a clear legislative statement that the city attorney shall be the legal advisor to the board. The fact that the city attorney is required to perform this function "[s]ubject to the board of trustees" simply delineates the attorney-client relationship and requires that the city attorney work under the general direction and control of the board. We construe the ordinance to mean the board must utilize the city attorney as its legal advisor under its general direction unless there is a conflict of interest which prevents the city attorney from serving in that capacity. We deem the record is insufficient to determine whether such a conflict exists in the circumstances of this case. We therefore do not address that issue, which was likewise not addressed by the district court.

## CONCLUSION

We conclude that the district court was without jurisdiction to determine the authority of the board to retain outside consultants other than an actuary, given the absence of a justiciable controversy as to the broader issue. But we conclude that the district court did not err in determining that the board had legal authority to retain an actuary to undertake a study of disability benefits paid from the System's trust fund and that the cost of such study is an administrative expense payable by appropriation from the City's general fund. Thus, as to the issue of the board's authority to retain consultants, we affirm the judgment as modified. We reverse and vacate that portion of the judgment of the district court declaring that the board has discretion to hire independent legal counsel whenever it deems such retention to be necessary.

AFFIRMED AS MODIFIED IN PART, AND IN PART REVERSED AND VACATED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

# United General Title Insurance Company, appellant, v. Daniel Malone et al., appellees.

858 N.W.2d 196

Filed January 30, 2015. No. S-13-1002.

1. **Summary Judgment.** Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
3. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **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.
5. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
6. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
7. **Torts: Conversion: Property: Words and Phrases.** Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
8. **Torts: Conversion: Property: Proof.** In order to maintain an action for conversion, the plaintiff must establish a right to immediate possession of the property at the time of the alleged conversion.
9. **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.
10. **Contribution: Words and Phrases.** Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.
11. **Contribution: Parties: Liability.** The prerequisites to a claim for contribution are that the party seeking contribution and the party from whom it is sought share a common liability and that the party seeking contribution has discharged more than his fair share of the common liability.
12. **Contribution: Restitution: Unjust Enrichment: Liability.** Both indemnity and contribution rest on principles of restitution and unjust enrichment. A party has a claim for indemnification if it pays a common liability that, as between itself and another party, is altogether the responsibility of the other party. A claim for contribution arises when a party has paid more than its fair share

of a common liability that is allocated in some proportion between itself and another party.

13. **Liability: Damages.** Generally, the party seeking indemnification must have been free of any wrongdoing, and its liability is vicariously imposed.
14. **Trusts: Property: Title: Unjust Enrichment: Equity.** A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.
15. **Trusts: Property: Title: Equity: Proof.** Regardless of the nature of the property upon which a constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.
16. **Trusts: Property.** Where money is the asset upon which a trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.
17. **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.
18. **Jury Instructions: Appeal and Error.** It is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.
19. ____: ____. If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.
20. **Conspiracy: Words and Phrases.** A civil conspiracy is a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.
21. **Conspiracy: Torts.** A conspiracy is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort.
22. **Conspiracy: Damages.** The gist of an action for civil conspiracy is not the conspiracy charged, but the damages the plaintiff claims to have suffered because of the wrongful acts of the defendants.
23. **Conspiracy: Liability.** By establishing a civil conspiracy, a plaintiff extends liability for the wrongful acts underlying the conspiracy to those actors who did not actively engage in the acts, but conspired in their commission.
24. **Jury Instructions: Appeal and Error.** Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.

25. **Rules of the Supreme Court: Pleadings.** The key inquiry of Neb. Ct. R. Pldg. § 6-1115(b) for "express or implied consent" to trial of an issue not presented by the pleadings is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.
26. **Pleadings.** Implied consent to trial of an issue not presented by the pleadings may arise in two situations: First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial, the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.
27. **Pleadings: Proof.** Implied consent to trial of an issue not presented by the pleadings may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues.
28. **Rules of the Supreme Court: Pleadings.** To satisfy Neb. Ct. R. Pldg. § 6-1115(b) and demonstrate implied consent to trial of an issue not presented by the pleadings, evidence to which no objection is raised must be directed solely at the unpleaded issue, in order to provide a clear indication that the opposing party would or should have recognized that a new issue was being injected into the case.
29. **Courts: Pleadings.** A court will not imply consent to try a claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim.
30. ____: ____. A trial court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.
31. **Contracts: Equity.** Absent a contractual arrangement, the right to indemnity has its roots in equity.
32. **Liability: Damages.** Indemnification is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his conduct.

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

Thomas M. Locher and Matthew E. Eck, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellant.

Robert F. Peterson and Kathleen M. Foster, of Laughlin, Peterson & Lang, for appellees.

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

CASSEL, J.

## I. INTRODUCTION

Improper transfers were made from a title insurance agent's escrow account. The agent's principal, United General Title Insurance Company (United General), paid the loss pursuant to a statute.[1] Relying upon numerous legal theories, it sued to recover the loss from multiple persons and entities, including recipients of the transferred funds. Although it recovered judgment against some persons and entities, summary judgment was entered against it on various claims. After a jury trial, several recipients successfully defended the action on the remaining issues. United General appeals.

As we will explain in more detail, the district court correctly granted summary judgment on United General's claim for contribution but erred in doing so on its claims for conversion and a constructive trust. At trial, the court properly rejected a proposed jury instruction, denied amendment of the complaint, and partially directed a verdict. After trial, it correctly granted a motion for judgment notwithstanding the verdict. We affirm in part, and in part reverse and remand for further proceedings.

## II. BACKGROUND

### 1. PARTIES

United General is a title insurance company authorized to issue title insurance commitments and policies of insurance in Nebraska. Several years before the improper transfers were discovered, it entered into a "Title Insurance Agency Agreement" with A.G. Ventures, LLC, doing business as Guardian Title Services (Guardian). The agreement authorized Guardian to originate and solicit applications for United General's title insurance products in Nebraska. It essentially permitted Guardian to issue title insurance policies underwritten by United General. As part of the agreement, Guardian was to collect premiums, earnest deposits, and other payments from customers and hold them in escrow for disbursement.

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[1] See Neb. Rev. Stat. § 44-1993(8) (Reissue 2010).

From January to September 2008, Guardian was owned solely by Daniel Malone. Guardian was managed by Investment Property Resources, Ltd. (IPR), a management and brokerage company owned by Malone and his wife. IPR managed several other entities in which Malone had an interest. These entities included Maple Office Partners, LLC, in which Malone had a membership interest, and Via Christe, L.L.C., of which Malone was the managing member. In addition to these entities, IPR also managed Northwest Village 2nd Addition Homeowners Association, Inc. (Northwest Village), and Angel Guardians, Inc.

### 2. Shortage

In July 2008, a shortage was discovered in one of Guardian's escrow accounts. United General advised its parent company of the shortage, and auditors were dispatched to assess the situation. The auditors ultimately determined that $588,671.80 was missing from the escrow account and that Guardian had failed to remit premiums for title insurance policies to United General in the amount of approximately $22,000. United General's parent company made immediate arrangements to cover the shortage by transferring $588,000 from United General to Guardian. United General also terminated its agency agreement with Guardian, and the Nebraska Department of Insurance prohibited Guardian from conducting further real estate closings.

In the investigation of the shortage, the auditors determined that frequent transfers of substantial amounts were made between Guardian's escrow account and its operating account. Some of the transferred funds remained in the operating account, while subsequent transfers were made to IPR, entities managed by IPR, or entities in which Malone had an interest. Further transfers were made between these entities in varying amounts. One auditor opined that the "majority of the money transferred out was used to keep the various businesses owned by . . . Malone functioning." The auditor further provided, "If you remove the transfers in and out . . . from each account none of the businesses would show a profit."

### 3. Complaint

After paying the loss, United General filed a complaint against 16 named defendants and 3 unknown entities associated with Malone or IPR. The defendants relevant to this appeal included:

- Malone;
- Tara Heitkamp (IPR's primary business manager);
- Guardian;
- Via Christe;
- IPR;
- Fidelis, LLC;
- Northwest Village;
- Angel Guardians;
- Maple Office Partners; and
- M & M Property Partners.

In its complaint, United General asserted 12 causes of action seeking to recover the unpaid premiums and the funds it had paid out to cover the shortage. The causes of action and their key factual allegations relevant to this appeal included:

- Conversion—One or more of the defendants intentionally converted United General's property, causing it damages in the amount of at least $22,000.
- Civil conspiracy—Guardian, Heitkamp, Malone, and the remaining defendants acted to accomplish the unlawful taking of funds from Guardian's escrow account and used the funds for improper and illegal purposes.
- Common-law indemnification—One or more of the defendants was obligated to indemnify United General.
- Contribution—One or more of the defendants was obligated to contribute to the loss sustained by United General.
- Constructive trust—One or more of the defendants received funds transferred from Guardian's escrow account as a result of fraud, misrepresentation, or an abuse of an influential or confidential relationship and were unjustly enriched.

In its prayer for relief, United General requested judgment against the defendants in the amount of at least $588,671.80.

### 4. Summary Judgment

In January 2011, several of the defendants moved for summary judgment. The moving defendants included Malone, Via Christe, Northwest Village, Angel Guardians, M & M Property Partners, Maple Office Partners, and Fidelis.

At the summary judgment hearing, two affidavits of Ellen Roethler, a former employee of IPR, were received into evidence. In her affidavits, Roethler explained that she examined each deposit slip and bank statement for several of the defendant entities in order to determine if they were benefited by the unauthorized transfers of funds into and out of their accounts. She ultimately concluded that (1) Via Christe sustained a net loss of $14,926.36, (2) Northwest Village was not financially impacted by the unauthorized transfers, (3) M & M Property Partners received net deposits of $241,046.66, (4) Angel Guardians received net deposits of $12,500, and (5) Maple Office Partners received net deposits of $2,500.

The district court also received two affidavits of Malone. Malone averred that M & M Property Partners was a partnership between himself and another individual that terminated in 2002. One of the partnership's bank accounts was not closed and remained dormant for several years. In 2006, Malone began to use the bank account for his personal use. Malone further provided that he had authorized deposits into the account in the amount of $230,500 to receive the proceeds from the sale of his interest in Via Christe. However, he acknowledged that the remaining transactions noted by Roethler involving M & M Property Partners were unauthorized. Finally, he claimed that he had filed for personal bankruptcy in July 2010 and that his debts were discharged in October.

As to Guardian's escrow account, Malone explained that "Guardian was required to keep escrow deposits received from customers, especially from prospective home buyers, in an escrow account, and some of these funds were subsequently to be paid to United General as insurance premium costs, when the transaction was completed."

The district court entered an order in August 2011 disposing of the motions for summary judgment. The court first entered

summary judgment on United General's claim for conversion. The court observed that "United General was never entrusted with the escrowed funds and never possessed the escrowed funds, nor did United General ever have the right to unconditionally and immediately repossess any of the escrowed funds." The court determined that without an immediate right to possess the escrowed funds, United General's conversion claim must fail.

The district court also granted the moving defendants summary judgment on United General's claims for contribution and a constructive trust. The court observed that a claim for contribution requires a mutual liability or a jointly committed wrong. While genuine issues of material fact existed as to whether the moving defendants were liable for conversion, United General was statutorily liable for the loss. Thus, no jointly committed wrong existed between United General and the defendants. As to a constructive trust, the court concluded that United General "had no ownership interest, equitable or otherwise, in the $588,671.80 of escrowed funds." And although United General could claim an interest in the $22,000 of unpaid premiums, the unpaid premiums could not be traced to any specific defendant or account.

But the district court determined that summary judgment was inappropriate on United General's claims of civil conspiracy and indemnification. Consequently, it ordered that a jury trial be conducted on those claims.

### 5. Trial

At trial, a representative from United General's parent company testified as to the real estate closing process and the handling of premiums for title insurance products. In almost every closing involving Guardian, a party was issued a United General title insurance policy. At closing, Guardian would write itself a check from its escrow account to its operating account to reflect that it had earned payment. A portion of that payment would be for the title insurance policy premium. The agency agreement between United General and Guardian provided that Guardian was entitled to 80 percent of the premium and United General was entitled to 20 percent. The

representative testified that in the course of the investigation of the shortage in Guardian's escrow account, it was discovered that Guardian had performed 309 closings for which it had failed to send United General its portion of the policy premium, amounting to $28,000.

A certified public accountant testified that he reviewed the bank statements and check registers for several of the defendant entities, as well as various affidavits and reports. The accountant indicated that the first transfer of funds from Guardian's escrow account to the defendant entities was made on April 1, 2007. The accountant testified that M & M Property Partners received $65,100 from the escrow account, IPR received $101,570, Via Christe received $247,600, Maple Office Partners received $18,800, Northwest Village received $5,700, Angel Guardians received $8,000, and Malone received $13,000. The accountant testified that in all, $561,500 was transferred from Guardian's escrow account.

Malone testified that the shortage in the escrow account came to his attention near the end of July 2008. On a Friday morning, he received a call from a bank that a check for $500,000 had been returned by another bank. The amount of the check "took [Malone's] breath away," because a check that large would be associated only with a closing. Malone called Heitkamp and told her to meet him at the bank.

At the bank, Malone and Heitkamp met with several bank representatives. According to Malone, Heitkamp explained that she had written the returned check in order to deposit money in the escrow account and accrue interest. But Malone testified that the situation was "very unusual" because he did not "tell [Heitkamp] to get creative and move money around." Heitkamp claimed that the initial presentation of the check for payment, its return, and its subsequent re-presentation had created a "backlog in the Federal Reserve system" that would clear itself in the next few days.

A waiting period of 3 or 4 days began in order to see if the deposits would clear and if the shortfall would be corrected. On the following Friday, Heitkamp came into Malone's office and told him that she had received the bank statement for the

escrow account and would balance the account over the weekend. However, Malone testified that he never saw Heitkamp again except during a deposition and at trial.

Malone alerted United General to the shortage, and auditors were sent to investigate. Malone testified that the bank statements for the entities managed by IPR revealed "all types of activity that was certainly not customary nor authorized." Malone explained that the activity consisted of 25 to 30 checks in large amounts going into and out of the entities' accounts every month. He described the activity as "[m]illions of dollars being washed around these accounts."

Malone testified that the checks going into and out of the entities' accounts were stamped with his signature by a stamp that he had given to Heitkamp "[s]trictly to execute customary and published and announced checks that we'd had every month." Malone testified that although Heitkamp was not authorized to make withdrawals from Guardian's escrow accounts, he had such authorization. He further provided that there were multiple online transfers originating from Heitkamp's desk.

According to Malone, the unauthorized transfers did not appear on anything he ever saw. And he testified that he never observed anything on the entities' tax returns that alerted him to any issues. Malone opined that Heitkamp was making the unauthorized transfers without recording them or was maintaining a separate set of books. He testified that he was never able to determine the ultimate destination of the funds transferred from Guardian's escrow account.

And Malone explained that the shortage in the escrow account ultimately caused him to claim personal bankruptcy and close his real estate business. He explained that IPR sold its assets to Fidelis, a Nebraska real estate company started by Malone's son and owned by Malone's daughter and her husband at the time of trial. Fidelis purchased IPR's assets in an "Asset Purchase Agreement" for $5,500. The agreement had an effective date of September 1, 2008, and provided that Fidelis did not assume any of IPR's liabilities. Malone testified that IPR closed its business at "year-end December of

2008." He further indicated that Fidelis was not in existence when the unauthorized transfers were made from Guardian's escrow account.

The district court also received testimony from several individuals with interests in the entities managed by IPR. A developer who was a property owner in Northwest Village testified that prior to the present litigation, he had no knowledge of any issues regarding the association's bank account. He explained that during the period of time that the association was managed by IPR, the association's bank statements were received by IPR. The developer also indicated that he had an interest in Via Christe and that Via Christe's bank statements were received by IPR. He confirmed that he had no knowledge of Via Christe's taking or using any funds that it had not generated or borrowed.

An owner of Maple Office Partners similarly testified that prior to August 2008, he had no knowledge of the funds going into and out of Maple Office Partners' bank account. He explained that he received monthly reports from IPR, but that the reports did not give any indication of unauthorized funds. And he confirmed that the reports did not include Maple Office Partners' bank statements.

Finally, Roethler testified and restated much of the analysis contained within her affidavits. However, she indicated that her earlier analysis of Via Christe erroneously identified a $15,000 disbursement as being unauthorized. Thus, she testified that the net effect of the unauthorized transactions on Via Christe was "pretty close to zero."

At the close of all the evidence, Fidelis asserted that the claims against it should be dismissed because it was not in existence when the funds were transferred from Guardian's escrow account. In response, United General made an oral motion to amend the complaint to add a claim of successor liability, arguing that Fidelis was a continuation of IPR. The district court overruled United General's motion to amend and stated that it was dismissing Fidelis. It explained that it believed Fidelis would have likely presented a different defense or offered additional evidence had the complaint made an allegation of

successor liability. The court subsequently entered a directed verdict in Fidelis' favor.

United General timely requested a proposed jury instruction that the district court rejected. The instruction addressed a party's liability for a claim of civil conspiracy and provided: "'As a general rule, one who counsels, commands, directs, advises, assists or aids and abets another individual in commission of a wrongful act or tort is responsible to the injured party for the entire loss or damage.'" The court observed that the instruction was a correct statement of the law, but it determined that the instruction was not warranted.

After the jury instructions were settled, the court submitted United General's remaining claims to the jury. On United General's civil conspiracy claim, the jury returned verdicts in favor of Maple Office Partners, Via Christe, Northwest Village, and Angel Guardians, but it returned verdicts against M & M Property Partners and Heitkamp. On United General's claim for indemnification, the jury returned verdicts against Maple Office Partners, Via Christe, Northwest Village, M & M Property Partners, Angel Guardians, and Heitkamp.

### 6. Posttrial Motion

After the trial, several of the defendants moved for "Judgment on Common-law Indemnification." The moving defendants included Maple Office Partners, Via Christe, Northwest Village, Angel Guardians, and M & M Property Partners. The district court characterized the motion as a motion for judgment notwithstanding the verdict and entered judgment in favor of Maple Office Partners, Via Christe, Northwest Village, and Angel Guardians on United General's indemnification claim. The court observed that by returning verdicts in favor of these defendants on the civil conspiracy claim, the jury had found them to be without fault for the embezzlement from Guardian's escrow account. It therefore determined that there was no basis to grant indemnification.

### 7. Appeals

United General filed a timely notice of appeal, and the case was assigned to the docket of the Nebraska Court of Appeals.

However, the Court of Appeals dismissed the case for lack of jurisdiction for failure to dispose of all the claims of all the parties. After obtaining an "Omnibus Order" providing for missing orders, United General filed a second timely notice of appeal. But the Court of Appeals again dismissed for lack of jurisdiction. The district court entered an order certifying a final order pursuant to Neb. Rev. Stat. § 25-1315 (Reissue 2008), and United General filed a third timely notice of appeal. We moved the case to our docket pursuant to statutory authority.[2]

## III. ASSIGNMENTS OF ERROR

As to the entry of summary judgment, United General assigns that the district court erred in concluding that it could not maintain actions for conversion, contribution, or a constructive trust against the moving defendants.

With respect to the trial, United General assigns that the district court erred in (1) refusing to give its requested jury instruction regarding liability for civil conspiracy, (2) denying its motion to amend the complaint and entering a directed verdict in Fidelis' favor, and (3) granting judgment notwithstanding the verdict on its claim for indemnification.

## IV. STANDARD OF REVIEW

[1] Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3]

[2,3] Whether the jury instructions given by a trial court are correct is a question of law.[4] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[5]

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

[3] *Roos v. KFS BD, Inc.*, 280 Neb. 930, 799 N.W.2d 43 (2010).

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

[5] *Id.*

[4] Permission to amend a pleading is addressed to the discretion of the trial court, and an appellate court will not disturb the trial court's decision absent an abuse of discretion.[6]

[5] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.[7]

[6] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.[8]

## V. ANALYSIS

We first address United General's assignments of error regarding the entry of summary judgment. We then turn to the errors that it asserts occurred at trial.

### 1. Summary Judgment

#### (a) Conversion

United General claims that the district court erred in concluding that it could not maintain an action for conversion against the moving defendants. It argues that genuine issues of material fact existed as to all of the elements of conversion.

However, we constrain our analysis to the element upon which the district court granted summary judgment—whether United General had a right to immediate possession of the escrowed funds when the funds were embezzled from the escrow account. And we further limit our review to the evidence received at the summary judgment hearing.

[7,8] We have defined tortious conversion as any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.[9]

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[6] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012).

[7] *Credit Bureau Servs. v. Experian Info. Solutions*, 285 Neb. 526, 828 N.W.2d 147 (2013).

[8] *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[9] See *Baye v. Airlite Plastics Co.*, 260 Neb. 385, 618 N.W.2d 145 (2000).

And our case law makes clear that in order to maintain an action for conversion, the plaintiff must establish a right to immediate possession of the property at the time of the alleged conversion.[10]

We agree with the district court that United General had no right to immediate possession of the escrowed funds comprising the deposits of Guardian's customers. United General had no interest in these funds and was never entrusted with their possession. Malone's affidavit provided that the escrow deposits were "deposits received from customers, especially from prospective home buyers." And the agency agreement between United General and Guardian prohibited Guardian from "[r]eceiv[ing] any funds, including escrow or closing funds, in the name of [United General]; any such funds shall be received by [Guardian] in its own name and for its own account . . . ." Thus, to the extent that the escrowed funds belonged to Guardian's customers, the court was correct in granting summary judgment.

[9] However, viewed in the light most favorable to United General, the evidence established genuine issues of material fact. 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.[11]

First, a factual issue existed as to whether some portion of the escrowed funds comprised the unpaid premiums owed to United General. In their affidavits, Roethler and Malone indicated that Guardian held funds from premiums in its escrow accounts. And the representative from United General's parent company averred that Guardian was responsible for keeping and holding insurance premiums in escrow. Further, the letter from the auditor provided that unpaid premiums were missing from Guardian's escrow account.

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[10] See, e.g., *id.; Zimmerman v. FirsTier Bank*, 255 Neb. 410, 585 N.W.2d 445 (1998); *Prososki v. Commercial Nat. Bank*, 219 Neb. 607, 365 N.W.2d 427 (1985).

[11] *Shada v. Farmers Ins. Exch.*, 286 Neb. 444, 840 N.W.2d 856 (2013).

Another genuine issue of material fact existed as to whether any of the funds transferred from Guardian's escrow account included the unpaid premiums owed to United General. Viewed in the light most favorable to United General, the evidence regarding the transferred funds was sufficient to support an inference that some or all of the respective transfers included unpaid premiums.

And it is clear that United General had an immediate right to possess the unpaid premiums which it was owed. The agency agreement provided that immediately upon the receipt of premiums for title insurance products, United General's portion of the premium was its sole and separate property to be held by Guardian in trust for United General's benefit. As a matter of law, this interest in the unpaid premiums was sufficient to prevent summary judgment against United General. The district court therefore erred in granting summary judgment on United General's conversion claim.

(b) Contribution

United General contends that the district court erred in granting summary judgment on its claim for contribution, because both it and the moving defendants were potentially liable to Guardian's customers for the shortage in the escrow account. It argues that it shared a common liability with the defendants for which it was entitled to seek contribution at trial.

[10,11] Contribution is defined as a sharing of the cost of an injury as opposed to a complete shifting of the cost from one to another, which is indemnification.[12] "'The prerequisites to a claim for contribution are that the party seeking contribution and the party from whom it is sought share a common liability and that the party seeking contribution has discharged more than his fair share of the common liability.'"[13]

The district court determined that United General could not seek contribution from the moving defendants, because it and the moving defendants did not jointly convert the escrowed funds. As we have already observed, genuine issues of material

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[12] *Estate of Powell v. Montange*, 277 Neb. 846, 765 N.W.2d 496 (2009).

[13] *Id.* at 849-50, 765 N.W.2d at 500, citing 18 C.J.S. *Contribution* § 5 (1990).

fact existed as to whether the moving defendants were liable to Guardian's customers for conversion. But United General was liable to Guardian's customers solely pursuant to a statutory mandate.[14] It could not be liable for conversion, because the transfers of the escrowed funds were outside the scope of Guardian's authority under the agency agreement. Thus, the court reasoned that without a jointly committed wrong, there was no common liability to support United General's claim for contribution.

Although we ultimately agree that United General could not seek contribution, we disagree with its reasoning. At the summary judgment stage, United General established a potential common liability between itself and the moving defendants—each was potentially liable for the shortage in Guardian's escrow account. And this potential liability was owed to the same persons, Guardian's customers. United General's liability was imposed by statute, while the moving defendants were potentially liable to Guardian's customers for a conversion of their escrowed funds. Thus, both United General and the moving defendants were at least potentially liable to the same persons for the same wrong. In that sense, it was a common liability. Further, by covering the shortage in the escrow account, United General extinguished any liability of the moving defendants to Guardian's customers. However, this common liability adduced at the summary judgment stage supported a claim for indemnification, not contribution.

[12] According to the Restatement (Third) of Restitution and Unjust Enrichment, both indemnity and contribution rest on principles of restitution and unjust enrichment.[15] A party has a claim for indemnification if it pays a common liability that, as between itself and another party, is altogether the responsibility of the other party.[16] In contrast, a claim for contribution arises when a party has paid more than its fair share of a common

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[14] See § 44-1993(8).

[15] See Restatement (Third) of Restitution and Unjust Enrichment § 23, comment *a*. (2011).

[16] See *id*.

liability that is allocated in some proportion between itself and another party.[17]

[13] Our case law reflects this distinction. As noted above, we have defined contribution as the sharing of the cost of an injury as opposed to the complete shifting of the cost from one to another, which is indemnification.[18] And we have stated that generally, the party seeking indemnification must have been free of any wrongdoing, and that its liability is vicariously imposed.[19]

In *Warner v. Reagan Buick*,[20] we determined that the defendant's third-party complaint was for indemnification, although the complaint made no mention of "indemnity." In that case, the purchaser of a used automobile filed suit to recover damages from the dealer-seller. The dealer-seller filed a third-party action against the seller from which it had purchased the automobile, alleging that its liability should be imposed against the third party. We concluded that the complaint was for indemnification because the dealer-seller sought full satisfaction from the third party for any amounts it was required to pay.

Here, too, United General sought a full shifting of its liability for the shortage to the moving defendants. United General's liability did not arise from any fault of its own, but was imposed constructively by statute. United General and the defendants could not share in the loss, because United General had not committed any wrongdoing. There was no basis on which to allocate responsibility for the loss between it and the defendants. Consequently, United General's claim for restitution was not for contribution, but indemnification. And United General separately stated a claim for indemnification, which was ultimately determined after a jury trial. For that reason, this assignment of error lacks merit.

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[17] See *id*.

[18] See, e.g., *Downey v. Western Comm. College Area*, 282 Neb. 970, 808 N.W.2d 839 (2012); *Kuhn v. Wells Fargo Bank of Neb.*, 278 Neb. 428, 771 N.W.2d 103 (2009); *Estate of Powell, supra* note 12.

[19] See *Downey, supra* note 18.

[20] *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992).

(c) Constructive Trust

United General contends that it was entitled to a constructive trust because the moving defendants received unauthorized transfers from Guardian's escrow account for which it was liable by statute. It further argues that it should have been permitted to present evidence at trial tracing the unpaid premiums to the defendants' possession.

[14,15] We have defined a constructive trust as a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his or her acquisition or retention of the property would constitute unjust enrichment.[21] Regardless of the nature of the property upon which the constructive trust is imposed, a party seeking to establish the trust must prove by clear and convincing evidence that the individual holding the property obtained title to it by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.[22]

The district court concluded that a constructive trust was inappropriate because United General had no interest, equitable or otherwise, in the escrowed funds belonging to Guardian's customers. And as to unpaid premiums, the court determined that it was impossible to identify any unpaid premiums in the defendants' possession.

We agree that United General could not seek a constructive trust as to the escrowed funds belonging to Guardian's customers. The Restatement provides that a constructive trust may arise if the defendant is "unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant's rights."[23] As discussed above, United General had no interest in any portion of the escrowed funds comprising the deposits of Guardian's customers. The

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[21] See *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007).

[22] *Id.*

[23] Restatement, *supra* note 15, § 55 at 296.

unauthorized transfers of these deposits were at the expense of Guardian's customers and in violation of their rights, not the rights of United General.

In contrast, any unauthorized transfers of the unpaid premiums were at United General's expense and in violation of its rights. And genuine issues of material fact existed as to whether the defendants received the unauthorized transfers as a result of fraud, misrepresentation, or an abuse of an influential or confidential relationship. The district court determined that it was impossible to trace the unpaid premiums to a specific defendant or account. But we see no basis for this conclusion.

[16] We have explained that where money is the asset upon which the trust is based, it is necessary that the specific amounts be identified and located, either by tracing the money to a specific and existing account, or where the funds have been converted into another type of asset such as by the purchase of real property, the money must be traced into the item of property.[24] There was no evidence establishing that it was impossible to trace the unpaid premiums to a specific defendant or account. We recognize that the court received evidence of numerous transactions involving Guardian's escrow account and the accounts of the defendant entities. But when viewed in the light most favorable to United General, this evidence was insufficient to establish that tracing the unpaid premiums was impossible. Thus, we conclude that with regard to United General's claim for unpaid premiums, the court erred in preventing it from seeking a constructive trust at trial.

### 2. Trial

#### (a) Proposed Jury Instruction

United General contends that the district court committed reversible error in rejecting its proposed jury instruction as to liability for civil conspiracy. As noted above, United General requested an instruction that a conspirator is liable for the entire loss or damage caused by the wrongful act or tort

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[24] See *Chalupa v. Chalupa*, 254 Neb. 59, 574 N.W.2d 509 (1998).

forming the basis of the conspiracy. United General further asserts that the court's jury instructions misstated the burden of proof.

[17-19] 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.[25] However, it is not error for a trial court to refuse a requested instruction if the substance of the proposed instruction is contained in those instructions actually given.[26] If the instructions given, which are taken as a whole, correctly state the law, are not misleading, and adequately cover the issues submissible to a jury, there is no prejudicial error concerning the instructions and necessitating a reversal.[27]

[20,21] We have defined a civil conspiracy as a combination of two or more persons to accomplish by concerted action an unlawful or oppressive object, or a lawful object by unlawful or oppressive means.[28] A "conspiracy" is not a separate and independent tort in itself, but, rather, is dependent upon the existence of an underlying tort.[29] Without such underlying tort, there can be no claim for relief for a conspiracy to commit the tort.[30]

[22,23] Additionally, the gist of an action for civil conspiracy is not the conspiracy charged, but the damages the plaintiff claims to have suffered because of the wrongful acts of the defendants.[31] Thus, by establishing a civil conspiracy,

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[25] *InterCall, Inc., supra* note 6.

[26] *State on behalf of Joseph F. v. Rial*, 251 Neb. 1, 554 N.W.2d 769 (1996).

[27] *InterCall, Inc., supra* note 6.

[28] See *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

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

[30] *Id.*

[31] *Treptow Co. v. Duncan Aviation, Inc.*, 210 Neb. 72, 313 N.W.2d 224 (1981).

a plaintiff extends liability for the wrongful acts underlying the conspiracy to those actors who did not actively engage in the acts, but conspired in their commission.[32] A conspirator is liable for the injuries sustained by the plaintiff as a result of the tortious conduct which forms the basis of the conspiracy.[33]

United General's proposed instruction was a correct statement of the law as to a conspirator's liability. However, the instructions given to the jury contained the substance of the proposed instruction. The jury was instructed that a claim of civil conspiracy serves "to impose vicarious liability for underlying wrongs of those who are party to conspiracy." And it was further instructed that "conspirators who have not acted but have promoted the act will be held liable." Thus, the instructions given by the district court correctly stated a conspirator's liability for the loss caused by the underlying wrongful act or tort. Because the instructions actually given, read as a whole, adequately addressed the matter, the court did not err in rejecting the proposed instruction.

[24] As to United General's assertion regarding the burden of proof, it contends that the instructions given to the jury could have been interpreted as requiring all of the defendants to have committed the wrongful act forming the basis of the conspiracy. However, United General failed to make an appropriate objection before the district court. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.[34] Further, the instruction given to the jury on the burden of proof accurately stated United General's burden. The instruction provided that United General was required to prove that at least one of the defendants committed an actionable wrong and that one or more of the defendants conspired in its commission. This was a correct statement of the law. United General's assertion is without merit.

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[32] See 15A C.J.S. *Conspiracy* § 8 (2012).

[33] See *id*.

[34] *Tolliver v. Visiting Nurse Assn.*, 278 Neb. 532, 771 N.W.2d 908 (2009).

### (b) Motion to Amend and Directed Verdict

United General contends that the district court erred in overruling its motion to amend the complaint and in directing a verdict in Fidelis' favor. It argues that Fidelis gave implied consent to the determination of successor liability at trial by failing to object to the admission of relevant evidence.

The amendment of a pleading is governed by Neb. Ct. R. Pldg. § 6-1115. Section 6-1115(b) provides that when issues not raised by the pleadings have been tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment.[35]

[25] We have previously set forth the inquiry for whether an unpleaded issue was tried by the consent of the parties.[36] The key inquiry of § 6-1115(b) for "express or implied consent" to trial of an issue not presented by the pleadings is whether the parties recognized that an issue not presented by the pleadings entered the case at trial.[37] United General does not allege that Fidelis gave express consent to the determination of successor liability. Consequently, we limit our analysis to implied consent.

[26-28] We have observed that implied consent may arise in two situations:

> "First, the claim may be introduced outside of the complaint—in another pleading or document—and then treated by the opposing party as if pleaded. Second, consent may be implied if during the trial the party acquiesces or fails to object to the introduction of evidence that relates only to that issue.

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[35] See § 6-1115(b).

[36] See *Blinn v. Beatrice Community Hosp. & Health Ctr.*, 270 Neb. 809, 708 N.W.2d 235 (2006).

[37] See *id.*

> "Implied consent may not be found if the opposing party did not recognize that new matters were at issue during the trial. The pleader must demonstrate that the opposing party understood that the evidence in question was introduced to prove new issues."[38]

To satisfy § 6-1115(b), evidence to which no objection is raised must be directed solely at the unpleaded issue, in order to provide a clear indication that the opposing party would or should have recognized that a new issue was being injected into the case.[39]

As to specific evidence of successor liability introduced at trial, United General points to Malone's testimony concerning his interests in IPR and Fidelis, the formation of Fidelis, and Fidelis' relation to IPR. It further points to the asset purchase agreement between IPR and Fidelis.

But the evidence cited by United General was not directed solely at the issue of successor liability. Malone's testimony as to his interests in IPR and Fidelis and Fidelis' relation to IPR was relevant to establish the extent of Malone's involvement in both entities. And the asset purchase agreement was similarly relevant to the issue of Malone's involvement in Fidelis. Because Malone was at the heart of the embezzlement from Guardian's escrow account, this evidence was relevant to both the civil conspiracy and indemnification claims.

[29] We acknowledge that some aspects of Malone's testimony and the asset purchase agreement touched upon the issue of successor liability. But the evidence was also relevant to the issues raised in United General's complaint. It was not of such a nature as to put Fidelis on notice that an issue not presented by the pleadings had been injected into the case at trial. We therefore reject United General's assertion that Fidelis gave implied consent to the determination of successor liability. A court will not imply consent to try a claim merely because

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[38] *Id.* at 817, 708 N.W.2d at 244 (emphasis omitted), quoting 3 James Wm. Moore et al., Moore's Federal Practice § 15.18[1] (3d ed. 2005).

[39] See *id.*

evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim.[40]

[30] And because successor liability was not tried by the express or implied consent of the parties, we find no abuse of discretion in the overruling of United General's motion to amend the complaint. Our case law provides that a trial court's denial of leave to amend pleadings is appropriate only in those limited circumstances in which undue delay, bad faith on the part of the moving party, futility of the amendment, or unfair prejudice to the nonmoving party can be demonstrated.[41] But United General did not move to amend the complaint until after the close of all the evidence. And Fidelis argued that it would have presented additional evidence had a claim of successor liability been raised in the pleadings. We therefore conclude that Fidelis successfully established that it would have been unfairly prejudiced by the insertion of a new claim, without the opportunity to present relevant evidence.

We similarly find no error in the entry of a directed verdict in Fidelis' favor. The uncontroverted evidence established that Fidelis was not in existence at the time of the transfers from Guardian's escrow account. Fidelis could not have participated in the transfers, and it could not have received any of the escrowed funds. Thus, no basis existed for United General's claims against Fidelis.

### (c) Judgment Notwithstanding Verdict

United General contends that the district court erred in granting judgment notwithstanding the verdict on its claim for indemnification. It claims that under Nebraska law, a party may assert indemnification as an independent claim. And it argues that the district court failed to apply indemnification as an independent claim by requiring that the defendants have some degree of fault for the shortage in Guardian's escrow account.

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[40] *Id.*

[41] See *Gonzalez v. Union Pacific RR. Co.*, 282 Neb. 47, 803 N.W.2d 424 (2011).

[31,32] United General correctly recognizes that indemnification may be asserted as an independent claim under Nebraska law. Absent a contractual arrangement, the right to indemnity has its roots in equity.[42] Under Nebraska law, indemnification is available when one party is compelled to pay money which in justice another ought to pay, or has agreed to pay, unless the party making the payment is barred by the wrongful nature of his conduct.[43]

We find no merit to United General's assertion that the district court failed to apply indemnification as an independent claim. Rather, in granting judgment notwithstanding the verdict, the court concluded that United General could not obtain indemnification from Maple Office Partners, Via Christe, Northwest Village, and Angel Guardians. The jury found that these defendants did not conspire in the embezzlement from Guardian's escrow account. Thus, the court determined that they were without fault for the injury to Guardian's customers.

We agree that the absence of fault was fatal to United General's indemnification claim against the above four defendants. Because these defendants were found to be without fault for the embezzlement, they were not liable to Guardian's customers for the conversion of the escrowed funds. Any liability to Guardian's customers existed solely in restitution, to the extent that they used or possessed any of the escrowed funds.

Consequently, United General was not entitled to seek indemnification from the four defendants. We have explained that one who is "secondarily," "technically," "constructively," or "vicariously" liable may seek indemnification from an active wrongdoer.[44] Although United General was constructively liable for the missing escrowed funds pursuant to a statute,[45]

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[42] See, *Warner, supra* note 20; *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989).

[43] *Warner, supra* note 20.

[44] See *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989).

[45] See § 44-1993(8).

its liability was not premised upon the active wrongdoing or primary liability of the four defendants. They did not commit any act or breach of duty causing injury to Guardian's customers and giving rise to United General's liability. Thus, by covering the shortage in the escrow account, United General did not discharge a debt that should have been paid wholly by the four defendants.[46]

We recognize that the four defendants received a benefit from United General's payment of the shortage in the escrow account and that they may have been unjustly enriched. As noted above, the four defendants were subject to liability to Guardian's customers for restitution of any escrowed funds that they used or had in their possession. And by covering the shortage, United General fulfilled this obligation and extinguished the defendants' potential liability. But United General did not pursue a claim of equitable subrogation, and we decline to comment on the merits of such a claim on appeal. It sought indemnification, which it was not entitled to obtain from the four defendants. This assignment of error is without merit.

## VI. CONCLUSION

We find no merit to the errors that United General asserts occurred at trial. And we agree with the district court's disposition of the motion for summary judgment, with the exception of United General's claims for conversion and a constructive trust. United General had an immediate right to possession of the unpaid premiums, and no evidence was received at the summary judgment hearing establishing that the unpaid premiums could not be traced to a specific defendant or account. We therefore affirm in part, and in part reverse and remand for further proceedings.

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

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[46] See *Downey, supra* note 18.

# HEADNOTES
## Contained in this Volume