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THIS BOOK CONTAINS THE OFFICIAL
REPORTS OF CASES

DECIDED BETWEEN

OCTOBER 13, 2017 and FEBRUARY 15, 2018

IN THE

Supreme Court of Nebraska

NEBRASKA REPORTS

VOLUME CCXCVIII

PEGGY POLACEK
OFFICIAL REPORTER

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DURING THE PERIOD OF THESE REPORTS

Michael G. Heavican, Chief Justice
John F. Wright, Associate Justice
Lindsey Miller-Lerman, Associate Justice
William B. Cassel, Associate Justice
Stephanie F. Stacy, Associate Justice
Max Kelch, Associate Justice[1]
Jeffrey J. Funke, Associate Justice

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

Frankie J. Moore, Chief Judge
Everett O. Inbody, Associate Judge[2]
Michael W. Pirtle, Associate Judge
Francie C. Riedmann, Associate Judge
Riko E. Bishop, Associate Judge
David K. Arterburn, Associate Judge

Peggy Polacek . . . . . Reporter
Teresa A. Brown . . . . . Clerk
Corey Steel . . . . . State Court Administrator

[1]Until February 14, 2018
[2]Until December 31, 2017

JUDICIAL DISTRICTS AND DISTRICT JUDGES

First District

Counties in District: Clay, Fillmore, Gage, Jefferson, Johnson, Nemaha, Nuckolls, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Vicky L. Johnson	Wilber
Ricky A. Schreiner	Beatrice
Julie D. Smith	Tecumseh

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
George A. Thompson	Papillion
Michael A. Smith	Plattsmouth
Stefanie A. Martinez	Papillion
Nathan B. Cox	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
John A. Colborn	Lincoln
Jodi L. Nelson	Lincoln
Robert R. Otte	Lincoln
Andrew R. Jacobsen	Lincoln
Lori A. Maret	Lincoln
Susan I. Strong	Lincoln
Darla S. Ideus	Lincoln
Kevin R. McManaman	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
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
Horacio J. Wheelock	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
Robert R. Steinke	Columbus
Mary C. Gilbride	Wahoo
James C. Stecker	Seward
Rachel A. Daugherty	Aurora

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
John E. Samson	Blair
Geoffrey C. Hall	Fremont
Paul J. Vaughan	Dakota City

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
James G. Kube	Madison
Mark A. Johnson	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
Mark D. Kozisek	Ainsworth
Karin L. Noakes	St. Paul

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Teresa K. Luther	Grand Island
William T. Wright	Kearney
Mark J. Young	Grand Island
John H. Marsh	Kearney

Tenth District

Counties in District: Adams, Franklin, Harlan, Kearney, Phelps, and Webster

Judges in District	*City*
Stephen R. Illingworth	Hastings
Terri S. Harder	Minden

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
Donald E. Rowlands	North Platte
James E. Doyle IV	Lexington
David W. Urbom	McCook
Richard A. Birch	North Platte

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
Leo P. Dobrovolny	Gering
Derek C. Weimer	Sidney
Travis P. O'Gorman	Alliance
Andrea D. Miller	Gering

JUDICIAL DISTRICTS AND COUNTY JUDGES

First District

Counties in District: Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer

Judges in District	*City*
Curtis L. Maschman	Falls City
Steven B. Timm	Beatrice
Linda A. Bauer	Fairbury

Second District

Counties in District: Cass, Otoe, and Sarpy

Judges in District	*City*
Robert C. Wester	Papillion
John F. Steinheider	Nebraska City
Todd J. Hutton	Papillion
PaTricia A. Freeman	Papillion

Third District

Counties in District: Lancaster

Judges in District	*City*
Laurie J. Yardley	Lincoln
Timothy C. Phillips	Lincoln
Matthew L. Acton	Lincoln
Holly J. Parsley	Lincoln
Thomas E. Zimmerman	Lincoln
Rodney D. Reuter	Lincoln
John R. Freudenberg	Lincoln

Fourth District

Counties in District: Douglas

Judges in District	*City*
Lawrence E. Barrett	Omaha
Marcena M. Hendrix	Omaha
Darryl R. Lowe	Omaha
John E. Huber	Omaha
Jeffrey L. Marcuzzo	Omaha
Craig Q. McDermott	Omaha
Marcela A. Keim	Omaha
Sheryl L. Lohaus	Omaha
Thomas K. Harmon	Omaha
Derek R. Vaughn	Omaha
Stephanie R. Hansen	Omaha
Stephanie S. Shearer	Omaha

Fifth District

Counties in District: Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York

Judges in District	*City*
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

Sixth District

Counties in District: Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington

Judges in District	*City*
C. Matthew Samuelson	Blair
Kurt T. Rager	Dakota City
Douglas L. Luebe	Hartington
Kenneth J. Vampola	Fremont

Seventh District

Counties in District: Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne

Judges in District	*City*
Donna F. Taylor	Madison
Ross A. Stoffer	Pierce
Michael L. Long	Madison

Eighth District

Counties in District: Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler

Judges in District	*City*
James J. Orr	Valentine
Tami K. Schendt	Broken Bow
Kale B. Burdick	O'Neill

Ninth District

Counties in District: Buffalo and Hall

Judges in District	*City*
Gerald R. Jorgensen, Jr.	Kearney
Arthur S. Wetzel	Grand Island
John P. Rademacher	Kearney
Alfred E. Corey III	Grand Island

Tenth District

Counties in District: Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster

Judges in District	*City*
Michael P. Burns	Hastings
Timothy E. Hoeft	Holdrege
Michael O. Mead	Hastings

Eleventh District

Counties in District: Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas

Judges in District	*City*
Kent D. Turnbull	North Platte
Edward D. Steenburg	Ogallala
Anne M. Paine	McCook
Michael E. Piccolo	North Platte
Jeffrey M. Wightman	Lexington

Twelfth District

Counties in District: Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux

Judges in District	*City*
James M. Worden	Gering
Randin R. Roland	Sidney
Russell W. Harford	Chadron
Kris D. Mickey	Gering
Paul G. Wess	Alliance

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

Douglas County

Judges	*City*
Douglas F. Johnson	Omaha
Elizabeth G. Crnkovich	Omaha
Wadie Thomas	Omaha
Christopher E. Kelly	Omaha
Vernon Daniels	Omaha
Matthew R. Kahler	Omaha

Lancaster County

Judges	*City*
Toni G. Thorson	Lincoln
Linda S. Porter	Lincoln
Roger J. Heideman	Lincoln
Reggie L. Ryder	Lincoln

Sarpy County

Judges	*City*
Lawrence D. Gendler	Papillion
Robert B. O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

Judges	*City*
James R. Coe	Omaha
J. Michael Fitzgerald	Lincoln
John R. Hoffert	Lincoln
Thomas E. Stine	Omaha
Daniel R. Fridrich	Omaha
Julie A. Martin	Lincoln
Dirk V. Block	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 297

Meredith Grey Ashley
Jared Jonathan Bazis
Collen Alana Beard
Shannon Marie Behm-Bleicher
Benjamin Edward Busboom
Brandon Jess Cage
Ryan Nicholas Decker
Aaron Jacob Eddy
Kyle Jordan Flentje
Alan Thomas Fogleman
Jeremy Fontain
Mark Joseph Goldsmith
Megan M. Hottman
William Howard Josephson
Deana Dougherty Klein
Tannaz Kouhpainezhad
Elizabeth Marie Lally
Michael Joseph Lunn
John Joseph Lyons
Philip Leroy Martin
Kala Marie Mueller
Matthew Luis Navarrete
Michael James Novotny
Kenneth K. Oh
Connor William Orr
Mark J. Parachini
Joshua William Pazderka
Fernando Dominatto Santos
Benjamin Wayne Shanahan
Gatsby Gottsch Solheim
Bradley Harzman Supernaw
Justin Tomlinson
Suzanne Marie Trail
Lee Christopher Trinrud
Theodore Charles Turnblacer, Jr.
Jaynee Marie Tyler
Nicholas Maxim Weil

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No. S-17-231: **State v. Longson**. Affirmed. Heavican, C.J. Wright, J., not participating.

No. S-17-567: **State v. Cook**. Affirmed. Stacy, J.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. S-17-049: **In re Interest of Terrance G**. Appeal dismissed as moot.

No. S-17-488: **State v. Harris**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-550: **Jacob v. Frakes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See § 2-107(B)(2).

No. S-17-605: **State v. Voss**. Appeal dismissed as moot; judgment of conviction vacated; and cause remanded to the trial court with direction to dismiss the case. See *State v. Campbell*, 187 Neb. 719, 193 N.W.2d 571 (1972), and *Sherman v. Neth*, 283 Neb. 895, 813 N.W.2d 501 (2012).

No. S-17-658: **In re Interest of Israel M**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-17-665: **State v. Parker**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-17-884: **In re Interest of Jenniffer S**. Stipulation allowed; appeal dismissed; each party to pay their own costs.

No. S-17-968: **Mumin v. Hansen**. Motion of appellee for summary dismissal sustained. See § 2-107(B)(1).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-15-798: **State v. Fair**. Petition of appellant for further review denied on November 13, 2017.

Nos. A-15-1211, A-15-1214: **State v. Robey**. Petitions of appellant for further review denied on November 8, 2017.

No. A-16-059: **State v. McCray**. Petition of appellant for further review denied on January 17, 2018.

No. A-16-103: **Chevalier v. Metropolitan Util. Dist.**, 24 Neb. App. 874 (2017). Petition of appellant for further review denied on December 11, 2017.

No. A-16-202: **Crozier v. Brownell-Talbot School**, 25 Neb. App. 1 (2017). Petition of appellee for further review denied on November 22, 2017.

No. S-16-451: **Wisner v. Vandelay Investments**. Petition of appellee for further review sustained on November 16, 2017.

No. A-16-527: **State v. Derreza**. Petition of appellant for further review denied on October 17, 2017.

No. A-16-682: **Essink v. City of Gretna**, 25 Neb. App. 53 (2017). Petition of appellee for further review denied on November 21, 2017.

No. A-16-824: **State v. Harris**. Petition of appellant for further review denied on November 13, 2017.

No. A-16-888: **State v. Long**. Petition of appellant for further review denied on December 11, 2017.

No. A-16-890: **Schriner v. Schriner**, 25 Neb. App. 165 (2017). Petition of appellant for further review denied on November 3, 2017, as premature. See § 2-102(F)(1).

No. A-16-890: **Schriner v. Schriner**, 25 Neb. App. 165 (2017). Petition of appellant for further review denied on December 29, 2017.

No. A-16-910: **State v. Williams**, 24 Neb. App. 920 (2017). Petition of appellant for further review denied on December 22, 2017.

No. A-16-915: **Ritts v. TEO, Inc**. Petition of appellant for further review denied on December 28, 2017.

No. A-16-923: **State v. Cook**. Petition of appellant for further review denied on October 18, 2017.

No. A-16-930: **State v. Payne**. Petition of appellant for further review denied on November 3, 2017.

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No. A-16-954: **State v. Miranda**. Petition of appellant for further review denied on December 11, 2017, for failure to file brief in support. See § 2-107(F)(1).

No. A-16-983: **State v. Huff**, 25 Neb. App. 219 (2017). Petition of appellant for further review denied on January 17, 2018.

No. S-16-985: **State v. Botts**, 25 Neb. App. 372 (2017). Petition of appellee for further review sustained on January 31, 2018.

No. A-16-997: **Mischo v. Chief School Bus Serv**. Petition of appellant for further review denied on November 20, 2017.

No. A-16-1008: **Koch v. City of Sargent**. Petition of appellant for further review denied on November 9, 2017.

No. A-16-1021: **State v. Wilson**. Petition of appellant for further review denied on November 6, 2017.

No. A-16-1050: **State v. Rowe**. Petition of appellant for further review denied on December 11, 2017.

No. A-16-1059: **Nienaber v. Nienaber**. Petition of appellant for further review denied on November 13, 2017, as premature. See § 2-102(F)(1).

No. A-16-1065: **Adams Bank & Trust v. Brown**. Petition of appellant for further review denied on December 6, 2017.

Nos. A-16-1077, A-16-1078: **In re Interest of Annika H. & Praxton H**. Petitions of appellant for further review denied on November 8, 2017.

No. A-16-1088: **State v. Niewohner**. Petition of appellant for further review denied on January 17, 2018.

No. A-16-1095: **In re Interest of N.L**. Petition of appellant for further review denied on October 17, 2017.

No. A-16-1109: **Berndt v. Berndt**, 25 Neb. App. 272 (2017). Petition of appellee for further review denied on January 3, 2018.

No. A-16-1129: **In re Interest of Dante S**. Petition of appellant for further review denied on December 29, 2017.

No. A-16-1163: **Dupell v. Ford Storage & Moving**. Petition of appellant for further review denied on November 13, 2017, as premature. See § 2-102(F)(1).

No. A-16-1163: **Dupell v. Ford Storage & Moving**. Petition of appellant for further review denied on December 5, 2017.

No. A-16-1168: **State v. Ware**. Petition of appellant for further review denied on January 4, 2018.

No. S-16-1205: **In re Interest of Kalen M**. Petition of appellee for further review sustained on January 17, 2018.

No. A-16-1220: **In re Interest of Johnathan D**. Petition of appellant for further review denied on October 10, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-17-008: **Moyers v. International Paper Co.**, 25 Neb. App. 282 (2017). Petition of appellant for further review denied on December 29, 2017, as premature. See § 2-102(F)(1).

No. A-17-077: **State v. Keita**. Petition of appellant for further review denied on January 31, 2018.

No. A-17-089: **In re Interest of Ozmohsiz M**. Petition of appellant for further review denied on January 24, 2018.

No. A-17-092: **State v. Dittrich**. Petition of appellant for further review denied on January 29, 2018.

No. A-17-102: **Hamilton v. United Parcel Serv**. Petition of appellant for further review denied on December 19, 2017.

No. A-17-185: **In re Interest of Gypsey N**. Petition of appellant for further review denied on January 24, 2018.

No. A-17-210: **State v. Turner**. Petition of appellant for further review denied on February 1, 2018.

No. A-17-211: **State v. Valeriano**. Petition of appellant for further review denied on December 29, 2017.

No. A-17-243: **State v. Smith**. Petition of appellant for further review denied on February 1, 2018.

Nos. A-17-283, A-17-284: **State v. Wellon**. Petitions of appellant for further review denied on January 8, 2018.

No. A-17-305: **State v. Charles**. Petition of appellant for further review denied on December 22, 2017.

No. A-17-329: **State v. Wallace**. Petition of appellant for further review denied on November 8, 2017.

No. A-17-346: **State v. Arellano**. Petition of appellant pro se for further review denied on January 31, 2018.

No. A-17-385: **Krafka v. Krafka**. Petition of appellant for further review denied on November 8, 2017.

No. A-17-426: **Johnson v. Hansen**. Petition of appellant for further review denied on January 25, 2018.

Nos. A-17-427 through A-17-429: **State v. Saenz**. Petitions of appellant for further review denied on November 13, 2017.

No. A-17-501: **County of Dodge v. Schindler**. Petition of appellant for further review denied on January 4, 2018.

No. A-17-533: **State v. Mumin**. Petition of appellant for further review denied on December 1, 2017.

No. A-17-558: **State v. Feldhacker**. Petition of appellant for further review denied on November 27, 2017, as untimely filed. See § 2-102(F)(1).

No. A-17-579: **State v. McBeth**. Petition of appellant for further review denied on November 13, 2017.

PETITIONS FOR FURTHER REVIEW

No. A-17-581: **State v. Miksch**. Petition of appellant for further review denied on December 19, 2017.

No. A-17-604: **State v. Verhagen**. Petition of appellant for further review denied on January 3, 2018.

No. A-17-641: **Olson v. Koch**. Petition of appellant for further review denied on October 10, 2017.

No. A-17-655: **State v. Yanga**. Petition of appellant for further review denied on January 9, 2018.

No. A-17-666: **Wesner v. Cruickshank**. Petition of appellant for further review denied on January 10, 2018.

No. A-17-706: **State v. Jackson**. Petition of appellant for further review denied on January 4, 2018.

No. A-17-728: **State v. Yanga**. Petition of appellant for further review denied on December 19, 2017.

No. A-17-806: **State v. Gray**. Petition of appellant for further review denied on December 1, 2017.

No. A-17-973: **State v. Chaloupka**. Petition of appellant for further review denied on November 21, 2017.

No. A-17-1003: **State v. Chapman**. Petition of appellant for further review denied on December 19, 2017.

298 Nebraska Reports
MARSHALL v. MARSHALL
Cite as 298 Neb. 1

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Amy Marshall, appellee, v. Brian W. Marshall, appellant.

902 N.W.2d 223

Filed October 13, 2017. No. S-15-035.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Evidence: Appeal and Error.** When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Divorce: Equity.** In Nebraska, dissolution of marriage cases are equitable in nature.
5. **Property Division.** The purpose of a property division is to distribute the marital assets equitably between the parties.
6. ____. The ultimate test for determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case. There is no mathematical formula by which property awards can be precisely determined.
7. **Property Division: Appeal and Error.** A division of property will not be disturbed on appeal unless it is patently unfair.
8. **Property Division.** Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities

of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

9. ____. Any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.
10. ____. As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.
11. ____. Compensation for purely personal losses is not in any sense a product of marital efforts. Compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by marital partnership.
12. **Property Division: Proof: Presumptions.** The burden of proving that all or a portion of an injury settlement is nonmarital rests on the spouse making the claim. If the burden is not met, the presumption remains that the proceeds from the settlement are marital property.
13. **Property Division.** The rule announced in *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999), does not require either that a settlement agreement itself must categorize the nature of the compensation or that parties must present expert testimony as to how settlement proceeds should be allocated. Rather, *Parde* simply requires competent evidence as to the nature of and underlying reasons for the compensation.
14. **Property Division: Proof.** Where the evidence shows the settlement proceeds were inadequate to compensate the purely personal losses proved by the injured spouse, and also were inadequate to compensate loses to the marital estate, inequity would generally result from classifying all of the settlement proceeds as either marital or nonmarital.
15. **Property Division.** The principles announced in *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999), can be applied to settlement proceeds that have already been spent, so long as the nonmarital portion of the settlement proceeds can be sufficiently traced.
16. ____. Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.
17. **Property Division: Proof.** Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse. But if the separate property remains segregated or is traceable into its product, commingling does

not occur. The burden of proof rests with the party claiming that property is nonmarital.

18. **Child Support: Rules of the Supreme Court.** The Nebraska Child Support Guidelines provide that in calculating the amount of child support to be paid, the court must consider the total monthly income, which is defined as income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages and includes income that could be acquired by the parties through reasonable efforts.
19. ____: ____. The Nebraska Supreme Court has not set forth a rigid definition of what constitutes income, but instead has relied upon a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases.
20. **Child Support: Taxation: Equity: Rules of the Supreme Court.** Income for the purposes of calculating child support is not necessarily synonymous with taxable income. A flexible approach is taken in determining a person's income for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Irwin and Bishop, Judges, on appeal thereto from the District Court for Douglas County, Thomas A. Otepka, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Donald A. Roberts and Justin A. Roberts, of Lustgarten & Roberts, P.C., L.L.O., for appellant.

Anthony W. Liakos, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Amy Marshall petitions for further review of the Nebraska Court of Appeals' opinion in *Marshall v. Marshall*.[1] She

[1] *Marshall v. Marshall*, 24 Neb. App. 254, 885 N.W.2d 742 (2016).

argues the Court of Appeals misapplied the principles of *Parde v. Parde*[2] when determining how proceeds from a personal injury settlement should be classified in this dissolution action. She also argues the appellate court erred in recalculating child support, reversing the property division, and reversing the award of alimony. On further review, we reverse the decision of the Court of Appeals and remand the cause with directions to affirm the decree entered by the trial court.

I. FACTS

A complete recitation of the facts is set forth in the opinion of the Court of Appeals.[3] We summarize here only those facts which are relevant to the issues on further review.

Amy and Brian W. Marshall married in 1993. Amy filed a complaint for dissolution in February 2013, and trial was held in October 2014. By that time, one of the parties' two children had reached the age of majority, and the other was 18. Disputed issues at trial were child support, alimony, classification and division of assets and debts, and attorney fees.

1. Trial Evidence

Most of the evidence at trial focused on two issues: how to classify and allocate a personal injury settlement received during the marriage and how to calculate Brian's total monthly income for purposes of child support and alimony. Given the factually intensive nature of these issues, we recite in some detail the evidence on which the district court relied.

(a) Personal Injury Settlement

In 2003, at age 34, Amy suffered a massive stroke. The stroke left her with permanent disabilities, including significant left-sided paralysis. Before the stroke, Amy had been taking the anti-inflammatory drug Vioxx on a regular basis. She did not have a prescription for Vioxx, but had been given free samples of the drug by a physician.

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[2] *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999).

[3] *Marshall, supra* note 1.

Amy and Brian ultimately reached a settlement with Merck & Co., Inc. (Merck), the manufacturer of Vioxx. As part of the agreement, Amy and Brian executed a release of all claims. The release did not allocate the settlement proceeds to any particular claim or category of damages. The release contained a confidentiality provision limiting disclosure of the amount of the settlement payments; we thus will not reference the gross settlement amount in this opinion. It is sufficient to note that after deducting attorney fees and costs, Amy and Brian received net settlement proceeds totaling $330,621.14.

It is undisputed that the parties spent nearly all the settlement proceeds during their marriage. It is also undisputed that they were able to trace where most of the settlement proceeds were spent. As relevant to the issues on appeal, the evidence showed they used $84,268.83 to pay off the mortgage on the marital home and $90,123.36 to remodel the kitchen of that home. Another $5,211.90 was used for additional remodeling of the home. Brian put $20,000 into a new bank account in his name and used $33,333 to purchase a one-third interest in a business, "Elite Fitness."

(i) Permanent Disability and Pain and Suffering

After the stroke, Amy was hospitalized for 1 week and then moved to a rehabilitation center for another 30 days. Once she was released to return home, Amy continued rehabilitation through physical therapy for approximately 4 years. Both Amy and her mother testified at trial about how the stroke affected her. The most complete explanation of Amy's condition and limitations after the stroke came from her rehabilitation physician:

> Despite a complete course of rehabilitation, [Amy] remains with rather significant left-sided paralysis. She has no significant functional use of the left upper extremity. She previously worked as an owner/operator of a hair salon. This stroke eliminated the functional use of her left

hand and ultimately she gave up her career and sold her salon. She has not been able to sustain reasonable work as a hairstylist since her stroke.

Functional tasks have become much more difficult . . . . [F]eeding is made more difficult as she is unable to cut her meat, prepare foods that require two hands and eating one-handed is simply clumsier and more difficult.

Likewise, dressing is performed entirely one-handed. She must select clothes from her wardrobe that do not have buttons or zippers. She also must perform toileting and bathing tasks one-handed and with adaptive equipment. These are performed more slowly and less thoroughly with her one-handed techniques. She is also unable to completely groom herself, particularly placing deodorant on her right side. She has difficulty grooming and bathing her right upper extremity with the paralyzed left arm.

[Amy] has the residuals of a neurogenic bladder post stroke. She has urinary urgency and must get to a bathroom more frequently than prior to her stroke. She is also more prone to the occasional bladder accident as a direct result of her stroke.

Exercise is performed more difficultly with her partially paralyzed left lower extremity. She is unable to ride a bicycle and is certainly unable to go jogging or ride an elliptical trainer. It is harder for her to achieve cardiovascular fitness under her hemiparetic circumstances.

Ambulation for [Amy] is clumsy and adaptive. She swings her left lower extremity forward in a circumferential pattern and has difficulty maintaining static stance on just her left lower extremity. She falls approximately once per month and has had [an] assortment of musculoskeletal bruises, sprains and strains as a result of her falls.

[Amy] requires lifelong treatment with an antiplatelet medication for her stroke. This slightly increases

> her overall risk of cerebral hemorrhage and certainly increases the amount of bruising she suffers with normal everyday activities.
>
> [Amy] at the present time [December 23, 2009,] is considered at maximum medical improvement in regard to her left hemiparetic stroke residuals. She has adapted her life to the near complete paralysis of her left upper extremity and the partial paralysis of her left lower extremity. Nonetheless, she has suffered significant functional impairments in her activities of daily living as a direct result of her stroke sequelae.

(ii) Past and Future Lost Earnings

Before the stroke, Amy co-owned a hair salon and earned approximately $43,580 per year. After the stroke, Amy was not able to work at all for several years, so she sold her interest in the hair salon. Later, she used proceeds from the sale of her salon to remodel a portion of the basement of the parties' home into a hair salon. She eventually returned to work as a hairstylist, working about 3 hours a day, 2 to 3 days a week. She has 10 loyal clients, mostly family and friends, who are willing to assist her with styling. In 2013, the gross income from Amy's home salon was $6,375 and her expenses were $7,000. Amy's past lost earnings from the time of her stroke until the parties' separation exceeded the amount of the Merck settlement proceeds. Her future lost earnings were estimated at over $1,133,000.

(b) Child Support

For purposes of calculating child support, the parties agreed on the amount of Amy's total monthly income, but disagreed regarding the amount of Brian's total monthly income. The evidence showed Brian had several sources of income, as well as in-kind benefits.

Brian works as the property manager for Marshall Enterprises, doing general property maintenance and upkeep.

He owns 49 percent of Marshall Enterprises, and his mother owns the remaining 51 percent. Marshall Enterprises manages properties purchased by Brian's parents and held in trust. Brian testified that he receives a salary of $2,500 per month, but his 2013 tax returns did not show any income from wages or salary. In addition, Marshall Enterprises provides Brian a truck, pays for maintenance and insurance on the truck, pays his cell phone bill of approximately $270 per month, allows Brian to live rent free in one of its rental properties that rents for $1,000 per month, and provides health insurance for Brian and his family.

Brian also operates a snow removal business. He testified he usually earns "$10,000 or more" annually from his snow removal business. Brian's income tax returns for 2009 through 2013 reported net profits for this business of $11,184, $10,830, $15,958, $12,990, and $13,805, respectively. Also, Brian's bank account statements from January to August 2014 showed average monthly deposits of more than $7,400—well in excess of what he claimed to be earning from his property management and snow removal jobs—and he provided conflicting testimony regarding the source of those regular deposits. Brian denied having investment income, but his tax return reported capital gains from the sale of stock acquired during the marriage.

At trial, Amy argued the evidence showed Brian's total monthly income was $11,041.25. Brian argued the evidence showed his total monthly income was $3,600. Generally, the disparity reflected the parties' differing valuations of Brian's in-kind benefits and their differing positions about the source of the regular deposits into his bank account.

2. Dissolution Decree

The district court entered a 34-page decree, with 17 pages of factual findings. We address only those portions of the decree that are relevant to consideration of the issues on further review.

(a) Merck Settlement Proceeds

The district court's decree acknowledged the parties' primary disagreement over what portion, if any, of the Merck settlement proceeds were properly characterized as nonmarital. It then recited and applied the principles announced in *Parde v. Parde*.[4] In that case, we held that settlement proceeds compensating a spouse for "purely personal losses" such as pain, suffering, disfigurement, disability, and postdivorce loss of earning capacity are not part of the marital estate, but that settlement proceeds for past wages, past medical expenses, and other items that compensate for diminution of the marital estate should be included in the marital estate.[5] Under *Parde*, the burden of proving that all or a portion of the settlement is nonmarital rests on the spouse making the claim; if the burden is not met, the settlement proceeds are presumed to be marital property.[6]

The district court noted that, like the settlement at issue in *Parde*, the Merck settlement "was silent on allocation" of the settlement proceeds. But the court went on to find:

> Notwithstanding [the failure to allocate], the Court, as the trier of fact and judge of the credibility of the witnesses, had an opportunity, over two days of trial, to not only see and hear Amy testify but [to] see how profoundly and permanently she has been affected and disabled by the massive stroke she sustained at such an early age [and] Brian . . . is now seeking to receive credit for half of the personal injury settlement of $330,621.14. The Court did not need the settlement documents . . . to see and appreciate the serious nature of Amy's permanent injuries. The settlement does not come close to compensating Amy for her future pain, suffering, disfigurement, [and] disability.

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[4] *Parde, supra* note 2.

[5] *Id.* at 109, 602 N.W.2d at 663.

[6] *Parde, supra* note 2.

The district court did not make an express finding allocating a certain percentage of the settlement proceeds as either marital or nonmarital. Instead, after making factual findings tracing the Merck settlement proceeds to several marital assets, the court divided those assets between the parties and, in valuing the assets, awarded a credit for nonmarital funds invested in that asset. Specifically, the court found that $179,604 of the Merck settlement proceeds had been used to pay off the mortgage and remodel the marital home. The court then awarded Amy the marital home, valued at $348,600, and gave her a credit of $179,604 against the value of the property to reflect her nonmarital share of the settlement proceeds.

The court took a similar approach with Brian. It found that he opened a bank account with $20,000 from the personal injury settlement and, by the time of trial, had spent the account down to $600. The court awarded Brian the account "as credit against his derivative or marital claim to the settlement proceeds." The court also found that Brian used $37,333.33 of the personal injury settlement to purchase an interest in Elite Fitness. The court awarded that business investment to Brian "as a credit against his derivative or marital claim to the settlement proceeds."

(b) Division of Marital Assets and Debts

Ultimately, the court calculated and divided the marital estate such that Amy received the marital home and her personal vehicle; Brian received a rental home, two trucks and two boats, his interest in Elite Fitness, and his 49-percent interest in Marshall Enterprises. The parties were each awarded the bank accounts in their own names, and the joint accounts were divided equally. The court also divided equally the cash value of various life insurance policies held by Brian. No equalization payment was ordered.

(c) Child Support

The court's decree noted the significant disparity in the parties' proposed child support calculations and described the

evidence regarding Brian's income as "confounding and at times conflicting." Nearly two pages of the court's factual findings were devoted to reciting what the court described as a "few, but certainly not all, examples" of Brian's contradictory evidence regarding his income and investments.

Ultimately, the court arrived at Brian's total monthly income by splitting the difference between the parties' suggested income calculations for Brian and adjusting the figure downward by several hundred dollars. The court explained that its decision to split the difference was based on the conflicting nature of the evidence, the best interests of the child and her age (18), and the equities of the situation. Using a total monthly income figure for Brian of $7,000, Brian was ordered to pay $935 per month in child support.

(d) Alimony

After reciting and analyzing the factors set out in Neb. Rev. Stat. § 42-365 (Reissue 2016), the district court ordered Brian to pay Amy alimony of $2,000 per month for a period of 21 years.

3. Court of Appeals' Decision

Brian appealed the decree. As relevant to this appeal, he assigned error to the district court's (1) classification and division of the marital estate, including classifying any portion of the settlement proceeds as nonmarital; (2) calculation of Brian's income for child support purposes; and (3) award of alimony. In a split decision, the Court of Appeals affirmed in part, and in part reversed and remanded with directions.

(a) Settlement Proceeds

The Court of Appeals found that Amy "failed to sufficiently demonstrate that any portion of the settlement proceeds were nonmarital property."[7] It reasoned:

> While it is clear that Amy's stroke has left her with serious physical impairments, it is also clear that her

[7] *Marshall, supra* note 1, 24 Neb. App. at 258-59, 885 N.W.2d at 747.

> stroke resulted in a great reduction in the value of the marital estate. The settlement proceeds received from Merck were simply not enough to cover all of the damages incurred by the parties. And, Amy simply failed to prove that any portion of the settlement proceeds were specifically allocated to her purely personal losses. In particular, Amy did not present any evidence which showed that 54 percent of the settlement proceeds were her nonmarital property. Thus, it is not clear how the district court determined that the proceeds should be broken down such that Amy received 54 percent of the proceeds as her nonmarital property; Brian received 12.5 percent of the proceeds as his nonmarital property; and the remaining 33.5 percent of the proceeds stayed in the marital estate. Without specific proof about how the settlement proceeds should be broken down, the presumption remains that all of the proceeds from the personal injury settlement are marital property. The district court erred in arbitrarily setting aside any portion of the settlement proceeds as nonmarital property. The entirety of the proceeds should be included in the marital estate.[8]

In reaching this conclusion, the Court of Appeals emphasized that the settlement proceeds were inadequate to compensate the marital estate for the income Amy lost after her stroke and before the parties separated. It reasoned:

> Evidence presented at trial revealed that prior to Amy's stroke, she worked full time as a hairdresser . . . . Her annual wages for this employment totaled approximately $43,580. After Amy's stroke, she is essentially unable to work as a hairdresser. She now earns a negligible amount of money working only a few hours a week. Accordingly, it is clear that the marital estate was greatly diminished as a result of Amy's lost wages. In fact, Amy's lost wages from the time of her stroke in 2003 through the

[8] *Id.* at 263-64, 885 N.W.2d at 750.

times of the parties' separation 10 years later in 2013 totaled more than $100,000 over the entirety of the settlement proceeds.[9]

Because it reversed the district court's decision to exclude portions of the personal injury settlement from the marital estate, the Court of Appeals remanded the matter to the district court to recalculate the value of the marital estate and to reconsider the equitable division of the marital assets.

(b) Child Support

The Court of Appeals found the district court erred in using $7,000 as Brian's monthly income for purposes of calculating child support. It found that Amy's proposed monthly income figure for Brian was not supported by the record and therefore concluded it was not reasonable for the district court to "'split the difference'" between Amy's and Brian's proposed figures when determining Brian's monthly income.[10] The Court of Appeals recalculated Brian's monthly income based on its de novo review of the evidence, and it found his monthly income was $5,864.20, which it rounded up to $6,000. It then directed the district court, on remand, to recalculate child support using $6,000 as Brian's monthly income figure.

(c) Alimony

The Court of Appeals found no abuse of discretion in ordering Brian to pay alimony of $2,000 per month for 21 years. However, because it was remanding the matter to the district court to recalculate and divide the marital estate and to recalculate Brian's child support, it reversed the alimony award as well, recognizing that when the district court performed these recalculations, its determination regarding appropriate alimony may be affected. As such, the Court of Appeals directed the district court on remand to "reconsider the issue of alimony in light of the changed circumstances resulting from

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[9] *Id.* at 263, 885 N.W.2d at 750.

[10] *Id.* at 267, 885 N.W.2d at 752.

the recalculation of both the marital estate and Brian's current income."[11]

4. Matters Before Court on Further Review

Both parties have assigned error on further review, but only Amy's assignments are properly before us. Neb. Ct. R. App. P. § 2-102(F)(1) (rev. 2015) requires that a petition for further review and memorandum brief "must be filed within 30 days after the release of the opinion of the Court of Appeals or the entry of the order of the Court of Appeals finally disposing of the appeal, whichever occurs later."

The Court of Appeals' opinion was released August 16, 2016. Amy timely filed for further review within 30 days of that date, and we granted her petition. Brian, however, did not petition for further review within 30 days of August 16. Instead, after Amy's petition was granted, he filed a brief opposing the assignments Amy raised on further review and purporting to cross-petition for further review to assign errors of his own. This purported cross-petition was out of time. As such, further review will be limited to the assignments raised by Amy.

II. ASSIGNMENTS OF ERROR

Amy assigns the Court of Appeals erred in (1) determining that the entirety of the settlement proceeds should be included in the marital estate, (2) remanding the matter to the district court for recalculation of the value of the marital estate and redistribution of the assets and debts, (3) reversing the district court's award of alimony, and (4) remanding the matter for recalculation of Brian's child support obligation.

III. STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's

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[11] *Id.* at 273-74, 885 N.W.2d at 756.

determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[12]

[2] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[13]

[3] When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[14]

IV. ANALYSIS

1. Classification of Settlement Proceeds

The primary issue in this appeal is whether the trial court erred in classifying $179,604 of the settlement proceeds as Amy's nonmarital property and dividing the parties' assets based on that classification. Before directly addressing that issue, we set out the general principles that guide our analysis.

[4-7] In Nebraska, dissolution of marriage cases are equitable in nature.[15] The purpose of a property division is to distribute the marital assets equitably between the parties.[16] The ultimate test for determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[17] There is no mathematical formula by which property awards can be precisely determined.[18] A

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[12] *Donald v. Donald*, 296 Neb. 123, 892 N.W.2d 100 (2017).

[13] *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017).

[14] *Erin W. v. Charissa W.*, 297 Neb. 143, 897 N.W.2d 858 (2017).

[15] *Laschanzky v. Laschanzky*, 246 Neb. 705, 523 N.W.2d 29 (1994).

[16] § 42-365.

[17] *Meints v. Meints*, 258 Neb. 1017, 608 N.W.2d 564 (2000).

[18] See *Thiltges v. Thiltges*, 247 Neb. 371, 527 N.W.2d 853 (1995).

division of property will not be disturbed on appeal unless it is patently unfair.[19] As we stated in *Parde v. Parde*,[20] "In equity, there is rarely one tidy answer that fits every size and type of problem that courts are called upon to resolve."

[8,9] Under § 42-365, the equitable division of property is a three-step process.[21] The first step is to classify the parties' property as marital or nonmarital. The second step is to value the marital assets and determine the marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.[22] We have recognized that any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.[23]

[10] As a general rule, all property accumulated and acquired by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule.[24] In the instant case, Amy relies on the exception for that portion of personal injury settlement proceeds which compensate a spouse for his or her "purely personal losses."[25]

Amy argues the trial court did not abuse its discretion in classifying and allocating the personal injury settlement proceeds, and she claims the Court of Appeals erred in finding there was a failure of proof. We agree, and begin our analysis with a discussion of the seminal case, *Parde v. Parde*.

In *Parde*, the husband was injured on the job during the marriage and ultimately received a settlement from his

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[19] See *Heser v. Heser*, 231 Neb. 928, 438 N.W.2d 795 (1989).

[20] *Parde, supra* note 2, 258 Neb. at 108, 602 N.W.2d at 662.

[21] *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017); *Despain v. Despain*, 290 Neb. 32, 858 N.W.2d 566 (2015).

[22] *Id.*

[23] *Stephens, supra* note 21.

[24] *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

[25] See *Parde, supra* note 2, 258 Neb. at 109, 602 N.W.2d at 663.

employer. Part of the settlement provided a cash payment, and part required the employer to fund an annuity which had not yet come due when the parties divorced. By that time, the cash portion of the settlement had been spent and was reflected in the assets of the parties; those assets were divided pursuant to the parties' settlement agreement. But a primary issue during the dissolution proceedings was whether the future annuity should be included or excluded from the marital estate. The district court found the annuity should be classified as marital property, and the husband appealed. The Court of Appeals reversed, finding the trial court had abused its discretion in failing to exclude the annuity as nonmarital property. We granted further review to clarify what we characterized as an "unnecessarily . . . muddled area of the law"—determining which portions of an injured spouse's personal injury settlement should be included in the marital estate for purposes of property division.[26]

[11,12] We observed there are two general approaches to the issue: the mechanical approach and the analytic approach. Under the mechanical approach, applied by a minority of jurisdictions, personal injury awards are treated entirely as marital property. Under the analytic approach, courts analyze the nature and underlying reasons for the compensation, and classify it accordingly. We found the analytic approach to be more consistent with the basic rule that the marital estate should include only property created by the marital partnership, and we adopted that approach. We explained:

> Compensation for purely personal losses is not in any sense a product of marital efforts. We, therefore, hold that compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other

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[26] *Id.* at 106, 602 N.W.2d at 661.

> items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by marital partnership.[27]

Parde emphasized that the burden of proving that all or a portion of the settlement is nonmarital rests on the spouse making the claim.[28] If the burden is not met, the presumption remains that the proceeds from the settlement are marital property.

In *Parde*, we applied the analytic approach and concluded that the cash portion of the settlement, which had been spent and was reflected in the parties' assets, more than adequately compensated the marital estate for any wages the husband lost during the marriage. We further held that the district court abused its discretion in classifying the annuity as marital. We rejected the wife's argument that the husband had failed to meet his burden of proof because he had not offered "direct evidence" establishing that the annuity "carried a specific designation showing it was for a nonmarital purpose."[29] We explained:

> While the husband's evidence did not consist of a settlement document with a tidy breakdown of each dollar of the settlement into well-defined categories, the testimony . . . when considered with the language of the Release itself and the settlement as a whole, proved what portion of the entire settlement is to be reasonably considered as lost wages during the marriage and, thus, as a marital asset. By proving what portion of the entire settlement should be considered as a marital asset, the husband has necessarily proved what portion could properly be viewed as nonmarital property.[30]

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[27] *Id.* at 109-10, 602 N.W.2d at 663.

[28] See *id.*

[29] *Id.* at 112, 602 N.W.2d at 664-65.

[30] *Id.* at 112-13, 602 N.W.2d at 665.

Here, the parties do not dispute that the personal injury settlement with Merck represents compensation for any and all damages sustained by Amy, Brian, and the marital estate as a result of Amy's stroke. But applying the principles announced in *Parde* to the instant appeal is complicated by two things: (1) the fact that the evidence shows the settlement proceeds were insufficient to compensate either Amy or the marital estate for the losses proved at trial and (2) the fact that the settlement proceeds have largely been spent. Although *Parde* did not directly address these complicating factors, we find nothing in the approach taken by the district court that was inconsistent with the general principles articulated in *Parde*.

The district court recognized that Amy had the burden, as the one claiming some or all of the settlement proceeds were nonmarital, to present evidence showing that all or a portion of the proceeds were specifically allocated to her purely personal losses.[31] The first issue, therefore, is whether she presented evidence sufficient to meet this burden of proof.

The Court of Appeals held that Amy "simply failed to prove that any portion of the settlement proceeds were specifically allocated to her purely personal losses."[32] Our de novo review of the record leads us to a different conclusion. Amy presented her own testimony, testimony from her mother, evidence from her treating physician as to the nature and extent of her physical injuries, and evidence of future lost earnings. The trial court found this evidence credible and made an express finding that the settlement proceeds did "not come close to compensating Amy" for her purely personal losses. All of this evidence demonstrated that Amy has sustained a significant amount of uniquely personal loss and implicitly demonstrated that a significant portion of the settlement proceeds was necessarily allocated to compensate her for this loss.

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[31] See *id*.

[32] *Marshall, supra* note 1, 24 Neb. App. at 263, 885 N.W.2d at 750.

[13] We take this opportunity to clarify that the rule announced in *Parde* does not require either that the settlement agreement itself must categorize the nature of the compensation or that parties must present expert testimony as to how settlement proceeds should be allocated. Rather, *Parde* simply requires competent evidence as to the nature of and underlying reasons for the compensation. It is not at all uncommon for personal injury settlement agreements to be silent regarding allocation, and we soundly reject any suggestion that such silence compels the conclusion that the entire settlement must be classified as marital property.

We also reject any suggestion that the analytic approach adopted in *Parde* requires testimony or evidence of a particular mathematical breakdown of the settlement proceeds. District court judges are well acquainted with personal injury evidence and damages and are called upon regularly to determine and allocate such damages. Indeed, case law from other jurisdictions indicates that neither mathematical allocation of settlement proceeds nor expert testimony as to allocation is required and that trial courts instead allocate damages based on personal testimony and other evidence.[33] As the Supreme Court of Alaska has stated:

> Although mathematically exact allocation of [a personal injury] award may not be possible, we are confident of the ability of the trial court to make a reasonable apportionment. Like the Supreme Court of New Jersey, "[w]e do not expect that the allocation of such awards will present any serious problems. Trial courts are used to allocating and tracing assets in equitable distribution cases."[34]

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[33] See, *Tramel v. Tramel*, 740 So. 2d 286 (Miss. 1999); *Dalessio v. Dalessio*, 409 Mass. 821, 570 N.E.2d 139 (1991); *Bandow v. Bandow*, 794 P.2d 1346 (Alaska 1990).

[34] *Bandow, supra* note 33, 794 P.2d at 1350, quoting *Landwehr v. Landwehr*, 111 N.J. 491, 545 A.2d 738 (1988).

[14] We acknowledge, as did both the lower court and the Court of Appeals, that the total amount of compensation here was inadequate to fully compensate either Amy or the marital estate for the full extent of losses suffered. That does not mean, however, that either all or none of the settlement proceeds must be classified as nonmarital. Indeed, where, as here, the evidence shows the settlement proceeds were inadequate to compensate the purely personal losses proved by the injured spouse, and also were inadequate to compensate loses to the marital estate, inequity would generally result from classifying all of the settlement proceeds as either marital or nonmarital.

We have recognized that any given property can constitute a mixture of marital and nonmarital interests; a portion of an asset can be marital property while another portion can be separate property.[35] As our recitation of the facts demonstrates, there was substantial evidence presented to the district court that the stroke caused Amy significant personal pain, suffering, disfigurement, disability, and loss of postdivorce earning capacity. While the marital estate also suffered significant loss due to Amy's lost wages, we cannot find that the district court abused its discretion in classifying slightly more than one-half of the settlement proceeds as Amy's nonmarital property.

[15-17] This case also demonstrates that the principles announced in *Parde* can be applied to settlement proceeds that have already been spent, so long as the nonmarital portion of the settlement proceeds can be sufficiently traced. We have recognized that setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.[36] Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of

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[35] *Stephens, supra* note 21.

[36] *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

the other spouse.[37] But if the separate property remains segregated or is traceable into its product, commingling does not occur.[38] The burden of proof rests with the party claiming that property is nonmarital.[39]

Here, that burden was met. The evidence was undisputed that $179,604 of the settlement proceeds was used to pay off the mortgage and remodel the marital home. After tracing that portion of the settlement proceeds to the marital home, the district court awarded Amy the marital home, valued at $348,600, and gave her a credit of $179,604 against the value of the property to reflect her nonmarital share of the settlement proceeds. This approach was equitable, consistent with the principles articulated in *Parde*, and supported by the evidence.

For all of these reasons, we find the trial court did not abuse its discretion in classifying and allocating Amy's nonmarital share of the settlement proceeds in the context of dividing the marital estate. To the extent the Court of Appeals concluded otherwise, we reverse.

2. Child Support

The Court of Appeals found the district court abused its discretion in determining Brian's total monthly income was $7,000 for purposes of the child support calculation. Based on its de novo review of the evidence, the Court of Appeals determined Brian's total monthly income was $6,000 and remanded the matter to the district court with instructions to recalculate child support using the lower monthly income figure. On further review, we find no abuse of discretion in the district court's calculation of Brian's monthly income.

[18] The Nebraska Child Support Guidelines provide that in calculating the amount of child support to be paid, the court

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[37] *Id.*

[38] *Id.*

[39] *Id.*

must consider the total monthly income, which is defined as "income of both parties derived from all sources, except all means-tested public assistance benefits which includes any earned income tax credit and payments received for children of prior marriages" and includes income that could be acquired by the parties through reasonable efforts.[40]

[19,20] We have not set forth a rigid definition of what constitutes income, but instead we have relied upon a flexible, fact-specific inquiry that recognizes the wide variety of circumstances that may be present in child support cases.[41] Thus, income for the purposes of calculating child support is not necessarily synonymous with taxable income.[42] We take this flexible approach in determining a person's "income" for purposes of child support, because child support proceedings are, despite the child support guidelines, equitable in nature.[43] Thus, a court is allowed, for example, to add "in-kind" benefits, derived from an employer or other third party, to a party's income.[44]

The decree described the evidence of Brian's income as "confounding and at times conflicting." Our de novo review of the record supports that characterization. The evidence adduced at trial could conceivably support a variety of reasonable monthly income calculations, but the trial court ultimately decided: "Based upon the evidence and the conflicting nature of same, [the minor's] age, her best interests, the equities of the situation and the need to later address alimony, the Court . . . split[s] the difference between the [parties'] suggested monthly gross incomes for Brian . . . and adjust[s] that difference downward slightly . . . ."

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[40] Neb. Ct. R. § 4-204 (rev. 2016).

[41] *Gangwish, supra* note 24; *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001).

[42] *Gangwish, supra* note 24.

[43] *Id.*

[44] *Workman, supra* note 41.

While we do not generally endorse the practice of splitting the difference in making child support calculations, we acknowledge the practice of splitting the difference is used occasionally by trial courts, sitting in equity, when there is a conflict in the evidence.[45] But regardless of the rationale utilized by the trial court, our de novo review of the record does not show an abuse of discretion in using a figure of $7,000 as Brian's monthly income.

The Court of Appeals engaged in an exhaustive de novo review of the record and determined it supported a finding that Brian's monthly income was $6,000. In doing so, however, it relied extensively on Brian's testimony and evidence produced by Brian with respect to his monthly income. Although our review is de novo, we cannot discount that the trial judge, who was in the best position to observe the witnesses' demeanor and credibility, expressed significant concern about Brian's credibility and the contradictory nature of the evidence Brian presented. When evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[46] In light of the conflicting nature of the evidence, the trial court's concerns about Brian's credibility, and particularly because the minor child was 18 at the time of trial and the support order was to last only a matter of months, we cannot find the trial court abused its discretion in finding that Brian's total monthly income for child support purposes was $7,000. We therefore reverse the Court of Appeals' decision on this issue.

3. Alimony

Finally, although the Court of Appeals found no abuse of discretion in the district court's alimony award, it reversed the award, because it was remanding the matter for recalculation

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[45] See, *Shald v. Shald*, 216 Neb. 897, 346 N.W.2d 406 (1984); *Sneckenberg v. Sneckenberg*, 9 Neb. App. 609, 616 N.W.2d 68 (2000).

[46] *Erin W., supra* note 14.

and division of the marital estate and for recalculation of child support and wanted the trial court to have an opportunity to reconsider the issue of alimony as well. Because we conclude on further review that the district court's decree should be affirmed, there is no need to reconsider alimony, and this aspect of the Court of Appeals' opinion is reversed as moot.

V. CONCLUSION

For the foregoing reasons, we find no abuse of discretion in the trial court's classification and allocation of the personal injury award or in the trial court's determination of Brian's monthly income for purposes of calculating child support. We therefore reverse the Court of Appeals' decision and remand the matter with directions to affirm the decree of the district court.

Reversed and remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Marilyn Waldron, appellant, v. Lancaster County Deputy Sheriff James Roark, individually and in his official capacity, appellee.

902 N.W.2d 204

Filed October 13, 2017. No. S-16-676.

1. **Summary Judgment: Appeal and Error.** An appellate court reviews the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.
2. **Summary Judgment: Immunity.** When a defendant asserts qualified immunity at the summary judgment stage, the plaintiff must produce evidence sufficient to create a genuine issue of fact regarding whether the defendant violated clearly established law.
3. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. ____. In the summary judgment context, a fact is material only if it would affect the outcome of the case. If a genuine issue of material fact exists, summary judgment may not properly be entered.
5. **Immunity.** Those entitled to qualified immunity hold more than a mere defense to liability; they hold an entitlement not to stand trial or face the other burdens of litigation.
6. ____. If a case is erroneously permitted to go to trial, then qualified immunity is effectively lost.
7. **Immunity: Public Officers and Employees.** Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right and (2) that the right was clearly established at the time of the challenged conduct.
8. ____: ____. In evaluating whether the right to qualified immunity was clearly established, the question is not whether the very action in

question has previously been held unlawful, but whether the contours of the right were sufficiently clear at the time of the challenged conduct that every reasonable official would have understood that the challenged conduct violates that right.

9. **Immunity.** In a qualified immunity analysis, the dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition.
10. **Immunity: Public Officers and Employees.** The clearly established standard gives government officials breathing room to make reasonable but mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.
11. ____: ____. Even if a public official has engaged in unlawful conduct, the clearly established prong of the qualified immunity analysis protects him or her from suit so long as the official reasonably believed such conduct to be lawful.
12. **Constitutional Law: Police Officers and Sheriffs: Search and Seizure.** Under certain circumstances, an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.
13. ____: ____: ____. The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests.
14. **Police Officers and Sheriffs: Search and Seizure: Words and Phrases.** In order to justify a no-knock entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile or that it would inhibit the effective investigation of the crime, for example by allowing the destruction of evidence.
15. **Police Officers and Sheriffs: Search and Seizure.** Police must have a reasonable suspicion under the particular circumstances that one of the grounds for failing to knock and announce exists, and this showing is not high.
16. **Immunity.** Courts have discretion to decide which of the two prongs of qualified immunity analysis to tackle first.
17. **Immunity: Police Officers and Sheriffs.** The dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his or her conduct was unlawful in the situation he or she confronted.
18. **Police Officers and Sheriffs: Arrests: Words and Phrases.** Reasonable force, which may be used by an officer making an arrest, is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would deem necessary under the circumstances.

19. **Police Officers and Sheriffs: Arrests.** The inquiry into the reasonableness of a use of force assesses reasonableness at the moment of the use of force, as judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.
20. **Constitutional Law: Civil Rights: Municipal Corporations.** Municipalities can be sued directly under 42 U.S.C. § 1983 (2012) for monetary, declaratory, or injunctive relief where the action alleged to be unconstitutional implements or executes a policy statement or custom of the municipality.
21. **Civil Rights: Municipal Corporations: Employer and Employee: Liability.** A municipality cannot be held liable under 42 U.S.C. § 1983 (2012) on a respondeat superior theory.
22. **Civil Rights: Public Officers and Employees.** The government as an entity is responsible under 42 U.S.C. § 1983 (2012), when execution of its 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.
23. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.
24. **Appeal and Error.** To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Affirmed.

Vincent M. Powers, of Vincent M. Powers and Associates, for appellant.

Joe Kelly, Lancaster County Attorney, David A. Derbin and Ryan M. Swaroff for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

I. INTRODUCTION

Marilyn Waldron brought this action pursuant to 42 U.S.C. § 1983 (2012), alleging a violation of her Fourth Amendment rights by Lancaster County Deputy Sheriff James Roark when

he entered Waldron's home to serve a warrant on Waldron's grandson, Steven Copple. Waldron argues that in doing so, Roark violated the knock-and-announce rule. Waldron also argues that her arrest was unreasonable and unconstitutional because there was no probable cause to arrest her and because Roark used excessive force in handcuffing her.

In *Waldron v. Roark* (*Waldron I*),[1] we found that material issues of fact existed as to Waldron's knock-and-announce and excessive force claims and remanded the cause. On remand, following additional argument on the issues of qualified immunity and sovereign immunity, the district court again granted Roark's motion for summary judgment, on the basis that Roark was entitled to qualified immunity. In this appeal, we now analyze Waldron's claims within the framework of the affirmative defense of qualified immunity. Because we find that Waldron did not meet the burden of showing that Roark violated a clearly established right in any of Waldron's claims, we affirm the district court's grant of qualified immunity.

II. BACKGROUND

In September 2013, Waldron filed a complaint against Roark, alleging that Roark violated Waldron's civil rights under § 1983, resulting in her injuries. Forming the basis of this action are the events that happened on February 22, 2012, when Roark and his partner, Lancaster County Deputy Sheriff Amanda May, went to Waldron's home to serve an arrest warrant on Copple. The specific allegations regarding what happened during this event are set forth in more detail in *Waldron I* and are discussed further in the analysis section below.

In November 2014, Roark filed a motion for summary judgment. In December 2014, Waldron filed an amended complaint against Roark, in his individual and official capacities. The district court eventually granted the motion for summary judgment, finding as a matter of law that the deputies' entry

[1] *Waldron v. Roark*, 292 Neb. 889, 874 N.W.2d 850 (2016).

into Waldron's home was proper, that Waldron obstructed the work of the deputies, and that Roark's use of force was objectively reasonable.

On appeal in *Waldron I*, we reversed the district court's order and remanded the cause for further proceedings. We held that summary judgment on Waldron's § 1983 Fourth Amendment claim was not proper because there were issues of material fact as to (1) whether Roark properly displayed notice of his office or authority when he entered Waldron's home, (2) whether Roark's entry was reasonable, and (3) whether the force Roark used was excessive.

Following the issuance of our opinion in *Waldron I*, the parties again addressed Roark's motion for summary judgment. In its second order granting the motion, the district court found that Roark was entitled to qualified immunity and that the record was sufficiently developed to render a separate trial or evidentiary hearing unnecessary. The court specifically found that (1) Roark was entitled to qualified immunity on Waldron's knock-and-announce claim because sufficient exigent circumstances existed from Roark's perspective to warrant his entry without a proper announcement, (2) Roark was entitled to qualified immunity on the excessive force claim because (a) Roark had probable cause to arrest Waldron and (b) Waldron's right to be free of excessive force was not clearly established, and (3) Roark was entitled to judgment in his favor as to Waldron's claims against him in his official capacity. Waldron appeals.

III. ASSIGNMENTS OF ERROR

Waldron assigns, restated and consolidated, that the district court erred in finding that (1) Roark was entitled to qualified immunity on Waldron's knock-and-announce claim, (2) Roark was entitled to qualified immunity on Waldron's unlawful arrest claim because (a) Roark had probable cause to arrest Waldron and (b) Waldron's "right to be free of the excessive force used by . . . Roark was not clearly established," (3) there was no evidence to support Waldron's claim that a policy or custom

of Lancaster County caused her damages, and (4) Roark was entitled to summary judgment in his official capacity.

IV. STANDARD OF REVIEW

[1,2] We review the district court's grant of summary judgment de novo, viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.[2] When a defendant asserts qualified immunity at the summary judgment stage, the plaintiff must produce evidence sufficient to create a genuine issue of fact regarding whether the defendant violated clearly established law.[3]

V. ANALYSIS

[3,4] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[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 material fact exists, summary judgment may not properly be entered.[6]

1. Qualified Immunity

[5,6] Both the U.S. Supreme Court and the Eighth Circuit Court of Appeals have repeatedly "'"stressed the importance of resolving immunity questions at the earliest possible stage in litigation."'"[7] This is because those entitled to qualified

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[2] *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir. 2011).

[3] *Id.*

[4] *Thomas v. Board of Trustees*, 296 Neb. 726, 895 N.W.2d 692 (2017).

[5] *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014).

[6] *Id.*

[7] *O'Neil v. City of Iowa City, Iowa*, 496 F.3d 915, 917 (8th Cir. 2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001)). Accord *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam).

immunity hold more than a mere defense to liability; they "hold 'an entitlement not to stand trial or face the other burdens of litigation.'"[8] If a case is erroneously permitted to go to trial, then qualified immunity is effectively lost.[9]

[7-11] Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right and (2) that the right was "'clearly established' at the time of the challenged conduct."[10] In evaluating whether the right was "clearly established," the question is not whether the very action in question has previously been held unlawful, but whether "'[t]he contours of [the] right [were] sufficiently clear'" at the time of the challenged conduct that "every 'reasonable official would [have understood] that [the challenged conduct] violates that right.'"[11] A case does not need to be directly on point, but existing precedent must have placed the constitutional question beyond debate.[12] The dispositive question is "whether the violative nature of *particular* conduct is clearly established."[13] This inquiry "'"must be undertaken in light of the specific context of the case, not as a broad general proposition."'"[14] Put frankly, plaintiffs in a § 1983 action have a steep burden of showing that a right is clearly established.[15] The "'clearly established'" standard "'gives government officials breathing room to make reasonable but mistaken

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[8] *Id.* (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)).

[9] *Id.*

[10] *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

[11] *Id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)).

[12] *Ashcroft v. al-Kidd, supra* note 10.

[13] *Id.*, 563 U.S. at 742 (emphasis supplied).

[14] *Mullenix v. Luna*, 577 U.S. 7, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015).

[15] See *Williams v. Baird*, 273 Neb. 977, 735 N.W.2d 383 (2007).

judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'"[16] Even if a public official has engaged in unlawful conduct, the clearly established prong of the qualified immunity analysis protects him or her from suit so long as the official reasonably believed such conduct to be lawful.[17] If a reasonable official could have believed the conduct was lawful, the official's conduct does not violate clearly established law.[18]

First, we address whether Roark is entitled to qualified immunity on Waldron's knock-and-announce claim.

(a) Waldron's Knock-and-Announce Claim

[12] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[19] Among the factors to be considered in assessing the reasonableness of a search or seizure is the "method of an officer's entry into a dwelling."[20] Under certain circumstances, "an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment."[21] The rule that officers should knock and announce their purpose and be denied admittance prior to entering a dwelling has been codified in Neb. Rev. Stat. § 29-411 (Reissue 2016).[22]

[13] The U.S. Supreme Court has made clear that not every entry must be preceded by an announcement.[23] "The Fourth Amendment's flexible requirement of reasonableness should

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[16] *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1774, 191 L. Ed. 2d 856 (2015).

[17] See *Anderson v. Creighton, supra* note 11.

[18] *Id.*

[19] U.S. Const. amend. IV.

[20] *Wilson v. Arkansas*, 514 U.S. 927, 934, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995).

[21] *Id.*

[22] *State v. Kelley*, 265 Neb. 563, 658 N.W.2d 279 (2003).

[23] *Wilson v. Arkansas, supra* note 20.

not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."[24] "[I]f circumstances support a reasonable suspicion of exigency when the officers arrive at the door, they may go straight in."[25]

We view the evidence surrounding Roark's entry into Waldron's home in the light most favorable to Waldron. According to Waldron, she "cautiously opened the door" and immediately noticed that "people were pushing on it." Waldron claims that she tried to, but could not, hold the door closed. According to Waldron, it was only "after they got in[to]" Waldron's home that Roark announced that he and his partner, May, were deputies and that they were looking for Copple. Viewing the evidence in the light most favorable to Waldron, we assume that Roark entered Waldron's home without knocking and announcing his purpose.

[14,15] In order to justify a "'no-knock'" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile or that it would inhibit the effective investigation of the crime, for example by allowing the destruction of evidence.[26] "[The Court] require[s] only that police 'have a reasonable suspicion . . . under the particular circumstances' that one of these grounds for failing to knock and announce exists, and . . . '[t]his showing is not high.'"[27]

As we noted in *Waldron I*, one possible exigency in this case was that "Copple posed a threat to the safety of the deputies or the public."[28] Roark testified that as he approached Waldron's home, he saw Copple inside, but that when he reached the

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[24] *Id.*, 514 U.S. at 934.

[25] *United States v. Banks*, 540 U.S. 31, 37, 124 S. Ct. 521, 157 L. Ed. 2d 343 (2003).

[26] *Richards v. Wisconsin*, 520 U.S. 385, 394, 117 S. Ct. 1416, 137 L. Ed. 2d 615 (1997).

[27] *Hudson v. Michigan*, 547 U.S. 586, 590, 126 S. Ct. 2159, 165 L. Ed. 2d 56 (2006).

[28] *Waldron I, supra* note 1, 292 Neb. at 904, 874 N.W.2d at 863.

door, he could no longer see Copple. Roark testified that Copple could be "a dangerous guy" and that he was "aware [Copple] had lots of law enforcement contacts," including "prior . . . weapons offenses."

Despite Roark's undisputed testimony about Copple's prior weapons offenses, we found in *Waldron I* that there was a material issue of fact as to whether exigent circumstances existed in his attempt to arrest Copple. However, whether exigent circumstances actually existed to justify Roark's no-knock entry is relevant only to the first prong of the qualified immunity analysis, i.e., whether a statutory or constitutional right has been violated.

[16] The U.S. Supreme Court has repeatedly held that "courts have discretion to decide which of the two prongs of qualified immunity analysis to tackle first."[29] Therefore, in evaluating whether Roark is entitled to qualified immunity against Waldron's knock-and-announce claim, we exercise our discretion to bypass the first prong of the qualified immunity analysis and instead tackle the second prong first. In so doing, we find that regardless of whether exigent circumstances actually existed to justify Roark's no-knock entry into Waldron's home, Roark is entitled to qualified immunity against Waldron's knock-and-announce claim, because a reasonable official could have believed that Roark's no-knock entry was lawful.

As noted above, Waldron bears the steep burden of proving that her right was so clearly established that every reasonable public official would have known that Roark's conduct violated the right. She has not met this burden. Instead, Waldron simply argues that "[i]t has long been held . . . that law enforcement must 'knock and announce' prior to serving a warrant or [when] authorized to make an arrest without [a warrant]."[30] Though it is true that the knock-and-announce

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[29] *Ashcroft v. al-Kidd, supra* note 10, 563 U.S. at 735 (citing *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)).

[30] Brief for appellant at 20.

rule is well established, Waldron ignores the fact that this rule does not apply when exigent or countervailing circumstances exist, and she makes no attempt to delineate the contours of the "exigent circumstances exception."[31]

In addition, Waldron relies solely on *U.S. v. Lucht*[32] to support her assertion that the right at issue was clearly established. While we cited *Lucht* to provide guidance as to whether exigent circumstances existed in *Waldron I*, as noted above, that was a first-prong analysis. We note that the applicability of *Lucht* is limited in addressing the second prong of the qualified immunity analysis. Unlike the case at hand, *Lucht* was not a § 1983 case; rather, the Eighth Circuit's holding applies to the knock-and-announce requirement as it pertains to the suppression of evidence. Moreover, as the district court stated, "there are factual differences between the officer's knowledge, assumptions, and conduct in *Lucht* and those of [Roark] in this case."

Although we are aware that certain categories of exigent circumstances have emerged (for example, when knocking would be dangerous, futile, or might allow the destruction of evidence[33]), we find no case law that so clearly establishes that any law enforcement officer standing in Roark's shoes would have understood that the circumstances presented were not exigent circumstances.

Even viewing the facts in the light most favorable to Waldron, it would not have been "'entirely unreasonable' for an officer to believe, in the particular circumstances of this case," that exigent circumstances existed.[34] Nor do the facts support a finding that Roark was "'"plainly incompetent"'" or "'"knowingly violate[d] the law."'"[35] Thus, we conclude that

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[31] *Waldron I, supra* note 1, 292 Neb. at 897, 874 N.W.2d at 859.

[32] *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1994).

[33] See *Richards v. Wisconsin, supra* note 26.

[34] *Messerschmidt v. Millender*, 565 U.S. 535, 549, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012).

[35] *Id.*, 565 U.S. at 546.

Waldron has not met her burden to prove that her right was clearly established. Nor has she shown that a material issue of fact prevents judgment as a matter of law.[36] As such, Waldron's first assignment of error is without merit.

(b) Waldron's Claims of Unlawful Arrest

Waldron makes two arguments as to why she believes Roark is not entitled to qualified immunity for Waldron's alleged unlawful arrest. First, Waldron argues that Roark did not have probable cause to arrest her; second, Waldron argues that Roark used excessive force in arresting her. We address these arguments separately below, disposing of both arguments under the second prong of the qualified immunity analysis.

(i) Probable Cause

We again exercise our discretion to bypass the first prong of the qualified immunity analysis and instead consider the second prong first. In so doing, we find that regardless of whether probable cause existed to justify Waldron's arrest, Roark is entitled to qualified immunity under the second prong because the law is not so clearly established that every reasonable official standing in Roark's shoes would have believed that there was no probable cause.

Waldron argues that her arrest was unlawful because Roark did not have a warrant or probable cause to arrest her. On the other hand, Roark argues that he had probable cause to believe that Waldron violated or was violating Neb. Rev. Stat. § 28-901 (Reissue 2016) (obstructing government operations). As noted above, the text of the Fourth Amendment protects "'against unreasonable searches and seizures.'"[37] Subsequent case law establishes that a warrantless seizure of a person is reasonable under the Fourth Amendment where there is probable cause to

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[36] See *Brock v. Dunning*, 288 Neb. 909, 854 N.W.2d 275 (2014).

[37] *Devenpeck v. Alford*, 543 U.S. 146, 152, 125 S. Ct. 588, 160 L. Ed. 2d 537 (2004).

believe that the person has committed or is committing a criminal offense.[38]

Section 28-901(1) provides, in relevant part, that "[a] person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act . . . ."

Accordingly, the crime of obstructing government operations has two elements. The person must have (1) "obstruct[ed], impair[ed], or pervert[ed] the administration of law or other governmental functions" and (2) intended to do so.[39] On appeal, Waldron does not challenge the district court's finding that "[she] was obstructing and hindering the deputies in the commission of their duties." Instead, Waldron asserts that "she could not have intended to impede" a police investigation because she did not know that Roark and May were law enforcement officers.[40]

Rather than impeding a police investigation, Waldron claims her intent was to "protect [Copple] from what she thought were intruders."[41] Although Waldron's actual intent may be relevant for purposes of determining her mens rea and whether she *actually* violated § 28-901, it is not relevant in considering whether Roark is entitled to qualified immunity. Instead, the relevant question for purposes of our second-prong analysis is whether the law is so clearly established that a reasonable officer standing in Roark's shoes could not have believed that Waldron intended to impede a police investigation.[42]

Though Waldron attempts to establish that Roark violated a statutory or constitutional right, she makes no argument as

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[38] *Devenpeck v. Alford, supra* note 37.

[39] See § 28-901(1).

[40] Brief for appellant at 15.

[41] *Id.*

[42] See *Ashcroft v. al-Kidd, supra* note 10.

to whether the right was clearly established at the time of the challenged conduct. We acknowledge that "[t]hat one cannot be arrested in the absence of probable cause" is clearly established.[43] But the U.S. Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality. . . . The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."[44] Rather, for a court to find that a violation of clearly established law has occurred, a "more particularized" inquiry is required.[45]

Therefore, as noted above, if a reasonable official could have believed the conduct under the particular circumstances was lawful because there was no existing precedent that had "placed the . . . constitutional question beyond debate," the official's conduct does not violate clearly established law.[46] Here, even viewing the evidence in the light most favorable to Waldron, including her admission that she was obstructing and hindering the deputies in the commission of their duties, a reasonable officer could have believed Waldron's arrest was lawful. We make this finding because the facts were such that Roark could have believed that Waldron knew he and May were law enforcement officers. After all, Roark was acting pursuant to an arrest warrant and Waldron admits that Roark told her that they were law enforcement officers looking for Copple after they entered her residence.

We recognize that there is a factual dispute as to whether Roark showed his badge to Waldron. Waldron testified that Roark announced he was a deputy but refused to show his badge. In contrast, Roark testified that upon entering Waldron's home, he "verbally and physically" identified himself "with

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[43] *Williams v. Baird, supra* note 15, 273 Neb. at 987, 735 N.W.2d at 392.

[44] *Ashcroft v. al-Kidd, supra* note 10, 563 U.S. at 742 (citations omitted).

[45] *Anderson v. Creighton, supra* note 11, 483 U.S. at 640.

[46] *Ashcroft v. al-Kidd, supra* note 10, 563 U.S. at 741.

[his] badge," and May testified that when she entered the living room, she saw Roark "already had [his badge] out" and "was showing it" to Waldron. But we conclude this factual dispute is not material to our determination of whether Roark is entitled to qualified immunity under these particular circumstances. Waldron cites no case law, and we find no case law, clearly establishing that these facts support a finding that Roark should have known that Waldron was unaware that Roark and May were law enforcement officers. Thus, even if the facts were as Waldron claims, it would not have been entirely unreasonable for an officer, while in plain clothes and faced with a person who was impeding an arrest pursuant to a warrant, to conclude probable cause existed to arrest Waldron for obstructing government operations. In other words, Waldron has failed to prove the right was clearly established.

Because Roark is entitled to qualified immunity on Waldron's claim that Roark arrested her without probable cause, it is not necessary for this court to address the State's argument that completing a diversion program bars Waldron's § 1983 claim that Roark lacked probable cause under *Heck v. Humphrey*.[47]

(ii) Excessive Force

[17] Next, we address Waldron's claim that "[t]he right to be free from excessive or deadly force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures."[48] We agree with the general proposition that every citizen should be free from excessive force. However, the framework required by the U.S. Supreme Court for analyzing qualified immunity requires a more particularized inquiry. The "'dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in*

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[47] *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

[48] Brief for appellant at 13.

the situation he confronted.'"[49] Therefore, we particularize our inquiry to the situation that Roark confronted and we address, when viewing the facts in the light most favorable to Waldron, whether it would have been "'entirely unreasonable' for an officer to believe, in the particular circumstances of this case," that his behavior was lawful.[50]

An arrest may be deemed unreasonable in violation of the Fourth Amendment if the manner in which the arrest is executed is unreasonable, e.g., if the police used excessive force.[51] Here, Waldron argues that Roark used excessive force in effecting her arrest and that Roark is not entitled to qualified immunity.

We view the evidence regarding Roark's use of force in the light most favorable to Waldron. According to Waldron, Roark, followed by May, went down the stairs to look for Copple. When Waldron began to follow the deputies down the stairs, she was instructed not to follow them and to instead "'[s]tay in the kitchen.'" Waldron admits that she did not obey the deputies' instructions and instead continued to follow May down the stairs. Waldron admits that when May stopped halfway down the stairs and put her leg across the stairwell to prevent Waldron from going down the stairs, Waldron pushed on May's leg with her body, attempted to go over her leg, and somehow eventually made her way down the stairs before May.

Waldron testified that after she arrived downstairs, she saw Copple's friend. Waldron claims that this "friend" in her basement was a "stranger," and she started screaming at the friend to "[g]et out of my house." There is no evidence that the deputies were aware Waldron did not know or recognize

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[49] *Hernandez v. Mesa*, ___ U.S. ___, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017) (emphasis supplied).

[50] *Messerschmidt v. Millender, supra* note 34, 565 U.S. at 549.

[51] See, *Tennessee v. Garner*, 471 U.S. 1, 8, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985) ("reasonableness depends on not only when a seizure is made, but also how it is carried out").

Copple's friend; nor was there any evidence that the deputies knew that Waldron was screaming at the friend and not at them. In fact, Waldron testified that she thought Roark might have thought she was screaming at him. When asked what Waldron was "hollering," Waldron indicated that she was "[p]robably still [hollering at the friend] to get out of [her] house. And probably to the — and asking — still asking Roark if he had a warrant."

According to Waldron, Roark turned around to handcuff her. She had "no idea" if Roark told her he was going to handcuff her, but she claims that he did not tell her that she was under arrest. According to Waldron, Roark "slapped" one cuff on her left arm, and when Roark started to bring her right hand around, Waldron asked him not to do so and indicated that she had had surgery on her right shoulder. Waldron testified that when Roark tried to bring her right hand around behind her back, she resisted by stiffening her arm and holding it out away from her body, "making a right angle with [her] arm and [her] body." According to Waldron, Roark then "put his knee in [her] back and pulled [her], and [she] fell" forward and broke her eyeglasses. Roark did not make any other contact with Waldron's body as he handcuffed her. Once Waldron was on the ground, Roark was able to cuff her right hand. Waldron did not know if Roark ever asked her to put her hands behind her back.

After she was handcuffed, Roark left Waldron on the floor and continued the search for Copple. Waldron admits that she eventually got up from the floor and slipped her right hand out of the cuff. When Roark turned around and saw that Waldron was up and her hand was out of the cuff, he handcuffed her again. This time, Waldron tried to prevent Roark from handcuffing her by stiffening her left arm and holding it out away from her body. Waldron testified that Roark pulled on her left arm to try to get it behind her back and that Waldron fell. She testified, "I don't think he pushed me down . . . I fell backwards." When she fell backwards, Waldron hit a couch and "bounce[d] off" onto the floor. According to Waldron, she hurt

her left shoulder when she hit the floor. Waldron was then handcuffed a second time, and someone (Waldron was not sure who) took her upstairs.

[18,19] "'Reasonable force,'" which may be used by an officer making an arrest, is generally considered to be that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would deem necessary under the circumstances.[52] The inquiry assesses reasonableness at the moment of the use of force, as judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.[53] This allows for the fact that "'police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'"[54]

On these facts, in *Waldron I* we found that there was "a material question of fact whether . . . the force [Roark] used was excessive."[55] However, this finding is relevant only to the first prong of the qualified immunity analysis, i.e., whether a statutory or constitutional right has been violated. Because Waldron must plead facts to support both prongs, we turn to the second prong, i.e., whether the right alleged to have been violated was clearly established.

Again, Waldron bears the steep burden of proving that this right was so clearly established that every reasonable officer would have known that Roark's conduct under the particular circumstances violated the right. We again find that Waldron has not met this burden.

Waldron argues that her rights are clearly established under *Copeland v. Locke*,[56] wherein the Eighth Circuit found that

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[52] *Waldron I, supra* note 1, 292 Neb. at 906, 874 N.W.2d at 864.

[53] *Id.*

[54] *Id*. at 906-07, 874 N.W.2d at 864.

[55] *Id.* at 911, 874 N.W.2d at 866.

[56] *Copeland v. Locke*, 613 F.3d 875 (8th Cir. 2010).

there was a material issue of fact as to whether an officer's use of force on a 67-year-old man was excessive. However, the amount of force reasonably depends on the particular facts and circumstances of each independent case. The facts of *Copeland* do not directly align with those in this case, and they are far more egregious. In determining whether a right is clearly established, the question is not whether the very action in question has previously been held unlawful.[57] Instead, the question is whether the contours of the right were sufficiently clear at the time of the challenged conduct that "every 'reasonable officer' would have understood that [the conduct at issue] violates that right."[58]

We conclude that under these facts, the contours of what constitutes reasonable force are not clearly defined. Courts may consider certain factors, such as "'"the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."'"[59] But these factors are not exhaustive.[60]

We think that an officer could reasonably, even if mistakenly, conclude that the amount of force Roark used was lawful given the circumstances. Roark was not in a calm situation in which he was dealing one-on-one with a cooperative Waldron. Rather, at the time Roark used force to arrest Waldron, Waldron had been screaming "get out of my house" while Roark was still trying to assess whether Copple's friend was a danger and while Copple was still at large. Waldron had repeatedly refused to listen to the officers' instructions. At the moment that Roark used force, Waldron was actively resisting arrest.

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[57] See, *Hernandez v. Mesa, supra* note 49; *Ziglar v. Abbasi*, ___ U.S. ___, 137 S. Ct. 1843, 198 L. Ed. 2d 290 (2017); *Blazek v. City of Iowa City*, 761 F.3d 920 (8th Cir. 2014).

[58] *Ashcroft v. al-Kidd, supra* note 10, 563 U.S. at 741. Accord *Anderson v. Creighton, supra* note 11.

[59] *Waldron I, supra* note 1, 292 Neb. at 907, 874 N.W.2d at 864.

[60] *Id.*

Waldron contends that the "manner in which [the arrest] was performed was objectively unreasonable given [her] age and size."[61] However, even considering her age and size, Waldron repeatedly ignored the officers' instructions to stay in the kitchen, was strong enough to push her way past a deputy and proceed down the stairs, and was nimble enough to work her hands out of the handcuffs.

Even viewing the facts in the light most favorable to Waldron, we conclude that the boundaries of reasonable force that can be applied were not clearly established in this circumstance. Therefore, Roark is entitled to qualified immunity and to summary judgment in his favor.

Before moving to Waldron's next assignment of error, we pause to recognize that our findings in this opinion are slightly nuanced from those in *Waldron I*. In *Waldron I*, we were evaluating whether Waldron's constitutional and statutory rights were violated, and as such, our holding in *Waldron I* is relevant to the first prong of our qualified immunity analysis. Furthermore, in *Waldron I*, we were not faced with the issue of qualified immunity and therefore did not deal with the question of whether the rights alleged to have been violated were clearly established.

In finding that the rights here were not clearly established and that Roark is entitled to qualified immunity, we follow the law set forth in recent U.S. Supreme Court cases. The law has consistently broadened the parameters within which law enforcement officers facing § 1983 claims can operate.[62] For example, in the 2017 U.S. Supreme Court case *White v. Pauly*,[63] an officer arrived late to an ongoing police action.

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[61] Brief for appellant at 16.

[62] See, *White v. Pauly*, 580 U.S. 73, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017); *City and County of San Francisco v. Sheehan, supra* note 16; *Ashcroft v. al-Kidd, supra* note 10; *Pearson v. Callahan, supra* note 29; *United States v. Lanier*, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997); *Anderson v. Creighton, supra* note 11.

[63] *White v. Pauly, supra* note 62.

After witnessing shots being fired by one of several individuals, the officer shot and killed an armed individual without first giving a warning. In analyzing whether the officer violated a clearly established right, the Court stated:

> In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. . . . The Court has found this necessary both because qualified immunity is important to "'society as a whole,'" . . . and because as "'an immunity from suit,'" qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial'" . . . .
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> Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." . . . As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. . . . Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." . . .
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> . . . .
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> . . . [The majority] recognized that "this case presents a unique set of facts and circumstances" in light of [the officer's] late arrival on the scene. . . . This alone should have been an important indication to the majority that [the officer's] conduct did not violate a "clearly established" right.[64]

As noted earlier, this is a § 1983 action; we are interpreting a federal statute, not a Nebraska statute; and we must follow U.S. Supreme Court precedent. Although we understand the concerns anytime a citizen is injured during an arrest, U.S. Supreme Court precedent establishes that qualified immunity for § 1983 purposes "'gives government officials breathing room to make reasonable but mistaken

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[64] *Id.*, 580 U.S. at 79-80 (citations omitted).

judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'"[65] After applying U.S. Supreme Court precedent to the instant circumstances, we conclude Roark is entitled to qualified immunity on the above claims.

2. Policy and Customs of Lancaster County

We next turn to Waldron's assignment that the district court erred in finding there was no evidence to support her claim that a policy or custom of Lancaster County caused her damages. Waldron argues that "[d]espite the County's official written policies, it is reasonable to infer that Roark's beliefs are premised on the County's unofficial custom of permitting officers to engage in such actions . . . ."[66] We disagree.

[20-23] Municipalities can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where the action alleged to be unconstitutional implements or executes a policy statement or custom of the municipality.[67] However, a municipality cannot be held liable solely because it employs a tortfeasor.[68] In other words, "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."[69] "Instead, it is when 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 that the government as an entity is responsible under § 1983."[70] Conclusions based upon guess, speculation,

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[65] *City and County of San Francisco v. Sheehan, supra* note 16, 575 U.S. at 611.

[66] Brief for appellant at 25.

[67] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

[68] *Id.*

[69] *Id.*, 436 U.S. at 691.

[70] *Id.*, 436 U.S. at 694.

conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[71]

Waldron contends that the deputies' acts of "forcing their way into a home without showing a badge, refusing to show either [a] badge or a warrant despite repeated requests, and then subjecting the resident to physical force despite the knowledge that she had an injury" amount to official policy by the county.[72] However, the Lancaster County sheriff's office's standard operating procedures contained in the record do not condone any of these actions.

Waldron fails to provide any basis as to why Roark's alleged acts "may fairly be said to represent official policy."[73] Rather, she merely speculates that it is "reasonable to infer that Roark's beliefs are premised on the County's unofficial custom."[74] As evidence of "Roark's beliefs," she relies only on his alleged actions during the events of February 22, 2012. We conclude that this evidence is not sufficient for a jury to infer that Roark's actions that night were an implementation of a custom or an unofficial policy. Waldron's third assignment of error is without merit.

3. Liability in Official Capacity

[24] Finally, Waldron assigns that the district court erred in finding that Roark was entitled to summary judgment in his official capacity. However, Waldron does not argue this assignment in her brief. To be considered by an appellate court, an alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error.[75] Though it is assigned, Waldron does not otherwise

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[71] *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

[72] Brief for appellant at 25-26.

[73] *Monell v. New York City Dept. of Social Services, supra* note 67, 436 U.S. at 694.

[74] Brief for appellant at 25.

[75] *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

argue this assertion. As such, we decline to consider it on appeal.

VI. CONCLUSION

We do not endorse the kind of officer behavior that Waldron claims she experienced; however, U.S. Supreme Court precedent controls our interpretation of § 1983 and our determination of qualified immunity. Based upon the framework set forth by the U.S. Supreme Court, Waldron has not proved that under these particular circumstances, the rights that she asserts were clearly established.

Accordingly, we conclude that the district court did not err in finding that Roark was entitled to qualified immunity on Waldron's knock-and-announce claim, nor erred in finding that Roark was entitled to qualified immunity on Waldron's unlawful arrest claim. Additionally, the district court did not err in finding that there was no evidence to support a claim that a policy or custom of Lancaster County caused Waldron's damages. Finally, we do not address whether the district court erred in finding that Roark was entitled to summary judgment in his official capacity, because Waldron does not argue this assignment in her brief.

Affirmed.

Cassel, J., concurring.

I join the court's opinion in full. It soundly applies qualified immunity jurisprudence[1] to all of Waldron's claims. Moreover, even if the court's analysis was somehow flawed regarding probable cause for her arrest, the end result would not change. In my opinion, her acceptance and completion of pretrial diversion—in exchange for dismissal of criminal charges—bar that claim.[2]

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[1] See *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

[2] See *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

Although I recognize there is a split of authority on the issue, I agree with those courts finding that completion of a diversion program in which the charge is dismissed bars a § 1983 challenge to probable cause.[3]

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[3] See, e.g., *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005); *Roesch v. Otarola*, 980 F.2d 850 (2d Cir. 1992); *Cabot v. Lewis*, 241 F. Supp. 3d 239 (D. Mass. 2017) (contrasting competing rationales); *Elphage v. Gautreaux*, 969 F. Supp. 2d 493 (M.D. La. 2013).

Wright, J., dissenting.

I respectfully dissent. In my opinion, no reasonable law enforcement officer would believe that it is lawful to forcibly enter a residence while in plain clothes to arrest a resident without providing any evidence of authority to do so.

As Marilyn Waldron answered her door one evening, a stranger shoved his way past her, into her home, his gun drawn. Another stranger soon followed. They were looking for her grandson. They claimed to be law enforcement officers, but were not in uniform. These strangers were unable or unwilling to produce a badge or a warrant to justify their claim to authority for their intrusion. As instructed to do by her late husband, a captain in the Nebraska State Patrol, Waldron demanded to see a badge and a warrant.

When Waldron, a 78-year-old woman whose right shoulder was tender from a prior surgery, did not immediately comply with the man's order to put her right hand behind her back to be handcuffed, she was pulled to the ground, a knee stuck in her back. Her glasses broke, and her face was bruised. With her shoulder in severe pain, Waldron slipped her right hand out of the handcuffs. The man came at her again. As her arm was wrenched around by the man, the 78-year-old fell backward onto the couch and then to the ground, injuring her other shoulder.

In my opinion, any reasonable law enforcement officer should know that such conduct would violate Waldron's

constitutional rights. I respectfully disagree with the majority's conclusion that Roark is entitled to qualified immunity.[1]

Of particular concern to me is the majority's conclusion that a reasonable officer could have concluded that there was probable cause to arrest Waldron for obstructing government operations. It is, of course, no crime to obstruct an intruder into your home. It is unlawful only if you know that the person you are obstructing is in fact a law enforcement officer.[2]

The majority gives two reasons for why Roark could have reasonably believed that Waldron knew he and May were police officers: (1) They were acting pursuant to an arrest warrant, and (2) "Waldron admits that Roark told her that they were law enforcement officers." The first reason is irrelevant; the fact that Roark and May were acting pursuant to an arrest warrant for Copple—which they were not able or willing to produce when asked by Waldron—has no bearing on whether Waldron knew they were law enforcement officers.

The second reason the majority offers to show that Roark could have reasonably believed that Waldron knew he was a law enforcement officer is that he told her he was. But this verbal claim does not satisfy the requirement that an officer must display his authority. Citizens are not subject to criminal liability for obstructing an unidentified stranger in plain clothes that barges into their home simply because the intruder verbally claims to be the police. Any common burglar can claim to be a police officer. Common sense dictates that citizens not be put to the choice of submitting to an armed home intruder with no evidence of authority beyond a bald verbal claim to be the police and facing the prospect of arrest and criminal prosecution. When a law enforcement officer enters a citizen's home in plain clothes, he must give some evidence of authority

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[1] See, generally, Claire L. Hillan, *The Not-So-Clearly Established Qualified Immunity Doctrine*, The Nebraska Lawyer, March/April 2017, at 15 (discussing history and details of qualified immunity doctrine).

[2] *Waldron v. Roark*, 292 Neb. 889, 874 N.W.2d 850 (2016).

beyond his mere word in order to have probable cause to arrest the resident for obstructing government operations.

Because I believe that Roark is not entitled to qualified immunity, I respectfully dissent.

For the sake of completeness, I note that the concurring opinion has expressed the view that Waldron's claim that she was arrested without probable cause is barred by her participation in a pretrial diversion program under *Heck v. Humphrey*.[3] My reading of *Heck*, and that of many other courts,[4] is to the contrary. Therefore, in my view, Waldron's participating in pretrial diversion does not bar her claim.

Miller-Lerman, J., joins in this dissent.

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[3] *Heck v. Humphrey*, 512 U.S. 477, 487, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (holding that "a § 1983 suit" is barred when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his [or her] conviction or sentence").

[4] *Vasquez Arroyo v. Starks*, 589 F.3d 1091 (10th Cir. 2009); *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008); *McClish v. Nugent*, 483 F.3d 1231 (11th Cir. 2007) (pretrial intervention program); *Magana v. County of San Diego*, 835 F. Supp. 2d 906 (S.D. Cal. 2011); *Medeiros v. Clark*, 713 F. Supp. 2d 1043 (E.D. Cal. 2010); *Butts v. City of Bowling Green*, 374 F. Supp. 2d 532 (W.D. Ky. 2005). Cf., *Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998) (voluntary dismissal of charges by prosecutor); *Adams v. Soyka*, No. 11-CV-00399-LTB-MEH, 2011 WL 4915492 at *3 (D. Colo. Oct. 14, 2011) (holding "*Heck* bar," see *Heck, supra* note 3, inapplicable in case involving "*Alford* plea" and stipulated deferred judgment). See, also, *Wallace v. Kato*, 549 U.S. 384, 392-94, 127 S. Ct. 1091, 166 L. Ed. 2d 973 (2007) (holding that "*Heck* bar," see *Heck, supra* note 3, which tolls the accrual of the statute of limitations for "§ 1983 . . . claims" until "favorable termination" when applicable, does not apply unless there is "an *extant conviction* which success in that tort action would impugn").

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Harold L. Stone, appellant.

902 N.W.2d 197

Filed October 13, 2017. No. S-16-941.

1. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.
2. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
3. **Constitutional Law: Statutes: Pleas.** As-applied challenges to the constitutionality of a criminal statute are preserved by a defendant's plea of not guilty.
4. **Constitutional Law: Statutes: Waiver.** The proper procedure for raising a facial constitutional challenge to a criminal statute is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.
5. **Constitutional Law: Statutes.** Regardless of how the parties label a constitutional challenge, a court will classify the challenge based upon the nature of the alleged constitutional defect.
6. ____: ____. Generally, a facial challenge seeks to void the statute in all contexts for all parties. In contrast, an as-applied challenge often concedes the statute is constitutional in some of its applications, but contends it is unconstitutional as applied to the particular facts of the case.
7. ____: ____. An as-applied challenge does not seek to void the statute for all purposes, but seeks only to prevent the statute's application to the facts before the court.
8. **Sentences.** Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. This is so, even when offenses carry a mandatory minimum sentence, unless the statute requires that consecutive sentences be imposed.

9. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
10. **Sentences.** When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.

Appeal from the District Court for Thayer County: Vicky L. Johnson, Judge. Affirmed.

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

In this direct appeal of his criminal convictions and sentences, Harold L. Stone seeks to challenge the constitutionality of the mandatory minimum sentencing scheme for first degree sexual assault of a child.[1] He also challenges his sentences as excessive. We conclude Stone did not preserve his constitutional challenge for appellate review, and we find no merit to his excessive-sentence claim. Accordingly, we affirm the judgment and sentences of the district court.

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[1] See Neb. Rev. Stat. § 28-319.01 (Reissue 2016).

FACTS

Conviction

In 2016, Stone was charged with five counts of first degree sexual assault of a child,[2] one count of third degree sexual assault of a child,[3] and one count of child abuse.[4] The amended information alleged Stone sexually penetrated H.W. on five separate occasions in 2014 and 2015, at a time when H.W. was under the age of 16 and Stone was over the age of 25. Stone entered pleas of not guilty, and the matter proceeded to trial.

The facts underlying Stone's charges are not directly relevant to his assignments of error, so we do not recount them in detail. Generally, evidence at trial showed that Stone, a 58-year-old man, befriended, groomed, and sexually assaulted H.W., a 15-year-old child with behavioral disabilities.

The jury returned a verdict finding Stone guilty of four counts of first degree sexual assault of a child and one count of child abuse. Each sexual assault conviction was a Class IB felony carrying a mandatory minimum prison sentence of 15 years[5] and a maximum sentence of life imprisonment.[6]

Sentencing

At the sentencing hearing, Stone argued the mandatory minimum sentencing scheme of § 28-319.01 violated the Equal Protection Clauses of the U.S. and Nebraska Constitutions by treating him more harshly than younger offenders. Stone asserted that if he had been 19 to 24 years old, rather than 58, at the time of his crimes, the sexual assaults would have been classified as Class II felonies with a 1-year minimum

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[2] § 28-319.01(1)(b).

[3] Neb. Rev. Stat. § 28-320.01(1) (Reissue 2016).

[4] Neb. Rev. Stat. § 28-707(1)(a) and (d) (Cum. Supp. 2014).

[5] See § 28-319.01(1)(b) and (2).

[6] See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014).

term,[7] instead of Class IB felonies with a 15-year mandatory minimum term.[8] Stone contended there was no rational basis to treat him more harshly based on his age, and he asked the court to sentence him "as if the offense were a Class II felony." Stone ultimately conceded that "[a]ssuming the validity of the sentencing scheme, the Court has no legal option but to impose a sentence of not less than a mandatory 15-year sentence on [the sexual assault convictions] and . . . then has to consider whether any sentences imposed should be concurrent or consecutive." Stone asked the court to run his sentences concurrently rather than consecutively, suggesting the mandatory minimum was already "harsher than it should be legally or constitutionally."

The trial court rejected Stone's constitutional arguments and, on each of the four sexual assault convictions, sentenced Stone to imprisonment for a mandatory minimum term of 15 years and a maximum term of 20 years. On the child abuse conviction, Stone was sentenced to a term of 4 to 5 years' imprisonment. The court ordered two of the sexual assault sentences to be served consecutively and ordered the remaining sentences to be served concurrently.

Stone timely appealed, and he filed a notice of constitutional question under Neb. Ct. R. App. P. § 2-109(E) (rev. 2014), advising that "this appeal presents a question as to the constitutionality of . . . §28-319.01(1)(b) [and] (2), as applied." We moved the case to our docket on our own motion.[9]

ASSIGNMENTS OF ERROR

Stone assigns (1) that the mandatory minimum term of 15 years' imprisonment under § 28-319.01(2), based upon age, has no rational basis and violates the Equal Protection

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[7] See Neb. Rev. Stat. § 28-319 (Reissue 2016) and § 28-105.

[8] § 28-319.01(2).

[9] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

Clauses of the U.S. and Nebraska Constitutions and (2) that the imposition of consecutive mandatory minimum sentences was unreasonable and excessive.

STANDARD OF REVIEW

[1] The constitutionality of a statute presents a question of law, which we independently review.[10]

[2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[11]

ANALYSIS

Facial or As-Applied Challenge

As a threshold matter, we consider whether Stone has properly presented his constitutional challenge to § 28-319.01. The proper procedure for raising and preserving a constitutional challenge differs depending on whether it is a facial or an as-applied challenge.[12]

[3,4] As-applied challenges to the constitutionality of a criminal statute are preserved by a defendant's plea of not guilty.[13] But the proper procedure for raising a facial constitutional challenge to a criminal statute is to file a motion to quash, and all defects not raised in a motion to quash are taken as waived by a defendant pleading the general issue.[14]

Stone did not file a motion to quash in this case and concedes he has waived any facial challenge to § 28-319.01. Instead, he characterizes his equal protection claim as an "as-applied" constitutional challenge to § 28-319.01. The State takes issue with this characterization and argues that Stone is

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[10] *J.M. v. Hobbs*, 288 Neb. 546, 849 N.W.2d 480 (2014).

[11] *State v. Policky*, 285 Neb. 612, 828 N.W.2d 163 (2013).

[12] See *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012).

[13] *State v. Boche*, 294 Neb. 912, 885 N.W.2d 523 (2016); *Harris, supra* note 12.

[14] *Harris, supra* note 12.

actually mounting a facial challenge to the constitutionality of § 28-319.01.

[5-7] Regardless of how the parties label a constitutional challenge, a court will classify the challenge based upon the nature of the alleged constitutional defect.[15] We have described a facial challenge as a "'challenge to a statute, asserting that no valid application of the statute exists because it is unconstitutional on its face.'"[16] Generally, a facial challenge seeks to void the statute in all contexts for all parties.[17] In contrast, an as-applied challenge often concedes the statute is constitutional in some of its applications, but contends it is unconstitutional as applied to the particular facts of the case.[18] An as-applied challenge does not seek to void the statute for all purposes, but seeks only to prevent the statute's application to the facts before the court.[19]

After reviewing the record and the parties' arguments, we conclude that although Stone attempts to frame it otherwise, he is asserting a facial challenge to the statutory classification scheme under § 28-319.01. Stone argues there is no rational basis for a "statutory classification which imposes a substantially harsher sentence [for sexual assault of a child] when the actor is 25 years of age or older than when the actor is 19 years of age or older."[20] In making this argument, Stone does not premise the alleged constitutional violation on any

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[15] See, e.g., *State v. Sanders*, 269 Neb. 895, 697 N.W.2d 657 (2005).

[16] *Id.* at 905, 697 N.W.2d at 667, quoting *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

[17] See 16 C.J.S. *Constitutional Law* § 243 (2015). See, also, *Harris, supra* note 12, 284 Neb. at 221, 817 N.W.2d at 268 ("a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the act would be valid, i.e., that the law is unconstitutional in all of its applications").

[18] 16 C.J.S., *supra* note 17.

[19] *Id.*

[20] Brief for appellant at 7.

facts specific to his case or circumstances. Instead, the nature of the constitutional defect he raises—that the age classification in § 28-319.01 is arbitrary and has no rational basis—is one that every offender 25 years of age or older could raise. His challenge seeks to void the statutory age classification in all contexts for all parties and is properly classified as a facial challenge.

Because Stone has not preserved this facial challenge for appellate review, we do not reach his first assignment of error.

Consecutive Sentences

Stone argues the sentencing court abused its discretion by ordering two of the mandatory minimum sentences to run consecutively. We find no abuse of discretion on this record.

[8] Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively.[21] This is so, even when offenses carry a mandatory minimum sentence,[22] unless the statute requires that consecutive sentences be imposed.[23]

Section 28-319.01(2) requires a mandatory minimum prison sentence of 15 years[24] and classifies Stone's crime as a Class IB felony, which carries a maximum term of life imprisonment.[25] The jury convicted Stone of four separate counts of first degree sexual assault of a child. The trial court imposed

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[21] *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014); *Policky, supra* note 11.

[22] See, *State v. Abejide*, 293 Neb. 687, 879 N.W.2d 684 (2016); *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[23] *Berney, supra* note 21.

[24] See *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015) (specific 15-year mandatory minimum in § 28-319.01(2) for first degree sexual assault of child controls over general 20-year minimum for Class IB felonies in § 28-105).

[25] § 28-105.

a sentence of 15 to 20 years' imprisonment on each of the four convictions under § 28-319.01(2) and ordered two of the sentences to be served consecutively. All other sentences were ordered to be served concurrently.

[9,10] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[26] When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.[27]

Here, the sentences imposed were well within the statutory range and the record shows the court considered and applied all the necessary sentencing factors. Stone committed serious felonies that caused lasting harm. He groomed his child victim and befriended her family to increase his access to the victim. He was found to be in the moderate-high risk range on a sex offender specific assessment. We find no abuse of discretion in ordering consecutive mandatory minimum sentences.

CONCLUSION

For the foregoing reasons, the judgment and sentences of the district court are affirmed.

Affirmed.

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[26] *State v. Garza*, 295 Neb. 434, 888 N.W.2d 526 (2016).

[27] *State v. Rogers*, 297 Neb. 265, 899 N.W.2d 626 (2017).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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State of Nebraska, appellee, v. Bryant L. Irish, appellant.

902 N.W.2d 669

Filed October 13, 2017. No. S-16-1200.

1. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
2. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **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.
5. **Criminal Law: Convictions: Probation and Parole: Motor Vehicles: Licenses and Permits: Revocation.** When a motor vehicle operator's license revocation must be part of a court's judgment of conviction in a criminal case, as distinguished from an authorized term of probation, it is a distinct part of the offender's punishment for the crime.
6. **Constitutional Law: Sentences: Probation and Parole: Drunk Driving: Motor Vehicles: Licenses and Permits: Revocation.** Because the license revocation requirement under Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2016) is not a term of probation and the statute does not authorize a court to impose it as such, the Nebraska Constitution prohibits a court from later commuting the original sentence.
7. **Jurisdiction: Time: Appeal and Error.** To vest an appellate court with jurisdiction, Neb. Rev. Stat. § 25-1912 (Reissue 2016) requires a criminal defendant to perfect an appeal within 30 days of the judgment.
8. **Criminal Law: Judgments: Sentences.** In a criminal case, the judgment is the sentence.

Appeal from the District Court for Madison County: Mark A. Johnson, Judge. Appeal dismissed.

Alan G. Stoler and Jerry M. Hug, of Alan G. Stoler, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

INTRODUCTION

This is Bryant L. Irish's appeal from the district court's order that denied his request to modify his probation order. We conclude that the court lacked jurisdiction to consider his untimely challenge to its sentencing order through a motion to amend or terminate a term of probation. We therefore dismiss his appeal.

BACKGROUND

In March 2015, Irish was convicted under Neb. Rev. Stat. § 60-6,198 (Cum. Supp. 2016) of proximately causing serious bodily injury to another while driving under the influence of alcohol, a Class IIIA felony.[1] Section 60-6,198(1) provides that upon conviction of this crime,

> the court shall, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years from the date ordered by the court and shall order that the operator's license of such person be revoked for the same period.

At the sentencing hearing, the court placed Irish on probation for a period of 60 months and ordered him to serve the first 180 days in jail. It also revoked his driver's license for a period of 10 years. The court then stated from the bench, "After a 45-day period of no driving, you may apply for an ignition interlock permit and install an ignition interlock

[1] See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014).

device on any motor vehicle that you operate." But the court's written sentencing order was silent on Irish's eligibility to drive with an ignition interlock device.

Irish appealed, arguing only that the evidence was insufficient to show that he had proximately caused his passenger's serious injuries. We rejected that argument in January 2016.[2]

In August 2016, Irish moved for a nunc pro tunc order. He asked the court to correct what he characterized as the void sentencing order that it had issued in March 2015. He asserted that the court had directed his eligibility for an ignition interlock permit during his license revocation hearing but that the Nebraska Department of Motor Vehicles (DMV) had denied his application because no statute authorized an ignition interlock permit for someone convicted of Irish's crime. Irish argued that the judgment was therefore void and requested that the court revise the revocation period in its order to carry out the court's intent. After a hearing, which is not part of the record, the court overruled the motion.

Irish then filed a motion to modify or clarify the probation order. At the November 2016 hearing, Irish again asked the court to revise its original probation order to carry out its sentencing intent because the DMV would not grant him an ignition interlock permit. He argued that a probation order can always be modified. The court responded that § 60-6,198 required the court to order a person not to drive for a period of at least 60 days and not more than 15 years and to order a license revocation for the same period. As a result, it concluded that it lacked authority to issue a probation order that was contrary to that statutory requirement and overruled the motion.

ASSIGNMENT OF ERROR

Irish assigns that the district court erred in determining that it lacked authority to modify the terms of his probation.

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[2] See *State v. Irish*, 292 Neb. 513, 873 N.W.2d 161 (2016).

STANDARD OF REVIEW

[1-3] We independently review questions of law decided by a lower court.[3] A jurisdictional issue that does not involve a factual dispute presents a question of law.[4] Statutory interpretation presents a question of law.[5]

ANALYSIS

Irish relies upon Neb. Rev. Stat. § 29-2263(3) (Reissue 2016) for his contention that the district court had legal authority to grant his motion to modify his order of probation. Section 29-2263(3) sets forth that a court—on application of a probation officer or of the probationer, or its own motion—may modify or eliminate any of the conditions imposed on the probationer or add further conditions authorized by Neb. Rev. Stat. § 29-2262 (Reissue 2016). However, the district court effectively concluded that it lacked jurisdiction to consider Irish's request to reduce the license revocation period in its sentencing order.

If the court from which an appeal was taken lacked jurisdiction, then the appellate court acquires no jurisdiction.[6] But we have the power to determine whether we have jurisdiction over an appeal and to correct jurisdictional errors, even if we lacked jurisdiction to consider the merits of the order or judgment appealed.[7]

Irish concedes that there is no statutory provision under § 60-6,198 for allowing an ignition interlock device as part of the driver's license revocation in cases involving serious bodily injury. He further concedes that, as a result, the district court was wrong in believing it could authorize the use of an

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[3] *State v. McColery*, 297 Neb. 53, 898 N.W.2d 349 (2017).

[4] *Id.*

[5] See *State v. Robbins*, 297 Neb. 503, 900 N.W.2d 745 (2017).

[6] See *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015).

[7] See *id.*

ignition interlock device after 45 days of no driving. However, he argues that § 29-2263(3) authorizes the sentencing court to modify or eliminate any of the conditions imposed upon the probationer and that as a result, the court could have reduced the revocation period. We disagree.

The relevant portion of § 60-6,198(1) provides that upon conviction of this crime,

> the court *shall*, as part of the judgment of conviction, order the person not to drive any motor vehicle for any purpose for a period of at least sixty days and not more than fifteen years . . . and shall order that the operator's license of such person be revoked for the same period.

(Emphasis supplied.)

[4] As a general rule, the word "shall" in a statute is considered mandatory and is inconsistent with the idea of discretion.[8] The term "shall" as it appears in § 60-6,198 describes a specific punishment which must be included in the judgment of conviction. Regardless of whether the criminal offender under § 60-6,198 is sentenced to imprisonment or is given a sentence of probation, the trial court is required to order the offender not to drive during a specified period and to revoke the offender's license for a like period.

In *State v. Hense*,[9] under a comparable statutory mandate, we held that when a person is convicted of felony operation of a motor vehicle during a license revocation period,[10] it is mandatory the court revoke the operator's license of the offender for 15 years, and that the court does not have discretion as to whether or not it imposes such revocation. We further held that the trial court must impose the mandatory 15-year license revocation as a part of its sentence, including a sentence of probation.[11]

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[8] See *Huntington v. Pedersen*, 294 Neb. 294, 883 N.W.2d 48 (2016).

[9] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[10] See Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2006).

[11] *Hense, supra* note 9.

Similarly, the Nebraska Court of Appeals has held that the 15-year license revocation period for driving in violation of an ignition interlock restriction[12] does not conflict with the 5-year limit on a sentence of probation for a felony conviction.[13] It reasoned that a trial court has no discretion not to impose the 15-year license revocation period, which is statutorily required, in addition to any other sentence the court imposes for the crime. It also reasoned that the revocation was not a term of probation, but was a term of punishment.[14]

The Court of Appeals further noted that the Legislature has demonstrated that it can distinguish between a mandatory license revocation period and a revocation that is a condition of probation.[15] That legislative distinction is currently illustrated in Neb. Rev. Stat. § 60-6,197.03 (Reissue 2016), the sentencing statute for a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) (driving under the influence) or Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2016) (refusal to submit to chemical test).

As an example, for a person convicted of violating § 60-6,196 or § 60-6,197 and who has no prior convictions, § 60-6,197.03(1) provides that a court shall order a 6-month license revocation as part of its judgment and require the offender to apply for an ignition interlock permit for the revocation period. However, if the court places such offender on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order that the operator's license of such person be revoked for a period of 60 days from the date ordered by the court and order that during the period of revocation the person apply for an ignition interlock permit pursuant to Neb. Rev. Stat. § 60-6,211.05 (Cum. Supp. 2016).

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[12] See Neb. Rev. Stat. § 83-1,127.02(4) (Reissue 2014).

[13] See *State v. Donner*, 13 Neb. App. 85, 690 N.W.2d 181 (2004).

[14] *Id.*

[15] *Id.*

Similarly, under § 60-6,197.03(6), if an offender has two prior convictions, a court shall order a 15-year license revocation period as part of its judgment and issue an order under Neb. Rev. Stat. § 60-6,197.01 (Cum. Supp. 2016). Section 60-6,197.01(1)(b) gives a court discretion to allow an offender to apply for an ignition interlock permit after a 45-day period of no driving. Again, however, if the court orders probation or suspends the offender's sentence, § 60-6,197.03(6) requires the 15-year license revocation period to be a condition of the probation or suspended sentence and authorizes the court to permit the offender to apply for an ignition interlock permit after a 45-day period of no driving.

The language of § 60-6,198 requires the court to order a license revocation. The statute further makes no reference to a sentence of imprisonment or a sentence of probation. As a result, it is clear that the Legislature intended that the license revocation period be a mandatory part of the judgment of conviction and not a condition of probation.

Additionally, in *State v. Bainbridge*,[16] we held that Neb. Rev. Stat. § 39-669.19 (Cum. Supp. 1992), since transferred to Neb. Rev. Stat. § 60-6,209 (Cum. Supp. 2016), which allowed a person to seek a reduction of a 15-year license revocation period, violated the separation of powers clause of the Nebraska Constitution. We concluded that the 15-year revocation under Nebraska's driving under the influence statute was part of the overall punishment of the defendant as opposed to a remedial condition.[17] We further reasoned, in significant part, that the driving under the influence statutes required the revocation period to be a part of the court's judgment of conviction.[18] Relying on our previous decision in *State v. Philipps*,[19] we held that the precursor to § 60-6,209 invaded the Board of

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[16] *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996).

[17] *Id.*

[18] *Id.*

[19] *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994).

Pardons' power to commute sentences, a power that belonged to the executive branch under Neb. Const. art. IV, § 13, and therefore violated the separation of powers clause.[20]

In 1998, 2 years after we decided *Bainbridge*, the Legislature amended § 60-6,209 to require offenders to apply to the DMV for a recommendation that the Board of Pardons issue a reprieve from a 15-year license revocation.[21] But the Legislature did not authorize such an application for an offender whose license was revoked under § 60-6,198.

In 2011, the Legislature amended Neb. Rev. Stat. § 60-4,118.06 (Supp. 2011). Under specific circumstances, § 60-4,118.06 authorizes the director of the DMV to issue an ignition interlock permit allowing the operation of a motor vehicle equipped with an ignition interlock device. The amendment added subsection (3)(a), which precludes the DMV from issuing an ignition interlock permit to any person except in cases of a violation of one of the specified statutes, which do not include § 60-6,198.[22]

[5,6] Our case law clearly establishes that when a motor vehicle operator's license revocation must be part of a court's judgment of conviction in a criminal case, as distinguished from an authorized term of probation, it is a distinct part of the offender's punishment for the crime. Thus, a district court cannot later reduce the revocation period pursuant to an offender's application to amend the terms of his or her probation. Because the license revocation requirement under § 60-6,198 is not a term of probation and the statute does not authorize a court to impose it as such, the Nebraska Constitution prohibits a court from later commuting the original sentence.

[7,8] We recognize that the court's statement from the bench was inconsistent with its written order of probation. But to vest an appellate court with jurisdiction, Neb. Rev.

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[20] See Neb. Const. art. II, § 1.

[21] See 1998 Neb. Laws, L.B. 309, § 18.

[22] See 2011 Neb. Laws, L.B. 667, § 29.

Stat. § 25-1912 (Reissue 2016) requires a criminal defendant to perfect an appeal within 30 days of the judgment.[23] In a criminal case, the judgment is the sentence.[24] Irish did not appeal. We therefore agree with the district court that it lacked jurisdiction over Irish's request that it reduce his license revocation period.

CONCLUSION

We conclude that the district court lacked jurisdiction to consider Irish's untimely challenge to its sentencing order through a motion to modify or clarify the probation order. Accordingly, we dismiss Irish's appeal.

Appeal dismissed.

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[23] See, e.g., *State v. Meints*, 291 Neb. 869, 869 N.W.2d 343 (2015); *State v. Ruffin*, 280 Neb. 611, 789 N.W.2d 19 (2010).

[24] *Dugan v. State*, 297 Neb. 444, 900 N.W.2d 528 (2017).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Jay D. Amaya, appellant.

902 N.W.2d 675

Filed October 20, 2017. No. S-16-959.

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. The lower court's findings of fact will be upheld unless such findings are clearly erroneous.
2. **Judgments: Appeal and Error.** An appellate court reviews a denial of a motion to alter or amend the judgment for an abuse of discretion.
3. **Postconviction.** A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.
4. **Postconviction: Limitations of Actions.** The 1-year statute of limitations in Neb. Rev. Stat. § 29-3001(4) (Reissue 2016) applies to all verified motions for postconviction relief, including successive motions.
5. ____: ____. If, as part of its preliminary review, the trial court finds the postconviction motion affirmatively shows—either on its face or in combination with the files and records before the court—that it is time barred under Neb. Rev. Stat. § 29-3001(4) (Reissue 2016), the court is permitted, but not obliged, to sua sponte consider and rule upon the timeliness of the motion.
6. **Constitutional Law: Statutes: Sentences.** A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.
7. ____: ____: ____. There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was

innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.

8. **Postconviction: Constitutional Law: Limitations of Actions: Sentences.** The statutory time limits in Neb. Rev. Stat § 29-3001(4) (Reissue 2016) do not result in ex post facto punishment.
9. **Postconviction: Limitations of Actions: Proof.** To satisfy the tolling provision of Neb. Rev. Stat. § 29-3001(4)(c) (Reissue 2016), a prisoner must show there was (1) an impediment created by state action, (2) which amounted to a violation of the federal or state Constitution or a state law, and (3) as a result, the prisoner was prevented from filing a verified motion. If all these factors are satisfied, the 1-year limitation period will begin to run on the date the impediment was removed.
10. **Postconviction: Rules of the Supreme Court.** Postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases, and Nebraska's postconviction statutes do not contemplate the opportunity to amend a postconviction motion after the court has determined it does not necessitate an evidentiary hearing.
11. **Judgments: Pleadings: Time.** Under Neb. Rev. Stat. § 25-1329 (Reissue 2016), a motion to alter or amend a judgment shall be filed no later than 10 days after the entry of the judgment.

Appeal from the District Court for Lincoln County: Donald E. Rowlands, Judge. Affirmed.

Jay D. Amaya, pro se.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Jay D. Amaya filed a successive motion for postconviction relief. The district court denied the motion without conducting an evidentiary hearing, and Amaya filed this appeal. We affirm.

I. FACTS

In 1999, Amaya pled no contest to one count of first degree murder, one count of use of a knife in the commission of a felony, and one count of sexual assault.[1] The charges arose out of the assault and murder of Sheri Fhuere.[2] No direct appeal was filed.

In 2006, Amaya filed a motion for postconviction relief, alleging various instances of ineffective assistance of counsel. After conducting an evidentiary hearing, the district court denied relief, and we affirmed.[3]

On September 2, 2016, Amaya filed what he captioned a "Successive Verified Motion for Postconviction Relief." Amaya's pro se motion acknowledged the 1-year statute of limitations for the filing of postconviction actions imposed by Neb. Rev. Stat. § 29-3001(4) (Reissue 2016), but alleged his successive motion was not time barred for several reasons that we discuss in more detail later. The successive motion alleged trial counsel was ineffective because (1) he did not make Amaya aware of documents and evidence relating to his defense and (2) he incorrectly told Amaya that he could get the death penalty if convicted. The successive motion also alleged that counsel appointed to represent Amaya in his original postconviction action was ineffective for not raising these issues. Amaya also attempted to include, in his postconviction motion, a motion for new trial pursuant to Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 2016).

On September 7, 2016, the district court denied Amaya's successive postconviction motion without conducting an evidentiary hearing and without requesting a response from the State. The court concluded the motion (1) was time barred under § 29-3001(4), (2) impermissibly sought to raise grounds for relief that either had been litigated in Amaya's

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

[2] *Id.*

[3] *Id.*

first postconviction motion[4] or were available at the time of his first motion,[5] and (3) was "completely frivolous." The district court did not expressly address the motion for new trial, but implicitly overruled it by dismissing the entire successive motion, and all accompanying motions, with prejudice.

On September 9, 2016, before he had received the court's order denying his successive motion, Amaya filed a motion for leave to amend his successive motion. He attached an amended successive motion for postconviction relief to this motion. On September 14, the district court denied Amaya's motion to amend, reasoning it had already ruled on and dismissed his successive motion.[6]

On September 26, 2016, Amaya filed a motion to alter or amend the judgment entered September 7. The district court denied the motion to alter or amend, finding it was not filed within 10 days of the September 7 order and thus was untimely under Neb. Rev. Stat. § 25-1329 (Reissue 2016). Amaya subsequently filed this appeal.

II. ASSIGNMENTS OF ERROR

Amaya assigns, reordered and restated, that the district court erred in (1) denying his successive motion for postconviction relief without notice and hearing, (2) denying his motion to alter or amend the judgment and denying his motion to amend the successive postconviction motion, and (3) denying his motion for appointment of postconviction counsel.

III. STANDARD OF REVIEW

[1] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant

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[4] See *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989).

[5] See *State v. Williams*, 295 Neb. 575, 889 N.W.2d 99 (2017).

[6] See *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016) (postconviction statutes do not contemplate opportunity to amend postconviction motion after court determines motion is insufficient to necessitate an evidentiary hearing).

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.[7] The lower court's findings of fact will be upheld unless such findings are clearly erroneous.[8]

[2] An appellate court reviews a denial of a motion to alter or amend the judgment for an abuse of discretion.[9]

IV. ANALYSIS

1. Successive Motion Was Properly Dismissed

[3] This is Amaya's second motion for postconviction relief. A defendant is entitled to bring a second proceeding for postconviction relief only if the grounds relied upon did not exist at the time the first motion was filed.[10] But here, it is not necessary to determine whether any of the grounds alleged in Amaya's successive motion existed at the time of his earlier postconviction motion, because we agree with the district court that his successive postconviction motion is time barred under § 29-3001(4), which 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:
>
> (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;
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> (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;

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[7] *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015); *State v. Cook*, 290 Neb. 381, 860 N.W.2d 408 (2015).

[8] *State v. Poindexter*, 277 Neb. 936, 766 N.W.2d 391 (2009); *State v. Watkins*, 277 Neb. 428, 762 N.W.2d 589 (2009).

[9] *Knapp v. Ruser*, 297 Neb. 639, 901 N.W.2d 31 (2017).

[10] *State v. Hessler*, 288 Neb. 670, 850 N.W.2d 777 (2014).

(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.

[4] The 1-year statute of limitations in § 29-3001(4) applies to all verified motions for postconviction relief, including successive motions.[11]

(a) Court May Consider Timeliness Sua Sponte

In the instant appeal, the district court denied the successive postconviction motion as time barred without requiring notice to be served on the county attorney[12] and without requiring the State to file a written response.[13] As such, the State did not have an opportunity to raise the affirmative defense that the successive postconviction motion was time barred.

In *State v. Crawford*,[14] we held that the 1-year limitation period in § 29-3001(4) is not a jurisdictional requirement, but instead is in the nature of a statute of limitations. We held that because the State did not raise the statute of limitations as an affirmative defense, the issue was waived and could not be raised for the first time on appeal. But in *Crawford*, we noted:

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[11] See *State v. Goynes*, 293 Neb. 288, 876 N.W.2d 912 (2016).

[12] See § 29-3001(2).

[13] See, generally, *Robertson, supra* note 6 (noting district court may ask State to respond to postconviction motion). See, also, *State v. McLeod*, 274 Neb. 566, 741 N.W.2d 664 (2007); *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[14] *State v. Crawford*, 291 Neb. 362, 865 N.W.2d 360 (2015).

"The court did not raise the issue sua sponte, and we therefore need not determine whether a court may raise the issue sua sponte when the State fails to do so."[15]

Here, we are squarely presented with the question whether a court can raise the statute of limitations issue sua sponte as part of its preliminary review of the postconviction motion. We conclude it can.

Section 29-3001(2) expressly provides that a district court in Nebraska must review a postconviction action when it is filed and that "[u]nless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney . . . ." The plain language of § 29-3001 both authorizes and requires a district court to conduct a preliminary review of a postconviction motion.[16]

The U.S. Supreme Court considered a similar requirement in *Day v. McDonough*[17] and concluded it permitted federal district courts to consider sua sponte the timeliness of habeas petitions. In *Day*, a prisoner filed a petition for a writ of habeas corpus that was governed by a 1-year statute of limitation.[18] The State apparently miscalculated the applicable tolling period and conceded in its answer that the petition was timely filed. When the federal court reviewed the calculations, it found the State had erred; the court ultimately dismissed the habeas petition as untimely. The prisoner appealed, arguing the court had no authority to dismiss based on the limitation period after the State had conceded timeliness in its answer. The Supreme Court ultimately concluded that federal district courts are permitted, but not obliged, to sua sponte consider the timeliness of a state prisoner's habeas petition. *Day* noted

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[15] *Id*. at 372, 865 N.W.2d at 368.

[16] See *Robertson, supra* note 6.

[17] *Day v. McDonough*, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006).

[18] See 28 U.S.C. § 2244(d) (2012).

in part that the applicable habeas rules required a district court to "'promptly examine'" habeas petitions and dismiss them "'[i]f it plainly appears . . . that the petitioner is not entitled to relief.'"[19]

[5] We find the reasoning of *Day* to be instructive, and we now hold that if, as part of its preliminary review, the trial court finds the postconviction motion affirmatively shows—either on its face or in combination with the files and records before the court—that it is time barred under § 29-3001(4), the court is permitted, but not obliged, to sua sponte consider and rule upon the timeliness of the motion.[20]

(b) Successive Motion Was Time Barred

Amaya concedes his successive motion was filed more than 1 year after the date his judgment of conviction became final under § 29-3001(4)(a). And he does not claim that subsections (b), (d), or (e) of § 29-3001(4) apply to make his successive motion timely. Instead, Amaya claims his successive motion should be considered timely because (1) the time limits under § 29-3001(4) cannot be applied to him and (2) an "impediment created by state action" prevented him from filing his successive motion sooner. Neither claim has merit.

(i) No Ex Post Facto Punishment

Amaya alleged that because his crime occurred before the 1-year limitation period was enacted by the Legislature in 2011,[21] applying the limitation period to him results in ex post facto punishment. We disagree.

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[19] *Day, supra* note 17, 547 U.S. at 207. See Rule 4, Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. following § 2254 (2012).

[20] See *Day, supra* note 17.

[21] See 2011 Neb. Laws, L.B. 137, § 1.

[6,7] A law which purports to apply to events that occurred before the law's enactment, and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed, is an ex post facto law and will not be endorsed by the courts.[22] There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.[23]

[8] The addition of a statutory time limitation on a defendant's postconviction remedy does not fall within any of the four categories of ex post facto laws. The statutory time limits in § 29-3001(4) do not result in ex post facto punishment, and Amaya's claim to the contrary is without merit.

(ii) No Impediment Under § 29-3001(4)(c)

Amaya alleges there was an "impediment created by state action" under § 29-3001(4)(c) which, he claims, continues to toll the 1-year time limit. Specifically, he alleges that his first postconviction counsel was ineffective for failing to adequately raise the claims of ineffective assistance of trial counsel that he now wishes to raise in his successive motion, and he contends this "impediment" prevented him from filing his successive motion sooner. We conclude Amaya's tolling argument fails as a matter of law.

[9] To satisfy the tolling provision of § 29-3001(4)(c), a prisoner must show there was (1) an impediment created by state action, (2) which amounted to a violation of the federal

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[22] *State v. Harris*, 284 Neb. 214, 817 N.W.2d 258 (2012); *State v. Vela*, 279 Neb. 94, 777 N.W.2d 266 (2010).

[23] *State v. Kibbee*, 284 Neb. 72, 815 N.W.2d 872 (2012).

or state Constitution or a state law, and (3) as a result, the prisoner was prevented from filing a verified motion. If all these factors are satisfied, the 1-year limitation period will begin to run on the date the impediment was removed. Amaya has not satisfied any of these factors.

First, he has not shown how the alleged ineffective assistance about which he complains was "created by state action." Moreover, even if he could show state action, the alleged "impediment" would not rise to a constitutional violation as required by § 29-3001(4)(c), because we have consistently held there is no constitutional right to effective assistance of counsel in a postconviction proceeding.[24] And finally, Amaya has alleged no facts showing how the actions of his prior postconviction counsel prevented him from filing this successive postconviction motion sooner. Notably, the record shows Amaya's first postconviction action was concluded in 2008, and he did not file this successive verified motion until 2016.

Our de novo review of the record and files affirmatively shows that Amaya's successive motion is time barred under § 29-3001(4) and was properly dismissed by the district court on that basis. For the same reason, we find no error in the district court's denial of Amaya's motion for appointment of postconviction counsel.[25] His first and third assignments of error have no merit.

2. Amaya's Other Assignments of Error Are Without Merit

(a) No Error in Overruling Motion to Amend

After the court considered and dismissed Amaya's successive postconviction motion with prejudice, Amaya sought leave

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[24] *Hessler, supra* note 10. See, also, *State v. Deckard*, 272 Neb. 410, 722 N.W.2d 55 (2006); *State v. Bao*, 269 Neb. 127, 690 N.W.2d 618 (2005).

[25] See *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015).

to amend the motion. The district court overruled the request to amend, reasoning the postconviction proceeding already had been dismissed. Amaya argues that despite the timing, he should have been permitted to amend his postconviction motion pursuant to Neb. Ct. R. Pldg. § 6-1115(a) and *State v. Mata*.[26] We addressed and rejected a similar argument in *State v. Robertson*.[27]

[10] In *Robertson,* we clarified that postconviction proceedings are not governed by the Nebraska Court Rules of Pleading in Civil Cases, and we held that Nebraska's postconviction statutes do not contemplate the opportunity to amend a postconviction motion after the court has determined it does not necessitate an evidentiary hearing.[28] Because Amaya did not seek leave to amend until after his successive postconviction action had been dismissed, we find no abuse of discretion in not allowing the amendment.

(b) No Error in Overruling Motion to Alter or Amend Judgment

The court overruled Amaya's motion to alter or amend the judgment of dismissal, finding it was not filed within 10 days of the order dismissing the successive motion and therefore was not timely.

[11] Under § 25-1329, "[a] motion to alter or amend a judgment shall be filed no later than ten days after the entry of the judgment." The record shows Amaya's motion to alter or amend the judgment was filed 19 days after judgment was entered, and it sought to vacate the judgment of dismissal in order to amend a successive motion that was clearly time barred. Under these circumstances, we can find no abuse of

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[26] *State v. Mata*, 280 Neb. 849, 790 N.W.2d 716 (2010), *disapproved, Robertson, supra* note 6.

[27] *Robertson, supra* note 6.

[28] See *id*.

discretion in the court's decision to overrule the motion to alter or amend the judgment of dismissal.

V. CONCLUSION

For the foregoing reasons, we affirm the decision of the district court dismissing Amaya's successive motion for post-conviction relief.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Anthony P. Dyer, appellant.

902 N.W.2d 687

Filed October 27, 2017. No. S-16-742.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
3. **Sentences: Appeal and Error.** A determination of whether there are substantial and compelling reasons under Neb. Rev. Stat. § 29-2204.02(2)(c) (Supp. 2015) why a defendant cannot effectively and safely be supervised in the community is within the trial court's discretion, and a decision to withhold probation on such basis will not be reversed on appeal absent an abuse of discretion.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann and Bishop, Judges, on appeal thereto from the District Court for Lancaster County, John A. Colborn, Judge. Judgment of Court of Appeals affirmed.

Mark E. Rappl for appellant.

Douglas J. Peterson, Attorney General, Erin E. Tangeman, and, on brief, George R. Love for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

NATURE OF CASE

Anthony P. Dyer pled no contest to a charge of enticement by electronic communication device in the district court for Lancaster County. The court sentenced Dyer to 2 years' imprisonment and 12 months' postrelease supervision. Dyer appealed his sentence to the Nebraska Court of Appeals and claimed that the district court had imposed an excessive sentence. Dyer argued that because the charge to which he pled was a Class IV felony, Neb. Rev. Stat. § 29-2204.02 (Supp. 2015) required the court to impose a sentence of probation unless there were substantial and compelling reasons why he could not effectively and safely be supervised in the community. Dyer asserted that the district court in this case failed to articulate such substantial and compelling reasons. The Court of Appeals rejected Dyer's arguments and affirmed the sentence imposed by the district court. *State v. Dyer*, 24 Neb. App. 514, 891 N.W.2d 705 (2017).

We granted Dyer's petition for further review. Although we clarify the standards with respect to sentencing pursuant to § 29-2204.02, we agree with the Court of Appeals' ultimate determination that the district court did not abuse its discretion, and we therefore affirm the Court of Appeals' disposition of this appeal.

STATEMENT OF FACTS

Dyer pled no contest to a charge of enticement by electronic communication device pursuant to a plea agreement in which the State agreed not to pursue any additional charges arising out of the underlying investigation. The factual basis for the plea was, generally, that on November 17 and 18, 2015, Dyer, who was 30 years old at the time, communicated online and through text messages with an investigator Dyer believed to be a 13-year-old girl. The communications included discussion of sexual activity, and Dyer sent a picture of his genitalia to the investigator. Dyer arranged a meeting at a specific location,

and he was arrested when he arrived at the arranged meeting place. The court accepted the plea.

Thereafter, the district court sentenced Dyer to 2 years' imprisonment and 12 months' postrelease supervision. In its sentencing order, the court stated that it found, "pursuant to NEB. REV. STAT. § 29-2260 [(Supp. 2015)]," that

> substantial and compelling reasons, as checked on the attached sheet, exist why the defendant cannot effectively and safely be supervised in the community on probation and that imprisonment of the defendant is necessary for the protection of the public because the risk is substantial that, during any period of probation, the defendant would engage in additional criminal conduct and because a lesser sentence would depreciate the seriousness of the defendant's crime and promote disrespect for the law.

The sheet that was attached to, and referenced in, the order stated: "Pursuant to Neb. Rev. Stat. § 29-2260, the court finds the following substantial and compelling reasons (those checked) why the defendant cannot effectively and safely be supervised in the community on probation[.]" Thereunder were listed 21 generically phrased reasons; the court had placed an "X" next to the following 5 of the 21 reasons: (1) "A lesser sentence would depreciate the seriousness of the crime"; (2) "[a] lesser sentence would promote disrespect for the law"; (3) "[i]ncarceration is necessary to protect the safety and security of the public, including the victim(s) in this case"; (4) "[t]he crime caused or threatened serious injury or harm"; and (5) "[t]he circumstances indicate that the defendant understood the consequences of his or her actions and the potential harm to others."

At the sentencing hearing, which was held the same day the sentencing order was entered, the court stated that in determining the appropriate sentence, it had considered the comments of Dyer and his attorney and the information on Dyer's behalf that was included in the presentence report. The

court stated that it could not ignore "the serious nature of this offense and all of the surrounding facts and circumstances," and it recounted various factors it considered. These included the benefits to Dyer of the plea agreement, the results of testing and evaluation of Dyer, and specific facts and circumstances surrounding the offense Dyer committed. The court then stated that it found substantial and compelling reasons why Dyer could not be effectively and safely supervised in the community on probation. The court's comments at the sentencing hearing regarding substantial and compelling reasons were virtually identical to the comments set forth above that were included in the sentencing order.

Dyer appealed to the Court of Appeals, and his sole assignment of error was that the district court imposed an excessive sentence. He argued that the court failed to articulate substantial and compelling reasons, beyond the nature of the crime itself, why probation would not be appropriate. The Court of Appeals rejected Dyer's arguments and affirmed. *State v. Dyer*, 24 Neb. App. 514, 891 N.W.2d 705 (2017).

The Court of Appeals found no abuse of discretion in the sentence imposed. The Court of Appeals noted that under Neb. Rev. Stat. § 28-833 (Reissue 2016), enticement by electronic communication device is a Class IV felony, and that the maximum sentence for a Class IV felony is 2 years' imprisonment and 12 months' postrelease supervision. The sentence imposed was within the statutory limits. The Court of Appeals also noted that § 29-2204.02, which we quote later in the opinion, provides that if a defendant is convicted of a Class IV felony, the court shall impose a sentence of probation unless there are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community. The Court of Appeals further noted that the determination of whether "substantial and compelling reasons" are present under § 29-2204.02 shall be made by reference to, but not limited to, the criteria set forth in Neb. Rev. Stat. § 29-2260(2) and (3) (Supp. 2015), which list grounds

which shall be accorded weight either in favor of or opposed to probation.

With these statutes in mind, the Court of Appeals rejected Dyer's argument to the effect that the district court abused its discretion when it withheld probation based solely on the nature of the crime. Dyer had argued that when the Legislature enacted § 29-2204.02 and related statutes, it intended a presumption of probation for Class IV felonies, including enticement by electronic communication device.

The Court of Appeals found Dyer's argument without merit, because (1) § 29-2260 and, consequently, § 29-2204.02 require regard for the nature of the offense when considering probation versus imprisonment and (2) the district court in this case did not rely solely on the nature of the offense. The Court of Appeals determined that the record showed that the district court considered not only the nature of the offense generally but also the nature of the specific violation in this case, as well as factors such as the substantial risk that Dyer would engage in criminal conduct while on probation, the risk of a lesser sentence depreciating the seriousness of the offense, and the risk of promoting disrespect for the law.

As specific facts in the record that supported its determinations, the Court of Appeals noted that Dyer communicated with a person he believed to be 13 years old, he set up a meeting with that person, and he followed through by showing up at the arranged meeting site with condoms. The Court of Appeals also noted that the district court relied on an evaluation which determined that Dyer's risk for reoffending was in the "moderate-high risk category." The Court of Appeals concluded that although Dyer's sentence was at the maximum, it was within the statutory range, and that the district court did not abuse its discretion when it imposed a sentence of imprisonment rather than probation.

We granted Dyer's petition for further review.

ASSIGNMENT OF ERROR

Dyer claims that the Court of Appeals erred when it affirmed the sentence imposed by the district court, and in particular the district court's decision to impose a sentence of imprisonment rather than probation.

STANDARDS OF REVIEW

[1,2] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id.*

[3] A determination of whether there are substantial and compelling reasons under § 29-2204.02(2)(c) why a defendant cannot effectively and safely be supervised in the community is within the trial court's discretion, and a decision to withhold probation on such basis will not be reversed on appeal absent an abuse of discretion. See *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017).

ANALYSIS

The offense for which Dyer was convicted was a Class IV felony which occurred on November 17 and 18, 2015. Because the relevant portions of § 29-2204.02 became effective August 30, 2015, the sentencing in this case was subject to the provisions of § 29-2204.02 relating to Class IV felonies. Recently, in *State v. Baxter, supra*, we set forth standards to be followed by trial courts when sentencing a defendant for a Class IV felony pursuant to § 29-2204.02 and by appellate courts when reviewing such sentencing. Because the Court of Appeals did not reference *Baxter* in its published opinion in this case, we granted further review to determine whether the Court of Appeals' analysis in this case comports with the principles we set forth in *Baxter*. Although we find it necessary to clarify

certain aspects of the Court of Appeals' analysis, we agree with the Court of Appeals' ultimate conclusion that the district court did not abuse its discretion when it sentenced Dyer to 2 years' imprisonment and 12 months' postrelease supervision.

Dyer's argument regarding the sentence imposed in this case focuses on the district court's decision to impose a sentence of imprisonment rather than probation. Regarding sentencing for a Class IV felony, § 29-2204.02 provides in relevant part:

> (2) If the criminal offense is a Class IV felony, the court shall impose a sentence of probation unless:
>
> (a) The defendant is concurrently or consecutively sentenced to imprisonment for any felony other than another Class IV felony;
>
> (b) The defendant has been deemed a habitual criminal pursuant to section 29-2221; or
>
> (c) There are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community, including, but not limited to, the criteria in subsections (2) and (3) of section 29-2260. Unless other reasons are found to be present, that the offender has not previously succeeded on probation is not, standing alone, a substantial and compelling reason.
>
> (3) If a sentence of probation is not imposed, the court shall state its reasoning on the record, advise the defendant of his or her right to appeal the sentence, and impose a sentence as provided in subsection (1) of this section.

Subsections (2)(a) and (b) of § 29-2204.02 were not relevant in this case, and therefore the district court's decision to withhold a sentence of probation and to sentence Dyer to imprisonment was based on its finding of substantial and compelling reasons to do so under subsection (2)(c).

Dyer argues that the Court of Appeals misconstrued the intent of § 29-2204.02 and related statutes which, he argues, require a presumption of probation. He also argues that § 29-2204.02 and related statutes put the focus on

the characteristics of the defendant and why that particular defendant is not a proper candidate for probation. He contends that certain factors upon which the district court focused, such as "depreciate the seriousness of the crime" and "promote disrespect for the law," incorrectly focused on the nature of the crime rather than the specific defendant. The Court of Appeals found no merit to Dyer's arguments.

In *State v. Baxter*, 295 Neb. 496, 504, 888 N.W.2d 726, 733 (2017), although we did not use a phrase stating that "§ 29-2204.02(2) creates a presumption of probation" as the proper sentence for a Class IV felony, we did note that "§ 29-2204.02(2) effectively adds a general limitation on a court's discretion in choosing between probation and incarceration with respect to a Class IV felony, because it requires a court to impose a sentence of probation for a Class IV felony unless certain specified exceptions are present." While in *Baxter* we indicated that § 29-2204.02 requires a sentence of probation in the absence of one or more of the specified exceptions, we also stated that the trial court has discretion to determine the existence of the exception for "substantial and compelling reasons" set forth in § 29-2204.02(2)(c). But to the extent that the Court of Appeals in this case did not recognize that § 29-2204.02 "tips the balance . . . toward probation" in Class IV felonies, see *Baxter*, 295 Neb. at 506, 888 N.W.2d at 734, we disapprove of its reasoning.

Dyer's argument that § 29-2204.02(2)(c) puts the focus on the characteristics of the defendant has some support in the text of the statute. Section 29-2204.02(2)(c) specifies that the court must find "substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community." Such phrase focuses on the characteristics of the defendant and whether such characteristics indicate that the particular defendant cannot effectively and safely be supervised in the community. But the statute at § 29-2204.02(2)(c) continues by stating that such substantial and compelling reasons include, but are not limited to, "the

criteria in subsections (2) and (3) of section 29-2260," and § 29-2260 includes traditional sentencing criteria, including consideration of the nature of the crime. Therefore, the appropriate considerations under § 29-2204.02(2)(c), when deciding whether the defendant can effectively and safely be supervised in the community, include the traditional reasons that a court is to consider when deciding whether to impose a sentence of imprisonment or a sentence of probation.

As relevant to Dyer's argument in the present case, one criterion set forth in § 29-2260(2) includes: "(c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law." Thus, contrary to Dyer's argument that such considerations are inappropriate because they focus on the nature of the crime rather than the specific defendant, the Legislature determined in § 29-2204.02(2)(c) that such criteria are and remain relevant to determining whether the defendant can effectively and safely be supervised in the community.

Dyer further argues that the Court of Appeals' decision is not consistent with *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017), because the district court did not state its reasoning on the record, but instead merely supplied a list of reasons without articulating how the record supported such reasons. In *Baxter*, we were differentiating between § 29-2204.02(2)(c), which requires "substantial and compelling reasons" in order not to grant probation, and § 29-2204.02(3), which requires that "the court shall state its reasoning on the record" as to why probation is denied. As explained in *Baxter*, the court's reasons could also be understood as its reasoning if sufficiently articulated by the court "on the record" when it pronounces sentence or by the court's sentencing order. Applying these standards to our review of the sentencing in this case, we note that in its sentencing order, the district court, having listed what it found to be substantial and compelling reasons why Dyer "cannot effectively and safely be supervised in the community on probation," found that "imprisonment of the defendant is

necessary for the protection of the public." The reasons set forth by the district court were all valid considerations under the language of § 29-2204.02(2)(c).

Although the sentencing order itself merely listed the reasons and did not provide the "reasoning" required by § 29-2204.02(3), the district court's comments at the sentencing hearing filled in the missing pieces of the court's reasoning. The court noted specific findings from the record which we recognize as supporting its determination that substantial and compelling reasons against probation existed under § 29-2204.02(2)(c). We note that at the time the district court sentenced Dyer, it did not have the benefit of our decision in *Baxter*, and therefore the district court was not as explicit in showing its reasoning as a court would be in light of *Baxter*. However, through its comments at the sentencing hearing when combined with the sentencing order, the court set forth the substantial and compelling reasons that it found to exist and it set forth information from the record that supported such reasons. On appeal, we can connect the court's observations as contained in the record to its finding of substantial and compelling reasons, and we see that the record as a whole supports the court's findings. We therefore conclude that the district court did not abuse its discretion when it determined that there were substantial and compelling reasons why Dyer could not effectively and safely be supervised in the community and when it therefore imposed a sentence of imprisonment rather than probation.

Finally, although Dyer's arguments in support of further review focus on the district court's decision to impose a term of imprisonment rather than probation, we also find no error in the Court of Appeals' determination that the district court did not abuse its discretion with regard to the length of the sentence it imposed.

CONCLUSION

Although we clarify certain standards relating to a sentencing decision under § 29-2204.02, we agree with the Court

of Appeals' ultimate determination that the district court did not abuse its discretion when it sentenced Dyer to imprisonment in this Class IV felony. We therefore affirm the Court of Appeals' disposition of this appeal.

Affirmed.

Miller-Lerman, J., concurring.

I agree with the conclusion that the district court did not abuse its discretion when it sentenced Anthony P. Dyer to 2 years' imprisonment and 12 months' postrelease supervision. I write separately to emphasize certain points regarding the requirements under Neb. Rev. Stat. § 29-2204.02 (Supp. 2015), with respect to a court's decision whether to impose a sentence of probation or a sentence of imprisonment when the defendant has been convicted of a Class IV felony. With certain exceptions, § 29-2204.02 generally requires a court to impose a sentence of probation for a Class IV felony. See *State v. Baxter*, 295 Neb. 496, 888 N.W.2d 726 (2017). These statutory requirements relative to sentencing for a Class IV felony differ significantly from the same decision when the defendant has been convicted of a felony of a different class.

In Neb. Rev. Stat. § 29-2260(2) (Supp. 2015), the Legislature provided that when a defendant is convicted of "a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required," the sentencing court generally has discretion to impose a sentence of probation rather than a sentence of imprisonment. The statute sets forth factors that, while not controlling the court's discretion, would support a sentence of probation. But § 29-2260(2) limits the court's discretion to impose a sentence of probation when the court has found that for certain reasons, "imprisonment of the offender is necessary for protection of the public."

When the Legislature enacted § 29-2204.02 as part of 2015 Neb. Laws, L.B. 605, it chose to set Class IV felonies apart from other types of crimes with regard to the decision whether to impose a sentence of imprisonment or a sentence of

probation. We stated in *Baxter*, 295 Neb. at 506, 888 N.W.2d at 734, that § 29-2204.02(2) "generally tips the balance in sentencing for a Class IV felony toward probation." It does so by requiring that when the offense is a Class IV felony, "the court shall impose a sentence of probation unless" one or more of the following is present: (1) The defendant is concurrently or consecutively sentenced to imprisonment for any felony other than another Class IV felony, (2) the defendant has been deemed a habitual criminal, or (3) there are substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community. § 29-2204.02(2). We further stated in *Baxter* that § 29-2204.02(3) "reinforces this balance [favoring probation] by obligating the court to state its reasoning for withholding probation on the record." 295 Neb. at 506, 888 N.W.2d at 734.

I turn to the sentencing in this case to illustrate the application of § 29-2204.02 in sentencing for a Class IV felony. Pursuant to § 29-2204.02(2), the court was required to sentence Dyer to probation unless it found one of the three circumstances noted above to be present. In this case, as in *Baxter*, the circumstances set forth in § 29-2204.02(2)(a) and (b) were clearly not present, and so the court needed to determine under § 29-2204.02(2)(c) whether there were "substantial and compelling reasons why the defendant cannot effectively and safely be supervised in the community." I note that although § 29-2204.02(2)(c) provides that such reasons include, but are not limited to, "the criteria in subsections (2) and (3) of section 29-2260," § 29-2204.02(2)(c) includes two requirements that expand this analysis when sentencing for a Class IV felony beyond what would be required under § 29-2260 when sentencing for any other class of felony or for a misdemeanor.

First, although the reasons listed in § 29-2260 are appropriate considerations under § 29-2204.02(2)(c) and, under § 29-2260, the court is required to find only that the reasons exist, with respect to a Class IV felony under § 29-2204.02(2)(c),

the court must further find that such reasons are "substantial and compelling." Second, while the focus of § 29-2260(2) is on determining whether "imprisonment of the offender is necessary for protection of the public," the focus of § 29-2204.02(2)(c) is on determining whether "the defendant cannot effectively and safely be supervised in the community." I respectfully suggest that, as Dyer urges, this requirement emphasizes the specific characteristics of the defendant rather than the general nature of the crime he or she has committed. In my view, the Legislature has taken into account the general nature of an offense when it classifies the offense, and in § 29-2204.02(2)(c), the Legislature expressed a policy that offenses it has classified as Class IV felonies are the ones for which probation is generally an appropriate punishment, absent specific exceptions relating to the particular defendant. In this respect, I recognize that the manner in which a particular defendant committed an offense, in contrast to the general nature of the offense, can be indicative of that defendant's individual characteristics and therefore relevant to the analysis under § 29-2204.02(2)(c).

In the present case, along with the majority and the Nebraska Court of Appeals, I would conclude that the district court did not abuse its discretion when it found under § 29-2204.02(2)(c) that there were substantial and compelling reasons why Dyer could not effectively and safely be supervised in the community. In this regard, as I read the record, the district court appropriately gave weight to its finding that "the risk is substantial that, during any period of probation, [Dyer] would engage in additional criminal conduct."

At the sentencing hearing, the district court noted facts which supported this finding. This included evidence that Dyer had not only committed the charged offense of enticing by electronic communications a person he thought to be a 13-year-old, he took the further steps of setting up a meeting and followed through by showing up at the arranged meeting place and time. The district court also noted that certain

testing showed Dyer to be in the moderate-to-high category for risk to reoffend. Although Dyer points to other materials indicating that he was at a lower risk, the district court did not abuse its discretion when it gave greater credence to the evidence of a higher risk. Taken together, the parts of the record noted by the district court supported the finding that there was a substantial risk that during a period of probation, Dyer might engage in conduct similar to that shown in this case. And, more to the point of an analysis under § 29-2204.02(2)(c), I believe that such substantial risk constitutes a substantial and compelling reason why Dyer in particular could not effectively and safely be supervised in the community. I believe this consideration in itself is sufficient to support the district court's decision to withhold probation and impose a term of imprisonment; accordingly, I do not think it necessary to examine each reason cited by the district court.

As a general matter, I believe that when a factor such as "a lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law" is cited to support a finding under § 29-2204.02(2)(c), the court should take care to show that such consideration is a substantial and compelling reason why the specific defendant could not effectively and safely be supervised in the community. I recognize that such factors, being considerations listed in § 29-2260(2) and (3), are ones that the Legislature has deemed to be appropriate considerations under § 29-2204.02(2)(c). However, as noted above, the determination with regard to a Class IV felony under § 29-2204.02(2)(c) is different from the determination with respect to any other class of offense under § 29-2260. Thus, the court's invocation of the considerations in § 29-2260(2) and (3) must be specific to the defendant and his or her specific offense and not a determination that the general offense is one that should carry a punishment of imprisonment. Such a generalized determination of the appropriate punishment for an offense is for the Legislature to make when it classifies a statutory offense, and by classifying an

offense as a Class IV felony, the Legislature has indicated in § 29-2204.02(2) its determination that such offense is one for which probation is generally an appropriate punishment, absent specific exceptions.

Finally, I want to note the importance of the "reasoning" requirement of § 29-2204.02(3) to the balance the Legislature created in the statute. As we stated in *State v. Baxter*, 295 Neb. 496, 506, 888 N.W.2d 726, 734 (2017), in § 29-2204.02(2), the Legislature "generally tips the balance in sentencing for a Class IV felony toward probation" and it "reinforces this balance by obligating the court [in § 29-2204.02(3)] to state its reasoning for withholding probation on the record." In this case and in *Baxter*, we have stressed that "reasoning" is more than merely a list of reasons. In this case, the district court attached to its sentencing order a sort of checklist of potential "substantial and compelling reasons" and checked those that it found to be present. A checklist is clearly helpful to a court by guiding its analysis of relevant considerations and by communicating and summarizing its findings, but in my view, courts should not fall into a habit of relying on such a checklist as a substitute for the "reasoning on the record" requirement of § 29-2204.02(3). Instead, reasoning under § 29-2204.02(3) requires analysis of why the record in a specific case supports the court's determination that substantial and compelling reasons exist why the specific defendant cannot effectively and safely be supervised in the community; such analysis is not fulfilled by a checklist of potential reasons on which certain reasons are checked off.

In this case and in *Baxter*, the requirements of § 29-2204.02 were still fairly new at the time of sentencing. In our consideration, we have afforded the sentencing courts some leeway in how explicitly they articulated the connection between the record and the required findings under § 29-2204.02(2)(c), and we have affirmed the sentence if the record as a whole supports proper reasoning, even if the court did not explicitly state its reasoning as required by § 29-2204.02(3). In the future, it

will be more conducive to appellate review if sentencing courts explicitly state their reasoning rather than relying on the appellate court to make the connection.

As we indicated in *Baxter*, the reasoning requirement of § 29-2204.02(3) has the purpose of explaining the court's reasoning to the defendant, and it helps to focus the court's analysis where the court is required to explicitly set forth the reasoning behind its findings which support its decision not to impose probation. Because § 29-2204.02 tips the balance toward probation, as we stated in *Baxter*, "if the court is having difficulty articulating its reasoning for imposing a sentence of imprisonment on the record," it may suggest that "the court should impose a sentence of probation." 295 Neb. at 506, 888 N.W.2d at 734.

After having expressed the foregoing cautions, I agree with the majority's conclusion that the district court did not abuse its discretion in this case, and I therefore concur that the decision of the Court of Appeals on further review should be affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Interest of Becka P. et al., children under 18 years of age. State of Nebraska, appellee, v. Robert P. and Veronica M., appellants.

902 N.W.2d 697

Filed October 27, 2017. Nos. S-16-1131 through S-16-1133.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.
2. **Appeal and Error.** On a question of law, an appellate court reaches a conclusion independently of the court below.

Appeals from the County Court for Garden County: Randin Roland, Judge. Affirmed.

Robert S. Harvoy for appellant Robert P.

On brief, Michael R. Snyder, of Snyder & Hilliard, P.C., L.L.O., for appellants.

Philip E. Pierce, Garden County Attorney, for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

After a dispositional hearing, the county court for Garden County, Nebraska, sitting as a juvenile court, declined to adopt a case plan and a court report recommended by the Department of Health and Human Services (DHHS). Among

other instructions, the court ordered DHHS to update the children's immunizations. The children's parents, Robert P. and Veronica M., appeal. We affirm.

FACTUAL BACKGROUND

Robert and Veronica are the parents of Becka P., Thomas P., and Robert P., Jr. Prior to 2015, multiple claims were made against Robert and Veronica, alleging physical neglect of the children. The court concluded that these allegations were unfounded. In one instance, Becka was removed from the home for a time, but was returned and noncourt services were provided. In another instance, services were offered but rejected.

In December 2015, the State filed juvenile petitions and affidavits in support of those petitions, alleging that Robert and Veronica had collectively been cited four times since 2013 for failure to use a child safety restraint. Evidence was presented that one of Robert and Veronica's children had been involved in several automobile accidents while riding unrestrained in the front seat while Robert was driving. One of the accidents involved a fire, and another accident involved a rollover, where it was determined that the child was sitting unrestrained on Robert's lap while he was driving. The children were adjudicated; that adjudication was affirmed in an unpublished memorandum opinion by the Nebraska Court of Appeals on October 16, 2016, in cases Nos. A-16-351 through A-16-353.

While the adjudication was on appeal, the juvenile court appointed an educational surrogate for the children. Robert and Veronica appealed. This court found that Robert and Veronica were appealing from final orders and affirmed the county court's appointment, concluding that (1) the appeals of the adjudication did not divest the juvenile court of jurisdiction to issue or rule on the various orders to show cause and (2) the orders appointing the educational surrogate were not premised on a finding of contempt; thus, Robert and Veronica's assertion that they should have been given the

ability to purge their contempt was misplaced. Robert and Veronica did not challenge the merits of the educational surrogate appointment.[1]

While the appeals from the surrogate appointment were pending, proceedings in the juvenile court continued. A dispositional hearing was held on November 10, 2016, on the DHHS court report. In that report, DHHS recommended the continuing permanency goal of family preservation, with custody of the children to be returned to the parents and the surrogate left in place to address educational concerns. The children's guardian ad litem testified that he did not agree with the DHHS recommendation that custody of the children be returned to Robert and Veronica.

Following that hearing, the juvenile court declined to adopt the DHHS recommendation. Instead, on November 10, 2016, the juvenile court ordered that "[c]are, custody, and control . . . remain with [DHHS]" for each child, and additionally ordered various other directives, including specifically ordering that "[s]ervices to be provided shall include, but not be limited to: DHHS shall confirm the child's immunizations are up to date, and if not, shall have them made current w/DHHS paying for the same if the parents and insurance are not able to pay for the same."

It is from these orders that Robert and Veronica appeal.

ASSIGNMENT OF ERROR

Robert and Veronica assign that the juvenile court was without authority to order DHHS to immunize the children.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings.[2]

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[1] *In re Interest of Becka P. et al.*, 296 Neb. 365, 894 N.W.2d 247 (2017).

[2] *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017).

[2] On a question of law, an appellate court reaches a conclusion independently of the court below.[3]

ANALYSIS

On appeal, Robert and Veronica argue that the juvenile court erred in ordering DHHS to have the children immunized, because it lacked the authority to do so. Robert and Veronica do not challenge the orders on constitutional or religious grounds, but instead base their argument on Neb. Rev. Stat. § 43-285(1) (Reissue 2016), which provides in relevant part:

> When the court awards a juvenile to the care of the Department of Health and Human Services, an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the legal custody and care of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.

Robert and Veronica contend that the court lacks the power to set its own conditions and, instead, can only "assent" to decisions made by DHHS. Because DHHS did not recommend that the children be immunized, and there is no evidence to show that DHHS is concerned about the children's health or that the children will be attending public school, Robert and Veronica argue that the court acted outside its authority.

Robert and Veronica do not cite to Neb. Rev. Stat. § 43-288 (Reissue 2016), which provides:

> If the court's order of disposition permits the juvenile to remain in his or her own home as provided by section 43-284 or 43-286, the court may, as a condition or conditions to the juvenile's continuing to remain in his or her own home, or in cases under such sections when the

[3] *Id.*

juvenile is placed or detained outside his or her home, as a condition of the court allowing the juvenile to return home, require the parent, guardian, or other custodian to:

(1) Eliminate the specified conditions constituting or contributing to the problems which led to juvenile court action;

(2) Provide adequate food, shelter, clothing, and medical care and for other needs of the juvenile;

(3) Give adequate supervision to the juvenile in the home;

(4) Take proper steps to insure the juvenile's regular school attendance;

(5) Cease and desist from specified conduct and practices which are injurious to the welfare of the juvenile; and

(6) Resume proper responsibility for the care and supervision of the juvenile.

The terms and conditions imposed in any particular case shall relate to the acts or omissions of the juvenile, the parent, or other person responsible for the care of the juvenile which constituted or contributed to the problems which led to the juvenile court action in such case.

At the time the juvenile court ordered that the children's immunizations be "made current," the children were placed in Robert and Veronica's home. As such, the State argues that under § 43-288(2), the juvenile court was authorized to require DHHS to immunize the children.

We agree. To hold otherwise would limit the powers of a juvenile court to order DHHS and parents to undertake actions for the betterment of juveniles and their families within the juvenile court system. As such, we find no error in the juvenile court's orders.

CONCLUSION

We affirm the judgments below.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Tyler A. Lintz, appellant.

902 N.W.2d 683

Filed October 27, 2017. No. S-16-1158.

1. **Judgments: Speedy Trial: Appeal and Error.** As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken.
4. **Final Orders: Appeal and Error.** Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered.
5. **Speedy Trial.** Addressing a claimed denial of statutory speedy trial rights in a motion for discharge involves a relatively simple mathematical computation of whether the 6-month speedy trial clock, as extended by statutorily excludable periods, has expired prior to the commencement of trial.
6. ____. When ruling on a motion for absolute discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 2016), the trial court shall make specific findings of each period of delay excludable under Neb. Rev. Stat. § 29-1207(4)(a) to (e) (Reissue 2016), in addition to the findings under § 29-1207(4)(f). Such findings shall include the date and nature of the proceedings, circumstances, or rulings which initiated and concluded each excludable period; the number of days composing

each excludable period; and the number of days remaining in which the defendant may be brought to trial after taking into consideration all excludable periods.

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 reversed, and cause remanded with directions.

Darin J. Knepper, Scotts Bluff County Deputy Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Joe Meyer for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

Tyler A. Lintz appeals the order of the district court for Scotts Bluff County that affirmed the county court's order denying his motion for absolute discharge. Lintz claims a violation of his statutory right to speedy trial. We reverse the district court's order and remand the cause to that court with directions to remand the matter to the county court with directions to enter an order that incorporates specific findings pursuant to our directive in *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009).

BACKGROUND

Lintz was arrested on suspicion of domestic assault on February 5, 2016. On February 8, the State charged Lintz by complaint with third degree domestic assault, a Class I misdemeanor. See Neb. Rev. Stat. § 28-323 (Reissue 2016). Lintz requested a jury trial.

The county court scheduled the jury trial for August 9, 2016, with jury selection to begin 2 weeks earlier on July

26. Lintz failed to appear for the scheduled jury selection, and the county court ordered a bench warrant. The State amended the complaint to add a misdemeanor charge of failure to appear.

Lintz turned himself in on July 28, 2016, and that same day waived his right to a jury trial. The county court scheduled a bench trial for September 22.

On August 11, 2016, Lintz filed a motion for absolute discharge, alleging his constitutional and statutory rights to a speedy trial had been violated. The county court held a hearing on August 16. In a subsequent written order, it considered "[w]hether [Lintz'] right to speedy trial was violated when the court set the case for trial beyond the six month requirement even though [Lintz] failed to appear for jury selection *before* the six month requirement had expired." (Emphasis in original.) The county court reasoned that jury selection is a condition precedent to a jury trial and found that by failing to appear for jury selection, Lintz caused a delay in his trial. The county court further stated:

> Once a defendant has caused a delay due to a failure to appear for court, the time between the defendant's absence and the next reasonably available trial date is excluded. *Neb.Rev.Stat.* [§] 29-1207(4)(d) [(Reissue 2016)]. The trial was rescheduled within 60 days. A trial date scheduled within six months of the defendant's reappearance is presumed to be the next reasonably available trial date.

The county court denied Lintz' motion and ordered the case to be tried on September 22, as previously scheduled.

Lintz appealed to the district court, asserting only his statutory right to a speedy trial. Based on reasoning similar to the county court's, the district court affirmed.

Lintz now appeals to this court.

ASSIGNMENT OF ERROR

Lintz assigns as error the denial of his motion for absolute discharge.

STANDARD OF REVIEW

[1] As a general rule, a trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014).

ANALYSIS

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it, irrespective of whether the issue is raised by the parties. *State v. McColery*, 297 Neb. 53, 898 N.W.2d 349 (2017). For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken. *Id.* Under Neb. Rev. Stat. § 25-1902 (Reissue 2016), an order is final for purposes of appeal if it affects a substantial right and (1) determines the action and prevents a judgment, (2) is made during a special proceeding, or (3) is made on summary application in an action after judgment is rendered. *State v. McColery, supra.* And we have determined that a ruling on a motion for absolute discharge based upon an accused criminal's nonfrivolous claim that his or her speedy trial rights were violated is a ruling affecting a substantial right made during a special proceeding and is therefore final and appealable. See *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997). Here, the county court's order denying Lintz' motion for absolute discharge was final and appealable. However, a final, appealable order is not the only prerequisite for meaningful appellate review.

[5,6] Addressing a claimed denial of statutory speedy trial rights in a motion for discharge involves a relatively simple mathematical computation of whether the 6-month speedy trial clock, as extended by statutorily excludable periods, has expired prior to the commencement of trial. See *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009). But in

ruling on a motion to discharge, this court unequivocally requires specific findings regarding the statutorily excludable periods:

> Effective March 9, 2009, when ruling on a motion for absolute discharge pursuant to [Neb. Rev. Stat.] § 29-1208 [(Reissue 2016)], the trial court shall make specific findings of each period of delay excludable under § 29-1207(4)(a) to (e), in addition to the findings under § 29-1207(4)(f) . . . . Such findings *shall* include the date and nature of the proceedings, circumstances, or rulings which initiated and concluded each excludable period; the number of days composing each excludable period; and the number of days remaining in which the defendant may be brought to trial after taking into consideration all excludable periods.

(Emphasis supplied.) *State v. Williams*, 277 Neb. at 143-44, 761 N.W.2d at 524. Therefore, the county court, as part of its ruling on Lintz' motion for absolute discharge, was required to set forth the above calculation as part of its findings in applying Neb. Rev. Stat. § 29-1207(4)(d) (Reissue 2016), but it did not.

We require this calculation of any excludable days pursuant to § 29-1207(4)(d) to facilitate appellate review. See *State v. Williams, supra*. A trial court's determination as to whether charges should be dismissed on speedy trial grounds is a factual question which will be affirmed on appeal unless clearly erroneous. See *State v. Hettle*, 288 Neb. 288, 848 N.W.2d 582 (2014). But we cannot review whether the trial court's determination of the facts is erroneous unless such factual determination is complete. Certainly, we appreciate the county court's issuing a written order, but without a computation as required by *State v. Williams, supra*, we cannot conduct a proper review. Accordingly, the county court's order must be remanded with directions to add the required computation. See *Rutherford v. Rutherford*, 277 Neb. 301, 761 N.W.2d 922 (2009) (remanding for failure to include child support

worksheet which was required by our rules and which would have facilitated meaningful review). Then, the parties may file new appeals from the corrected order. And henceforth, if a trial court fails to include the computation as required by *State v. Williams, supra*, in its order on a motion for absolute discharge, the appeal will be summarily remanded to the trial court so that it can prepare the required computation.

CONCLUSION

We reverse the order of the district court and remand the cause to the district court with directions to further remand the matter to the county court with directions to enter specific findings pursuant to our directive in *State v. Williams, supra*.

Reversed and remanded with directions.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Patrick O'Brien, appellant, and Suburban Air Freight, Inc., and Liberty Mutual Insurance Company, appellees, v. Cessna Aircraft Company and Goodrich Aerospace Company, appellees.

903 N.W.2d 432

Filed November 3, 2017. No. S-15-1212.

1. **Products Liability.** The central question in any claim based on strict liability in tort is whether the product was defective.
2. ____. Defects usually fall into one of three categories: design defects, manufacturing defects, or warning defects.
3. **Products Liability: Expert Witnesses: Circumstantial Evidence: Proof.** The best means of proving a defect is expert testimony pointing to a specific defect. But in lieu of pleading and proving a specific defect, plaintiffs have been permitted to prove an unspecified defect in the warranted product through circumstantial evidence using what is commonly referred to as the "malfunction theory."
4. **Products Liability: Proof.** Under the malfunction theory, also sometimes called the indeterminate defect theory or general defect theory, a plaintiff may prove a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as the result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.
5. ____: ____. The malfunction theory, which permits a plaintiff to prove a product defect circumstantially without proof of any specific defect, is not available when specific defects are alleged.
6. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
7. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.

8. **Judgments: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
9. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
10. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.
11. **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.
12. **Trial: Evidence: Appeal and Error.** Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated. An appellate court reviews the trial court's ruling on authentication for abuse of discretion.
13. **Judgments: Words and Phrases: Appeal and Error.** An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, 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.
14. **Products Liability: Proof.** A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff.
15. **Products Liability: Proof: Notice.** In a strict liability case, the proponent of the evidence bears the burden to establish the similarity between the other accidents and the accident at issue before the evidence is admitted. The proffered evidence must satisfy the substantial similarity test for it to be properly admitted into evidence, whether to prove defect, causation, or knowledge/notice. Substantial similarity is satisfied when the prior accidents or occurrences happened under substantially the same circumstances and were caused by the same or similar defects and dangers.
16. **Trial: Evidence: Appeal and Error.** The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.

17. **Trial: Evidence: Testimony.** 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.
18. **Trial: Evidence: Juries.** A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such motion to obtain a final ruling upon the ultimate admissibility of the evidence.
19. **Trial: Evidence: Proof: Appeal and Error.** Because overruling a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine must be raised and preserved for appellate review by an appropriate objection or offer of proof during trial.
20. **Rules of Evidence.** Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to prove that the evidence is what the proponent claims.
21. **Trial: Evidence.** A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis.
22. **Rules of Evidence: Proof.** Neb. Rev. Stat. § 27-901 (Reissue 2016) lists, by way of illustration, 10 means of adequately authenticating a document.
23. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
24. **Pleadings: Evidence.** Similar to a stipulation, a judicial admission must be unequivocal, deliberate, and clear.
25. **Rules of Evidence: Hearsay.** Hearsay is not admissible except as provided by the Nebraska Evidence Rules.
26. **Rules of Evidence: Hearsay: Proof.** The party seeking to admit a business record under Neb. Rev. Stat. § 27-803(5)(a) (Reissue 2016) bears the burden of establishing foundation under a three-part test. First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities. Second, the proponent must establish that the record was made as part of a regular business practice at or near the time of the event recorded. Third, the proponent must authenticate the record by a custodian or other qualified witness.
27. **Trial: Witnesses: Proof.** In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific

question, the record must show an offer to prove the facts sought to be elicited.

28. **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 those facts and that the moving party is entitled to judgment as a matter of law.
29. **Jurisdiction: States.** When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.
30. **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.
31. **Courts: Jurisdiction: States.** In answering any choice-of-law question, a court first asks whether there is any real conflict between the laws of the states.
32. **Jurisdiction: States.** An actual conflict of law exists when a legal issue is resolved differently under the law of two states.
33. **Constitutional Law: Damages: Penalties and Forfeitures.** Under Nebraska law, punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction.
34. **Jurisdiction: States: Contracts: Torts.** Once a court determines there is a conflict of law between two states, the next step is to classify the nature of the specific conflict issue, because different choice-of-law rules apply depending on whether the cause of action sounds in contract or in tort.
35. **Torts: Appeal and Error.** To resolve conflicts of law involving tort liability, the Nebraska Supreme Court consistently has applied the Restatement (Second) of Conflict of Laws § 146 (1971).
36. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.
37. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure 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 failure to give the tendered instruction.
38. **Jury Instructions: Appeal and Error.** Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.
39. **Trial: Jury Instructions: Negligence.** A trial court is not required to submit repetitious allegations of the same act of negligence.

40. **Torts: Jury Instructions.** The Nebraska Supreme Court has consistently condemned the practice of instructing the jury in haec verba and, instead, has placed the duty squarely upon the trial court to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions.
41. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
42. **Costs.** The costs of litigation and expenses incident to litigation may not be recovered unless provided by statute or a uniform course of procedure.
43. **Torts: Costs.** Under Neb. Rev. Stat. § 25-1710 (Reissue 2016), a successful defendant in a tort action is ordinarily entitled to an award of costs as a matter of course upon a judgment in his or her favor.
44. **Depositions: Costs.** Deposition costs are properly taxable and recoverable under Neb. Rev. Stat. § 25-1710 (Reissue 2016).
45. ____: ____. Unless it appears that the depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable under Neb. Rev. Stat. § 25-1710 (Reissue 2016), even if the depositions were not used at trial. The questions of good faith and reasonable necessity are for the trial court to determine.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed.

Arthur A. Wolk, Bradley J. Stoll, and Cynthia M. Devers, of Wolk Law Firm, David A. Domina, of Domina Law Group, P.C., L.L.O., and Robert W. Mullin, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellant.

John C. Nettels, Jr., and Robin K. Carlson, of Stinson, Leonard & Street, L.L.P., and Bryan S. Hatch, of Likes, Meyerson & Hatch, L.L.C., for appellee Cessna Aircraft Company.

Elizabeth B. Wright and Andrew H. Cox, of Thompson Hine, L.L.P., and William R. Johnson and Brian J. Brislen, of Lamson, Dugan & Murray, L.L.P., for appellee Goodrich Aerospace Company.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

I. NATURE OF CASE

This tort action was filed by a pilot who was injured when the plane he was flying crashed on approach to the airport in Alliance, Nebraska. After a 4-week trial, the jury returned a general verdict for the defendants. The pilot appeals, asserting 65 assignments of error. We affirm the judgment of the district court.

II. BACKGROUND

Patrick O'Brien was employed as a commercial pilot flying mail overnight between Alliance, North Platte, and Omaha, Nebraska. In February 2007, he was seriously injured when the Cessna 208B Caravan he was flying crashed through the roof of a metal building and into a utility pole during a nonprecision approach to the Alliance airport. The impact occurred at approximately 2:25 a.m. in heavy fog and below freezing temperatures; night instrument meteorological conditions prevailed. O'Brien has no memory of the crash or any of his actions before the crash. He theorizes that ice accumulated on the aircraft during flight, resulting in an "ice contaminated tail stall" (ICTS) that caused the crash.

O'Brien sued the aircraft's designer and manufacturer, Cessna Aircraft Company (Cessna), as well as the designer and manufacturer of the aircraft's pneumatic deicing system, Goodrich Aerospace Company (Goodrich), asserting claims of strict liability, negligence, and fraudulent misrepresentation. Cessna and Goodrich denied O'Brien's claims and alleged the accident was the result of O'Brien's negligent operation and misuse of the aircraft.

The case was tried to a jury over a period of 4 weeks. The jury returned a general verdict for the defendants, finding O'Brien had not met his burden of proof on any of his claims. Rather than detail all of the evidence offered at trial, we summarize the evidence and set out the general theories advanced by the parties.

1. Cessna 208B Caravan

At the time of the crash, O'Brien was flying a Cessna 208B Caravan (hereinafter Model 208B) owned and maintained by his employer. The Model 208B is a single-engine, turboprop, high-wing airplane. The Model 208B was certified by the Federal Aviation Administration (FAA) for "Flight Into Known Icing Conditions." To obtain this certification, an aircraft designer must show that the aircraft can operate safely in icing conditions. The Model 208B that O'Brien was flying was configured for such conditions and to carry cargo.

The Model 208B was designed with pneumatic deicing "boots," and the aircraft O'Brien was flying was equipped with such boots. This deicing system uses hot "bleed air" from the aircraft's engine to inflate corrugated rubberlike boots affixed to multiple parts of the aircraft. As the boots inflate and expand, accumulated ice is broken up and shed. The deicing boots are manually activated by the pilot using a switch in the cockpit.

When Cessna was designing the Caravan models, it considered several different ice-protection systems, including TKS. TKS is an anti-icing system that extrudes an alcohol/glycol-based fluid through a thin mesh to prevent ice from forming. Cessna had used a TKS system on a different plane model, but chose to use pneumatic deicing boots for the Caravan models, including the Model 208B.

2. O'Brien's Theory

O'Brien's experts testified that his aircraft suffered ICTS while flying through light-to-moderate icing conditions. Accident scene photographs taken a few hours after the crash, supported by testimony at trial, showed ice accumulation of anywhere from one-tenth to one-fourth of an inch of ice on the leading edge of the wings, and approximately one-eighth of an inch of ice on the horizontal tail. Witnesses testified that the horizontal tail keeps the aircraft balanced in flight by creating a downward lift and preventing the nose of the aircraft from pitching down. Generally speaking, when

enough ice accumulates on the horizontal tail to disrupt the downward lift, ICTS can occur and the tail cannot keep the aircraft upright.

O'Brien cited various design defects in the Model 208B and its pneumatic deicing system that he claimed caused his aircraft to suffer ICTS. Specifically, he claimed the deicing system on the Model 208B was defectively designed and unreasonably dangerous in that the deicing boots provided insufficient coverage and the deicing system lacked a water separator to prevent contaminants from entering and affecting its operation.

O'Brien also claimed the crash was caused by the negligence of Cessna and Goodrich in selecting, designing, and testing the deicing system. He claimed, summarized, they were negligent in selecting pneumatic deicing boots rather than a TKS anti-icing system for the Caravan models, in failing to install a water separator for the deicing boots, in failing to provide a filter for the bleed air system, in failing to provide boots with adequate coverage for the conditions in which the aircraft would be flown, in failing to properly test the Model 208B for flight in icing conditions, in failing to warn operators and owners that the Model 208B was unsuitable for operating in icing conditions and suffers ICTS, and in failing to provide adequate instructions for operating the aircraft in icing conditions.

O'Brien also claimed Cessna fraudulently misrepresented that if the Model 208B was operated in accordance with the "Pilots Operating Handbook and FAA Approved Airplane Flight Manual," it was safe to fly in icing conditions, when it knew it was not. O'Brien alleged he relied on this false representation, which proximately caused his crash and injuries.

3. Theory of Cessna and Goodrich

Cessna and Goodrich claimed there was no credible evidence that O'Brien's aircraft experienced ICTS and suggested the crash was caused by O'Brien's own negligence in descending

below the minimum descent altitude before he had the runway environment in sight. Defense experts testified that the crash resulted from "controlled flight into terrain" caused by O'Brien's inadvertent descent below the minimum descent altitude, at night, in a single-pilot environment, due to distraction and heavy fog.

To counter evidence that the aircraft experienced a tail stall, the defense offered evidence that O'Brien's vertical and horizontal flight path, although below the minimum descent altitude, appeared to be under control and lined up with the runway. Additionally, the defense suggested the aircraft's 4-degree angle of impact into the metal building and the similar angle of the aircraft's path through the roof of the building indicated the aircraft was under O'Brien's control at the time of impact.

Cessna and Goodrich denied that the crash was caused by any malfunction or defect in the pneumatic deicing boots. They presented evidence that the weather conditions would not have required activation of the deicing boots, and they offered circumstantial evidence that O'Brien had not cycled the boots before the crash.

Cessna's expert testified that the pilots operating handbook indicates a pilot should cycle the boots as a matter of course immediately before landing and, depending on the type of ice, whenever one-fourth to three-fourths of an inch of ice has accumulated on the wing's leading edge. O'Brien has no memory of using the deicing boots before the crash, but testified it was his usual practice to wait until at least one-half of an inch of ice had accumulated on the wing's leading edge before activating the boots. A defense expert performed an ice accretion analysis using the weather data supplied by O'Brien's weather expert and determined that approximately one-tenth of an inch of ice would have accumulated on the wings' leading edges before the crash. The defense also relied on accident scene photographs showing that the protected surfaces of the plane had approximately one-tenth of an inch

of ice, and roughly the same amount of ice was found on the unprotected surfaces, suggesting O'Brien had not cycled the boots before impact.

4. Jury Verdict and Appeal

The case was submitted to the jury on O'Brien's claims of negligence and strict liability against both Cessna and Goodrich, and on O'Brien's claim of fraudulent misrepresentation against Cessna. The jury deliberated for approximately 8 hours before returning a general verdict for the defendants. The district court accepted the verdict, entered judgment thereon for the defendants, and directed O'Brien to pay the costs of the action. After an evidentiary hearing on costs, the court found O'Brien should be ordered to pay costs in the amount of $35,701.68 and entered judgment accordingly. O'Brien timely appealed.

III. ASSIGNMENTS OF ERROR

O'Brien assigns 65 errors, which we condense into 10. O'Brien assigns, renumbered and restated, that the district court erred in (1) excluding the testimony of his expert regarding 32 "substantially similar" plane crashes; (2) failing to enforce its discovery order compelling Cessna to produce flight test data; (3) excluding as hearsay a copy of a 2006 Airworthiness Directive affecting the Caravan models; (4) excluding exhibits showing Cessna concealed information regarding the "Caravan's susceptibility to ICTS"; (5) excluding evidence that after the crash, Cessna changed the design of the Caravan models from one which used pneumatic deicing boots to one which used an anti-icing system; (6) excluding multiple documents Goodrich marked as "confidential"; (7) excluding the opinion testimony of O'Brien's radar reconstruction expert; (8) concluding that Nebraska law applied to the issue of punitive damages rather than Kansas law; (9) refusing to instruct the jury using O'Brien's tendered instruction; and (10) taxing excessive costs to O'Brien.

IV. ANALYSIS

1. O'Brien Cannot Rely on Malfunction Theory to Infer Unspecified Defect

In addition to presenting evidence of specific design defects in the deicing system of the Model 208B, O'Brien sought to present circumstantial evidence that the Model 208B was defective because it was "susceptible to ICTS." Many of O'Brien's assignments of error include the argument that he was prevented from showing the Model 208B was "susceptible to ICTS" or had a "propensity to suffer ICTS."[1]

Both before the district court and on appeal, Cessna argued that O'Brien's "susceptibility theory" identifies no specific defect and "is so vague as to be meaningless."[2] The trial court did not instruct the jury on O'Brien's "susceptibility theory," reasoning in part that it had not been sufficiently pled. Because so many of O'Brien's assigned errors include the argument that he should have been permitted to show that the Model 208B was "susceptible to ICTS," we address the viability of this theory as a threshold matter.

[1-4] The central question in any claim based on strict liability in tort is whether the product was defective.[3] Defects usually fall into one of three categories: design defects, manufacturing defects, or warning defects.[4] The best means of proving a defect is expert testimony pointing to a specific defect.[5] But in lieu of pleading and proving a specific defect, we have—at least in the context of an implied warranty case—permitted plaintiffs to prove an *unspecified* defect in the warranted product through circumstantial evidence using what is

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[1] E.g., replacement brief for appellant at 26.

[2] Brief for appellee Cessna at 21.

[3] See, *Roskop Dairy v. GEA Farm Tech.*, 292 Neb. 148, 871 N.W.2d 776 (2015); *Stahlecker v. Ford Motor Co.*, 266 Neb. 601, 667 N.W.2d 244 (2003).

[4] *Roskop Dairy v. GEA Farm Tech., supra* note 3.

[5] *Genetti v. Caterpillar*, 261 Neb. 98, 621 N.W.2d 529 (2001).

commonly referred to as the "malfunction theory."[6] We have described the rationale and application of the malfunction theory as follows:

> The malfunction theory is based on the same principle underlying res ipsa loquitur, which permits a fact finder to infer negligence from the circumstances of the incident, without resort to direct evidence of the wrongful act.
>
> Under the malfunction theory, also sometimes called the indeterminate defect theory or general defect theory, a plaintiff may prove a product defect circumstantially, without proof of a specific defect, when (1) the incident causing the harm was of a kind that would ordinarily occur only as the result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.[7]

This court has addressed the natural limitations of the malfunction theory and emphasized it should be applied with caution:

> The malfunction theory should be utilized with the utmost of caution. Although some circumstances may justify the use of the malfunction theory to bridge the gap caused by missing evidence, the absence of evidence does not make a fact more probable but merely lightens the plaintiff's evidentiary burden despite the fact that the missing evidence might well have gone either way, and this rationale is too often subject to misapplication by courts in situations in which evidence is actually available.
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> . . . .
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> The malfunction theory is narrow in scope. The malfunction theory simply provides that it is not necessary for the plaintiff to establish a specific defect so

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[6] *Roskop Dairy v. GEA Farm Tech., supra* note 3.

[7] *Id.* at 174, 871 N.W.2d at 796.

> long as there is evidence of some unspecified dangerous condition or malfunction from which a defect can be inferred—the malfunction itself is circumstantial evidence of a defective condition. The malfunction theory does not alter the basic elements of the plaintiff's burden of proof and is not a means to prove proximate cause or damages.[8]

We understand O'Brien's argument that the Cessna Caravan models are "susceptible to ICTS" as an attempt to prove an unspecified or general defect in the aircraft through circumstantial evidence. This court has not extended the malfunction theory into the context of strict liability product defect claims.[9] Assuming without deciding the theory can be used in a strict liability case, it is unavailable to O'Brien here for two reasons: (1) He did not plead such a theory and (2) the applicability of such a theory is negated by his assertion of specific defects.

A plaintiff who wishes to rely on the malfunction theory to establish an unspecified defect must plead and prove that (1) the incident causing the harm was of a kind that would ordinarily occur only as the result of a product defect and (2) the incident was not, in the particular case, solely the result of causes other than a product defect existing at the time of sale or distribution.[10] O'Brien's amended complaint included no such allegations and, instead, identified a myriad of very specific design defects that allegedly caused the aircraft to crash. Given the nature of the crash, it is doubtful O'Brien could satisfy either factor of the malfunction theory, but his failure to plead the malfunction theory at all prevents him from relying on it to prove a nonspecific defect that the aircraft was "susceptible to ICTS."

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[8] *Id*. at 174-75, 871 N.W.2d at 796-97.

[9] See *Shuck v. CNH America, LLC*, 498 F.3d 868 (8th Cir. 2007) (discussing Nebraska law on strict liability product defect claims).

[10] *Roskop Dairy v. GEA Farm Tech., supra* note 3.

More importantly, in a case such as this where the plaintiff pleads specific defects, the malfunction theory is simply unavailable. As we observed recently:

> [W]e have found little case law specifically addressing whether the malfunction theory applies when there is no loss of evidence or when there is an allegation of a specific defect, [but] we find no cases that have done so. And we observe that the related doctrine of res ipsa loquitur does not apply when specific acts of negligence are alleged or there is evidence of the precise cause of the accident.[11]

[5] We now expressly hold what we previously observed: The malfunction theory, which permits a plaintiff to prove a product defect circumstantially without proof of any specific defect, is not available when specific defects are alleged. A plaintiff cannot simultaneously rely on the malfunction theory to establish an unspecified defect and, at the same time, point to evidence of specific defects.

As such, to the extent O'Brien has assigned error to various trial court rulings excluding evidence related to the general theory that the Cessna Caravan models are "susceptible to ICTS," all such assignments are without merit and warrant no additional discussion.

2. Discovery Ruling

O'Brien assigns that the district court erred in failing to enforce a discovery order. His argument relates to two separate discovery rulings; O'Brien asserts the first discovery ruling was erroneous and the second ruling illustrates how he was prejudiced. We summarize both discovery rulings below and find no abuse of discretion.

(a) Standard of Review

[6,7] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of

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[11] *Id.* at 179, 871 N.W.2d at 799.

an abuse of discretion.[12] The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.[13]

(b) Discovery Rulings

Early in the case, O'Brien asked Cessna to produce all the data which was recorded on the flight data recording equipment on board aircraft "N208LP," which number is the FAA registration number assigned to one of the prototypes of Cessna's Caravan models. The requested flight test data was stored on magnetic tapes onto which Cessna had recorded raw telemetry data from Caravan test flights in the 1980's. The court ordered production of the magnetic tapes, and Cessna copied the raw data from the magnetic tapes and produced it to O'Brien.

O'Brien then moved for an order compelling Cessna to convert the raw flight test data into a different format and moved for sanctions. The court overruled O'Brien's motion, including the request for sanctions, but it ordered Cessna to produce a compact disc of flight test data that had been converted for use by Cessna's expert. The court also invited O'Brien's counsel to bring the matter back before the court if he believed additional converted flight test data existed. And while the court did not require Cessna to convert all of the raw flight test data into a different format, it did not foreclose the possibility of such an order in the future, explaining:

> The Court declines to order Cessna to convert all raw flight test data into readable format at this time. Instead, Cessna will produce a recently located CD containing flight test data. Once [O'Brien has] had an opportunity to review the CD, [he] may request a hearing or further telephone conference, if needed.

The record does not show that O'Brien followed up with either Cessna or the district court on this issue.

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[12] *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016); *Breci v. St. Paul Mercury Ins. Co.*, 288 Neb. 626, 849 N.W.2d 523 (2014).

[13] *Id.*

Later, after the deadline for completing expert discovery passed, Cessna moved to exclude the testimony of one of O'Brien's experts on the ground O'Brien had not produced his expert for deposition despite repeated requests from Cessna. In response, O'Brien claimed his expert was not able to complete his work because he had not seen the disputed Cessna flight test data. The district court sustained Cessna's motion to limit the expert's testimony, but advised counsel it would reconsider its decision if O'Brien could show that Cessna's delay in producing the flight test data had, in fact, delayed O'Brien's expert's work. The record does not show that O'Brien took any further action on the issue.

On appeal, O'Brien assigns that the district court erred by failing to enforce its order compelling Cessna to produce flight test data. He contends he was "deprived" of converted flight test data because the "court failed to enforce its order" compelling discovery. O'Brien claims he was prejudiced because his expert witnesses needed the converted data to, among other things, prove "ICTS susceptibility."

(c) No Abuse of Discretion

To put this particular discovery dispute in context, we note the trial court heard and ruled upon at least 40 motions regarding various discovery issues. In regard to the discovery dispute over converting the raw flight test data, O'Brien argues on appeal that the trial court "fail[ed] to assure disclosure"[14] of the data by imposing discovery sanctions. We see nothing in the record that suggests the court abused its discretion on this issue.

[8] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[15] Here, the court initially

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[14] Replacement brief for appellant at 43.

[15] *Hill v. Tevogt*, 293 Neb. 429, 879 N.W.2d 369 (2016).

ordered Cessna to produce the raw flight test data, and Cessna complied. When O'Brien later asked that Cessna be ordered to convert all the flight test data into a different format, the court conditionally denied the motion, but ordered Cessna to turn over the flight test data that already had been converted and invited O'Brien's counsel to request further hearing on the issue once it had an opportunity to review that information. O'Brien's trial counsel took no further action. We cannot construe counsel's failure to follow up on the court's invitation as an abuse of discretion by the trial court.

3. Evidentiary Rulings

O'Brien assigns error to many of the trial court's evidentiary rulings. We address each in turn, but first we set out the standards by which we review such rulings on appeal.

(a) Standard of Review

[9] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[16]

[10] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination to admit evidence over a hearsay objection or exclude evidence on hearsay grounds.[17]

[11] 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]

[12] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether

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[16] *Hartley v. Metropolitan Util. Dist.*, 294 Neb. 870, 885 N.W.2d 675 (2016).

[17] *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

[18] *Hartley v. Metropolitan Util. Dist., supra* note 16.

evidence has been properly authenticated.[19] An appellate court reviews the trial court's ruling on authentication for abuse of discretion.[20]

[13] An abuse of discretion, warranting reversal of a trial court's evidentiary decision on appeal, 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.[21]

(b) Evidence of Other Accidents

Cessna moved in limine to prevent O'Brien's expert from testifying about 32 accidents involving other Model 208B aircraft. After a 3-day hearing during which the court received testimony and exhibits regarding each of the other accidents, the court excluded evidence of the other accidents, finding O'Brien had failed to meet his burden of proving substantial similarity between the other accidents and O'Brien's accident. O'Brien assigns this as error.

[14,15] A plaintiff in a strict liability case may rely on evidence of other similar accidents involving the product to prove defectiveness, but the plaintiff must first establish that there is a substantial similarity of conditions between the other accidents and the accident that injured the plaintiff.[22] The proponent of the evidence bears the burden to establish the similarity between the other accidents and the accident at issue before the evidence is admitted.[23] The proffered evidence must satisfy the substantial similarity test for it to be properly admitted into evidence, whether to prove defect, causation, or knowledge/notice.[24] Substantial similarity is satisfied when

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[19] *State v. Oldson*, 293 Neb. 718, 884 N.W.2d 10 (2016).

[20] *Id.*

[21] *Id.*

[22] *Shipler v. General Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006).

[23] *Id.*

[24] *Id.*

"the prior accidents or occurrences happened under substantially the same circumstances and were caused by the same or similar defects and dangers."[25]

Here, the court summarized the circumstances of O'Brien's accident and the specific design defects he alleged and then compared it to the evidence adduced regarding the 32 other accidents. The court found the other accidents spanned from 1990 to the present, and while all involved flying in ice, sleet, or snow, most did not involve evidence that the pilot had activated the deicing boots, as O'Brien alleged to have done. Some accidents involved planes that crashed during landing, while others involved crashes during takeoff. Still others involved an aircraft that landed safely or sustained minimal damage. After comparing the evidence, the court concluded that none of the 32 other accidents were substantially similar to O'Brien's, explaining:

> These accidents occurred under entirely different circumstances; including different points of significance during the flights, pilots of different experience levels, different airport geography and topography, different weather conditions (some conditions outside of those under which the aircraft is actually certified to fly), and under circumstances that required different investigating agencies coming to different factual and causation conclusions from [O'Brien's] proposed expert opinions on causation.

O'Brien does not take exception to any of these findings. Instead, he suggests the trial court failed to recognize that he offered evidence of the other accidents not just to prove the specific defects he had alleged, but also as circumstantial evidence that the aircraft was "susceptible to ICTS."[26] O'Brien suggests that despite the dissimilarities noted by the court, the prior accidents "are compelling proof" that the Model 208B is generally "unsafe in icing conditions because of its

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[25] *Id.* at 223, 710 N.W.2d at 834.

[26] Replacement brief for appellant at 27.

design,"[27] and he argues the other accidents should have been admitted for that purpose. We conclude the trial court not only recognized O'Brien's argument in this regard, but correctly rejected it.

As explained earlier, O'Brien alleged his accident was caused by several specific design defects and, consequently, he cannot simultaneously rely on the malfunction theory in an effort to prove the accident was caused by a nonspecific defect rendering the aircraft "susceptible to ICTS." The trial court correctly considered the admissibility of the 32 other accidents by comparing them to the circumstances surrounding O'Brien's accident and the specific defects he alleged, and focusing on whether "the prior accidents or occurrences happened under substantially the same circumstances and were caused by the same or similar defects and dangers."[28]

On this record, we find no abuse of discretion in the court's decision to exclude evidence of the 32 prior accidents. "[W]here an individual fails to adequately demonstrate how prior occurrences are substantially similar, evidence of prior occurrences is irrelevant and, thus, inadmissible."[29]

(c) FAA Airworthiness Directive

In 2006, the FAA issued "Airworthiness Directive 2006-06-06" (AD) affecting all "Cessna Model 208 airplanes and Model 208B airplanes" equipped with pneumatic deicing boots that were "not currently prohibited from flight in known or forecast icing." The AD required that certain information be inserted into the flight manual, inserted into the pilots operating handbook, and placed on instrument panel placards to inform pilots that the aircraft could dispatch into forecast areas of icing, but if pilots encountered "moderate or greater icing conditions," they were prohibited from continued flight

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[27] *Id*. at 28.

[28] *Shipler v. General Motors Corp., supra* note 22, 271 Neb. at 223, 710 N.W.2d at 834.

[29] *Holden v. Wal-Mart Stores*, 259 Neb. 78, 85, 608 N.W.2d 187, 193 (2000).

and had to immediately exit such conditions. The AD included regulatory language explaining how to comply with the FAA's directive and summarized several "accident/incidents" that prompted the FAA to issue the AD.

At trial, there was considerable testimony regarding the AD. The jury heard testimony about when and why the AD was issued, what it required, how it impacted the certification and operation of the Model 208B in moderate icing conditions, and the actions taken to comply with the AD. But the court did not receive a copy of the AD into evidence, finding it contained inadmissible hearsay and was more prejudicial than probative.

On appeal, O'Brien asserts it was reversible error to exclude the AD as an exhibit. He argues the AD was admissible, because it either fell within one of several hearsay exceptions or was offered for a nonhearsay purpose. He also argues it was an agency ruling subject to judicial notice under Neb. Rev. Stat. § 27-201 (Reissue 2016). We do not reach the merits of these evidentiary arguments, because we conclude even if error could be shown, it would not warrant reversal on this record because O'Brien cannot show the requisite prejudice.

[16,17] 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.[30] The exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.[31] 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.[32]

Here, the relevant information contained within the AD was presented to the jury through witness testimony. O'Brien's

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[30] *Steinhausen v. HomeServices of Neb.*, 289 Neb. 927, 857 N.W.2d 816 (2015).

[31] *Id.*

[32] *Id.*

closing argument focused extensively on that testimony, and his briefing articulates no way in which the presentation of O'Brien's case was unfairly constrained by the exclusion of the exhibit. Instead, O'Brien suggests that exclusion of the AD exhibit was prejudicial, because it was the "only document the jury asked to see during deliberations."[33]

During deliberation, the foreperson sent a question to the court asking: "Is [the AD] in evidence? If so, we can not [sic] locate our copy. Could you provide it to us? (Or is it demonstrative?)" Before responding to the jurors' question, the court consulted with counsel. O'Brien's attorney pointed out that the jury "heard all about" the AD and that "witnesses discussed it in excruciating detail," so he took the position that the jury either should be provided a copy of the exhibit, even though it was not in evidence, or should be instructed that "[y]our recollection of its contents should be controlling." The court rejected both suggestions. Instead, the court responded to the jury's question as follows: "The Court received testimony about the [AD], but the document itself was not received as an exhibit . . . ."

O'Brien does not assign error to the court's response, but argues that the jury's interest in reviewing the AD shows he was prejudiced by its exclusion. We disagree.

Thousands of exhibits were marked in this case, and given the amount of testimony and argument focused on the AD, we find nothing unusual about the jury's asking whether a copy of the AD was in evidence. O'Brien's statement to the trial court that the jury "heard all about" the AD and "witnesses discussed it in excruciating detail" is supported by the record and directly contradicts the position he takes on appeal. Moreover, nothing about the jury's question, or the court's response, supports O'Brien's argument that excluding a copy of the AD unfairly prejudiced a substantial right. This assignment is without merit.

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[33] Reply brief for appellant at 8.

(d) FAA and National Transportation Safety Board Documents

O'Brien assigns error to the exclusion of 12 exhibits related to safety investigations conducted by the FAA and the National Transportation Safety Board. The FAA exhibits include various directives, bulletins, briefing papers, and letters. The National Transportation Safety Board's exhibits include safety recommendations, a listing of the board's "Most Wanted Transportation Safety Improvements," and a PowerPoint presentation assessing icing incidents involving the Model 208B. In response to a motion in limine, some of those exhibits were excluded on hearsay grounds, and others were excluded on grounds the exhibit was either irrelevant or more prejudicial than probative. At trial, O'Brien made an offer of proof concerning the excluded exhibits and the court affirmed its preliminary rulings and excluded the exhibits.

O'Brien's briefing combines his argument regarding all 12 exhibits. With respect to the exhibits excluded as hearsay, O'Brien argues they were not being offered for their truth and alternatively argues they should have been admitted under the residual hearsay exception.[34] With respect to the exhibits excluded as irrelevant or unfairly prejudicial, O'Brien argues the trial court should have required more proof that the unfair prejudice outweighed the exhibits' probative value.

We find it unnecessary to discuss the merits of O'Brien's evidentiary arguments, because we conclude that even if some error could be shown, O'Brien cannot show that the exclusion of these exhibits unfairly prejudiced a substantial right.[35]

O'Brien claims he offered these exhibits to establish "the Caravan's susceptibility to ICTS" and Cessna's efforts to conceal that susceptibility. He argues the exhibits were relevant

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[34] See Neb. Rev. Stat. § 27-804(2)(e) (Reissue 2016).

[35] See *Steinhausen v. HomeServices of Neb., supra* note 30 (holding that exclusion of evidence in civil case was not reversible error unless it unfairly prejudiced substantial right of complaining party).

to show that "the Caravan suffered unknown design flaws making it unsafe to fly" in icing conditions and that "Cessna knew the Caravan was susceptible to ICTS and concealed that knowledge."[36] But as noted previously, O'Brien's argument that the Model 208B is "susceptible to ICTS" is an attempt to prove an unspecified or general defect in the aircraft through circumstantial evidence. And O'Brien cannot rely on the malfunction theory in this case, because he did not plead it and because the malfunction theory is not available where, as here, specific defects have been alleged. As such, we conclude O'Brien cannot show he was unfairly prejudiced by the exclusion of exhibits he claims were offered to support a theory on which he could not properly rely.

(e) Postaccident Design Change

In 2008, Cessna changed the design of its Caravan 208 series to, among other things, switch from pneumatic deicing boots to a TKS anti-icing system. Cessna moved in limine to exclude evidence of the postaccident design changes as a subsequent remedial measure under Neb. Rev. Stat. § 27-407 (Reissue 2016). The court sustained Cessna's motion, but indicated it would revisit the admissibility of the design change evidence "should conditions arise at trial that were not anticipated in the briefing." O'Brien assigns error to this ruling.

[18,19] A motion in limine is only a procedural step to prevent prejudicial evidence from reaching the jury. It is not the office of such motion to obtain a final ruling upon the ultimate admissibility of the evidence.[37] Because overruling a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review, a question concerning the admissibility of evidence which is the subject of a motion in limine must be raised and preserved

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[36] Replacement brief for appellant at 35.

[37] *State v. Schreiner*, 276 Neb. 393, 754 N.W.2d 742 (2008).

for appellate review by an appropriate objection or offer of proof during trial.[38]

O'Brien's briefing neither mentions nor cites to an offer of proof regarding evidence of the Caravan 208 series' postaccident design change. We note O'Brien made a lengthy offer of proof just before resting his case in chief, but that offer did not include evidence of the Caravan 208 series' postaccident design change. Having been cited to nowhere in the 25-volume record where O'Brien made an appropriate offer of proof regarding the postaccident design change, we conclude he failed to preserve this assigned error for appellate review.

(f) Documents Marked as "Confidential"

During discovery, Goodrich produced 11 documents, each marked "confidential" pursuant to a protective order entered at Goodrich's request. The protective order defined "confidential information" to mean "*bona fide* trade secret or other confidential, financial, research and development, or other information identified in good faith by the supplying party, whether it be a tangible thing, a document . . . or information revealed in an interrogatory answer or other discovery." The documents at issue include copies of emails, reports, letters, handwritten faxes, transcribed voicemail messages, and handwritten notes. When O'Brien tried to offer these documents as exhibits at trial, Goodrich objected. The trial court sustained the objections and excluded the exhibits, finding they had not been properly authenticated, lacked necessary foundation, and contained inadmissible hearsay.

On appeal, O'Brien does not separately describe the exhibits or explain why, with respect to each exhibit, the court's evidentiary rulings were erroneous. Rather, he addresses all 11 exhibits collectively, so we take the same approach.

O'Brien primarily argues that the trial court erred in ruling the exhibits had not been properly authenticated and contained

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[38] See *id.*

hearsay. Specifically, he contends that because Goodrich produced these documents during discovery and marked them "confidential," the documents were (1) thereby authenticated under Neb. Rev. Stat. § 27-901 (Reissue 2016) and (2) excepted from the hearsay rule as business records under Neb. Rev. Stat. § 27-803(5) (Reissue 2016). The trial court correctly rejected both these contentions.

(i) Lack of Authentication

[20,21] Authentication or identification of evidence is a condition precedent to its admission and is satisfied by evidence sufficient to prove that the evidence is what the proponent claims.[39] A court must determine whether there is sufficient foundation evidence for the admission of physical evidence on a case-by-case basis.[40] Because authentication rulings are necessarily fact specific, a trial court has discretion to determine whether evidence has been properly authenticated; we review a trial court's ruling on authentication for abuse of discretion.[41]

[22] Section 27-901 lists, by way of illustration, 10 means of adequately authenticating a document. O'Brien does not claim to have relied on any of these means to authenticate the documents at issue. Instead, he claims that Goodrich's act of marking the documents "confidential" constituted a "judicial admission of authenticity."[42] Additionally, he argues that because the documents were produced by Goodrich during discovery, they needed no further authentication. We reject both of O'Brien's authenticity arguments.

[23,24] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for

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[39] *State v. Oldson, supra* note 19.

[40] *Id.*

[41] *Id.*

[42] Replacement brief of appellant at 38.

evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.[43] Similar to a stipulation, a judicial admission must be unequivocal, deliberate, and clear.[44] By marking certain documents "confidential" in connection with producing them during discovery, Goodrich indicated nothing more than a good faith belief that the document contained "confidential information" as defined in the court's protective order. Goodrich did not thereby concede any proposition of fact alleged by O'Brien in the litigation. Identifying the documents as "confidential" did not amount to a judicial admission of the document's authenticity.

We also reject the broad proposition that producing a document during discovery alleviates a proponent's burden to lay proper foundation for the admissibility of the evidence at trial. Authentication requires more than saying "'my opponent gave me a document.'"[45] While not a high hurdle, it is still the burden of the proponent of the evidence to provide the court with sufficient evidence that the document or writing is what it purports to be.[46] On this record, we find no abuse of discretion in excluding the exhibits for lack of authentication.

(ii) Hearsay Exception for Business Records

[25,26] Hearsay is not admissible except as provided by the Nebraska Evidence Rules.[47] O'Brien claims the 11 exhibits at issue were admissible under the business records exception to

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[43] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

[44] *Id.*

[45] See *Cordray v. 135-80 Travel Plaza, Inc.*, 356 F. Supp. 2d 1011, 1015 n.5 (D. Neb. 2005).

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

[47] *Id.*

the general exclusion of hearsay evidence.[48] The party seeking to admit a business record under § 27-803(5)(a) bears the burden of establishing foundation under a three-part test.[49] First, the proponent must establish that the activity recorded is of a type that regularly occurs in the course of the business' day-to-day activities.[50] Second, the proponent must establish that the record was made as part of a regular business practice at or near the time of the event recorded.[51] Third, the proponent must authenticate the record by a custodian or other qualified witness.[52]

O'Brien directs us to nowhere in the record where he attempted to establish the foundational requirements for showing that any of the 11 exhibits were business records under § 27-803(5). Instead, both before the district court and on appeal, O'Brien argued that because the documents were marked "confidential" by Goodrich and produced during discovery, they must, ipso facto, be treated as Goodrich's business records.

The trial court rejected O'Brien's blanket proposition that anytime a business produces a document marked "confidential" pursuant to a protective order, the document must be allowed to come into evidence as a business record under § 27-803(5). We reject it too.

It was O'Brien's burden, as the party seeking to admit a business record under § 27-803(5)(a), to establish the foundational requirements for such admission.[53] He failed to meet

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[48] § 27-803(5). See *Arens v. NEBCO, Inc., supra* note 17.

[49] *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). See, also, *Misle v. Misle*, 247 Neb. 592, 529 N.W.2d 54 (1995); *State v. Wright*, 231 Neb. 410, 436 N.W.2d 205 (1989).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] See *id*.

that burden, and we find no abuse of discretion in excluding these exhibits as hearsay.

(g) Radar Reconstruction Expert

Before trial, Cessna moved in limine to prohibit O'Brien's radar reconstruction expert from testifying regarding his performance analysis of the accident flight. After an evidentiary hearing, the trial court sustained the motion in limine, finding that O'Brien did not meet his burden to show that the methodology employed by the expert was scientifically reliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[54] and *Schafersman v. Agland Coop.*[55]

Two months later, O'Brien moved for reconsideration of the ruling in limine and asked to supplement the record. The court declined to revisit its preliminary ruling before trial, explaining that O'Brien had been given an opportunity to supplement his evidence before the court's original ruling in limine and was content at the time to rest on the evidence and argument submitted.

On appeal, O'Brien argues it was error for the trial court to exclude the opinion testimony of his radar reconstruction expert. Cessna argues this issue was not preserved for appellate review, because O'Brien failed to make an offer of proof at trial regarding the expert's testimony. The record bears this out.

[27] In order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited.[56] O'Brien does not argue that he made an appropriate offer of proof at trial regarding the opinions he wanted to elicit from his radar reconstruction expert. Rather,

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[54] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[55] *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

[56] *State v. Schreiner, supra* note 37.

he suggests the issue was adequately preserved by the district court's ruling in limine. O'Brien is incorrect.

As stated previously, the ruling on a motion in limine is not a final ruling on the admissibility of evidence; the admissibility of evidence which has been the subject of a motion in limine must be raised and preserved for appellate review by an appropriate objection or offer of proof during trial.[57] Because he failed to make an offer of proof at trial regarding the anticipated testimony of the radar reconstruction expert, O'Brien failed to preserve this assigned error for our review.

4. Choice of Law Regarding Punitive Damages

O'Brien's amended complaint sought to recover punitive damages and alleged that the law of Kansas, rather than Nebraska, applied to that issue. Cessna and Goodrich moved for partial summary judgment on the choice-of-law issue. After an evidentiary hearing, the district court conducted a choice-of-law analysis and concluded that as a matter of law, Nebraska law applied to the issue of punitive damages. O'Brien assigns this as error.

(a) Standard of Review

[28-30] 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 those facts and that the moving party is entitled to judgment as a matter of law.[58] When there are no factual disputes regarding state contacts, conflict-of-law issues present questions of law.[59] When reviewing questions of law, an appellate court has an obligation to

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[57] *Id.*

[58] *White v. Busboom*, 297 Neb. 717, 901 N.W.2d 294 (2017).

[59] *Erickson v. U-Haul Internat.*, 278 Neb. 18, 767 N.W.2d 765 (2009); *Heinze v. Heinze*, 274 Neb. 595, 742 N.W.2d 465 (2007).

resolve the questions independently of the conclusion reached by the trial court.[60]

(b) Nebraska Law Applies to Issue of Punitive Damages

[31,32] In answering any choice-of-law question, a court first asks whether there is any real conflict between the laws of the states.[61] An actual conflict exists when a legal issue is resolved differently under the law of two states.[62] The district court found that a conflict existed between Nebraska and Kansas law on the issue of punitive damages. We agree.

[33] Under Nebraska law, "punitive, vindictive, or exemplary damages contravene Neb. Const. art. VII, § 5, and thus are not allowed in this jurisdiction."[63] In contrast, Kansas law allows punitive damages to be awarded for "'malicious, vindictive, or willful and wanton invasion of another's rights, with the ultimate purpose being to restrain and deter others from the commission of similar wrongs.'"[64]

[34,35] Once a court determines there is a conflict of law between two states, the next step is to classify the nature of the specific conflict issue, "'because different choice-of-law rules apply depending on whether the cause of action sounds in contract or in tort.'"[65] This case involves tort liability, and

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[60] See *id.*

[61] *In re Estate of Greb*, 288 Neb. 362, 848 N.W.2d 611 (2014).

[62] See *id.*

[63] *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 857, 443 N.W.2d 566, 574 (1989), citing *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975).

[64] *Adamson v. Bicknell*, 295 Kan. 879, 888, 287 P.3d 274, 280 (2012), quoting *Cerretti v. Flint Hills Rural Electric Co-op Ass'n*, 251 Kan. 347, 837 P.2d 330 (1992).

[65] *Johnson v. United States Fidelity & Guar. Co.*, 269 Neb. 731, 737, 696 N.W.2d 431, 437 (2005) (emphasis omitted), quoting *Buchanan v. Doe*, 246 Va. 67, 431 S.E.2d 289 (1993).

to resolve conflicts of law involving tort liability, this court consistently has applied the Restatement (Second) of Conflict of Laws § 146,[66] which sets out the general rule that "[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . ."

Section 145 of the Restatement (Second) of Conflict of Laws sets out the "most significant relationship" test and provides that in addition to principles articulated elsewhere in the Restatement,[67] the court should take into account the following contacts:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicil, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.[68]

The Restatement cautions, however, that these contacts are not to be given equal weight mechanically, but should each be considered in light of their relative importance with respect to the particular issue under consideration.[69]

Additionally, because the issue under consideration here involves punitive damages, we note that § 171 of the Restatement (Second) of Conflict of Laws deals specifically with damages. Comment *d.* of § 171 addresses exemplary or punitive damages and directs that "[t]he law selected by

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[66] Restatement (Second) of Conflict of Laws § 146 (1971). See, *Yoder v. Cotton*, 276 Neb. 954, 758 N.W.2d 630 (2008); *Heinze v. Heinze, supra* note 59; *Malena v. Marriott International*, 264 Neb. 759, 651 N.W.2d 850 (2002).

[67] See Restatement, *supra* note 66, § 6.

[68] *Id.*, § 145(2).

[69] *Id.*

application of the rule of § 145 determines the right to exemplary damages."[70]

As such, under the general rule set forth in § 146 of the Restatement (Second) of Conflict of Laws, Nebraska law will apply to the issue of punitive damages in this case, unless Kansas has a more significant relationship considering the factors in § 145.

Here, the district court began its analysis by noting the parties did not dispute the basic facts about the parties' contacts with Nebraska and Kansas. O'Brien was a Nebraska resident, employed by a Nebraska company flying mail in Nebraska, and he was injured and treated for his injuries in Nebraska. Cessna was headquartered in Kansas, made several design decisions regarding the Caravan models in Kansas, and conducted test flights from Kansas. Goodrich was a New York corporation with its principal place of business in North Carolina.

The district court then analyzed the pertinent sections of the Restatement (Second) of Conflict of Laws, discussed several state and federal cases applying those factors, and considered the undisputed evidence regarding the parties' contacts under the factors in § 145. It ultimately concluded:

> This case has numerous, strong contacts to Nebraska that inform Nebraska's interest in applying its laws to the issue of punitive damages. The injury took place in Nebraska; Plaintiffs are Nebraska residents; . . . O'Brien was flying a regular route within Nebraska at the time of the accident; Suburban Air Freight, the owner of the aircraft and employer of . . . O'Brien, is a Nebraska resident; . . . O'Brien was treated in Nebraska; the Cessna aircraft product at issue was operated at all relevant times within the borders of Nebraska and the alleged product failures took place in this state. . . . Although important decisions and product manufacture took place

[70] *Id.*, § 171, comment *d.* at 512.

> at the Cessna headquarters in Kansas, the overall weight of the contacts in this case point toward Nebraska having the most significant relationship with this issue. . . . Given the Cessna aircraft's consistent operation on a Nebraska air route by Nebraska pilots and owners, it is Nebraska that has the most interest in the application of laws to this accident. As Nebraska also has a strong constitutional policy against punitive damages, Nebraska law should be applied to punitive damage claims . . . in this case.

In O'Brien's briefing, he points to nothing in the district court's analysis of the Restatement factors that he claims was incorrect or incomplete. He offers no rationale for applying Kansas law on punitive damages other than to state that "Kansas law should apply because Cessna is based there and its culpable conduct occurred in Kansas."[71] His briefing does not address any of the other Restatement factors. And except for the issue of punitive damages, O'Brien has not argued that Kansas law properly governs any other issue of liability or damages in this tort litigation.

After reviewing the record in light of the applicable Restatement factors, we agree with the district court that the factors predominate in favor of applying Nebraska law to the issue of punitive damages in this case. The trial court did not err in granting summary judgment on this issue of law.

5. Jury Instructions

O'Brien assigns error to the jury instructions given in this case. He argues that when instructing the jury on his negligence and strict liability claims, the district court should have used the "statement of the case" instruction O'Brien tendered.[72] We find no error in the district court's refusal of O'Brien's proposed instruction.

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[71] Replacement brief for appellant at 44.

[72] *Id.* at 25.

(a) Standard of Review

[36] Whether the jury instructions given by a trial court are correct is a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[73]

(b) No Error in Refusing O'Brien's Instruction

[37,38] To establish reversible error from a court's failure 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 failure to give the tendered instruction.[74] Jury instructions do not constitute prejudicial error if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and evidence.[75]

On appeal, O'Brien does not argue that the court's jury instructions incorrectly stated the applicable law. Rather, he complains that the court's burden-of-proof instructions were incomplete, because they did not include each of the specific acts of negligence, or each of the particular design defects, that he described in his pleadings and repeated in his tendered instruction.

At the jury instruction conference, the trial court expressed concern with the length, complexity, and redundancy of O'Brien's proposed instructions. We note O'Brien's proposed statement of the case was 15 pages long; his burden-of-proof section listed 27 ways in which the defendants were negligent and 18 ways in which the Model 208B and its component parts were defectively designed. The district court refused to give O'Brien's tendered instructions and instead drafted its own,

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[73] *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[74] *Tapp v. Blackmore Ranch*, 254 Neb. 40, 575 N.W.2d 341 (1998).

[75] *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

explaining that its goal was to eliminate the redundancy and simplify the issues for the jury, while still allowing the parties to argue all of the claims and defenses that were properly supported by the pleadings and the evidence.

It is unnecessary to individually address each of the specific factual grounds that O'Brien claims the court erroneously omitted from the jury instructions. The essence of his argument on appeal is that his specific allegations of negligence and design defect should have been submitted to the jury in haec verba and that the court's summarization was unfair. We disagree with both contentions.

[39,40] A trial court is not required to submit repetitious allegations of the same act of negligence.[76] This court has consistently condemned the practice of instructing the jury in haec verba and, instead, has placed the duty squarely upon the trial court to properly analyze, summarize, and submit the substance of the numerous allegations of negligence in tort petitions.[77] That is precisely what the district court did here.

Having examined the entire record, we conclude the district court's jury instructions properly analyzed and fairly summarized O'Brien's various theories in accordance with Nebraska law, and did so in a manner which minimized redundancy and still allowed the parties to argue all the theories that were supported by the pleadings and the evidence.

In sum, we reject O'Brien's argument that his tendered instructions should have been used and we conclude that the district court's instructions correctly stated the law, were not misleading, and adequately covered the issues to be submitted to the jury.

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[76] See, *Davis v. Roosman*, 179 Neb. 808, 140 N.W.2d 639 (1966); *Kroeger v. Safranek*, 165 Neb. 636, 87 N.W.2d 221 (1957).

[77] See, *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985); *Greenberg v. Bishop Clarkson Memorial Hosp.*, 201 Neb. 215, 266 N.W.2d 902 (1978); *Marquardt v. Nehawka Farmers Coop. Co.*, 186 Neb. 494, 184 N.W.2d 617 (1971).

6. Taxation of Costs

After the jury returned its verdict for the defendants, the court accepted the verdict and entered judgment thereon, directing O'Brien to "pay costs of [the] action." Six days later, Cessna moved for an award of costs in the sum of $124,424.39.

O'Brien argued Cessna's motion for costs was untimely, because it was filed 6 days after the court accepted the jury's verdict and entered judgment thereon. The district court disagreed and found Cessna's motion was timely. It noted that its earlier judgment ordered O'Brien to pay costs but did not specify an amount, and it construed Cessna's motion alternatively either as a motion to calculate those costs or as a motion to alter or amend the judgment to include a specific award of costs.[78]

After an evidentiary hearing and briefing, the court entered an order awarding Cessna some of its deposition costs and subpoena fees in the total amount of $35,701.68. The court's order recited the applicable law and included an itemized list of the deposition costs found to be recoverable.

On appeal, O'Brien assigns error to the court's award of costs. His primary argument is that the motion for costs was untimely, but he also suggests it was error to tax costs associated with certain depositions. We address both arguments below, and we find neither has merit.

(a) Standard of Review

[41] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.[79] An abuse of discretion occurs when the trial judge's reasons or rulings are clearly untenable, unfairly depriving a litigant of a

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[78] See Neb. Rev. Stat. § 25-1329 (Reissue 2016).

[79] *Mock v. Neumeister*, 296 Neb. 376, 892 N.W.2d 569 (2017); *City of Falls City v. Nebraska Mun. Power Pool*, 281 Neb. 230, 795 N.W.2d 256 (2011).

substantial right and denying just results in matters submitted for disposition.[80]

(b) No Error in Awarding Costs

[42,43] We have long held that the costs of litigation and expenses incident to litigation may not be recovered unless provided by statute or a uniform course of procedure.[81] In this case, the court awarded costs pursuant to Neb. Rev. Stat. § 25-1710 (Reissue 2016).[82] Under that statute, a successful defendant in a tort action is ordinarily entitled to an award of costs as a matter of course "upon a judgment in his favor."[83]

(i) Motion for Costs Was Timely

O'Brien argues Cessna's motion for costs was untimely under this court's holding in *Salkin v. Jacobsen*.[84] In *Salkin*, we held that the defendant, who was seeking an award of attorney fees on the ground the plaintiff's action had been dismissed as frivolous,[85] had not timely filed his motion before the entry of judgment. We reasoned that attorney fees, where recoverable, are treated as an element of court costs, and we further reasoned that an award of costs in a judgment is considered part of the judgment. We then held that one seeking an award of attorney fees from the trial court pursuant to § 25-824 must make such a request before judgment is entered.

Salkin did not address the timeliness of a motion for costs under § 25-1710. Nor does the language of § 25-1710 address when any such motion must be filed, directing instead that "[c]osts shall be allowed of course to any defendant upon

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[80] *Holden v. Wal-Mart Stores, supra* note 29.

[81] See *City of Falls City v. Nebraska Mun. Power Pool, supra* note 79.

[82] See *Bunnell v. Burlington Northern RR. Co.*, 247 Neb. 743, 530 N.W.2d 230 (1995).

[83] See *Rehn v. Bingaman*, 152 Neb. 171, 173, 40 N.W.2d 673, 675 (1950), citing § 25-1710.

[84] *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[85] See Neb. Rev. Stat. § 25-824 (Reissue 2016).

a judgment in his favor in the actions mentioned in section 25-1708." A similar statute provides that costs "shall be allowed of course" to prevailing plaintiffs.[86]

As a practical matter, it is unlikely that a plaintiff or defendant will file a motion seeking costs in the trial court before judgment is entered in their favor. And while we do not endorse the practice, we note it is not uncommon for trial courts, when entering judgment on a jury verdict, to award unspecified "costs" to the prevailing party without identifying or calculating the amount.

Here, the district court's judgment expressly directed O'Brien to pay costs of the action, but did not specify the amount of such costs. O'Brien's argument that the motion for costs was untimely is premised on the conclusion that the judgment awarding unspecified costs was final and appealable. We express no opinion on whether a purported judgment that includes an award of unspecified costs can be considered a judgment under Neb. Rev. Stat. § 25-1301 (Reissue 2016), but on this record, we find no abuse of discretion in the district court's conclusion that Cessna's motion for specific costs was timely.

Like the district court, we construe Cessna's subsequent motion for costs either as a motion seeking to modify the award of unspecified costs previously awarded or as a motion to alter or amend the judgment purporting to award unspecified costs. Whether construed as a motion to modify under Neb. Rev. Stat. § 25-2001 (Reissue 2016) or a as a motion to alter or amend under § 25-1329, we conclude that Cessna's motion, filed 6 days after the court entered a judgment that included unspecified costs, was timely filed.

(ii) No Abuse of Discretion in Awarding Deposition Costs

[44,45] O'Brien's briefing challenges only that portion of the court's award pertaining to deposition costs. It is well

[86] Neb. Rev. Stat. § 25-1708 (Reissue 2016).

established that deposition costs are properly taxable and recoverable under § 25-1710.[87] Moreover, we have explained that "'"unless it appears that the depositions were not taken in good faith or were actually unnecessary, costs of taking them are properly taxable,"'" even if the depositions were not used at trial.[88] The questions of good faith and reasonable necessity are for the trial court to determine, bearing in mind that a deposition may appear necessary when taken, but "'"afterward the case may take such a course as to make it unnecessary to use the deposition."'"[89]

Here, the district court determined that Cessna should recover the reasonable costs to prepare the original transcripts of the depositions along with the court reporter appearance fees, but did not allow recovery of the costs associated with videotaping and editing the depositions. The court also declined to award deposition costs when the invoices were not sufficiently detailed, and in several instances, it prorated costs for depositions that took longer than the court's protective orders permitted.

On this record, we find the district court provided a reasoned and logical explanation for the manner in which it taxed costs under § 25-1710. It did not abuse its discretion, and O'Brien's assignment to the contrary is without merit.

V. CONCLUSION

For the reasons set forth herein, we find no merit to any of O'Brien's assigned errors and affirm the judgment of the district court.

Affirmed.

Wright, J., not participating.

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[87] *Bunnell v. Burlington Northern RR. Co., supra* note 82.

[88] *Stocker v. Wells*, 155 Neb. 472, 478, 52 N.W.2d 284, 287 (1952).

[89] *Id.*

Nebraska Supreme Court
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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Rodney A. Halstead, respondent.

902 N.W.2d 701

Filed November 3, 2017. No. S-16-774.

1. **Disciplinary Proceedings: Appeal and Error.** Because attorney discipline cases are original proceedings before the Nebraska Supreme Court, the court reviews a referee's 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 offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
3. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
4. ____. Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

Original action. Judgment of suspension.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

Thomas J. Anderson, P.C., L.L.O., for respondent.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

INTRODUCTION

This is an attorney discipline case in which the only question before this court is the appropriate sanction. Rodney A. Halstead admitted to authoring and filing annual guardianship reports containing false statements over a period of 6 years. The referee recommended that Halstead be suspended from the practice of law for 1 year with other conditions set forth in more detail below. Because this is a serious offense which was repeated year after year, we adopt the referee's recommendation and enter a judgment of suspension.

BACKGROUND

Halstead was admitted to the practice of law in the State of Nebraska on September 25, 1991. At all relevant times, he was engaged in the practice of law in Omaha, Nebraska.

Grounds for Attorney Discipline

In August 2009, Halstead was appointed permanent guardian of an incapacitated adult (the ward). He was required to file annual reports on the condition of the ward and, among other items, list the ward's current address and indicate how many times and on what dates he saw the ward in the past year.[1] Halstead filed these mandatory reports with the county court for 6 consecutive years, 2010 through 2015.

However, each report contained information which Halstead knew to be false. In annual reports filed in 2010 and 2011, Halstead handwrote virtually identical responses: "I have seen [the ward] about once a month [and] check via phone more often." Then, in 2012, his typical response changed and he handwrote, "I have been kept updated mostly by telephone." Halstead handwrote this same response in his 2013 and 2014 report. Finally, in his 2015 report, Halstead replied in shorthand and handwrote, "updated by telephone." In fact, Halstead had not visited the ward or spoken to anyone at the ward's

[1] See Neb. Rev. Stat. § 30-2628(a)(6) (Reissue 2016).

assisted living facility since 2009. If he had, he would have learned that the ward had moved out of the assisted living facility in 2011. Halstead learned of the ward's actual whereabouts only after a court-appointed visitor found the ward at another address and reported Halstead's neglect to the court.

Formal Charges

On August 15, 2016, Counsel for Discipline of the Nebraska Supreme Court filed formal charges against Halstead, alleging that he violated his oath of office as an attorney and Neb. Ct. R. of Prof. Cond. §§ 3-501.1, 3-501.3, 3-501.4(a)(2), 3-503.3(a)(1) and (a)(3), and 3-508.4(a) and (c). Halstead admitted to these allegations in his answer, and we sustained Counsel for Discipline's motion for judgment on the pleadings limited to the facts. We then appointed a referee for the taking of evidence limited to the appropriate discipline.

Referee's Report

After an evidentiary hearing, the referee reported his findings of fact and recommendations for the appropriate sanction. The report indicated that Halstead understood the seriousness of his misconduct. Specifically, it stated that Halstead was "direct and not evasive," that he "appeared genuinely uncomfortable and remorseful," and that it "appeared that his guilt and regret were sincere." It further stated that Halstead admitted to authoring and filing false reports year after year, but that he denied deliberately trying to mislead the court. Instead, Halstead maintained, "I believed that I was reporting his current condition as I knew it at the time." The referee concluded that Halstead was not deliberately misleading the court for the purpose of covering up anything, but noted, "[H]is very lack of purpose is what is most troubling about the repeated neglect and the repeated false filings."

The referee found that Halstead's repeated violation of the Rules of Professional Conduct in the same way over an extended period of time was a strongly aggravating factor. This factor was made worse by the mandatory annual reporting requirements.

The referee also identified certain mitigating factors. Such factors included the fact that Halstead was fully cooperative with Counsel for Discipline, that Halstead had no prior disciplinary issues, that Halstead's actions did not result in harm to the ward, that Halstead had an extensive community service record, and that Halstead understood the gravity of his offense and was sincerely remorseful. Halstead offered 22 letters in support from other attorneys in the community. However, the referee gave no weight to these letters, because none of the writers were aware of the actual charges against Halstead or otherwise explained what may have been the cause of the neglect or the false reporting.

With respect to the sanctions to be imposed, and giving weight to these aggravating and mitigating factors, the referee recommended that Halstead be suspended from the practice of law for 1 year. He also recommended that prior to readmission, Halstead be required to satisfactorily complete continuing legal education credits in legal ethics and office management. Finally, the referee recommended a period of supervision upon Halstead's readmission and a prohibition on accepting guardianship or conservatorship appointments for a period of time.

ASSIGNMENT OF ERROR

Halstead takes exception to the referee's recommended sanction but does not challenge the truth of the referee's findings. Therefore, the only question before this court is the appropriate discipline.

STANDARD OF REVIEW

[1] Because attorney discipline cases are original proceedings before this court, we review a referee's recommendations de novo on the record, reaching a conclusion independent of the referee's findings.[2]

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[2] *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017).

ANALYSIS

[2] To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.[3] The first four factors call for a serious sanction in response to Halstead's actions and inactions, and they are important considerations in assessing the last two factors.

Halstead violated several disciplinary rules, including a rule which describes the special duties of attorneys in their role as officers of the court to protect the integrity of the adjudicative process.[4] This rule sets forth a duty of candor such that "[a] lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."[5] Violation of this rule is a serious offense, and repeated violation indicates indifference to an attorney's important legal obligations and fitness for the practice of law.[6]

[3] In addition to the above six factors, the propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.[7] The referee relied upon prior cases in which the attorney misconduct involved filing an affidavit in court containing allegations known to be false,[8] lying to a court and to the Department of Veterans Affairs to aid a

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[3] *Id.*

[4] See § 3-503.3, comment 2.

[5] § 3-503.3(a).

[6] See § 3-508.4, comment 2.

[7] See *State ex rel. Counsel for Dis. v. Gast, supra* note 2.

[8] See *State ex rel. NSBA v. Zakrzewski*, 252 Neb. 40, 560 N.W.2d 150 (1997).

client,[9] notarizing and filing documents without being in the presence of the signer,[10] knowingly filing a false easement,[11] and neglecting a client's case and altering a court document.[12] The sanctions in those cases all involved periods of suspension ranging from 1 to 2 years.

[4] Conversely, Halstead argues that cases resulting in public reprimand are more appropriate for comparison to his misconduct. He cites to cases in which the attorney misconduct involved simultaneously representing two clients who had conflicting and adverse interests in the same or similar transaction[13] and failing to timely manage and resolve probate matters.[14] However, these cases did not involve a violation of the duty of candor to a tribunal. Furthermore, these cases each involved isolated incidents of attorney misconduct whereas Halstead's misconduct included repeat violations over 6 years. And cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.[15] As a result, we do not agree that these cases are comparable.

The referee relied on appropriate cases for the purpose of determining a proportionate sanction for Halstead's offense. The serious nature of the offense and the fact that it was repeated year after year with no explanation suggests that Halstead is indifferent to the special duties he owes the court

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[9] See *State ex rel. NSBA v. Scott*, 252 Neb. 698, 564 N.W.2d 588 (1997).

[10] See *State ex rel. Counsel for Dis. v. Mills*, 267 Neb. 57, 671 N.W.2d 765 (2003).

[11] See *State ex rel. Counsel for Dis. v. Rokahr*, 267 Neb. 436, 675 N.W.2d 117 (2004).

[12] See *State ex rel. Counsel for Dis. v. Gilner*, 280 Neb. 82, 783 N.W.2d 790 (2010).

[13] See *State ex rel. Counsel for Dis. v. Peppard*, 291 Neb. 948, 869 N.W.2d 700 (2015).

[14] See *State ex rel. Counsel for Dis. v. Connor*, 289 Neb. 660, 856 N.W.2d 570 (2014).

[15] See *id.*

as an officer of the legal system. And neglect of these responsibilities compromises the integrity of the legal profession and the public interest which it serves.

We recognize that Halstead fully cooperated with the Counsel for Discipline, had practiced for many years, and had no previous disciplinary history. And we have considered the other mitigating factors identified by the referee. But the duty of candor to the tribunal lies at the heart of an attorney's role as an officer of the court. And this was no slip of the tongue. The falsehoods were made in writing and were repeated from year to year.

Therefore, upon our de novo review of the record, this court determines that Halstead should be suspended from the practice of law and required to comply with the other requirements set forth below.

CONCLUSION

Halstead's exception with regard to the recommended sanction is overruled. Halstead is hereby suspended from the practice of law for a period of 1 year, effective immediately, and, before applying for reinstatement, he must complete continuing legal education credits in legal ethics and office management. After the period of suspension, Halstead may apply for reinstatement upon a showing of his fitness to practice law and compliance with all requirements. Upon reinstatement, Halstead shall be subject to a 1-year probation, during which time he shall not accept guardianship or conservatorship appointments.

Halstead 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. Halstead 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(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

Judgment of suspension.

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Gerard Bridgeford, appellant.

State of Nebraska, appellee, v.
Judith Bridgeford, appellant.

903 N.W.2d 22

Filed November 3, 2017. Nos. S-16-1032, S-16-1035.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court resolves independently of the conclusion reached by the trial court.
2. **Speedy Trial: Waiver: Motions for Continuance.** Although the amendments to Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 2016) were designed to prevent abuse, it does not follow that the waiver set forth therein applies only if the defendant's continuance was in bad faith.
3. **Speedy Trial: Waiver: Motions for Continuance: Time.** To determine if a defendant has permanently waived his or her statutory right to a speedy trial, the inquiry is simply whether the defendant's motion to continue resulted in a trial date that exceeded the 6-month period, as calculated with the excludable periods up to the date of the motion; the reason for and nature of the motion to continue are of no consequence.
4. **Speedy Trial: Time: Indictments and Informations.** To calculate the 6-month clock, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under Neb. Rev. Stat. § 29-1207(4) (Reissue 2016).
5. **Speedy Trial: Time: Pleadings.** Excludable periods attributable to pretrial motions such as motions to suppress, motions to quash, demurrers, pleas in abatement, and motions for change of venue begin on the date of filing and end on the date of final disposition of the motions.
6. **Speedy Trial: Time: Pretrial Procedure: Motions for Continuance.** Continuances of pretrial conferences are excludable from the speedy trial clock from the original date of the pretrial conference to the newly scheduled pretrial conference date.

7. **Trial: Motions for Continuance: Time.** An indefinite continuance of trial runs from the day of the motion until either the defendant's notice of a request for trial or the date set for trial by the court's own motion.
8. **Motions for Continuance: Time.** Any motion to continue that fails to set forth at the outset a definite length of time is indefinite.
9. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.

Appeals from the District Court for Saunders County: Mary C. Gilbride, Judge. Affirmed.

Jennifer D. Joakim for appellant Gerard Bridgeford.

Mark A. Steele, of Steele Law Office, for appellant Judith Bridgeford.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

NATURE OF CASE

The defendants in these consolidated appeals assert that the district court erred in denying their motions for absolute discharge. The district court determined that under the plain language of Neb. Rev. Stat. § 29-1207(4)(b) (Reissue 2016), the defendants had permanently waived their statutory speedy trial right by requesting continuances that resulted in moving their trial dates from a date within the statutory 6-month period to a date outside the statutory 6-month period. The defendants dispute the court's reading of § 29-1207(4)(b) and argue that the permanent waiver set forth therein does not apply because they requested continuances for a definite rather than an indefinite period of time. They also argue that they should not be

deemed to have permanently waived their statutory right to a speedy trial when the requested continuances were reasonable and not motivated by gamesmanship.

BACKGROUND

Gerard Bridgeford and Judith Bridgeford were charged on June 3, 2014, with several crimes. Gerard was charged with 10 counts of possessing marijuana with intent to deliver and 5 counts of possession of marijuana with intent to deliver to minors. Judith was charged with 10 counts of aiding and abetting possession of marijuana with intent to deliver and 5 counts of aiding and abetting possession of marijuana with intent to deliver to minors.

Their trials were set for September 24, 2014. On August 14, Gerard filed a motion to continue his scheduled trial. On August 15, the court granted Gerard's motion to continue. The court set a new date of September 22 for Gerard's status hearing and set the jury trial for October 15.

Judith similarly moved for a continuance on August 18, 2014, which the court granted that same date. The court set the new date for Judith's status hearing for September 29. The court did not set a new trial date at that time.

On September 17, 2014, Gerard moved to continue his status hearing from September 22 to September 29. The court granted the motion.

At Judith's status hearing on September 29, 2014, the court granted Judith's motion to remove her case from the trial docket. She explained that she intended to file a motion to suppress. Gerard's status hearing is not in the record.

On October 6, 2014, both Gerard and Judith filed motions to suppress. On January 5, 2015, the court denied the motions and set status hearings for January 26.

On January 13, 2015, Gerard and Judith both filed motions to continue their January 26 status hearings. On January 16, the court granted the motions. The court rescheduled the status hearings to February 9.

At their status hearings on February 9, 2015, Gerard and Judith moved to continue trial in order to complete depositions. The court set June 25 as their new trial date.

On May 11, 2015, Gerard and Judith again moved to continue their trials. The court granted the motions and set a new trial date for August 26.

The State filed a motion for joinder on May 18, 2015. At a hearing on June 23 to consider the State's motion, Gerard and Judith both moved to further continue their trials. The court granted the motions, setting status hearings for September 14, with the trial dates to be determined at that time. The court did not consider the motion for joinder.

At the September 14, 2015, status hearing, the court granted Gerard's and Judith's motions for continuances on the ground that depositions were still being conducted. The court set status hearings for October 26.

On October 26, 2015, Gerard and Judith moved to continue the date of their status hearings. The court rescheduled the hearings to December 21, with the trial dates to be set at that time.

On December 17, 2015, Gerard and Judith moved to continue the December 21 status hearings. The court rescheduled the hearings for February 8, 2016.

On February 5, 2016, Gerard and Judith moved to continue the February 8 status hearings. On February 8, the court granted the motions and rescheduled the hearings for April 25.

The status hearings finally took place as scheduled on April 25, 2016. And Gerard and Judith stated at the hearing that they were ready to proceed to trial. The court set their trials for December 12.

On June 3, 2016, the hearing was held on the State's motion for joinder. However, no ruling on the motion is in the record.

On September 9, 2016, Judith filed a motion for absolute discharge, alleging that both her statutory and constitutional

speedy trial rights had been violated. On October 3, Gerard filed a motion for absolute discharge alleging the same.

After a hearing, the court overruled the motions. The court reasoned that under § 29-1207(4)(b), both Gerard and Judith permanently waived their statutory right to a speedy trial when they requested a continuance that resulted in a trial date within the statutory 6-month period's being moved to a date outside of the statutory 6-month period. The court did not expressly address Gerard's and Judith's constitutional right to a speedy trial. Gerard and Judith each appealed.

ASSIGNMENTS OF ERROR

Gerard and Judith both assign that the district court erred in failing to grant their motions for absolute discharge on the ground that their statutory and constitutional speedy trial rights were violated.

Gerard asserts that his motion for absolute discharge should have been granted for the additional reason that he was denied due process.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, which we resolve independently of the conclusion reached by the trial court.[1]

ANALYSIS

Statutory Right

Gerard and Judith argue that they did not permanently waive their statutory right to a speedy trial, as determined by the district court. Section 29-1207(4)(b) states in relevant part that "[a] defendant is deemed to have waived his or her right to speedy trial when the period of delay resulting from a continuance granted at the request of the defendant or his

[1] See, e.g., *Pettit v. Nebraska Dept. of Corr. Servs.*, 291 Neb. 513, 867 N.W.2d 553 (2015).

or her counsel extends the trial date beyond the statutory six-month period." Gerard and Judith do not deny that their requests for continuances extended the trial date beyond the 6-month period. Rather, they assert that the waiver language of § 29-1207(4)(b) does not apply because they requested continuances for a definite period of time and for good reason. These are not relevant factors in the waiver inquiry.

In *State v. Gill*,[2] we recently reiterated that the waiver language contained in § 29-1207(4)(b) was added in response to the concurring opinion in *State v. Williams*.[3] The concurring opinion criticized the fact that the statutory scheme at that time allowed the speedy trial clock to follow the State during potentially years of aggregate individual continuances by the defendant. During such extended period, the defendant could wait and hope that the State would make a mistake in calculating excludable periods, and thereby obtain absolute discharge of the charges without any showing of prejudice. The concurrence in *Williams* suggested that the Legislature should consider providing for permanent waiver of the statutory right to a speedy trial once a defendant extends the trial date beyond the statutory 6-month period. That is precisely what the Legislature did with the waiver language of § 29-1207(4)(b).

We held in *Gill* that § 29-1207(4)(b) "provides for a 'permanent waiver'" regardless of whether the continuance was for a definite or indefinite period of time.[4] We explained that there is no language in the statute suggesting that only if the continuance was indefinite does a defendant waive his or her statutory right to a speedy trial.

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[2] *State v. Gill*, 297 Neb. 852, 901 N.W.2d 679 (2017). See, also, *State v. Vela-Montes*, 287 Neb. 679, 844 N.W.2d 286 (2014); *State v. Mortensen*, 287 Neb. 158, 841 N.W.2d 393 (2014).

[3] *State v. Williams*, 277 Neb. 133, 761 N.W.2d 514 (2009) (Wright, J., concurring; Heavican, C.J., and Connolly, J., join).

[4] *State v. Gill, supra* note 2, 297 Neb. at 862, 901 N.W.2d at 686.

We also repeated in *Gill* what we had explained in *State v. Mortensen*[5] and *State v. Vela-Montes*.[6] The waiver language of § 29-1207(4)(b) is broad. It provides for a permanent waiver regardless of the reasons for which a continuance was granted.

[2] As indicated in *Gill*, *Mortensen*, and *Vela-Montes*, we will not read into the broad waiver provision of § 29-1207(4)(b) a meaning that is not there. Although the amendments to § 29-1207(4)(b) were designed to prevent abuse, it does not follow that the waiver set forth therein applies only if the defendant's continuance was in bad faith. Such a case-by-case evaluation of subjective intent would be untenable, and the statute does not provide for it.

[3] To determine if a defendant has permanently waived his or her statutory right to a speedy trial, the inquiry is simply whether the defendant's motion to continue resulted in a trial date that exceeded the 6-month period, as calculated with the excludable periods up to the date of the motion.[7] The reason for and nature of the motion to continue are of no consequence.

[4-8] The facts presented here show that Gerard and Judith sought continuances that resulted in trial dates outside the 6-month statutory period. To calculate the 6-month clock, a court must exclude the day the information was filed, count forward 6 months, back up 1 day, and then add any time excluded under § 29-1207(4).[8] Excludable periods attributable to pretrial motions such as motions to suppress, motions to quash, demurrers, pleas in abatement, and motions for change of venue begin on the date of filing and end on the date of final disposition of the motions.[9] Continuances of pretrial

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[5] *State v. Mortensen, supra* note 2.

[6] *State v. Vela-Montes, supra* note 2.

[7] See *State v. Gill, supra* note 2.

[8] See *State v. Williams, supra* note 3.

[9] See § 29-1207(4).

conferences are excludable from the original date of the pretrial conference to the newly scheduled pretrial conference date.[10] An indefinite continuance of trial runs from the day of the motion until either the defendant's notice of a request for trial or the date set for trial by the court's own motion.[11] Any motion to continue that fails to set forth at the outset a definite length of time is indefinite.[12]

Absent any excludable periods, the 6-month clock would have run for Gerard and Judith on December 3, 2014. That trial date was first extended for Gerard for 62 days between the August 14 motion to continue and the new trial date of October 15. At that point, the 6-month clock would have run for Gerard on February 3, 2015. On October 6, 2014, Gerard filed a motion to suppress, which was not decided until January 5, 2015. Discounting overlapping days between October 6 and October 15, 2014, this resulted in 82 more excludable days and a new 6-month clock date of April 26, 2015.

On January 13, 2015, Gerard moved to continue his January 26 status hearing, which was rescheduled to February 9. This was another 14 excludable days, resulting in a new speedy trial date of May 10. At the February 9 hearing, Gerard asked for a continuance resulting in a new trial date of June 25, well beyond the May 10 speedy trial date considering excludable periods up to that point. Because Gerard's February 9 motion to continue resulted in a trial date that exceeded the 6-month period, as calculated with the excludable periods up to the

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[10] See, *State v. Wells*, 277 Neb. 476, 763 N.W.2d 380 (2009); *State v. Craven*, 17 Neb. App. 127, 757 N.W.2d 132 (2008); *State v. Dailey*, 10 Neb. App. 793, 639 N.W.2d 141 (2002).

[11] See, § 29-1207(4)(b); *State v. Wells, supra* note 10; *State v. Williams, supra* note 3; *State v. Schmader*, 13 Neb. App. 321, 691 N.W.2d 559 (2005).

[12] See, *State v. Schmader, supra* note 11; *State v. Dailey, supra* note 10. See, also, *State v. Powell*, 755 N.E.2d 222 (Ind. App. 2001).

date of the motion, he permanently waived his statutory right to a speedy trial.

Judith first extended her December 3, 2014, speedy trial date when, on August 18, she filed a motion for an indefinite continuance of her trial. The excludable period of Judith's motion did not end until the new trial date of June 25, 2015, since, despite intervening motions, that was the first trial date set after the August 18, 2014, motion. The January 13, 2015, motion resulted in 311 excludable days and a new speedy trial date of October 10.

On May 11, 2015, Judith asked for a continuance that resulted in the court's setting a new trial date for August 26. This created 107 excludable days and a new speedy trial date of January 25, 2016. And on June 23, 2015, Judith moved for an indefinite continuance. At no point before January 25, 2016, did Judith take any affirmative action to end the continuance, nor did the court reschedule the trial date. Thus, as of January 26, Judith's indefinite continuance resulted in a trial date that exceeded the 6-month period as calculated with the excludable periods up to the date of the motion. Judith permanently waived her statutory speedy trial right by virtue of the June 23, 2015, motion to continue.

Gerard and Judith both permanently waived their statutory right to a speedy trial. We find no merit to their contention that the district court erred in failing to grant their motions for absolute discharge on the ground that their statutory right to a speedy trial was violated.

Constitutional Speedy Trial and Due Process Rights

Likewise, we find no merit to Gerard's and Judith's assertion that the district court erred in failing to grant their motions for absolute discharge on the ground that their constitutional right to a speedy trial was violated. They focus on the 231-day delay between the time they finally stated on April 25, 2016, that they were ready to proceed to trial and the scheduled

trial date. They acknowledge that the delay up until the April 25 hearing was attributable to their own motions, and neither makes any assertion that their ability to present a defense was prejudiced by the delay after that time.[13]

[9] As for Gerard's due process claim of oppressive delay, assuming without deciding that such a claim could be part of the final, appealable order presented by a ruling on a motion for absolute discharge, that claim was not presented to the district court in Gerard's motion for discharge. We will not address it for the first time in this appeal. 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]

CONCLUSION

For the foregoing reasons, we affirm the orders of the district court.

Affirmed.

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[13] See *Reed v. Farley*, 512 U.S. 339, 114 S. Ct. 2291, 129 L. Ed. 2d 277 (1994).

[14] *State v. Nadeem*, 284 Neb. 513, 822 N.W.2d 372 (2012).

Nebraska Supreme Court
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William Burdess, appellant, v. Washington County Board of Equalization, appellee.

903 N.W.2d 35

Filed November 3, 2017. No. S-17-026.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record. When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not arbitrary, capricious, or unreasonable.
2. ____: ____: ____. An appellate court reviews questions of law arising during appellate review of decisions by the Tax Equalization and Review Commission de novo on the record.

Appeal from the Tax Equalization and Review Commission. Affirmed.

Aaron F. Smeall, of Smith, Gardner & Slusky Law, L.L.P., for appellant.

M. Scott Vander Schaaf, Washington County Attorney, and Emily A. Beamis for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

I. NATURE OF CASE

William Burdess filed a petition for review of an order made by the Nebraska Tax Equalization and Review Commission (TERC), which affirmed the valuation of the Washington

County Board of Equalization (Board) wasteland acres and homesite acres owned by Burdess for tax years 2013 through 2016. On review, Burdess argues that Nebraska law requires that wasteland acres be valued at $0 per acre and that the valuation of his homesite acres is unreasonable because it is not equalized with an allegedly comparable homesite property located one-half mile away.

II. FACTS

1. Valuation of Land and Protest

This case involves two parcels of land owned by Burdess and located in Washington County, Nebraska. Both parcels consist of agricultural land, a homesite, a secondary building, and wasteland. The first parcel contains 80 acres of land, 25.56 of which the parties have stipulated are wasteland. The second parcel contains 60 acres of land, 29.12 of which the parties have stipulated are wasteland. The wasteland on Burdess' two properties, along with all other wasteland in Washington County, was assessed at $290 per acre for tax year 2013, $335 per acre for tax year 2014, and $450 per acre for tax years 2015 and 2016. The homesite acres were assessed at $41,000.

Burdess protested the 2013 through 2016 assessed values of the two parcels to the TERC, arguing that the wasteland should be valued at $0 and that the homesite acres should be assessed at a value no higher than another homesite (the "Sully property") one-half mile away. A hearing was held in November 2016, and evidence was received.

2. November 2016 Hearing

(a) Value of Wasteland

At the hearing, Burdess testified that the wasteland was not cultivatable or profitable, but was instead used for mushroom hunting and walnut-tree harvesting. Burdess testified that he permitted family members and friends to hunt and gather mushrooms on the land, but did not charge anyone any money

to do so. Burdess also testified that he had earned approximately $7,500 over the past 50 years selling a few walnut trees on the property, none of which was earned during the tax years at issue. Burdess testified that he had some immature walnut trees still on the property, but that it takes 75 to 100 years for the trees to mature and have any significant value.

On behalf of the Board, the Washington County assessor testified at the hearing. He explained that because Burdess had elected "special value," Burdess' wasteland acres were not valued according to their market value, but according to their special value. "Special valu[e]" is the "value that land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses."[1] Accordingly, special value does not take into account urban development potential.

The assessor testified that in order to determine the special value for properties in Washington County, he looked to the values of property in other counties, such as Burt County, Nebraska, where there is less development potential. The assessor testified that he assessed the wasteland acres based upon actual sales of farmland containing wasteland acres in Burt County and then increased the per acre value in proportion to the increases in the value of other classes of property, such as dryland or irrigated land.

(b) Value of Homesite Acres

Burdess' homesite acres were assessed at $41,000 for each of the 4 tax years at issue. The Sully property was assessed at $27,000 for tax year 2014. Testimony at the hearing established that both are farm properties, zoned agricultural, and that they are located one-half mile apart.

The assessor testified that the difference in their valuation was due to their location and the difference in the terrain. Despite the properties' proximity to each other, they

[1] Neb. Rev. Stat. § 77-1343(5) (Reissue 2009).

are located within different market areas within the county. Burdess' homesite is located within "Market Area 6," and the Sully property is located within "Market Area 7," which is classified as a flood plain. The assessor testified that the Sully property is located on a river bottom, while Burdess' property is located on a bluff, and that people will not pay as much to build on the river bottom.

Burdess testified that the Sully property has "never flooded in 52 floods" because "the building site . . . is on high ground." He compared that to his property, which was flooded by a creek in 1999 and 2016.

3. TERC's December 2016 Order and Appeal

In December 2016, the TERC affirmed the Board's decision as to the value of the wasteland and homesite acres. The TERC found that Burdess did not produce clear and convincing evidence that the wasteland should have been assessed and valued at $0 per acre. The TERC also found that the homesite acres did not warrant value equalized to the Sully property's because the properties are located in two different market areas with significantly different physical characteristics. Burdess appeals.

III. ASSIGNMENTS OF ERROR

Burdess assigns that the TERC erred in its valuation of the wasteland and in its valuation of the homesite acres associated with the property.

IV. STANDARD OF REVIEW

[1,2] "We review TERC decisions for errors appearing on the record."[2] When reviewing a judgment for errors appearing on the record, our inquiry is whether the decision conforms to the law, is supported by competent evidence, and is not

[2] *Lozier Corp. v. Douglas Cty. Bd. of Equal.*, 285 Neb. 705, 708, 829 N.W.2d 652, 655 (2013).

arbitrary, capricious, or unreasonable.[3] We review questions of law arising during appellate review of decisions by the TERC de novo on the record.[4]

V. ANALYSIS

Burdess argues that the TERC erred in its valuation of the wasteland and in its valuation of the homesite associated with the property. We address each of these arguments in turn.

1. Wasteland

Before beginning our analysis, we note that "wasteland" is a subclass of "agricultural and horticultural land."[5] "Wasteland includes land that [is] not suitable for agricultural or horticultural purposes."[6]

Neb. Rev. Stat. § 77-201(1) (Cum. Supp. 2016) sets forth the general rule that all real property, unless expressly exempt, is subject to taxation and is to be valued at its actual value. However, pursuant to the authority granted by our State Constitution,[7] the Legislature has made agricultural land and horticultural land a separate and distinct class of property for purposes of property taxation.[8] While most real property is valued for taxation purposes at 100 percent of its actual value ("[a]ctual value" is "the market value of real property in the ordinary course of trade"[9]), the Legislature has determined that agricultural land and horticultural land shall be valued

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[3] *Lozier Corp., supra* note 2.

[4] *Id.*

[5] See Neb. Rev. Stat. § 77-1359(1) (Cum. Supp. 2016) ("[a]gricultural land and horticultural land means a parcel of land . . . which is primarily used for agricultural or horticultural purposes, *including wasteland* lying in or adjacent to and in common ownership or management with other agricultural land and horticultural land") (emphasis supplied).

[6] 350 Neb. Admin. Code, ch. 14, § 002.54 (2007).

[7] See Neb. Const. art. VIII, § 1.

[8] § 77-1359. See, also, Neb. Const. art. VIII, § 1(4).

[9] Neb. Rev. Stat. § 77-112 (Reissue 2009).

at 75 percent of its value.[10] And the Legislature has further distinguished agricultural land and horticultural land from other types of real property by allowing the owners of certain agricultural land and horticultural land (land that meets the qualifications set forth in Neb. Rev. Stat. § 77-1344 (Reissue 2009)) to elect "[s]pecial valuation," rather than having their properties valued according to their actual value.

"Special valuation means the value that the land would have for agricultural or horticultural purposes or uses without regard to the actual value the land would have for other purposes or uses."[11] This is in contrast to "[a]ctual value," which takes into account "all the uses to which the real property is adapted and for which the real property is capable of being used."[12]

The special valuation statutes[13] were enacted because of the economic impact that urban development and other nonagricultural development have on neighboring agricultural and horticultural land.[14] Special valuation protects persons engaged in agricultural endeavors from excessive tax burdens that might force them to discontinue those endeavors.[15]

Because Burdess has elected special valuation, the value of his agricultural land, including his wasteland, must be valued under the special valuation statutes.

Burdess argues that Nebraska law requires that the special value of wasteland acres must be $0 per acre. In support of this argument, Burdess relies solely on Neb. Const. art. VIII, § 1(5), which authorizes the Legislature to enact § 77-1343. In turn, § 77-1343(5) defines "[s]pecial valuation" as "the value that the land would have for agricultural or horticultural purposes

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[10] § 77-201.

[11] § 77-1343(5).

[12] § 77-112.

[13] Neb. Rev. Stat. §§ 77-1343 to 77-1347.01 (Reissue 2009 & Cum. Supp. 2016).

[14] 350 Neb. Admin. Code, ch. 11, § 001 (2007).

[15] *Id.*

or uses without regard to the actual value the land would have for other purposes or uses." Because Burdess' wasteland is "not suitable for agricultural or horticultural purposes,"[16] he argues that it must necessarily be valued at $0 per acre.

However, Burdess ignores the statutory provisions that dictate how special value is to be determined. Section 77-201(3) sets forth that certain agricultural land and horticultural land, such as Burdess' wasteland, shall be valued for taxation at 75 percent of its special value. Regarding calculation of special value, § 77-1346 sets forth that the "Tax Commissioner shall adopt and promulgate rules and regulations to be used by county assessors . . . in determining the special valuation of such land for agricultural or horticultural purposes under section 77-1344." Thus, to determine whether the Board was arbitrary, capricious, or unreasonable in its valuation of the wasteland, we must turn to 350 Neb. Admin. Code, ch. 11, § 005 (2007), which sets forth how special value is to be determined.

Subsection 005.02B of 350 Neb. Admin. Code, ch. 11, provides that "[s]pecial valuation of agricultural and horticultural land shall be based on a market analysis of arms length sales that may include property that sold subject to certain probable and legal agricultural and horticultural purposes and uses."

Here, the assessor determined the special value of Burdess' wasteland by valuing it based on a market analysis of arm's-length sales of property sold subject to certain probable and legal agricultural purposes and uses. Specifically, the assessor used actual sales of farmland containing wasteland in a nearby county (Burt County) where urban development had little influence on the price of sales. Burdess does not dispute the value of these sales or argue that the Burt County property was not comparable to his. In sum, he has failed to show that the Board's valuation was arbitrary, capricious, or unreasonable.

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[16] See 350 Neb. Admin. Code, *supra* note 6.

Per our standard of review, the question presented is whether the TERC's decision to affirm the Board's valuation of the wasteland was based on competent evidence. We find that it was. Therefore, Burdess' first assignment of error is without merit.

2. Homesite Acres

Burdess also argues that the homesite acres were not properly valued because they should have been valued similarly to those of the Sully property. Burdess argues that the Sully property is comparable to his homesite acres because both properties are zoned agricultural and they are one-half mile apart.

However, despite their similarities and proximity, we agree with the Board that Burdess' property and the Sully property have sufficient differences to justify the $14,000 difference in valuation. The assessor testified that the properties are located in different market areas; that the Sully property is located on a river bottom, while Burdess' property is located on a bluff; and that people will not pay as much to build on the river bottom.

Competent evidence supports the TERC's decision to affirm the Board's valuation of Burdess' homesite acres. The assessor testified that he based his valuation of Burdess' homesite acres on the sale of similarly sized parcels within the same market area. Although the valuation of Burdess' homesite acres may not be as low as Burdess would like, the TERC's decision to affirm the Board's valuation of Burdess' homesite acres was not arbitrary, capricious, or unreasonable. Therefore, Burdess' second assignment of error is without merit.

VI. CONCLUSION

For the reasons stated above, we find no errors appearing on the record. Therefore, the TERC's December 2016 order is affirmed.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Charles Anderson, appellee, v. EMCOR Group, Inc., appellant, and State of Nebraska, Workers' Compensation Trust Fund, appellee.

903 N.W.2d 29

Filed November 3, 2017. No. S-17-040.

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. ____: ____. On appellate review, the factual findings made by the trial judge of the Workers' Compensation Court have the effect of a jury verdict and will not be disturbed unless clearly wrong.
3. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
5. **Workers' Compensation: Appeal and Error.** To determine whether findings of fact made by the compensation court support an order granting or denying vocational rehabilitation benefits, an appellate court must consider the findings of fact in light of the statute authorizing vocational rehabilitation benefits, Neb. Rev. Stat. § 48-162.01 (Reissue 2010).
6. **Workers' Compensation: Intent.** A primary purpose of the Nebraska Workers' Compensation Act is restoration of an injured employee to gainful employment.

7. **Workers' Compensation.** When an injured employee is unable to perform suitable work for which he or she has previous training or experience, the employee is entitled to vocational rehabilitation services as may be reasonably necessary to restore him or her to suitable employment.
8. **Workers' Compensation: Words and Phrases.** Suitable employment is employment which is compatible with the employee's preinjury occupation, age, education, and aptitude.
9. **Workers' Compensation.** The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.

Appeal from the Workers' Compensation Court: Laureen K. Van Norman, Judge. Affirmed.

Dru M. Moses and Patrick J. Sodoro, of Law Office of Patrick J. Sodoro, L.L.C., for appellant.

Dennis P. Crawford, of Crawford Law Offices, P.C., L.L.O., for appellee Charles Anderson.

Douglas J. Peterson, Attorney General, and Lorra T. O'Banion for appellee State of Nebraska, Workers' Compensation Trust Fund.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

INTRODUCTION

The Workers' Compensation Court awarded an injured employee unspecified vocational rehabilitation. A counselor recommended formal training, but the court's rehabilitation specialist "denied" the plan. The employer petitioned to eliminate the requirement, and the employee moved for plan approval. The court granted approval and denied elimination. The employer appeals. Because competent evidence in the record supported the court's factual findings in light of

the statutory goal to return an injured employee to "suitable employment,"[1] we affirm the compensation court's order.

BACKGROUND

Original Award

The circumstances leading to the initial award of unspecified vocational rehabilitation services were largely undisputed. Charles Anderson sought workers' compensation benefits due to an injury to his upper right extremity. He sustained the injury in the course of his employment as a millwright with EMCOR Group, Inc. (EMCOR). At that time, Anderson earned an hourly wage of $26.50 and an average weekly wage of $1,060. In the initial award, the compensation court expressly stated that it was making no determination as to entitlement to vocational rehabilitation services. After Anderson reached maximum medical improvement, the court entered a further award determining that Anderson was entitled to a vocational rehabilitation evaluation.

Vocational Rehabilitation

Counselor Opinions

If an employee claims entitlement to vocational rehabilitation services, the employee and the employer or the employer's insurer shall attempt to agree on the choice of a vocational rehabilitation counselor.[2] The parties agreed upon Lisa Porter, who prepared a "Vocational Rehabilitation Plan Justification for Formal Training Proposal" for Anderson.

Section 48-162.01(3) sets forth five priorities, in order from lower to higher priority, to be used in developing and evaluating a vocational rehabilitation plan. No higher priority may be used unless all lower priorities are unlikely to result in suitable employment.[3] The three lowest priorities involve employment

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[1] See Neb. Rev. Stat. § 48-162.01(3) (Reissue 2010).

[2] See *id.*

[3] See *id.*

with the same employer.[4] But Porter noted that Anderson could not return to work with EMCOR, because EMCOR had no suitable work available. The next higher priority would be a job with a new employer.[5] But Porter's Internet job searches uncovered jobs paying $9 to $11 per hour. She also called various employers and discovered that there were no current openings in small automotive and engine repair businesses and that all permanent worker positions were filled in horticultural businesses.

A period of formal training designed to lead to employment in another career field is the highest priority set out in § 48-162.01(3)(e). Porter decided that a training program in Anderson's region was the only viable option. She stated: "Anderson did not require any vocational assessment in the form of an interest test, since he already knew what he wanted to do. His interest was developed and he had the skill to grow vegetables as evidenced by having grown county-fair award winning vegetables in the past." She felt that a horticultural or agricultural program would be ideal due to "amazing opportunities available . . . in seed production, tree farms, nurseries, garden centers[,] and hybrid seed producers." Porter further stated: "Anderson will not be able to earn a comparable wage to the $26.50 that he was earning pre-injury initially. However, he is interested in working with an employer once his education is complete for several years before perhaps one day becoming self-employed in hydroponics."

Porter ultimately prepared a plan of study for Anderson. According to the plan, Anderson would obtain a 2-year associate's degree of applied science in agriculture business and management with a focus in horticulture at Southeast Community College in Beatrice, Nebraska. After completion of the plan, Porter projected that Anderson's hourly wage would be $13.20.

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[4] See § 48-162.01(3)(a) through (c).

[5] See § 48-162.01(3)(d).

A vocational rehabilitation plan must be evaluated by a vocational rehabilitation specialist of the compensation court and approved by such or a judge of the compensation court before it is implemented.[6] There is a rebuttable presumption that any plan approved by the specialist is an appropriate form of vocational rehabilitation.[7] But here, the specialist "denied" the proposed plan. The specialist noted that labor market information from the community college's placement services director did not substantiate the necessity for the proposed formal training or the appropriateness of the specific job goals. Nor did the labor market information in Porter's plan justification support the need for the proposed formal training. The specialist observed that Porter's Internet job search showed six job openings—none of which required formal training—with one opening reporting wages of $9 per hour and another reporting wages of $12 to $14 per hour. The specialist concluded that the plan for formal training was not reasonable or necessary, noting that one of the specific goals of the plan was employment as a vegetable farmer or gardener and that Anderson was currently performing those job functions.

Porter responded to the specialist's denial. She stated that the job goals selected for Anderson were as a supervisor or manager; they were not as a seasonal, minimum-wage earning worker. The job titles Porter focused on required knowledge and education that typically involved training in vocational schools, on-the-job training, and up to an associate's degree. According to an Internet resource, first line supervisors of farming, fishing, and forestry workers in Nebraska earned a median annual wage of $49,100 in 2015.

Modification Sought

EMCOR filed a petition to modify the award. It requested a modification of the award of vocational rehabilitation benefits

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[6] See § 48-162.01(3).

[7] See *id.*

and services, alleging that Anderson's "condition and circumstances no longer support an award of such services." EMCOR asserted that any formal retraining or other vocational rehabilitation services were unnecessary because (1) Anderson was currently engaged in gardening and selling the yield of his efforts and (2) Anderson acknowledged "his inability to earn a similar or increased wage performing the work for which he seeks vocational rehabilitating retraining, and consent to earning such a lower wage."

Anderson filed a motion requesting that the compensation court approve the vocational rehabilitation plan prepared by Porter.

The compensation court thereafter held a hearing on EMCOR's petition and Anderson's motion. The parties stipulated that the usual rebuttable presumption of correctness did not attach to Porter's proposed plan because the specialist did not approve of the plan.

Claimant's Testimony

Anderson testified regarding his educational background. He earned a diploma through the GED program. In 1998, he obtained a diploma in computer-aided drafting. But Anderson testified that the diploma was no longer "applicable" because he "would have to totally retrain" due to changes in technology.

At the time of the hearing, Anderson lived in Dawson, Nebraska. He testified that there were few job opportunities in his area and that "[e]verything is pretty much physical labor." Anderson expressed his unwillingness to commute to employment located more than 20 or 25 miles away. Dawson is located approximately 1½ hours from Lincoln and from Omaha. The closest town, Humboldt, Nebraska, is 10 miles away and has a population of approximately 1,000 people. Beatrice is 57 miles away.

Anderson had not sought employment over the past year. He earned money by selling vegetables raised in his half-acre garden, resulting in earnings of approximately $150 a week

over a 5-month period. Anderson wished to build a greenhouse so that he could sell produce year round, but materials for the greenhouse would cost approximately $3,000 and Anderson did not have the money to construct one. Anderson also helped his wife create crafts to sell. He testified that he and his wife collectively earn approximately $8,000 a year.

Anderson wanted to have Porter's plan implemented. He testified it would improve his business by providing him with knowledge to expand "with the greenhouse," knowledge about chemicals used, and general knowledge in botany. He felt that the associate's degree would qualify him for jobs involving applying or selling chemicals, in farm management, or as a golf course manager. Anderson's ultimate career employment goal was to be self-employed. But he explained that he needed other employment before he could construct a greenhouse and become self-employed. Anderson agreed that after completing the program, he would earn less than he did at EMCOR.

Compensation Court's Decision

The compensation court dismissed EMCOR's petition to modify and ordered that Anderson was entitled to participate in the proposed plan. The court concluded that Anderson's current employment of operating his garden was not "suitable employment" and declined to modify the previous award of vocational rehabilitation services. With regard to Porter's plan, the court stated that it was "unable to conclude that the plan will not lead to a suitable job for [Anderson]."

EMCOR filed a timely appeal, and we moved the case to our docket.[8]

ASSIGNMENT OF ERROR

EMCOR assigns that the compensation court erred as a matter of law when it determined that the proposed vocational rehabilitation plan would result in suitable employment.

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[8] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

STANDARD OF REVIEW

[1] A judgment, order, or award of the compensation court may be modified, reversed, or set aside only upon the grounds that (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.[9]

[2,3] The parties disagree as to whether the issue on appeal presents a question of fact or a question of law. On appellate review, the factual findings made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong.[10] But the meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.[11]

[4,5] Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the compensation court.[12] To determine whether findings of fact made by the compensation court support an order granting or denying vocational rehabilitation benefits, an appellate court must consider the findings of fact in light of the statute authorizing vocational rehabilitation benefits, § 48-162.01.[13]

ANALYSIS

[6,7] A primary purpose of the Nebraska Workers' Compensation Act is restoration of an injured employee to

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[9] Neb. Rev. Stat. § 48-185 (Cum. Supp. 2016).

[10] *Gardner v. International Paper Destr. & Recycl.*, 291 Neb. 415, 865 N.W.2d 371 (2015).

[11] *Interiano-Lopez v. Tyson Fresh Meats*, 294 Neb. 586, 883 N.W.2d 676 (2016).

[12] *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

[13] *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991).

gainful employment.[14] When an injured employee is unable to perform suitable work for which he or she has previous training or experience, the employee is entitled to vocational rehabilitation services "as may be reasonably necessary to restore him or her to suitable employment."[15] This appeal centers on whether a proposed plan of vocational rehabilitation would restore an employee to "suitable employment."

[8] Over 25 years ago, this court recognized that we had never defined the terms "restore," "suitable employment," and "gainful employment" as used in § 48-162.01.[16] We found instructive definitions from other jurisdictions and quoted with approval the Alabama Supreme Court's interpretation of the terms:

> "'Restore' means to put back. The ability to be gainfully employed must be put back or restored through vocational rehabilitation. Gainful employment means employment similar in remuneration to that earned prior to the injury. Implicit in this is that the gainful employment sought to be restored must be 'suitable.' By 'suitable' we mean employment which is compatible with the employee's pre-injury occupation, age, education, and aptitude. . . ."[17]

We now explicitly adopt those definitions. Thus, "suitable employment" is "employment which is compatible with the employee's pre-injury occupation, age, education, and aptitude."

Although the compensation court's factual findings were not extensive, we cannot say that those findings were clearly

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[14] § 48-162.01(1).

[15] See § 48-162.01(3). See, also, *Becerra v. United Parcel Service*, 284 Neb. 414, 822 N.W.2d 327 (2012).

[16] See *Yager v. Bellco Midwest, supra* note 13.

[17] *Id.* at 895-96, 464 N.W.2d at 340, quoting *Ex Parte Beaver Valley Corp.*, 477 So. 2d 408 (Ala. 1985).

wrong. The court found: Anderson "acknowledges he would eventually like to earn sufficient income gardening to be able to support himself and his family. However, he recognizes the need for employment to supplement his income. In order to attain employment in a field related to his horticultural interests, he will require additional education." The court determined that vocational rehabilitation services were necessary because income of less than $8,000 per year was not suitable employment. In approving the plan proposed by Porter, the court stated: "While there are numerous impediments to [Anderson's] potential successful completion of the plan, the Court is unable to conclude that the plan will not lead to a suitable job for [Anderson]." And the court also recognized that Anderson's "job opportunities are limited by his choice to live in Dawson, . . . a small, rural area." The court's findings are supported by the record and, thus, are not clearly wrong.

Opposition to the plan focused on Anderson's goal to be self-employed and disregarded his need for other employment. Although Anderson ultimately wished to become self-employed growing and selling produce—work he was already performing—he testified that he would need to obtain other employment before he could do so successfully. And Porter's plan was designed to train Anderson for full-time work as a supervisor or manager. She pointed out that the median annual wage in 2015 for first line supervisors of farming, fishing, and forestry workers was $49,100. Thus, the plan was geared toward putting Anderson back to employment paying wages similar to those earned prior to the injury and in a field that would be compatible with his age, education, and aptitude.

[9] In considering the compensation court's factual findings, we are mindful that the Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent

purposes.[18] Because the plan was reasonably necessary to restore Anderson to suitable employment, the court did not err in ordering that Anderson was entitled to participate in it.

CONCLUSION

Because the findings of the compensation court are supported by competent evidence in the record and the plan would comport with the statutory goal to return an injured employee to suitable employment, we affirm the compensation court's order.

Affirmed.

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



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Felipe German Mora, appellant.

903 N.W.2d 244

Filed November 9, 2017. No. S-16-1120.

1. **Rules of Evidence: Hearsay: Appeal and Error.** Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.
2. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Sentences: Words and Phrases: Appeal and Error.** An appellate court reviews criminal sentences for abuse of discretion, which 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.
4. **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.
5. ____: ____. In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are 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. **Rules of Evidence: Hearsay: Physician and Patient.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment are not excluded by the hearsay rule.
7. **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 2016), 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.
8. **Rules of Evidence: Hearsay.** A statement is generally considered admissible under the medical purpose hearsay exception if gathered for dual medical and investigatory purposes.
9. ____: ____. Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them.
10. ____: ____. For a statement to be an excited utterance, the following criteria must be met: (1) There must be a startling event; (2) the statement must relate to the event; and (3) the declarant must make the statement while under the stress of the event. The true test is not when the exclamation was made, but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.
11. **Trial: Evidence: Appeal and Error.** The improper admission of evidence is a trial error and subject to harmless error review.
12. **Criminal Law: Juries: Evidence.** 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.
13. **Trial: Convictions: Evidence.** 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. **Sentences.** When imposing a sentence, the sentencing court should customarily consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence

involved in the commission of the offense. However, the sentencing court is not limited to any mathematically applied set of factors.

15. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
16. ____. It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.
17. **Appeal and Error.** Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.
18. **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. Otherwise, the issue will be procedurally barred.
19. **Effectiveness of Counsel: Records: Appeal and Error.** On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record.
20. ____: ____: ____. The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
21. ____: ____: ____. An appellate court can determine whether the record proves or rebuts the merits of a claim of ineffective assistance of trial counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance.
22. **Effectiveness of Counsel: Postconviction: Records: Appeal and Error.** An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made 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.
23. **Claims: Effectiveness of Counsel.** A claim of ineffective assistance of counsel insufficiently stated is no different than a claim not stated at all.

Appeal from the District Court for Lancaster County: Jeffre Cheuvront, Judge, Retired. Affirmed.

Joe Nigro, Lancaster County Public Defender, and Shawn Elliott for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

I. INTRODUCTION

In this direct appeal from criminal convictions and sentences, Felipe German Mora (Mora) challenges the overruling of his hearsay objections, the sufficiency of the evidence, the excessiveness of his sentences, and whether his trial counsel provided effective assistance. Because we find no error and the record is insufficient to review the allegations of ineffective assistance of counsel that were sufficiently stated, we affirm the district court's judgment.

II. BACKGROUND

The State charged Mora with four counts of first degree sexual assault of a child and one count of third degree sexual assault of a child. The victim in each count was B.C. Counts I through III alleged that between December 30, 2010, and September 18, 2015, Mora subjected B.C. to sexual penetration in Lincoln, Nebraska. Each count differed only as to the address of the crime: E Street, Theresa Street, and Saunders Avenue, respectively. Count IV alleged that on September 19, 2015, Mora subjected B.C. to sexual penetration. And count V alleged that between December 30, 2010, and September 19, 2015, Mora subjected B.C. to sexual contact. Because Mora was born in February 1983 and B.C. was born in December 2004, at the times of the crimes, Mora was at least 19 years old and B.C. was under the age of 12. We recite the evidence in the light most favorable to the State.

The evidence at trial established that B.C. came to the United States when she was 6 years old. B.C. began living

with her mother, Marcela M., and Marcela's partner, Mora, on E Street. Over time, B.C. got to know Mora and thought of him "[l]ike a dad." Because Mora was acquitted on the count pertaining to sexual penetration at the E Street address, we recite only the evidence relevant to the count for sexual contact. While living at the E Street address, Mora began touching B.C.'s vagina under her clothes with his hands.

When B.C. was 8 years old, she moved to Theresa Street. B.C. testified that Mora "rubbed his fingers up and down" her vagina and began inserting his penis in her vagina. These acts occurred at the Theresa Street address more than 20 times.

When B.C. was 10 years old, she moved to Saunders Avenue. At that location, Mora put his penis inside of B.C.'s vagina on more than 10 occasions. B.C. did not tell anybody what Mora was doing because she was scared.

On the morning of September 19, 2015, Mora subjected B.C. to penile-vaginal intercourse. Defense counsel pointed out some inconsistencies in B.C.'s testimony with regard to this assault. B.C. testified in a deposition that Mora took her clothes off, but she testified at trial that Mora told her to take her clothes off and that she complied. At trial, B.C. testified that she did not see any ejaculate that day, but she told an investigator that Mora "put white stuff on [her] stomach." B.C. admitted that it was difficult to remember all the details. She explained that the events happened a number of times, with Mora's taking her clothes off at times and B.C.'s taking her own clothes off at other times.

On the evening of September 19, 2015, Mora took B.C. to the residence of his brother, Rafael German Mora (Rafael), while Marcela and Mora went to a casino in Council Bluffs, Iowa. Rafael's partner, Maricela Saldivar, saw Rafael kissing B.C. and touching her vaginal area with his hand over her clothes. After Saldivar sent Rafael to the store, Saldivar asked B.C., "'What is going on? Why did this happen?'" B.C. said that nothing happened, but then began crying and said that Rafael was touching her. After Saldivar testified she told B.C. that Saldivar needed to tell Mora what had occurred,

the prosecutor asked what happened. Defense counsel raised a hearsay objection, which the court overruled. Saldivar then testified that B.C. "said no because her dad was doing the same thing to her." Saldivar testified that when she told Mora what happened was not right, Mora did not deny touching B.C. and instead just said that Saldivar did not know what he had "gone through."

Marcela testified that as she and Mora were returning to Lincoln from the casino, B.C.'s aunt told Marcela over a cell phone that B.C. said Mora had been sexually abusing B.C. Marcela asked Mora if it was true, but Mora denied doing anything. Once they arrived in Lincoln, Marcela went to see B.C., because B.C. was crying. The prosecutor asked what B.C. said to Marcela, and Mora's counsel objected as to hearsay. The court overruled the objection. Marcela answered: "I asked [B.C.] if it was true what . . . had been said about [Mora's] having been abusing her sexually. [B.C.] said yes."

Marcela testified that after police were called, Mora said, "'Yes, I did it,' but that [Marcela] was at fault because [she] would always leave [B.C.] with him when [Marcela] had to go to work." Marcela later discovered a text on her cell phone from Mora, sent September 20, 2015, at 2:07 a.m. The message was in Spanish, but the English translation was either: "'Sorry. I'll never forget you.'" or "'Forgive me. I will never forget [the] two of you.'"

On September 20, 2015, Eileen Bonin, a sexual assault nurse examiner, examined B.C. In her experience, it was infrequent to find injuries when conducting sexual assault examinations. Bonin observed some redness on B.C.'s right labia minora, which was an unusual finding. Defense counsel raised a hearsay objection when the prosecutor asked what B.C. told Bonin about what had occurred, but the court overruled the objection. Bonin testified that B.C. said her "stepdad, [who was] not really her stepdad," had been touching B.C. since she was 7 years old and that her uncle had been touching her for approximately 9 months. Bonin testified that B.C. told her that Mora "put his private parts in her private parts."

On September 20, 2015, an investigator used cotton swabs to obtain DNA from Mora's hands and penis. The swab from Mora's penis revealed a mixture of DNA of at least two individuals. B.C. was included as a major contributor, but Mora was excluded. In other words, B.C.'s DNA was on Mora's penis.

On September 22, 2015, Dr. Stacie Bleicher, the medical director at a child advocacy center, performed a followup examination on B.C. During Bleicher's testimony, when the prosecutor asked if B.C. said anything that was significant to Bleicher, defense counsel objected on the ground of hearsay. After the court overruled the objection, Bleicher answered that B.C. said she "had sexual contact by both her stepfather and . . . her uncle."

An inmate incarcerated at prison testified about what Mora told him while they were both being held at the Lancaster County jail. The inmate asked Mora about his case, and Mora said that he did not do the crime. But the next day, Mora told the inmate that he had sexual intercourse with a young female, his stepdaughter. The inmate had hoped to get some leniency in court for this information, but at the time of his testimony, he had not received any accommodation nor been offered a deal. The inmate admitted that he had previously cooperated with authorities on a number of occasions.

After the State rested its case, the defense did not call any witnesses or offer evidence.

The jury found Mora not guilty of count I, but guilty of the other counts. The district court sentenced Mora to imprisonment as follows: on count II, 30 years, 15 of which were a mandatory minimum, to life; on count III, 30 years, 15 of which were a mandatory minimum, to life; on count IV, 30 years, 15 of which were a mandatory minimum, to life; and on count V, "a period of 3 years." The court ordered that counts II and III run concurrently with one another but consecutively to counts IV and V. It ordered that counts IV and V were to be served consecutively to each other and consecutively to counts II and III.

Through counsel different from trial counsel, Mora timely filed an appeal.

III. ASSIGNMENTS OF ERROR

Mora assigns that the district court erred in (1) permitting the State to introduce hearsay statements of B.C. based on the medical purpose and excited utterance exceptions to the hearsay rule, (2) adjudging him guilty when the evidence was insufficient, and (3) imposing excessive sentences.

Mora also assigns that he was denied the right to the effective assistance of counsel due to counsel's failure to (1) adequately communicate in order to prepare a defense and explore options, (2) properly advise him about the right to testify, (3) have the penile swab retested and retain an expert to refute the State's DNA evidence, and (4) explore calling character witnesses at trial.

IV. STANDARD OF REVIEW

[1] Apart from rulings under the residual hearsay exception, an appellate court reviews for clear error the factual findings underpinning a trial court's hearsay ruling and reviews de novo the court's ultimate determination whether the court admitted evidence over a hearsay objection or excluded evidence on hearsay grounds.[1]

[2] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2]

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[1] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[2] *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[3] An appellate court reviews criminal sentences for abuse of discretion, which occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.[3]

[4,5] Whether a claim of ineffective assistance of trial counsel may be determined on direct appeal is a question of law.[4] In reviewing claims of ineffective assistance of counsel on direct appeal, an appellate court decides only whether the undisputed facts contained within the record are 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.[5]

V. ANALYSIS

1. Hearsay

(a) Medical Purpose Exception

Mora argues that the district court erred in admitting B.C.'s statements to Bonin and Bleicher that Mora sexually abused her. Mora contends that such statements were not pertinent to medical diagnosis or treatment and that identification of the abuser should not have been permitted because he was not in a position to return home. We disagree.

[6-8] Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment are not excluded by the hearsay rule.[6] In order for statements to be admissible under rule 803(3), the party seeking to introduce the evidence must demonstrate (1) that the circumstances

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[3] *State v. Duncan*, 293 Neb. 359, 878 N.W.2d 363 (2016).

[4] *State v. Mendez-Osorio, supra* note 2.

[5] *Id.*

[6] Neb. Evid. R. 803(3), Neb. Rev. Stat. § 27-803(3) (Reissue 2016).

under which the statements were made were such that the declarant's purpose in making the statements was to assist in the provision of medical diagnosis or treatment and (2) that the statements were of a nature reasonably pertinent to medical diagnosis or treatment by a medical professional.[7] A statement is generally considered admissible under the medical purpose hearsay exception if gathered for dual medical and investigatory purposes.[8]

B.C.'s statements to Bonin and Bleicher meet the admissibility requirements. B.C.'s statement to Bonin, a sexual assault nurse examiner, came during Bonin's examination which was performed in a hospital's emergency room. Bonin testified that in conducting an examination, she wants to find out what happened to help with her medical assessment. B.C.'s statement to Bleicher, a doctor, occurred while Bleicher performed a followup examination. Bleicher testified that she makes inquiries about what happened in order to determine whether any further testing may be necessary and to help guide her medical evaluation.

We have previously touched on whether statements regarding the identity of the perpetrator could be admitted under rule 803(3). In *State v. Vigil*,[9] we recognized that identity can be pertinent to diagnosis and treatment:

> While statements relating to fault are generally not admissible under rule 803(3), when a child is sexually abused, and especially when the child has a familial relationship with the child's abuser, the identity of the perpetrator is reasonably pertinent to diagnosis and treatment, because the victim cannot be effectively treated if sent right back into the abuser's clutches.

Mora claims the above reason for allowing the identity of the perpetrator is inapplicable here. He points out that in *Vigil*, the defendant was going to return home in approximately 1 week.

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[7] *State v. Vigil*, 283 Neb. 129, 810 N.W.2d 687 (2012).

[8] *Id.*

[9] *Id.* at 141, 810 N.W.2d at 698.

On the other hand, Mora states that "it is fanciful to believe that [he] would have been back in the family home."[10] But it was not "fanciful" at the time of the examinations: Mora had not been charged with a crime at the time of Bonin's examination, and Bleicher's examination occurred on the same day that the State charged Mora with sexual assault.

Regardless, in *Vigil*, we concluded that the frequency and nature of the victim's sexual contacts with a perpetrator are part of the victim's medical history. The same is true of B.C.'s sexual contacts with Mora. We conclude the district court did not err in allowing Bonin and Bleicher to testify as to what B.C. told them during their medical examinations.

(b) Excited Utterance Exception

Mora next argues that the district court erred by admitting B.C.'s statements to Marcela and to Saldivar under the excited utterance exception. B.C. made the statements after Rafael had touched her, and Mora contends that "[t]he startling event which the State relied upon did not relate to [Mora's] purported assault of the victim."[11]

[9,10] Excited utterances are an exception to the hearsay rule, because the spontaneity of excited utterances reduces the risk of inaccuracies inasmuch as the statements are not the result of a declarant's conscious effort to make them.[12] For a statement to be an excited utterance, the following criteria must be met: (1) There must be a startling event; (2) the statement must relate to the event; and (3) the declarant must make the statement while under the stress of the event. The true test is not when the exclamation was made, but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.[13]

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[10] Brief for appellant at 35.

[11] *Id.* at 30.

[12] *State v. Britt*, 293 Neb. 381, 881 N.W.2d 818 (2016).

[13] *Id.*

[11-13] Assuming without deciding that the testimony was inadmissible hearsay, any error was harmless. The improper admission of evidence is a trial error and subject to harmless error review.[14] 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.[15] 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.[16] Here, there was ample evidence to support Mora's convictions even without these statements: B.C. testified that the assaults occurred, a swab of Mora's penis contained B.C.'s DNA, and Mora admitted the assaults to Marcela and an inmate.

2. Sufficiency of Evidence

Mora attacks the sufficiency of the evidence in a number of ways. He claims that the State's medical evidence and DNA evidence did not establish Mora sexually assaulted B.C. He also asserts that his purported admissions to Marcela and the inmate were unreliable. Mora further argues that B.C.'s testimony provided little detail about the assaults and that she was inconsistent with regard to some of the details about the September 19, 2015, assault. But these attacks are directed at the credibility of witnesses and the weight to be given to evidence—they were matters for the jury to consider. By returning guilty verdicts, the jury rejected these arguments. On appeal, our role is different.

As set out in our standard of review, the relevant question for an appellate court in reviewing the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

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[14] *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

[15] *Id.*

[16] *Id.*

have found the essential elements of the crime beyond a reasonable doubt.[17] Clearly, one could.

As applicable to the facts of this case, a person at least 19 years of age commits sexual assault of a child in the first degree when he subjects another person under 12 years of age to sexual penetration.[18] And a person at least 19 years of age commits sexual assault of a child in the third degree when he subjects another person 14 years of age or younger to sexual contact and does not cause serious personal injury to the victim.[19] At all relevant times, Mora was at least 19 years of age and B.C. was a person under 12 years of age. B.C.'s testimony established that Mora subjected her to penile-vaginal intercourse and that he touched her vagina with his hands at various locations in Lincoln. The evidence supported Mora's convictions.

3. Excessiveness of Sentences

Mora argues that the district court abused its discretion by imposing excessive sentences. He does not assert that the sentences were outside the statutory ranges; rather, he contends that the court should have imposed the minimum sentence permitted by law, should have not imposed a life sentence as the maximum term, and should have run all of the sentences concurrent with one another.

[14-16] When imposing a sentence, the sentencing court should customarily consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the violence involved in the commission of the offense. However, the sentencing court is not limited to any mathematically applied set of factors.[20] The

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[17] *State v. Dehning*, 296 Neb. 537, 894 N.W.2d 331 (2017).

[18] See Neb. Rev. Stat. § 28-319.01(1)(a) (Reissue 2016).

[19] See Neb. Rev. Stat. § 28-320.01(1) and (3) (Reissue 2016).

[20] *State v. Dehning, supra* note 17.

appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[21] It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.[22]

At the time of sentencing, Mora was 33 years old. Mora described himself as coming from a "poor and humble family" in Mexico. His prior criminal record consisted of minor traffic violations. And his score on a sex offender risk assessment tool placed him in the low risk range. But as the district court stated: "[S]ociety has an obligation to protect those of a tender age who are vulnerable and unable to protect themselves. It is clear that [B.C.] loved you, she considered you to be her father and trusted you, and you took advantage of that trust and violated that trust." And the violations occurred repeatedly over 4 years. We conclude that the court did not abuse its discretion in imposing Mora's sentences.

4. Suggestion of Plain Error

[17] The State asserted in its brief that the sentence imposed for third degree sexual assault of a child presented plain error. According to the State, Neb. Rev. Stat. § 29-2204.02(4) (Reissue 2016) required the district court to impose an indeterminate sentence. Plain error may be found on appeal when an error unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would result in damage to the integrity, reputation, and fairness of the judicial process.[23]

However, at oral argument, counsel for the State forthrightly conceded that there was no plain error. We agree. By its terms, § 29-2204.02(4) applies to a Class IIIA felony "for

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[21] *Id.*

[22] *State v. Artis*, 296 Neb. 172, 893 N.W.2d 421 (2017).

[23] *State v. Mendez-Osorio, supra* note 2.

an offense committed on or after August 30, 2015." But in this case, the charged offense straddled August 30, 2015. The jury did not make any specific finding as to when the crime occurred, and B.C.'s testimony about Mora's assaults could cover dates both before and after August 30. Another statute adopted at the same time as § 29-2204.02(4) states that "an offense shall be deemed to have been committed prior to August 30, 2015, if any element of the offense occurred prior to such date."[24] In the absence of a specific jury finding demonstrating that the offense was "committed on or after August 30, 2015,"[25] we find no plain error.

5. Ineffective Assistance of Counsel

[18] Finally, Mora claims that he received ineffective assistance of trial counsel. 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. Otherwise, the issue will be procedurally barred.[26]

[19,20] On direct appeal, the resolution of ineffective assistance of counsel claims turns upon the sufficiency of the record.[27] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.[28] Both parties assert that the record on appeal is insufficient to address any of the ineffective assistance of counsel claims.

[21-23] But an appellate court can determine whether the record proves or rebuts the merits of a claim of ineffective

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[24] Neb. Rev. Stat. § 28-116 (Reissue 2016).

[25] § 29-2204.02(4).

[26] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

[27] *Id.*

[28] *Id.*

assistance of trial counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance.[29] An ineffective assistance of counsel claim is raised on direct appeal when allegations of deficient performance are made 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.[30] A claim insufficiently stated is no different than a claim not stated at all.[31] We assess the sufficiency of Mora's claims of ineffective assistance of counsel.

(a) Failure to Adequately Communicate

Mora assigns that trial counsel failed to adequately communicate with him to prepare a defense and to explore his options. Mora contends that counsel "only met with him a few times with an interpreter prior to the commencement of the jury trial"[32] and that counsel "did not engage in meaningful conversations about the State's evidence and what evidence [Mora] had to rebut the charges he faced."[33] But these statements are not sufficient allegations of deficient performance. Mora also claims that due to the lack of communication, "he was unable to make an informed decision about whether to engage in plea negotiations, whether to accept a plea offer, what defense to present at trial and whether he should testify or remain silent."[34] But this is a conclusory statement that also fails to set forth counsel's deficiency. We believe the only

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[29] *Id.*

[30] *State v. Ash*, 293 Neb. 583, 878 N.W.2d 569 (2016).

[31] *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[32] Brief for appellant at 46.

[33] *Id.* at 46-47.

[34] *Id.* at 47.

sufficiently specific allegation regarding failure to communicate is that trial counsel "did not provide any discovery to him, nor did he review the discovery that he had obtained from the State with [Mora]."[35] The record is insufficient to resolve this claim.

(b) Right to Testify

Mora argues that counsel failed to properly advise him about his right to testify and wrongly recommended that he not testify. This allegation of deficient performance is sufficiently stated, but the record is insufficient to review it.

(c) Penile Swab

Mora claims that counsel performed deficiently by failing to have the penile swab retested and failing to retain an expert witness to refute the State's DNA evidence. He backs up this statement by making specific arguments about what counsel should have done and why. This allegation is also sufficiently stated, but the record is insufficient to resolve it.

(d) Character Witnesses

Finally, Mora assigns that counsel failed to explore calling character witnesses and to call such witnesses at trial. Mora states that he provided information about witnesses counsel could have interviewed. He states that "[t]hose witnesses were individuals he worked with and the relatives and friends who had seen him with [B.C. and Marcela] prior to the accusations being made against him."[36] Although Mora alludes to what the witnesses would have testified to, he did not name the individuals.

We have required a significant degree of specificity in such claims. We explained that "we can think of no good reason why [an appellant] would be unable to give appellate counsel the names or descriptions of the uncalled witnesses he claims

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[35] *Id.*

[36] *Id.* at 53.

he informed trial counsel of."[37] And we previously expressed concern "with the lack of any specificity as to who those uncalled witnesses were 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."[38]

The same problem is present here. Mora's purported "descriptions" are too broad and indefinite and thus, fail to alleviate our concern. Because Mora did not identify or specifically describe the witnesses who he contends counsel should have called upon, he failed to make sufficiently specific allegations of deficient conduct.

VI. CONCLUSION

We conclude that the district court properly admitted statements under the medical purpose hearsay exception, that any error in admitting statements under the excited utterance exception was harmless, that the evidence was sufficient, and that the sentences imposed were not excessive or plainly erroneous. Finally, we conclude that Mora's claims of ineffective assistance of counsel are either not sufficiently presented for our review or not able to be reviewed on the record before us. We therefore affirm the judgment of the district court.

Affirmed.

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[37] *State v. Abdullah, supra* note 31, 289 Neb. at 134, 853 N.W.2d at 867.

[38] *Id.* at 133-34, 853 N.W.2d at 867.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. William E. Gast, respondent.

903 N.W.2d 259

Filed November 9, 2017. No. S-17-318.

1. **Disciplinary Proceedings.** A proceeding to discipline an attorney is a trial de novo on the record.
2. ____. The Nebraska Supreme Court evaluates each attorney discipline case in light of its particular facts and circumstances.
3. ____. To determine whether and to what extent discipline should be imposed in an attorney discipline proceeding, the Nebraska Supreme Court considers the following factors: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law.
4. ____. For purposes of determining the proper discipline of an attorney, the Nebraska Supreme Court considers the attorney's acts both underlying the events of the case and throughout the proceeding, as well as all aggravating or mitigating factors.
5. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
6. **Judgments: Records: Judicial Notice.** A court has the right to examine its own records and take judicial notice of its own proceedings and judgments in a former action.
7. **Disciplinary Proceedings.** Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate a disrespect for the Nebraska Supreme Court's disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice.

8. ____. An attorney's failure to respond to inquiries and requests for information from the Counsel for Discipline is an important matter and is a threat to the credibility of attorney disciplinary proceedings. The failure to respond to formal charges in the Nebraska Supreme Court is of even greater moment.

Original action. Judgment of suspension.

Kent L. Frobish, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

INTRODUCTION

This original proceeding arises from formal charges filed by the Counsel for Discipline (Relator) against attorney William E. Gast. Relator alleges violations of the Nebraska Rules of Professional Conduct and Gast's oath of office as an attorney arising from (1) the unauthorized practice of law and (2) frivolous pleadings. We granted Relator's motion for judgment on the pleadings pursuant to Neb. Ct. R. § 3-310(I) (rev. 2014), and the facts alleged in the formal charges are deemed admitted. Thus, the only issue we must determine is the appropriate discipline to be imposed. Given the facts and circumstances of this case, we adopt Relator's recommended sanction of an indefinite period of suspension of at least 1 year, with reinstatement conditioned on Gast's demonstrating his fitness to practice law and addressing the circumstances of the instant violations. Such sanction shall run consecutively to the suspension previously imposed by this court.

BACKGROUND

Gast was admitted to the practice of law in the State of Nebraska on January 22, 1973. At all times relevant to these

proceedings, Gast was engaged in the practice of law in Nebraska. This disciplinary proceeding results from formal charges filed by Relator on March 24, 2017. See Neb. Ct. R. § 3-309(H) (rev. 2011).

The undisputed formal charges allege that Gast (1) engaged in the unauthorized practice of law in violation of (a) Neb. Ct. R. of Prof. Cond. §§ 3-501.4 (failure to communicate with his client about her case and his suspension), (b) 3-501.16 (failure to withdraw after suspension), (c) 3-505.5 (rev. 2012) (practicing law while suspended), and (d) 3-508.4(d) (engaging in conduct prejudicial to administration of justice) and (2) filed frivolous pleadings in violation of (a) Neb. Ct. R. of Prof. Cond. §§ 3-503.1 (meritorious claims and contentions) and (b) 3-508.4(d) (engaging in conduct prejudicial to administration of justice). The formal charges further allege that Gast's acts and omissions violated his oath of office as an attorney licensed to practice law in Nebraska. See Neb. Rev. Stat. § 7-104 (Reissue 2012).

Unauthorized Practice of Law

On June 30, 2015, Gast's license to practice law in Nebraska was suspended because Gast failed to report his mandatory continuing legal education (MCLE) requirements and failed to pay his mandatory assessment to the Attorney Services Division.

Gast had previously filed suit on behalf of Connie Surber in the district court for Douglas County in case No. CI14-7634. Although Gast had actual knowledge that his license was administratively suspended on June 30, 2015, he continued to represent Surber in that case and did not inform her that his license had been suspended. Gast did not withdraw from representing Surber in the district court and did not notify the district court and opposing counsel of his suspension.

Gast's license was later reinstated on January 22, 2016, after he complied with his MCLE requirements and paid the appropriate assessment.

On September 9, 2016, Gast sent a letter informing Relator that he had represented Surber during his suspension, between June 30, 2015, and January 22, 2016. Gast sent the letter after opposing counsel in Surber's case discovered that Gast's license had been suspended during a time Gast represented Surber and informed Gast that he would report Gast's conduct if Gast did not.

According to the formal charges, on September 9, 2016, Relator sent the following email to Gast:

> "Mr. Gast,
>
> "Thank you for your email and letter. I will open a new disciplinary grievance based on your self-report of your possible unauthorized practice of law during your suspension. Please send me copies of all letters and emails you sent regarding . . . Surber's case between July 1, 2015 and January 22, 2016, when you were reinstated to practice law. If you have any time records regarding your representation of . . . Surber during your suspension, please provide those. Please state whether you informed your client that your license was suspended, and if so, state the date when you did so. I will probably need additional information as we go forward, but we can start with this for now.
>
> "Thank you for your cooperation in this matter."

Gast did not respond to the email.

On September 15, 2016, Relator sent a certified letter to Gast informing him that an investigation had been opened regarding his unauthorized practice of law. The letter directed Gast to submit an appropriate written response within the next 15 working days. See § 3-309(E). Gast signed for the certified letter on September 22, but he did not submit a written response.

On November 17, 2016, Relator sent a followup email to Gast directing him to file his response to the certified letter. On November 21, Gast sent a reply email stating that he would

send his written response "'asap,'" but he did not submit any such written response.

Because Gast did not submit a response to Relator, on December 13, 2016, Relator sent a followup email to Gast directing him to immediately file a response to the September 15 certified letter or an application for the temporary suspension of his license to practice law would be filed. Gast did not file any such response, so on January 12, 2017, the "Chair of the District Four Committee on Inquiry" filed an application for the temporary suspension of Gast's license to practice law. The application was docketed as case No. S-17-052.

On January 26, 2017, we issued an order to show cause in case No. S-17-052, directing Gast to show cause within 7 days after receipt of the order why we should not enter an order temporarily suspending his license to practice law in Nebraska. That order was delivered to Gast by certified mail, and Gast signed for it on January 28. Gast did not file a response to the order to show cause.

On February 15, 2017, we suspended Gast from the practice of law in the State of Nebraska until further order. Relator filed these formal charges on March 24.

On May 19, 2017, we issued our decision in another disciplinary matter involving Gast, his only previous discipline for violating the Rules of Professional Conduct. See *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017). That disciplinary matter includes facts relevant to the current charges for the unauthorized practice of law.

The previous disciplinary matter commenced in November 2014, when a grievance was filed with Relator against Gast based on a series of communications he sent to Douglas County District Court Judge Peter C. Bataillon in the course of litigating *State of Florida v. Countrywide Truck Ins. Agency*, 294 Neb. 400, 883 N.W.2d 69 (2016), a lengthy and complicated case, referred to here as the "*Florida v. Countrywide Truck* litigation," which began in January 1998.

The private communications urged Judge Bataillon to rule based on improper and legally irrelevant grounds. Relator ultimately filed formal charges on September 1, 2015, alleging that Gast violated the Rules of Professional Conduct and his oath of office when he sought to influence the judge by means prohibited by law and made statements with reckless disregard for truth or falsity regarding the integrity of the judge.

According to the record before this court in *State ex rel. Counsel for Dis. v. Gast, supra*, in June 2016, Gast gave sworn testimony at the formal hearing regarding his suspension in 2015, the period during which the current formal charges allege he engaged in the unauthorized practice of law. Gast stated that he failed to pay his dues because he was depressed at the time and he "was not [him]self" due to the "way [he] was being treated" in matters relating to the *Florida v. Countrywide Truck* litigation. Gast further explained that he did not have the money to pay his $98 dues, because he had not been paid in the *Florida v. Countrywide Truck* litigation since 2009 and he did not have many other cases. He testified that he accepted these consequences to be a "zealous advocate" for his client. Regarding the unreported MCLE requirements, Gast again stated that he "just wasn't [him]self" at the time and referred to his frustrations with the *Florida v. Countrywide Truck* litigation. Gast denied representing any clients as of July 1, 2015, when he learned of his suspension for failure to pay dues and to report MCLE requirements, and he testified that he notified his clients of his suspension.

In *State ex rel. Counsel for Dis. v. Gast, supra*, we suspended Gast from the practice of law for a period of 1 year retroactive to March 3, 2017, to be followed by a period of 2 years' probation upon reinstatement.

Frivolous Pleadings

The frivolous pleadings charge also relates to the *Florida v. Countrywide Truck* litigation. At all relevant times, Gast represented two of the defendants in that case.

As mentioned above, the case was filed in the district court for Douglas County in January 1998; Gast entered his appearance in February 2002. The case was appealed to this court multiple times. See, *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008); *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005); *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

On May 12, 2015, the district court, Judge Bataillon presiding, entered judgment for the plaintiff. According to the formal charges, on May 29, the district court entered an order finding that Gast filed several frivolous actions over the course of the litigation:

> "a. As to the Defendant's [unsuccessful] Motion for Recusal of June 2004, and the subsequent [unsuccessful] appeal to the Nebraska Supreme Court, . . . this Court finds that this was a frivolous action by . . . Gast, however, this Court awards no fees as the Supreme Court was in the best position to award fees and did not do so. [See *State of Florida v. Countrywide Truck Ins. Agency*, 270 Neb. 454, 703 N.W.2d 905 (2005).]
>
> "b. After the initial trial in this matter in 2006, the [Defendants] appealed this Court's directed verdict for the Plaintiff to the Nebraska Supreme Court. The Nebraska Supreme Court reversed the directed verdict decision by this Court and remanded for a new trial. [See *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008).] . . . Thereafter, . . . Gast filed Motions requesting this Court to limit the issues to be tried. This Court refused these requests as the Mandate and the opinion of the Nebraska Supreme Court did not so direct. Thereafter, . . . Gast [unsuccessfully] appealed the decision by a Writ of Mandamus against this Court. . . . This Court finds that these actions by . . . Gast [were] frivolous, however, this Court awards no fees as

> the Nebraska Supreme Court was in the best position to award fees and did not do so.
>
> "c. On October 4, 2014, . . . Gast filed a Motion for this Court to Recuse itself because of some relationship/friendship this Court had with Plaintiff's counsel. . . . This Court finds that this Motion for Recusal was groundless and frivolous. . . ."

The district court sanctioned Gast for the frivolous motion to recuse filed in 2014 by entering judgment for the plaintiff for costs in the amount of $15,000, to be paid personally by Gast.

Gast filed an appeal of the sanction order on June 5, 2015. On August 5, 2016, we affirmed the district court's sanction order against Gast. See *State of Florida v. Countrywide Truck Ins. Agency*, 294 Neb. 400, 883 N.W.2d 69 (2016). We determined that the district court had jurisdiction to sanction Gast, but we did not examine the factual basis for the sanction, because Gast did not question it.

As noted above, we later suspended Gast from the practice of law after Relator made formal charges arising from Gast's communications with Judge Bataillon in the *Florida v. Countrywide Truck* litigation, but those charges did not address the frivolousness of any claims. See *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017).

Now with the current formal charges, Relator seeks disciplinary sanctions against Gast for rule violations associated with filing frivolous pleadings.

Judgment on Pleadings and Relator's Recommendation

On March 28, 2017, Gast signed a document acknowledging receipt of the summons and formal charges, which had been filed on March 24. However, Gast failed to file an answer to the formal charges.

On May 4, 2017, Relator filed a motion for judgment on the pleadings, and on May 30, we granted the motion,

limited to facts. We directed the parties to brief the issue of discipline.

Gast did not file a brief.

Relator's brief recommends that we sanction Gast with an indefinite suspension of his license to practice law for a minimum of 1 year. Relator's brief further recommends that any application for reinstatement filed by Gast after the minimum suspension period should include a showing under oath which demonstrates his fitness to practice law and fully addresses the circumstances of the instant violations.

Relator bases its recommendation upon the uncontroverted allegations of misconduct, Gast's prior disciplinary record, and similar cases. Relator further notes that in the absence of responses from Gast, there is no evidence of why he engaged in misconduct and no evidence of mitigating factors.

STANDARD OF REVIEW

[1] A proceeding to discipline an attorney is a trial de novo on the record. *State ex rel. Counsel for Dis. v. Tonderum*, 286 Neb. 942, 840 N.W.2d 487 (2013).

ANALYSIS

In this disciplinary matter, Gast faces formal charges stemming from the unauthorized practice of law and frivolous pleadings. Because we granted judgment on the pleadings as to the facts, the only issue before us is the appropriate discipline. See *id*. Having examined the facts and circumstances of this case in conjunction with other pertinent considerations, we agree with Relator's recommendation.

[2-5] We evaluate each attorney discipline case in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009). 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. *Id*. For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding, as well as all aggravating or mitigating factors. *Id.* The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017).

[6] This decision represents the second time we have imposed disciplinary sanctions against Gast this year, following several decades with no disciplinary intervention. A court has the right to examine its own records and take judicial notice of its own proceedings and judgments in a former action. *Burns v. Burns*, 296 Neb. 184, 892 N.W.2d 135 (2017). Thus, in addition to the current formal charges, in our de novo review we consider the relevant facts from Gast's previous disciplinary proceedings, as well as the aggravating nature of his previous disciplinary offenses. See, *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012); *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012).

In the previous disciplinary matter, Gast's behavior toward a sitting judge showed disrespect for the judicial process, and we find this to be an aggravating factor.

In addition, we consider the formal hearing for the previous disciplinary matter, where Gast denied under oath that he represented any clients after learning of his administrative suspension for failure to pay dues and to report MCLE requirements and testified that he notified his clients of his suspension. This testimony conflicts with the current formal charges that Gast continued to represent Surber and failed to withdraw or to inform her or the court of his administrative suspension. Although Relator did not raise this discrepancy

in the current formal charges, it does not weigh favorably for Gast.

Relator charges Gast with the unauthorized practice of law in Surber's case, a case distinct from the *Florida v. Countrywide Truck* litigation for which he was previously sanctioned. This represents a pattern of noncompliance with our disciplinary rules, and cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. See *State ex rel. Counsel for Dis. v. Gast, supra.* And we have said that ordinarily, cumulative acts of misconduct can, and often do, lead to disbarment. See *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009).

On the other hand, there is mitigating evidence that Gast failed to pay his dues and comply with MCLE requirements because he was financially and emotionally overwhelmed by the *Florida v. Countrywide Truck* litigation. And there is no evidence that Gast harmed his client, Surber. However, the cumulative nature of Gast's past and present violations suggests a risk of future harm and necessitates a sanction that protects the public and maintains the reputation of the bar as a whole.

The second charge of misconduct raised by Relator involves instances of frivolous claims or filings by Gast in the course of the *Florida v. Countrywide Truck* litigation. We note that one such filing involved a frivolous motion to recuse, for which the district court sanctioned Gast.

[7,8] Gast's lack of participation in the disciplinary process is also a factor in our analysis. Responding to disciplinary complaints in an untimely manner and repeatedly ignoring requests for information from the Counsel for Discipline indicate a disrespect for our disciplinary jurisdiction and a lack of concern for the protection of the public, the profession, and the administration of justice. *State ex rel. Counsel for Dis. v. Tighe*, 295 Neb. 30, 886 N.W.2d 530 (2016). An attorney's failure

to respond to inquiries and requests for information from the Counsel for Discipline is an important matter and is a threat to the credibility of attorney disciplinary proceedings. *State ex rel. Counsel for Dis. v. Wickenkamp*, 277 Neb. 16, 759 N.W.2d 492 (2009). The failure to respond to formal charges in this court is of even greater moment. *Id.*

In the present disciplinary process, Gast has failed to correspond with Relator, to respond to the formal charges, and to brief the issue of discipline as directed by this court. These facts do not reflect positively on Gast's attitude and lead us to question his respect for this court's disciplinary jurisdiction. See *State ex rel. Counsel for Dis. v. Carbullido, supra*. And although Gast initially self-reported his unauthorized practice of law, this fact has little mitigating impact, because Gast was prompted to self-report by opposing counsel's ultimatum and effectively did not participate in the disciplinary process thereafter. Consequently, Gast sacrificed the opportunity to enlighten us about any additional mitigating factors or his current or future fitness to practice law. See *State ex rel. Counsel for Dis. v. Tonderum*, 286 Neb. 942, 840 N.W.2d 487 (2013). Under such circumstances, we have declined to disbar the attorney and instead imposed an indefinite suspension. *Id.* But we caution the bar that failing to participate in the disciplinary process is a very serious matter.

Finally, we consider the appropriate sanction with reference to the sanctions imposed in prior similar cases. See *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017). Prior cases, though factually unique, offer some insight. See, e.g., *State ex rel. Counsel for Dis. v. Keith*, 286 Neb. 551, 840 N.W.2d 456 (2013) (suspended for approximately 4 months pursuant to terms of conditional admission for continuing to represent client after suspension for failure to pay bar dues); *State ex rel. Counsel for Dis. v. Carbullido*, 278 Neb. 721, 773 N.W.2d 141 (2009) (disbarment for successive instances of unauthorized practice of law, multiple

convictions for driving under the influence, and failure to respond to inquiries and charges); *State ex rel. Counsel for Dis. v. Frye*, 278 Neb. 527, 771 N.W.2d 571 (2009) (90-day suspension pursuant to conditional admission for unauthorized practice of law, failure to respond, disciplinary actions in Iowa). We conclude that Relator's recommended sanction for Gast harmonizes with our prior disciplinary cases.

CONCLUSION

Having considered the facts and circumstances of Gast's case, the prior decisions by this court, and his failure to participate in the disciplinary process, and having weighed Gast's present case in view of his prior disciplinary matter, we adopt Relator's recommended sanction of indefinite suspension from the practice of law for a minimum of 1 year. Such suspension shall run consecutively with the suspension previously imposed by this court and shall commence on March 3, 2018. Any application for reinstatement filed by Gast after the minimum suspension period shall include a showing under oath which demonstrates his fitness to practice law and fully addresses the circumstances of the instant violations.

Gast is also directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

Judgment of suspension.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Harold W. Baker, appellant.

903 N.W.2d 469

Filed November 17, 2017. No. S-16-979.

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. **Motions to Suppress: Pretrial Procedure: Trial: 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.
3. **Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
4. **Search Warrants: Probable Cause.** The particularity requirement for search warrants is distinct from, but closely related to, the requirement that a warrant be supported by probable cause.
5. **Search Warrants: Probable Cause: Evidence.** A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause.
6. **Search and Seizure: Search Warrants.** The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another.

7. **Search Warrants: Police Officers and Sheriffs.** A search warrant must be sufficiently particular to prevent an officer from having unlimited or unreasonably broad discretion in determining what items to seize.
8. **Constitutional Law: Search Warrants: Police Officers and Sheriffs.** To satisfy the particularity requirement of the Fourth Amendment, a search warrant must be sufficiently definite to enable the searching officers to identify the property authorized to be seized.
9. **Evidence.** A court must consider whether a statement made by a third party admitted to give context to a party's statement is relevant.
10. **Criminal Law: Evidence.** To evaluate the relevance of a third party's statement for the purpose of providing context, a court must compare the probative value of the defendant's statement with and without the added context; if the third-party statement makes the defendant's statement any more probative, the third-party statement is itself relevant.
11. **Evidence.** When analyzing evidence under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016), courts not only consider the risk of unfair prejudice or other dangers the evidence carries, but weigh those dangers against the probative value of the evidence, determining whether the former substantially outweighs the latter.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Wright, J.

NATURE OF CASE

Harold W. Baker was found guilty by a jury of his peers of murdering Jermaine J. Richey and Derek L. Johnson and attempting to murder Demetrion A. Washington and Lamar A. Nedd. He was sentenced by the court to life imprisonment on each of the two first degree murder convictions, 30 to 40 years' imprisonment on each of the two attempted first degree murder convictions, and 25 to 30 years' imprisonment on each

of the four use of a firearm to commit a felony convictions. Baker appeals.

At issue is whether the search warrant for Baker's residence was unconstitutional because it lacked particularity by authorizing the police to search for "[a]ny and all" firearms in his residence. Also at issue is whether evidence found during the course of and as a result of the search should be suppressed if the warrant were found to be invalid. Baker also claims that the trial court erred by admitting a recording of a telephone conversation that he made to his ex-girlfriend from jail. Because we conclude that the search warrant was sufficiently particular and that the trial court's admission of the telephone conversation was not an abuse of discretion, we affirm.

BACKGROUND

Baker was charged with eight counts: count I, first degree murder, a Class IA felony, for the killing of Richey; count II, use of a firearm to commit a felony, a Class IC felony; count III, first degree murder, a Class IA felony, for the killing of Johnson; count IV, use of a firearm to commit a felony, a Class IC felony; count V, attempted first degree murder, a Class II felony, for the attempted murder of Washington; count VI, use of a firearm to commit a felony, a Class IC felony; count VII, attempted first degree murder, a Class II felony, for the attempted murder of Nedd; and count VIII, use of a firearm to commit a felony, a Class IC felony.

In July 2016, Baker was tried before a jury in the Douglas County District Court. The jury found him guilty on all counts. Baker was sentenced to life imprisonment on each of the two first degree murder convictions, 30 to 40 years' imprisonment on each of the two attempted first degree murder convictions, and 25 to 30 years' imprisonment on each of the four use of a firearm to commit a felony convictions. The court ordered that all of the sentences be served consecutively.

The shooting that led to the deaths of Richey and Johnson occurred outside of an apartment building on Meredith Avenue in Omaha, Nebraska, on December 21, 2014. The building has

entrances on its north and the south sides and parking stalls along its east side. At the time of the shooting, the building was equipped with three security cameras: one monitoring an office inside the building, one monitoring the north entrance, and one monitoring the east parking area.

Prior to the shooting, a blue Crown Victoria—the victims' vehicle—pulled into a parking stall on the east side of the apartment building. One of the building's security cameras showed a black sport utility vehicle (SUV) subsequently park in the east parking area, two parking stalls to the south of the Crown Victoria. At this time, the occupants of the Crown Victoria exited the vehicle and appeared to follow the SUV's occupants into the south entrance of the building.

The security camera on the north entrance to the apartment building showed that at around 5:05 p.m., two individuals walked into the building, with the door opened for them from the inside by a third individual. Neither was openly carrying a rifle, but the individual later identified as Baker walked up the steps in an odd stiff-legged manner, which the prosecution argued at trial was because he was concealing a rifle in his pants.

At around 5:07 p.m., the security camera footage of the east parking area showed the four individuals from the Crown Victoria returning to their vehicle from the apartment building's south entrance. As these four entered the vehicle, two individuals, similar in appearance to the two individuals that had recently entered the north entrance, also came to the east parking area from the area of the south entrance. These two stood waiting behind the nearby SUV while the four other individuals entered the Crown Victoria. One of the two individuals standing waiting pulled out a rifle, held it up to his shoulder, stepped out from behind the SUV, and fired multiple shots into the Crown Victoria. The driver of the Crown Victoria, Richey, slumped over in his seat. The front passenger, Johnson, ran out of the vehicle a short distance before grabbing his chest and falling over. The two rear passengers exited the vehicle.

Johnson died of a gunshot wound to the heart, and Richey died 16 days later from a gunshot wound to the head. After the shooting, police spoke with Washington, who had also been shot. Washington claimed he did not know the shooter. Nedd was also in the Crown Victoria during the shooting and sustained a small injury on his rib cage from glass fragmentation. Nedd claimed not to know the shooter.

Police recovered 30 spent ammunition casings at the scene. All of the recovered casings were from .223-caliber cartridges.

Police obtained a search warrant to search Baker's residence, where he lived with his brother and his brother's family. During the search of Baker's residence, police recovered a blue jacket bearing a distinctive logo and text, similar to the jacket worn by the shooter in the security camera footage, and a .223-caliber semiautomatic rifle with a 30-round magazine containing 18 loaded rounds. Baker was not located at the residence. Police subsequently obtained an arrest warrant for Baker and arrested him.

Testing of DNA samples taken from the rifle and the jacket showed that Baker was very likely a contributor to both samples. Ballistics testing of the rifle showed that 27 of the 30 casings found at the crime scene had been fired from the rifle found in Baker's residence; 3 of the casings were not suitable for comparison.

Baker filed a pretrial motion to suppress any and all evidence found as a result of the search of his residence on the basis that the search warrant was not sufficiently particular.

The search warrant authorized police to search for, among other things: "Any and all unknown make and model firearm(s), to include handguns, rifles, and / or shotguns, along with ammunition, spent projectiles and spent shell casings, and all companion equipment for these firearm(s), including holsters, cleaning kits, sales and/or registration paperwork, and original packaging/boxes."

The warrant affidavit provided, in addition to a description of the build and clothing of the two individuals seen entering

the building and committing the shooting, the following facts: Police reviewed security camera footage from the Meredith Avenue apartment building. They had received an anonymous tip that Baker had bought a gun from Adren Goynes-Wynn, that Baker used the gun in the shooting, and that Baker returned the gun to Goynes-Wynn, who hid the gun in his mother's apartment at the Meredith Avenue apartment building.

The affidavit also stated that police had responded to a shooting at another Omaha residence on January 11, 2015, where numerous .223-caliber casings were found. Prior to that shooting, Baker had come to see his ex-girlfriend, Shyanne Clark. Baker became upset when he observed that there was another man in her residence. Baker made a comment to the effect of "'I'm about to shoot shit up,'" after which Clark heard numerous gunshots outside the residence. Clark told police that Baker had admitted to shooting and killing two individuals at the Meredith Avenue apartment building and that she had seen Baker with a rifle in the past. Clark confirmed the location of Baker's residence. Clark identified Baker as one of the individuals seen on the security camera footage entering the Meredith Avenue building just prior to the shooting based on his wearing of the blue jacket bearing the distinctive logo and text and his "tasseled stocking cap," which she had given him.

The affidavit also said that shooting victim Washington told police that he observed two individuals in the Meredith Avenue apartment building just before they walked out to the parking lot prior to the shooting. Washington said that he had a brief interaction with one of the parties before exiting the building. Out of a photographic lineup array, Washington identified Baker as one of the individuals and Goynes-Wynn as the other individual.

At the hearing on Baker's motion to suppress, the only evidence presented as to the types of weapons capable of firing .223-caliber cartridges was the testimony of an Omaha Police Department detective:

> Q. All right. Concerning the [crime] scene investigation, as I understand it, the only — only casings that were observed or recovered were all the same caliber, this 223?
>
> A. That's correct, sir.
>
> Q. All right. And is 223 something that would be consistent with handguns being able to fire, or do you know?
>
> A. Well, primarily it's a rifle cartridge, but there are rifles that are considered pistols or handguns [by] the [Bureau of Alcohol, Tobacco, Firearms and Explosives], and it's just a shortened version of an M-4 or AR-15 styled rifle, but they are considered nowadays to be pistols.
>
> Q. Okay. But they're basically assault weapons?
>
> A. They're assault weapons, yes, sir.

The trial court overruled Baker's motion to suppress as it related to the search for weapons in his residence, relying on this court's holding in *State v. Tyler*.[1]

On January 21, 2015, the day that he was arrested, Baker telephoned his ex-girlfriend, Clark, from jail. The call was recorded and played for the jury at Baker's trial. A transcript of the call was given to jurors while the call was played, which transcript Clark had reviewed for accuracy. The most relevant portion of the conversation is as follows:

> **Baker:** Man, that shit was crazy. I'm like. I don't know man. It just, I guess, you know, it's meant to be now. Like, but, I can see if like, like if I did the shit, ya know what I mean, like you know and was running and shit but they tryin' to get . . .
>
> **Clark:** The only thing is, [Baker]. The only thing is . . .
>
> **Baker:** Just listen. I'm gonna read my charges. Just listen to this dumb ass shit.

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[1] *State v. Tyler*, 291 Neb. 920, 870 N.W.2d 119 (2015), *cert. denied* 577 U.S. 1159, 136 S. Ct. 1207, 194 L. Ed. 2d 212 (2016).

Clark: I know your charges.

Baker: They talking 'bout four counts of first degree murder.

Clark: No it was two counts of first degree murder. Two counts of attempted murder . . .

Baker: No but now they talkin' 'bout. But now, but now, but . . [.]

Clark: And two counts of use of a firearm for a felony.

Baker: Yes. But what's two. That's what I'm sayin'. Two weapons. No. What what, what, then I'm like, ya knaw I mean?

Clark: Because two people died and that other boy got hit. The only thing is, can you listen to me for a second. The only thing is they have pictures of you at the crime scene.

Baker: Do they?

Clark: Yes.

Clark: Yes. They showed them to me and you can tell that it . . . like you could just tell. Like, they showed me a bunch of pictures.

Clark: Of you at the crime scene. That's what, what got you hit. They had pictures from all of your homeboys['] Facebook[s] []and everything. Their Instagrams, everything.

Baker: But what did I . . . They had pictures, like. Alright, so . . .

Clark: They had pictures of you at the crime scene in your blue jacket. And then they have pictures of you on Facebook wearing your blue jacket. That's how they knew it was you at the crime scene.

Baker: I ain't gon nuttin' on faaa, uhhh.

Clark: They have, they have all of your homies['] Facebook pictures. They had a bunch of people's Facebook pictures, yuh. They showed me a bunch of stuff.

Baker: Damn. Damn. So it's like, so it's like, umm. Well, they tryin' to say I got four counts of murder and four counts of use of weapon. Ya know what I mean?

Clark: No. You just got two counts of murder, two counts of attempted murder.

Baker: What[']s two . . .

Clark: And the felony charge, the felony weapon charges. But you don't have a felony record, ever before any of this, before this, you don't have a felony record so everything's gonna be dropped to second degree. You know that right?

Baker: I don't know.

Clark: Yes. Because it's not like you woke up that morning and was like, ["]hey, let's go kill these mother fuckers["] and planned it all out. It was all, it was either your life or their life. Right?

Baker: Yeah.

Clark: Alright! So that's second degree. You didn't plan it. You had to do what you had to do.

Baker: Aww, shit man. This shit cray cray. I didn't know they came and talked to you, though. But . . [.]

Clark: Yeah, like yeah. I was . . .

Baker: Aight. The pictures, hey, the pictures, did, did they look, were they outside? Like, let me know . . .

Clark: Yeah. They were outside those . . . You could tell they were outside those apartments. It was like you and two other people walking.

Baker: Walkin'?

Clark: Yeah. Like one of you guys were going up the stairs and two of you were following, like not far behind.

Baker: But they got me shootin'. Do they got a picture of me in the action?

Clark: No. No.

Baker: Okay then. Then that's what they need. I didn't fuckin', motherfucker I'm outta state cuz, nigga I didn't want, know what I mean, do it. So, other than if somebody got a make, made up belief, a made up, umm,

> story talkin' bout dat I had it. Know what I mean? And plus how the fuck I'm gon motherfuckin' have a, uh, uh, uh, man, a big ass, know mean gun, on me down there? Like get real. But, man. I just want you by my side. Whatever happens.

At trial, Baker objected to the admission of the telephone conversation based on hearsay and Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 2016). The court overruled the objections, but offered the following limiting instruction to the jury at the time the recording of the conversation was played:

> You're going to hear a phone conversation between . . . Clark and [Baker] that occurred on January 21st, 2015.
>
> The statements made by . . . Clark are not to be considered by you for the truth of the statements she made, but are only received to aid you in providing context for the statements of [Baker]. You must consider . . . Clark's statements for that limited purpose and no other.

A substantially identical instruction was included in the final jury instructions.

At the conclusion of Baker's trial, the jury found him guilty on all counts.

ASSIGNMENTS OF ERROR

Baker claims that the trial court erred in overruling his motion to suppress evidence found during the course of and as a result of the search of his residence. He also claims that the trial court erred in admitting the recorded telephone conversation between him and Clark.

STANDARD OF REVIEW

[1,2] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review.[2] Regarding historical facts, an appellate court reviews the trial

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[2] *State v. Rocha*, 295 Neb. 716, 890 N.W.2d 178 (2017).

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.[3] 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.[4]

[3] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[5]

ANALYSIS

Particularity of Search Warrant: "Any and All" Firearms

Baker argues that the search warrant that authorized the search of his residence for "[a]ny and all" firearms was invalid because it violated the particularity requirement of the Nebraska and U.S. Constitutions.

We note that Baker challenges the validity of the search warrant under both the Nebraska Constitution and the U.S. Constitution. He makes his argument about the particularity requirement under both constitutional provisions together and does not ask us to construe the Nebraska Constitution differently from the U.S. Supreme Court's construction of the U.S. Constitution. We generally construe article I, § 7, of the Nebraska Constitution in lockstep with the U.S. Supreme Court's construction of the Fourth Amendment, and we do so today.[6]

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] See *State v. Rocha, supra* note 2, 295 Neb. at 746, 890 N.W.2d at 202 ("[t]his court typically construes the enumerated rights in the Nebraska Constitution consistently with their counterparts in the U.S. Constitution as construed by the U.S. Supreme Court . . .").

Article I, § 7, of the Nebraska Constitution 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." Similarly, the Fourth Amendment to the U.S. Constitution provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The "'particularity requirement'" thus demands that a warrant describe with particularity (1) "'the place to be searched'" and (2) "'the persons or things to be seized.'"[7] Here, the second part of the particularity requirement is at issue. Baker argues that the search warrant that authorized the seizure of "[a]ny and all" firearms was invalid because it failed to "particularly describ[e] the . . . things to be seized."[8]

It is well established that the primary historical factor leading to the adoption of the Fourth Amendment was the use of "'general warrants'" and "'writs of assistance'" by the British against American colonists, authorizing government officials to rummage through a person's belongings with no limitation on the scope of the search.[9] The Fourth Amendment barred such searches by requiring that warrants "'"particularly

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[7] *United States v. Grubbs*, 547 U.S. 90, 97, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006). Accord, U.S. Const. amend. IV; Neb. Const. art. I, § 7.

[8] See U.S. Const. amend. IV. Accord Neb. Const. art. I, § 7.

[9] See, *Payton v. New York*, 445 U.S. 573, 583 n.21, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971); *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965); *State v. Sprunger*, 283 Neb. 531, 811 N.W.2d 235 (2012). See, generally, Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 Stan. L. Rev. 1005 (2010) (discussing history of Fourth Amendment, general warrants, and particularity requirement); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531 (2005) (same); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547 (1999) (same).

describ[e] the place to be searched, and the persons or things to be seized."'"[10]

[4,5] The particularity requirement is distinct from, but closely related to, the requirement that a warrant be supported by probable cause.[11] A warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause.[12] Here, Baker does not claim that the affidavit in support of the warrant does not establish probable cause to search for "[a]ny and all" firearms, but only that the warrant's description was insufficiently particular.

[6-8] Discussing the Fourth Amendment's particularity requirement, the U.S. Supreme Court nearly a century ago said, "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[13] While it is not literally true that a warrant must be of such precise specificity that an officer has no discretion whatsoever in the execution of the search, a warrant must be sufficiently

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[10] *Payton v. New York, supra* note 9, 445 U.S. at 585. See, also, *U.S. v. Sanjar*, 853 F.3d 190 (5th Cir. 2017).

[11] 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.6(a) at 766 (5th ed. 2012 & Supp. 2017) ("requirement of particularity is closely tied to the requirement of probable cause"). See, also, *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987).

[12] 2 LaFave, *supra* note 11, § 4.6(a).

[13] *Marron v. United States*, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231 (1927). See, also, *Steele v. United States No. 1*, 267 U.S. 498, 504, 45 S. Ct. 414, 69 L. Ed. 757 (1925) (concluding that warrant's description of "'cases of whiskey'" was sufficiently particular); *State v. Tyler, supra* note 1; *State v. Henderson*, 289 Neb. 271, 854 N.W.2d 616 (2014).

particular to prevent the officer from having unlimited or unreasonably broad discretion in determining what items to seize.[14] The Eighth Circuit has explained that "'[t]o satisfy the particularity requirement of the fourth amendment, the warrant must be sufficiently definite to enable the searching officers to identify the property authorized to be seized.'"[15] The particularity requirement is one of "'practical accuracy rather than' of hypertechnicality."[16] But a warrant may not validly authorize a "general exploratory rummaging in a person's belongings" or "'fishing expeditions.'"[17]

Regarding the degree of particularity required in a warrant, the Sixth Circuit said:

> The degree of specificity required depends on the crime involved and the types of items sought. . . . The use of a generic term or a general description is not per se violative of the fourth amendment. . . . When a more specific description of the items to be seized is unavailable, a general description will suffice.[18]

Similarly, the Fifth Circuit has said, "Generic language may satisfy th[e] 'particularity' requirement if describing a more

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[14] See, *U.S. v. Triplett*, 684 F.3d 500, 504 (5th Cir. 2012) ("Fourth Amendment requires that warrants 'particularly describ[e] the place to be searched, and the persons or things to be seized.' . . . Some interpretation is unavoidable"); *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968); 2 LaFave, *supra* note 11, § 4.6(a).

[15] *U.S. v. Sigillito*, 759 F.3d 913, 923 (8th Cir. 2014). See, also, *U.S. v. Sanjar, supra* note 10, 853 F.3d at 200 (requiring "enough detail in the warrant to allow a reasonable agent to know what items she is permitted to take").

[16] *U.S. v. Sigillito, supra* note 15, 759 F.3d at 923. See, also, *U.S. v. Triplett, supra* note 14, 684 F.3d at 504 ("[r]easonable specificity is required, not 'elaborate detail'").

[17] *State v. Sprunger, supra* note 9, 283 Neb. at 539, 811 N.W.2d at 243. See, also, *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152 (Minn. 2017) (Anderson, J., dissenting; Stras, J., joins in part).

[18] *U.S. v. Blakeney*, 942 F.2d 1001, 1026-27 (6th Cir. 1991) (citations omitted).

specific item is not possible."[19] And "'[t]he degree of specificity required will depend on the circumstances of the case and on the type of items involved.'"[20]

The Ninth Circuit has articulated the following factors for analyzing the particularity of a warrant:

> In determining whether a description is sufficiently precise, we have concentrated on one or more of the following: (1) whether probable cause exists to seize all items of a particular type described in the warrant . . . ; (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not . . . ; and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued.[21]

In *State v. Tyler*,[22] this court considered the validity of a search warrant that authorized police to search for and seize "'[a]ny and all firearms.'" Police had recovered shell casings at the scene of the crime and had learned that the defendant had purchased a pistol capable of firing that type of ammunition. There were around 20 types of guns capable of firing that type of ammunition.[23] The defendant filed a motion to suppress the handgun found in the execution of the search warrant, which motion the trial court overruled. He argued that the warrant was insufficiently particular because police knew the caliber of firearm used in the crime, but the

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[19] *U.S. v. Sanjar, supra* note 10, 853 F.3d at 200. See, also, *U.S. v. Pulliam*, 748 F.3d 967, 972 (10th Cir. 2014) ("'warrant that describes the items to be seized in broad or generic terms may be valid when the description is as specific as the circumstances and the nature of the activity under investigation permit'"), cited by *State v. Tyler, supra* note 1.

[20] *U.S. v. Sigillito, supra* note 15, 759 F.3d at 923.

[21] *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986).

[22] *State v. Tyler, supra* note 1, 291 Neb. at 934, 870 N.W.2d at 130.

[23] *State v. Tyler, supra* note 1.

warrant authorized a search for "'[a]ny and all firearms.'"[24] We rejected this argument, reasoning:

> This provision was not open-ended. It authorized police to search for firearms and companion equipment; the scope of the search was not left to the discretion of the officers. Furthermore, the nature of the activity under investigation justifies its scope. Police were investigating a murder performed with a gun. They learned from the crime lab that about 20 guns were capable of firing the bullets recovered from the scene. The provision was sufficiently particular.[25]

Here, we reject Baker's argument that the provision of the search warrant authorizing police to search for "[a]ny and all" firearms was insufficiently particular. Importantly, Baker does not argue that probable cause was lacking for police to search for any and all firearms. Thus, we need not address whether there was probable cause to authorize a search for any and all firearms, including handguns and shotguns, where the crime scene evidence (the shell casings found and the shot-up Crown Victoria) and the security camera footage indicated that the gun used was likely a rifle. Rather, Baker argues that the warrant was lacking in particularity.

The search warrant was sufficiently particular because it told police with reasonable clarity which items to search for and seize. It did not authorize a "'fishing expedition[]'" through Baker's residence.[26] Even without specifying a particular caliber of firearm, the description of "[a]ny and all" firearms, followed by the exemplary list of types of firearms, was "'sufficiently definite to enable the searching officers to identify the property authorized to be seized.'"[27] Police were

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[24] *Id.* at 934, 870 N.W.2d at 130

[25] *Id.* at 935, 870 N.W.2d at 131.

[26] See *State v. Sprunger, supra* note 9, 283 Neb. at 539, 811 N.W.2d at 243.

[27] See *U.S. v. Sigillito, supra* note 15, 759 F.3d at 923.

not given open-ended discretion as to which items they could search for and seize.

Because the provision of the search warrant authorizing police to search for and seize "[a]ny and all" firearms did not run afoul of the particularity requirement of the U.S. and Nebraska Constitutions, the trial court properly denied Baker's motion to suppress. Because the search warrant was valid, we need not address whether the DNA swabs obtained from the rifle found in the search are "'fruit of the poisonous tree.'"[28]

Hearsay and Rule 403: Jail Telephone Call

Baker claims that the trial court improperly admitted a recorded telephone call between him and Clark, his ex-girlfriend, that he made from jail. He argues that the trial court erred in admitting the call over his hearsay and rule 403 objections.

At Baker's trial, the court allowed the prosecution to play for the jury a recorded telephone call between Baker and Clark. Baker objected to the admission of Clark's statements in the telephone conversation on hearsay and rule 403 grounds. The trial court gave a limiting instruction to the jury that Clark's statements were admissible for the limited purpose of providing context to Baker's statements and should not be considered for the truth of the matter asserted.

Baker asserts that the correct analytical framework for reviewing the admissibility of Clark's statements is the framework set forth in *State v. Rocha*.[29] Because this case similarly involves the admissibility of statements made by a third party admitted for the limited purpose of providing context to the statements of a party, we agree.

In *Rocha*, we considered the admissibility of statements made by a police officer within a recorded police interview with the defendant, in which the officer made statements

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[28] See brief for appellant at 22.

[29] *State v. Rocha, supra* note 2.

regarding the guilt and veracity of the defendant. A video recording of the interview was played for the jury, and the trial court gave a limiting instruction explaining that the officer's statements were interrogation techniques and that the statements should not be considered as substantive evidence or considered in any way when evaluating the defendant's guilt or the truth of any of his statements.

In *Rocha*, we elected to analyze such statements under the normal rules of evidence rather than to adopt a special rule for such evidence.[30] In doing so, we advised courts that when considering the admissibility of such statements, they must "do more than offer 'a mechanical recitation'" that the third party's statements are necessary to provide context.[31]

First, we said that absent some ground for admissibility as substantive evidence, such third party, out-of-court statements are not admissible to prove the truth of the matter asserted in the statements, for this would violate the hearsay rule.[32] And we said that "[u]pon request, a defendant is entitled to a limiting instruction that such [third-party] statements are to be considered only for the [limited] permissible purpose of providing context to the defendant's statements."[33]

[9,10] Next, we said that a court must consider whether the statement made by a third party admitted to give context to a party's statement is relevant. To evaluate the relevance of the third party's statement for the purpose of providing context, a court must compare the probative value of the defendant's statement with and without the added context; if the third-party statement makes the defendant's statement any more probative, the third-party statement is itself relevant.[34]

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[30] See *People v. Musser*, 494 Mich. 337, 835 N.W.2d 319 (2013).

[31] *State v. Rocha, supra* note 2, 295 Neb. at 738, 890 N.W.2d at 198.

[32] *State v. Rocha, supra* note 2; Neb. Evid. R. 801 and 802, Neb. Rev. Stat. §§ 27-801 and 27-802 (Reissue 2016).

[33] *State v. Rocha, supra* note 2, 295 Neb. at 741, 890 N.W.2d at 199.

[34] *Id.*

We then said that a court must consider whether the third-party statement runs afoul of rule 403.[35] This rule allows for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[36] In determining whether the danger of unfair prejudice substantially outweighed the probative value in *Rocha*, we looked to several considerations.[37] We considered the fact that the third-party statements were made by a police officer, which could induce improper reliance by the jury because the statements carried the "'imprimatur of the government.'"[38] But we also considered the fact that a limiting instruction was given in the case, which mitigated the risk of improper reliance on the officer's statements. We concluded that while the case was a "close call" and "approache[d] the line," the trial court's admission of the statements did not rise to the level of an abuse of discretion.[39]

Here, Clark's statements to Baker are plainly relevant. Baker's statements have far more probative value when considered in the context of Clark's statements to which he is responding. For example, Baker's statement "Do they?" is far more probative when considered in light of Clark's preceding statement, "[T]hey have pictures of you at the crime scene." Baker's statement "Yeah" is far more probative with the context of Clark's preceding statement, "[I]t's not like you woke up that morning and was like, 'hey, let's go kill these mother fuckers' and planned it all out. It was all, it was either your life or their life. Right?" Clark's statements are intertwined with Baker's responses throughout the conversation. Plainly, her

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[35] *State v. Rocha, supra* note 2; § 27-403.

[36] § 27-403.

[37] *State v. Rocha, supra* note 2.

[38] *Id.* at 743, 890 N.W.2d at 201.

[39] *Id.* at 744, 890 N.W.2d at 201.

statements have probative value for the purpose of providing context to Baker's own statements, which could not be fully understood standing alone.

And the trial court did not abuse its discretion in concluding that the probative value of Clark's statements was not substantially outweighed by the risk of unfair prejudice under rule 403. Certainly, Clark's statements carried with them some risk of prejudice. She made comments about police having pictures of Baker from social media, having pictures of him at the crime scene and identifying him based on his clothing, and even suggesting that he committed the killings but that they were not premeditated. But the evidence identifying Baker at the crime scene from the security camera footage based on his clothing was presented to the jury; Clark's comments on this evidence were not *unfairly* prejudicial. And unlike the facts in *Rocha*, the statements were not made by a police officer or other official with the "'imprimatur of the government'"; nor did they question the veracity of a defendant's claims to innocence.[40]

[11] And when analyzing evidence under rule 403, courts not only consider the risk of unfair prejudice or other dangers the evidence carries, but weigh those dangers against the probative value of the evidence, determining whether the former substantially outweighs the latter.[41] Here, Clark's statements carried substantial probative value by providing necessary context to Baker's statements. Even Clark's statement suggesting that Baker committed but did not plan the killings provides irreplaceable context to Baker's responses: "Yeah" and "Aww, shit man. This shit [is] cray cray." Baker's effective admission to, or at least lack of denial of, committing the killings cannot be understood without the context of Clark's preceding statements. Clark's statements here carry far more probative weight than those made by the officer in *Rocha*,

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[40] *Id.* at 743, 890 N.W.2d at 201.

[41] *State v. Rocha, supra* note 2.

many of which bore a tenuous connection to the defendant's statements.

Thus, Clark's statements carried both some risk of unfair prejudice and significant probative value. Whether the former substantially outweighed the latter is a question left to the discretion of the trial court. We conclude that the trial court did not abuse its discretion by determining that the admission of the telephone call, including Clark's statements, did not violate rule 403 and overruling Baker's objections to its admission.

CONCLUSION

The search warrant that authorized police to search for and seize any and all firearms in Baker's residence did not violate the constitutional particularity requirement. The warrant was sufficiently definite to enable police to know what items they were authorized to search for and seize. And while the admission of statements made by Clark, Baker's ex-girlfriend, as part of the recorded telephone conversation between her and Baker carried some risk of prejudice, the trial court did not abuse its discretion in concluding that the risk of unfair prejudice did not substantially outweigh the probative value of those statements to give necessary context to Baker's statements. We affirm.

Affirmed.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Curtis H. Lavalleur, appellant.
903 N.W.2d 464

Filed November 17, 2017. No. S-17-139.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Judgments: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Evidence: Appeal and Error.** The overruling of a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review.
4. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
5. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.
6. **Actions: Appeal and Error.** The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution. Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.

Appeal from the District Court for Lancaster County: Andrew R. Jacobsen, Judge. Affirmed and remanded for further proceedings.

Joseph D. Nigro, Lancaster County Public Defender, Webb E. Bancroft, John C. Jorgensen, and Katherine Lesiak, Senior Certified Law Student, for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Cassel, J.

INTRODUCTION

Curtis H. Lavalleur appeals from an order denying his second plea in bar, asserting a double jeopardy violation. But Lavalleur does not challenge the operative information; rather, he seeks advance review of evidence that may be offered upon retrial. Because there have been no final evidentiary rulings, this issue lies outside of the scope of our jurisdiction over this appeal. We affirm the district court's denial of Lavalleur's plea in bar.

BACKGROUND

This is the third time this case has been before this court on appeal and the second time Lavalleur has entered a plea in bar on double jeopardy grounds. Because a thorough factual background is already chronicled in our 2014[1] and 2016[2] opinions in this case, only those facts relevant to this appeal will be repeated.

The State originally charged Lavalleur with first degree sexual assault (digital penetration) and attempted first degree sexual assault (penile penetration). The attempted first degree sexual assault charge alleged that Lavalleur "did attempt to subject [the victim] to sexual penetration without her consent."

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[1] *State v. Lavalleur*, 289 Neb. 102, 853 N.W.2d 203 (2014).

[2] *State v. Lavalleur*, 292 Neb. 424, 873 N.W.2d 155 (2016).

After a jury trial, Lavalleur was acquitted of first degree sexual assault and convicted of attempted first degree sexual assault. Lavalleur appealed this conviction, and we reversed the judgment and remanded the cause for a new trial after finding reversible error.[3] The acquittal of first degree sexual assault remained in full effect.

On remand, the State sought and was granted leave to file an amended information over Lavalleur's objection. In its amended information, the State again charged Lavalleur with one count of attempted first degree sexual assault. However, as well as alleging that Lavalleur attempted to subject the victim to penile penetration without her consent, the State alleged in the alternative that the victim was mentally or physically incapable of consenting. In response, Lavalleur entered his first plea in bar on double jeopardy grounds. After the district court denied it, Lavalleur timely appealed the matter to this court.[4]

In reviewing Lavalleur's assignment of error on appeal, we examined the record to find that the jury had already addressed the victim's capacity to consent. We reasoned that where Lavalleur admitted to the alleged digital penetration at issue in the first degree sexual assault charge, the jury must have found that the victim consented to the digital penetration to return a not guilty verdict on that charge. And, if the jury found that the victim consented, it clearly had to find that the victim was capable of consenting. Because we also determined "on these facts it is not possible for [the victim] to be capable of consenting to digital penetration but incapable of consenting to penile penetration," we concluded that capacity to consent could not be relitigated as to the attempted first degree sexual assault charge.[5] Accordingly, we reversed, and remanded for further proceedings.

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[3] *Lavalleur, supra* note 1.

[4] *Lavalleur, supra* note 2.

[5] *Id.* at 432, 873 N.W.2d at 160.

On remand, the State filed a second amended information. This time, the State alleged only that Lavalleur attempted to subject the victim to penile penetration without her consent. Lavalleur subsequently filed a motion in limine seeking to prohibit testimony concerning "[a]ny claim or assertion of incapacity, state of consciousness or intoxication," on the grounds that such matters were irrelevant and would subject him to the risk of double jeopardy.

A hearing was held on the motion at which the State explained it intended to elicit testimony that the victim was asleep before the incident, but awake when Lavalleur was attempting to penetrate her with his penis. The State reasoned that the testimony would not be presented to support a diminished capacity argument, but merely to provide context for why the victim could not remember portions of the evening. The court overruled the motion in limine to allow the victim to testify that she fell asleep, with the following admonishment:

> I'm not going to allow the State to say, well, were you too intoxicated and is that why you were asleep, was it the effects of marijuana or to argue . . . that . . . Lavalleur knew or should have known that she was mentally or physically incapable of resisting or appraising the nature of her conduct.

Because Lavalleur maintained that such evidence concerned capacity to consent, an issue of fact which the jury had previously decided in Lavalleur's favor, he filed a second plea in bar before trial. After the district court denied the plea, Lavalleur brought this timely appeal.

ASSIGNMENTS OF ERROR

Lavalleur assigns that the district court erred in denying his plea in bar and permitting the introduction of evidence to prove criminal allegations previously determined by the jury, in violation of the Double Jeopardy Clauses of the federal and state Constitutions.

STANDARD OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law.[6] On a question of law, an appellate court reaches a conclusion independent of the court below.[7]

ANALYSIS

Lavalleur frames the issue in this appeal as one of collateral estoppel and attempts to challenge the district court's overruling of his motion in limine before trial. Specifically, he asserts that "the District Court's orders denying [his] Motion in Limine and Plea in Bar are inconsistent with the United States and the Nebraska State Constitutional protections against double jeopardy."[8]

[3] But the overruling of a motion in limine is not a final ruling on the admissibility of evidence and does not present a question for appellate review.[9] In other words, it is outside the scope of our review of Lavalleur's plea in bar. Accordingly, we must limit our analysis to whether the State's second amended information places Lavalleur at risk of double jeopardy. At oral argument, Lavalleur essentially conceded that it does not.

[4] The Double Jeopardy Clauses of both the federal and Nebraska Constitutions protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[10] In this case, the State's second amended information is identical to the attempted first degree sexual assault charge for which Lavalleur was originally convicted. We reversed that

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[6] *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

[7] *Id.*

[8] Brief for appellant at 20.

[9] *State v. Schmidt*, 276 Neb. 723, 757 N.W.2d 291 (2008).

[10] *State v. Ballew*, 291 Neb. 577, 867 N.W.2d 571 (2015).

conviction in his first appeal after finding prejudicial evidentiary errors, and remanded the cause for a new trial. In doing so, we held that the federal and state Double Jeopardy Clauses did not forbid a retrial on the attempted first degree sexual assault charge.[11]

[5,6] Under the law-of-the-case doctrine, the holdings of an appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.[12] The law-of-the-case doctrine operates to preclude a reconsideration of substantially similar, if not identical, issues at successive stages of the same suit or prosecution.[13] Matters previously addressed in an appellate court are not reconsidered unless the petitioner presents materially and substantially different facts.[14]

Here, Lavalleur has presented no facts distinguishing the second amended information from the attempted first degree sexual assault charge in the original information. Because we previously determined retrial on the attempted first degree sexual assault charge of the original information did not implicate double jeopardy, we necessarily conclude that double jeopardy is not implicated with the second amended information.

In our limited review of Lavalleur's plea in bar at this stage of the prosecution, the law of the case drives our decision that the second amended information did not place Lavalleur at risk of double jeopardy. As a result, the district court was correct in denying his plea in bar.

We unreservedly reject Lavalleur's attempt, however artful, to package future evidentiary rulings into a plea in bar. As we

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[11] *Lavalleur, supra* note 1.

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

[13] *Id.*

[14] *Id.*

have already explained, the evidence that may be offered at trial remains to be determined. The parties have endeavored to entice us into rendering an advisory opinion, but we decline to do so.

CONCLUSION

We affirm the order of the district court denying Lavalleur's plea in bar, and we remand the cause for further proceedings consistent with this opinion.

Affirmed and remanded for
further proceedings.

Wright and Stacy, JJ., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

James R. Zeleny, appellant, v. State of Nebraska, appellee.

904 N.W.2d 10

Filed December 1, 2017. No. S-16-953.

1. **Judgments: Appeal and Error.** Generally, the appropriate standard of review for an order granting relief by way of a writ of prohibition is de novo.
2. **Jurisdiction: Final Orders: Appeal and Error.** An appellate court has jurisdiction to review a judgment rendered or final order made by the district court.
3. **Judgments: Final Orders: Words and Phrases.** According to Neb. Rev. Stat. § 25-1301(1) (Reissue 2016), a judgment is the final determination of the rights of the parties in an action.
4. **Actions: Jurisdiction.** A motion for a writ of prohibition is an action.
5. **Judgments: Final Orders: Jurisdiction: Appeal and Error.** An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken.
6. **Final Orders: Jurisdiction: Appeal and Error.** An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal. But that jurisdiction does not extend to issues that are not presented by the final order, because an appellate court's jurisdiction to grant relief pursuant to Neb. Rev. Stat. § 25-1911 (Reissue 2016) is limited to reversal, vacation, or modification of the final order from which the appeal is taken.
7. **Jurisdiction: Words and Phrases.** In modern practice, the writ of prohibition is an extraordinary writ, issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has control, or from exceeding its legitimate powers in a matter of which is has jurisdiction.
8. ____: ____. Prohibition is a preventative remedy rather than a corrective one.

9. **Jurisdiction.** Mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to the extraordinary remedy by prohibition, both because there has been no usurpation or abuse of power and because there exist other adequate remedies.
10. ____. In general, three things are necessary to justify the issuance of a writ of prohibition: (1) that the court, officer, or person against whom it is directed is about to exercise judicial or quasi-judicial power; (2) that the exercise of such power by such court, officer, or person is unauthorized by law; and (3) that it will result in injury for which there is no other adequate remedy.

Appeal from the District Court for Fillmore County: Ricky A. Schreiner, Judge. Affirmed.

Chad J. Wythers, of Berry Law Firm, for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

James R. Zeleny's petition for a writ of prohibition was denied. He appeals. We affirm.

FACTUAL BACKGROUND

Zeleny was charged by information in the county court with operating a motor vehicle "while under the influence of alcoholic liquor or . . . when he had a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath." That charge was enhanced with the allegation that Zeleny's alcohol level was "fifteen hundredths of one gram or more by weight of alcohol per two hundred ten liters of his breath."

Pursuant to a plea agreement, Zeleny was charged with "driving under the influence of alcohol, first offense, under

.15." A separate charge of failure to give information at an accident scene was dismissed. Zeleny was given verbal notice of this amendment at a hearing on the plea agreement, but the original complaint was not amended by interlineation and an amended information was not filed. Zeleny pled guilty to the single charge, as verbally amended.

At the hearing before the county court, a factual basis for the crime was established, with the State indicating Zeleny had called law enforcement to report that he was involved in a single-vehicle accident. Zeleny reported that he had crashed into some cattle, drove the vehicle involved in the crash to his home, and returned to the scene in a different vehicle. The responding officer observed the odor of alcohol on Zeleny's person and noted that Zeleny's voice was slurred and his eyes were watery and bloodshot. Zeleny failed a preliminary breath test and field sobriety tests. He was arrested and transported to a nearby hospital, where a blood sample was drawn. That sample tested at a blood alcohol content of .297.

Prior to sentencing, Zeleny filed a motion to arrest judgment in the county court, which was denied. Zeleny then filed a petition for a writ of prohibition with the district court, asking that the court restrain the county court from sentencing him in the underlying case for driving under the influence. Zeleny's petition for a writ was denied. The basis for both motions was Zeleny's contention that there was an insufficient factual basis to support his plea; specifically, Zeleny argues that he was charged with driving under the influence by a measurement of *breath*, while the factual basis indicated that the crime was committed by a measurement of *blood*. Zeleny appeals.

ASSIGNMENTS OF ERROR

Zeleny assigns that (1) the county court erred in denying appellant's motion to arrest judgment and (2) the district court erred in denying his motion for a writ of prohibition.

STANDARD OF REVIEW

[1] Generally, the appropriate standard of review for an order granting relief by way of a writ of prohibition is de novo.[1]

ANALYSIS

Issues on Appeal.

As an initial matter, we must consider what issues are before us in this appeal. Zeleny attempts to appeal the county court's denial of his motion to arrest judgment and the district court's denial of his motion for a writ of prohibition. The State contends that only the denial of the motion for a writ of prohibition is properly before us.

[2-4] An appellate court has jurisdiction to review a "judgment rendered or final order made by the district court."[2] According to Neb. Rev. Stat. § 25-1301(1) (Reissue 2016), a "judgment is the final determination of the rights of the parties in an action." We have previously indicated that a motion for a writ of prohibition is an action.[3] The denial of Zeleny's writ of prohibition, then, was a final determination of that action. Thus, the assignment of error relating to the writ of prohibition is properly before this court.

[5,6] But we do not have jurisdiction over the denial of the motion to arrest judgment filed in the county court. An appellate court's jurisdiction is limited to the judgment or final order from which the appeal is taken.[4] An appeal from a final order may raise, on appeal, every issue presented by the order that is the subject of the appeal. But that jurisdiction does not extend to issues that are not presented by the final order, because an appellate court's jurisdiction to grant relief pursuant to Neb. Rev. Stat. § 25-1911 (Reissue 2016) is limited

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[1] 72A C.J.S. *Prohibition* § 91 (2015).

[2] Neb. Rev. Stat. § 25-1911 (Reissue 2016).

[3] *State, ex rel. Wright, v. Barney*, 133 Neb. 676, 276 N.W. 676 (1937).

[4] *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

to reversal, vacation, or modification of the final order from which the appeal is taken.[5]

In other words, while an appellate court can reverse, vacate, or modify a final order, it cannot address issues that do not bear on the correctness of the final order upon which its appellate jurisdiction is based.[6] Without opining on the finality of the county court's order denying Zeleny's motion to arrest judgment, we observe that it appears Zeleny did not file a separate notice of appeal from that order. And even if he had filed a notice of appeal in the county court, the appeal would have run to the district court in a separate proceeding from that initiated by Zeleny's petition for a writ of prohibition. The motion to arrest judgment is simply not before us. As such, we lack jurisdiction to determine the merits of Zeleny's first assignment of error relating to the county court's denial of the motion to arrest judgment.

Writ of Prohibition.

We turn to Zeleny's contention that the district court erred in denying the petition seeking a writ of prohibition.

[7] In modern practice, the writ of prohibition is an extraordinary writ, issued by a superior court to an inferior judicial tribunal to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has control, or from exceeding its legitimate powers in a matter of which is has jurisdiction.[7]

[8,9] Prohibition is a preventative remedy rather than a corrective one.[8] Mere error, irregularity, or mistake in the proceedings of a court having jurisdiction does not justify a resort to

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[5] See *id.*

[6] *Id.*

[7] *Conkling v. Delany*, 167 Neb. 4, 91 N.W.2d 250 (1958).

[8] *State of Nebraska ex rel. Line v. Kuhlman*, 167 Neb. 674, 94 N.W.2d 373 (1959).

the extraordinary remedy by prohibition, both because there has been no usurpation or abuse of power and because there exist other adequate remedies.[9] Whatever power is conferred may be exercised, and, if it is to be exercised injudiciously or irregularly, it amounts to an error merely, and not a usurpation or excess of jurisdiction.[10]

Prohibition is a counterpart to a writ of mandamus in that the writ of mandamus is used to compel the performance of certain activities, while a writ of prohibition is used to restrain the performance of certain activities.[11] A writ of prohibition is the legal equivalent of the equitable remedy of injunction.[12]

[10] In general, three things are necessary to justify the issuance of a writ of prohibition: (1) that the court, officer, or person against whom it is directed is about to exercise judicial or quasi-judicial power; (2) that the exercise of such power by such court, officer, or person is unauthorized by law; and (3) that it will result in injury for which there is no other adequate remedy.[13]

In this case, we agree that the county court is set to sentence Zeleny, which is a judicial power. But the exercise of this power was not unauthorized by law. Contrary to Zeleny's suggestion otherwise, it is plain that a county court has, on these facts, the jurisdiction to sentence Zeleny for his driving under the influence conviction.

Moreover, the issuance of a writ of prohibition was not the only remedy to cure Zeleny's claimed injury. Zeleny complains that his plea was not supported by a sufficient factual basis. Assuming without deciding that this was the case, other

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[9] *Conkling v. DeLany, supra* note 7.

[10] *Id.*

[11] 72A C.J.S., *supra* note 1, § 1.

[12] *Id.*

[13] See, *Line v. Rouse*, 241 Neb. 779, 491 N.W.2d 316 (1992); *State of Nebraska ex rel. Line v. Kuhlman, supra* note 8.

remedies are available to him. Zeleny could move to withdraw his plea, or he could appeal from his conviction following sentencing. Zeleny has failed to meet the standards for the issuance of such an extraordinary writ.

There is no merit to Zeleny's second assignment of error.

CONCLUSION

The decision of the district court is affirmed.

Affirmed.

Wright, J., not participating.

Nebraska Supreme Court
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-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Dominique Hairston, appellant.

904 N.W.2d 1

Filed December 1, 2017. No. S-16-965.

1. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
2. **Criminal Law: Juror Misconduct: Proof.** A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial.
3. **Juror Misconduct: Proof: Appeal and Error.** When an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed.
4. **Prosecuting Attorneys: Appeal and Error.** When considering a claim of prosecutorial misconduct, an appellate court first considers whether the prosecutor's acts constitute misconduct.
5. **Prosecuting Attorneys: Witnesses: Perjury.** It is not improper per se for a prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely. But warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

William J. O'Brien for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

NATURE OF CASE

Dominique Hairston appeals his convictions in the district court for Douglas County for unlawful discharge of a firearm and use of a weapon to commit a felony. Hairston claims the district court erred when it denied him a new trial based on his allegations of juror misconduct and prosecutorial misconduct. We reject Hairston's claims and affirm his convictions.

STATEMENT OF FACTS

On July 30, 2015, police officers responded to reports of a shooting in the area of South 33d and Q Streets in Omaha, Nebraska. Police found a dark blue Oldsmobile parked near a convenience store on Q Street. Police learned that shots had been fired into the Oldsmobile from another vehicle that was passing it in an adjacent lane. Four adults and two children had been inside the Oldsmobile at the time, and one of the adult occupants was injured by a gunshot to the neck. Police found another vehicle, a silver Saturn, stopped a short distance away on South 33d Avenue; it appeared that the Saturn had been disabled after it struck the curb of a storm drain after turning onto South 33d Avenue from Q Street. Witnesses stated that three men had run from the Saturn after it stopped.

The registered owner of the Saturn was Lafferrell Matthews. Officers investigating the shooting found Matthews in the area near South 33d and S Streets. When the officers approached Matthews, he told them he had been looking for police in order to report that his car had been stolen. In later questioning by police, Matthews initially repeated that his car had been stolen

but he eventually admitted that he was driving the Saturn at the time the shooting occurred. Matthews further told police that Hairston and another man, Nico Wofford, were passengers in the Saturn.

Hairston and Wofford were each charged with unlawful discharge of a firearm and use of a weapon to commit a felony, and the two were tried in a consolidated trial. Matthews, who was charged with the same offenses but whose case was not consolidated with the others, testified at Hairston and Wofford's consolidated trial.

Matthews testified that on July 30, 2015, he was driving his Saturn and Hairston and Wofford were passengers, with Hairston in the front passenger seat and Wofford in the back seat on the passenger side. Matthews first noticed the Oldsmobile in front of his Saturn when he was stopped at a light at the intersection of South 30th and Q Streets. Matthews testified that Hairston said that he recognized the Oldsmobile. After going through the intersection of South 30th and Q Streets, Matthews moved into the left lane to pass the Oldsmobile, which was in the right lane. As he was passing the Oldsmobile, Matthews heard three or four shots coming from the back seat of his Saturn, where Wofford was located. Matthews testified that he then saw Hairston pull out a handgun, lean out the window, and fire six or seven shots.

The State presented other evidence, including, inter alia, testimony by various police officers who had investigated the shooting. During the testimony of one of the officers, the State offered into evidence a DVD containing a surveillance camera video that was taken from a restaurant located near the site of the shooting. The video depicted the Saturn passing the Oldsmobile as the shooting occurred. The State also offered a DVD containing a redacted version of the video in which the image was slowed down and enlarged. Both DVD's offered by the State were received into evidence without objection, and they were played for the jury while the State questioned the officer regarding what was being depicted in the videos.

Hairston testified in his own defense as follows: On July 30, 2015, Hairston rode with Matthews in Matthews' car; the purpose of their trip was for Hairston to pick up marijuana at a location on South 30th Street. Matthews dropped Hairston off near the corner of South 29th and S Streets, and Hairston then walked to the location, where he purchased marijuana. Hairston returned to the spot where Matthews had dropped him off, but Matthews was no longer there. After a few minutes, Hairston decided that because Matthews had not returned, he would walk home. On the way, Hairston saw a friend, Kayla Cash, driving by; he waved her down, and she gave him a ride the rest of the way. Hairston testified that on July 30, he did not ride in Matthews' car with both Matthews and Wofford, he did not shoot at another vehicle from Matthews' car, and he did not shoot a gun at all that day.

Hairston attempted to call Cash as a witness in his defense, but Cash invoked her Fifth Amendment right to remain silent. Cash had a pending charge of accessory to a felony related to Hairston's and Wofford's cases, and she invoked her Fifth Amendment rights upon the advice of her attorney.

The case was submitted to the jury, and the jury rendered verdicts finding Hairston guilty on both counts. After the jury was dismissed, Wofford's counsel was approached by a juror who told him that during deliberations, jurors had viewed a "mirror-image" of the surveillance video that had been played in court. Wofford's counsel later spoke with the jury foreperson, who said that he and another juror had used a feature on the laptop computer that had been provided to the jury to play a reversed or mirror image of the surveillance video. The foreperson further said that after viewing the mirror image, the two had called over other jurors to view the mirror image. The foreperson and another juror told counsel that when they viewed the mirror image, they could see an arm coming out of the back seat window of the vehicle and a front seat passenger in a white shirt and that they had not noticed these things when they had viewed the video in the original manner.

Hairston thereafter filed a motion for a new trial in which he alleged three bases for a new trial. First, he alleged that there was prosecutorial misconduct because Cash had told Hairston's counsel that before she decided to invoke her Fifth Amendment right to remain silent, the prosecutor told her that if she testified in Hairston's defense, she could be prosecuted for perjury. Hairston argued that the prosecutor's statement caused Cash to refuse to testify. Second, Hairston alleged that there was an irregularity in the proceedings, because during deliberations, the court provided the jury with a laptop device—rather than a television as requested by the jury—which allowed the jury to view a mirror image of the surveillance video. Finally, Hairston alleged that that there was juror misconduct because jurors viewed a mirror image of the surveillance video; he argued that the mirror image was extraneous prejudicial information.

Hairston attached to his motion for a new trial an affidavit of Wofford's attorney, and attached to the affidavit were transcriptions of that attorney's conversations with two jurors. Hairston also attached an affidavit of his own attorney regarding his attorney's conversation with Cash. At a hearing on the motion for a new trial, the district court received the attachments for the sole purpose of deciding the motion. After hearing argument by both parties, the court stated, with regard to the alleged juror misconduct, that "the evidence that went in was a video, and that . . . video wasn't changed, altered, manipulated as far as changing the picture, . . . what it showed, what it was capable of showing." The court determined that there was not "any extraneous, prejudicial information that went in or any . . . outside influence." With regard to the alleged prosecutorial misconduct, the court stated that it did not see any evidence that the prosecutor had "somehow influenced this witness to take her Fifth Amendment." The court therefore overruled Hairston's motion for a new trial and denied his request for an evidentiary hearing.

The court thereafter sentenced Hairston to imprisonment for 20 to 30 years for unlawful discharge of a firearm and 20 to 30 years for use of a weapon to commit a felony. The court ordered the two sentences to be run consecutively to one another.

Hairston appeals his convictions.

ASSIGNMENTS OF ERROR

Hairston claims that the district court erred when it overruled his motion for a new trial and rejected his allegations of (1) juror misconduct relating to jurors' viewing a mirror image of the surveillance video and (2) prosecutorial misconduct relating to the prosecutor's comments to Cash regarding her potential testimony in Hairston's defense. Hairston further claims that the court erred when it denied his request for an evidentiary hearing to further develop his allegations of juror misconduct and prosecutorial misconduct.

STANDARDS OF REVIEW

[1] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Hoerle*, 297 Neb. 840, 901 N.W.2d 327 (2017).

ANALYSIS

Alleged Juror Misconduct: Jurors' Viewing of Reversed Image of Surveillance Video Did Not Expose Jurors to Extraneous Prejudicial Information.

Hairston first claims that the district court erred when it overruled his motion for a new trial based on his allegation of juror misconduct related to the viewing of a reversed image of the surveillance video. He also claims that the court erred when it denied an evidentiary hearing to develop the allegation. We determine that Hairston's allegation did not show serious

juror misconduct, and we therefore conclude that the district court did not err when it determined that his allegations did not warrant an evidentiary hearing and did not abuse its discretion when it overruled his motion for a new trial based on the allegation.

[2,3] A criminal defendant claiming jury misconduct bears the burden of proving, by a preponderance of the evidence, (1) the existence of jury misconduct and (2) that such misconduct was prejudicial to the extent that the defendant was denied a fair trial. *State v. Cardeilhac*, 293 Neb. 200, 876 N.W.2d 876 (2016). We have held that when an allegation of jury misconduct is made and is supported by a showing which tends to prove that serious misconduct occurred, the trial court should conduct an evidentiary hearing to determine whether the alleged misconduct actually occurred. If it occurred, the trial court must then determine whether it was prejudicial to the extent that the defendant was denied a fair trial. *Id*. If the trial court determines that the misconduct did not occur or that it was not prejudicial, adequate findings are to be made so that the determination may be reviewed. *Id*.

In the present case, after hearing argument on Hairston's motion for a new trial, the district court considered Hairston's allegations, motion, and attachments, and it determined that the jurors' use of the computer to display a reversed image did not change the evidence and did not constitute extraneous prejudicial information. The court therefore effectively determined that Hairston had not made a showing that tended to prove that serious juror misconduct had occurred and that an evidentiary hearing was not necessary.

We express no opinion whether the district court properly considered Hairston's allegations regarding jurors' statements to the extent such consideration was allowed under Neb. Rev. Stat. § 27-606(2) (Reissue 2016). Section 27-606(2) generally provides that in connection with an inquiry into the validity of a verdict, a juror may not testify as to anything that occurred during deliberations or as to the effect anything had

on the juror's decision. Section 27-606(2), however, allows a juror to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Hairston offered the affidavit of Wofford's attorney regarding jurors' statements to the effect that they had used the laptop computer to view a reversed image of the surveillance video. The State in this appeal does not dispute that the court could consider these allegations to the extent they may indicate that extraneous prejudicial information may have been brought to the jury's attention.

We have stated that in the context of § 27-606(2), "extraneous," in the phrase "extraneous prejudicial information," means "'"'"existing or originating outside or beyond: external in origin: coming from the outside . . . brought in, introduced, or added from an external source or point of origin.'"'" *Cardeilhac*, 293 Neb. at 212, 876 N.W.2d at 884, quoting *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). In *Thomas*, we stated that when "[n]one of the jurors brought extraneous information to the jury or obtained extra information about the facts of the case," then extraneous prejudicial information was not brought to the jury's attention. 262 Neb. at 1000, 637 N.W.2d at 650.

The items at issue consisted of two DVD exhibits, one of which contained the surveillance video and the other of which contained a redacted version of the video which was slowed down and enlarged. The DVD's had been received into evidence without objection and were published to the jury in court. Although Wofford objected to allowing the redacted DVD to be provided to the jury during deliberations, the court overruled the objection and Hairston did not join in Wofford's objection.

Hairston argues that he should have been granted a new trial because jurors' manipulation of the video image using the laptop computer resulted in the jury's being exposed to extraneous prejudicial information. He asserts that the computer's

software allowed the jury to view the surveillance video in a way which was different from how it had been presented in court and that therefore the jury was allowed to rely on evidence that was not presented in court.

We reject Hairston's argument and instead agree with the district court's determination that the jurors' viewing of a reversed image of the surveillance video in this case did not constitute extraneous prejudicial information. Although the computer software allowed the jurors to view the video from a perspective which differed from its presentation in court, and although the jurors may have noticed things in the video that they had not previously noticed, there is nothing in Hairston's allegations that indicates that such viewing altered or augmented the fixed content of the DVD's in any manner that would constitute evidence extraneous to what had been received into evidence. The undisputed record does not suggest this jury engaged in misconduct.

Our reasoning is consistent with other authorities. In *People v. Collins*, 49 Cal. 4th 175, 232 P.3d 32, 110 Cal. Rptr. 3d 384 (2010), the Supreme Court of California rejected an argument that a juror had been exposed to extraneous prejudicial information when the juror used his personal computer to diagram events at issue in the case. The court in *Collins* reasoned that the juror's use of the computer was "simply his own permissible thinking about the evidence received, and was not an experiment resulting in the acquisition of any new facts." 49 Cal. 4th at 252, 232 P.3d at 91, 110 Cal. Rptr. 3d at 454. The court noted that the juror had relied on evidence in the record to create his diagram. The court stated:

> The computer did not create evidence that was not already before [the juror]. The computer was simply the device that allowed [the juror] to draw his diagram with ease and accuracy in order to visualize the evidence. There was no showing that the computer or its software performed any analytical function or provided any outside information.

Id. at 255, 232 P.3d at 93, 110 Cal. Rptr. 3d at 457. The court in *Collins* cautioned that a computer could be used to investigate a case, "[i]f, for example, a juror conducts an investigation in which he or she relies on software that manipulates the data, subjecting it to presumptions written into the program, such use would likely constitute an improper experiment." 49 Cal. 4th at 256, 232 P.3d at 93, 110 Cal. Rptr. 3d at 457. The court in *Collins* concluded, however, that the juror's use of the computer in that case was part of the juror's critical examination of the admitted evidence rather than an investigation that created new evidence.

In *People v. Turner*, 22 Cal. App. 3d 174, 99 Cal. Rptr. 186 (1971), the court rejected an argument that the jury had conducted an improper experiment that introduced new evidence when the jury used a magnifying glass to examine a photograph. The court reasoned that the jury was merely making a more critical examination of the evidence than was made at trial and that "[a]t most, the use of the magnifying glass involved an extension of the jury's sense of sight . . . ." *Id.* at 183, 99 Cal. Rptr. at 191.

Similar to the reasoning in these cases, we determine that the jurors' use of the computer in this case to view a reversed image of the surveillance video did not expose the jury to extraneous information but instead allowed them to make a more critical examination of an exhibit that had been admitted into evidence. There is no indication that the computer was used to manipulate the video in a manner that altered or augmented what was already contained on the DVD and therefore no indication that new information was introduced. Instead, similar to the magnifying glass in *Turner*, the computer in this case was a tool that operated as an extension of the jurors' sense of sight and allowed them to critically examine evidence that had been admitted in the trial.

Because Hairston did not make a showing which tended to prove that serious juror misconduct occurred, there was no need to conduct an evidentiary hearing to determine whether

the alleged misconduct actually occurred and, if so, whether it was prejudicial to the extent Hairston was denied a fair trial. We therefore conclude that the district court did not err when it denied Hairston an evidentiary hearing on the issue and when it overruled Hairston's motion for a new trial based on his allegation of juror misconduct. We reject this assignment of error.

Alleged Prosecutorial Misconduct: Prosecutor's Alleged Comment Regarding Potential Perjury Charge Was Not Threat or Intimidation.

Hairston next claims that the district court erred when it overruled his motion for a new trial without an evidentiary hearing, based on his allegation of prosecutorial misconduct related to Cash's decision not to testify in Hairston's defense. We determine that Hairston's allegations did not show prosecutorial misconduct, and we therefore conclude that the district court did not err when it determined that his allegations did not warrant an evidentiary hearing and did not abuse its discretion when it overruled his motion for a new trial based on this allegation.

[4] When considering a claim of prosecutorial misconduct, we first consider whether the prosecutor's acts constitute misconduct. *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016). Hairston argues that the prosecutor's comments to Cash constituted misconduct because the comments put her under such duress that she was unable to make a clear and free choice whether to testify in Hairston's defense. Hairston relies in large part on *State v. Ammons*, 208 Neb. 797, 305 N.W.2d 808 (1981), in which we concluded that there was prosecutorial misconduct when the prosecution intimidated a witness for the defense and caused him to refuse to testify.

We reasoned in *Ammons* that the "constitutional [due process] right of a defendant to call witnesses in his defense mandates that they must be called without intimidation." 208 Neb. at 801, 305 N.W.2d at 811. In *Ammons*, the potential defense

witness had pled guilty to a separate charge pursuant to a plea agreement in which the prosecutor agreed to not bring charges against the witness for the robbery for which the defendant was being tried. At a hearing in which the witness ultimately decided to assert his Fifth Amendment rights and not testify for the defense, the prosecutor "stated for the record that the State would prosecute" the witness for the burglary if the witness testified in the *Ammons* case; the prosecutor stated that "any agreement the prosecutor in [the witness'] case made was 'out the window' if [the witness] took the stand in the present case and testified in open court that he committed the robbery." 208 Neb. at 800, 305 N.W.2d at 810. We concluded that the record in *Ammons* was "clear that the prosecutor's threat to [the witness] caused [the witness] to refuse to testify and resulted in depriving the defendant of that testimony." 208 Neb. at 803, 305 N.W.2d at 812.

One justice dissented without opinion in *Ammons*. Two other justices concurred in the result on the sole basis that "the State failed to honor . . . an enforceable plea bargain"; the concurring justices "[did] not want to suggest that a judge or prosecutor who warns a witness of the possibility of self-incrimination or of the penalties for perjury has engaged in witness intimidation." *Id*.

[5] The Court of Appeals for the Eighth Circuit in *United States v. Risken*, 788 F.2d 1361 (8th Cir. 1986), made a distinction similar to that made by the concurring justices in *Ammons*. The Court of Appeals stated:

> "It is not improper *per se* for a . . . prosecuting attorney to advise prospective witnesses of the penalties for testifying falsely. But warnings concerning the dangers of perjury cannot be emphasized to the point where they threaten and intimidate the witness into refusing to testify." *United States v. Blackwell*, 224 U.S.App.D.C. 350, 694 F.2d 1325, 1334 (1982) (citations omitted). The prosecutor's statements in the present case do not approximate the sort of governmental misconduct held

> unconstitutional in the leading case of *Webb v. Texas*, 409 U.S. 95, 98, 93 S.Ct. 351, 353, 34 L.Ed.2d 330 (1972) (per curiam), in which the trial court gratuitously and at great length admonished only the defendant's single witness not to lie and warned him of the dire consequences of perjury, or in *United States v. Smith*, 156 U.S.App.D.C. 66, 478 F.2d 976, 979 (1973), in which the prosecutor threatened to prosecute the prospective witness for *past* crimes if he took the stand and testified in a pending trial. Rather, the prosecutor's statements in the present case constituted a constitutionally permissible "mere warning" about the dangers of committing perjury. *See, e.g., United States v. Blackwell*, 694 F.2d at 1335; *United States v. Simmons*, 216 U.S.App.D.C. 207, 670 F.2d 365, 371 (1982) (per curiam); *cf. United States v. Harlin*, 539 F.2d 679, 681 (9th Cir.) (trial judge's warning), *cert. denied*, 429 U.S. 942, 97 S.Ct. 362, 50 L.Ed.2d 313 (1976). The prosecutor told [the potential witness] about the serious consequences of perjury, including the possibility of prosecution and the range of punishment. The prosecutor's remarks here were limited to warning [the potential witness] about the serious consequences of perjury in the context of [the potential witness'] testimony in this case; the prosecutor did not threaten to prosecute [the potential witness] for other crimes or to retaliate against him if he testified truthfully. *See United States v. Blackwell*, 694 F.2d at 1334 (citing cases involving threats of prosecution for other crimes, reindictment on dropped charges, revocation of probation).
>
> We note, however, that prosecuting attorneys should exercise considerable restraint when advising potential witnesses about the consequences of committing perjury.

Risken, 788 F.2d at 1370-71.

In the present case, Hairston attached to his motion for a new trial the affidavit of his attorney, who stated Cash told him that the prosecutor "had admonished her that if she

testified in defense of . . . Hairston, she could be prosecuted for perjury." Hairston's attorney further stated in his affidavit that when he attempted to call Cash as a witness in Hairston's defense, "Cash stated in chambers before the trial judge and on the record that she would refuse to testify based on the advice of her attorney." Hairston's attorney further stated that Cash's attorney had told him that "he was advising . . . Cash not to speak with affiant and not to sign any affidavit regarding what [the prosecutor] may have said to her."

Hairston's allegations of prosecutorial misconduct therefore were merely that the prosecutor had "admonished" Cash of the potential penalties for perjury. Although Cash refused to testify in Hairston's defense, there was no indication that her decision was the result of any threat or intimidation by the prosecutor. Hairston made no allegation that the prosecutor's statement went beyond an accurate statement regarding potential penalties for perjury, and he made no allegation that the prosecutor threatened to prosecute her for some other crime if she testified truthfully in Hairston's trial. Instead, Hairston's attorney's affidavit indicates that Cash chose not to testify based on the advice of her attorney. We note that in an in camera hearing after Hairston attempted to call Cash as a witness, Cash stated to the court that she was invoking her Fifth Amendment rights on the advice of her counsel.

We conclude that Hairston's allegations did not show an improper threat or intimidation by the prosecutor; instead, it appears that the prosecutor advised Cash regarding the penalties for perjury and that Cash made her decision not to testify after consulting with her attorney. Because Hairston's allegations did not show that the prosecutor improperly threatened or intimidated Cash to prevent her testimony, we conclude that the court did not err when it denied an evidentiary hearing on the issue and that it did not abuse its discretion when it overruled Hairston's motion for a new trial based on the allegation of prosecutorial misconduct. We reject this assignment of error.

CONCLUSION

We conclude that the district court did not err when it denied an evidentiary hearing on Hairston's allegations of juror misconduct and prosecutorial misconduct and that it did not abuse its discretion when it overruled Hairston's motion for a new trial on such bases. We therefore affirm Hairston's convictions.

Affirmed.

Wright, J., not participating in the decision.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

The Estates at Prairie Ridge Homeowners Association, a Nebraska nonprofit corporation, appellee, v. Duane R. Korth and Kathryn A. Korth, husband and wife, appellants.

904 N.W.2d 15

Filed December 1, 2017. No. S-16-1108.

1. **Restrictive Covenants: Equity.** An action to enforce restrictive covenants is equitable in nature.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.
3. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.
4. **Restrictive Covenants.** The language of restrictive covenants must be interpreted in its entirety.
5. ____. If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.
6. **Contracts: Restrictive Covenants.** As in the interpretation of a contract, a court must first determine, as a matter of law, whether the language of restrictive covenants is ambiguous.
7. **Contracts: Words and Phrases.** Ambiguity exists in a document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
8. **Restrictive Covenants.** Restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.
9. **Restrictive Covenants: Intent.** Extrinsic evidence is not permitted to explain the terms of restrictive covenants where they are not ambiguous. Instead, the intentions of the parties must be determined from the document itself.

10. **Summary Judgment: Appeal and Error.** The denial of a motion for summary judgment is neither appealable nor reviewable.

Appeal from the District Court for Sarpy County: George A. Thompson, Judge. Reversed and remanded with directions.

John M. Walker, of Lamson, Dugan & Murray, L.L.P., for appellants.

Larry R. Forman, of Hillman, Forman, Childers & McCormack, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ.

Cassel, J.

I. INTRODUCTION

After homeowners repainted their residence in a blue color, a homeowners association sued to enforce restrictive covenants and the district court decreed that the house be repainted in an "earth tone." The homeowners' appeal turns on the covenants' plain language, which does not control the color of repainting. Because the covenants were not ambiguous and did not prohibit the homeowners' action, we reverse, and remand with directions.

II. BACKGROUND

1. Restrictive Covenants

The Estates at Prairie Ridge, LLC (Developer), filed the restrictive covenants at issue in 2003. The covenants included prohibitions of certain "external improvement[s]" (except those specifically approved by Developer), as well as storage of anything that would be "obnoxious to the eye." They also specified that "[n]o objectionable, unlawful or offensive trade or activity shall be carried on upon any Lot nor shall anything be done thereon which may be or become a nuisance or annoyance to the neighborhood or surrounding Lots."

In 2004, Duane R. Korth and Kathryn A. Korth (Homeowners) purchased a residential lot from Developer which was subject to the restrictive covenants. Homeowners submitted plans for construction of a residence on their purchased lot to Developer as required by the covenants. After the residence was built, Homeowners spoke to Developer and proposed to paint their residence blue. Developer denied this proposal and recommended that they choose an earth-tone color instead. Homeowners ultimately painted their residence in an earth-tone color.

2. Alleged Violations

Ten years later, Homeowners informed a member of The Estates at Prairie Ridge Homeowners Association (the HOA) of their decision to repaint their residence a shade of blue. The parties disagreed as to whether the restrictive covenants required approval of the new paint color, and conflict ensued. Homeowners ultimately repainted their residence blue, without seeking or acquiring approval of their chosen paint color.

After the house was repainted, Developer assigned its interests under the restrictive covenants to the HOA pursuant to article II, section 1, of the covenants. As Developer's successor in interest, the HOA filed a lawsuit requesting the court to, among other things, (1) declare Homeowners to be in willful violation of certain provisions of the restrictive covenants, (2) order Homeowners to submit a substitute earth-tone color to be approved by the HOA, and (3) order Homeowners to repaint their residence in the approved color.

3. Motions for Summary Judgment

Before filing an answer, Homeowners filed a motion to dismiss, which was converted to a motion for summary judgment.[1] The HOA then filed its own motion for summary judgment. At a hearing, both parties presented evidence and argued that there was no genuine issue of material fact.

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[1] See Neb. Ct. R. Pldg. § 6-1112(b)(6).

However, the court disagreed and overruled both motions. It identified issues of fact regarding the HOA's level of control over color under the restrictive covenants and whether the particular color violated the restrictive covenants.

Both parties moved for reconsideration of their motions for summary judgment. At the hearing, Homeowners principally argued that the HOA had no control over the color of their residence, because the restrictive covenants did not specifically refer to exterior paint as an improvement. The court took the matter under advisement and reviewed *Kalkowski v. Nebraska Nat. Trails Museum Found.*[2] and *Tyler v. Tyler*[3] to determine that painting the exterior of a residence can be an improvement or an ordinary repair, depending on the factual circumstances of the case. After concluding that this was a disputed factual issue, the court overruled the parties' motions. The court later overruled Homeowners' renewed motion for summary judgment on these same grounds.

4. Trial

At trial, an agent of Developer testified over Homeowners' objection that the intent and purpose of the restrictive covenants was to give Developer "fairly broad authority to deal with matters in [the] subdivision" and that Developer "was to be able to control color." He further testified that it was the intent of Developer to keep the development "a very natural, earth tone environment" in line with its name, The Estates at Prairie Ridge (Prairie Ridge), and have residences "blend in with the environment." However, he admitted that there was no language in the restrictive covenants specifically referencing paint color or a preference for earth tones.

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[2] *Kalkowski v. Nebraska Nat. Trails Museum Found.*, 290 Neb. 798, 862 N.W.2d 294 (2015) (defining term "improvements" in farm lease agreement as distinguished from ordinary repair).

[3] *Tyler v. Tyler*, 253 Neb. 209, 214, 570 N.W.2d 317, 320 (1997) (painting of dwelling's exterior as "improvement" of marital home).

Current and former residents of surrounding lots also testified that they had been required to disclose exterior paint color for approval by Developer when building their residences. They all additionally testified to their opinions that the blue color chosen by Homeowners was a nuisance, an annoyance, and obnoxious.

Homeowners presented evidence that a board member of the HOA communicated there were "not currently" any restrictions on paint color in the restrictive covenants and that Homeowners were copied on the communication. The HOA board member testified that he said "not currently," because there were ongoing discussions of rewriting the covenants to specifically address paint color and clear up any ambiguity in the covenants. However, he and other board members also testified that Developer had the final say in all improvements, including paint color, until it assigned its interests in the restrictive covenants to the HOA in July 2015, at which point, the HOA had the final say in all improvements. Even so, Homeowners testified that they understood that the covenants did not include restrictions on paint color before repainting their house.

5. District Court Judgment

After trial, the district court entered a judgment in favor of the HOA. The court found that "[t]he evidence showed that anyone purchasing a lot and erecting a residence at Prairie Ridge needed to obtain prior approval from [Developer] for such items including square footage, septic system, paint color, garage location, etc." And, the court specifically found that Homeowners' painting of their residence was an improvement as a "permanent addition to and for the betterment of [Homeowners'] residence and the property." As such, the court concluded that they needed approval before they could repaint the residence.

The court also found that the blue color of the residence was "a nuisance, annoyance, and obnoxious to the eye," based on

the cumulative testimony of surrounding lot owners expressing the opinion that it "clashed with the neighborhood" and "does not fit in." The court concluded that this violated several restrictive covenants. It therefore ordered Homeowners to submit a substitute color in an earth tone reasonably acceptable to the HOA by a certain date and then repaint their residence within 30 days after approval of the substitute color.

Homeowners timely appealed, and we moved the appeal to our docket.[4]

III. ASSIGNMENTS OF ERROR

Homeowners assign, reordered, restated, and combined, that the district court erred when it (1) construed sections 2(a), 15, and 16 of article I of the covenants to give the HOA the ability to control the paint color of Prairie Ridge residences; (2) failed to find that the terms "or other external improvement," "nuisance or annoyance," and "obnoxious to the eye" were ambiguous; (3) failed to construe ambiguous provisions in a manner which allowed the maximum unrestricted use of their property; (4) determined that Homeowners violated sections 2(a), 15, 16, and 14 of article I of the covenants; (5) determined that the restrictive covenants vested the HOA's predecessor in interest with "absolute and sole discretion concerning the use and makeup of the land"; and (6) ruled that genuine issues of material fact existed as to whether the painting of a residence was an "external improvement" or a "repair" and whether exterior paint color may be a "nuisance" or an "annoyance" to the neighborhood or surrounding lots.

IV. STANDARD OF REVIEW

[1,2] An action to enforce restrictive covenants is equitable in nature.[5] On appeal from an equity action, an appellate

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[4] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[5] See, *Skyline Woods Homeowners Assn. v. Broekemeier*, 276 Neb. 792, 758 N.W.2d 376 (2008); *Boyles v. Hausmann*, 246 Neb. 181, 517 N.W.2d 610 (1994).

court decides factual questions de novo on the record and, as to questions of both fact and law, is obligated to reach a conclusion independent of the trial court's determination.[6]

V. ANALYSIS

The principal issue in this case is whether Homeowners' repainting their residence a shade of blue without approval by Developer violated the restrictive covenants on their property. Homeowners argue that the restrictive covenants relied upon by the HOA are silent regarding exterior paint color. In the alternative, they argue that if the language is ambiguous, the covenants must be construed against the drafter (Developer) and its successors in interest.

1. Restrictive Covenants

Our analysis depends upon the meaning of the relevant restrictive covenants. Thus, we begin by recalling basic principles of the governing law.

[3-5] Restrictive covenants are to be construed so as to give effect to the intentions of the parties at the time they agreed to the covenants.[7] The language of restrictive covenants must be interpreted in its entirety.[8] If the language of a restrictive covenant is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.[9]

[6,7] Thus, as in the interpretation of a contract, a court must first determine, as a matter of law, whether the language of restrictive covenants is ambiguous.[10] Ambiguity exists in a

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[6] *Mutual of Omaha Bank v. Watson*, 297 Neb. 479, 900 N.W.2d 545 (2017).

[7] *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012).

[8] See *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 266 N.W.2d 62 (1978).

[9] *Southwind Homeowners Assn. v. Burden, supra* note 7.

[10] See *David Fiala, Ltd. v. Harrison*, 290 Neb. 418, 860 N.W.2d 391 (2015).

document when a word, phrase, or provision in the document has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.[11]

[8] However, as Homeowners correctly argue, ambiguity must be interpreted in their favor. Restrictive covenants are not favored in the law and, if ambiguous, should be construed in a manner which allows the maximum unrestricted use of the property.[12]

The district court held that Homeowners violated four restrictive covenants: article I, sections 2(a), 15, 16, and 14. Therefore, we must first address whether each covenant is ambiguous in the light of the entire document and then determine whether the covenants governed the exterior paint color of Prairie Ridge residences.

(a) Article I, Section 2

Article I, section 2, is a general use and building restrictive covenant. That section states in pertinent part:

> No residence, building, fence, wall, driveway, patio, patio enclosure, swimming pool, dog house, tree house, pool house, antenna, satellite receiving stations, dishes or discs, flag poles, solar heating or cooling devices, tool or storage shed, or other external improvement . . . shall be constructed, erected, placed or permitted to remain on any Lot . . . except Improvements which have been approved by [Developer.]

Section 2(a) also requires that any "Lot owner desiring to erect an Improvement on such Lot shall submit construction plans to [Developer]." This language is unambiguous.

Homeowners' residence was "constructed," "erected," "placed," and "permitted to remain" in 2004. Homeowners submitted construction plans at that time. The "improvement"

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[11] See *Frohberg Elec. Co. v. Grossenburg Implement*, 297 Neb. 356, 900 N.W.2d 32 (2017).

[12] *Southwind Homeowners Assn. v. Burden, supra* note 7.

was made at that time. At the time of repainting 10 years later, Homeowners were not "desiring to erect an Improvement"; it had been erected 10 years earlier. Sections 2 and 2(a) are silent as to painting the exterior of a residence. And, exterior paint, in and of itself, is not something which is typically "constructed," "erected," "placed," or "permitted to remain" on land. Thus, we conclude that repainting is not governed by the plain language of the covenant. This is in line with cases from other jurisdictions in which courts have found paint color governed by general use and building restrictions only where "'exterior design and color'" or "'color scheme'" is specifically referenced in the covenant.[13]

Nonetheless, the HOA advances three arguments in support of its allegation that painting the exterior of a residence is an "external improvement" within the plain meaning of article I, section 2. None are persuasive.

First, the HOA argues that exterior painting is an improvement, because it is a "'betterment of real property that enhances its capital value and that involves the expenditure of labor and money . . . .'"[14] It cites to our opinion in *Kalkowski v. Nebraska Nat. Trails Museum Found.*, which generally defined the term "improvements" in two ways; however, our opinion used these broad definitions in the context of a farm lease agreement permitting a tenant to remove "improvements" from the land at the expiration of the lease.[15] Here, the covenants define "external improvements" by the list of examples. And paint or paint color is simply not in that list. Moreover, the HOA deemphasizes critical aspects of our broad definitions in *Kalkowski*. Our "betterment" definition spoke not just of enhancement to

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[13] See, e.g., *Village of Pheasant Run v. Kastor*, 47 S.W.3d 747, 751 (Tex. App. 2001). See, also, e.g., *West Hill Colony v. Sauerwein*, 138 N.E.2d 403 (Ohio App. 1956).

[14] *Kalkowski v. Nebraska Nat. Trails Museum Found., supra* note 2, 290 Neb. at 805, 862 N.W.2d at 301.

[15] *Id.*

capital value and expenditure of labor and money, but also described such an improvement as "'designed to make the property more useful or valuable as distinguished from ordinary repairs.'"[16] And another definition of "improvements" spoke of "'"enhanc[ing] the value of premises *permanently* for general uses."'"[17] Repainting does not fit either definition from *Kalkowski*. Repainting does not permanently enhance value. And it amounts to an ordinary, recurring repair. Under the HOA's application of *Kalkowski*, a tenant who painted the landlord's barn would be entitled to remove the barn or at least the paint. That would be absurd. To the extent that the definitions of *Kalkowski* have any application here, they inform us that painting is not an "improvement."

Second, the HOA suggests that this court has already specifically determined that the painting of the exterior of a residence is an "improvement" in *Tyler v. Tyler*.[18] But we did so in an entirely different context, where we attempted to credit a husband for value personally contributed to a marital home. We are not persuaded that this has any application in the context of restrictive covenants.

[9] Third, the HOA argues that Homeowners' initial disclosure to Developer of their intent to paint their residence blue in 2005 is evidence of the parties' intent that exterior paint color is an external improvement. But at oral argument, the HOA reiterated its argument that the covenants were not ambiguous. Extrinsic evidence is not permitted to explain the terms of restrictive covenants where they are not ambiguous.[19] Instead, the intentions of the parties must be determined from the document itself.[20]

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[16] *Id.*

[17] *Id.* (emphasis supplied).

[18] *Tyler v. Tyler, supra* note 3.

[19] See *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015).

[20] See *id.*

Because we have determined that exterior paint color is not subject to the plain language of article I, section 2, we conclude that Homeowners did not violate the covenant when they repainted their residence without first seeking and acquiring approval from Developer.

(b) Article I, Section 15

Article I, section 15, states: "No objectionable, unlawful or offensive trade or activity shall be carried on upon any Lot nor shall anything be done thereon which may be or become a nuisance or annoyance to the neighborhood or surrounding Lots." Because there is nothing inherently ambiguous in this language, we must enforce the covenant by its plain language.

The covenant's plain language is limited to trade or activity on a lot. Nowhere does it describe external paint, color, or siding as a trade, activity, or something which may be done on a lot. And, while numerous Prairie Ridge residents opine that the paint color at issue is a nuisance or annoyance, their opinions cannot vary the plain language of the covenant. We find no merit to the HOA's reliance on article I, section 15.

(c) Article I, Section 16

The applicable provision in article I, section 16, prohibits the "storage of any property or thing that . . . will be obnoxious to the eye." Though what constitutes "obnoxious to the eye" may be subjective, the relevant language of the covenant is not ambiguous and clearly indicates that it is limited to the "storage" of things on Prairie Ridge lots.

The parties do not contest that exterior paint color is not something "stor[ed]" on land. Rather, the HOA would apparently have us ignore the limiting language "storage of any property or thing" to find that the covenant prohibits all things obnoxious to the eye. This would effectively rewrite the covenant. Therefore, we decline to adopt the HOA's interpretation and we adhere to the plain language.

Because a residence's exterior paint color is not something which is stored on the property, it is not governed by article I, section 16. Thus, Homeowners did not violate the covenant when they repainted their residence blue.

(d) Article I, Section 14

The last covenant, article I, section 14, provides: "Each Lot owner shall comply with all county and state health requirements and permits, and observe all rules and regulations of all lawfully constituted authorities in the use and ownership of such Lot."

The district court apparently found Homeowners violated this covenant by failing to observe the rules provided in the restrictive covenants listed above, since no other evidence of alleged noncompliance was presented at trial. But because Homeowners did not violate any other restrictive covenants and the evidence does not show any other violations of laws, rules, or regulations, it necessarily follows that Homeowners did not violate article I, section 14.

Although the plain language of the restrictive covenants does not control the color of repainting of an existing residence, the other residents are not without a potential remedy. Article III, section 3, states that the covenants "may be amended by and [sic] instrument signed by the owners of not less than seventy-five percent (75%) of the Lots covered by [the covenants]." It is not our function to in effect amend the covenants by interpretation or construction contrary to the plain meaning of the language used.

2. Remaining Assignment of Error

[10] We do not address Homeowners' remaining assignment of error, because it challenges the denial of their motion for summary judgment. The denial of a motion for summary judgment is neither appealable nor reviewable.[21]

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[21] *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002).

VI. CONCLUSION

The restrictive covenants at issue were not ambiguous and did not apply to Homeowners' repainting of their residence. Because Homeowners did not violate any restrictive covenants, we reverse, and remand with directions to the district court to enter judgment in Homeowners' favor.

Reversed and remanded with directions.

Wright and Kelch, JJ., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Jason William Custer, appellant.

903 N.W.2d 911

Filed December 1, 2017. No. S-16-1196.

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: 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.
3. **Postconviction: Constitutional Law.** 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 or her constitutional rights such that the judgment was void or voidable.
4. **Postconviction: Constitutional Law: Proof.** 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.
5. **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.
6. **Effectiveness of Counsel: Proof: Words and Phrases: 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. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.

7. **Rules of the Supreme Court: Trial: Attorneys at Law.** The Nebraska Rules of Professional Conduct set forth that a lawyer shall not, in trial, state a personal opinion as to the credibility of a witness or the guilt or innocence of an accused.
8. **Trial: Prosecuting Attorneys.** When a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor 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.
9. ____: ____. In cases where a prosecutor comments on the theory of defense, the defendant's veracity, or the defendant's guilt, the prosecutor crosses the line into misconduct only if the prosecutor's comments are expressions of the prosecutor's personal beliefs rather than a summation of the evidence.
10. **Trial: Prosecuting Attorneys: Appeal and Error.** In assessing whether a prosecutor's statements were misconduct, an appellate court looks at the entire context of the language used to determine whether the prosecutor was expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence.
11. **Postconviction: Appeal and Error.** An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.
12. **Postconviction: Right to Counsel.** There is no federal or state constitutional right to an attorney in state postconviction proceedings.
13. ____: ____. Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to represent the defendant.
14. **Postconviction: Justiciable Issues: Right to Counsel: Appeal and Error.** Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant.

Appeal from the District Court for Cheyenne County: Derek C. Weimer, Judge. Affirmed.

Jason William Custer, pro se.

Douglas J. Peterson, Attorney General, and Melissa R. Vincent for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

I. INTRODUCTION

Jason William Custer appeals from the district court's denial, without an evidentiary hearing, of his motion for postconviction relief. Custer proceeds pro se in his postconviction motion. We affirm.

II. BACKGROUND

The facts of this case can be found in this court's opinion on direct appeal, *State v. Custer*.[1] The following facts from the direct appeal opinion are pertinent to our decision on Custer's postconviction motion.

> On or around October 20, 2012, [Adam] McCormick came to the apartment where Custer and [Billy] Fields were staying to collect the money [that Custer owed McCormick]. After Custer told McCormick he would pay him from his next check, Fields, who was upset that McCormick had come to confront Custer, told McCormick that he would pay McCormick by the end of the week. In the following days, McCormick exchanged threatening text messages and telephone calls with Custer and Fields.
>
> On or about October 26, 2012, . . . McCormick confronted [Custer and Fields], demanding his money. Fields testified that when McCormick approached them, it

[1] *State v. Custer*, 292 Neb. 88, 871 N.W.2d 243 (2015).

> looked like McCormick was reaching into his pocket for something, and that Fields thought it was a knife that he knew McCormick carried. Custer and Fields told McCormick they could not repay the $150 at that time, but in order to calm McCormick, Fields paid him $40 for another debt he owed. . . .
>
> A few days later, on November 1, 2012, McCormick sent Fields text messages threatening physical violence if the debt was not repaid soon. The text messages prompted Custer to arrange with McCormick to meet in a park for a fight. Custer and Fields went to the park at the arranged time. McCormick did not show up, but he continued to exchange confrontational text messages and telephone calls with Custer and Fields.
>
> . . . .
>
> The next night, November 2, 2012, [McCormick was at a gathering at Syrus Leal's house]. . . . Throughout the evening, [Fields' girlfriend] updated Custer and Fields through text messages and telephone calls regarding McCormick's activities and whereabouts. Around 11:20 p.m., Custer responded . . . with a text message stating that he and Fields were coming over to handle matters with McCormick.
>
> . . . Around 11:35 p.m., Custer asked McCormick [via text] whether they could "FINISH THIS RIGHT NOW ONE ON ONE." McCormick responded in the affirmative . . . .
>
> Shortly after midnight on November 3, 2012, [Custer learned that] McCormick was leaving the gathering at Leal's house. Custer borrowed Fields' truck to drive to Leal's house. . . . Thereafter, an incident ensued in which Custer shot McCormick twice.[2]

Following the shooting, Custer was charged with first degree murder, a Class IA felony; use of a firearm to commit

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[2] *Id.* at 92-94, 871 N.W.2d at 250-52.

a felony, a Class IC felony; and possession of a firearm by a prohibited person, a Class ID felony. On January 31, 2014, the jury found Custer guilty on all three counts. The court sentenced Custer to life imprisonment for first degree murder, to 20 to 50 years' imprisonment for use of a firearm to commit a felony, and to 10 to 20 years' imprisonment for being a felon in possession of a firearm. The court ordered that the sentences be served consecutively. Custer appealed his convictions and sentences. This court affirmed Custer's convictions and affirmed his sentences as modified.[3]

On May 10, 2016, Custer filed a motion for postconviction relief, a motion for permission to proceed in forma pauperis, and a motion for appointment of counsel. The State filed a motion to dismiss Custer's motion for postconviction relief without conducting an evidentiary hearing, and on November 22, 2016, the district court overruled Custer's motion for postconviction relief without an evidentiary hearing. Custer appeals.

III. ASSIGNMENTS OF ERROR

Custer assigns, restated, that the district court erred in denying his motion for postconviction relief, because counsel was ineffective when counsel (1) "illicited testimony from Dr. Peter Schilke on information that was not in evidence [and] information that he was not the originating expert on"; (2) "insisted that a key state witness was testifying falsely to information supported by the record and critical to [Custer's] self-defense defense"; (3) cross-examined a patrol officer; (4) "failed to call rebuttal witness, a fellow law partner, Kelly Breen, to the stand"; (5) "failed to object at critical junctures throughout the entirety of the trial"; and (6) failed to ensure that "the court provided proper jury instructions, or a proper verdict form to all jurors, and omitted critical instruction on self-defense, assault, terroristic threats and other omissions."

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[3] See *State v. Custer, supra* note 1.

Custer also assigns that the district court erred in denying his motion for appointment of counsel.

IV. STANDARD OF REVIEW

[1,2] 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] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[5]

V. ANALYSIS

On appeal, Custer argues that his trial counsel was ineffective in various particulars and that the district court erred in denying his motion for postconviction relief without a hearing.

[3-5] 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 or her constitutional rights such that the judgment was void or voidable.[6] 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.[7] 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]

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[4] *State v. Watson*, 295 Neb. 802, 891 N.W.2d 322 (2017).

[5] *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016).

[6] Neb. Rev. Stat. § 29-3001(1) (Reissue 2016).

[7] *State v. Starks, supra* note 5.

[8] *State v. Phelps*, 286 Neb. 89, 834 N.W.2d 786 (2013).

1. Ineffective Assistance of Counsel

[6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[9] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense.[10] To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.[11] A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.[12]

(a) Testimony From Dr. Peter Schilke

Custer argues that the district court erred in denying an evidentiary hearing on the ground that counsel rendered ineffective assistance when cross-examining Dr. Peter Schilke. Schilke was a witness for the State and a pathologist. Schilke performed McCormick's autopsy, during which he obtained fluids for a toxicology panel. Those samples were sent to a toxicologist for testing.

Custer takes issue with the following question posed by counsel during cross-examination of Schilke:

> Q. . . . [I]n [the toxicologist's] findings, he said that blood levels of 200 ng to 600 ng had been reported in methamphetamine abusers who exhibited violent and irrational behavior. Now I realize [McCormick's] level

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

[10] *State v. Watson, supra* note 4.

[11] *Id.*

[12] *Id.*

> wasn't as high as 200 to 600 but what I guess I am asking you is it, in your experience that methamphetamine users can exhibit violent and irrational behavior?
>
> A. Sure, that has been reported.

Custer argues that counsel erred in drawing the jury's attention to the fact that the level of methamphetamine in McCormick's system was lower than levels that had reportedly caused "violent and irrational behavior."

Custer relied on a theory of self-defense at trial. The testimony elicited by counsel demonstrated that McCormick had levels of methamphetamine in his system. Schilke's testimony supported the conclusion that levels did not have to be as high as "200 ng to 600 ng" in order to cause "methamphetamine users [to] exhibit violent and irrational behavior." That McCormick could have been violent and irrational despite the relatively low level of methamphetamine in his system was entirely consistent with, and helpful to, Custer's claim of self-defense.

We agree with the district court that counsel's performance was not deficient and therefore find no merit to this assignment of error.

(b) Cross-Examination of Billy Fields

Custer argues that counsel was ineffective in advising him to discredit Billy Fields' testimony, which Custer claims ultimately led Custer to change Custer's testimony.

Custer testified that a few days before the shooting, McCormick came to an apartment in which Custer was staying and demanded that Custer repay the money that McCormick had loaned him. Custer testified that during this exchange, neither he nor McCormick threatened each other with a knife.

At trial, however, Fields testified on cross-examination that while Fields did not see anything, Custer told him after the exchange that "he had pulled a knife on [McCormick] and that [McCormick] had pulled one back." On cross-examination,

Fields initially claimed that he had explained this account in his deposition, but when pressed by Custer's counsel, Fields was unable to find this testimony in the transcript of that deposition. Counsel then asked Fields: "[I]t's safe to say the first time you ever said that was yesterday in court, correct?" Fields agreed. But on redirect, the State presented Fields with his deposition and requested that he read certain lines the State had identified in which Fields had stated that Custer and McCormick pulled knives on each other. In addition, Custer's testimony at trial of the same incident contradicted Fields' testimony.

Assuming that counsel was ineffective in his attempt to attack Fields' credibility, Custer has not shown that he was prejudiced. The incident in which McCormick allegedly pulled a knife on Custer occurred several days before the shooting and did not provide a basis for the jury to find, as Custer contends, that Custer feared for his life at the time of the shooting. Indeed, evidence at trial showed that Custer and McCormick had exchanged threats the night of the shooting, at which point Custer drove over to Syrus Leal's house, where he knew McCormick was, to confront McCormick. Therefore, even if counsel was deficient in this line of questioning, Custer has not shown that he was prejudiced by counsel's performance. There is no merit to Custer's assertion that counsel was ineffective.

(c) Cross-Examination of Officer James Bush

Custer argues that counsel was ineffective for failing to "highlight" critical facts on the cross-examination of Officer James Bush about the collection of guns and drug paraphernalia found at Leal's house.[13] Custer contends that "[c]ritical to [his] self-defense claim was a general knowledge as to [Leal's] being an armed ex-felon" and that counsel "squandered an

[13] Brief for appellant at 18.

opportunity to show the seriousness of the envir[on]ment at [Leal's] house." Custer also argues that Leal could have given McCormick a weapon at the time of the incident which resulted in McCormick's death.

Bush, the State's witness, was a patrol officer for the city of Sidney, Nebraska. Bush testified that exhibits 86 through 90 contained photographs of the firearms and drug paraphernalia found in Leal's house. Bush further testified that "the firearms were located in the southwest bedroom closet." In addition, Fields also testified that there were at least four weapons at Leal's house. Custer testified in his defense, but did not mention in his testimony any concern he had about the weapons in Leal's house at the time of the shooting.

We find Custer's allegation to be without merit. Custer's motion does not explain what he believes counsel should have done to further emphasize this evidence. As such, Custer has failed to allege sufficient facts to support his allegation. We further note that because Bush and other witnesses testified about the weaponry found at Leal's house, the jury was aware of that fact.

Assuming that Custer has made sufficient allegations to preserve his claim of ineffective assistance of counsel as to this issue, we still find no prejudice in counsel's handling of this issue. There is no merit to this assignment of error.

(d) Failure to Call Breen as Witness

Custer contends that his counsel was ineffective for failing to call Breen, a lawyer from the Commission on Public Advocacy who was first appointed as Custer's counsel, because Breen "had been told the entire version of . . . Custer's side of the incidents leading up to the shooting death of . . . McCormick, within only a few days of the shooting" in order "to confirm the version of events as told by [Custer] at trial."[14] Custer

[14] *Id.* at 19.

argues that Breen could have testified that Custer "maintained from the beginning that he acted in self-defense" and that Custer "testified differently at the behest of" counsel due to "improper legal advice."[15]

Fields testified on direct examination that Custer had told him shortly after the shooting that McCormick "had come running at [Custer] with something in his hand," so Custer shot at him. Fields testified again on direct examination that Custer told him that McCormick "had rushed [Custer] and that [McCormick] had something in his hand."

Custer has not identified how Breen's testimony of Custer's account following the shooting and immediately prior to trial would have differed from the account that Custer relayed to Fields shortly after the shooting and prior to trial. Custer has only alleged that Breen would "underscore" that Custer "testified [at trial] differently at the behest of his unethical lawyer . . . whom [sic] gave him improper legal advice."[16] Custer has not alleged what Breen would testify to in support of Custer's claim that he changed his testimony due to counsel's "improper legal advice." Custer alleged only mere conclusions of law and has not alleged sufficient facts to support his allegation of ineffective assistance of counsel. There is no merit to Custer's arguments on appeal.

(e) Failure to Object

Custer argues that counsel was ineffective for failing to object to (1) a statement made by the prosecutor in closing argument that Custer could "accurately testify in relation to the evidence . . . because he had had 15 months to review the evidence, discovery, and hear all the testimony given in the case";[17] (2) an analogy made by the prosecutor in closing statements; (3) "badgering the witness about someone else yelling

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[15] *Id.* at 20.

[16] *Id.*

[17] *Id.* at 22.

during the shooting";[18] (4) an inquiry made by the State into Custer's criminal history during direct examination of Fields; and (5) testimony from Fields that Custer was not scared of McCormick. The district court held that counsel's failure to object in each of these instances was not deficient and that Custer had not shown he was prejudiced.

First, Custer contends that the prosecutor's statements in closing arguments were improper when the prosecutor stated that Custer could "accurately testify in relation to the evidence . . . because he had had 15 months to review the evidence."[19] We have already addressed this allegation in our opinion in Custer's direct appeal.[20] We held that

> the State's comments [made during closing arguments referencing the prosecutor's statements] regarding the amount of time [Custer] had to prepare his testimony for trial and the State's comments highlighting [Custer's] failure to report the shooting and McCormick's alleged aggressive actions to the police . . . were not improper and did not constitute prosecutorial misconduct.[21]

We will not revisit the matter here.[22] There is no merit to this assertion.

Custer next contends that counsel was ineffective for failing to object to the prosecutor's closing argument when the prosecutor relied on an analogy that Custer's account of the circumstances surrounding the shooting were a "lie" and a "fantasy," much like the story about Santa Claus that he told his son at Christmas. In order for his son to believe in Santa Claus, the prosecutor explained, his son would have to "ignore the evidence." The prosecutor then stated that Custer's account

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[18] *Id.* at 24.

[19] See *id.* at 22.

[20] *State v. Custer, supra* note 1.

[21] *Id.* at 107, 871 N.W.2d at 259.

[22] See *Thomas v. State*, 268 Neb. 594, 685 N.W.2d 66 (2004).

"doesn't comport with reality. He is asking you to ignore the evidence. It does not fit common sense." Custer contends that the analogy was "religiously infused," thus "playing to the passions and prejudices of the jury."

[7-10] The Nebraska Rules of Professional Conduct set forth that a lawyer shall not, in trial, "state a personal opinion as to the . . . credibility of a witness . . . or the guilt or innocence of an accused."[23] But we have explained that "when a prosecutor's comments rest on reasonably drawn inferences from the evidence, the prosecutor 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."[24] Thus, in cases where a prosecutor comments on the theory of defense, the defendant's veracity, or the defendant's guilt, the prosecutor crosses the line into misconduct only if the prosecutor's comments are expressions of the prosecutor's personal beliefs rather than a summation of the evidence.[25] In assessing whether a prosecutor's statements were misconduct, we "look[] at the entire context of the language used to determine whether the prosecutor was expressing a personal opinion or merely submitting to the jury a conclusion that the prosecutor is arguing can be drawn from the evidence."[26]

Custer mischaracterizes the prosecutor's analogy. The prosecutor's statements were not "religiously infused." Instead, looking at the entire context of the language, the statement to which Custer takes issue established an inference that the jury would have to "ignore the evidence" to believe Custer's account. Thus, the prosecutor was arguing that a conclusion could be drawn from the evidence that Custer lied in his

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[23] Neb. Ct. R. of Prof. Cond. § 3-503.4(e).

[24] *State v. Gonzales*, 294 Neb. 627, 645, 884 N.W.2d 102, 117 (2016).

[25] *State v. Gonzales, supra* note 24.

[26] *Id.* at 647, 884 N.W.2d at 118.

testimony. Because the prosecutor's analogy was not an expression of a personal opinion in support of religion, or an effort to inflame the jurors' prejudices or excite their passions against the accused, we find no error in the prosecutor's comments.

[11] Custer next argues that counsel was ineffective for failing to object to questioning about "someone else yelling during the shooting, which wasn't in evidence."[27] Custer argued this assertion in his brief, but did not allege this in his motion for postconviction relief. An appellate court will not consider as an assignment of error a question not presented to the district court for disposition through a defendant's motion for postconviction relief.[28] Therefore, we do not consider this allegation.

Custer also contends that counsel was ineffective for failing to object to questions during the direct examination of Fields about Custer's prior criminal record and status as a felon. Custer contends that counsel should have invoked Neb. Rev. Stat. § 27-609 (Reissue 2016), which deals with the impeachment by evidence of a conviction for a crime. Custer takes issue with the following question counsel directed at Fields on direct examination: "Q: [Custer] also is a felon, is that correct? [Fields]: Yes." While not cited by Custer, counsel then proceeded to ask:

> Q: And where has he done some time? State or —
> [Fields]: State jail.
> Q: State and county jail?
> A: Yeah.
> . . . .
> Q: Okay, and in fairness to him, I mean there is nothing similar to these charges?
> A: No.
> Q: It was theft or those types of things?
> A: That stuff, yes.

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[27] Brief for appellant at 24.

[28] *State v. Haas*, 279 Neb. 812, 782 N.W.2d 584 (2010).

Section 27-609(1) provides for the impeachment of a witness on cross-examination when the witness has committed a felony or a crime of dishonesty.[29] 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.'"[30]

Counsel's conduct was not deficient. Having reviewed the record, it is apparent that the purpose of this line of questioning was to emphasize that Custer's prior criminal record was nonviolent. Given that Custer was charged in this case with first degree murder, it was not deficient for counsel to emphasize that while Custer might have a criminal record, the prior charges for which he was convicted were not violent crimes.

And even if counsel was deficient in questioning Fields about Custer's prior criminal record and status as a felon, Custer's claim fails for lack of prejudice. On direct examination, Custer also testified that he had been convicted of a felony and listed the felonies on his criminal record. There is no merit to this allegation of ineffective assistance of counsel.

In addition, Custer contends that counsel was ineffective for failing to object to an answer made by Fields, which Custer contends was hearsay. Custer takes issue with the following inquiry in the State's direct examination of Fields: "Q: How about, to your knowledge did [Custer] ever indicate that he was scared of [McCormick] to you? [Fields]: No. Q: He didn't indicate that [to] you? A: No." Custer claims that counsel should have objected to Fields' answer as hearsay, because Fields "is unqualified to know the thoughts and fears of [Custer]."[31]

Custer mischaracterizes the above line of inquiry. The State asked whether Custer had indicated to Fields that he was

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[29] See *State v. Castillo-Zamora*, 289 Neb. 382, 855 N.W.2d 14 (2014).

[30] *Id.* at 388, 855 N.W.2d at 22, quoting *State v. Johnson*, 226 Neb. 618, 413 N.W.2d 897 (1987).

[31] Brief for appellant at 25.

scared of McCormick. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.[32] The question concerns whether Custer had indicated anything to Fields. This is a fact within Fields' personal knowledge of the matter and, as such, was admissible.[33] Counsel was not deficient for failing to object.

There is no merit to this assignment of error.

(f) Jury Instructions

Custer argues that counsel was ineffective for (1) failing to submit a proper jury instruction on self-defense in accordance with *State v. Miller*[34] and NJI2d Crim. 7.3; (2) failing to provide a "self-defense option on jury verdict form, and only 1 jury verdict form was sent to the jury room, which prevented multiple jurors from seeing the jury form and understanding it completely";[35] (3) failing to identify manslaughter as voluntary manslaughter in jury instructions Nos. 4 and 5; (4) using the wrong definition of "premeditation" in jury instruction No. 7; (5) failing to include jury instruction No. 10, "Self Defense (Deadly Force)," as part of jury instruction No. 3, "Reasonable Doubt"; and (6) failing to object to jury instruction No. 14, because it "is confusing."[36]

We find that the jury was instructed on Custer's claim of self-defense. Jury instruction No. 4 states, under the elements of first degree murder, "[t]hat the Defendant did not do so in self-defense." Similarly, this phrase is also listed under the elements of second degree murder and manslaughter.

The language of jury instruction No. 10 comes directly from NJI2d Crim. 7.3. Custer contends that the language is improper

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[32] Neb. Rev. Stat. § 27-602 (Reissue 2016).

[33] See *id.*

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

[35] Brief for appellant at 26.

[36] *Id.* at 29.

in light of *State v. Miller*.[37] But Custer fails to allege how the instruction should have read in order for it to be "proper." Therefore, we find that the above jury instruction properly instructed the jury on self-defense.

Second, we find that "a self-defense option" was clearly explained in the jury instructions. As we stated, jury instruction No. 10 defines self-defense under the circumstances of this case. Jury instruction No. 4 further states that the jury must find Custer not guilty of count I if "you find the State has failed to prove beyond a reasonable doubt any one or more of the elements." Because "[t]hat the Defendant did not do so in self-defense" was one of the elements of first degree murder, second degree murder, and manslaughter, it necessarily follows that if the jury found the State had not proved that element, the jury would have to find Custer not guilty of both counts I and II. Therefore, the jury instructions provided adequate explanation and opportunity for the jury to find that Custer acted in self-defense.

We do not consider the remainder of Custer's allegations on appeal, because they were not alleged in his motion for postconviction relief.

There is no merit to this assignment of error.

2. Appointment of Counsel

Finally, Custer contends that the district court erred in denying him appointment of counsel because the "instant action" is a "'critical stage of a criminal prosecution.'"[38]

[12-14] There is no federal or state constitutional right to an attorney in state postconviction proceedings.[39] Under the Nebraska Postconviction Act, it is within the discretion of the trial court as to whether counsel shall be appointed to

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[37] *State v. Miller, supra* note 34.

[38] Brief for appellant at 10.

[39] *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010).

represent the defendant.[40] Where the assigned errors in the postconviction petition before the district court are either procedurally barred or without merit, establishing that the postconviction action contained no justiciable issue of law or fact, it is not an abuse of discretion to fail to appoint appellate counsel for an indigent defendant.[41] Because Custer's postconviction motion presents no justiciable issues, the district court did not err in not appointing Custer postconviction counsel.

VI. CONCLUSION

We conclude the district court did not err when it determined that Custer's motion for postconviction relief did not allege facts which constituted a denial of his constitutional rights and accordingly denied Custer's motion. The judgment of the district court is affirmed.

Affirmed.

Wright, J., not participating in the decision.

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[40] *Id.*

[41] *State v. Silvers*, 255 Neb. 702, 587 N.W.2d 325 (1998).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Troy McCoy, appellee, v. John H. Albin, Nebraska Commissioner of Labor, appellant.

903 N.W.2d 902

Filed December 1, 2017. No. S-17-057.

1. **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.
2. **Statutes: Appeal and Error.** Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.
3. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
4. **Statutes: Intent.** In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
5. **Actions: Service of Process.** A civil action is commenced by filing in the proper court a petition and causing a summons to be issued.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Reversed with directions.

Katie S. Thurber, Thomas A. Ukinski, and Dale M. Shotkoski for appellant.

Troy McCoy, pro se.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

In 1995, the Nebraska Department of Labor (Department) issued a "Notice of Deputy's Overpayment Determination" to Troy McCoy, informing McCoy that he had been overpaid $850 for unemployment benefits. In 2016, his income tax refund from the State of Nebraska in the amount of $293 was intercepted to partially pay the overpayment judgment, as authorized by Neb. Rev. Stat. § 48-665(1)(c) (Cum. Supp. 2016). McCoy appealed from that action.

Following a hearing, an appeal tribunal, citing Neb. Rev. Stat. § 25-218 (Reissue 2016), concluded that the Department's action was barred by a 4-year statute of limitations. The Department petitioned the Sarpy County District Court for review of the tribunal's determination. The district court affirmed, and the Department appeals. We conclude there is no time limitation to the interception of a state tax refund under § 48-665(1)(c), and accordingly, we reverse the decision of the district court with directions to reverse the decision of the appeal tribunal.

FACTUAL BACKGROUND

On October 25, 1995, notice was mailed to McCoy indicating that he had been overpaid unemployment benefits in the amount of $850 and that he was liable for repayment of that amount. No appeal was taken, and no funds were repaid at that time.

On February 22, 2016, McCoy received notice that his income tax refund totaling $293 had been intercepted and applied to his overpayment of unemployment benefits. McCoy, acting pro se, appealed, contending that the Department should not have intercepted his 2015 refund of $293. He also took issue with the Department's interception of his 1997 income tax refund in the amount of $217.

A hearing was held before an appeal tribunal. That tribunal found in McCoy's favor, holding that the Department was barred by the statute of limitations from intercepting the 2015 refund. The Department appealed to the district court, arguing that the statute providing for the authority to intercept tax refunds to apply against unemployment benefits did not include a statute of limitations and that, in any case, a statute of limitations is an affirmative defense that was not raised by McCoy and thus was waived. The district court affirmed.

ASSIGNMENT OF ERROR

The Department assigns, restated and consolidated, that the district court erred in affirming the appeal tribunal's decision that the Department was barred from intercepting McCoy's refund by the statute of limitations set forth in § 25-218.

STANDARD OF REVIEW

[1] When the petition instituting proceedings for review is filed in the district court on or after July 1, 1989, the appeal shall be taken in the manner provided by law for appeals in civil cases. The judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.[1] When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[2]

[2] Statutory interpretation is a question of law that an appellate court resolves independently of the trial court.[3]

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[1] Neb. Rev. Stat. § 84-918(3) (Reissue 2014).

[2] *Marion's v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 982, 858 N.W.2d 178 (2015).

[3] *ML Manager v. Jensen*, 287 Neb. 171, 842 N.W.2d 566 (2014).

ANALYSIS

Introduction

The issue on appeal is whether the Department's interception of a state income tax refund in order to repay an unemployment benefit overpayment is subject to a statute of limitations.

It is undisputed that the statutes providing for this right to setoff do not include a statute of limitations. The appeal tribunal found, and the district court agreed, that the 4-year limitations period in Neb. Rev. Stat. § 25-206 (Reissue 2016) (read in conjunction with § 25-218), dealing with an action on liability created by a statute, barred the recovery. Alternatively, the appeal tribunal noted that Neb. Rev. Stat. § 25-1515 (Reissue 2016), which limits the execution of a judgment to a time period of 5 years from the date rendered or last execution date, would prevent the Department from intercepting the refund, because it had been more than 5 years since the Department had intercepted McCoy's 1997 refund.

The Department disputes that §§ 25-206, 25-218, and 25-1515 are applicable and argues that the plain meaning of the statutes, read as a whole, clearly indicates that no statute of limitations was intended, noting that this result is consistent with the availability of setoff against a federal tax refund. The Department also argues that the statute of limitations was an affirmative defense, which McCoy did not allege, and states that the possibility that a statute of limitations would bar a setoff was initially raised by the appeal tribunal, which was not acting in a neutral capacity.

Relevant Statutes

Section 48-665(1) provides that "[a]ny person who has received any sum as benefits under the Employment Security Law to which he or she was not entitled shall be liable to repay such sum to the commissioner for the fund." That section sets forth four ways in which repayment might be sought: "without interest by civil action," "by offset against any future

benefits payable to the claimant with respect to the benefit year current at the time of such receipt or any benefit year which may commence within three years after the end of such current benefit year," "by setoff against any state income tax refund," and by setoff against a federal income tax refund.

The procedure to be followed for the Department to recover such a setoff is encompassed in Neb. Rev. Stat. §§ 77-27,197 to 77-27,209 (Reissue 2009) and in the Department's regulations found at 219 Neb. Admin. Code, ch. 16 (2012). Section 77-27,197 provides that the Legislature's intent was "to establish and maintain a procedure to set off against a debtor's income tax refund any debt owed to the Department . . . which has accrued as a result of an individual's liability for the repayment of unemployment insurance benefits determined to be in overpayment." Nebraska law further provides that this "collection remedy . . . shall be in addition to and not in substitution for any other remedy available at law."[4]

The setoff provided by state law is similar to the one provided by federal law. The federal "Treasury Offset Program" allows covered unemployment compensation debt to be recovered through the offset of federal income tax.[5] There is no time limitation in federal law.

As noted above, several more general statutes of limitations are relevant here. Section 25-206 provides: "An action upon a contract, not in writing, expressed or implied, or an action upon a liability created by statute, other than a forfeiture or penalty, can only be brought within four years."

Section § 25-218 provides:

> Every claim and demand against the state shall be forever barred unless action is brought thereon within two years after the claim arose. Every claim and demand on behalf of the state, except for revenue, or upon official

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[4] § 77-27,200.

[5] I.R.C. § 6402(f)(5) (2012).

> bonds, or for loans or money belonging to the school funds, or loans of school or other trust funds, or to lands or interest in lands thereto belonging, shall be barred by the same lapse of time as is provided by the law in case of like demands between private parties. This section shall not apply to any claim or demand against the state regarding property taxes.

Finally, § 25-1515 provides:

> If execution is not sued out within five years after the date of entry of any judgment that now is or may hereafter be rendered in any court of record in this state, or if five years have intervened between the date of the last execution issues on such judgment and the time of suing out another writ of execution thereon, such judgment, and all taxable costs in the action in which such judgment was obtained, shall become dormant and shall cease to operate as a lien on the estate of the judgment debtor.

Applicability of Limitations Period

[3,4] When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.[6] It is the court's duty to discover, if possible, legislative intent from the statute itself.[7] In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.[8]

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[6] See *Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004).

[7] *Id.*

[8] *Id.*

Section 48-665 provides four ways for the Department to collect an overpayment. One way includes an explicit time limitation. As relevant, subsection (1)(b) states that for an offset against future unemployment benefits payable to the claimant with respect to the benefit year current at the time of such receipt of any benefit year, such offset may be commenced within 3 years after the end of such current benefit year. Another option is recovery by a civil action as provided for by subsection (1)(a) and provides for an implicit time limitation—specifically, the statute of limitations for a civil action as set forth in chapter 25 of the Nebraska Revised Statutes.

The third and fourth collection options are offsets against either federal or state income tax refunds. Neither option explicitly states a limitations period, nor does either implicitly include a limitations period. Federal law previously prescribed a 10-year limitations period to offset overpayments against a federal income tax refund. However, that limitations period was apparently removed in 2010 and there is currently no limitations period for the offset of overpayment against a federal refund.[9]

Applying the usual standards of statutory application to the language of § 48-665, we hold that the Legislature did not intend for the time limitations provided for in §§ 25-206 and 25-218 to infringe upon the Department's ability to collect an overpayment by setoff. The statutory language provides for different methods of collection—some with and others without time limitations—lending support to the conclusion that the lack of a limitation for an offset against a state tax refund is meaningful.

Moreover, the language employed by the Legislature, even beyond the failure to include an explicit limitation, does not suggest any limitation. Section 48-665(1)(c) provides

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[9] See Pub. L. No. 111-291, § 801(a)(4), 124 Stat. 3157.

that a setoff may be made "against *any* state income tax refund due the claimant pursuant to sections 77-27,197 to 77-27,209." (Emphasis supplied.) And "[r]efund" is defined by § 77-27,199(2) as "*any* Nebraska state income tax refund." (Emphasis supplied.)

That the plain language of the statute supports the Department's position that no statute of limitations is applicable to a setoff against a state income tax refund is further supported by an examination of the Legislature's intent:

> It is the intent of the Legislature to establish and maintain a procedure to set off against a debtor's income tax refund *any* debt owed to the Department . . . which has accrued as a result of an individual's liability for the repayment of unemployment insurance benefits determined to be in overpayment pursuant to sections 48-665 and 48-665.01 . . . .[10]

[5] The plain language of §§ 25-206 and 25-218 states that the limitations period provided by each statute is applicable to an *action*. A civil action is commenced by filing in the proper court a petition and causing a summons to be issued.[11] A setoff is not an *action* in the traditional sense, and were it to be treated as such, it would be duplicative to the collection procedure set forth in § 48-665(1)(a) allowing an overpayment to be collected by a civil action filed in the name of the commissioner.

This result is consistent with federal law. As explained above, federal law previously provided a 10-year limitations period, but no longer has such a limitation. Because the procedure for a federal refund offset is similar to the procedure for a state refund offset under § 48-665(1)(c), it would make sense to have the same limitations period, or none at all, for

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[10] § 77-27,197 (emphasis supplied).

[11] *Tiedtke v. Whalen*, 133 Neb. 301, 275 N.W. 79 (1937). See, also, Neb. Rev. Stat. § 25-501 (Reissue 2016).

each mechanism. We further observe that even if we were to conclude that the Department was unable to recover a setoff from McCoy's state income tax refund, it would be able to obtain a setoff from any federal refund by following the applicable procedure.

We reject the appeal tribunal's reliance upon § 25-1515. Section 25-1515 deals with dormant judgments and specifically provides that a judgment is dormant 5 years after it was recorded if never executed upon; otherwise, it is dormant 5 years after its last execution, which in this case was in 1997. But the plain language of § 25-1515 supports the conclusion that the notice of overpayment is not a judgment. Section 25-1515 states in relevant part that it applies to "any judgment . . . rendered in any court of record in this state." The notice of overpayment at issue in this case was not rendered by any court of record—it was entered by an administrative agency. We therefore conclude that on these facts, such notice of overpayment is not a judgment for purposes of § 25-1515.

Having concluded that there is no statute of limitations applicable to the procedure set forth in § 48-665(1), we need not address the Department's waiver argument.

CONCLUSION

There is no statute of limitations barring the Department's interception of McCoy's state income tax refund to offset his unemployment benefit overpayment. We therefore reverse the decision of the district court with directions to reverse the decision of the appeal tribunal.

Reversed with directions.

Wright, J., not participating in the decision.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Interest of Lilly S. and Vincent S., children under 18 years of age. State of Nebraska, appellee, v. Kenny S., appellant.

903 N.W.2d 651

Filed December 1, 2017. No. S-17-259.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. When the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Rules of Evidence: Judicial Notice.** Pursuant to Neb. Rev. Stat. § 27-201(2) (Reissue 2016), a judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
3. ____: ____. When neither of the alternative tests prescribed in Neb. Rev. Stat. § 27-201(2) (Reissue 2016) is satisfied, judicial notice of an adjudicative fact is improper.
4. **Rules of Evidence: Judicial Notice: Words and Phrases.** Adjudicative facts within the meaning of Neb. Rev. Stat. § 27-201 (Reissue 2016) are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. In other words, the adjudicative facts are those to which the law is applied in the process of adjudication.
5. **Judgments: Words and Phrases.** A fact is adjudicative if the fact affects the determination of a controverted issue in litigation.
6. **Judicial Notice.** A judge or court may take judicial notice, whether requested or not, and judicial notice of an adjudicative fact may be taken at any stage of proceedings.

7. **Juvenile Courts: Judicial Notice: Records.** A juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.
8. **Judicial Notice.** A trial court cannot take judicial notice of disputed allegations.
9. **Juvenile Courts: Jurisdiction.** To obtain jurisdiction over a juvenile at the adjudication stage, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of Neb. Rev. Stat. § 43-247 (Reissue 2016).
10. **Juvenile Courts: Jurisdiction: Parental Rights.** Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) outlines the basis for the juvenile court's jurisdiction and grants exclusive jurisdiction over any juvenile who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian.
11. **Juvenile Courts: Jurisdiction: Proof.** While the State need not prove that a child has actually suffered physical harm to assert jurisdiction under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016), Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm.
12. **Parental Rights: Proof.** The State must prove the allegations in a petition for adjudication filed under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2016) by a preponderance of the evidence.
13. **Parental Rights.** A court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child.
14. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; 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 the Constitution or statutes; and a hearing before an impartial decisionmaker.
15. **Child Custody: Parental Rights.** Under the parental preference principle, a parent's natural right to the custody of his or her child trumps the interests of strangers, including the State, to the parent-child relationship and the preferences of the child.
16. **Constitutional Law: Public Policy: Child Custody: Parental Rights.** Unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child.
17. **Constitutional Law: Parental Rights: Presumptions.** Absent circumstances which justify terminating a parent's constitutionally protected

right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child.

18. **Child Custody: Parental Rights.** The parental preference doctrine, under which a parent's natural right to the custody of his or her child trumps the interests of strangers, is applicable even to an adjudicated child.
19. **Juvenile Courts: Parent and Child: Evidence.** Once there has been the adjudication that a child is a juvenile within meaning of the Nebraska Juvenile Code, the foremost purpose or objective is promotion and protection of the juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents, where continuation of such parental relationship is proper under the law. To accomplish such a goal and fashion a dispositional remedy beneficial to the juvenile, the juvenile court should have access to the best available evidence which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile.
20. **Child Custody: Parental Rights.** While it is true that a parent has a natural right to the custody of his or her child, the court is not bound as a matter of law to restore a child to a parent under any and all circumstances.
21. ____: ____. The parent's natural right to the custody of his or her child is limited by the State's power to protect the health and safety of the children.
22. **Child Custody: Parental Rights: Proof.** The best interests of the children must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his or her superior right to custody, the court may place the children in the custody of an unrelated third party.
23. **Juvenile Courts: Parental Rights: Notice.** Neb. Rev. Stat. § 43-267(2) (Reissue 2016) requires that as a party, the parent shall receive notice of a juvenile dispositional hearing. Such notice ensures that the rights of the adjudicated and nonadjudicated parents are recognized.

Appeal from the Separate Juvenile Court of Douglas County: Douglas F. Johnson, Judge. Affirmed in part, and in part vacated and remanded with directions.

Thomas C. Riley, Douglas County Public Defender, and Zoë R. Wade for appellant.

No appearance for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

Kenny S. appeals the adjudication and disposition order of the separate juvenile court of Douglas County. He challenges (1) the sufficiency of the evidence that his children were at risk of harm, (2) the juvenile court's judicial notice of disputed facts and judicial notice of facts within the court's own "knowledge," (3) the constitutionality of Neb. Rev. Stat. § 43-247(5) (Reissue 2016) as currently construed, and (4) the dispositional order entered without notice or a reasonable opportunity to be heard. We conclude that the juvenile court erred in finding sufficient evidence that Kenny's faults or habits placed the children at risk for harm, taking judicial notice of disputed adjudicative facts, and failing to provide notice and a hearing for disposition, but we reject the remainder of Kenny's claims. Accordingly, we affirm in part and in part vacate the court's decision and remand the cause with directions.

FACTS

Kenny and Ashley S. are the biological parents of Lilly S., born in 2006, and Vincent S., born in 2012.

In November 2016, the State filed a petition alleging that Lilly and Vincent were children within the meaning of § 43-247(3)(a) due to the fault or habits of their parents. Regarding Ashley, the petition alleged that she had continued to allow Kenny to supervise the children despite knowing he "abuses methamphetamines"; that she engages in domestic violence with Kenny and has failed to take steps to address it; that she has failed to provide proper parental care, support, or supervision for the children; and that these circumstances placed the children at risk for harm. As to Kenny, the petition alleged that he "tested positive for methamphetamines and

amphetamines"; that he uses alcohol or controlled substances; that he engages in domestic violence with Ashley and has failed to take steps to address it; that "Ashley" has failed to provide proper parental care, support, or supervision for the children; and that these circumstances placed the children at risk for harm.

Adjudication proceedings were held in February 2017, during which Ashley entered a "plea" admitting the allegation regarding domestic violence and the allegation that the children were at risk for harm. Specifically, she admitted that there had been one incident where Kenny had pushed her and she called the police. Based on Ashley's admission, the juvenile court found a factual basis sufficient to adjudicate the children as to Ashley and proceeded to receive exhibits and hear arguments concerning disposition as to her.

Immediately thereafter, the matter proceeded to adjudication of the allegations against Kenny. The State attempted to elicit evidence regarding Kenny's use of methamphetamine, but was unable to do so because Kenny invoked his Fifth Amendment privilege against self-incrimination. The State's efforts to obtain such testimony from other witnesses were also unsuccessful, as the court sustained various objections.

The guardian ad litem called Ashley to testify regarding the domestic violence allegations. Ashley testified that on November 1, 2016, she and Kenny engaged in an argument which led to her calling the police. She explained that Kenny pushed her out of his way in order to leave the house. Upon cross-examination by Kenny's counsel, Ashley further testified that this was the only time Kenny had "been physical" with her and that their children were not in the home at the time of the altercation.

The juvenile court took the matter under advisement and issued a written adjudication and dispositional order as to Kenny later that day. It determined Lilly and Vincent to be children within the meaning of § 43-247(3)(a) by a preponderance of the evidence.

Specifically, the juvenile court found that Ashley's testimony was credible with respect to her report that there was an incident of domestic violence following an argument that caused her to call the police. The juvenile court continued:

> [T]he Court also, upon its own motion, takes judicial notice that just before trial [Ashley] admitted to the same when she entered a plea of admission [that she engages in domestic violence with Kenny and has failed to take steps to address the domestic violence, placing the children at risk of harm]. The Court finds that by taking jurisdiction of that the same factual basis applies to [Kenny]. Any domestic violence, whether the children are present or not, normally occurs more than one time. Although there may be [one] incidence that is suggested the Court finds that the case law is clear that the children do not have to await for [sic] actual harm to occur for the State to intervene[.]

The juvenile court found the allegations of domestic violence to be true and adjudicated the children on those grounds as to Kenny, but dismissed the substance abuse allegations for insufficient evidence. It went on to state that the "matter proceeded to immediate disposition hearing as to [Kenny]." The juvenile court then ordered Kenny to undergo an initial diagnostic interview as well as any further recommended evaluations and to participate in an accredited domestic violence "Batterer's Intervention Program."

Kenny appeals. The State filed notice of its intent to waive filing a brief and participation in oral arguments in this matter. Ashley has not appealed; as such, this appeal pertains to Kenny only.

ASSIGNMENTS OF ERROR

Kenny assigns that (1) the juvenile court erred in finding sufficient evidence that the children are at risk for harm; (2) the juvenile court erred in taking judicial notice of disputed facts and facts within the court's own personal "knowledge";

(3) § 43-247(5), as it is currently construed, unconstitutionally deprives a parent of his or her procedural due process rights under the U.S. and Nebraska Constitutions; and (4) he was denied due process of law when the juvenile court entered dispositional orders without providing notice or a reasonable opportunity to be heard.

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches a conclusion independently of the juvenile court's findings. *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016). When the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *Id.*

ANALYSIS

Judicial Notice of Disputed Facts and Facts Within Court's Personal "Knowledge"

We first address Kenny's claim that the juvenile court erred in taking judicial notice of disputed facts and facts within the court's own personal "knowledge." As noted above, the juvenile court order stated, in part:

> [T]he Court also, upon its own motion, takes judicial notice that just before trial [Ashley] admitted to the same when she entered a plea of admission [that she engages in domestic violence with Kenny and has failed to take steps to address the domestic violence, placing the children at risk of harm]. The Court finds that by taking jurisdiction of that the same factual basis applies to [Kenny]. Any domestic violence, whether the children are present or not, normally occurs more than one time. Although there may be [one] incidence that is suggested the Court finds that the case law is clear that the children do not have to await for [sic] actual harm to occur for the State to intervene[.]

Kenny characterizes the juvenile court's statement, "Any domestic violence, whether the children are present or not, normally occurs more than one time," as the court's taking judicial notice of its personal knowledge. However, we do not view it as judicial notice, but, rather, as permissible commentary on the credibility of Ashley's testimony concerning the frequency of domestic violence and her apparent reluctance to testify about the incident which prompted her to contact the police. In this respect, the juvenile court did not err.

Clearly, however, the juvenile court took judicial notice of the factual basis from the "plea of admission" that Ashley entered during her adjudication proceedings and used it as evidence to support the allegations against Kenny in separate proceedings. Kenny argues that because these facts were in dispute, the juvenile court erred. We agree.

[2-5] The Nebraska Evidence Rules control adduction of evidence at an adjudication hearing under the Nebraska Juvenile Code. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). See, also, Neb. Rev. Stat. § 43-279(1) (Reissue 2016). Pursuant to Neb. Rev. Stat. § 27-201(2) (Reissue 2016), a judicially noticed fact must be one not subject to reasonable dispute in that it is either (a) generally known within the territorial jurisdiction of the trial court or (b) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. When neither of the alternative tests in § 27-201(2) is satisfied, judicial notice of an adjudicative fact is improper. *State v. Vejvoda*, 231 Neb. 668, 438 N.W.2d 461 (1989). Adjudicative facts within the meaning of § 27-201 are simply the facts developed in a particular case, as distinguished from legislative facts, which are established truths, facts, or pronouncements that do not change from case to case but apply universally. *Strunk v. Chromy-Strunk*, 270 Neb. 917, 708 N.W.2d 821 (2006). In other words, the adjudicative facts are those to which the law is applied in the process of adjudication. *Id.* A fact is adjudicative if the fact affects the

determination of a controverted issue in litigation. *State v. Vejvoda, supra*.

[6,7] A judge or court may take judicial notice, whether requested or not, and judicial notice of an adjudicative fact may be taken at any stage of proceedings. § 27-201(3); *State v. Vejvoda, supra*. And a juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined. *In re Interest of Ty M. & Devon M.*, 265 Neb. 150, 655 N.W.2d 672 (2003).

The foregoing authority permitted the juvenile court to take judicial notice of the adjudicated fact that it had found Lilly and Vincent, in Ashley's case, to be within the meaning of § 43-247(3)(a) due to domestic violence occurring between Kenny and Ashley. See *Strunk v. Chromy-Strunk, supra*. But here, the juvenile court went a step further and took judicial notice of the factual basis of Ashley's admission, which consisted of adjudicative—not adjudicated—facts, facts which Kenny disputed.

[8] As Kenny points out, we have recognized that under § 27-201(2), "a trial court cannot take judicial notice of disputed allegations." *In re Interest of N.M. and J.M.*, 240 Neb. 690, 698, 484 N.W.2d 77, 82 (1992). And previously addressing judicial notice of adjudicative facts, we quoted 1 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 201[03] (1988):

> "When facts do not possess [the] requisite degree of certainty, our traditional procedure has been to require proof within the framework of the adversary system for reasons well-expressed by Professor Davis: 'The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to

> the parties. . . .' [Quoting from K. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in Perspectives of Law 69 (1964).]"

State v. Vejvoda, 231 Neb. at 676, 438 N.W.2d at 467.

Here, the factual basis provided by the State for Ashley's admission, which is disputed by Kenny, did not "'possess [the] requisite degree of certainty'" that is required for judicial notice, since the veracity of the facts offered was not subject to any test by Kenny at the time of Ashley's admission. See *id.* We conclude that this procedure of judicially noticing adjudicative facts against a parent who challenges those facts, without providing that parent the opportunity to respond to the act of judicial notice, was in error. And we do not consider such facts in evaluating the sufficiency of the evidence.

Sufficiency of Evidence of Risk of Harm

[9-12] Next, Kenny claims that the juvenile court erred in finding sufficient evidence that the children were at risk for harm and therefore came within the meaning of § 43-247(3)(a). To obtain jurisdiction over a juvenile at the adjudication stage, the court's only concern is whether the conditions in which the juvenile presently finds himself or herself fit within the asserted subsection of § 43-247. *In re Interest of Justine J. et al.*, 286 Neb. 250, 835 N.W.2d 674 (2013). "Section 43-247(3)(a) outlines the basis for the juvenile court's jurisdiction and grants exclusive jurisdiction over any juvenile 'who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian.'" *In re Interest of Justine J. et al.*, 286 Neb. at 253, 835 N.W.2d at 677. While the State need not prove that the child has actually suffered physical harm, Nebraska case law is clear that at a minimum, the State must establish that without intervention, there is a definite risk of future harm. *In re Interest of Justine J. et al., supra*. The State must prove such allegations by a preponderance of the evidence. *Id.*

As to Kenny, the petition alleged, in relevant part, that Lilly and Vincent came within the meaning of § 43-247(3)(a) due to domestic violence between Kenny and Ashley which placed the children at risk for harm. Disregarding the judicially noticed adjudicative facts, the evidence supporting this allegation consisted of Ashley's in-court testimony that Kenny pushed her once while outside the children's presence and the juvenile court's judicial notice of the adjudication of the children as to Ashley, pursuant to § 43-247(3)(a).

[13] As the juvenile court observed, "a court need not await certain disaster to come into fruition before taking protective steps in the interest of a minor child." *In re Interest of S.L.P.*, 230 Neb. 635, 639, 432 N.W.2d 826, 830 (1988). Conceivably, a child need not witness domestic violence or be in the vicinity in order to be placed at risk for harm. For example, if a child observed the subsequent results of domestic violence or was otherwise made aware of the domestic violence, this could constitute a risk for harm to the child. But to support adjudication, this court has required an evidentiary nexus between a parent's fault or habits and the risk for harm to the child. See *In re Interest of Justine J. et al., supra*. Here, without additional evidence of the actual or potential effects of the domestic violence on Lilly and Vincent, there is insufficient evidence in the record to find that they were placed at risk for harm by Kenny's actions. Therefore, we conclude that the juvenile court erred in finding sufficient evidence that the children were at risk for harm due to any faults or habits of Kenny and that it erred in adjudicating the children on that basis.

Due Process Claims

Finally, Kenny claims that § 43-247(5), as construed by this court, unconstitutionally deprives a "non-adjudicated" parent of his or her procedural due process rights under the U.S. and Nebraska Constitutions. Brief for appellant at 13. Further, Kenny claims that he was denied due process of law when the

juvenile court entered dispositional orders as to him without providing notice or a reasonable opportunity to be heard. We shall address these assignments of error together, since they are intertwined.

In relevant part, § 43-247 provides:

> The juvenile court in each county shall have jurisdiction of:
>
> . . . .
>
> (3) [a]ny juvenile (a) . . . who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian [and]
>
> . . . .
>
> (5) [t]he parent, guardian, or custodian of any juvenile described in this section.

Under our previous interpretations of § 43-247(5), when a child is adjudicated as a child within the meaning of § 43-247(3)(a), a juvenile court can also exercise jurisdiction over a nonadjudicated parent, that is, a parent who did not deprive the child of proper parental care due to his or her faults or habits. See, *In re Interest of Devin W. et al.*, 270 Neb. 640, 707 N.W.2d 758 (2005); *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996). It is this application of § 43-247(5) that Kenny challenges and which we now uphold.

Kenny claims that our previous holdings applying § 43-247(5) to nonadjudicated parents fail to address "the State's burden to show the parent is unfit" and "unfairly deprive[] parent[s] of their fundamental interest in the care and custody of their children without due process of law." Brief for appellant at 13. Notably, Kenny fails to cite any specific legal authority to support his contention that our previous analyses are incorrect.

[14] Instead, Kenny points to two principles. First, he cites our description of procedural due process in the context of a juvenile adjudication:

> "'"[P]rocedural due process includes notice to the person whose right is affected by the proceeding;

> reasonable opportunity to refute or defend against the charge or accusation; 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 the Constitution or statutes; and a hearing before an impartial decisionmaker."'"

In re Interest of Heather R. et al., 269 Neb. 653, 659-60, 694 N.W.2d 659, 665 (2005) (quoting *In re Interest of Mainor T. & Estela T.*, 267 Neb. 232, 674 N.W.2d 442 (2004)).

[15-18] Second, Kenny relies on the parental preference principle, under which a parent's natural right to the custody of his or her child trumps the interests of strangers, including the State, to the parent-child relationship and the preferences of the child. See *In re Interest of Sloane O.*, 291 Neb. 892, 870 N.W.2d 110 (2015). Unless it has been affirmatively shown that a biological or adoptive parent is unfit or has forfeited his or her right to custody, the U.S. Constitution and sound public policy protect a parent's right to custody of his or her child. *Id.* Absent circumstances which justify terminating a parent's constitutionally protected right to care for his or her child, due regard for the right requires that a biological or adoptive parent be presumptively regarded as the proper guardian for his or her child. *Id.* The doctrine is applicable even to an adjudicated child. *Id.*

We dealt with a similar claim in *In re Interest of Amber G. et al.*, 250 Neb. 973, 554 N.W.2d 142 (1996), where one parent asserted that the process of waiting until the dispositional hearing to determine placement is unconstitutional as applied to a nonadjudicated parent. In *In re Interest of Amber G. et al.*, we found that despite no allegations against one parent, both parents were subject to the jurisdiction of the juvenile court after an adjudication hearing found the children to be within § 43-247(3)(a). Further, we found that both parents' rights were protected by the two-step process of adjudication and disposition. We stated:

> In Nebraska, the rights of the parent and the child are protected by the separate adjudication and dispositional phases of the dependency proceeding. A petition brought under § 43-247(3)(a) is brought on behalf of the child, not to punish the parents. . . . The purpose of the adjudication phase of the proceeding is to protect the interests of the child; the purpose of the dispositional phase is to determine placement and the rights of the parties in the action. . . . It is not improper for the court to sustain jurisdiction at the adjudication phase if the State [establishes a] lack of proper parental care in the child's present living situation.

Id. at 980, 554 N.W.2d at 148 (citations omitted).

[19] Kenny asserts that his rights are not protected by waiting until the dispositional phase to address them; however, the adjudication stage represents the initial process whereby the juvenile court determines whether the child is subject to its jurisdiction pursuant to § 43-247. Once there has been the adjudication that a child is a juvenile within meaning of the Nebraska Juvenile Code, the foremost purpose or objective is promotion and protection of the juvenile's best interests, with preservation of the juvenile's familial relationship with his or her parents, where continuation of such parental relationship is proper under the law. *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 262, 417 N.W.2d 147, 155 (1987). To accomplish such a goal and fashion a dispositional remedy beneficial to the juvenile, the juvenile court should have access to the best available evidence which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile. *Id.*

This in turn leads to Kenny's next contention, which involves the following language from *In re Interest of Amber G. et al.*, 250 Neb. at 984, 554 N.W.2d at 150:

> Where there are two parents with separate homes, the children can be removed from the home of the unfit parent at the adjudication hearing without prejudicing the

> other parent's right to gain custody of the child at the dispositional hearing *upon a sufficient showing that he or she is capable of providing proper parental care*.

(Emphasis supplied.) Kenny argues that "permitting a nonadjudicated parent to gain custody of his or her child 'upon a sufficient showing that he or she is capable of providing proper care'" improperly shifts the burden of proving parental fitness to the parent, thereby relieving the State of its burden of proof. Brief for appellant at 18.

We perceive the contradictory nature of the aforementioned language from *In re Interest of Amber G. et al.*, 250 Neb. 973, 982, 554 N.W.2d 142, 149 (1996), wherein we also stated:

> This court has long held that in a child custody controversy between a biological or adoptive parent and one who is neither a biological nor an adoptive parent of the child involved in the controversy, a fit biological or adoptive parent has a superior right to the custody of the child. . . . A court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child.

(Citation omitted.) To the extent that *In re Interest of Amber G. et al.* places the initial burden on the nonadjudicated parent at a dispositional hearing to show parental fitness, it is disapproved.

[20-22] However, upon a showing at a dispositional hearing by the State or another interested party or a predispositional report that raises concerns about the parental fitness of a nonadjudicated parent, that parent has the burden to rebut such evidence. This is consistent with our precedent that while it is true that a parent has a natural right to the custody of his or her child, the court is not bound as a matter of law to restore a

child to a parent under any and all circumstances. *In re Interest of Amber G. et al., supra.* Instead, the parent's natural right is limited by the State's power to protect the health and safety of the children. *Id.* The best interests of the child must always be considered in determining matters of child custody, and where the parent is shown to be unfit or to have forfeited his or her superior right to custody, the court may place the children in the custody of an unrelated third party. *Id.*

If we accepted Kenny's premise, a child would automatically be placed with the nonadjudicated parent until a hearing could be scheduled, which means that pending the placement hearing, the child would be placed in an unknown situation. We understand that much of the time, placement with the nonadjudicated parent would be appropriate. Unfortunately, however, there are those limited situations where placement with the nonadjudicated parent would cause harm to the child. At the same time, we also understand that the government is not a substitute for parents. But there must be a balancing between the rights of parents and the best interests of the child. See *In re Interest of Cassandra B. & Moira B.*, 290 Neb. 619, 861 N.W.2d 398 (2015). Certainly, Kenny, as a parent, would be the preferred placement for Lilly and Vincent, but without any information about his situation, the juvenile court would have insufficient evidence to fashion a disposition that served the children's best interests. See Neb. Rev. Stat. § 43-283.01 (Reissue 2016).

[23] Finally, we recognize that Neb. Rev. Stat. § 43-267(2) (Reissue 2016) requires that as a party, the parent shall receive notice of the dispositional hearing. Such notice ensures that the rights of the adjudicated and nonadjudicated parents are recognized. Unfortunately, those procedures were not followed in this situation. Kenny was not provided notice of the dispositional hearing and was thereby deprived of the opportunity to address any placement concerns or his parental fitness. Therefore, we vacate the dispositional order of the juvenile court and remand this cause back to that court

for a dispositional hearing for Kenny after proper notice to all parties.

CONCLUSION

For the foregoing reasons, we affirm in part and in part vacate the juvenile court's decision and remand the cause for further proceedings.

Affirmed in part, and in part vacated and remanded with directions.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Brianna L. Huston, appellant.

903 N.W.2d 907

Filed December 1, 2017. No. S-17-267.

1. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
2. **Criminal Law: Statutes: Sentences: Legislature.** Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.
3. **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 Hall County, Mark J. Young, Judge, on appeal thereto from the County Court for Hall County, Philip M. Martin, Jr., Judge. Sentence vacated, and cause remanded with directions.

Robert W. Alexander, Deputy Hall County Public Defender, for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

NATURE OF CASE

Brianna L. Huston was sentenced to jail time and probation after pleading guilty to first-offense driving during revocation. In addition to this sentence, the county court for Hall County ordered a revocation of Huston's driver's license for 1 year, believing that such was required under this court's interpretation of Neb. Rev. Stat. § 60-4,108 (Cum. Supp. 2016) set forth in *State v. Frederick*.[1] On appeal, the district court for Hall County affirmed. Huston subsequently appealed the revocation portion of her sentence to this court.

While Huston's appeal was pending, 2017 Neb. Laws, L.B. 263, went into effect, which amended § 60-4,108 to allow the sentencing court discretion in ordering a revocation for first-time offenders when the offender has been placed on probation.[2] Because we determine that the amended version of § 60-4,108 applies retroactively to Huston's sentence, we vacate Huston's sentence in its entirety and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.

FACTS

In July 2016, Huston was charged with driving during revocation, second or third offense. In November, she pled guilty to an amended charge of first-offense driving during revocation. In exchange for Huston's plea, the State agreed to a sentence of 45 days' jail time and to not oppose Huston's request for house arrest. The county court sentenced Huston to 45 days' jail time and 6 months' probation and revoked her license for 1 year.

In revoking Huston's license, the county court found that it was obligated to do so by *State v. Frederick*, which involved

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[1] *State v. Frederick*, 291 Neb. 243, 864 N.W.2d 681 (2015).

[2] See 2017 Neb. Laws, L.B. 263, § 65.

another appellant convicted of driving during revocation.[3] In *Frederick*, we found no merit to the appellant's assignment of error and affirmed his conviction. Although neither party assigned or argued it, we found that the sentencing court committed plain error when it failed to revoke the appellant's driver's license. We said that revocation was required by § 60-4,108(1)(a), which, at the time *Frederick* was issued (and at the time Huston was sentenced), stated in relevant part:

> [For a first offense of driving during revocation,] the court shall, as a part of the judgment of conviction, order such person not to operate any motor vehicle for any purpose for a period of one year from the date ordered by the court and also order the operator's license of such person to be revoked for a like period . . . . Such [order] shall be administered upon sentencing, upon final judgment of any appeal or review, or upon the date that any probation is revoked, whichever is later.

Huston appealed her sentence to the district court, which affirmed the county court's sentencing order, finding no abuse of discretion.

Huston then timely appealed the district court's order in March 2017. The parties' briefs were filed in May and June.

Effective August 24, 2017, L.B. 263 amended § 60-4,108. Prior to L.B. 263, § 60-4,108(1)(a) provided that for a first offense under that section, "the court shall . . . order the operator's license of such person to be revoked for [a period of 1 year]." L.B. 263 added the phrase, "unless the person was placed on probation, then revocation may be ordered at the court's discretion."

ASSIGNMENT OF ERROR

Huston assigns that the district court erred in affirming the county court's decision to revoke her driver's license and its decision that the revocation must begin immediately.

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[3] See *State v. Frederick, supra* note 1.

STANDARD OF REVIEW

[1] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.[4]

ANALYSIS

Before addressing Huston's assigned errors, we turn our attention to the State's assertion that L.B. 263 would amend § 60-4,108 and that if the change went into effect while Huston's appeal was still pending, then the amendment might affect Huston's sentence under *State v. Randolph*.[5]

[2] In *State v. Randolph*, we held that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise.[6] But, the *Randolph* doctrine does not apply if the Legislature created a "new crime" rather than merely changing the penalty for an existing crime.[7] Here, the amended version of § 60-4,108 changed only the punishment.

Section 60-4,108 was amended after Huston committed the offense of driving during revocation, but before final judgment. If a defendant appeals his or her sentence, the sentence is not a final judgment until the entry of a final mandate.[8] Because we have not yet entered a final mandate on Huston's appeal of her sentence, the judgment is not yet final. Thus, if the amendment to § 60-4,108 mitigates Huston's punishment, then Huston's punishment is that provided by the amended version of § 60-4,108, unless the Legislature has specifically provided otherwise.

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[4] *State v. Lantz*, 290 Neb. 757, 861 N.W.2d 728 (2015).

[5] *State v. Randolph*, 186 Neb. 297, 183 N.W.2d 225 (1971).

[6] *Id.*

[7] See *State v. Duncan*, 291 Neb. 1003, 870 N.W.2d 422 (2015).

[8] *Id.*

We conclude that Huston's punishment is that provided by the amended version of § 60-4,108. The Legislature has not provided otherwise, and the amendment to § 60-4,108 mitigates the punishment for Huston's offense. Before the amendment, under our interpretation set forth in *State v. Frederick*, § 60-4,108 required that a defendant convicted of first-offense driving during revocation have his or her driver's license revoked for a period of 1 year regardless of whether that defendant was placed on probation.[9] After the amendment, if the defendant is placed on probation, revocation is not necessarily required.[10] Accordingly, the amended version of § 60-4,108 allows for a more lenient punishment, i.e., mitigates the punishment, and therefore it applies retroactively to Huston's sentence. Because it applies retroactively, then, the county court should have had discretion in deciding whether to revoke Huston's driver's license.

We acknowledge that Huston's current sentence, including the revocation portion, is within the statutory limits of the past version of § 60-4,108; and even under the amended version of the statute, the county court could order a 1-year period of revocation in its discretion. However, here, the county court was bound by the law at the time of sentencing, was required to impose a period of revocation, and was unable to exercise its discretion.

As a matter of plain error, therefore, we conclude that Huston is entitled to retroactive relief under L.B. 263.[11] Consequently, we vacate Huston's sentence and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.

[3] Because we conclude that the amended version of § 60-4,108 applies retroactively to Huston's sentence and

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[9] See *State v. Frederick, supra* note 1.

[10] See 2017 Neb. Laws, L.B. 263, § 65.

[11] See *State v. Chacon*, 296 Neb. 203, 894 N.W.2d 238 (2017).

remand the cause for resentencing, we need not consider Huston's assignment 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.[12]

CONCLUSION

For the reasons set forth above, we conclude that the amended version of § 60-4,108 applies retroactively to Huston's sentence. Under the amended version, the county court has discretion in deciding whether to impose a period of revocation. Because the county court was unable to exercise its discretion at the time of Huston's sentencing, we vacate Huston's sentence in its entirety and remand the cause to the district court with directions to remand it to the county court for resentencing consistent with the amended version of § 60-4,108.

Sentence vacated, and cause remanded with directions.

Wright, J., not participating.

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[12] *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016).



Nebraska Supreme Court

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-- Nebraska Reporter of Decisions

Mohammed Nadeem, appellant, v. State of Nebraska, appellee.

904 N.W.2d 244

Filed December 8, 2017. No. S-16-113.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Motions to Dismiss: Pleadings.** For purposes of a motion to dismiss, a court may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings.
3. **Pleadings: Complaints.** Documents embraced by the pleadings are materials alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings.
4. ____: ____. Documents embraced by the complaint are not considered matters outside the pleadings.
5. **Res Judicata: Judgments.** Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
6. **Convictions: Claims: Pleadings.** Under Neb. Rev. Stat. § 29-4603 (Reissue 2016), a party alleging a wrongful conviction claim must plead (1) conviction and sentence for a felony for which the party has served at least part of the sentence; (2) pardon, vacation of the conviction, or reversal and remand without a resulting retrial and conviction; (3) actual innocence of the crime; and (4) that the plaintiff did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another, except for coerced confessions or guilty pleas.

7. **Sentences: Words and Phrases.** Legal innocence is defined as the absence of one or more procedural or legal bases to support the sentence given to a defendant.
8. ____: ____. Actual innocence refers to the absence of facts that are prerequisites for the sentence given to a defendant.
9. **Actions: Complaints.** In determining whether a complaint states a cause of action, a court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations.

Petition for further review from the Court of Appeals, Pirtle, Bishop, and Arterburn, Judges, on appeal thereto from the District Court for Lancaster County, Robert R. Otte, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Jeffry D. Patterson for appellant.

Douglas J. Peterson, Attorney General, and Ryan S. Post for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

Mohammed Nadeem filed a claim against the State for damages under the Nebraska Claims for Wrongful Conviction and Imprisonment Act.[1] The district court granted the State's motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failure to state a claim. Nadeem appealed to the Nebraska Court of Appeals, which reversed the district court's dismissal.[2] We granted the State's petition for further review. Because Nadeem has not sufficiently pled a claim of actual innocence, we reverse, and remand to the Court of Appeals with directions to affirm the order of the district court.

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[1] Neb. Rev. Stat. §§ 29-4601 to 29-4608 (Reissue 2016).

[2] *Nadeem v. State*, 24 Neb. App. 825, 899 N.W.2d 635 (2017).

FACTS

Background

Nadeem was convicted in 2010 of attempted first degree sexual assault and attempted third degree sexual assault of H.K., a minor. These offenses were based on an encounter that Nadeem had with a 14-year-old girl in 2009 when he was 22 years old. The evidence presented at Nadeem's criminal trial is summarized in his original direct appeal,[3] but the facts according to Nadeem's complaint are summarized below.

In 2009, Nadeem met a 14-year-old girl in a public library and engaged in conversation with her. Nadeem asked the girl questions such as how old she was, where she went to school, and whether she had a boyfriend. The girl told Nadeem that she was not allowed to give out her telephone number. Nadeem asked the girl if he could give her his telephone number, and she said, "'I guess.'" Nadeem wrote down his telephone number for her and told her that he hoped she would call.

When the girl told her mother about her interaction with Nadeem, the mother became very upset. She complained to the head librarian, who suggested that she call the police.

The girl's mother did call the police, and the next day, investigators invited the girl and her mother into their headquarters for recorded interviews. The investigators then had the girl make a recorded "'controlled call'" to Nadeem, instructing the girl on what to say and how to respond to Nadeem. According to Nadeem, the purpose of the call was to induce him into a conversation with the girl that involved sexual content. The officers instructed the girl to tell Nadeem to meet her at the library and to bring a condom. Nadeem went to the library as requested, but did not bring a condom. Police met Nadeem there and arrested him.

Nadeem's convictions for attempted first degree sexual assault and attempted third degree sexual assault of a minor

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[3] *State v. Nadeem*, 19 Neb. App. 565, 809 N.W.2d 825 (2012), *reversed* 284 Neb. 513, 822 N.W.2d 372.

were ultimately vacated by the Court of Appeals.[4] Although the Court of Appeals rejected Nadeem's argument that there was insufficient evidence to sustain his convictions, it reversed Nadeem's convictions and remanded the cause for a new trial based on ineffective assistance of counsel and based on the denial of a jury instruction for the defense of entrapment.[5] The State sought further review with this court in 2013, which we denied. During that time, Nadeem completed his prison sentence.

Wrongful Conviction Claim

In 2015, Nadeem filed a claim against the State for compensation under the Nebraska Claims for Wrongful Conviction and Imprisonment Act, which claims are filed under the State Tort Claims Act.[6] In part of Nadeem's complaint, he alleged that he had been entrapped. The State then filed a motion to dismiss Nadeem's claim, arguing that the affirmative defense of entrapment is legally insufficient to show *actual* innocence (as opposed to legal innocence), which is a required element of a wrongful conviction claim.[7] The district court granted the motion, and Nadeem appealed.

The Court of Appeals determined that the district court erred in granting the State's motion to dismiss. The majority did not consider whether the defense of entrapment was legally sufficient to show actual innocence. Instead, it noted that Nebraska has a notice pleading system and stated, "[T]he only issue we must decide is whether Nadeem sufficiently alleges that he was [actually] innocent of attempted first degree sexual assault."[8] Because his conviction was for an

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[4] *State v. Nadeem*, No. A-10-981, 2013 WL 674158 (Neb. App. Feb. 26, 2013) (selected for posting to court website).

[5] *Id.*

[6] See § 29-4607.

[7] See *Nadeem v. State, supra* note 2.

[8] *Id.* at 831, 899 N.W.2d at 639.

attempted crime, the question was whether he "intentionally engaged in conduct which constituted a substantial step toward" the completed crime.[9] The Court of Appeals concluded that because, "[i]n his complaint, Nadeem alleged that he did not have the requisite intent to commit the alleged crime and did not take a substantial step toward committing that crime," he had made sufficient factual allegations to defeat the State's motion to dismiss.[10]

The State's petition for further review contends, among other things, that the Court of Appeals failed to consider its prior opinion in the criminal case, which Nadeem referenced in his complaint. Relevant to this contention, the Court of Appeals said:

> We acknowledge that in this court's previous opinion,[11] we specifically found that the evidence presented at Nadeem's criminal trial was sufficient to sustain his convictions for attempted first degree sexual assault and for attempted third degree sexual assault. However, in the current appeal, we are analyzing only whether the allegations in Nadeem's complaint are sufficient to state a cause of action under the [Nebraska Claims for Wrongful Conviction and Imprisonment] Act. As such, we are confined to review only the specific allegations in Nadeem's complaint. We cannot look to evidence outside of the pleadings which may or may not be presented at a subsequent phase of these proceedings. We also cannot assess the nature and quality of the evidence presented in past proceedings to predict the outcome of this action.[12]

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[9] *Id.* at 832, 899 N.W.2d at 639.

[10] *Id.* at 833, 899 N.W.2d at 640.

[11] *State v. Nadeem, supra* note 4.

[12] *Nadeem v. State, supra* note 2, 24 Neb. App. at 832-33, 899 N.W.2d at 640.

ASSIGNMENTS OF ERROR

The State assigns that the Court of Appeals erred (1) in concluding that it was confined to review only the specific allegations in the complaint and (2) by not affirming the district court's dismissal of the complaint.

STANDARD OF REVIEW

[1] We review a district court's order granting a motion to dismiss de novo, accepting all allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[13]

ANALYSIS

Whether Court of Appeals Erred in Not Considering Its Prior Opinion

The State first argues that the Court of Appeals erred in concluding that it was limited to looking at the face of Nadeem's complaint and could not look to its prior opinion, which the court viewed as "evidence outside of the pleadings."[14] The State argues that the prior opinion is not outside the pleadings because it was "necessarily embraced by the complaint."[15] In support of its argument, the State cites *DMK Biodiesel v. McCoy*.[16]

[2-4] In *DMK Biodiesel*, we held that for purposes of a motion to dismiss, a court may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings. We explained that documents embraced by the pleadings are materials alleged in a complaint and whose authenticity no party questions, but which are not physically

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[13] *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017).

[14] *Nadeem v. State, supra* note 2, 24 Neb. App. at 833, 899 N.W.2d at 640.

[15] Memorandum brief for appellee in support of petition for further review at 4.

[16] *DMK Biodiesel v. McCoy*, 285 Neb. 974, 830 N.W.2d 490 (2013).

attached to the pleadings.[17] These documents are "not considered matters outside the pleadings."[18]

We agree with the State that the Court of Appeals' prior opinion is "embraced by the complaint." In Nadeem's complaint, he cites to the Court of Appeals' 2013 opinion and refers to numerous statements made by the court in that opinion. Further, no party questions the authenticity of the opinion. Thus, to the extent that the Court of Appeals suggested that it could not consider the opinion in determining whether Nadeem's complaint sufficiently alleged facts to state a cause of action, it was in error. However, as will be explained below, only limited portions of the opinion by the Court of Appeals are relevant to the matter before us.

Whether Court of Appeals Erred in Reversing District Court's Dismissal

We next address the State's argument that the Court of Appeals erred in not affirming the district court's dismissal because the "facts [from the Court Appeals' prior opinion] show Nadeem cannot . . . establish his actual innocence."[19]

[5] Although the Court of Appeals could have considered its prior opinion, wherein it found that there was sufficient evidence to sustain Nadeem's conviction, the prior opinion does not necessarily preclude Nadeem from alleging actual innocence under § 29-4603(3),[20] since his vacated conviction does not have any res judicata effect on his current claim. Res judicata bars relitigation of any right, fact, or matter directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent

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[17] See *id.*

[18] *Id.* at 980, 830 N.W.2d at 496.

[19] Memorandum brief for appellee in support of petition for further review at 5.

[20] See Neb. Rev. Stat. § 29-4603(3) (Reissue 2016) (that "he or she was innocent of the crime or crimes").

jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.[21] Here, although a final judgment was entered by the jury, the judgment has since been vacated and has thus been deprived of its conclusive character.[22]

The relevant issue at this stage of the litigation is whether Nadeem's complaint sufficiently placed the State on notice of his wrongful conviction claim by setting forth "a short and plain statement of the claim" showing that he is entitled to relief.[23]

[6] Under § 29-4603, a party alleging a wrongful conviction claim must plead (1) conviction and sentence for a felony for which the party has served at least part of the sentence; (2) pardon, vacation of the conviction, or reversal and remand without a resulting retrial and conviction; (3) actual innocence of the crime; and (4) that the plaintiff "did not commit or suborn perjury, fabricate evidence, or otherwise make a false statement to cause or bring about such conviction or the conviction of another," except for coerced confessions or guilty pleas.

The State does not dispute that Nadeem sufficiently alleged that he was convicted of and sentenced for a felony and served at least part of the sentence, that the conviction was vacated and the cause remanded without a resulting retrial and conviction, and that he did not commit or suborn perjury or fabricate evidence. However, the State does argue that Nadeem has not sufficiently alleged facts to support a finding of actual innocence.

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[21] *State on behalf of Hopkins v. Batt*, 253 Neb. 852, 573 N.W.2d 425 (1998).

[22] See 50 C.J.S. *Judgments* § 958 at 282 (2009) ("[a]s a general rule, when a judgment has been reversed on appeal, or vacated or set aside by the court which rendered it, it is deprived of its conclusive character . . .").

[23] See Neb. Ct. R. Pldg. § 6-1108(a).

[7,8] First, in *Hess v. State*,[24] we delineated two distinct definitions of innocence—legal and actual. Legal innocence is defined as "'[t]he absence of one or more procedural or legal bases to support the sentence given to a defendant,'"[25] whereas actual innocence refers to "'[t]he absence of facts that are prerequisites for the sentence given to a defendant.'"[26] In other words, actual innocence means that a defendant did not commit the crime for which he or she is charged.[27] Or, as the U.S. Supreme Court has explained, "A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of the crime."[28] Accordingly, a defendant must plead more than lack of intent to establish actual innocence.

[9] In determining whether a complaint states a cause of action, we are free to ignore legal conclusions, unsupported conclusions, unwarranted inferences, and sweeping legal conclusions cast in the form of factual allegations.[29] Several of the allegations in Nadeem's complaint contain quotations from the Court of Appeals' opinion, wherein the Court of Appeals evaluated the evidence from Nadeem's criminal trial. These are not factual allegations, but conclusions drawn by the Court of Appeals from evidence presented at Nadeem's criminal trial, and thus, we do not consider them when evaluating his complaint.

In addition, several of the allegations in Nadeem's complaint contain conclusory phrases, such as "hysterical speculation

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[24] *Hess v. State*, 287 Neb. 559, 843 N.W.2d 648 (2014).

[25] *Id.* at 563, 843 N.W.2d at 653 (quoting Black's Law Dictionary 859 (9th ed. 2009)).

[26] *Id.*

[27] *Hess v. State, supra* note 24.

[28] *Sawyer v. Whitley*, 505 U.S. 333, 340, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

[29] *Kellogg v. Nebraska Dept. of Corr. Servs.*, 269 Neb. 40, 690 N.W.2d 574 (2005).

and overreaction," "entirely innocent," "complete absence of any evidence," and "could not possibly be 'ready and willing.'" In evaluating Nadeem's complaint, we do not consider the information imparted by these unsupported conclusions.

Nadeem's complaint does set forth that "[o]n August 6, 2009, . . . Nadeem engaged [H.K.] in an innocent conversation while she was sitting in an open, public area of [a] Library." But after reviewing Nadeem's entire complaint and the Court of Appeals' opinion, we discern that Nadeem's reference to the August 6 encounter clearly describes only the initial contact Nadeem had with H.K. His complaint does not set forth how his later telephone conversation with H.K. or his going to meet H.K. at the library for a second time would reflect his actual innocence.

Excluding from Nadeem's complaint conclusions drawn by the Court of Appeals and his own conclusory allegations, his complaint does not allege an *absence of facts* which reflects his actual innocence as we required in *Hess*.[30] Even after drawing all reasonable inferences of law and fact from Nadeem's pleadings in his favor, we find Nadeem has not sufficiently pled a claim of actual innocence.

CONCLUSION

For the reasons set forth above, we reverse the decision of the Court of Appeals that reversed the district court's order dismissing Nadeem's complaint and remand the cause to the Court of Appeals with directions to affirm the order of the district court.

Reversed and remanded with directions.

Wright, J., not participating.

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[30] *Hess v. State, supra* note 24.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Dori Ann Osantowski, appellee, v. Brian Osantowski, appellant.

904 N.W.2d 251

Filed December 8, 2017. No. S-16-807.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
5. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.
6. ____: ____. Under Neb. Rev. Stat. § 42-365 (Reissue 2016), the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities

of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.

7. ____: ____. Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate. Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.
8. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
9. **Agriculture: Crops: Animals.** Agricultural crops are categorically different in nature from a herd of cattle and, therefore, are not entitled to the same treatment for tracing purposes.
10. **Agriculture: Crops: Equity.** Courts are allowed flexibility in their treatment of stored and growing agricultural crops to account for the equities of the situation.
11. **Property Division: Appeal and Error.** As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. The date of valuation is reviewed for an abuse of the trial court's discretion.
12. **Appeal and Error.** Absent plain error, errors argued but not assigned will not be considered on appeal.
13. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
14. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.
15. **Property Division.** A nonowning spouse is entitled to some benefit when marital funds have been expended to improve or reduce the debt on the other spouse's nonmarital property.
16. **Divorce: Property Division: Alimony.** In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment.
17. ____: ____: ____. In addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 2016), in dividing property and considering alimony upon a dissolution of marriage, a court should consider the

income and earning capacity of each party and the general equities of the situation.

18. **Property Division.** As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.

Appeal from the District Court for Seward County: James C. Stecker, Judge. Affirmed as modified.

John W. Ballew, Jr., and Adam R. Little, of Ballew, Covalt & Hazen, P.C., L.L.O., for appellant.

Stan A. Emerson, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

Brian Osantowski appeals from a decree of dissolution entered by the Seward County District Court, which dissolved his marriage to Dori Ann Osantowski, divided the marital assets and debts, and ordered Brian to make an equalization payment of $680,000, distributing the estate about equally.

Brian argues that his premarital crops should have been treated similarly to a herd of cattle—as a single asset for tracing purposes, that the court made specific errors in the division of marital assets, and that its distribution of the marital estate was inequitable.

We reject Brian's argument that crops are similar to cattle herds for tracing purposes. However, we hold that the court erred in its division of certain marital assets and debts. Therefore, we affirm the district court's order as modified by this opinion.

I. BACKGROUND

Brian and Dori were married on September 23, 2011, and separated on or about May 26, 2014. Dori filed a dissolution

complaint in June 2014. Trial was held on January 14 and February 12, 2016.

1. Parties' Marriage

During the marriage, Brian resided primarily in Polk County, Nebraska, at a residence owned by his parents. Dori maintained a residence in Lincoln, Nebraska, until May 2013. Dori testified that while she was living in Lincoln, she spent a minimum of three to four nights per week with Brian in Polk County during the academic year and full time during the summers and other school breaks. As of May 2013, Dori resided in Polk County full time and commuted to Lincoln for her final semester of school.

In September 2013, Dori held a master's degree in entomology from the University of Nebraska-Lincoln (UNL) and was enrolled in a doctoral program for plant health at UNL. She testified that while she had originally intended to pursue a Ph.D. in entomology at South Dakota State University, she enrolled in a program at UNL instead because Brian had objected to the distance. Dori also stated that she changed her program to plant health so that she could gain a better understanding of agriculture in Nebraska and contribute to the Osantowski farming operation.

Dori received a scholarship and a stipend for her school and living expenses. She also worked full time during the summers in Lincoln, earning between $8,000 and $20,000 in wages for 2011, 2012, and 2013 each. Most of Dori's income and scholarship money during the marriage went to tuition, insurance payments, payments for her motorcycle, commuting expenses, rent and utilities for the Lincoln apartment, and other living expenses. She testified that Brian provided minimal financial support to her during the marriage, but what he did provide was used for the household expenses she paid for the Polk County residence. In February 2014, Dori began working full time for an annual salary of $75,000 and obtained medical and dental insurance for herself and Brian.

Brian began farming in 2005. He has a farming operation with his two brothers in and around Polk County. Under the operation, Brian and his brothers own equipment separately but jointly acquire land, which is owned in equal thirds. Each brother, however, farms land independently and bears the rental fees and input costs for his operation. Accordingly, crops and expenses are completely separate and distinct to each individual.

Brian testified that he receives benefits from his family which increase the profitability of his farming operation, including: discounted rental rates of $150 to $200 per acre versus the market rate of $300 to $400 per acre on the majority of the land that he rents; the majority of his diesel fuel at no cost to him; and the sharing of equipment, labor, shop space, and various other expenses.

Dori testified that she made the following contributions to Brian's farming operation: Brian would consult her about chemical and herbicide application and general soil welfare; she created plat maps for all of the Osantowski fields to keep field spray records and to help plan for the future; she scouted fields for weed growth; she picked up parts and ran errands; and she went with Brian to check fields, pivots, and lay irrigation pipe. Brian agreed that Dori performed these tasks occasionally, except he explained that the plat maps created by Dori were part of her summer employment and that when Dori would ride with him to the fields, she did so because she enjoyed riding a "four-wheeler" and not because she actually helped with irrigation.

Dori also testified that she performed all of the household duties at her Lincoln residence and that such duties in the Polk County residence were a team effort with Brian.

2. Evidence Offered at Trial

The parties offered into evidence two versions of a joint property statement, each listing premarital and marital debts and assets. One of the statements was dated May 18, 2015, and the other dated January 9, 2016. Each version listed the

same assets and debts; however, slightly different values were assigned to some. Additional documents were received into evidence to support the property statements, including personal property appraisals from Grubaugh Auction Services, LLC; inventory reports from a certified public accountant; tax returns; settlement sheets from elevators; bank statements; retirement accounts; and balance sheets from several banks, including Great Western Bank.

(a) Stored and Growing Crops

In regard to the premarital and marital crop inventory, Brian called Michael Hershberger as his expert witness to determine the quantity of stored crops that Brian had on the date of marriage and on the date of separation. Hershberger is a certified public accountant who works with agricultural clients on a regular basis. In reaching his conclusions on these issues, Hershberger relied on Brian's tax returns from 2011 to 2014; the total annual yields in Brian's crop insurance reports, which were reported to him by Brian; two crop sales receipts; and a spreadsheet summary of Brian's recorded crop sales. The spreadsheet summary was prepared by Brian's mother, who does all of Brian's bookkeeping.

On the first day of trial, Hershberger gave testimony regarding his determination of crop inventories and a report he authored was received into evidence. However, that testimony and the exhibit were stricken from the record, because Hershberger had relied on grain elevator receipts which were not provided to Dori through discovery. After Brian supplemented his discovery, Hershberger was again called to testify regarding the crop inventory.

In regard to the premarital crop inventory, Hershberger opined that Brian had a total of 57,156.26 bushels of corn in storage on September 23, 2011, and 91,296.09 bushels of corn and 10,405.99 bushels of soybeans ready for harvest. On September 23, the price at the local elevator was $6.07 for a bushel of corn and $11.57 for a bushel of soybeans. Accordingly, Hershberger concluded that the fair market

value on the date of marriage for Brian's stored crops was $346,938.50 and his unharvested crops were $554,167.27 for corn and $120,397.30 for soybeans, totaling $1,021,503.07. Based on the spreadsheet summary, he also concluded that Brian sold these crops for a total of $1,207,465.53.

Hershberger testified that he believed his estimation of the total bushels of crops produced in 2011 was very accurate, because Brian had claimed on his crop insurance report that a total of 91,863 bushels of corn and 10,151 bushels of soybeans were produced.

In regard to the marital crop inventory, Hershberger concluded that the parties had 95,300.36 bushels of corn in storage on the date of separation and that a bushel of corn sold for $4.66 on that day. Accordingly, he valued the corn in storage on the date of separation as $444,099.68.

However, a balance sheet Brian had submitted to Great Western Bank, dated March 20, 2014, stated that he had 135,000 bushels of corn on hand which had a value of $573,750. Additionally, in Brian's November 2014 response to Dori's interrogatories, he stated that the March 20 balance sheet reflected the quantity and value of the stored crops. In both joint property statements, Dori relied on the March 20 balance sheet for the quantity and value of crops that were marital property.

In the May 2015 joint property statement, Brian failed to list the quantity of crops in storage or assign a value thereto. But in the January 2016 joint property statement, Brian listed 14,862 bushels of corn in storage on the date of separation with a value of $69,257. At trial, Brian testified that his January 2016 estimation of the quantity of corn in storage on the date of separation was based on Hershberger's initial analysis.

Hershberger admitted, however, that his opinions changed dramatically from the first day of trial to the second day of trial. His valuation of the stored crops on the date of separation changed from $69,259.25 to $444,099.68. While his

valuation of the stored and growing crops on the date of marriage changed from $898,603.04 to $1,021,503.07. Hershberger attributed these changes to his mistaken belief that all crops were sold before the next harvest began. But after he requested that Brian's mother identify the year of production for each crop at issue in the sale transactions on the spreadsheet summary, his analysis changed.

(b) Personal Property and Farm Equipment

Minimal testimony was elicited regarding the parties' premarital and marital personal property and farm equipment. The joint property statements set forth the items, and Brian and Dori generally agreed to them. The values, however, were not agreed upon by the parties. A personal property and equipment appraisal was completed by Grubaugh Auction Services and was received into evidence. The court generally adopted the valuations established in that report.

(c) Real Estate

In regard to real estate, the record shows that Brian owned four parcels of real estate prior to the marriage as follows: a one-third interest in the "NW¼ [of] Section 8, Township 15 North, Range 1 West[,] Butler County[, Nebraska]" (Bosshart/Gruenwald farm); a one-third interest in the "SW¼W½NW¼ [of] Section 4, Township 15 North, Range 1, Butler County" (Hondorfer farm); a one-third interest in the "W½NE¼ [of] Section 8, Township 16 North[, Butler County]" (Dodendorf farm); and a one-third interest in the "E½SE¼ [of] Section 13, Township 16 North, Range 1, Polk County" (Jahn farm). During the marriage, the parties purchased a one-third interest in the "SW¼ of Section 10, Township 15 North, Range 2 West and the NW¼ of Section 15, Township 15 North, Range 2 West, Polk County" (Roberts farm). Secured debt was owed against each of the properties.

(d) Premarital Debt

In regard to the division of debt, there was no direct evidence of the value of Brian's debts on September 23, 2011. However, Brian annually submitted balance sheets to Great Western Bank that listed his debts and their value on the date of submission. The balance sheets nearest to the date of marriage were dated December 8, 2010, and March 8, 2012. The parties relied on the debts listed on the March 2012 balance sheet in their joint property statements, and the court awarded Brian the six debts listed therein as premarital. The court, however, did not include corresponding values to these debts.

Though the parties listed different amounts for certain debts, the record indicates that the value of the premarital debts awarded to Brian are as follows: Great Western Bank 2010 operating line of credit, $162,000; Great Western Bank loan for a 2008 Mercury Milan, $6,927; Bosshart/Gruenwald farm secured debt, $125,495; Dodendorf farm secured debt, $31,557; "Ag Direct" loan for a Cat Challenger tractor, $49,250; and Hondorfer farm secured debt (Great Western Bank account No. xxx6688), $247,500. The six debts totaled $622,729.

Additionally, the record contains a 2011 "itemized categories report." This report shows that Brian paid $296,046.69 in expenses after the date of the marriage. Brian testified at trial that each of these expenses were incurred for his 2011 crop, which he claimed as a premarital asset, and the court awarded him as such. Accordingly, these expenses were premarital debts.

Therefore, Brian's total premarital debts, as reflected in the record, were approximately $918,775.69.

Dori had a $7,000 debt to her father on the date of the marriage, and she was awarded this premarital debt by the court. The court did not assign a value to this debt, but on the joint property statements, Dori listed its value at $7,000. The record does not reflect any reduction of the debt.

3. Trial Court's Decree

In June 2016, the court issued its decree dissolving the parties' marriage and ordering the division of the marital estate. The court determined values for most of the premarital and marital assets it awarded.

The court awarded premarital assets to Dori, with a total value of $20,600, and to Brian, with a total value of $1,139,047. Two of the premarital assets awarded to Brian were the value of his 2010 crops, sold in 2011, and his 2011 crops, sold in 2012, but the court did not assign a value to these assets. It also awarded him the funds present on the date of the marriage in four separate bank accounts.

However, the court found that all of Brian's premarital crops had been liquidated by the date of separation. It also found that Brian deposited the nonmarital proceeds from the liquidated crops into his premarital bank accounts, along with the proceeds from the sale of the marital crops. Accordingly, the court found that these premarital crops and monetary assets were commingled with marital assets. Therefore, it ruled that Brian was not entitled to a setoff from the marital estate for these premarital assets.

The court also rejected Brian's argument that crops should be treated similarly to a herd of cattle—as a single asset for tracing purposes. It reasoned that a herd of cattle is similar to land in that it is a self-sustaining and income producing. Conversely, it stated that crops are an end product that is marketed and liquidated on a short-term basis to pay the expenses of producing it, purchase the seed used for the next crop's production, purchase equipment, and provide the farmer his income for the year. Accordingly, the court did not give Brian a credit for any of the crops in storage on the date of separation; instead, the court awarded Brian all of the crops in storage on the date of separation at a value of $573,750.

The court listed the marital debt it awarded to Dori with a corresponding value of $3,216. While the court also awarded several marital debts to Brian, it did not assign values to all

of them. Nevertheless, the court summarized its award of the marital estate as follows: Brian received $2,517,950 in marital assets and $1,145,294 in marital debt for a total estate of $1,372,656; Dori received $21,611 in marital assets and $3,216 in marital debt for a total estate of $18,395.

Regarding the equity of the distribution, the court found that the marriage was of short duration and that neither party gave up employment or educational opportunities, but that Dori did change her educational program to benefit the marriage. The court rejected Brian's argument that Dori should receive less than one-third of the marital assets. It reasoned that any financial benefit Brian brought to the relationship, above his income, was as the landlord of the premarital property he farmed and that the proper way to account for such a benefit would have been to charge the marriage a cash rent or a crop-share arrangement and segregate it as nonmarital property, of which Brian did not do or provide evidence.

The court ordered Brian to make an equalization payment of $680,000 to Dori, awarding about half of the marital estate to each party.

The court overruled Brian's subsequent motion for new trial or to alter and amend the judgment. Brian appealed.

II. ASSIGNMENTS OF ERROR

Brian assigns, restated and reordered, that the court erred in (1) failing to set off premarital property awarded to him from the marital estate; (2) failing to set off the value of his premarital stored and growing crops; (3) twice awarding him the same $78,500 as marital property; (4) valuing the crops in storage 2 months prior to separation, when the vast majority of the estate was valued as of the date of separation; (5) making significant mathematical errors in its division of the marital estate; and (6) dividing the marital estate inequitably for a marriage of short duration where the marital estate was almost entirely due to the efforts and premarital contributions of one party.

III. STANDARD OF REVIEW

[1] In a marital dissolution action, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding custody, child support, division of property, alimony, and attorney fees.[1]

[2] In a review de novo on the record, an appellate court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue.[2] However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.[3]

[3] A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[4]

[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]

IV. ANALYSIS

[5,6] Under Nebraska's divorce statutes, "[t]he purpose of a property division is to distribute the marital assets equitably between the parties."[6] The ultimate test in determining the appropriateness of the division of property is fairness and

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[1] See *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017).

[2] See *id.*

[3] *Id.*

[4] *Id.*

[5] See *White v. White*, 296 Neb. 772, 896 N.W.2d 600 (2017).

[6] Neb. Rev. Stat. § 42-365 (Reissue 2016).

reasonableness as determined by the facts of each case.[7] We have stated that under § 42-365, the equitable division of property is a three-step process. The first step is to classify the parties' property as marital or nonmarital, setting aside the nonmarital property to the party who brought that property to the marriage. The second step is to value the marital assets and marital liabilities of the parties. The third step is to calculate and divide the net marital estate between the parties in accordance with the principles contained in § 42-365.[8]

1. District Court Abused Its Discretion in Failing to Set Off Certain Nonmarital Assets

[7] Generally, all property accumulated and acquired by either spouse during a marriage is part of the marital estate.[9] Exceptions include property that a spouse acquired before the marriage, or by gift or inheritance.[10] Setting aside nonmarital property is simple if the spouse possesses the original asset, but can be problematic if the original asset no longer exists.[11] Separate property becomes marital property by commingling if it is inextricably mixed with marital property or with the separate property of the other spouse.[12] If the separate property remains segregated or is traceable into its product, commingling does not occur.[13] The burden of proof rests with the party claiming that property is nonmarital.[14]

Brian contends that the court made several errors regarding its determination of premarital assets. The court awarded

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[7] *Bergmeier, supra* note 1.

[8] *Id.*

[9] *Id.*

[10] *Sellers v. Sellers*, 294 Neb. 346, 882 N.W.2d 705 (2016).

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Bergmeier, supra* note 1.

Brian the aggregate balance of his four bank accounts on the date of the marriage, which was $182,471. However, it failed to include any credits for that amount. The court awarded Brian the 2010 and 2011 crops, but it did not determine a value for those crops. Brian claims that he used $80,000 from the premarital crops for a downpayment on real estate purchased during the marriage, but that the court did not give him credit for the $80,000.

Brian further contends that based on his testimony and that of Hershberger, he had met his burden to trace the value of his crops on the date of marriage. In the alternative, he asserts that we should treat crops as a single unit for tracing purposes, as the Nebraska Court of Appeals did with livestock in *Shafer v. Shafer*.[15] He asserts that both livestock and crops are biological commodities that are sustained through the reinvestment of the proceeds from their sales and that crops are not self-sustaining merely as a result of the proprietary nature of seeds which producers are contractually obligated to not replant. Accordingly, he asserts that we should deduct the crops he had on the date of marriage from the crops in storage on the date of separation and set it off from the marital estate. Additionally, he argues that the $80,000 downpayment he made on the Roberts farm was traceable to premarital funds.

Dori contends that under our decision in *Brozek v. Brozek*,[16] the court correctly found that Brian was not entitled to a setoff of his premarital crops or the proceeds from those crops and the premarital funds in his accounts because they no longer existed or had been commingled with marital assets at the time of separation. She also argues that Brian is not credible and that therefore, Hershberger's analysis should not be relied on.

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[15] *Shafer v. Shafer*, 16 Neb. App. 170, 741 N.W.2d 173 (2007), *modified on denial of rehearing* 16 Neb. App. 327, 743 N.W.2d 781 (2008).

[16] *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016).

(a) Valuing Brian's Premarital Stored and Growing Crops

We begin by noting that the court awarded Brian the 2011 stored and growing crops as premarital assets, but did not assign a value to those crops.

In exhibit 37, Hershberger's detailed analysis showed the number of bushels of crops Brian possessed on the date of marriage. While Dori vigorously contested Brian's credibility and Hershberger's reliability, she presented no alternative estimations. Further, Hershberger's estimation of Brian's stored crops and growing crops in 2011 was supported by the crop insurance reports, tax returns, balance sheets, and sales receipts in the record. Exhibit 37 stated the value of Brian's stored and growing crops on the date of marriage was $1,021,503.07.

[8] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.[17] Because the record shows the appropriate nonmarital value of these assets, we assign $1,021,503.07 as the value of Brian's premarital stored and growing crops.

(b) Crops Are Not Similar to Livestock for Tracing

In *Sellers v. Sellers*,[18] we adopted the Court of Appeals' reasoning it posited in *Shafer* that a cattle herd owned at the time of the marriage could, based on the totality of the circumstances, be treated as a single asset for tracing purposes and set off from the marital estate as separate property if such a result was equitable.

There, the husband had been engaged in the cattle business throughout the marriage and continually reinvested the proceeds from the sale of cattle into the acquisition of new cattle. We recognized that

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[17] *Schuman v. Schuman*, 265 Neb. 459, 658 N.W.2d 30 (2003).

[18] *Sellers, supra* note 10.

> "one cannot draw a straight line from a cow owned [at the time of the marriage] to a cow owned [at the time of divorce,] which is the prototypical 'tracing' of a premarital asset so as to set it aside to the party who owned it at the time of the marriage."[19]

However, we reasoned that treating a cattle herd as a single asset "'acknowledged the realities of what happens over time in a cattle operation'" rather than "'exalt[ing] form over substance and ignor[ing] the equitable nature of a dissolution action.'"[20]

In *Brozek*, however, we declined to extend this exception to the tracing requirement to premarital machinery because unlike a herd of cattle, which is self-sustaining through reproduction, equipment depreciates in value as it deteriorates and becomes outdated.[21]

We agree with the trial court's reasoning in this case: A herd of cattle is more similar to real property than to personal property. As we stated in *Brozek*, a herd of cattle is generally self-sustaining, through reproduction and reinvestment, and is not subject to depreciation, because it consistently maintains its number- and income-producing capabilities. Crops, on the other hand, are more similar to milk products produced by a herd of dairy cattle. Both are short-term assets that are the product of investing input, maintenance, and equipment costs. They are liquidated on a short-term basis and continuously rolled into production. While a crop cycle is longer and crops may be stored for several years, crops, like milk products, are still end products that account for the income of the individuals raising them.

[9] Brian's argument that crops would be self-sustaining absent contractual requirements to not replant is unavailing. Even if a crop could be used as a source of seed for replanting,

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[19] *Id.* at 354, 882 N.W.2d at 711, quoting *Shafer, supra* note 15.

[20] *Id.* at 355, 882 N.W.2d at 712, quoting *Shafer, supra* note 15.

[21] *Brozek, supra* note 16.

it would result only in a decrease in the input cost of the production of the short-term asset that is produced through the continued cycle of cultivation and liquidation. Accordingly, we hold that agricultural crops are categorically different in nature from a herd of cattle and, therefore, are not entitled to the same treatment for tracing purposes.

(c) Brian Is Entitled to Setoff of Certain Nonmarital Assets

In *Brozek*, we also considered whether the husband was entitled to a setoff for the balance of his bank accounts and the value of crops he possessed on the date of the marriage. In that case, the parties had been married nearly 20 years and the stored crops at the time of their separation, valued at $1.2 million, were the most substantial asset of the $2.5 million net marital estate. At trial, the husband estimated, through "an armful of exhibits," that the premarital balance of his accounts was $79,000.[22] Additionally, he was not able to show the actual number of crop bushels he harvested the year of the marriage, but, relying on the acres he farmed and the average yield of the area, he estimated the crop's value at $190,000. He claimed that proceeds of the premarital crop were reflected in the current crop, because he continually rolled his proceeds into the subsequent year's expenses.

We held that the husband was not entitled to a setoff from either source of premarital assets, because after 20 years, he could "not identify the different permutations that his premarital property underwent during the marriage."[23] We reasoned that his reinvestment was "mixed with the proceeds of marital harvests and subject to the vicissitudes of the farming economy for nearly 20 years" and that he presented no evidence of the unknown number of deposits and withdrawals from his accounts during the marriage.[24]

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[22] *Id.* at 698, 874 N.W.2d at 31.

[23] *Id.* at 699, 874 N.W.2d at 31.

[24] *Id.* at 699, 874 N.W.2d at 32.

In *Kalkowski v. Kalkowski*,[25] "we decline[d] to adopt any bright-line rule as to whether or not crops which will eventually generate income may be treated as divisible marital property in a dissolution proceeding." Our analysis considered at the forefront our long-standing principle that the ultimate test in determining the appropriateness of the division of property is fairness and reasonableness as determined by the facts of each case.[26]

There, the parties were married for over 10 years and the wife was the primary caregiver to the four marital children while the husband farmed. The husband argued that his stored and growing crops were inventory, not a traditional asset, because they represented income he had already earned but not realized and income that he had not yet earned. Nevertheless, he included the crops with an assigned value as an asset in the joint property statement and at trial, requested that they be awarded to him. Therefore, we held that the court did not abuse its discretion in including the crops in the marital estate.

[10] Income earned from one or both spouses' employment during a marriage is a marital asset.[27] However, as we recognized in *Kalkowski*, crops are a product of a farming operation that are not income but generate income upon their liquidation. Under this reasoning, crops produced before the marriage and sold during the marriage would generally be considered marital income, but crops produced during the marriage but sold after would not. Accordingly, we allow courts flexibility in their treatment of stored and growing agricultural crops to account for the equities of the situation.

In this case, Brian entered the marriage with a large amount of income from his liquidated crops and unrealized income in the form of growing and stored crops. The court determined

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[25] *Kalkowski v. Kalkowski*, 258 Neb. 1035, 1042, 607 N.W.2d 517, 524 (2000).

[26] *Id.*

[27] *Davidson v. Davidson*, 254 Neb. 656, 578 N.W.2d 848 (1998).

that this income and unrealized income should not be considered a marital asset because it was fully earned prior to the marriage. On the other hand, the court chose to include the stored crops and proceeds from the sale of crops produced during the marriage in the marital estate but not the crops growing at the time of separation, because the cultivation and risk for these crops remained predominantly with Brian. This decision by the court fairly accounted for the realities of this situation; Brian should not have been punished for holding crops produced and fully grown before the marriage.

The court, however, set off no value from its award of these premarital assets to Brian because it found that the income had been commingled with marital assets. We recognize the law concerning tracing, but we also recognize the overarching principle in the division of marital property is equity, ultimately guided by fairness and reasonableness.

We reject Brian's proposition that providing evidence of the value of growing and stored crops on the date of marriage is sufficient for purposes of tracing; instead, it would simply be a necessary prerequisite for the analysis. Nevertheless, we hold that applying the rigid requirements of tracing in this case would unfairly deprive Brian of his premarital efforts and result in his being double-charged in the division of the marital estate by depriving him of his premarital assets and then awarding him the real or personal property in which they were invested.

Hershberger testified that had grain prices not been rising to historic levels, the standard practice would have been for Brian to liquidate his stored crops before the next harvest, which began around the time of the marriage. Further, Brian would likely not have held his 2011 crops through the 2012 harvest when they were no longer traceable.

In *Brozek*, the court included in the marital estate the crops in storage and the balance of the husband's bank accounts, which held the income from crop sales, on the date of the separation. It also included in the marital estate the husband's premarital crops and proceeds therefrom in his bank

accounts. However, this case is distinguishable for a number of reasons.

First, in *Brozek*, the husband could not definitively identify the values of his premarital assets. Just as one could not trace an unknown value of assets, it would be unreasonable to set off a value of assets that is not proved. As mentioned above, Brian clearly established that the value of his stored and growing crops was $1,021,503.07. Further, while Brian did not produce bank statements proving the premarital balance of his accounts, Dori did not contest the values he provided on the second joint property statement. Accordingly, the balance of the accounts, as assigned by the court, was $182,471.

Second, the equities in *Brozek* were vastly different than in this case. In *Brozek*, the estimated value of the premarital assets was less than 10 percent of the net marital estate. Here, the value of Brian's premarital assets was nearly 87 percent of what the court stated was the net marital estate.

Third, the parties in *Brozek* had been married nearly 20 years. Brian and Dori's marriage, on the other hand, lasted only 31 months, spanning only 2 full crop cycles. Through the course of a long-term marriage, proceeds reinvested in crops are subject to the vicissitudes of the market, equipment purchased with such proceeds deteriorates and is replaced with equipment purchased through solely marital funds, and the equity of commingling funds becomes less severe. In light of the short-term marriage here, it would be inequitable to allow Dori to benefit from an increase to the marital estate of over $1.2 million in assets because of Brian's inability to trace them.

Accordingly, based on the equities of the situation in this case, the court's failure to set off the value of Brian's premarital bank accounts and crops placed Brian at a vast disadvantage in the division of marital property. Therefore, fairness and reasonableness require a determination that the court abused its discretion in not setting off $1,203,974.07 from the marital estate.

2. Valuation and Distribution of Marital Assets

(a) Trial Court Abused Its Discretion by Double Counting Assets

Brian argues that the court double counted assets by awarding him check No. 1718, for $78,500, and the 2011 John Deere tractor model 9630T without deducting the downpayment on the tractor as evidenced by check No. 1718.

In exhibit 20, Dori listed the checks and their values that she argued were prepayments for farming expenses associated with the 2014 crop that Brian paid with marital funds before the separation. She did not claim any interest in the 2014 crops but argued that the prepayments with marital assets should be considered marital property. Included in the exhibit 20 list was check No. 1718 for $78,500, which was dated February 3, 2014. At trial, however, both parties testified that check No. 1718 was used as a downpayment for the 2011 John Deere tractor.

In its decree, the court awarded Brian all of the prepaid farm expenses listed in exhibit 20 as marital assets, including check No. 1718 with the value of $78,500. The court also awarded Brian the 2011 John Deere tractor model 9630T, at a value of $140,000, which represented its fair market value of $205,000 minus the premarital value of a Cat Challenger tractor that was sold for $65,000 and used toward its purchase.

The court's failure to deduct the $78,500 prepayment on the 2011 John Deere tractor model 9630T from the tractor's value resulted in an increase to Brian's net marital estate of $78,500. Accordingly, the court abused its discretion in substantially increasing the value of the marital estate it awarded to Brian.

(b) Court Abused Its Discretion by Valuing Crops in Storage as of March 20, 2014

Brian contends that the court erred in accepting Dori's value of the stored crops that relied on his March 20, 2014, balance

sheet. He argues this valuation is inequitable, because it represents the quantity of stored crops and the price per bushel on March 20, 2014, rather than the actual date of separation over 2 months later. Accordingly, he argues that the quantity and value of crops in storage should be valued at $444,099.68, because the evidence shows that he had only 95,300.36 bushels of corn on May 31, 2014, and the price per bushel of corn on that day was $4.66.

Dori contends that the quantity and valuation of the parties' stored crops is a disputed factual matter and that we should defer to the trial court's decision, because it had the opportunity to evaluate the credibility of the witnesses. She contends that unlike Brian and his expert, Hershberger, she has consistently maintained her opinion that the stored crop's marital value was $573,750, which the court accepted.

[11] As a general principle, the date upon which a marital estate is valued should be rationally related to the property composing the marital estate. The date of valuation is reviewed for an abuse of the trial court's discretion.[28]

As discussed in the background section, the parties spent a considerable period of time at trial contesting the quantity and value of corn that the parties owned at the time of separation. Hershberger testified that his determination in exhibit 37 of the quantity of corn in storage was based on Brian's or Brian's mother's determination as to what year of crops were reflected in the sales receipts in the fall of 2014. He also testified that if the information he was provided was inaccurate, then so was exhibit 37. Exhibit 37 is the final valuation that Brian relied upon and what he argues we should find the value as on appeal.

Exhibit 37 shows that the bushels of corn the parties owned on March 20, 2014, was 142,040.44. Hershberger's report showed the bushels of corn the parties owned on May 31, 2014, was 95,300.36. The record also contains five sales

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[28] *Stanosheck v. Jeanette*, 294 Neb. 138, 881 N.W.2d 599 (2016).

receipts which show the quantity of stored crops decreased between March 20 and May 31, 2014, by 46,740.08 bushels as a result of Brian's selling the grain. In addition, the record contains deposit slips showing that the proceeds from each of the five sales were deposited into Brian's farm checking account between April 8 and May 12, 2014. The value of Brian's farm checking account was determined as of May 31, 2014.

The court's reliance on the corn values as of March 20, 2014, and its reliance on the bank account balance as of May 31, 2014, creates a double counting of the corn's value. Accordingly, the court abused its discretion in disregarding this evidence and relying on the March 20, 2014, balance sheet alone, because it resulted in a valuation that was not rationally related to the property composing the marital estate. Therefore, the value of crops in storage on the date of separation awarded to Brian is $444,099.68.

(c) Errors Argued But Not Assigned

Dori contends that on the date of separation, Brian had 45,024.032 bushels of corn stored at Husker Coop, with a value of $209,811.93, which was not included in the court's award. Her argument is based on an August 23, 2013, settlement sheet from Husker Coop, which shows that Brian had 70,024.02 bushels of corn stored there and that he sold 25,000 bushels of the stored corn. She argues that there is no record of this remaining corn being sold and that it is not accounted for on Brian's March 20, 2014, balance sheet.

Brian argues that the court incorrectly added the value of the bank accounts it awarded to Dori as marital property. If Brian were correct, the court's mistake would constitute plain error.[29] His argument, however, is more properly characterized as asserting that the court incorrectly valued the marital assets in Dori's First National Bank savings account

[29] See *Clason v. Clason*, No. A-15-626, 2016 WL 6210946 (Neb. App. Oct. 25, 2016) (selected for posting to court website).

No. xxx632 by relying on the value listed in the first joint property statement, $500, rather than the second joint property statement, $4,627.

[12] Absent plain error, errors argued but not assigned will not be considered on appeal.[30] The court's findings and its award concerning both the crops in storage on the date of separation and account No. xxx632 were supported by evidence presented to the court. Therefore, we do not consider either parties' argument.

3. Plain Error Committed by Court

[13,14] Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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.[31] Plain error may be asserted for the first time on appeal or be noted by an appellate court on its own motion.[32]

(a) Trial Court Erred in Valuing Marital Debt on Roberts Farm

In its decree, the court explained that Brian had listed secured debt on the real estate, including the Bosshart/Gruenwald farm, the Dodendorf farm, and the Roberts farm, in the amount of $1,063,797. As a result, the court calculated the value of the secured marital debt on the Roberts farm by deducting the value of Brian's premarital debt on the Bosshart/Gruenwald farm and the Dodendorf farm on the date of the marriage from the total stated amount. After making the deduction, it determined that the marital debt secured by real estate was $894,081.

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[30] *Hike v. State*, 297 Neb. 212, 899 N.W.2d 614 (2017).

[31] *State v. Robbins*, 297 Neb. 503, 900 N.W.2d 745 (2017).

[32] *Id.*

However, in the January 2016 joint property statement, both parties listed the amount of the debt on the Roberts farm to be $871,297, which is the amount stated in the March 20, 2014, balance sheet. Accordingly, the court mistakenly valued the Roberts farm debt to be $22,784 more than it actually was.

The court's valuation of the Roberts farm was not based on the evidence and resulted in Brian's being awarded an additional $22,784 in marital debt. In doing so, the court committed plain error in this valuation.

Since we give Brian credit for his premarital crop inventory, his argument that he used $80,000 from the premarital crops for a downpayment on the Roberts farm is without merit.

(b) Court Failed to Set Off Brian's Premarital Dodendorf Farm Debt From Marital Estate

The court awarded Brian the debt owed on the Dodendorf farm as a marital debt but did not assign a value. The parties agreed in both joint property statements that the value of this debt at the time of separation was $17,451. Under Dori's valuation of the debt, however, she stated on both joint property statements that the debt was premarital, and Brian did the same on the second joint property statement. This debt is listed in Brian's February 18, 2010, balance sheet, and the court awarded the Dodendorf farm to Brian as a premarital asset.

In awarding Brian the debt on the Dodendorf farm as a marital debt, it committed plain error in failing to set off the debt as premarital in the amount of $17,451.

(c) Trial Court Failed to Value and Award Certain Marital Assets and Debts

As mentioned above, under § 42-365, a court has a duty to value and divide all of the assets and debts constituting the marital estate. In this case, the court's failure to do so in the following instances significantly affected the valuation and equitable distribution of the marital estate.

As mentioned above, because appeals in domestic relations matters are heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record.[33] In each of the following instances, the court's findings and the record provide a sufficient basis to value and award the assets and debts.

(i) Marital Property That Should Have Been Awarded to Brian as Assets

Both joint property statements and both of the personal property and equipment appraisals from Grubaugh Auction Services contain the following items of property: "2012 Brandt Grain Deck," "2010 Polaris 550 ATV," a one-third interest in two pivots (Roberts farm), a one-third interest in the Hondorfer farm well pump, a 48-foot grain bin, and a 24-foot enclosed car trailer. Brian valued these items at a combined total of $25,900, and Dori valued them at a combined total of $78,010. At trial, Brian testified that his valuations were based on the appraisals from Grubaugh Auction Services, and Dori testified that her valuations were based on the depreciation schedules from Brian's tax returns or the May 20, 2014, balance sheet.

The court awarded Brian "[a]ny property not specifically listed, but in [his] possession." Further, the court relied on the Grubaugh Auction Services appraisals over Brian's depreciation schedule for valuing all of the items it valued. Dori did not assign error to the court's reliance on those appraisals, so we will defer to the court's judgment on that issue.

Accordingly, we award these remaining assets to Brian and find their value as follows: "2012 Brandt Grain Deck," $10,500; "2010 Polaris 550 ATV," $3,500; a one-third interest in two pivots (Roberts farm), $2,000; a one-third interest in the Hondorfer farm well pump, $4,000; a 48-foot grain bin, $1,500; and a 24-foot enclosed car trailer, $4,400.

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[33] *Schuman, supra* note 17.

(ii) Value of Marital Debts Awarded to Brian

When listing the unsecured marital debts that were awarded to Brian, the court provided no corresponding values. It summarized the total marital debts awarded to Brian as $1,145,294. We can find no combination of debts in the record that total this amount.

The value of the following debts awarded to Brian were undisputed: Roberts Farm, $871,297; "Ag Direct" loan for the Cat Challenger tractor, $30,548; "John Deere Financial," $183,000; and "Chase Auto Finance," $30,785. As a result, we determine the amount of debt awarded to Brian to be $1,115,630.

However, other debts were inconsistently listed on the joint property statements or the evidence varied as to the amounts owed, including the Great Western Bank operating line of credit, a Sears credit card debt, and a Cabela's credit card debt.

At trial, the president of Great Western Bank and Brian's primary lender testified that the March 20, 2014, balance sheet accurately stated that Brian owed $1,486 on the operating line of credit on that date but that it had no balance owed on the date of separation. Dori did not challenge this witness' credibility, and the court made no finding that he was not credible.

In regard to the Sears and Cabela's credit cards, Dori introduced evidence to show that both debts were paid in full on the date of separation.

Brian also claimed for the first time on the second joint property statement that he had a marital debt from unpaid property taxes. Under the title of the debt, Brian listed the four properties, presumably, from which the taxes were owed. One of these was the Roberts farm, but the others were premarital properties. Real estate taxes on nonmarital property are nonmarital debts.[34] Brian did not submit any supporting evidence

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[34] 2 Brett R. Turner, Equitable Distribution of Property § 6:97 (3d ed. 2005 & Supp. 2016-17).

of this claim or of the value attributable to the Roberts farm. The court did not award or value this debt.

Based on the record, we conclude that there was no debt owed on the Sears and Cabela's credit cards or the Great Western Bank operating line of credit on the date of separation. We also conclude that Brian failed to submit sufficient evidence to show how much, if any, unpaid taxes he owed on the Roberts farm; accordingly, the court did not err in failing to assign it.

(iii) Brian Should Have Been Awarded Value of Reduction in His Premarital Debts as Asset

[15] "[A] non-owning spouse is entitled to some benefit when marital funds have been expended to improve or reduce the debt on the other spouse's nonmarital property."[35] As discussed above, Brian had $918,775.69 in premarital debts between loans on his nonmarital property and expenses incurred in the production of his 2011 crop. According to Brian's premarital debts listed on the March 20, 2014, balance sheet, only $209,951 of these debts existed on the date of separation. As a result, Brian's premarital debts were reduced, during the marriage, by approximately $708,824.69. In light of the fact that we set off the premarital value of Brian's bank accounts and stored and growing crop inventory, it would be inequitable to not also include in the marital estate this benefit conferred to Brian. Accordingly, we award Brian the value of his premarital debts reduced with marital funds.

4. Division and Valuation of Marital Property

Brian argues that the court committed mathematical errors in totaling the parties' assets and debts, which created errors in the equalization payment it ordered. After reviewing the

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[35] *Jones v. Jones*, 2014 Ark. 96, at 5, 432 S.W.3d 36, 40 (Feb. 27, 2014). Accord 24 Am. Jur. 2d *Divorce and Separation* § 486 (2008). See, also, *Gangwish v. Gangwish*, 267 Neb. 901, 678 N.W.2d 503 (2004).

order, we agree that the court committed an abuse of discretion by incorrectly totaling the values of its award and relying on those values to calculate the marital estate and equalization payment.

Having resolved Brian's assignments of error and noticing plain error on the division of the marital estate, we provide the following division of debts and assets of the parties:

Item	Brian	Dori
Bank Accounts	$ 218,120.00	$ 5,272.00
Real Estate	981,333.00	0.00
Vehicles	59,500.00	17,500.00
Farm Equipment	280,701.00	0.00
Crop Inventory	444,099.68	0.00
Prepaid Farm Expenses	164,643.00	0.00
401K	0.00	1,739.00
Household Goods & Furnishings	5,200.00	0.00
Reduction in Premarital Debt	708,824.69	0.00
Debt	(1,115,630.00)	(3,216.00)
Premarital Crop Inventory	(1,021,503.07)	(0.00)
Premarital Bank Accounts	(182,471.00)	(0.00)
TOTAL	$ 542,817.30	$21,295.00

Based on the balance sheet above, the total value of the marital estate is $564,112.30. The value of the marital estate awarded to Brian is $542,817.30, and the value awarded to Dori is $21,295. An equal distribution would require a payment from Brian to Dori in the amount of $260,761.15.

5. Division of Marital Estate

Brian contends that the court's equal distribution of the marital estate is inequitable based on our principles for distributing the marital estate. Additionally, Brian argues that we should award Dori less than the standard 33 to 50 percent of the marital estate, under *Davidson v. Davidson*.[36] He argues this case is factually analogous to *Davidson*, except the wife in *Davidson* abandoned a promising career for the marriage,

[36] *Davidson, supra* note 27.

while Dori did not forgo any opportunities. Further, he asserts that the division does not provide him a means to pay the award, because it will likely put him out of business.

Dori contends that the court's distribution was warranted because both parties worked hard during the marriage and she changed her field of study and college for her doctoral program to benefit the marriage. She argues that the unique circumstances in *Davidson* are not applicable here, because Brian had been farming only a short time before the marriage and held no stock options or retention shares. Further, she asserts that there is no evidence to support Brian's claim that he cannot make the equalization payment, because at the time of separation, he had little short-term debt and significant liquid assets and had prepaid many of his 2014 farm expenses.

[16-18] In dividing property and considering alimony upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties, (2) the duration of the marriage, (3) the history of contributions to the marriage, and (4) the ability of the supported party to engage in gainful employment.[37] In addition to the specific criteria listed in § 42-365, in dividing property and considering alimony upon a dissolution of marriage, a court should consider the income and earning capacity of each party and the general equities of the situation.[38] As a general rule, a spouse should be awarded one-third to one-half of the marital estate, the polestar being fairness and reasonableness as determined by the facts of each case.[39]

In *Davidson*, the marital estate was valued at $7,886,119, of which the husband's employee stock options and stock retention shares alone accounted for $5,655,974.[40] At the time of the

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[37] *Anderson v. Anderson*, 290 Neb. 530, 861 N.W.2d 113 (2015).

[38] *Id.*

[39] See *Lorenzen v. Lorenzen*, 294 Neb. 204, 883 N.W.2d 292 (2016), citing *Millatmal v. Millatmal*, 272 Neb. 452, 723 N.W.2d 79 (2006).

[40] *Davidson, supra* note 27.

marriage, the husband was Union Pacific Railroad's president and chairman. About 1 year into the marriage, he was named president of the Union Pacific Corporation, and about 2 years into the marriage, he was promoted to chief operating officer of that same corporation. We acknowledged that the bulk of the marital estate consisted of stock options and retention shares that were earned as a result of those promotions.

In considering the equitable division of the estate, we noted that the husband's "33-year career in the railroad industry had reached its zenith at the time the parties were married" and that he had been receiving stock options and retention annually for the 10 years preceding the marriage.[41] We also noted that the wife provided social support, tutored the husband's college-age son, and interrupted a successful career for the marriage. On the other hand, the husband's nonmarital children did not reside permanently with the parties and the wife was able to finish her Ph.D. during the marriage. Further, we reasoned:

> Considering that no children were born to the parties, that the parties separated after 2 years, that the marriage lasted 38 months, that [the husband's] career was well established, and that [the wife] is highly educated and capable of finding employment, we conclude that the trial court's adherence to the general guidelines was an abuse of discretion.[42]

Accordingly, based on the circumstances of the case, which we stated were "unique," we reversed the court's order granting the wife 33 percent of the marital estate and held that the wife was entitled to only $950,000, or about 12 percent of the marital estate.[43]

In the instant case, we reject Brian's argument that the circumstances warrant deviating from our general rule for

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[41] *Id.* at 670, 578 N.W.2d at 859.

[42] *Id.* at 671, 578 N.W.2d at 859.

[43] *Id.* at 672, 578 N.W.2d at 860.

dividing the marital estate. While some of the factors for dividing the marital estate in this case are similar to those in *Davidson*, the unique circumstances in *Davidson* that warranted the deviation is not.

The facts in *Davidson* were unique because the husband's career reached its zenith at the same time that the parties married. As a result of the husband's career-long efforts, he was twice promoted during the short-term marriage, which resulted in his receiving employee stock options and stock retention shares far in excess of his regular salary. While we accounted for the portion of the option and shares that were nonmarital, the remaining value had still resulted substantially from his premarital efforts and the husband had no ability to prevent these assets from becoming marital as they were income from employment.

Because we decided that Brian was entitled to a setoff of his premarital assets above, there is nothing in this case that approaches the inequity we found in *Davidson*.

Admittedly, the following factors in this case are similar to those in *Davidson*: the marriage was short term, no children were born of the marriage, Brian contributed a disproportionate amount of finances to the estate, Dori received a professional doctoral degree during the marriage, and both parties are well situated to engage in gainful employment. Also, unlike in *Davidson*, Dori did not forgo any employment opportunities, and, while she changed her educational plans, Dori received a comparable education to what she would have in South Dakota.

While these factors may support awarding Dori only 33 percent of the marital estate, as the lower court in *Davidson* had, the circumstances of the parties and their contributions to the marriage support a more equal distribution.

In *Davidson*, the wife made little contribution to the marriage, financially or through other efforts, which we described as occasional tutoring of the husband's son and volunteer work.

Here, Dori worked full time during her breaks from school and after graduation, and she received financial support from

her scholarship for living expenses. While she earned less than Brian, she bore most of the costs of the apartment in Lincoln, her living expenses in Lincoln, and her travel expenses. Brian, on the other hand, lived in a house provided by his parents and provided no evidence of expenses outside of his farming operation. Brian provided little financial support to Dori during the marriage, which prevented her from accruing savings or other assets.

Further, while her education was comparable to what she would have received, she changed her field of study to enable her to contribute to the farming operation. While her contributions to the farming operation during the marriage were minimal, what she did contribute was based primarily on knowledge she obtained from her studies, which showed the utility of the educational decisions she made.

Additionally, Dori bore the majority of the burden of travel during the marriage to allow the parties to see each other. During the portion of the marriage when Dori resided in Lincoln, she still traveled to the Polk County residence 3 or 4 days a week. During the other portion of the marriage when Dori resided in Polk County, she commuted to Lincoln for school and her full-time summer employment. Brian traveled to Lincoln frequently during the first winter of the marriage but carried little of the burden thereafter. Further, Dori was solely responsible for maintaining her Lincoln residence and also put in considerable efforts at the Polk County residence. Brian testified that she would provide extra assistance at the Polk County residence during his busy season, which allowed him to focus on his farming operation.

While reasonable minds could differ as to what the appropriate distribution of the marital estate within the general range should have been in this case, an abuse of discretion is a highly deferential standard of review. Our opinion, based on an independent review of the record, supplants the court's decision only in the instance where its decision was untenable. Brian contributed more financially to the marital estate, but Dori also earned income throughout the marriage and was responsible

for much of the expenses. She also bore a disproportionate amount of homemaking duties and the burden to ensure she and Brian could spend time together regularly during the marriage. Finally, as the trial court reasoned, Brian had the opportunity to keep his family gifts and nonmarital property contributions, which contributed heavily to his earnings, separate from the estate, but did not. Accordingly, we cannot say that the decision by the district court was unreasonable or unfair.

Brian presented no evidence to support his claim that the equalization payment would threaten the continuation of his business. He was awarded substantial cash assets, prepaid farming expenses for 2014, and the crops produced that year, the expenses of which would likely have been paid in the prior year when they were produced. Accordingly, we find no merit to his claim that requiring him to make an equalization payment was unfair.

V. CONCLUSION

We affirm the court's decision that stored and growing crops should not be treated the same as cattle herds for tracing purposes, but we hold that the court committed an abuse of discretion and plain error in its distribution of nonmarital and marital assets and debts. Notably, based on the circumstances of this case, we find that the court erred in not setting off the value of Brian's stored and growing crops on the date of marriage and not assigning a credit to the marital estate for the substantial amount of Brian's premarital debts that were reduced during the marriage.

Further, we hold that the court did not abuse its discretion in awarding Dori one-half of the marital estate. In light of our holdings above, we modify the court's order consistent with this opinion and order Brian to make an equalization payment of $260,761.15.

Affirmed as modified.

Wright, J., not participating in the decision.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Christopher M. Payne, appellant.

904 N.W.2d 275

Filed December 8, 2017. No. S-16-1233.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Judgments: Appeal and Error.** The construction of a mandate issued by an appellate court presents a question of law, on which an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Jurisdiction: Appeal and Error.** 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, irrespective of whether the issue is raised by the parties.
4. **Postconviction: Final Orders.** In a postconviction proceeding, an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.
5. **Judgments: Appeal and Error.** Where the mandate makes the opinion of an appellate court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.
6. **Courts: Judgments: Appeal and Error.** A district court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.
7. ____: ____: ____. A lower court may not modify a judgment directed by an appellate court; nor may it engraft any provision on it or take any provision from it.
8. **Judgments: Appeal and Error.** No judgment or order different from, or in addition to, the appellate mandate can have any effect.
9. **Courts: Judgments: Jurisdiction: Appeal and Error.** Because a trial court is without power to affect rights and duties outside the scope of

the remand from an appellate court, any order attempting to do so is entered without jurisdiction and is void.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Order vacated, and cause remanded with directions.

Gregory A. Pivovar for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

This is Christopher M. Payne's second appeal from postconviction proceedings before the district court for Sarpy County. In his first appeal, we reversed the district court's order denying postconviction relief and remanded the cause for an evidentiary hearing on Payne's claim that his no contest plea was the result of his trial counsels' ineffective assistance.[1] On remand, the district court interpreted our opinion to require an evidentiary hearing on a different issue, and Payne timely appeals from that order.

We conclude the district court misinterpreted the directions on remand and consequently entered an order that exceeded the scope of our mandate and was therefore void. We vacate the district court's order and remand the cause with directions.

FACTS

In 2005, Payne was charged with first degree sexual assault of a child, incest, and sexual assault of a child. Pursuant to a plea agreement, he pled no contest to first degree sexual assault of a child and was sentenced to imprisonment for a term of 40 to 50 years. Payne did not file a direct appeal. His

[1] *State v. Payne*, 289 Neb. 467, 855 N.W.2d 783 (2014).

trial counsel had not withdrawn and was still engaged as counsel during the time an appeal could have been filed.

Postconviction Motion

On August 24, 2012, Payne filed a verified motion for postconviction relief, and he thereafter filed amended and second amended motions. In his operative motion, Payne alleged his trial attorneys were ineffective in (1) failing to preserve his speedy trial rights by filing a motion to discharge; (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 file a plea in abatement or motion to quash to challenge the State's failure to provide sufficient evidence as to venue and corpus delecti; and (5) advising him to plead guilty or no contest despite the fact that a law enforcement witness testified falsely. Read as a whole, Payne's postconviction motion asserted that if his trial counsel had not been ineffective in one or more of the five asserted ways, he would have insisted on going to trial and would not have entered his no contest plea.

The district court denied Payne's postconviction motion without conducting an evidentiary hearing, finding his allegations of ineffective assistance of trial counsel were procedurally barred because he had not filed a direct appeal. Payne timely appealed.

First Appeal

This court reversed that denial and remanded the cause for further proceedings. In doing so, we generally addressed two issues: procedural bar and waiver. We concluded Payne's ineffective assistance of counsel claims were not procedurally barred, because Payne was still represented by trial counsel at the time a direct appeal could have been filed. We explained that because trial counsel represented Payne during the entire appeal period, Payne's first opportunity to raise ineffective assistance of trial counsel was in a motion for postconviction

relief, and consequently, his claims that trial counsel provided ineffective assistance were not procedurally barred.[2]

We also addressed whether Payne had waived any of the claims asserted in his postconviction motion by entering his plea of no contest. Generally, a voluntary guilty plea or plea of no contest waives all defenses to a criminal charge.[3] Thus, when a defendant pleads guilty or no contest, 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.[4] In a postconviction proceeding brought by a defendant convicted because of a guilty plea or a plea of no contest, a court will consider an allegation that the plea was the result of ineffective assistance of counsel.[5]

In addressing the waiver issue, we noted that because Payne pled no contest, he "waived all of his claims except his claim that counsel was ineffective in advising him to plead no contest."[6] We then reversed the denial of his motion and remanded the cause for further proceedings on Payne's claims that his no contest plea was the result of his trial counsels' ineffective assistance.[7] The mandate issued accordingly and directed that judgment be entered "in conformity with the judgment and opinion of this court."

Proceedings on Remand

On remand, the district court set the matter for evidentiary hearing. Payne's postconviction counsel then filed a motion asking the trial court to determine the "nature and parameters"

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[2] See, *State v. Armendariz*, 289 Neb. 896, 857 N.W.2d 775 (2015); *State v. Robinson*, 285 Neb. 394, 827 N.W.2d 292 (2013).

[3] See, *State v. Lee*, 290 Neb. 601, 861 N.W.2d 393 (2015); *State v. Amaya*, 276 Neb. 818, 758 N.W.2d 22 (2008).

[4] See *State v. Bazer*, 276 Neb. 7, 751 N.W.2d 619 (2008).

[5] *Id.*

[6] *State v. Payne, supra* note 1, 289 Neb. at 470, 855 N.W.2d at 786.

[7] *State v. Payne, supra* note 1.

of the issues to be addressed at the evidentiary hearing. Payne's motion generally requested an evidentiary hearing on all five of his claims that his plea of no contest was the result of his trial counsels' ineffective assistance.

The district court issued an order finding that, based on its review of this court's opinion, the "sole" issue for evidentiary hearing was whether Payne's trial counsel was ineffective for failing to file a direct appeal. The court reasoned:

> After review of the [Supreme Court's opinion], the Court is of the opinion the issue that first must be decided is whether the failure of trial Counsel to file a Direct Appeal is grounds to determine that Counsel was incompetent and failed to meet the standard of care as an attorney.
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> This being said, it is the opinion of this Court this is the sole issue to be determined at the hearing.

Payne timely appealed from the district court's order. We moved the appeal to our docket on our own motion.[8]

ASSIGNMENTS OF ERROR

Payne assigns, restated and renumbered, that the trial court erred in (1) finding the evidentiary hearing was limited to the issue of whether trial counsel was ineffective in failing to file a direct appeal and (2) failing to hold an evidentiary hearing on the issue of whether Payne's no contest plea was the result of his trial counsels' ineffective assistance.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law.[9]

[2] The construction of a mandate issued by an appellate court presents a question of law, on which an appellate court

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[8] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[9] *Karo v. NAU Country Ins. Co.*, 297 Neb. 798, 901 N.W.2d 689 (2017). See, *State v. Harris*, 292 Neb. 186, 871 N.W.2d 762 (2015); *State v. Meints*, 291 Neb. 869, 869 N.W.2d 343 (2015).

is obligated to reach a conclusion independent of the determination reached by the court below.[10]

ANALYSIS

[3] 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, irrespective of whether the issue is raised by the parties.[11]

[4] We have consistently held that an order granting an evidentiary hearing on some issues and denying a hearing on others is a final order as to the claims denied without a hearing.[12] Because Payne has appealed the district court's order limiting the evidentiary hearing to a single issue and implicitly denying an evidentiary hearing on all other issues, we conclude he has appealed from a final, appealable order.

[5] Payne appeals from the district court's order interpreting the scope of this court's mandate following the first appeal. The construction of a mandate issued by an appellate court presents a question of law.[13] Where, as here, the mandate makes the opinion of the court a part thereof by reference, the opinion should be examined in conjunction with the mandate to determine the nature and terms of the judgment to be entered or the action to be taken thereon.[14]

[6-9] A district court has an unqualified duty to follow the mandate issued by an appellate court and must enter judgment in conformity with the opinion and judgment of the appellate court.[15] A lower court may not modify a judgment directed

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[10] *Klingelhoefer v. Monif*, 286 Neb. 675, 839 N.W.2d 247 (2013).

[11] *Clarke v. First Nat. Bank of Omaha*, 296 Neb. 632, 895 N.W.2d 284 (2017).

[12] *State v. Alfredson*, 287 Neb. 477, 842 N.W.2d 815 (2014); *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[13] *Klingelhoefer v. Monif, supra* note 10.

[14] *Pursley v. Pursley*, 261 Neb. 478, 623 N.W.2d 651 (2001).

[15] *Klingelhoefer v. Monif, supra* note 10.

by an appellate court; nor may it engraft any provision on it or take any provision from it.[16] No judgment or order different from, or in addition to, the appellate mandate can have any effect.[17] Because a trial court is without power to affect rights and duties outside the scope of the remand from an appellate court, any order attempting to do so is entered without jurisdiction and is void.[18]

We conclude the order entered by the district court on remand is void, because it attempted to affect rights and duties outside the scope of remand. The district court interpreted our mandate to require an evidentiary hearing on whether Payne's trial counsel provided ineffective assistance by failing to file a direct appeal. But Payne never alleged such a claim, and our opinion did not direct the district court to hold an evidentiary hearing on such a claim. To the contrary, our opinion in *State v. Payne*[19] held that the failure to file a direct appeal did not procedurally bar the "only remaining issue" that Payne's no contest plea was the result of his trial counsels' ineffective assistance, and the cause was remanded for an evidentiary hearing on that issue.

In a postconviction proceeding 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.[20] Thus, Payne argues that on remand, he was entitled to an evidentiary hearing on his claims that his no contest plea was the result of his trial counsels' ineffective assistance. We observe that Payne's operative postconviction motion alleged five ways that the ineffective assistance of his trial counsel resulted in his accepting the plea offer instead of insisting on a trial. The State, both in its brief

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[16] See *id.*

[17] *Id.*

[18] See *State v. Shelly*, 279 Neb. 728, 782 N.W.2d 12 (2010).

[19] *State v. Payne, supra* note 1, 289 Neb. at 471, 855 N.W.2d at 786.

[20] *Id.*, citing *State v. Bazer, supra* note 4.

and at oral argument before this court, generally agreed that under the mandate from *Payne*, Payne is entitled to an evidentiary hearing on each of those five claims.

By limiting the evidentiary hearing to whether trial counsel was ineffective in not filing a direct appeal, the district court's order following remand exceeded the scope of our mandate. Because the district court was without power to affect rights and duties outside the scope of the remand, the district court's order exceeded its jurisdiction, was void, and must be vacated.[21]

CONCLUSION

For these reasons, we vacate the district court's order regarding the scope of the evidentiary hearing and we remand the cause with directions that an evidentiary hearing be held on Payne's claims that his no contest plea was the result of his trial counsels' ineffective assistance.

Order vacated, and cause remanded with directions.

Wright, J., not participating in the decision.

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[21] See, *State v. Shelly, supra* note 18; *Pursley v. Pursley, supra* note 14.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Dukhan Mumin, appellant, v. Scott Frakes, director, Nebraska Department of Correctional Services, and Brian Gage, warden, Tecumseh State Correctional Institution, appellees.

904 N.W.2d 667

Filed December 15, 2017. No. S-16-327.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.
2. **Statutes: Affidavits.** Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) contemplates only two circumstances under which a court may deny leave to proceed in forma pauperis, assuming the application and affidavit is proper: (1) when the evidentiary hearing shows the applicant has sufficient funds to pay costs, fees, or security and (2) when the court concludes the applicant is asserting legal positions which are frivolous or malicious.
3. **Affidavits.** If the basis for denial of in forma pauperis status is frivolousness, the court must provide a written statement of its reasons, findings, and conclusions.
4. **Constitutional Law: Statutes: Affidavits: Appeal and Error.** The in forma pauperis statutes contemplate two circumstances under which a court has no authority to deny a proper application and affidavit to proceed in forma pauperis. The first circumstance is expressly laid out in statute: A court shall not deny an in forma pauperis application on the basis that the applicant's legal positions are frivolous or malicious if to do so would deny the applicant his or her constitutional right to appeal in a felony case. The second circumstance is one which this court has found to be implicit in the statutory scheme: Because an applicant has a statutory right to interlocutory appellate review of an order denying an in forma pauperis application, a court may not deny an application to proceed in forma pauperis when the applicant is seeking to appeal from an order denying an earlier in forma pauperis application.

5. **Statutes: Affidavits: Appeal and Error.** Although the in forma pauperis statutes give a trial court the authority to deny an application requested to commence, prosecute, defend, or appeal a case in forma pauperis if the court finds the applicant has sufficient funds or the legal positions being asserted therein are frivolous or malicious, a trial court does not have the same authority once an in forma pauperis application is denied and the applicant seeks interlocutory appellate review of that denial.
6. **Affidavits: Appeal and Error.** When an application to proceed in forma pauperis is denied by the trial court and the applicant seeks leave to proceed in forma pauperis to obtain appellate review of that denial, a trial court does not have the authority to issue an order that would interfere with such appellate review.

Petition for further review from the Court of Appeals, Riedmann, Bishop, and Arterburn, Judges, on appeal thereto from the District Court for Johnson County, Daniel E. Bryan, Jr., Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Dukhan Mumin, pro se.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Stacy, J.

Dukhan Mumin seeks further review of a Nebraska Court of Appeals opinion addressing his successive appeals from district court orders denying successive applications to proceed in forma pauperis (IFP). On further review, we clarify the procedure trial courts should follow in ruling on successive applications to proceed IFP, as well as the procedure appellate courts should follow in reviewing successive appeals from the denial of IFP applications. We ultimately reverse the decision of the Court of Appeals and remand the matter with specific directions.

I. BACKGROUND

In 2013, Mumin was convicted of possession of cocaine. He was found to be a habitual criminal and was sentenced to imprisonment for a term of 10 to 20 years. His conviction and sentence were affirmed on direct appeal to the Court of Appeals in an unpublished memorandum opinion in case No. A-13-783 filed on June 6, 2014.

1. IFP Applications

In March 2016, Mumin filed a pro se petition for writ of habeas corpus in the district court for Johnson County, Nebraska. Along with the petition, he filed an affidavit and application for leave to proceed IFP. The district court denied the IFP application, finding the legal positions Mumin advanced in his habeas petition were frivolous.

Mumin filed a timely notice of appeal from the order denying his IFP application (first appeal). In lieu of the statutory docket fee on appeal,[1] he filed an application and affidavit to proceed IFP on appeal. The district court denied Mumin's application to proceed IFP on appeal, reasoning again that his habeas petition was frivolous.

Mumin then timely appealed from the district court's order denying his application to proceed IFP on appeal (second appeal). The Clerk of the Supreme Court and Court of Appeals docketed both the first and second appeals under the same case number.

2. Court of Appeals' Opinion

In a memorandum opinion,[2] the Court of Appeals addressed Mumin's successive IFP appeals using the procedure we outlined in *State v. Carter*.[3] First, the Court of Appeals addressed the second appeal and concluded it had jurisdiction over that

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[1] See Neb. Rev. Stat. §§ 25-1912 and 25-1916 (Reissue 2016).

[2] *Mumin v. Frakes*, No. A-16-327, 2017 WL 672286 (Neb. App. Feb. 21, 2017) (selected for posting to court website).

[3] *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

appeal, because Mumin had filed a timely notice of appeal from the order denying IFP on appeal, accompanied by a proper poverty affidavit and IFP application. On the merits of the second appeal, the Court of Appeals analyzed, de novo on the record, whether the district court correctly concluded the underlying habeas petition was frivolous. It concluded Mumin was asserting a frivolous legal position in his habeas petition and, thus, affirmed the district court's order denying IFP on appeal.

The Court of Appeals then held the first appeal under submission to give Mumin an opportunity to pay the statutory docket fee on appeal, reasoning that "pursuant to [Neb. Rev. Stat.] § 25-2301.02(1) [(Reissue 2016)], we will not have jurisdiction of the first appeal unless Mumin pays the statutory docket fee within 30 days of the date of release of this opinion."[4]

Mumin timely filed a petition for further review, which we granted.

II. ASSIGNMENT OF ERROR

Mumin assigns it was error to conclude his habeas petition was frivolous.

III. STANDARD OF REVIEW

[1] A district court's denial of IFP status is reviewed de novo on the record based on the transcript of the hearing or written statement of the court.[5]

IV. ANALYSIS

We granted further review to address the proper procedure for trial and appellate courts to follow when considering successive applications to proceed IFP and successive appeals from orders denying IFP. Mumin's appeal involves what has

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[4] *Mumin v. Frakes, supra* note 2, 2017 WL 672286 at *3.

[5] Neb. Rev. Stat. § 25-2301.02(2) (Reissue 2016); *State v. Carter, supra* note 3.

become a relatively common factual scenario: (1) A trial court denies an IFP application to commence a case; (2) the applicant appeals the denial of IFP and, in lieu of the statutory docket fee on appeal, asks to proceed IFP on appeal; (3) the trial court denies the application to proceed IFP on appeal; and (4) the applicant then appeals the second IFP denial.[6] In this common example, the potential cycle of successive IFP denials and appeals is seemingly endless.

Because successive IFP denials, and appeals therefrom, strain the limited resources of our judicial system and delay final resolution of matters brought before the court, we take this opportunity to clarify certain aspects of the IFP process which appear to have generated confusion in both the trial and appellate courts. We consider two questions on further review: (1) When does a trial court have authority to deny an application to proceed IFP on appeal? (2) When presented with successive IFP appeals, should an appellate court follow the procedure articulated in *Glass v. Kenney*[7] or the procedure articulated in *State v. Carter*?[8]

To answer these questions, we begin with an overview of the statutory IFP scheme. We then explain and contrast our holdings in *Glass* and *Carter,* after which we analyze Mumin's successive IFP appeals under the *Glass* procedure. Finally, we highlight an additional consideration for trial courts presented with IFP applications in cases such as Mumin's, where no prepayment of fees or costs was required.[9]

1. IFP Statutes

Nebraska's IFP statutes are codified at Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2016). Those statutes define IFP as "the permission given by the court for a party to

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[6] See *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

[7] *Id.*

[8] *State v. Carter, supra* note 3.

[9] See Neb. Rev. Stat. § 29-2824 (Reissue 2016).

proceed without prepayment of fees and costs or security."[10] The IFP statutes authorize any county or state court, except the Workers' Compensation Court, to authorize "the commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis."[11] The IFP statutes define "[c]ase" to include "any suit, action, or proceeding."[12]

The requirements of an IFP application are set out in statute. An application to proceed IFP "shall include an affidavit stating that the affiant is unable to pay the fees and costs or give security required to proceed with the case, the nature of the action, defense, or appeal, and the affiant's belief that he or she is entitled to redress."[13] We have not construed this language to mandate separate poverty affidavits and IFP applications; instead, we hold that as long as the poverty affidavit itself includes an indication that the party is applying for IFP status, § 25-2301.01 does not require that a separate IFP application be filed in addition to the poverty affidavit.[14]

Assuming a proper IFP application and affidavit is filed, the IFP statutes mandate that leave to proceed IFP "shall be granted unless there is an objection that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious."[15] An objection may be raised by "any interested person" or by the court on its own motion.[16] An objection claiming that an applicant has sufficient funds or is asserting frivolous or malicious legal positions must be made within 30 days after the IFP application is filed, but an objection claiming that the IFP application was fraudulent may be made at any

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[10] § 25-2301(2).

[11] § 25-2301.01.

[12] § 25-2301(1).

[13] § 25-2301.01.

[14] *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001).

[15] § 25-2301.02(1).

[16] *Id.*

time.[17] When an objection is filed, the court must conduct an evidentiary hearing on the objection, except when the objection is on the court's own motion on grounds the applicant is asserting legal positions which are frivolous or malicious.[18]

[2,3] Section 25-2301.02 contemplates only two circumstances under which a court may deny leave to proceed IFP, assuming the application and affidavit is proper: (1) when the evidentiary hearing shows the applicant has sufficient funds to pay costs, fees, or security and (2) when the court concludes the applicant is asserting legal positions which are frivolous or malicious.[19] If the basis for denying IFP is frivolousness, the court must provide a written statement of its reasons, findings, and conclusions.[20]

[4] Additionally, the IFP statutory scheme contemplates two circumstances under which a court has no authority to deny a proper application and affidavit to proceed IFP. The first circumstance is expressly laid out in § 25-2301.02(1): A court "shall not deny" an IFP application on the basis that the applicant's legal positions are frivolous or malicious if to do so would deny the applicant his or her constitutional right to appeal in a felony case. The second circumstance is one which this court has found to be implicit in the IFP statutory scheme: Because an applicant has a statutory right to interlocutory appellate review of an order denying an IFP application,[21] a court does not have authority to interfere with such appellate review by denying a request to proceed IFP in order to obtain appellate review of an order denying an earlier IFP application.[22]

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Glass v. Kenney, supra* note 6; *Jacob v. Schlichtman*, 261 Neb. 169, 622 N.W.2d 852 (2001).

[22] *Glass v. Kenney, supra* note 6.

Finally, under the IFP statutory scheme, when an IFP application is denied, the applicant has two choices: (1) to proceed with the matter upon payment of fees, costs, or security[23] or (2) to appeal the order denying IFP.[24] If the applicant elects to appeal from the denial of IFP, he or she may ask the court for a transcript of the IFP hearing and the court is required by statute to "order the transcript to be prepared and the cost shall be paid by the county in the same manner as other claims are paid."[25] For the sake of completeness, we also note that IFP applications filed by prisoners seeking IFP status to file a civil action are subject to an additional statute, Neb. Rev. Stat. § 25-3401 (Reissue 2016), but that statute does not apply to habeas corpus relief[26] and is not relevant to the instant appeal.

2. Successive IFP Appeals

Our modern IFP jurisprudence has articulated two different procedures for appellate courts to follow when reviewing successive appeals involving the denial of IFP. Generally speaking, when the first appeal is from an order denying a request to proceed IFP, the procedure on appeal is set out in *Glass v. Kenney*.[27] But when the first appeal is not from an order denying IFP, but instead is from a judgment or final order, the proper appellate review procedure is set out in *State v. Carter*.[28] We discuss both cases, and procedures, below.

(a) *Glass v. Kenney*

Glass v. Kenney,[29] decided in 2004, involved the same factual situation present in the instant appeals. An inmate

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[23] § 25-2301.02(1).

[24] § 25-2301.02(2); *Glass v. Kenney, supra* note 6.

[25] § 25-2301.02(2).

[26] § 25-3401(1)(a).

[27] *Glass v. Kenney, supra* note 6.

[28] *State v. Carter, supra* note 3.

[29] *Glass v. Kenney, supra* note 6.

filed an application and affidavit to proceed IFP in connection with filing a pro se petition for writ of habeas corpus. The trial court denied the IFP application finding the allegations in the habeas petition were frivolous. The inmate filed a notice of appeal from the order denying IFP (first appeal) and filed therewith an application and affidavit to proceed IFP on appeal. The trial court denied the application to proceed IFP on appeal, reasoning again that the habeas petition was frivolous. The inmate then filed a notice of appeal from the second IFP denial (second appeal), along with another application and affidavit to proceed IFP on appeal. The first appeal and second appeal were docketed separately, but eventually were consolidated.

The State argued there was no appellate jurisdiction over the inmate's second appeal, because he had not paid the statutory docket fee.[30] We rejected this argument based on the language of the IFP statutes and our prior case law. Specifically, we found that when an application to proceed IFP is denied, the applicant may "either proceed with the trial action or appeal the ruling denying [IFP] status."[31] We emphasized that under § 25-2301.02, there is a "statutory right of interlocutory appellate review of a decision denying [IFP] eligibility."[32] Thus, we held that the appeal from the denial of the application to proceed IFP on appeal was a "statutorily authorized interlocutory appeal which we will entertain if other jurisdictional requirements are met."[33] We explained that in an appeal from a denial of IFP status on appeal, a poverty affidavit serves as a substitute for the docket fee otherwise required on appeal, so an appellate court obtains jurisdiction over the appeal "'upon the timely filing of a notice of appeal and a proper [IFP]

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[30] See § 25-1912.

[31] *Glass v. Kenney, supra* note 6, 268 Neb. at 709, 687 N.W.2d at 911, citing *Martin v. McGinn*, 265 Neb. 403, 657 N.W.2d 217 (2003).

[32] *Id.*, citing *Jacob v. Schlichtman, supra* note 21.

[33] *Glass v. Kenney, supra* note 6.

application and affidavit.'"[34] We concluded we had jurisdiction over the second appeal, because the inmate had filed a timely notice of appeal, a proper application to proceed IFP, and a poverty affidavit.

After concluding we had jurisdiction over the second appeal, we addressed the merits of that appeal. We ultimately concluded the trial court erred in denying the inmate's application to proceed IFP on appeal, because doing so effectively denied his statutory right to interlocutory appellate review of an order denying IFP. Because the trial court was "without authority" to issue an order interfering with that right,[35] we resolved the second appeal by reversing and vacating the trial court's order denying the application to proceed IFP on appeal.

After resolving the second appeal, *Glass* addressed the merits of the first appeal. In the first appeal, the inmate challenged the trial court's denial of his original application to proceed IFP filed along with his habeas petition. *Glass* reviewed the legal positions asserted in the habeas petition, found they were frivolous, and concluded the trial court had not erred in denying the inmate's first IFP application on that basis. Ultimately, the resolution of *Glass* was that the second appeal was reversed and vacated in order to reach the first appeal, and the first appeal was affirmed.

(b) *State v. Carter*

In *State v. Carter*,[36] decided in 2015, we applied the basic rationale of *Glass* to slightly different procedural facts. In *Carter*, the inmate filed a pro se motion for postconviction relief, which the trial court denied without conducting an evidentiary hearing. The inmate then filed an appeal from the order denying postconviction relief (first appeal) and, in lieu

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[34] *Id*. at 709, 687 N.W.2d at 911, quoting *State v. Jones*, 264 Neb. 671, 650 N.W.2d 798 (2002).

[35] *Id*. at 710, 687 N.W.2d at 912.

[36] *State v. Carter, supra* note 3.

of the statutory docket fee, filed an application and affidavit to proceed IFP on appeal. The trial court denied the IFP application, reasoning the underlying postconviction motion was frivolous. At that point, the inmate had 30 days to either pay the statutory docket fee and proceed with the appeal or appeal the denial of IFP.[37] The inmate chose to file a notice of appeal from the order denying IFP on appeal (second appeal), accompanied by another application and affidavit to proceed IFP on appeal. The record on appeal did not contain a ruling on the second IFP application.

Carter recognized that the procedural posture of the case differed slightly from that considered in *Glass*.[38] However, on the threshold question whether the appellate court had jurisdiction over the second appeal despite the inmate's failure to pay the statutory docket fee, the court in *Carter* concluded the "same principles" as were discussed in *Glass* generally applied.[39] Consequently, in *Carter*, just as in *Glass*, we concluded we had jurisdiction over the second appeal, because the inmate had filed a proper application and affidavit to proceed IFP along with his timely notice of appeal.

Carter then proceeded to consider the merits of the inmate's second appeal, which challenged the denial of his "application to proceed IFP on appeal."[40] In doing so, *Carter* observed the general rule that a trial court has the authority to deny an IFP application (whether IFP is initially requested to commence an action or to take an appeal) if it determines the applicant is asserting legal positions that are frivolous or malicious.[41] We then reviewed de novo the trial court's conclusion that the inmate should not be granted leave to appeal IFP because his postconviction motion was frivolous. We agreed the inmate

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[37] See *Glass v. Kenney, supra* note 6, citing *Martin v. McGinn, supra* note 31.

[38] *State v. Carter, supra* note 3.

[39] *Id*. at 20, 870 N.W.2d at 644.

[40] *Id*. at 21, 870 N.W.2d at 644.

[41] See § 25-2301.02(1).

was asserting "only frivolous legal positions" in his postconviction motion, and thus resolved the second appeal (the inmate's appeal from the denial of IFP on appeal) by affirming the district court's order.[42] As to the inmate's first appeal (from the final order denying postconviction relief without a hearing), we reasoned:

> [P]ursuant to § 25-2301.02(1), we will not have jurisdiction of the first appeal unless [the inmate] pays the statutory docket fee within 30 days of the date of release of this opinion. We therefore hold the first appeal under submission for payment of the statutory docket fee. If [the inmate] fails to timely pay the statutory docket fee, his first appeal will be dismissed for lack of jurisdiction.[43]

The inmate subsequently paid the statutory docket fee, and in a brief per curiam supplemental opinion, we considered the merits of his first appeal from the order denying postconviction relief. We affirmed the denial of postconviction relief, explaining: "As was foreshadowed in [our earlier opinion], we find [the inmate's] motion for postconviction relief to be meritless."[44]

(c) Contrasting *Glass* and *Carter*

We have not previously explained the rationale behind the different appellate procedures followed in *Glass* and *Carter,* but emphasize now that the appellate procedure was driven by the nature of the first appeal and the differing points at which the applicants sought interlocutory appellate review of the trial court's order denying IFP.

In *Glass*, the first appeal was from the denial of a request to proceed IFP to commence a case, and the second appeal

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[42] *State v. Carter, supra* note 3, 292 Neb. at 23, 870 N.W.2d at 645.

[43] *Id*. at 23, 870 N.W.2d at 646.

[44] *State v. Carter*, 292 Neb. 481, 481, 877 N.W.2d 211, 211 (2016) (supplemental opinion), *cert. denied* 580 U.S. 863, 137 S. Ct. 151, 196 L. Ed. 2d 115.

was from the denial of IFP to seek interlocutory appellate review of the first IFP denial. But in *Carter,* the first appeal was from a final order denying postconviction relief, and the second appeal was from the denial of the request to proceed IFP on appeal.

[5,6] This variation in the factual posture of *Glass* and *Carter* significantly affects the procedural analysis on appeal. This is so, because although the IFP statutory scheme gives a trial court the authority to deny an IFP application requested to commence, prosecute, defend, or appeal a case if the court finds the applicant has sufficient funds or the legal positions being asserted therein are frivolous or malicious,[45] a trial court does not have the same authority once an IFP application is denied and the applicant wishes to seek interlocutory appellate review of the denial.[46] When an IFP application is denied and the applicant seeks leave to proceed IFP to obtain appellate review of that denial, the trial court does not have authority to issue an order that would interfere with such appellate review.[47] Otherwise, the IFP applicant would be denied his or her statutory right to appellate review of the order denying IFP status.

(d) Mumin's Appeals Are Governed by *Glass*, Not *Carter*

In the present case, the Court of Appeals followed the appellate procedure outlined in *Carter* when considering Mumin's successive IFP appeals. But given the procedural posture of Mumin's first appeal (which was from an order denying IFP to commence a case), the proper procedure was that outlined in *Glass*, not *Carter*.

Mumin does not directly challenge the appellate procedure applied in this case; rather, his sole assignment is that the court erred in finding his habeas petition was frivolous.

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[45] § 25-2301.02(1)(a) and (b).

[46] *Glass v. Kenney, supra* note 6, citing *Jacob v. Schlichtman, supra* note 21.

[47] *Id.*

Reviewing the matter de novo on the record and applying the appellate procedure from *Glass*, we find no merit to Mumin's assignment.

An appellate court's threshold consideration, whether analyzing successive IFP appeals under *Glass* or *Carter,* is to decide whether it has jurisdiction over the second appeal. Here, the Court of Appeals correctly concluded it had jurisdiction over the second appeal. An appellate court obtains jurisdiction over an appeal "'upon the timely filing of a notice of appeal and a proper [IFP] application and affidavit.'"[48] Mumin timely filed his second notice of appeal, along with a proper application and affidavit to proceed IFP on appeal. Similarly, we conclude this court has jurisdiction on further review, because Mumin timely filed his petition for further review and his poverty affidavit serves as a substitute for the statutory docket fee otherwise required.[49]

(i) Merits of Second Appeal

Having confirmed jurisdiction, we consider the substance of the second appeal, in which Mumin seeks appellate review of the district court's order denying his application to proceed IFP on appeal. As we explained in *Glass*, under the statutory IFP scheme, Mumin has a right to interlocutory appellate review of an order denying IFP status to commence a case.[50] Because the district court's second order denying IFP interfered with Mumin's statutory right to appeal the first IFP denial, the district court was without authority to issue the second denial.[51] Therefore, we conclude the district court erred in denying Mumin's application to proceed IFP

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[48] *Id.* at 709, 687 N.W.2d at 911, quoting *State v. Jones, supra* note 34.

[49] See Neb. Rev. Stat. § 33-103.01 (Reissue 2016) and Neb. Ct. R. App. P. §§ 2-101(G)(1)(b) and 2-102(F)(1) (rev. 2015). Accord *Glass v. Kenney, supra* note 6, citing *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

[50] *Glass v. Kenney, supra* note 6; *Jacob v. Schlichtman, supra* note 21.

[51] *Id.*

on appeal. To the extent the Court of Appeals affirmed the district court's order denying Mumin's request to proceed IFP on appeal, we reverse the decision and, consistent with *Glass*, remand this matter to the Court of Appeals with directions to reverse and vacate that order of the district court.[52]

(ii) Merits of First Appeal

With respect to Mumin's first appeal, in which he seeks review of the district court's order denying his IFP application to commence his petition for writ of habeas corpus, Mumin presents the same argument on further review that he advanced to the Court of Appeals—that his sentence is void because there was insufficient evidence presented at his sentencing to support habitual criminal enhancement. Both the district court and the Court of Appeals correctly concluded that because any insufficiency of the evidence presented at the sentencing proceedings would not render Mumin's conviction or sentence void, his habeas petition asserts a frivolous legal position.[53]

On further review, Mumin argues that under the holding in *Berumen v. Casady*,[54] his sentence should be considered void. In *Berumen*, we found that a habeas petitioner had shown his enhanced sentence for second-offense driving while intoxicated was void by offering a record showing the State failed to offer any evidence of a first offense. The holding in *Berumen* was based in part on the proposition that a collateral attack may be made on the validity of a conviction used for enhancement, a proposition we have since rejected.[55] But more important, unlike *Berumen,* Mumin's habeas petition and the documents attached thereto show the State offered documentary evidence of Mumin's prior convictions, and the

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[52] See *Glass v. Kenney, supra* note 6.

[53] See *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

[54] *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[55] See *id.*, citing *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992), *overruled, State v. Louthan*, 257 Neb. 174, 595 N.W.2d 917 (1999).

court specifically found the evidence supported his sentence enhancement. We therefore find that both the district court and the Court of Appeals correctly concluded that Mumin's habeas petition asserts a frivolous legal position.

But because the Court of Appeals was following the procedural framework of *Carter* rather than *Glass*, it reached this correct conclusion in the context of analyzing the second appeal rather than the first, and it then held the first appeal under submission for payment of the statutory docket fee. Under the *Glass* procedure, it should instead have reached the merits of the first appeal and concluded the district court correctly denied Mumin's original IFP application filed with his habeas petition.[56]

We thus reverse the decision and remand the matter to the Court of Appeals with directions to affirm the district court's denial of Mumin's first IFP application. Before doing so, we take this opportunity to mention another consideration when ruling on IFP applications, which we did not squarely address in either *Glass* or *Carter*.

(e) Additional IFP Considerations

Some appeals involving successive denials of IFP arise in cases where no prepayment of fees or costs is required to commence the case in the trial court. This appeal is one such example. Mumin sought leave to proceed IFP in connection with filing a petition for writ of habeas corpus. But pursuant to Neb. Rev. Stat. § 29-2824 (Reissue 2016), "no person or officer shall have the right to demand the payment in advance of any fees" in proceedings on habeas corpus in a criminal case.[57] As a result, Mumin was able to file his habeas petition with the clerk of the Johnson County District Court without the need to prepay the filing fee. A

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[56] See § 25-2301.02(1)(b).

[57] Accord § 2-101(G)(1)(c) (providing appellate docket fees in habeas corpus proceedings are not required in advance and will be collected at conclusion of proceeding).

similar rule applies to filing motions for postconviction relief in criminal cases.[58]

Consequently, while it was not improper for the district court to rule on the IFP application as a threshold matter, doing so was not necessary to allow Mumin to file or proceed with his habeas petition. And once the district court concluded—in the context of its IFP review—that the legal positions asserted in the habeas petition were frivolous, it would have been more efficient for the district court to rule directly on the merits of the habeas petition at the same time it ruled on the IFP application. Instead, because the district court ruled only on the IFP applications and not on the habeas petition, Mumin's habeas petition has remained unresolved awaiting resolution of the IFP denials that were appealed.

Where, as here, there is no statutory requirement for prepayment of fees or costs to file or proceed with a matter, a trial court should consider whether it may be appropriate to defer ruling on an IFP application either until such time as it appears that some payment of fees, costs, or security may be necessary to proceed or until a judgment or final order is entered. In cases where no prepayment of fees or costs is required, deferring the ruling on an IFP application would permit the court to reach the merits of the case more quickly and without potentially lengthy delays caused by interlocutory appeals from orders denying IFP.

V. CONCLUSION

For the reasons stated above, we reverse the decision of the Court of Appeals and remand the matter with directions to reverse and vacate the order of the district court in the second appeal and, in the first appeal, to affirm the district court's denial of Mumin's original IFP application.

Reversed and remanded with directions.

Wright, J., not participating in the decision.

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[58] See Neb. Rev. Stat. § 29-3001(2) (Reissue 2016) (providing "[c]osts shall be taxed as in habeas corpus cases").



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Danielle Benard, appellant, v. McDowall, LLC, appellee.

904 N.W.2d 679

Filed December 15, 2017. No. S-16-946.

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 those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Negligence: Proof.** In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The question whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
6. ____: ____. A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial.
7. **Summary Judgment: Evidence: Proof.** After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

8. **Landlord and Tenant: Liability.** In Nebraska, the obligation of a landlord to warn of a dangerous condition on leased premises is based on the Restatement (Second) of Torts § 358 (1965).
9. ____: ____. As a general rule, in the absence of statute, covenant, fraud, or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property.
10. **Landlord and Tenant: Contracts.** In the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them.
11. **Landlord and Tenant: Liability: Contracts.** A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if (1) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, (2) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented; and (3) the lessor fails to exercise reasonable care to perform his contract.
12. **Negligence: Liability: Contracts.** Liability in negligence based on contract is dependent on the terms of the agreement.
13. **Landlord and Tenant: Words and Phrases.** The word "repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Eric R. Chandler, of Law Office of Eric R. Chandler, P.C., L.L.O., for appellant.

Michael T. Gibbons, Aimee C. Bataillon, and Raymond E. Walden, of Woodke & Gibbons, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

NATURE OF CASE

Danielle Benard sustained injuries when she fell on the entry step of the single-family home (Property) she rented. She

brought a negligence action against her landlord, McDowall, LLC. The district court for Douglas County granted summary judgment in favor of McDowall, and Benard appeals. Although the district court did not err in the portion of the ruling in the summary judgment order with regard to Benard's theory that McDowall was obligated to warn her of a dangerous condition on the Property, due to genuine issues of material fact, the district court erred with respect to Benard's allegation that McDowall failed to repair and maintain the Property as required by the November 1, 2011, lease (Lease). We affirm in part, and in part reverse and remand for further proceedings.

STATEMENT OF FACTS

Benard seeks damages for injuries she suffered after falling on the steps leading to the front entryway of the Property, which she leased from McDowall. The Property was located in Omaha, Nebraska.

Benard's complaint alleged that on September 23, 2012, she fell on the front concrete step of the Property and seriously injured her ankle and sustained damages. In her deposition, she testified that shortly before midnight, she was standing on the front step, concluding a telephone call, and when she stepped off the step, the heel of her shoe became stuck in a crack or gap between the front stoop and the front step and she lost her balance and fell to the ground. She gathered her cell phone and keys and reentered the Property. Her fall resulted in torn ligaments in her ankle, for which she ultimately underwent surgery.

Benard presented evidence of ongoing disrepair of the front entryway despite orders from a city housing code inspector to make repairs. Seven months prior to the execution of the Lease, in March 2011, a housing code inspector for the city of Omaha's planning department (Planning Department) had inspected the Property and, on April 5, 2011, notified McDowall that occupancy of the Property was prohibited until

repairs were made, because numerous violations made the dwelling "unfit for human occupancy." These violations for "unsafe structure[s]" included the sinking front step, which needed to be "mud jacked," or lifted, leveled, and stabilized. Benard claims that McDowall never notified her of the safety code violations or completed the repairs ordered by the Planning Department.

The record also contains a "Section 8" Omaha Housing Authority inspection checklist completed prior to Benard's fall, dated July 31, 2012. The checklist indicates that the property passed the Section 8 inspection for "Condition of Stairs, Rails, and Porches."

McDowall's designated representative testified in his deposition that prior to renting the house to Benard, he completed all repairs required by the April 2011 Planning Department's list of violations. He testified that he jacked up the step using a pry bar and some boards, reached underneath, and packed in dirt and gravel to bolster the step.

In 2013, subsequent to Benard's injury, the Planning Department again inspected the Property and concluded that no repairs had been made to the front steps and found that the front steps were still in an unsafe condition. The Planning Department housing inspector who conducted both the 2011 and 2013 inspections stated in an affidavit that "[d]uring my inspection on April 5, 2013, I found that the previous violations noted in the March 2011 inspection, including the sunken front steps, had not been remedied, and that the property had been unlawfully occupied." On April 8, 2013, the housing inspector issued an "Order to Vacate" regarding the Property.

Benard testified at her deposition that she viewed the Property once or twice prior to entering into the residential Lease with McDowall. During her walk throughs, a McDowall representative named "Chris" informed her that he "still had to fix stuff on the house" and that he "was still working on the house." Benard could not recall whether "Chris" informed

her of particular repairs. However, she denied seeing any "big, glaring, red flags" at that time and she wanted to "hurry up and move."

The Lease contained provisions pertaining to safety and maintenance, excerpted below:

> **9. Condition of Premises.** Lessee stipulates that he has examined the demised premises, including the grounds and all buildings and improvements, and that they are, at the time of the lease, in good order, repair, and a safe, clean, and tenantable condition.
>
> . . . .
>
> **20. Maintenance and Repair.** Lessee will, at his sole expense, keep and maintain the leased premises and appurtenances in good and sanitary condition and repair during the term of this lease and any renewal thereof. In particular, Lessee shall keep the fixtures in the house or on or about the leased premises in good order and repair; keep the furnace clean; keep the electric bills in order; keep the walks free from dirt and debris; and, at his sole expense, shall make all requested repairs to the plumbing, range, heating[] apparatus, and electric and gas fixtures whenever damage thereto shall have resulted from Lessee's misuse, waste, or neglect or that of his employee, family, agent, or visitor. *Major maintenance and repair of the leased premises, not due to Lessee's misuse, waste, or neglect or that of his employee, family, agent, or visitor, shall be the responsibility of Lessor or his assigns*.

(Emphasis supplied.)

Benard testified that at some point after she moved in, she noticed that the front steps of the Property were sinking in and shifting. Because of the condition of the steps, she began to turn to the side and descend hip first. Benard testified that during the year she resided at the Property before she was injured, several other friends and family members either tripped on or expressed difficulty navigating the steps. During

the year between her move-in date and her injury, Benard's niece and twin nephews had tripped on the step, and her niece advised her that the step needed to be fixed. She testified that when a representative of McDowall would come to collect her rent, she would step outside her house and he would see her navigate the steps sideways, inferring that McDowall was on notice. Benard stated, however, that she did not explicitly notify McDowall of her ongoing issues with the step and landing or of any worsening of the condition.

On February 17, 2014, Benard filed this negligence action to recover damages for the injuries she sustained in her fall. She alleged that McDowall was negligent in failing to properly maintain and repair the front steps of the Property and for failing to notify Benard of the defect in the front steps. In its answer, McDowall alleged, inter alia, that Benard was negligent to a degree sufficient to bar or reduce her recovery.

After the parties exchanged written discovery and took depositions, McDowall moved for summary judgment. Following a hearing, the district court took the matter under advisement. In its written order, filed July 13, 2016, the district court determined that there was no evidence that McDowall concealed or failed to disclose the condition of the steps and that the condition was open and obvious. The court further found that the undisputed evidence showed that Benard was aware of the condition of the steps at the time she fell. Based on these reasons, the court granted summary judgment in favor of McDowall and dismissed the complaint.

This appeal followed.

ASSIGNMENT OF ERROR

On appeal, restated, Benard claims generally that the district court erred when it granted summary judgment in McDowall's favor.

STANDARDS OF REVIEW

[1,2] An appellate court will affirm a lower court's grant of summary judgment if the pleadings and admitted evidence

show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Midland Properties v. Wells Fargo*, 296 Neb. 407, 893 N.W.2d 460 (2017). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted and gives that party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

In this negligence action, Benard alleged that McDowall was liable because, as landlord of her rental home, McDowall failed to maintain and repair the front steps and failed to notify her of the defect in the front steps. McDowall denied the substantive allegations and alleged that Benard was contributorily negligent. At the summary judgment hearing, McDowall presented evidence that Benard was aware of the condition of the steps and the district court granted summary judgment in favor of McDowall generally based on its reasoning that McDowall had not concealed the danger.

Although the district court did not err in the portion of the ruling in the summary judgment order with regard to Benard's theory that McDowall was obligated to warn her of a dangerous condition, due to genuine issues of material fact, the district court erred with respect to Benard's allegation that McDowall failed to repair and maintain the property as required by the Lease. We affirm in part, and in part reverse and remand for further proceedings.

Applicable Law

[3,4] In order to recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010). The question whether a legal duty exists for actionable

negligence is a question of law dependent on the facts in a particular situation. *Id*.

[5-7] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Tolbert v. Jamison*, 281 Neb. 206, 794 N.W.2d 877 (2011). A prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. *Id*. After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* In reviewing a summary judgment, we give the party against whom the judgment was entered all reasonable inferences deducible from the evidence. *Id*. (citing *Wilson v. Fieldgrove*, 280 Neb. 548, 787 N.W.2d 707 (2010)).

This case involves a dangerous condition on the Property governed by the Lease. The parties argue many theories not repeated here which are not dispositive. The centerpiece of our analysis are the long-established obligations between a landlord and a tenant with regard to (1) warning and (2) repairing dangerous conditions on leased premises.

Landlord's Alleged Failure to Notify Tenant of Dangerous Condition

[8] In Nebraska, the obligation of a landlord to warn of a dangerous condition on leased premises is based on the Restatement (Second) of Torts § 358 (1965). The district court's analysis was guided by a summary of the law reflected in a jury instruction, NJI2d Civ. 8.31, which, adjusted to this case, provides as follows:

> Before [Benard] can recover against [McDowall on her claim of failure to warn of the dangerous condition, Benard] must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. That there was a condition on the [Property] that involved an unreasonable risk of harm to [Benard];
>
> 2. That [Benard] was the lessee . . . ;
>
> 3. That [McDowall] knew or had reason to know of this condition and realized or should have realized the risk involved;
>
> 4. That [McDowall] concealed or failed to disclose the condition to [Benard];
>
> 5. That [Benard] did not know or have reason to know of the condition or the risk involved;
>
> 6. That [McDowall] had reason to expect that [Benard] would not discover the condition or realize the risk;
>
> 7. That the condition was a proximate cause of some damage to [Benard after she had taken possession of the Property]; and
>
> 8. The nature and extent of that damage.

At the hearing on summary judgment, McDowall produced evidence to show that it had no reason to expect that Benard would not discover the condition or realize the risk. In this regard, Benard's testimony reflected that the condition of the step and landing were known to her family and friends, including young children; that she took precautionary measures due to the settling of the entryway; and that she understood that McDowall observed the worsening of the condition based on the viewing of the property's exterior by representatives of McDowall.

Benard argues on appeal that McDowall did not have reason to expect that she would realize the risk created by the steps. However, Benard is unable to point to any material fact in the record which shows the risk was concealed or difficult to appreciate that would prevent summary judgment in favor of McDowall on this theory. The district court did not err when

it ruled in favor of McDowall on this theory, and we turn to Benard's remaining theory that McDowall breached its obligation to exercise reasonable care in repairing and maintaining the leased Property.

Landlord's Failure to Repair and Maintain Property: Lease Provisions

[9,10] Regarding a single-family unit, the law may be summarized as follows: "'"As a general rule, in the absence of statute, covenant, fraud or concealment, a landlord who gives a tenant full control and possession of the leased property will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased property."'" *Tolbert v. Jamison*, 281 Neb. 206, 215, 794 N.W.2d 877, 885 (2011). This proposition is consistent with the Restatement, *supra*, § 356. We have also stated that "[i]n the absence of an express agreement to the contrary, a lessor does not warrant the fitness or safety of the premises and the lessee takes them as he or she finds them." *Tolbert v. Jamison*, 281 Neb. at 216, 794 N.W.2d at 885. See *Roan v. Bruckner*, 180 Neb. 399, 143 N.W.2d 108 (1966), *abrogated, Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

[11] Section 356 of the Restatement notes that there are several exceptions to the nonobligation of the landlord. One exception is contained in the Restatement (Second) of Torts § 357 at 241 (1965), which provides:

> A lessor of land is subject to liability for physical harm caused to his lessee and others upon the land with the consent of the lessee or his sublessee by a condition of disrepair existing before or arising after the lessee has taken possession if
>
> (a) the lessor, as such, has contracted by a covenant in the lease or otherwise to keep the land in repair, and
>
> (b) the disrepair creates an unreasonable risk to persons upon the land which the performance of the lessor's agreement would have prevented; and

> (c) the lessor fails to exercise reasonable care to perform his contract.

The landlord's duty under a contract to make repairs as reflected in § 357 of the Restatement has been adopted in Nebraska. *Zuroski v. Estate of Strickland*, 176 Neb. 633, 126 N.W.2d 888 (1964). See, also, *Gehrke v. General Theatre Corp.*, 207 Neb. 301, 298 N.W.2d 773 (1980); *Reicheneker v. Seward*, 203 Neb. 68, 277 N.W.2d 539 (1979); *Quist v. Duda*, 159 Neb. 393, 67 N.W.2d 481 (1954).

[12] Liability in negligence based on contract is dependent on the terms of the agreement. The Restatement, *supra*, § 357, comment *d*. at 242-43, provides:

> Since the duty arises out of the existence of the contract to repair, the contract defines the extent of the duty. Unless it provides that the lessor shall inspect the land to ascertain the need of repairs, a contract to keep the premises in safe condition subjects the lessor to liability only if he does not exercise reasonable care after he has had notice of the need of repairs. In any case his obligation is only one of reasonable care.

See, also, *Gehrke v. General Theatre Corp., supra*; *Reicheneker v. Seward, supra*; *Zuroski v. Estate of Strickland, supra*; *Quist v. Duda, supra*.

As noted above, paragraph 20 of the Lease between the parties provided that "[m]ajor maintenance and repair of the leased premises, not due to Lessee's misuse, waste, or neglect or that of his employee, family, agent, or visitor, shall be the responsibility of Lessor or his assigns." Thus, McDowall contracted to make major repairs under the Lease. Further, the record contains some evidence that McDowall made additional oral promises to Benard regarding future repairs on the Property. According to Benard's testimony, during her visits with a McDowall representative to tour the Property, the representative indicated that he "was still working on the house" and "still had to fix stuff on the house," from which

we infer McDowall's intention to make repairs consistent with the Lease.

[13] "The word 'repair' means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction." *Zuroski v. Estate of Strickland*, 176 Neb. at 634, 126 N.W.2d at 890. McDowall does not contest that the work required to lift and support the exterior concrete step and landing is a major repair to the property and that major repairs are covered in paragraph 20 of the Lease.

In the underlying complaint, Bernard pled, inter alia, theories of negligence based on McDowall's alleged failure to repair and maintain the steps. We consider the evidence regarding initial repairs first. Through the Planning Department's 2011 notice, Benard's evidence showed that the step was in need of repair at that time. And the affidavit from the housing code inspector from the Planning Department stated that in 2013, he "found that the previous violations noted in the March 2011 inspection, including the sunken front steps, had not been remedied, and that the property had been unlawfully occupied." Benard also testified that the step was problematic throughout her tenancy.

But the record is disputed regarding whether the steps were repaired, and if so, whether the repairs were made before or during Benard's occupancy. Paragraph 9 of the Lease provides that the tenant has "examined the demised premises, including the grounds and all buildings and improvements, and that they are, at the time of the lease, in good order, repair, and a safe, clean, and tenantable condition." The deposition testimony by a representative of McDowall claimed that he repaired the step by raising it up and packing additional dirt and sand underneath prior to Benard's tenancy, which he claims was done to remedy the housing code violation in 2011. As noted, the Section 8 inspection approved of the condition of the steps. In contrast, Benard's testimony indicated that repairs, if made, were not effective during her tenancy.

In addition to the issue of whether McDowall exercised reasonable care after it had notice of the initial need of repairs, there is the further issue of whether McDowall had notice of any worsening of the step or landing triggering its obligation under the Lease to maintain the steps. Even if McDowall performed repairs to the steps at some point, the record contains additional issues of fact as to whether the repairs were initially effective at eliminating unreasonable danger and whether McDowall was aware thereafter of the worsening of the condition. To this question, Benard testified that a representative of McDowall routinely observed her negotiating the steps in a cautious way when she met the representative in front of the Property to pay her rent. Thus, if McDowall was aware of the worsening or further settling, there is a question of whether it exercised reasonable care after it had such notice of the need of additional repairs. In sum, there are material questions of fact regarding whether McDowall breached its obligations to Benard. As such, McDowall failed to carry its burden to show it was entitled to judgment as a matter of law. The district court erred when it granted summary judgment in favor of McDowall on the theory of McDowall's failure to repair.

Contributory Negligence

For completeness, we note that Benard seems to contend on appeal that the district court erred by basing its decision on her alleged contributory negligence. Because we do not read the district court's order as suggested by Benard, we reject this argument.

Heins v. Webster County

On appeal, Benard claims that the district court erred because it neglected to decide whether there was a material issue of fact as to whether McDowall's conduct was willful or wanton. Benard cites our decision in *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996). Even reading Benard's complaint liberally, she alleges only negligence and the issue

of willful and wanton conduct was not properly before the district court on summary judgment. Further, Benard's reliance on *Heins* is not appropriate, because our holding did not abolish the relationship between a landlord and tenant; in *Heins*, we abolished the distinction between invitees and licensees. See *Warner v. Simmons*, 288 Neb. 472, 849 N.W.2d 475 (2014). Benard's argument is without merit. We reject this argument.

CONCLUSION

Because the undisputed evidence shows that Benard knew or had reason to know of the dangerous condition of the steps and the risk involved, it was not unreasonable for McDowall not to warn Benard of the defective steps. McDowall was entitled to judgment on Benard's theory based on failure to warn. However, genuine issues of material fact preclude an award of summary judgment in favor of McDowall on Benard's theory that McDowall failed to exercise reasonable care to maintain and repair the Property where McDowall had contracted to perform major repairs under the Lease. Accordingly, the district court's order of July 13, 2017, is affirmed in part and in part reversed, and the cause is remanded for further proceedings.

Affirmed in part, and in part reversed and remanded for further proceedings.

Wright, J., not participating in the decision.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v.
Nico M. Wofford, appellant.
904 N.W.2d 649

Filed December 15, 2017. No. S-16-1004.

1. **Trial: Joinder: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion.
2. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory.
3. **Trial: Juries: Evidence: Appeal and Error.** A trial court's decision to allow a jury during deliberations to rehear or review nontestimonial evidence is reviewed by an appellate court for an abuse of discretion.
4. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Sentences: Appeal and Error.** An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly

depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

7. **Trial: Joinder: Indictments and Informations.** The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial.
8. **Trial: Joinder: Proof: Appeal and Error.** The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced.
9. **Trial: Joinder.** Consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated.
10. **Trial: Joinder: Evidence.** A defendant is not considered prejudiced by a joinder where the evidence relating to both defendants would be admissible in a trial of either defendant separately.
11. **Juries: Prosecuting Attorneys: Equal Protection.** A prosecutor is ordinarily entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his or her view concerning the outcome of the case. However, the U.S. Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), held that the Equal Protection Clause forbids the prosecutor from challenging jurors solely because of their race.
12. **Juries: Discrimination: Prosecuting Attorneys: Proof.** Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. In this three-step process, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination.
13. **Juries: Discrimination: Prosecuting Attorneys.** Whether a prosecutor's reasons for using a peremptory challenge are race neutral is a question of law.
14. ____: ____: ____. In determining whether a prosecutor's explanation for using a peremptory challenge is race neutral, a court is not required to reject the explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory. Only inherently discriminatory explanations are facially invalid.

15. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
16. **Trial: Juries: Evidence.** A trial court does not have discretion to submit testimonial materials to the jury for unsupervised review, but the trial court has broad discretion to submit to the jury nontestimonial exhibits, in particular, those constituting substantive evidence of the defendant's guilt.
17. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
18. **Sentences.** When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime.
19. **Sentences: Judgments.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Douglas County: Duane C. Dougherty, Judge. Affirmed.

Ernest H. Addison, Jr., for appellant.

Douglas J. Peterson, Attorney General, and Austin N. Relph for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

NATURE OF CASE

Nico M. Wofford appeals his convictions and sentences in the district court for Douglas County for unlawful discharge of a firearm and use of a weapon to commit a felony. Wofford assigns error to certain rulings and actions of the trial court, and he claims that there was insufficient evidence for his

convictions and that the court imposed excessive sentences. We affirm Wofford's convictions and sentences.

STATEMENT OF FACTS

On July 30, 2015, police officers responded to reports of a shooting in the area of South 33d and Q Streets in Omaha, Nebraska. Police found a dark blue Oldsmobile parked near a convenience store on Q Street. Shots had been fired into the Oldsmobile from another vehicle that was passing it in an adjacent lane. Four adults and two children had been inside the Oldsmobile at the time, and one of the adult occupants was injured by a gunshot to the neck. Police found another vehicle, a silver Saturn, stopped a short distance away on South 33d Avenue; it appeared that the Saturn had been disabled after it struck the curb of a storm drain after turning onto South 33d Avenue from Q Street. Witnesses stated that three men had run from the Saturn after it stopped.

The registered owner of the Saturn was Lafferrell Matthews. Officers investigating the shooting found Matthews in the area near South 33d and S Streets. When the officers approached Matthews, he told them he had been looking for police in order to report that his car had been stolen. In later questioning by police, Matthews initially repeated that his car had been stolen, but he eventually admitted that he was driving the Saturn at the time the shooting occurred. Matthews further told police that Wofford and another man, Dominique Hairston, were passengers in the Saturn.

Wofford and Hairston were each charged in the district court with unlawful discharge of a firearm and use of a weapon to commit a felony. The State moved the court to consolidate the two cases for trial pursuant to Neb. Rev. Stat. § 29-2002 (Reissue 2016). Wofford objected to the consolidation. He argued, inter alia, that consolidation would prejudice him because there was a real probability that the jury could find him guilty by association with Hairston and because there was a risk of inconsistent defenses between the two codefendants.

Hairston did not object to consolidation. The court rejected Wofford's arguments and sustained the State's motion to consolidate the two cases for trial.

During jury selection for the consolidated trial, Wofford raised a challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Wofford noted that both he and Hairston were African-American. He further noted that only 1 out of the 62 potential jurors included in the venire was African-American and that the State used a peremptory strike on the sole African-American. Hairston joined Wofford's *Batson* challenge. The prosecutor responded to the challenge by stating that his reason for striking the potential juror was because "numerous times during questioning, he explained that he had religious beliefs that, yes, he could vote with the group, but he would not be able to judge somebody on an individual basis." The prosecutor stated that he did not think the potential juror would be appropriate based on his "hesitancy to be able to make a judgment based on his religious beliefs on an individual basis."

In connection with the *Batson* discussion, the prosecutor appeared to be referring to the voir dire of the potential juror wherein the prosecutor asked, "[W]hen you go back to the jury room, you're going to vote, and you're going to vote guilty or innocent. Do your religious beliefs prevent you from doing that as an individual?" The potential juror responded, "Yes, it does." The prosecutor followed up by asking, "You wouldn't be able to set aside your religious beliefs and give . . . Wofford and . . . Hairston a fair trial?," to which the potential juror responded "No." At that point in the voir dire, the State challenged the potential juror for cause. The court questioned the potential juror further and asked whether the potential juror would be comfortable judging others as part of a group, even in light of his religious beliefs. The potential juror responded to the court, "As a group I can, yeah." The court asked further questions regarding whether the potential juror meant that he would simply go along with the group's decision or whether

he would make his own decision. The juror replied, "Based on the evidence, if I disagree, yes, I will stand . . . my ground." Thereafter, the State appeared to abandon its challenge for cause but used one of its peremptory challenges to strike the potential juror.

In the *Batson* challenge, after the State gave its reasons for striking the potential juror, the court ruled that the State's reasons for removal were acceptable. Wofford and Hairston then argued that the State's reasons were pretextual because the potential juror's statements "arose more from a language problem than anything else" and that the potential juror did not appear to fully understand the prosecutor's questions. They noted that when the potential juror was asked "more pointed, direct questions, can you be fair and impartial, will you make up your own mind and not be swayed by the group, he said yes to all that." The court then found that the reasons given by the State were "neutral and not racial based," and it therefore denied Wofford and Hairston's *Batson* challenge.

Matthews, who was charged with the same offenses as Wofford and Hairston but whose case was not consolidated with their trial, testified at Wofford and Hairston's consolidated trial. Matthews testified that on July 30, 2015, he was driving his Saturn and Wofford and Hairston were passengers, Wofford riding in the back seat on the passenger side and Hairston in the front passenger seat. Matthews first noticed the Oldsmobile in front of his Saturn when he was stopped at a light at the intersection of 30th and Q Streets. Matthews testified that Hairston said that he recognized the Oldsmobile. After going through the intersection of 30th and Q Streets, Matthews moved into the left lane to pass the Oldsmobile, which was in the right lane. As he was passing the Oldsmobile, Matthews heard three shots coming from the back seat of his Saturn, where Wofford was located. Matthew testified that he then saw Hairston pull out a handgun, lean out the window, and fire six or seven shots.

The State presented other evidence including, inter alia, testimony by various police officers who had investigated the shooting. Testimony by officers indicated that, based on shell casings found at the scene of the shooting, the shots fired at the Oldsmobile had been fired from two different guns. During the testimony of one of the officers, the State offered into evidence a surveillance camera video that was taken from a restaurant located near the site of the shooting and which depicted the Saturn passing the Oldsmobile as the shooting occurred. The video was received into evidence without objection, and the video was played for the jury while the State questioned the officer regarding what was being depicted in the video.

After the State rested its case, Wofford and Hairston moved the court to dismiss on the basis that the State had not shown a prima facie case. The court overruled the motion to dismiss.

Wofford chose not to testify in his own defense. Hairston testified in his own defense and generally testified that while he had ridden with Matthews in Matthews' car on July 30, 2015, he did not ride in Matthews' car at a time when Wofford was a passenger, and that he did not fire any shots out of Matthews' car. Hairston did not testify that Wofford had been in Matthews' car at any time on July 30, and he did not testify that Wofford had fired any shots from Matthews' car.

The case was submitted to the jury. During deliberations, the jury sent a request asking for a "t.v. for video please." The court agreed to the request; however, a laptop computer rather than a television was sent to the jury to be used for viewing the surveillance video.

The jury rendered verdicts finding Wofford guilty on both counts. Sometime after the jury was dismissed, Wofford's counsel was approached by one of the jurors, who told him that during deliberations, the jury had viewed a "mirror-image" of the surveillance video that had been played in court. Wofford's counsel later spoke with the jury foreperson, who said that he

and another juror had used a feature on the laptop computer that had been provided to the jury to play a reverse or mirror image of the surveillance video. The foreperson further said that after viewing the mirror image, they had called over other jurors to view the mirror image. The foreperson and another juror told counsel that when they viewed the mirror image, they could see an arm coming out of the back seat window of the vehicle and a front-seat passenger in a white shirt, and that they had not noticed these things when they had viewed the video in the original manner.

Wofford filed a motion for a new trial in which he alleged two bases for a new trial: First, Wofford alleged that there was an irregularity in the proceedings because during the jury's deliberation, the court provided it with a laptop computer which allowed jurors to view a mirror image of the surveillance. Second, Wofford alleged that that there was jury misconduct because the jury viewed a mirror image of the surveillance video; he argued that the mirror image was extraneous prejudicial information that was not presented in court. The court overruled Wofford's motion for a new trial and his request for an evidentiary hearing on the motion.

The court thereafter sentenced Wofford to imprisonment for 20 to 30 years for unlawful discharge of a firearm and to an additional term of imprisonment for 20 to 30 years for use of a weapon to commit a felony. The court ordered the two sentences to be run consecutively to each other.

Wofford appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Wofford claims that the district court erred when it (1) sustained the State's motion to consolidate his trial with Hairston's; (2) overruled his challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the jury selection process; and (3) allowed the jury unsupervised and unfettered access to view the surveillance video during deliberations. Wofford further claims that there was insufficient

evidence to support his convictions and that the court imposed excessive sentences.

STANDARDS OF REVIEW

[1] A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed on appeal absent an abuse of discretion. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

[2] An appellate court reviews de novo the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law. It reviews for clear error a trial court's factual determination regarding whether a prosecutor's race-neutral explanation is persuasive and whether the prosecutor's use of a peremptory challenge was purposefully discriminatory. *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017).

[3] A trial court's decision to allow a jury during deliberations to rehear or review nontestimonial evidence is reviewed by an appellate court for an abuse of discretion. See *State v. Vandever*, 287 Neb. 807, 844 N.W.2d 783 (2014).

[4] In reviewing a criminal conviction for a sufficiency of the evidence claim, whether the evidence is direct, circumstantial, or a combination thereof, the standard is the same: An appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact. The relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017).

[5,6] An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly

depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Id*.

ANALYSIS

District Court Did Not Abuse Its Discretion When It Sustained Motion to Consolidate Wofford's and Hairston's Cases for Trial.

Wofford claims that the district court erred when it sustained the State's motion to consolidate his trial with that of Hairston. We conclude that the court did not abuse its discretion.

[7,8] We note first that there is no constitutional right to a separate trial and that instead, the right is statutory and depends upon a showing that prejudice will result from a joint trial. *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015). See § 29-2002. The propriety of a joint trial involves two questions: whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial. *State v. Stricklin, supra*. The burden is on the party challenging a joint trial to demonstrate how and in what manner he or she was prejudiced. *Id*.

[9] We have stated that consolidation is proper if the offenses are part of a factually related transaction or series of events in which both of the defendants participated. *Id*. Wofford does not appear to dispute that the charges he and Hairston faced were part of a factually related transaction or series of events. Further, we note that Wofford and Hairston were charged with the same offenses and that the charges against each of them arose from their alleged involvement in the July 30, 2015, shooting.

Instead, Wofford argues that the district court's consolidation of the two cases was an abuse of discretion because it prejudiced him and deprived him of a fair trial. Wofford asserts that he was prejudiced by the consolidated trial because the

jury may have been misled by evidence implicating Hairston and may have found culpability on Wofford's part based on guilt by association with Hairston. Wofford also contends that he was prejudiced because of the testimony of Matthews, a codefendant whose trial was not consolidated with that of Wofford and Hairston. Wofford further argues that he was prejudiced because while he chose not to testify in his defense, Hairston did testify in his own defense, and because he admitted certain things, such as an association with Matthews, which the jury might have used as evidence against Wofford.

We disagree with Wofford's assertion that consolidation unfairly prejudiced him. Regarding Wofford's argument that he was prejudiced as a result of guilt by association with Hairston, we agree with the State's contention that guilt by association is a risk present any time codefendants' trials are consolidated and that such risk may be adequately ameliorated by proper jury instruction. In this case, the district court instructed the jury that it "must come to a separate decision regarding each Defendant." Also, the risk of guilt by association in this case appeared small. This does not appear to be a case where the evidence against Hairston was much stronger than that against Wofford. Instead, the same evidence, in particular Matthews' testimony, seemed to implicate both equally. Also, contrary to Wofford's contention that he and Hairston each relied on a defense of exonerating himself by implicating the other, we note that when Hairston testified in his own defense, he generally denied being involved in the shooting. But Hairston did not implicate Wofford, and instead, he testified that he did not know whether or not Wofford was involved.

Having reviewed the record, we believe that there is no indication that any of the evidence admitted in this consolidated case, including the testimony of Matthews and the testimony of Hairston, would not have been admissible against Wofford in a separate trial. To the extent Wofford argues that certain testimony by Matthews should not have been admitted or that

certain evidence Wofford offered regarding Matthews should have been admitted, it is an argument focused on the evidence ruling and it does not appear that the admission or refusal of such evidence was influenced by the fact that Wofford's trial was consolidated with that of Hairston. Wofford does not separately assign error to the admission or refusal of such evidence, and therefore, we consider the argument only to the extent it impacts the correctness of the court's decision to consolidate the trials.

[10] Because it appears that the rulings regarding the admissibility of the evidence noted by Wofford would have been the same in a separate trial, Wofford has failed to show that the consolidation of his trial with that of Hairston caused him prejudice. A defendant is not considered prejudiced by a joinder where the evidence relating to both defendants would be admissible in a trial of either defendant separately. See *State v. Stricklin*, 290 Neb. 542, 861 N.W.2d 367 (2015).

We determine that the consolidation of Wofford's trial with that of Hairston was proper and that Wofford was not prejudiced by the consolidation. The district court therefore did not abuse its discretion when it sustained the State's motion to consolidate the trials, and we reject Wofford's first assignment of error.

District Court Did Not Err When It Overruled Wofford's Batson *Challenge to the Jury Selection Process.*

Wofford claims that the district court erred when it overruled his challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), to the jury selection process. We conclude that the court did not so err.

We note first that Wofford appears to argue that he challenged both the composition of the venire and the prosecutor's strike of the sole African-American potential juror. However, other than noting that "only one out of 62 [potential] jurors was black," the record does not show that Wofford developed

an attempt to challenge the composition of the venire. That is, Wofford did not attempt to make a showing that the underrepresentation of racial minorities was "'due to systematic exclusion of the group in the jury-selection process'" as would be required for such a challenge. See *State v. Thomas*, 262 Neb. 985, 1002, 637 N.W.2d 632, 652 (2002). Instead, Wofford's challenge at the district court focused on the State's use of a peremptory strike to remove the sole African-American potential juror, and on appeal, we focus on that challenge.

[11] A prosecutor is ordinarily entitled to exercise permitted peremptory challenges for any reason at all, if that reason is related to his or her view concerning the outcome of the case. *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017). However, the U.S. Supreme Court in *Batson v. Kentucky, supra*, held that the Equal Protection Clause forbids the prosecutor from challenging jurors solely because of their race.

[12] Determining whether a prosecutor impermissibly struck a prospective juror based on race is a three-step process. *State v. Clifton, supra*. In this three-step process, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Id*. First, a defendant must make a prima facie showing that the prosecutor exercised a peremptory challenge because of race. Second, assuming the defendant made such a showing, the prosecutor must offer a race-neutral basis for striking the juror. And third, the trial court must determine whether the defendant has carried his or her burden of proving purposeful discrimination. *Id*.

[13] Once the trial court has decided the ultimate question of intentional discrimination, however, the question on appeal is only whether the prosecutor's reasons were facially race neutral and whether the trial court's final determination regarding purposeful discrimination was clearly erroneous. *Id*. Whether a prosecutor's reasons for using a peremptory challenge are race neutral is a question of law. *Id*.

[14] We conclude that in this case, the prosecutor's stated reason for exercising his peremptory strike was race neutral. The prosecutor generally stated that he struck the prospective juror because he was concerned by the prospective juror's statements to the effect that because of his religious beliefs, he did not think that he could judge another person. In determining whether a prosecutor's explanation for using a peremptory challenge is race neutral, a court is not required to reject the explanation because it is not persuasive, or even plausible; it is sufficient if the reason is not inherently discriminatory. *Id*. Only inherently discriminatory explanations are facially invalid. *Id*. The prosecutor in this case gave a reason that did not indicate discrimination based on the prospective juror's race.

We next consider whether the district court's final determination regarding purposeful discrimination was clearly erroneous. The third step of the inquiry under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), requires the trial court to evaluate the persuasiveness of the justification proffered by the prosecutor; it ultimately determines whether the explanation was a pretext for discrimination. *State v. Clifton*, 296 Neb. 135, 892 N.W.2d 112 (2017). A trial court's determination that the prosecutor's race-neutral explanation should be believed frequently involves its evaluation of a prosecutor's credibility, which requires deference to the court's findings absent exceptional circumstances. *Id*.

The question before us is whether the district court clearly erred in finding that the prosecutor's race-neutral explanation for the peremptory strike was genuine and not pretextual, and we may consider the rationality of the prosecutor's reason in our inquiry. *Id*. A prosecutor's intuitive assumptions, inarticulable factors, or even hunches can be proper bases for rejecting a potential juror, so long as the reasons are not based on impermissible group bias. *Id*.

We believe that the prosecutor's stated reason for striking the juror appears to be a valid reason that was not a pretext for racial discrimination. The prosecutor was concerned whether

the potential juror's stated beliefs would prevent him from participating in deliberations because of his reluctance to judge Wofford. The potential juror had made statements to this effect, and although the potential juror also made other statements indicating that he could make such a judgment as part of a group and that he could render a fair decision, the potential juror's initial statements could have given the prosecutor valid cause for concern.

Based on our review of the record, we determine the district court did not clearly err when it found that the prosecutor's race-neutral explanation for striking the sole African-American prospective juror was valid and that the use of the peremptory challenge was not purposefully discriminatory. We therefore reject Wofford's claim that the district court erred when it denied his *Batson* challenge.

District Court Did Not Abuse Its Discretion When It Allowed the Jury Access to Surveillance Video During Deliberations.

For his next assignment of error, Wofford claims that the district court erred when it allowed the jury unsupervised and unfettered access to view the surveillance video during deliberations. We determine that the district court did not err.

[15] As a preliminary matter, we note that in his brief, Wofford argues that the court erred when it overruled his motion for a new trial based on (1) alleged irregularities in the proceedings because the jury was provided a laptop computer to view the surveillance video and (2) alleged jury misconduct because the jury used the laptop computer to view a reversed image of the surveillance video. This claim differs from his assignment of error. An appellate court does not consider errors which are argued but not assigned. *State v. Jedlicka*, 297 Neb. 276, 900 N.W.2d 454 (2017). We therefore do not consider Wofford's arguments related to the overruling of the motion for a new trial in this appeal, and instead, we limit our consideration to the error assigned. However, we note

that in his appeal, Wofford's codefendant, Hairston, raised the court's overruling of the motion for a new trial related to the jury's consideration of the video and that we concluded that the district court did not abuse its discretion when it overruled Hairston's motion for a new trial based on alleged jury misconduct. *State v. Hairston, ante* p. 251, 904 N.W.2d 1 (2017). We turn to consideration of the error assigned by Wofford.

[16] A trial court does not have discretion to submit testimonial materials to the jury for unsupervised review, but the trial court has broad discretion to submit to the jury nontestimonial exhibits, in particular, those constituting substantive evidence of the defendant's guilt. See *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016). The surveillance video in this case was not testimony but was instead a nontestimonial exhibit that constituted substantive evidence of Wofford's guilt. Whether or not Wofford could be identified in the video, the video depicted the shooting for which he was charged, and the video corroborated other evidence. Because the DVD's containing the surveillance video were nontestimonial exhibits that contained substantive evidence of Wofford's guilt, the district court had broad discretion to submit the DVD's to the jury for use during deliberations. We find no abuse of discretion.

To the extent Wofford argues that it was improper to allow the jury to use the laptop computer to view the video, it is clear that some sort of device was necessary to allow the jury to view the DVD's, and there is no indication in the record that Wofford objected to the particular device—the laptop computer—that was given to the jury at the time it was given. We conclude that the court did not abuse its discretion by doing so, and we reject this assignment of error.

Evidence Was Sufficient to Support Wofford's Convictions.

Wofford claims that there was insufficient evidence to support his convictions. Because the evidence was sufficient, we reject this assignment of error.

We note that Wofford framed his assignment of error as a challenge to the sufficiency of the evidence, but in his argument, he asserts that the district court erred when it overruled his motion to dismiss at the close of the State's case. We have held that a defendant who moves for dismissal or a directed verdict at the close of the evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling of the motion for dismissal or a directed verdict but may still challenge the sufficiency of the evidence. *State v. Olbricht*, 294 Neb. 974, 885 N.W.2d 699 (2016). Because Wofford framed his assignment of error as a challenge to the sufficiency of the evidence, we consider his arguments as such and we need not consider whether he waived his right to challenge the court's overruling of his motion to dismiss.

Wofford generally contends that the State's evidence was not sufficient to prove a prima facie case for the charges against him. He argues that the testimony of the State's witnesses was not corroborated by any physical evidence such as DNA testing or fingerprinting that would identify Wofford as the person who fired the shots. He further argues that none of the occupants of the vehicle into which the shots were fired identified him as the shooter, that no weapon was found in his possession, and that there was no gunpowder residue to connect him to the shooting. Wofford further contends that the testimony of his codefendants, Matthews and Hairston, was "so self serving and so extremely doubtful in character" that it lacked probative value to support his convictions. Brief for appellant at 19.

Physical and testimonial evidence in this case showed that shots had been fired from the Saturn into the Oldsmobile on July 30, 2015. Matthews testified that Wofford was sitting on the passenger side of the back seat of the Saturn that Matthews was driving, and Matthews heard shots being fired from the

back seat. Such testimonial evidence, if believed by the jury, was, in combination with the other evidence presented by the State, sufficient to show Wofford's guilt for the crimes charged. The absence of physical evidence, forensic or otherwise, identifying Wofford as the shooter does not necessarily negate a finding that he fired the shots. To the extent Wofford argues that Matthews' testimony was not credible, when reviewing a claim of sufficiency of the evidence, we do not pass on the credibility of witnesses, because such matters are for the finder of fact. See *State v. Mendez-Osorio*, 297 Neb. 520, 900 N.W.2d 776 (2017). The jury as fact finder in this case had the duty to assess Matthews' credibility, and the jury was able to consider the extent to which Matthews' self-interest or other factors affected his credibility.

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. *Id*. The jury in this case could reasonably have found Matthews' testimony credible and, viewing his testimony in connection with the other evidence in this case, found Wofford guilty of the crimes charged.

We conclude that the evidence was sufficient to support Wofford's convictions. We reject this assignment of error.

District Court Did Not Impose Excessive Sentences.

Wofford claims that the court imposed excessive sentences. We conclude that the court did not abuse its discretion when it sentenced Wofford.

Wofford was convicted of unlawful discharge of a firearm at an occupied motor vehicle, which is a Class ID felony under Neb. Rev. Stat. § 28-1212.02 (Reissue 2016). The sentencing range for a Class ID felony is imprisonment for a mandatory minimum of 3 years and maximum of 50 years. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2014). He was also convicted of use

of a firearm to commit a felony, which is a Class IC felony under Neb. Rev. Stat. § 28-1205(1)(a) and (c) (Reissue 2016). The sentencing range for a Class IC felony is imprisonment for a mandatory minimum of 5 years and maximum of 50 years. § 28-105(1). The district court sentenced Wofford to imprisonment for 20 to 30 years for unlawful discharge of a firearm and to a consecutive term of imprisonment for 20 to 30 years for use of a weapon to commit a felony. The sentences were within the statutory ranges, and we therefore review the sentences for an abuse of discretion by the district court. See *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017).

[17-19] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Stone, ante* p. 53, 902 N.W.2d 197 (2017). When imposing a sentence, the sentencing court is to consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense and (8) the amount of violence involved in the commission of the crime. *Id*. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *State v. Jackson*, 297 Neb. 22, 899 N.W.2d 215 (2017).

Wofford contends that the district court did not adequately consider all these factors when it imposed his sentences. He asserts in particular that the court did not give adequate weight to the fact that he had no prior felony convictions or convictions for assaultive or violent behavior; that he had a long, stable, and consistent employment history; that he had no bond violations after bonding out of jail and had not

lost any good time while he was incarcerated prior to bonding out; and that he had strong family ties, including two minor children.

The record of the sentencing hearing indicates that these factors were presented to the court, and the court acknowledged Wofford's arguments. The court indicated that when it determined Wofford's sentences, it also considered the seriousness of the crime and testing that showed that Wofford was at a very high risk to reoffend.

The sentences imposed by the district court were in the middle of the statutory ranges for the offenses. Nothing in the record indicates that the court failed to consider the mitigating factors advanced by Wofford or that it did not give adequate weight to such factors when considered in light of the factors cited by the court to justify the sentences. We find no abuse of discretion in the sentencing, and we therefore reject Wofford's claim of excessive sentences.

CONCLUSION

Having rejected Wofford's assignments of error, we affirm Wofford's convictions and sentences.

Affirmed.

Wright, J., not participating in the decision.

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Marvin E. Buggs, appellant, v. Scott Frakes, director, Nebraska Department of Correctional Services, appellee.

904 N.W.2d 664

Filed December 15, 2017. No. S-16-1015.

1. **Habeas Corpus: Appeal and Error.** On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.
2. **Actions: Habeas Corpus: Pleadings.** It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it, and if it fails to state a cause of action, the court must enter an order denying the writ.

Appeal from the District Court for Lancaster County: Susan I. Strong, Judge. Reversed and remanded with instructions.

Marvin E. Buggs, pro se.

Douglas J. Peterson, Attorney General, and David A. Lopez for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

Marvin E. Buggs filed a petition for a writ of habeas corpus and a motion seeking the postponement of fees. His motion to postpone fees was denied, with the district court finding the underlying petition frivolous. We reverse, and remand with instructions.

FACTUAL BACKGROUND

Buggs was convicted in 2001 of second degree forgery with a habitual criminal enhancement, and manslaughter. He was sentenced to 10 years' imprisonment for forgery based on the enhancement, and a consecutive sentence of 20 to 20 years' imprisonment for manslaughter. Both his mandatory release date and his parole eligibility date have been calculated for the same date in June 2021.

On August 31, 2016, Buggs filed a motion for postponement of fees in the district court, citing as authority Neb. Rev. Stat. § 29-2824 (Reissue 2016). At that time, Buggs also apparently presented the district court clerk with a petition for a writ of habeas corpus. It not clear from our record whether that petition was filed or whether it is being held in abeyance pending disposition of the motion to postpone.

In any event, the district court treated the motion to postpone fees as a request to proceed in forma pauperis (IFP) and denied the request, finding that Buggs' underlying petition for a writ of habeas corpus was frivolous. Buggs appeals.

ASSIGNMENTS OF ERROR

Buggs assigns that the district court erred in (1) treating his motion to postpone fees as a motion for IFP status and applying IFP standards to that motion and (2) finding his petition for a writ of habeas corpus frivolous.

STANDARD OF REVIEW

[1] On appeal of a habeas corpus petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.[1]

ANALYSIS

On appeal, Buggs argues that the district court erred in treating his motion for postponement of fees as a motion to proceed IFP. We agree.

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[1] *Sanders v. Frakes*, 295 Neb. 374, 888 N.W.2d 514 (2016).

Section 29-2824 provides in relevant part that in the case of filing for a writ of habeas corpus,

> no person or officer shall have the right to demand the payment in advance of any fees which such person or officer may be entitled to by virtue of such proceedings on habeas corpus, when the writ shall have been issued or demanded for the discharge from custody of any person confined under color of proceedings in any criminal case.

In other words, no prepayment of fees is necessary in order to file a petition for a writ of habeas corpus based upon an issue of custody in a criminal case.[2]

Under § 29-2824, Buggs did not have to prepay the fees associated with the filing of his petition for a writ of habeas corpus, nor was IFP status required in order for Buggs to file that petition.[3] For the same reason, Buggs' motion seeking postponement of fees was unnecessary. Buggs was permitted, by operation of § 29-2824, to file his petition for a writ of habeas corpus without any further motion with regard to the payment of fees.

We conclude that the district court erred in treating Buggs' motion as one for IFP status, because Buggs did not seek IFP status and was not required to obtain IFP status in order to file a petition for a writ of habeas corpus. As such, we reverse the district court's decision and remand the cause with instructions.

[2] Upon remand, the district court shall, consistent with the prohibition against the prepayment of fees set forth in § 29-2824, file the petition for a writ of habeas corpus if the petition has not yet been filed. After filing the motion, the district court should proceed with its habeas corpus review and

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[2] *Mumin v. Frakes, ante* p. 381, 904 N.W.2d 667 (2017).

[3] *Id.* Accord Neb. Ct. R. App. P. § 2-101(G)(1)(c) (rev. 2015) (providing appellate docket fees in habeas corpus proceedings are not required in advance and will be collected at end of proceeding).

examine the petition to see if it states a cause of action.[4] It is the duty of the court on presentation of a petition for a writ of habeas corpus to examine it, and if it fails to state a cause of action, the court must enter an order denying the writ.[5] This analysis is distinct from a frivolousness review under Neb. Rev. Stat. § 25-2301.02(1)(b) (Reissue 2016).

CONCLUSION

The decision of the district court is reversed, and the cause is remanded with instructions.

Reversed and remanded with instructions.

Wright, J., not participating.

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[4] See *Dixon v. Hann*, 160 Neb. 316, 70 N.W.2d 80 (1955). See, also, *O'Neal v. State*, 290 Neb. 943, 863 N.W.2d 162 (2015) (Cassel, J., concurring).

[5] *Id.*

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In re Interest of Elainna R., a child under 18 years of age. State of Nebraska, appellee, v. Elainna R., appellant.

904 N.W.2d 689

Filed December 15, 2017. No. S-17-237.

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. **Ordinances: Appeal and Error.** Interpretation of a municipal ordinance is a question of law, on which an appellate court reaches an independent conclusion irrespective of the determination made by the court below.
3. **Ordinances.** Absent anything to the contrary, the language of a city ordinance is to be given its plain and ordinary meaning.
4. **Statutes.** Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.
5. **Schools and School Districts: Disturbing the Peace.** A school security officer or campus supervisor may be a victim of disturbing the peace.
6. **Evidence: Proof.** A finder of fact may draw reasonable inferences from the facts and circumstances proved.

Appeal from the Separate Juvenile Court of Lancaster County: Linda S. Porter, Judge. Affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Brittani E. Lewit for appellant.

Connor L. Reuter for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ., and Moore, Chief Judge.

Funke, J.

The appellant, Elainna R., was adjudicated by the separate juvenile court of Lancaster County, under Neb. Rev. Stat. § 43-247(1) (Reissue 2016), for violating a Lincoln city ordinance prohibiting disturbing the peace. The juvenile court found proof beyond a reasonable doubt that Elainna knowingly or intentionally disturbed the peace of Sief Mahagoub, a high school security officer, by engaging in fighting. For the reasons discussed herein, we affirm.

BACKGROUND

On November 17, 2016, Elainna was attending Lincoln Southeast High School. On that day, she was involved in a fight with another student, A.L., in the hallway of the school. The named victim in this case, Mahagoub, is employed at the school as a campus supervisor and security officer and had been so employed for 4 years. His duties include maintaining safety and security on the school campus.

About 1:17 p.m., Mahagoub observed the two students yelling at each other. Elainna then angrily ran toward A.L. while Mahagoub attempted to stop the fight before it became physical.

Mahagoub yelled, "Stop, stop, stop," in a loud, commanding voice and positioned himself between the students. Elainna, however, struck A.L.'s head and grabbed her hair. Mahagoub tried to separate the two, but Elainna maintained her grip on A.L.'s hair. Mahagoub continued to command Elainna to stop, and the three scuffled to the ground.

Mahagoub again yelled, "Stop" and "Let go." With the help of another adult, Mahagoub separated the students. The incident lasted between 2 and 3 minutes.

Mahagoub testified that altercations like this are very common with students of that age, but said that this fight was disruptive to the workday. Mahagoub described the altercation as "very intense" and "very difficult" to stop. He described Elainna as the aggressor and observed her strike A.L. multiple

times. After the altercation, Mahagoub observed hair on the floor that was consistent with A.L.'s hair.

Mahagoub stated he acted in accordance with his training, which instructed him to do as much as possible to prevent harm. On cross-examination, Mahagoub testified that he has trained as a military police officer and served three tours in Iraq. He further stated that the school provided him 2 full days of training for his role as a security officer and that he received specific training on how to deal with upset and aggressive students. He stated his job duties include breaking up fights between students.

According to Mahagoub, he has dealt with many fights during his time as campus supervisor, including students who were verbally and physically aggressive toward him. He also testified that he works with police officers in dealing with difficult students and occasionally assists law enforcement officers with investigations of criminal activity within the school.

An associate principal at Lincoln Southeast High School testified he witnessed the later portion of the fight after it had progressed to the floor. He observed Elainna holding the other student's hair and Mahagoub's attempts to separate them. He testified that the altercation was disruptive to the schoolday.

The juvenile petition alleged that "on or about the 17th day of November 2016, [Elainna] did knowingly or intentionally disturb the peace and quiet of . . . Mahagoub, by fighting, in violation of L.M.C. § 9.20.050." Elainna entered a denial, and the matter proceeded to adjudication.

At the conclusion of the adjudication, the court found the State had proved the allegations in the petition beyond a reasonable doubt. The juvenile court continued final disposition of the case pending the completion of a predisposition report. Elainna perfected an appeal to this court.

ASSIGNMENTS OF ERROR

Elainna assigns, restated, the following errors: (1) The juvenile court erred in determining that Mahagoub's peace was disturbed as a school security officer or campus supervisor,

and (2) the evidence was insufficient to sustain an adjudication of jurisdiction under § 43-247(1).

STANDARD OF REVIEW

[1] An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.[1]

[2] Interpretation of a municipal ordinance is a question of law, on which we reach an independent conclusion irrespective of the determination made by the court below.[2]

ANALYSIS

We first consider whether, as a matter of law, an individual who engages in fighting can disturb the peace of a school security officer or campus supervisor. If we determine a person can disturb the peace of such a school official by fighting, we must consider whether the evidence in the record before the juvenile court supports an adjudication under § 43-247(1).

School Security Officer or Campus Supervisor May Be Victim of Disturbing Peace

The relevant portion of Lincoln's disturbing the peace ordinance, Lincoln Mun. Code § 9.20.050 (2013), is as follows:

> (a) It shall be unlawful for any person to intentionally or knowingly disturb the peace and quiet of any person, family, or neighborhood, or any public assembly, or assembly of persons for religious worship. The offense of disturbing the peace shall include, but shall not necessarily be limited to, the following:
>
> (1) Engaging in fighting.

Under Neb. Rev. Stat. § 28-1322 (Reissue 2016), a person who intentionally disturbs the peace and quiet of any person,

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[1] *In re Interest of LeVanta S.*, 295 Neb. 151, 887 N.W.2d 502 (2016).

[2] *Landrum v. City of Omaha Planning Bd.*, 297 Neb. 165, 899 N.W.2d 598 (2017).

family, or neighborhood commits the offense of disturbing the peace. Disturbing the peace, like the common-law offense of breach of the peace, is a violation of public order.[3] The offense generally includes violent acts and acts and words likely to produce violence in others.[4]

Elainna argues that Mahagoub is not a proper victim under Lincoln's disturbing the peace ordinance and that she could not have disturbed his peace. Relying on decisions from other jurisdictions, she contends school safety officers, such as Mahagoub, should be treated the same as police officers, who she asserts have no expectation of peace and tranquility because of their training and duties.[5]

In support of her argument, Elainna cites to several cases which stand for the proposition that the direction of "fighting words" toward a police officer does not amount to a disturbance of the peace.[6] Elainna contends police officers frequently encounter offensive language and have been trained to diffuse such situations without physical retaliation, and therefore are not likely to act violently in response to offensive words or gestures.

The State argues Elainna's position is contrary to settled Nebraska law. To support its argument, the State relies on several Nebraska cases.[7]

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[3] *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989) (citing *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960)).

[4] *Broadstone, supra* note 3.

[5] See, *In re M.M.*, 54 Cal. 4th 530, 278 P.3d 1221, 142 Cal. Rptr. 869 (2012); *People v. Bowers*, 77 Misc. 2d 697, 356 N.Y.S.2d 432 (1974).

[6] *H.N.P. v. State*, 854 So. 2d 630 (Ala. Crim. App. 2003); *People v. Slaton*, 24 Ill. App. 3d 1062, 322 N.E.2d 553 (1974). See, also, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942); *State v. Drahota*, 280 Neb. 627, 788 N.W.2d 796 (2010).

[7] *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987); *State v. Groves*, 219 Neb. 382, 363 N.W.2d 507 (1985); *State v. Boss*, 195 Neb. 467, 238 N.W.2d 639 (1976).

In *State v. Boss*,[8] we affirmed a conviction for abusing or resisting an officer in the execution of his office. In *Boss*, a police officer pulled over a speeding motorist and obtained his license and registration. During this process, the motorist called the officer a "'dirty son-of-a-bitch.'"[9] We found the words used by the motorist were "fighting words."[10] We specifically rejected authorities which held that such language cannot constitute "fighting words" when directed to a police officer, who is trained to accept such abuse without violent reaction.[11]

Similarly, in *State v. Groves*,[12] we affirmed a conviction for disorderly conduct under a city of Omaha ordinance, and again specifically rejected the argument that a police officer is less susceptible to such abuse than other members of the general public.

In *State v. Moore*,[13] we affirmed a conviction for disturbing the peace under a Lincoln ordinance. In *Moore*, a Lincoln police officer responded to a complaint of a disturbance at a house. The officer encountered a loud house party and shined his cruiser's spotlight on the front of the house, where individuals were standing in the dark. The defendant ran up to the cruiser and yelled, "'What the fuck are you doing here? You've got no business here. Get the fuck out of here.'"[14] The officer testified that the defendant

> "continued to yell at me and I finished getting out of my cruiser and he was right up in my face. It was difficult to get out of my car, in fact. And I explained or tried to

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[8] *Boss, supra* note 7.

[9] *Id.* at 469, 238 N.W.2d at 642.

[10] *Id.* at 471, 238 N.W.2d at 643.

[11] *Id.*

[12] *Groves, supra* note 7.

[13] *Moore, supra* note 7.

[14] *Id.* at 348, 411 N.W.2d at 347.

> explain to the defendant that I was there on a disturbance call which seemed to even make him madder. . . .”[15]

We affirmed the defendant's conviction in *Moore* based on the totality of his conduct while in the officer's presence.[16] Accordingly, it is clear that in Nebraska, a police officer may be the victim of disturbing the peace.

[3,4] Absent anything to the contrary, this court will give the language of a city ordinance its plain and ordinary meaning.[17] Statutes relating to the same subject, although enacted at different times, are in pari materia and should be construed together.[18]

The applicable Lincoln ordinance states: “It shall be unlawful for any person to intentionally or knowingly disturb the peace and quiet of *any person* . . . .”[19] The Lincoln ordinance is broadly written and does not differentiate between public officials and the general public.

In *State v. McNair*,[20] for the purpose of analyzing a city of Omaha ordinance in a disturbance of lawful assembly case, we defined “disturb” to mean “‘[t]o throw into disorder or confusion; to interrupt the settled state of.’” Section 9.20.050 of the Lincoln Municipal Code covers the same subject matter as the ordinance in *McNair*. As a result, the definition of “disturb” from *McNair* equally applies to Lincoln Mun. Code § 9.20.050.

[5] Assuming, without deciding, that Mahagoub's role as a school security officer and campus supervisor is equivalent to a police officer for purposes of Lincoln's disturbing the

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[15] *Id.*

[16] *Moore, supra* note 7.

[17] *Brunken v. Board of Trustees*, 261 Neb. 626, 624 N.W.2d 629 (2001).

[18] *D.I. v. Gibson*, 295 Neb. 903, 890 N.W.2d 506 (2017); *Northwest High School Dist. No. 82 v. Hessel*, 210 Neb. 219, 313 N.W.2d 656 (1981).

[19] Lincoln Mun. Code § 9.20.050(a) (emphasis supplied).

[20] *State v. McNair*, 178 Neb. 763, 766, 135 N.W.2d 463, 465 (1965).

peace ordinance, we hold that a school security officer or campus supervisor may be a victim of disturbing the peace.

Evidence Supports Adjudication Under § 43-247(1)

When an adjudication is based upon § 43-247(1), the allegations must be proved beyond a reasonable doubt.[21]

Elainna argues there is no evidence that she used "fighting words" against Mahagoub. Upon our de novo review, we agree. But it does not follow that Elainna did not disturb Mahagoub's peace. The State argues Elainna's conduct went beyond words and included engaging in an actual fight which necessitated Mahagoub's physical involvement.

Indeed, the degree to which Elainna disturbed Mahagoub's peace can be measured by her actions following his command to stop. Elainna passed through Mahagoub's outstretched arm to hit A.L. in the head and grab her hair. As Mahagoub continued to attempt to stop Elainna, Elainna further struck A.L. Elainna's grip on A.L.'s hair was so forceful it brought both students and Mahagoub to the ground.

As the juvenile court said in its factual findings,

> A campus supervisor, I think, does have some — part of their job is to keep the peace and regulate the safety of students, but a situation where a fight occurs, and there was evidence that Elainna was certainly an aggressor in that fight, that causes a school security officer to end up between youth and end up on the floor trying to prevent — trying to get one youth to release the hair of another youth and interrupt the fight, I think I can infer some disturbance of his peace.

[6] A finder of fact may draw reasonable inferences from the facts and circumstances proved.[22] Accordingly, we agree

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[21] *In re Interest of Jeffrey K.*, 273 Neb. 239, 728 N.W.2d 606 (2007); Neb. Rev. Stat. § 43-279(2) (Reissue 2016).

[22] *Jindra v. Clayton*, 247 Neb. 597, 529 N.W.2d 523 (1995). See, also, *State v. Babbitt*, 277 Neb. 327, 762 N.W.2d 58 (2009).

with the reasoning of the juvenile court. Mahagoub described his efforts to prevent and stop the fight and how difficult it was during the 2- to 3-minute incident. This evidence establishes that Elainna's actions threw Mahagoub's peace and quiet into disorder, confusion, interruption, or an unsettled state. We find the State has proved beyond a reasonable doubt that Elainna disturbed the peace of Mahagoub by engaging in fighting.

CONCLUSION

We conclude Mahagoub, a school security officer and campus supervisor, may be an appropriate victim of disturbing the peace. Upon our de novo review, we independently find the evidence adduced sufficiently supports the juvenile court's adjudication under § 43-247(1).

Affirmed.

Wright, J., not participating.

Nebraska Supreme Court
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Rodney Cappel et al, appellants and cross-appellees, v. State of Nebraska Department of Natural Resources, an executive department and agency of the State of Nebraska, and Jeff Fassett, in his official capacity as director of the Department of Natural Resources, appellees and cross-appellants.

905 N.W.2d 38

Filed December 22, 2017. No. S-16-1037.

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. **Actions: Public Officers and Employees.** A suit against a state official in his or her official capacity is not a suit against the official, but, rather, a suit against the official's office.
4. **Actions.** A suit against a state agency is a suit against the State.
5. **Eminent Domain: Words and Phrases.** Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.
6. **Actions: Eminent Domain.** The initial question in an inverse condemnation case is whether a compensable taking or damage has occurred.
7. **Eminent Domain: Property.** A takings analysis begins with an examination of the nature of the owner's property interest.
8. **Waters: Property.** The right to appropriate surface water is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water.

9. **Irrigation Districts: Waters.** Rights of irrigation in Nebraska are limited in their scope by the language of their creation and subject to reasonable regulations subsequently adopted by virtue of the police power of the State.
10. **Constitutional Law: Actions: Legislature.** 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.
11. **Constitutional Law: Legislature: Immunity: Waiver.** Neb. Const. art. V, § 22, permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.
12. ____: ____: ____: ____. Neb. Const. art. V, § 22, is not self-executing, but instead requires legislative action for waiver of the State's sovereign immunity.
13. **Immunity: Waiver.** Waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implications from the text as will allow no other reasonable construction.
14. **Jurisdiction: Appeal and Error.** An appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.
15. **Actions: Jurisdiction.** Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
16. **Jurisdiction: Appeal and Error.** When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.
17. **Taxation: Irrigation Districts: Waters.** Neb. Rev. Stat. § 46-141 (Reissue 2010) allows taxpayers to request a refund for water taxes paid by filing a request in the office of the secretary of the district.
18. **Taxation: Waters.** Neb. Rev. Stat. § 2-3226.05(2) (Cum. Supp. 2016) allows taxpayers to request a local refund of occupation taxes after following the applicable procedures.

Appeal from the District Court for Hitchcock County: James E. Doyle IV, Judge. Affirmed in part, and in part reversed and remanded with directions.

Stephen D. Mossman, Ryan K. McIntosh, and Patricia L. Vannoy, of Mattson Ricketts Law Firm, for appellants.

Douglas J. Peterson, Attorney General, Justin D. Lavene, and Kathleen A. Miller for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

This case involves the administration of the Republican River Compact. Appropriators Rodney Cappel; Steven Cappel; Cappel Family Farm LLC; C & D Cappel Farms, L.L.C.; and Midway Irrigation, Inc. (collectively the Cappels) appeal the order of the district court for Hitchcock County that dismissed their complaint without leave to amend, upon the motion of the State of Nebraska Department of Natural Resources and Jeff Fassett, its director (collectively the DNR). The DNR cross-appeals. We hold that the Cappels failed to state a claim for inverse condemnation, but we conclude that the district court erred in failing to find that it lacked subject matter jurisdiction over the Cappels' remaining claims for relief under 42 U.S.C. § 1983 (2012), due process, and restitution, which were barred by sovereign immunity. Therefore, we affirm in part, and in part reverse and remand with directions to dismiss for lack of subject matter jurisdiction those claims barred by sovereign immunity.

BACKGROUND

The Cappels own farmland throughout the Republican River Basin. They irrigate their farmland with ground water from wells located within the Middle Republican Natural Resources District and receive surface water appropriations from the Frenchman Valley Irrigation District. As such, they are subject to the integrated management plan and associated surface water controls adopted jointly by the Middle Republican Natural Resources District and the DNR.

The administration of water in the Republican River Basin is subject to the Republican River Compact (hereinafter the Compact), which is an interstate compact between Nebraska, Kansas, and Colorado that regulates the consumption of the basin's waters and allocates a certain amount of surface water

to each state, depending on the amount of surface water available in the basin each year. The DNR is responsible for ensuring Nebraska's compliance with the Compact.

In January 2013 through 2015, the DNR's hydrologic forecast indicated that without essential action, Nebraska's consumption of water from the Republican River would exceed its allocation under the Compact. Accordingly, the DNR declared a "Compact Call Year" and issued closing notices to holders of surface water permits for each of those years. As a result of the closing notices, the Cappels were barred from using the surface waters of the Republican River and its tributaries to irrigate their crops. However, the Cappels were still obligated to pay the costs associated with owning irrigated acres, including taxes and assessments. And DNR did not curtail ground water use, which allegedly continued to deplete streamflow in the Republican River Basin to the future detriment of surface water users. The Cappels themselves had drilled new irrigational wells because they could not irrigate their land with surface water.

The Cappels did not challenge the DNR's 2013 through 2015 compact call year orders or corresponding closing notices as provided in Neb. Rev. Stat. § 61-206 (Reissue 2009). Instead, in December 2015, they filed a verified complaint against the DNR in the district court for Hitchcock County, followed by a verified amended complaint. They alleged a cause of action under 42 U.S.C. § 1983, due to deprivation of their property rights and violations of their due process rights. The Cappels also alleged that they had been subject to an inverse condemnation in that the closing notices and administration of the Republican River amounted to an uncompensated physical and regulatory taking under Neb. Const. art. I, §§ 3 and 21, and the U.S. Const. amends. V and XIV. Further, the Cappels alleged that they had suffered damages when they were deprived of the benefits of condemnation proceedings, in violation of their due process rights, and when DNR allowed excessive ground water pumping to the detriment of the their surface water

appropriations. The Cappels sought reimbursement for occupation taxes paid to the Middle Republican Natural Resources District and water taxes paid to the Frenchman Valley Irrigation District, money damages, and restitution.

The DNR filed a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(1) and (6), alleging lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Following a hearing, the district court issued a written order dismissing the amended complaint pursuant to § 6-1112(b)(6), without leave to amend. It determined beyond a doubt that the Cappels could plead no set of facts that would entitle them to relief under their theories of recovery and that amendment would be futile. Specifically, the district court found that it had subject matter jurisdiction, because the Cappels' claims were not barred by the State's sovereign immunity and therefore overruled the DNR's motion based on § 6-1112(b)(1). However, it determined that neither the closing notices nor the adopted integrated management plans amounted to a physical or regulatory taking. Additionally, the district court held that the closing notices and adopted plans did not violate the Cappels' due process rights and that the Cappels had failed to state a claim under 42 U.S.C. § 1983. Finally, the district court ruled that the Cappels were not entitled to restitution for taxes paid in 2013 through 2015.

The Cappels filed this appeal in the Nebraska Court of Appeals, and the DNR cross-appealed. We moved the case to our docket and denied the DNR's motion for summary affirmance.

ASSIGNMENTS OF ERROR

The Cappels assign, combined and restated, that the district court erred in holding that (1) the issuance of closing notices was not an exercise of eminent domain and did not constitute a physical or regulatory taking, (2) the DNR's administration of the Republican River did not constitute a regulatory taking, (3) the DNR did not deprive the Cappels of their due process

rights, (4) the Cappels failed to state a claim for relief under 42 U.S.C. § 1983, and (5) the Cappels were not entitled to restitution of occupation taxes levied against their property.

The DNR cross-appeals and assigns that the district court erred when it held that the Cappels' claims brought under 42 U.S.C. § 1983 were not barred by sovereign immunity.

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]

ANALYSIS

The Cappels brought claims (1) under 42 U.S.C. § 1983; (2) under article I, § 21, of the Nebraska Constitution and the 5th and 14th Amendments to the U.S. Constitution for alleged inverse condemnation; (3) under article I, § 3, of the Nebraska Constitution and the 5th and 14th Amendments to the U.S. Constitution for alleged violations of substantive and procedural due process rights; and (4) for restitution. We address the parties' assignments of error as they relate to each of these claims.

42 U.S.C. § 1983 Action

The Cappels' first claim against the DNR was brought under 42 U.S.C. § 1983. The district court dismissed this claim pursuant to § 6-1112(b)(6) for failure to state a claim upon which relief can be granted. The Cappels dispute this finding on appeal. On cross-appeal, the DNR contends that the Cappels' § 1983 claim is barred by sovereign immunity and that the district court erred by not dismissing it for lack of subject

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[1] *Hill v. State*, 296 Neb. 10, 894 N.W.2d 208 (2017).

[2] *Id.*

matter jurisdiction pursuant to § 6-1112(b)(1). We agree with the DNR.

Sovereign immunity is jurisdictional in nature, and courts have a duty to determine whether they have subject matter jurisdiction over a matter.[3] Thus, the district court's jurisdiction to address whether the Cappels stated a claim upon which relief can be granted depended on whether the Cappels' § 1983 claim is barred by sovereign immunity.

Section 1983 provides a civil remedy for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law.[4] But it does not necessarily provide a remedy for litigants seeking such remedy against a state.[5] The enactment of § 1983 did not abrogate the State's 11th Amendment immunity,[6] which bars such suits unless the State has waived its immunity or unless Congress has exercised its undoubted power under § 5 of the 14th Amendment to override that immunity.[7] Here, Nebraska has not waived its sovereign immunity with regard to § 1983 suits brought against it.[8] Nor has Congress exercised its power to override that immunity.[9] Therefore, the Cappels' § 1983 claim against the DNR, a state agency, and thus, the State,[10] is barred by sovereign immunity, and the district court erred in failing to dismiss it for lack of subject matter jurisdiction.

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[3] See *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017). See, also, *FDIC v. Meyer*, 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

[4] See *Amanda C. v. Case*, 275 Neb. 757, 749 N.W.2d 429 (2008).

[5] See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

[6] See *id.* See, also, *Anthony K. v. State*, 289 Neb. 523, 855 N.W.2d 802 (2014).

[7] *Will v. Michigan Dept. of State Police, supra* note 5.

[8] See *Anthony K. v. State, supra* note 6.

[9] *Will v. Michigan Dept. of State Police, supra* note 5.

[10] See *Davis v. State, supra* note 3.

[3,4] This finding applies equally to the Cappels' § 1983 claim against Fassett, the director. A suit against a state official in his or her official capacity is not a suit against the official, but, rather, a suit against the official's office.[11] Accordingly, the Cappels' suit against Fassett is a suit against a state agency. Because a suit against a state agency is a suit against the State,[12] the Cappels' claim against Fassett is a claim against the State, and it too is barred by sovereign immunity. The district court, therefore, erred in failing to dismiss the § 1983 claim against Fassett for lack of subject matter jurisdiction.

Inverse Condemnation

[5-7] The Cappels' second claim is for inverse condemnation. Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings.[13] In this regard, the Cappels seek damages under the Fifth Amendment to the U.S. Constitution, which states: "[N]or shall private property be taken for public use, without just compensation," and under Neb. Const. art. I, § 21, which states: "The property of no person shall be taken or damaged for public use without just compensation therefor." The initial question in an inverse condemnation case is whether a compensable taking or damage has occurred.[14] And a takings analysis begins with an examination of the nature of the owner's property interest.[15]

In their complaint, the Cappels assert two takings: a physical taking of property rights to appropriate the water at issue

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[11] *Will v. Michigan Dept. of State Police, supra* note 5.

[12] See *Davis v. State, supra* note 3.

[13] *Village of Memphis v. Frahm*, 287 Neb. 427, 843 N.W.2d 608 (2014).

[14] See *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013).

[15] See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

and a regulatory taking of the economically viable use of land. The district court analyzed both allegations and found neither sufficient to constitute a "taking." Specifically, the district court found that the closing notices did not constitute a "taking" and that they were issued pursuant to the DNR's police power and not pursuant to its right of eminent domain. The Cappels assign these findings as error. But as set forth below, we conclude that the district court properly determined that the Cappels did not sufficiently allege that a compensable vested property right was taken or damaged. Thus, without any physical or regulatory taking, we need not consider whether the DNR was acting pursuant to its right of eminent domain.[16]

The issue of whether the Cappels sufficiently alleged a compensable vested property interest is controlled by our recent opinion in *Hill v. State*.[17] In *Hill*, water appropriators filed an inverse condemnation action against the State and the DNR after the DNR had issued orders and sent closing notices to water appropriators under circumstances similar to those presented here. We affirmed the district court's dismissal of the inverse condemnation claim, explaining that the appropriators failed to establish that a compensable vested property right was taken. We concluded that the appropriators' rights to use the water were subject to the Compact (the equivalent of federal law) and thus found that those rights were not a compensable property interest when limited for the purpose of ensuring Nebraska's compliance with the Compact. We further found that the DNR does not have a duty to regulate ground water; thus, a failure by the DNR to regulate ground water pumping that affects the Republican River Basin does not give rise to a cause of action for inverse condemnation.

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[16] See *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016) (appellate court is not obligated to engage in analysis that is not necessary to adjudicate case and controversy before it).

[17] *Hill v. State, supra* note 1.

Here, as in *Hill*, the DNR conducted an annual forecast and determined that without essential action, Nebraska's consumption of water from the Republican River would exceed its allocation under the Compact. Accordingly, the DNR declared a "Compact Call Year" and issued closing notices to holders of surface water permits for each of those years. Because these actions were taken for the purpose of ensuring Nebraska's compliance with the Compact, under *Hill*, the water rights at issue were not a compensable property interest and the Cappels' physical taking argument must fail.

Nor do we find merit in the Cappels' claim that the actions of the DNR constitute a regulatory taking, as there has been no deprivation of a compensable property right under *Hill*. In *Scofield v. State*,[18] we explained the types of regulatory takings recognized by the U.S. Supreme Court:

> The U.S. Supreme Court in *Lingle v. Chevron U.S.A. Inc.*[, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005),] clarified the law surrounding regulatory takings claims and . . . identified two types of regulatory actions that constitute categorical or per se takings: "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." Compensation is required for physical takings "however minimal the economic costs [they] entail[]," because they "eviscerate[] the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." The "second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." The complete elimination of a property's value is the determinative factor in this category because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.

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[18] *Scofield v. State*, 276 Neb. 215, 231-32, 753 N.W.2d 345, 358-59 (2008).

> The Court in *Lingle* stated that outside these two relatively narrow categories, and the special context of land-use exactions, regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*[, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)]. Thus, under a *Penn Central* [*Transp. Co.*] inquiry, relief is possible from a regulatory taking which does not deprive the owner of all economic use of the property.

To determine whether a party may obtain relief from a regulatory taking, *Penn Central Transp. Co. v. New York City*[19] sets forth several factors designed to allow careful examination and weighing of all relevant circumstances.

The Cappels claim to have been deprived of the economic benefit of their property by a reduction in the production of crops, which means they have not alleged facts that show they have been deprived of *all* economically beneficial use of their property due to the DNR's actions. But the Cappels argue that they have pled a reduction in economic viability which would constitute a regulatory taking subject to a determination pursuant to *Penn Central Transp. Co*.

To support their position, the Cappels rely on *Scofield* and *Penn Central Transp. Co.*, where the *Penn Central Transp. Co.* factors were applied on appeal. These cases share a common theme: They both involved a regulation that directly affected private property, but neither involved an overriding federal law, such as the Compact. For example, in *Penn Central Transp. Co.*, the regulation limited how the owner could use its private property by prohibiting construction of an office building on a site designated as a landmark. In *Scofield*, the regulation changed private property previously used for recreation into a wildlife refuge.

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[19] See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[8,9] By contrast, the regulation in the instant case did not directly affect private property, but, rather, the use of a public resource. Water in Nebraska is a public resource dedicated for certain uses. And irrigation is one such use.[20] The right to appropriate surface water is not an ownership of property.[21] Instead, the water is viewed as a public want and the appropriation is a right to use the water.[22] As we noted in *Hill*, "'[r]ights of irrigation in the state . . . are . . . limited in their scope by the language of their creation'"[23] and subject to "'reasonable regulations subsequently adopted by virtue of the police power of the state.'"[24] Further, in *Keating v. Nebraska Public Power Dist.*,[25] the Eighth Circuit, recognizing water as a public resource, held that "when the DNR determines that the watershed no longer has the capacity to supply all permit holders, appellants no longer have a legitimate claim of entitlement to use the surface water and thus do not suffer a deprivation of a property right." Here, the regulation by the DNR restricts the Cappels' use of a public resource, i.e., water, in order to comply with the Compact, which has the status of federal law and is subject to the enforcement authority of the U.S. Supreme Court.[26]

We observe that the Cappels could still irrigate, albeit not from the river, and were still irrigating by use of ground water

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[20] See Neb. Const. art. XV, §§ 4 and 5.

[21] *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[22] *Id.*

[23] *Hill v. State, supra* note 1, 296 Neb. at 19, 894 N.W.2d at 215, quoting *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 699 N.W.2d 372 (2005).

[24] *Id.*, quoting *State v. Birdwood Irrigation District*, 154 Neb. 52, 46 N.W.2d 884 (1951).

[25] *Keating v. Nebraska Public Power Dist.*, 660 F.3d 1014, 1018 (8th Cir. 2011).

[26] See *Kansas v. Nebraska*, 574 U.S. 445, 135 S. Ct. 1042, 191 L. Ed. 2d 1 (2015).

when they filed suit. But this court is cognizant that it was beneficial for the Cappels to use surface water from the river and that the DNR restriction impacts their property, and we acknowledge the importance of water rights for the Cappels and other Nebraska farmers. Nonetheless, under the foregoing authority, we conclude that the Cappels have not shown that a compensable private property right, as contemplated in *Hill*, was taken or damaged by the order of the DNR and that therefore, they have not pled a physical or regulatory taking of private property.

Accordingly, the Cappels' assignments of error relating to their inverse condemnation claim are without merit.

Due Process

For the Cappels' third and fourth claims, they seek damages for alleged violations of procedural and substantive due process under the Due Process Clauses of the 5th and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, § 3.

[10-13] The Cappels' claim for a money judgment against the State under Neb. Const. art. I, § 3, fails by operation of Nebraska's sovereign immunity. Under the Nebraska Constitution, "[t]he state may sue and be sued, and the Legislature shall provide by law in what manner and in what courts suits shall be brought."[27] This provision permits the State to lay its sovereignty aside and consent to be sued on such terms and conditions as the Legislature may prescribe.[28] It is not self-executing, however, but instead requires legislative action for waiver of the State's sovereign immunity.[29] Waiver of sovereign immunity will be found only where stated by the most express language of a statute or by such overwhelming

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[27] Neb. Const. art. V, § 22.

[28] *Livengood v. Nebraska State Patrol Ret. Sys.*, 273 Neb. 247, 729 N.W.2d 55 (2007).

[29] *Id.*

implications from the text as will leave no room for any other reasonable construction.[30] The Cappels cite no authority indicating that Nebraska has waived its sovereign immunity. Nor were we able to find any. As a result, the Cappels cannot pursue a money judgment against the State based upon Neb. Const. art. I, § 3.

Regarding the Cappels' federal constitutional claims, we find that a due process violation does not create an independent cause of action for money damages. Although the Due Process Clauses in the 5th and 14th Amendments to the U.S. Constitution provide that no person shall be deprived of property without due process of law, no language in those clauses requires the payment of money damages if they are violated. Furthermore, several federal circuit courts have held that where Congress has provided 42 U.S.C. § 1983 for plaintiffs to obtain relief for the violation of constitutional rights, such is the exclusive remedy, and the plaintiff can no longer bring a direct cause of action under the U.S. Constitution.[31] We find these cases persuasive. Therefore, 42 U.S.C. § 1983 provided the Cappels with the exclusive remedy to obtain damages for alleged violations of procedural and substantive due process under the U.S. Constitution. But, as we have explained above, the Cappels' § 1983 claim is barred by sovereign immunity.

[14-16] Again, sovereign immunity is jurisdictional in nature.[32] While neither party has raised the issue of sovereign

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[30] See *id*.

[31] See, *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992); *Thomas v. Shipka*, 818 F.2d 496 (6th Cir. 1987), *vacated in part on other grounds* 872 F.2d 772 (6th Cir. 1989); *Hunt v. Robeson County Dept. of Social Services*, 816 F.2d 150 (4th Cir. 1987); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981); *Turpin v. Mailet*, 591 F.2d 426 (2d Cir. 1979); *Owen v. City of Independence, MO.*, 589 F.2d 335 (8th Cir. 1978), *reversed on other grounds* 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), *and rehearing denied* 446 U.S. 993, 100 S. Ct. 2979, 64 L. Ed. 2d 850; *Cale v. Covington*, 586 F.2d 311 (4th Cir. 1978).

[32] See *Davis v. State, supra* note 3. See, also, *FDIC v. Meyer, supra* note 3.

immunity on appeal in the context of the Cappels' due process claims, this court has repeatedly held that an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.[33] Lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[34] When a trial court lacks the power, that is, jurisdiction, to adjudicate the merits of a claim, an appellate court also lacks the power to adjudicate the merits of the claim.[35] Therefore, upon our own motion, we determine that the district court erred in failing to dismiss the Cappels' due process claims for lack of subject matter jurisdiction.

Restitution

The Cappels' fifth and last claim is for restitution of occupation and water taxes levied against their property. On appeal, the Cappels assign that the district court erred in dismissing that claim.

[17,18] In essence, the Cappels' restitution claim is a claim for a money judgment against the State, which would be subject to Nebraska's sovereign immunity.[36] Here, the Cappels cite no authority showing that the Legislature has waived the DNR's sovereign immunity to allow it to be sued for reimbursement of taxes levied and collected by other entities. Instead, as the DNR points out, the Legislature has enacted Neb. Rev. Stat. § 46-141 (Reissue 2010), which allows taxpayers to request a refund for water taxes paid by filing a request in the office of the secretary of the irrigation district. And the Legislature has also enacted Neb. Rev. Stat. § 2-3226.05(2) (Cum. Supp. 2016), which allows taxpayers to request a local refund of occupation taxes after following the applicable procedures.

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[33] *Davis v. State, supra* note 3.

[34] *Id.*

[35] *Id.*

[36] See *Livengood v. Nebraska State Patrol Ret. Sys., supra* note 28.

Thus, the Legislature has waived the State's immunity to the limited extent that it allows taxpayers to petition for exemption or a refund under the procedures set forth in §§ 46-141 and 2-3226.05(2). The Cappels have failed to allege that they have followed either of those procedures. Thus, the Cappels' claim for a money judgment against the State is barred by sovereign immunity, and we determine, sua sponte, that the district court erred in failing to dismiss the restitution claim for lack of subject matter jurisdiction.[37]

CONCLUSION

For the foregoing reasons, we find that the Cappels' § 1983 claim, due process claims, and restitution claim are barred by sovereign immunity and that the district court erred by not dismissing them for lack of subject matter jurisdiction. Regarding the Cappels' remaining inverse condemnation claim, we conclude that the district court did not err in dismissing it for failure to state a claim upon which relief can be granted. Accordingly, we affirm in part, and in part reverse and remand to the district court with directions to dismiss for lack of subject matter jurisdiction the Cappels' § 1983 claim, due process claims, and restitution claim.

Affirmed in part, and in part reversed and remanded with directions.

Wright, J., not participating.

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[37] See *Davis v. State, supra* note 3.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Jlee Rafert et al., appellants and cross-appellees, v. Robert J. Meyer, defendant and third-party plaintiff, appellee and cross-appellant, and Gerald C. Bryce et al., third-party defendants, appellees.

905 N.W.2d 30

Filed December 22, 2017. No. S-16-1116.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Final Orders: Appeal and Error.** A trial court's decision to certify a final judgment pursuant to Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) is reviewed for an abuse of discretion.
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. **Final Orders: Appeal and Error.** To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2016) and, additionally, where implicated, Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).
5. **Actions: Parties: Final Orders: Appeal and Error.** Neb. Rev. Stat. 25-1315(1) (Reissue 2016) is implicated where there are multiple causes of action or multiple parties and the court enters a final order as to one or more but fewer than all of the causes of action or parties.
6. ____: ____: ____: ____. With the enactment of Neb. Rev. Stat. § 25-1315(1) (Reissue 2016), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of Neb. Rev. Stat. § 25-1902 (Reissue 2016) as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.

7. **Statutes: Final Orders: Intent.** The intent behind Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) was to prevent interlocutory appeals, not to make them easier.
8. **Judgments: Parties: Appeal and Error.** Certification of a final judgment must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties.
9. **Courts: Judgments.** When a trial court concludes that entry of judgment under Neb. Rev. Stat. § 25-1315(1) (Reissue 2016) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.
10. ____: ____. In determining whether certification is warranted, a trial court must take into account judicial administrative interests as well as the equities involved.
11. ____: ____. A trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.
12. **Actions: Parties.** The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.
13. ____: ____. The policy underlying third-party practice is to avoid circuity of actions and multiplicity of suits, as well as to expedite the resolution of secondary actions arising out of or as a consequence of the same facts involved in the action originally instituted.

Appeal from the District Court for Richardson County: Daniel E. Bryan, Jr., Judge. Order vacated, and appeal dismissed.

Gary J. Nedved, of Keating, O'Gara, Nedved & Peter, P.C., L.L.O., for appellants.

Mark C. Laughlin and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellee Robert J. Meyer.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

INTRODUCTION

After an insured had obtained life insurance policies and named her trust as the owner, her insurance agent stole the renewal premiums and the policies lapsed. The insured and the trust's beneficiaries sued the trustee, and the trustee brought a third-party claim against the agent. The district court bifurcated the trial. Pursuant to a jury verdict on the first stage, the court entered an order against the trustee. But before trial on the third-party claim, the court certified its order as final.[1] Because we conclude the certification was an abuse of discretion, we dismiss the appeal for lack of jurisdiction.

BACKGROUND

Jlee Rafert spoke with an insurance agent, Gerald C. Bryce, about purchasing life insurance policies to be put in a trust for the benefit of her children. Bryce arranged for his cousin, Robert J. Meyer, to prepare a trust instrument and to serve as trustee of the trust. In March 2009, Rafert executed the irrevocable trust.

As trustee, Meyer thereafter signed three applications for life insurance that named Rafert as the insured and the trust as the owner of the policies. On each application for insurance, Meyer provided an address in South Dakota for himself as trustee. But Meyer was a resident of Nebraska, and he had no intent to pick up any mail sent to the South Dakota address. After signing the applications, Meyer never traveled to South Dakota to retrieve mail nor did he have mail from the South Dakota address forwarded to him. After signing the applications for insurance, Meyer considered his duties to Bryce and Rafert to be completed. Meyer testified that

[1] See Neb. Rev. Stat. § 25-1315(1) (Reissue 2016).

Bryce, who Meyer understood was operating as Rafert's agent, told Meyer that he would take care of having a successor trustee appointed.

In 2009, Rafert paid initial premiums on the policies totaling $262,006. In 2010, the insurers sent notices to Meyer at the South Dakota address that premiums were due and that the policies were in danger of lapsing. Once the policies lapsed, the insurers sent notices to the South Dakota address advising that the policies could be reinstated. Because the notices were sent to the South Dakota address and Meyer did not obtain mail from that address, Meyer and Rafert were unaware that the policies had lapsed.

Between August 2010 and July 2012, Rafert gave Bryce checks totaling $242,391.03 for renewal premiums, made payable to Bryce's insurance company, Ag/Insurance Services, Inc. (Ag). Rafert believed that Bryce was forwarding the checks to the insurers; however, she learned that Bryce stole the payments and that her insurance policies had lapsed.

Rafert and her children (collectively appellants) sued Meyer for breach of his duties as the trustee. The complaint alleged that Meyer breached his fiduciary duties in a number of ways, and it sought to recover all premiums paid by Rafert in the total amount of $514,847.03. As an affirmative defense, Meyer alleged that appellants' damages were caused by Bryce, Paradigm Financial Services, L.L.C. (Paradigm), and Ag.

Meyer filed a third-party complaint against Bryce, Paradigm, and Ag. He alleged that the lapse of the policies was due to their negligence and that they were responsible for the damages for which appellants alleged Meyer was liable. In Bryce's responsive pleading, he asserted several affirmative defenses. He claimed that the causes of action against him were barred under Neb. Rev. Stat. § 25-21,185.11 (Reissue 2016), because appellants had released Bryce from all liability that he may have in this matter. Paradigm and Ag filed similar responsive pleadings.

The district court ordered that Meyer's third-party claim be separately set for trial after the trial on the merits of appellants' suit against Meyer. Following a jury trial of appellants' lawsuit against Meyer, the court accepted the jury's verdict in favor of appellants and its determination of damages in the amount of $60,000.

On November 9, 2016, the district court entered a "Judgement Order." The order entered judgment on behalf of appellants and against Meyer in the amount of $59,086.85, which represented the jury's verdict of $60,000, less a credit of $913.15. It further entered judgment of $15,149.37 in appellants' favor and against Meyer for attorney fees.

Appellants filed a motion for certification. They requested that the district court certify the November 2016 order as a final order as to their cause of action against Meyer. They asserted that "[t]he adjudication of the third-party action will not affect the issues on appeal and the Appellate Court will not review the same issue twice."

During the hearing on the motion, the district court first gave Meyer 10 days to amend his third-party complaint in order to add other individuals who worked for Ag. In discussing Meyer's request and immediately before the court addressed the certification motion, counsel for Bryce, Paradigm, and Ag stated that "the basis of the third-party complaint all has to do with the first-party complaint. . . . [I]f there is no judgment against [Meyer], then there is no claim against [Bryce, Paradigm, and Ag] or anybody else . . . ." With respect to the motion for certification, the court stated:

> I know the Court generally doesn't like to do that. They want me to try the whole thing and get it over with, but as I'm listening to this, I realize it's just going to be a long time before they even get — it'd probably be three or four months before they can even get ready to try their case.

The court further stated, "I don't know how — I assume that the Court will grant — will grant your request, but I never

know because they could find it — not a final order, but I assume that they will based on my certification."

The district court entered an order granting the motion for certification. The order stated:

> The Court finds and certifies the Judgement Order entered on November 9, 2016 is a Final Order within the meaning of Neb. Rev. Stat. §25-1902 [(Reissue 2016)] as to the cause of action for breach of fiduciary duty brought by [appellants] against . . . Meyer and all issues associated with [appellants'] claims against [Meyer]. The Court further finds that pursuant to Neb. Rev. Stat. §25-1315(1), there is no just reason for the delay of an appeal.

On that same day, appellants filed a notice of appeal. We ordered supplemental briefing, which we have now considered, regarding the propriety of the certification.

ASSIGNMENTS OF ERROR

Although appellants assign error to the proceedings and Meyer assigns error on cross-appeal, we do not reach the assignments.

STANDARD OF REVIEW

[1,2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.[2] A trial court's decision to certify a final judgment pursuant to § 25-1315(1) is reviewed for an abuse of discretion.[3]

ANALYSIS

[3,4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[4] In order to vest

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[2] *Guardian Tax Partners v. Skrupa Invest. Co.*, 295 Neb. 639, 889 N.W.2d 825 (2017).

[3] *Id.*

[4] *Id.*

an appellate court with jurisdiction, a notice of appeal must be filed within 30 days of the entry of the final order.[5] To be appealable, an order must satisfy the final order requirements of Neb. Rev. Stat. § 25-1902 (Reissue 2016) and, additionally, where implicated, § 25-1315(1).[6]

[5,6] Section 25-1315(1) is implicated where there are multiple causes of action or multiple parties and the court enters a final order as to one or more but fewer than all of the causes of action or parties.[7] With the enactment of § 25-1315(1), one may bring an appeal pursuant to such section only when (1) multiple causes of action or multiple parties are present, (2) the court enters a final order within the meaning of § 25-1902 as to one or more but fewer than all of the causes of action or parties, and (3) the trial court expressly directs the entry of such final order and expressly determines that there is no just reason for delay of an immediate appeal.[8] All three components are met here, but we are concerned with the propriety of the court's determination that there is no just reason for delay.

[7,8] The intent behind § 25-1315(1) was to prevent interlocutory appeals, not to make them easier.[9] Ten years ago, we instructed that

> certification of a final judgment must be reserved for the "unusual case" in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. The power § 25-1315(1) confers upon

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[5] *Id.*

[6] *Id.*

[7] See *id.*

[8] *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015).

[9] See *id.*

> the trial judge should only be used "'"in the infrequent harsh case"'" as an instrument for the improved administration of justice, based on the likelihood of injustice or hardship to the parties of a delay in entering a final judgment as to part of the case.[10]

The message that certification must be reserved for the "unusual case" has been repeated numerous times.[11]

[9] Nebraska courts have also repeatedly stated that when a trial court concludes entry of judgment under § 25-1315(1) is appropriate, it should ordinarily make specific findings setting forth the reasons for its order.[12] Here, the court's order merely used the language of the statute and did not explain why certification was appropriate. While the absence of detailed findings by the trial court does not require automatic dismissal,[13] it is difficult to accord deference to a court's decision when there is no reasoning to support it. We once again remind trial courts that a decision to certify an order as final under § 25-1315(1) should be supported by the court's reasoning for doing so.

Without specific findings to support the district court's certification, we turn to the record in search of some indication

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[10] *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 809-10, 733 N.W.2d 877, 886 (2007).

[11] See, *Castellar Partners v. AMP Limited, supra* note 8; *Poppert v. Dicke*, 275 Neb. 562, 747 N.W.2d 629 (2008) (Gerrard, J., concurring); *Southwest Omaha Hospitality v. Werner-Robertson*, 20 Neb. App. 930, 834 N.W.2d 617 (2013); *Halac v. Girton*, 17 Neb. App. 505, 766 N.W.2d 418 (2009); *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 756 N.W.2d 299 (2008); *Jones v. Jones*, 16 Neb. App. 452, 747 N.W.2d 447 (2008); *Murphy v. Brown*, 15 Neb. App. 914, 738 N.W.2d 466 (2007).

[12] See, *Castellar Partners v. AMP Limited, supra* note 8; *Cerny v. Todco Barricade Co., supra* note 10; *Southwest Omaha Hospitality v. Werner-Robertson, supra* note 11; *Halac v. Girton, supra* note 11; *Sand Livestock Sys. v. Svoboda, supra* note 11; *Jones v. Jones, supra* note 11; *Murphy v. Brown, supra* note 11.

[13] See *Sand Livestock Sys. v. Svoboda, supra* note 11.

of an exceptional need for immediate appellate intervention.[14] Appellants' motion requested certification for the following reasons: (1) No appeal could move forward until the third-party claim between Meyer and the third-party defendants was resolved, (2) delaying the appeal would be contrary to the benefits achieved in the bifurcation of breach of fiduciary duty action and the third-party claim, (3) the adjudication of the third-party claim would not affect the issues on appeal and the appellate court would not review the same issue twice, and (4) the breach of fiduciary duty action had been in litigation since 2013 and further delay of an appeal would unnecessarily lengthen that time. And we can glean from the court's statement during the hearing on the motion for certification that it was concerned about the delay in trying the case Meyer brought against Bryce and the other third-party defendants.

[10,11] In determining whether certification is warranted, a trial court must take into account judicial administrative interests as well as the equities involved.[15] A trial court considering certification of a final judgment should weigh factors such as (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; and (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.[16] As a starting point for considering certification of a final judgment, it is

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[14] See *Castellar Partners v. AMP Limited, supra* note 8.

[15] *Id.*

[16] *Cerny v. Todco Barricade Co., supra* note 10.

appropriate for the trial court to consider whether the claims under review are separable from the others remaining to be adjudicated and whether the nature of the claims already determined was such that no appellate court would ever have to decide the same issues more than once even if there were subsequent appeals.[17]

[12,13] We begin by examining the interrelationship between the adjudicated and unadjudicated claims. Appellants claim in their supplemental brief that there is no relationship between the claims. But that belies the nature of a third-party claim. The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff.[18] A third-party claim may be asserted only when the third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to defendant.[19] Thus, some degree of relatedness is inherent in a suit involving a third-party claim. "'The policy underlying third-party practice is to avoid circuity of actions and multiplicity of suits, as well as to expedite the resolution of secondary actions arising out of or as a consequence of the same facts involved in the action originally instituted.'"[20]

The facts also demonstrate the interrelationship of the claims. "When the dismissed and surviving claims are factually and legally overlapping or closely related, fragmentation of the case is to be avoided except in '"unusual and compelling circumstances."'"[21] Here, appellants sued Meyer for breach of fiduciary duties. His use of a mailing address in

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[17] *Id.*

[18] *AgriStor Credit Corp. v. Radtke*, 218 Neb. 386, 356 N.W.2d 856 (1984).

[19] *Id.*

[20] *Id.* at 390, 356 N.W.2d at 859.

[21] *Cerny v. Todco Barricade Co., supra* note 10, 273 Neb. at 813, 733 N.W.2d at 888-89.

South Dakota—that he did not check or have mail forwarded from—prevented appellants and Meyer from knowing that the checks Rafert gave to Bryce were not being used to pay the premiums on the insurance policies. Because Bryce stole those checks, Meyer claims that Bryce is the proximate cause of appellants' damages. And on cross-appeal, Meyer brings up issues related to Bryce's settlement with Rafert's husband, in connection with which Rafert dismissed her lawsuit against Bryce—a lawsuit that alleged the same damages as her lawsuit against Meyer. Here, there is overlap—both factually and legally—between appellants' lawsuit against Meyer and Meyer's third-party claim against Bryce, Paradigm, and Ag. "It is uneconomical for an appellate court to review facts on an appeal following a . . . certification that it is likely to be required to consider again when another appeal is brought after the district court renders its decision on the remaining claims or as to the remaining parties."[22]

The parties contend that certification was appropriate because a reviewing court would not be obliged to consider the same issues a second time. They highlight that appellants' claim against Meyer was for breach of fiduciary duties and that Meyer's claim against the third-party defendants was for contribution. And they contend that the contribution claim would not involve any of the issues currently on appeal. Appellants go a step further and argue that the contribution claim cannot even be adjudicated until the amount Meyer is required to pay appellants is finally determined. But it would be most efficient for the reviewing court to have the claims presented for review as a unified package.

The circumstances here do not make this the "unusual case." In urging us to accept jurisdiction over the appeal, Meyer argues that our resolution of the issues on appeal could

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[22] 10 Charles Alan Wright et al., Federal Practice and Procedure § 2659 at 110 (2014).

eliminate the need for a trial of his third-party claim. While we understand Meyer's desire for an early appeal, § 25-1315 was not intended to multiply appeals merely upon the uncertain hope that doing so might avoid future proceedings. According to the district court, there probably would be a delay of 3 to 4 months before the third-party complaint would be ready for trial. But nothing in the record suggested that such a delay would cause an unusual hardship for the parties. We conclude that the court abused its discretion in certifying the November 9, 2016, order as final under § 25-1315(1).

CONCLUSION

We conclude that the district court abused its discretion in certifying the November 9, 2016, order as final. We therefore vacate the court's order certifying a final judgment, and because there is no final judgment, we dismiss the appeal for lack of jurisdiction.

Order vacated, and appeal dismissed.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Hannah Whilde, appellee, v. Margaret Whilde, appellant.

904 N.W.2d 695

Filed December 22, 2017. No. S-17-045.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Parent and Child.** During a period in which an individual stands in loco parentis to a child, he or she has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent.
3. ____. Because in loco parentis status is transitory, once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.
4. **Child Custody: Modification of Decree: Proof.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.

Appeal from the District Court for Otoe County: David K. Arterburn, Judge. Affirmed.

Anthony W. Liakos, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

Julie E. Bear, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Riedmann, Judge.

Miller-Lerman, J.

NATURE OF CASE

Margaret Whilde appeals the order of the district court for Otoe County, Nebraska, which modified a prior child custody order filed by a Texas court, awarded sole legal and physical custody of the child to Hannah Whilde, and ordered that Margaret be granted no further rights of custody or visitation with regard to the child. We affirm the district court's order.

STATEMENT OF FACTS

Margaret and Hannah met in 1999 and became involved in a romantic relationship during which they lived together. They lived in Mexico when they first met, but they later moved to Lincoln, Nebraska, for a time before they moved to Austin, Texas, in 2003. After moving to Texas, both Margaret and Hannah had their last names legally changed to "Whilde." The parties disputed whether they had a commitment ceremony soon after they met in 1999 and whether they considered themselves to be married, but the record indicates that the two had never been legally married.

In January 2010, Hannah gave birth to a baby girl. The child had been conceived by artificial insemination, and any parental rights of the biological father were terminated by a court in Texas. Margaret and Hannah were still in a relationship and living together at the time the child was born. Although the parties dispute whether there was an intent on the part of either Margaret or Hannah for Margaret to be considered a parent to the child, and although Margaret testified that she planned to adopt the child, Margaret conceded that she had not formally adopted the child.

The relationship between Margaret and Hannah began to decline after the child's birth. Although the parties dispute

the reasons and the circumstances surrounding their separation, in November 2011, Hannah moved back to her parents' home in Otoe County and she took the child with her. Soon after Hannah left Texas, Margaret filed an action in the district court for Travis County, Texas, in which she sought to have determined her legal rights with respect to the child. The Texas court entered an initial order in which it determined that Margaret had legal standing to assert rights with respect to the child and set forth certain rights and duties that Margaret and Hannah would share as "joint managing conservators" of the child.

After further proceedings and hearings, the Texas court filed an additional order on September 27, 2012. The order was denominated "Temporary Orders," and in the order, the court appointed Hannah as "Temporary Parent Sole Managing Conservator" and Margaret as "Temporary Non-Parent Possessory Conservator" of the child. The order then set forth certain rights and duties that each party would have during her periods of possession of the child, certain rights and duties that each party would have at all times as conservator, and certain rights that Hannah would have exclusively. The rights that Hannah was granted exclusively included, inter alia, the right to direct the moral and religious training of the child, the right to designate the primary residence of the child without geographic restriction, and the right to represent the child in legal actions and to make other decisions of substantial legal significance concerning the child.

The court then set forth terms for each party's periods of possession of the child. The order provided that Hannah would have possession of the child at all times other than times specified in the order when Margaret would have possession. The order generally provided that Margaret would have possession for one 4-day period each month and that Margaret's period of possession would increase to include certain specified periods after the child reached the age of 3. With regard to support, the order provided that neither party was obligated to pay direct child support to the other and that,

instead, each party would be responsible for expenses that arose during her period of possession. Margaret was ordered to provide health insurance for the child beginning November 24, 2012. The order stated that the temporary orders would "continue in force until the signing of the final order or until further order of this Court." It appears that no further orders were filed by the Texas court until after the present action was filed in Nebraska.

On June 6, 2014, Hannah filed in the district court for Otoe County an application to register the Texas court's September 27, 2012, order pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act, Neb. Rev. Stat. §§ 43-1226 through 43-1266 (Reissue 2016). She requested that the Nebraska court set aside the Texas order and modify the custody of the child in accordance with Nebraska law. Hannah alleged that she and the child had lived in Nebraska City, Nebraska, since November 2011 and that Margaret was currently living in Auburn, Nebraska, and had lived in Nebraska for more than 1 year. Hannah alleged that she was the biological mother of the child and that the biological father had been denied any parental rights by the Texas court. Hannah further alleged that no enforcement action had been taken with regard to the Texas court order since its entry and that no effort had been taken to bring about entry of a final order. Hannah alleged that it would be in the best interests of the child that Hannah be given sole legal and physical custody of the child and that Margaret should have no rights to custody or visitation of the child.

In her response, Margaret admitted much of the allegations in Hannah's complaint, but she requested that the complaint to modify the Texas order be dismissed and, to the extent Hannah requested a suspension of Margaret's visitations rights, that such request be denied.

Margaret moved back to Texas in late June 2014, shortly after Hannah filed this action. It appears that Margaret's contact with the child was minimal thereafter. Hannah presented evidence at the trial in this matter that after Margaret moved

back to Texas, Margaret had experienced significant mental health issues resulting in hospitalization, including time in a long-term psychiatric hospital in New York.

In December 2015, Hannah filed a motion in this action seeking to suspend Margaret's contact with the child because of Margaret's mental health issues. In February 2016, the district court preliminarily ordered that there be no contact between Margaret and the child, pending the court's determination of Hannah's motion. In a March 10, 2016, order, the court provided that pending trial in this matter, Margaret would be allowed 15 minutes each week of supervised contact with the child by telephone or "[S]kype." On March 11, Margaret filed an application for order to show cause, in which she alleged that Hannah had prevented her from exercising the visitation ordered in the March 10 order; Margaret requested an order for Hannah to show cause why she should not be held in contempt for failing to allow the ordered visitation. In an order entered March 21, the court addressed various matters, including the following:

> Visitation issue is further addressed by the Court. Court finds that Defendant [Margaret] has not provided records of her current treatment as previously ordered. Court finds that said records from the New York Psychiatric Institute shall be provided to counsel for Plaintiff [Hannah] on or before April 1, 2016. Fifteen-minute weekly Skype visitation shall recommence on April 6, 2016, at 7:00 p.m[.] Central Time. Weekly Skype visitation shall take place every Wednesday at 7:00 p.m. Central Time for 15 minutes and may be supervised by a person acceptable to Plaintiff. Said supervisor shall have the ability to terminate a Skype visitation if Defendant engages in any inappropriate conversation with the child.
>
> No order to show cause pursuant to contempt action filed by Defendant will be entered based on the foregoing order and based on Defendant's unavailability to be present to prosecute such a contempt action.

In July 2016, the district court communicated with the Texas court regarding jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act. As a result of such communication, the Texas court relinquished its jurisdiction of the case, finding that Nebraska had become the home state of the child. The district court in Nebraska also found that jurisdiction of the case under the act was in Nebraska.

Trial in the matter was held on August 2 and 3, 2016, and the court issued its opinion and order on December 16. This appeal is taken from the December 16 order. In the order, the court set forth much of the history recounted above. The court noted that the parties' testimony regarding their relationship and Margaret's relationship with the child varied widely. The court noted Hannah's testimony to the effect that their relationship began to deteriorate after Hannah became pregnant. Hannah testified that Margaret's behavior became erratic and that she became afraid to leave the child alone with Margaret. Hannah testified that Margaret did not spend significant time with the child and that Hannah was the primary caregiver. Hannah testified that Margaret began to cut Hannah off from contact with others and that eventually Hannah decided she needed to remove herself and the child from what she described as a "dysfunctional environment." Hannah obtained the assistance of her sister to leave Texas and return with the child to Nebraska.

Contrary to Hannah's testimony, Margaret testified that she was actively involved in the child's care and that she provided financial support by working outside the home while Hannah stayed at home with the child. She testified that she had initiated proceedings to adopt the child and that a final hearing had been scheduled for shortly after the day Hannah moved herself and the child out of their home. Margaret testified that she was shocked when she learned that Hannah had moved out with the child. Shortly after they moved, Margaret filed the action in Texas to secure her rights with regard to the child, and she moved to Nebraska in April 2013 to better exercise her rights of visitation.

It appears that the parties generally followed the visitation order after Margaret moved to Nebraska. But Hannah decided to curtail Margaret's visitation after an incident in May 2014, when Hannah asserted that Margaret kept the child beyond her allotted time. Hannah called the police to remove the child from Margaret's home. As a result of the police visit to Margaret's home, Hannah learned that the condition of Margaret's home was such that Hannah did not think it an appropriate place for the child. Hannah presented witness testimony and other evidence to the effect that Margaret maintained a home that was extremely dirty and unsafe for the child. After the May 2014 incident, Hannah filed for and obtained a harassment protection order against Margaret, and she filed the present action to modify custody.

Hannah also presented evidence at the trial regarding Margaret's mental health issues after Margaret returned to Texas in 2014. Margaret generally acknowledged such mental health issues, but she presented evidence to support her contention that she had undergone treatment and at the time of trial was capable of caring for the child.

The district court in its December 16, 2016, order stated that the evidence showed that with regard to financial support, Margaret had provided the majority of support while Hannah and the child lived with her in Texas. However, after Hannah and the child left, Margaret's financial support had been limited to support provided during her visitations in 2013 and 2014, and after Margaret returned to Texas in 2014, she had provided only occasional gifts.

In determining custody issues, the district court first considered the applicability of Texas law and the effect of the September 27, 2012, order entered by the Texas court. The district court determined that because the child and both parties had lived in Nebraska for over 1 year before this action was filed, Nebraska law applied and controlled whatever legal rights the parties might have. Regarding the applicability of the Texas order, the district court stated that by its terms, the order was temporary and was not contemplated to be a final

order. However, the district court determined that the Texas order was the operative order except to the extent modified by the district court.

The court therefore considered the effect of the Texas court's determination that Margaret held the status of a "temporary non-parent possessory conservator." The court noted that there was not a direct counterpart to such status under Nebraska law. However, the court determined that such status under Texas law was most comparable to the concept of an in loco parentis relationship under Nebraska law as set forth in cases such as *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011).

The district court determined that the evidence in this case established that a significant relationship existed between Margaret and the child, from the child's birth in January 2010 until Hannah and the child moved to Nebraska in November 2011. The court therefore acknowledged that an in loco parentis relationship "at one time did exist" between Margaret and the child. The court noted, however, that under Nebraska law, the establishment of an in loco parentis relationship does not forever grant parental rights to a nonbiological and nonadoptive parent and that once a person alleged to be in loco parentis no longer discharges all the duties incident to the parental relationship, the person is no longer in loco parentis.

The court determined that in the present case, the in loco parentis relationship that had once existed between Margaret and the child had ceased in the years after Margaret moved back to Texas in June 2014. The court recognized that in May 2014, Hannah had unilaterally cut off Margaret's access to the child, but the court determined that Hannah had legitimate reasons for doing so. The court noted evidence that "Margaret's mental health quickly deteriorated, resulting in approximately two years of unstable living conditions and repeated hospitalizations." The court recognized that at the time of the trial, Margaret appeared "to have regained much of what she has lost" and that she "was articulate in her presentation and has regained employment and a more stable

living environment." The court stated that the question, however, was whether in the course of those 2 years the in loco parentis relationship had been severed; the court determined that it had.

The court concluded that "the in loco parentis relationship that [Margaret] previously enjoyed has been severed largely through her own failings as a care provider and extended history of mental instability." The court found that the child's best interests would not be served by any further court-ordered contact between Margaret and the child. The court further found that Hannah had established a safe and secure home for the child. The court concluded that a material change of circumstances existed requiring the modification of the Texas court's September 27, 2012, order. The court therefore awarded sole legal and physical custody of the child to Hannah. The court ordered that Margaret was granted no rights of custody and visitation with the child and that she had no further obligation to support the child.

Margaret appeals the district court's December 16, 2016, order.

ASSIGNMENTS OF ERROR

Margaret claims that the district court erred when it (1) found that her in loco parentis relationship with the child had been severed, (2) found that such relationship had been severed as a result of events that had occurred in Margaret's life, and (3) granted Margaret no rights of custody or visitation with the child. Margaret also claims that the district court abused its discretion when it allegedly suspended contact between Margaret and the child as a discovery sanction.

STANDARD OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016).

ANALYSIS

Court Did Not Suspend Margaret's Visitation as a Discovery Sanction.

We first address Margaret's claim that the district court abused its discretion because it suspended contact between Margaret and the child as a discovery sanction. Margaret argues that in the order filed March 21, 2016, the court made her continued visitation with the child contingent upon her providing Hannah with copies of her mental health records; she asserts that this order was an inappropriate sanction for her failure to comply with a discovery request. In response, Hannah contends that the court did not limit Margaret's visitation as a discovery sanction but instead did so to protect the child's best interests pending a determination of Margaret's mental health status.

We do not agree with Margaret's characterization of the order, and we reject this assignment of error. As recounted above, Margaret's mental health status became an issue in these proceedings, and in December 2015, Hannah filed a motion seeking to suspend Margaret's contact with the child. In response to Hannah's motion, the district court in February 2016 entered a preliminary order that there be no contact between Margaret and the child, pending the court's determination of Hannah's motion. In a March 10, 2016, order, the court provided that pending trial in this matter, Margaret would be allowed 15 minutes each week of supervised contact with the child by telephone or Skype. Shortly thereafter, Margaret alleged that Hannah had prevented her from exercising the visitation ordered in the March 10 order; Margaret sought to have Hannah held in contempt for failing to allow the ordered visitation.

In the March 21, 2016, order, the court addressed these and other matters. The court noted that Margaret had not provided certain treatment records as had been previously ordered. So the court ordered Margaret to provide the records to Hannah's

counsel on or before April 1. The court went on to order that Margaret's weekly Skype visitations with the child would recommence on April 6 and continue weekly thereafter. The court stated that based in part on "the foregoing order," it would not enter an order to show cause as sought in the contempt action filed by Margaret.

We do not read the order of March 21, 2016, as imposing a sanction on Margaret for her failure to comply with a discovery order. Instead, we read the order as addressing Margaret's failure by setting a specific date—April 1—by which she was ordered to provide the records that were the subject of the prior order. Then, as a separate matter, the court responded to Margaret's request that Hannah be held in contempt for failing to comply with the order regarding Margaret's Skype visitation with the child. The court granted Margaret relief by ordering such visitation to recommence on April 6.

Although the court addressed both the discovery issue and the visitation issue in the same order, we do not read the March 21, 2016, order as connecting the two issues in the manner alleged by Margaret. The court did not suspend Margaret's visitation as a sanction for her failure to comply with the earlier discovery order. Instead, the court set specific dates by which each party would comply with previous orders—Margaret was to comply with the discovery order by April 1, and Hannah was to comply with the visitation order beginning April 6. Rather than suspending Margaret's visitation, the court ordered visitation to resume. Also, although Margaret was ordered to provide the mental health records on a date prior to the date visitation was ordered to resume, the court did not condition the resumption of visitation on Margaret's compliance with the order to provide records.

We do not find that the court suspended Margret's visitation as a discovery sanction, and we therefore find no merit to the claim the court abused its discretion by imposing such a sanction.

District Court Did Not Err When It Determined That Court-Ordered Visitation With Margaret Was No Longer in the Child's Best Interests.

Margaret's remaining assignments of error are directed at the district court's determinations regarding her in loco parentis status with respect to the child and its ultimate conclusion that she was no longer entitled to rights of custody and visitation with the child. We find no error in the district court's determinations and conclusions with regard to Margaret's rights of custody and visitation.

We note first that Margaret does not appear to take issue with the district court's conclusion that her legal status as determined in the Texas court's order was comparable to in loco parentis status under Nebraska jurisprudence. We find no error in this determination or in the district court's determination that based on the Texas order and the evidence regarding the time while the child was living in Texas, at one time, Margaret had in loco parentis status with respect to the child.

[2] We have recognized the doctrine of in loco parentis in child custody and visitation cases wherein we have stated that during a period in which an individual stands in loco parentis to a child, he or she has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016); *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011); *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000). In the order it filed on September 27, 2012, the Texas court appointed Margaret as "Temporary Non-Parent Possessory Conservator," while it appointed Hannah as "Temporary Parent Sole Managing Conservator." The court set forth certain rights and duties that each party would have during her periods of possession of the child, certain rights

and duties that each party would have at all times as conservator, and certain rights that Hannah would have exclusively. As we read the Texas order, we agree with the district court's conclusion in this case that the rights Margaret was given by the Texas court's order were equivalent to the rights one might be awarded based on in loco parentis status under Nebraska law. By denominating Margaret as a "Non-Parent Possessory Conservator," the Texas court appeared to recognize that although Margaret was not a biological parent to the child and she had not gone through the formalities necessary to legally adopt the child, Margaret had put herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship and that she was therefore entitled to certain rights of "possession" and rights as a "conservator," which rights appear to be similar to rights of custody and visitation under Nebraska law.

In addition to agreeing with the district court's conclusion that the rights Margaret was granted under the Texas order were similar to rights one might be awarded as a result of in loco parentis status under Nebraska law, we also agree with the district court's conclusion, based on evidence provided in the present proceeding, that at the time the Texas order was filed, Margaret had what would be considered an in loco parentis relationship with the child under Nebraska law. Evidence presented at the trial in this proceeding indicates that from the child's birth in January 2010 until the time Hannah and the child left Texas in November 2011, Margaret had assumed obligations with respect to the child that were of the sort that are incident to the parental relationship. Therefore, in the present proceeding in Nebraska, the district court correctly concluded that at one time, Margaret had in loco parentis status with respect to the child.

Margaret does not dispute this finding; instead, Margaret claims that the district court erred when it determined that her in loco parentis status had been severed as a result of her actions and when it concluded that continued custody and visitation with Margaret were not in the child's best interests.

As set forth below, we conclude that the district court did not err in these respects.

Although in past cases we have recognized that in loco parentis status may entitle a party to certain rights of custody and visitation, we have recognized that in loco parentis status is not equivalent to status as a parent and does not entitle a person to all the same rights that a legal parent would enjoy. See *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016). In *Windham v. Griffin*, we reasoned that "unlike biological and adoptive parenthood, the status of in loco parentis is temporary, flexible, and capable of being both suspended and reinstated" and that therefore "an individual standing in loco parentis, which is temporary in nature, is not the functional equivalent of a lawful parent for all purposes or in all contexts." 295 Neb. at 286, 887 N.W.2d at 715-16.

We have further explained that "in loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural parent when the evidence shows that the nonparent's exercise of such rights is in the child's best interests." *In re Guardianship of Brydon P.*, 286 Neb. 661, 673, 838 N.W.2d 262, 271 (2013). In *In re Guardianship of Brydon P.*, we recognized that in loco parentis is a standing doctrine and that in loco parentis status is transitory; we held that the trial court in that case did not err when it rejected a child's grandmother's request for permanent parental status under the doctrine of in loco parentis. Therefore, under our precedent, in loco parentis is not a permanent status; its presence, however, establishes one's standing to seek rights of custody and visitation at a specific time and in a specific proceeding.

[3] Because in loco parentis status is transitory and not permanent, it may be lost. We have noted that application of the in loco parentis doctrine "depends upon the circumstances in existence when the nonparent claims a child's best interests lie in allowing him or her to exercise parental rights." *Id.* at 674, 838 N.W.2d at 272. But because in loco parentis status is transitory, we have specifically stated that "[o]nce the

person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis" and that "[t]ermination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby." *In re Interest of Destiny S.*, 263 Neb. 255, 261, 639 N.W.2d 400, 406 (2002).

The understanding that in loco parentis status is a transitory status relevant to one's standing to seek custody and visitation informs our review of the district court's decision in this case. Margaret's standing in the present action was not challenged. At the time Hannah filed this action in the Nebraska district court, the Texas order granting Margaret certain rights with regard to the child was still in effect. Therefore, it was clear that Margaret had an interest and standing in this action, and she did not need to establish standing by showing that she had in loco parentis status.

[4] Hannah filed the present action as a request for modification of the custody provisions of the Texas order. Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Hopkins v. Hopkins*, 294 Neb. 417, 883 N.W.2d 363 (2016). First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. *Id*. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests. *Id*.

Because it was not necessary to refer to the in loco parentis doctrine to establish Margaret's standing in this action, the question whether Margaret's in loco parentis relationship with the child still existed was relevant in this case only to the extent it was relevant to the court's consideration of whether or not it was in the child's best interests for Margaret to continue to have rights of custody and visitation. Because the rights Margaret had under the Texas order were based on legal concepts similar to our understanding of the in loco parentis

doctrine, we think that consideration of whether Margaret continued to maintain such status since the time of the Texas order is relevant to determining whether there has been a material change in circumstances and whether modification of Margaret's rights is in the child's best interests.

As we noted in *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016), an individual standing in loco parentis, which is temporary in nature, is not the functional equivalent of a lawful parent for all purposes or in all contexts. We believe that modification of custody is a context in which one who obtained rights as a result of in loco parentis status will be considered differently from one who is a lawful parent; therefore, whether one has maintained the sort of relationship with the child that gave rise to in loco parentis status is relevant to modification of custody and visitation rights, both in determining whether there has been a material change of circumstances and whether a modification of custodial and visitation rights is in the child's best interests.

We find that in this case, the district court did not abuse its discretion when it considered the change in Margaret's relationship with the child since the time of the Texas order, along with other factors, and determined that a material change in circumstances had occurred and that a modification order to eliminate Margaret's rights of custody and visitation was warranted. We note first that the evidence showed that a change had occurred in the circumstances that had led to the determination that Margaret had at one time held in loco parentis status with regard to the child. Such determination had been based on evidence that after her birth, the child lived with Margaret and Hannah and that Margaret had supported the child. But the evidence presented at the trial in 2016 showed that for a considerable time before the trial, Margaret had not, to use in loco parentis terminology, "assumed the obligations incident to the parental relationship."

The evidence indicated that after the Texas order and until 2014, Margaret's support of the child had been limited to support she provided while the child was in her possession. The

evidence also showed that Margaret had not provided health insurance for the child as had been directed in the Texas order. The evidence further showed that since 2014, Margaret had assumed few of the obligations incident to the parental relationship. Margaret's contact with the child had been minimal, and she had provided almost no support other than occasional gifts.

Margaret contends that these facts cannot be used against her, because since 2014, Hannah had prevented her from having contact with the child. But there was also evidence that the lack of contact was the result of Margaret's mental health issues, and the district court found that Hannah had valid reasons for limiting Margaret's contact with the child. Whether Margaret's lack of contact was the fault of Hannah, the result of issues beyond Margaret's control, or Margaret's own actions, it is clear that for 2 years prior to the trial in this case, Margaret had not been performing the obligations incident to the parental relationship. To the extent Margaret presented evidence that she attempted to maintain a relationship with the child, such attempts appear to have been focused on contact and visitation with the child and they do not appear to have been attempts to perform obligations incident to the parental relationship, such as offering to provide financial support for the child. The evidence in this case clearly established a material change in circumstances since the time the Texas order was entered, because the nature and extent of Margaret's relationship with the child had changed materially.

With respect to the best interests of the child, we also believe that the evidence supported the district court's determination that it was in the child's best interests to terminate Margaret's court-ordered rights of custody and visitation. Because the relationship had diminished over time, there was less justification to legally require custody and visitation. As this case illustrates, it is within the court's discretion to consider the fact that in the first instance, Margaret's rights were based on her having had in loco parentis status rather than being a legal parent. Because her rights were initially based on

maintaining an existing relationship that was beneficial to the child rather than maintaining a parental relationship that was favored by the law, the fact that the relationship had diminished over time is of greater weight in this circumstance than it would be were the court considering the rights of a legal parent. The law would ordinarily favor maintaining the relationship with a legal parent. See, e.g., *Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016) (discussing parental preference). But in this case, it was valid for the court to consider whether maintaining the relationship through court-ordered rights of custody and visitation was in the child's best interests when Margaret had not been assuming the obligations incident to the parental relationship. We conclude that the court did not abuse its discretion when it determined that it was not in the child's best interests to continue Margaret's court-ordered rights of custody and visitation.

CONCLUSION

Having rejected Margaret's assignments of error, we affirm the district court's order.

Affirmed.

Wright, Kelch, and Funke, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Craig A. Johnson, appellant.

904 N.W.2d 714

Filed December 22, 2017. No. S-17-069.

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. **Effectiveness of Counsel: Appeal and Error.** When a claim of ineffective assistance of counsel presents a mixed question of law and fact, 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.
3. **Postconviction: Constitutional Law: Proof.** A defendant seeking relief under the Nebraska Postconviction Act must show that his or her conviction was obtained in violation of his or her constitutional rights.
4. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
5. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.
6. **Postconviction: Effectiveness of Counsel: Proof.** If the petitioner has not alleged facts which would support a claim of ineffective assistance of counsel or if the files and records affirmatively show he or she is entitled to no relief, then no evidentiary hearing is necessary.

7. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
8. **Effectiveness of Counsel: Proof: Words and Phrases: 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. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.
9. **Trial: Effectiveness of Counsel: Prosecuting Attorneys: Appeal and Error.** In determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct, an appellate court must first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.
10. **Trial: Prosecuting Attorneys: Juries.** A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.
11. **Criminal Law: Directed Verdict.** In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.
12. **Criminal Law: Directed Verdict: Appeal and Error.** In an appellate court's consideration of a criminal defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence.
13. **Directed Verdict.** If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.
14. **Trial: Prosecuting Attorneys.** In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.

15. **Trial: Prosecuting Attorneys: Evidence.** A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.
16. **Trial: Prosecuting Attorneys.** A prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.
17. **Trial: Constitutional Law: Testimony.** A defendant has a fundamental constitutional right to testify.
18. **Trial: Attorney and Client: Testimony: Waiver.** The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.
19. ____: ____: ____: ____. A trial court does not have a duty to advise the defendant of his or her right to testify or to ensure that the defendant waived this right on the record. Instead, defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
20. **Trial: Attorney and Client: Effectiveness of Counsel: Testimony: Waiver.** Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.
21. **Postconviction: Constitutional Law: Proof.** In a postconviction proceeding, an evidentiary hearing is not required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.
22. **Effectiveness of Counsel: Appeal and Error.** When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant.
23. ____: ____. Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.
24. **Constitutional Law: Speedy Trial.** Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis. This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.

25. **Postconviction: Appeal and Error.** A party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.

Appeal from the District Court for Cheyenne County: Derek C. Weimer, Judge. Affirmed.

Craig A. Johnson, pro se.

Douglas J. Peterson, Attorney General, and Erin E. Tangeman for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

This is Craig A. Johnson's appeal from the district court's order denying him postconviction relief without an evidentiary hearing. We affirm.

I. BACKGROUND

In the spring of 2011, Johnson began dating April Smith. During their relationship, Johnson exhibited signs of jealousy about April's relationship with her former husband Edward Smith. In November, Johnson told a coworker that he would kill April if she ever left him, and on December 10, he told his supervisor that if he ever caught April and Edward together, he would "beat the shit out of both of them."

Later that same day, April's nephew, Robert Gray, his wife, and their children visited April and Johnson at her duplex. Gray testified that Johnson was drinking beer that night and was unusually quiet. Both Gray and his wife testified that Johnson was upset that Edward had repaired April's van and that other men had been flirting with April. Gray's wife also testified that Johnson's demeanor was angry, that the interactions between Johnson and April were tense, and that they had begun to argue before the Grays left that evening. April's neighbors reported hearing loud voices and arguing in the early morning hours of December 11, 2011. One of the

neighbors stated that she heard "a couple of thuds" as well. On December 12, April did not report to work and did not respond to Gray's attempts to contact her. Two law enforcement officers went to April's duplex and found April dead. April's body was lying face down in the living room, and her feet and hands were bound. They observed ligature abrasions on her neck, a wound on her hand and face, and a gaping wound on her abdomen. The pathologist who performed April's autopsy concluded that pinpoint hemorrhages found on April's mouth could have been caused by strangulation or suffocation. The ligature abrasion on her neck indicated strangulation. A forensic scientist found a fingerprint on a trash bag that matched one of Johnson's fingerprints. DNA testing on blood found on the trash bag produced DNA profiles that matched April's profile. An investigator testified that an imprint left on the trash bag appeared to be of a human face. Investigators also found two knives in the sink, one of which had an 8-inch blade with blood on it that matched April's DNA. The duplex showed signs of a struggle, and blood was splattered throughout. The pathologist opined that her death was a homicide caused by the stab wound to her abdomen and suffocation, with a contributing cause of multiple drug toxicity.

On December 15, 2011, Johnson was arrested in Michigan while driving April's van. When Nebraska investigators searched the van, they found Johnson's T-shirt and athletic shoes with dark stains that they believed to be blood. The stains on both the T-shirt and the shoes tested positive for blood, and the DNA profile extracted from these stains matched April's profile.

After a jury trial in which Johnson did not testify, he was convicted of first degree murder, use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. The court sentenced him to prison terms of, respectively, life, 40 to 50 years, and 10 to 20 years, with all terms to be served consecutively.

On direct appeal, Johnson claimed that the court erred by admitting cumulative, gruesome autopsy photographs that depicted the same injuries, thus allowing the prosecutor to inflame the jurors' passions. We rejected this claim, because Johnson did not assign and argue it.[1] We also rejected his claim that the court erred by denying his *Batson* challenge based on an irrational and pretextual justification.[2] In doing so, we held that the record supported the prosecutor's concerns about the juror's knowledge of the case. Lastly, we determined that the court did err by admitting testimony and exhibits that Johnson's DNA profile contained certain alleles that matched alleles found in a mixed blood sample, because such evidence lacked sufficient probative value. However, we concluded that the error was harmless beyond a reasonable doubt.

In Johnson's verified motion for postconviction relief, he alleged multiple instances of ineffective assistance of counsel. Because Johnson was represented by the same lawyers at the time of his trial and on direct appeal, this postconviction proceeding was his first opportunity to assert claims of ineffective assistance of counsel. Johnson alleged that his trial counsel was ineffective in failing to file a motion for absolute discharge on the basis of speedy trial, failing to object to the prosecutor's comments in voir dire, failing to properly examine various witnesses at trial, failing to argue after moving for a directed verdict, failing to object to the state's closing argument, failing to sever count III from the other charges, and failing to allow Johnson to testify at trial.

The district court, without holding an evidentiary hearing, denied Johnson's motion, finding that Johnson had failed to allege sufficient facts to demonstrate a violation of his constitutional rights and that the record and files affirmatively showed that he was entitled to no relief. Johnson timely appealed.

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[1] See *State v. Johnson*, 290 Neb. 862, 862 N.W.2d 757 (2015).

[2] See *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

II. ASSIGNMENTS OF ERROR

Johnson assigns, restated, that the district court erred in overruling his motion for postconviction relief by (1) denying his claim of ineffective assistance of counsel during voir dire, (2) denying his claim of ineffective assistance of counsel on the motion for directed verdict, (3) denying his claim of ineffective assistance of counsel during closing arguments, (4) denying his claim of ineffective assistance of counsel concerning his constitutional right to testify, (5) denying his claim of ineffective assistance of counsel on direct appeal, and (6) denying his claim of a violation of his constitutional right to a speedy trial.

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.[3]

[2] Likewise, when a claim of ineffective assistance of counsel presents a mixed question of law and fact, 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.[4]

IV. ANALYSIS

In its ruling on Johnson's motion for postconviction relief, the district court determined that its records and files, as well as the bill of exceptions and transcript prepared for Johnson's direct appeal, provided a sufficient record to consider each of Johnson's claims. In doing so, the court ruled that he was not entitled to relief on his motion and was not entitled to an evidentiary hearing.

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[3] *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017).

[4] See *State v. Dubray*, 289 Neb. 208, 854 N.W.2d 584 (2014).

[3-6] A defendant seeking relief under the Nebraska Postconviction Act[5] must show that his or her conviction was obtained in violation of his or her constitutional rights.[6] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.[7] When a district court denies postconviction relief without conducting an evidentiary hearing, an appellate court must determine whether the petitioner has alleged facts that would support a claim of ineffective assistance of counsel and, if so, whether the files and records affirmatively show that he or she is entitled to no relief.[8] If the petitioner has not alleged facts which would support a claim of ineffective assistance of counsel or if the files and records affirmatively show he or she is entitled to no relief, then no evidentiary hearing is necessary.[9]

1. Ineffective Assistance of Counsel

[7,8] A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[10] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[11] the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the

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[5] Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016).

[6] *State v. Robertson*, 294 Neb. 29, 881 N.W.2d 864 (2016).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Vela, supra* note 3.

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

defendant's defense.[12] To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.[13] A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.[14]

(a) Voir Dire

Concerning the statements made by the prosecutor during voir dire, the court determined that the statements complained of by Johnson were not objectionable, and therefore, counsel was not ineffective for failing to object, and that Johnson failed to show how he was prejudiced by counsel's performance. Those statements include the prosecutor's telling the prospective jurors that there would be no evidence of a shooting or "gun play," that the matter was not a death penalty case, that the evidence and testimony was "not pretty," and that Johnson had "an obligation to put [the State's] evidence to the test."

[9,10] In determining whether defense counsel was ineffective in failing to object to prosecutorial misconduct, an appellate court must first determine whether the petitioner has alleged any action or remarks that constituted prosecutorial misconduct.[15] A prosecutor's conduct that does not mislead and unduly influence the jury does not constitute misconduct.[16]

The first statement raised by Johnson—that there would be no evidence of a shooting or "gun play"—was not improper.

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[12] *Vela, supra* note 3.

[13] *Id.*

[14] *Id.*

[15] See *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[16] *Id.*

The evidence clearly showed that a gun was not found during the investigation, and there was no evidence that April was shot. The prosecutor brought up this issue during voir dire to address what he believed were inaccurate media reports about the case and to explain why the jurors must set aside anything that they may have heard about the case or what they may have seen about the case outside of the courtroom.

It was not improper for the prosecutor to inform the jurors of their obligations so long as it was consistent with the law. Later, at the end of the trial, the court also instructed the jury that certain things were not evidence from which it could find the facts, including "[a]nything you may have seen or heard about this case outside the courtroom." As a result, the prosecutor's comment about "gun play" was not improper.

The second statement raised by Johnson—that the State was not seeking the death penalty—was an important detail to share with the prospective jurors. If the State had been seeking the death penalty, the jury would have been tasked with determining whether alleged aggravating circumstances existed. As a result, it was proper to inform the jury of what their responsibilities entailed. So to address the fact that the State was not seeking the death penalty was not improper.

The third statement raised by Johnson—that the evidence and testimony was "not pretty"—was not improper. The crime scene and autopsy photographs depicted the violent end to April's life, and the testimony of the pathologist detailed the injuries April sustained. This type of evidence would be disturbing to most jurors, and it was important for both the State and Johnson to know whether prospective jurors would be able to cope with seeing such evidence and maintain their impartiality. As a result, to phrase it as "not pretty" was not improper.

In regard to the last statement raised by Johnson, that the defendant had an obligation to put the State's evidence to the test, Johnson has taken this comment out of context. The entirety of the prosecutor's statement was as follows:

> The judge has a role to administer sentence. He has a role to rule on objections. He has a role to conduct the court accordingly and as the judge told you we are optimistic that we can try this case as quickly as possible. And I read about 21 names of potential witnesses, we have a [b]unch of exhibits, a [b]unch of photographs, a lot of videos, some physical evidence to put before you and then there are 21 witnesses and we are going to try to speed through them as quickly as possible but we also have an obligation, we have an obligation to meet our burden of proof and the defendant has an obligation to put our evidence to the test and that sometimes is not an exact science. There is no normal in a murder case or any jury trial. Most of the state's witnesses in this case are coming from long distances away, some from Michigan, some from Iowa, there are a few local but most of them are from Scotts Bluff or f[a]rther. There could be traffic problems, there could be days [we] would run out of witnesses because we went to[o] fast and we ended [at] 3:00, there may be days that we go a bit later maybe an hour later because we have to fit the witness [in], I think it is all of our goals to have this case to you no later than Monday, perhaps Tuesday of next week. Is it possible that you go Wednesday, maybe and maybe deliberations go on into Wednesday, could be longer could be much shorter. Is there anybody aside from those th[at] indicated earlier to the judge that is going to be so distracted about the [length] that this trial, the fact that their kids are not getting picked up or having to rearrange plans that they are not going to be able to focus on the evidence and just think about rushing justice?

The prosecutor made the statement while explaining the number of witnesses intended to call and the amount of evidence he intended to present. The prosecutor was determining whether any of the prospective jurors would have difficulty with the length of the trial. The comment was not repeated

in the prosecutor's comments regarding the State's burden to prove Johnson guilty beyond a reasonable doubt. The comment was also not included in the prosecutor's comments about Johnson's presumption of innocence.

Though we do not condone the use of the term "obligation," the same did not impose upon Johnson a compulsion to put the State's evidence to the test. Further, the trial court instructed the jury at the end of the trial that "[i]n criminal prosecutions, the burden of proof never shifts from the State to the Defendant." A phrase used no less than five times throughout the instructions. In addition, the jury was instructed that "[s]tatements, arguments, and questions of the attorneys representing both the State and [Johnson]" were not evidence. As a result, given the specific and limited context in which the phrase "obligation to put [the State's] evidence to the test" was used, it was not improper.

(b) Motion for Directed Verdict

In regard to the claim that upon moving for a directed verdict, counsel failed to argue in support of the motion, the district court noted that sufficient evidence had been offered to support the charges and that therefore, argument would have been fruitless. As a result, the district court found that Johnson was not prejudiced by counsel's failure to make such an argument.

[11-13] In a criminal case, the court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged or (2) evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.[17] In our consideration of a criminal defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible

[17] *State v. Betancourt-Garcia*, 295 Neb. 170, 887 N.W.2d 296 (2016).

from the evidence.[18] If there is any evidence which will sustain a finding for the party against whom a motion for directed verdict is made, the case may not be decided as a matter of law, and a verdict may not be directed.[19]

Johnson alleges that since his DNA and fingerprints were not found on the knife recovered in April's home, the court should have granted a directed verdict on counts II and III. However, sufficient evidence was introduced to support the jury's finding that Johnson committed the murder, including witnesses who heard Johnson state that he would harm April if she ever left him, witnesses who saw Johnson and April arguing on the evening before the murder, a witness who heard thuds from April's home on the night she was killed, the pathologist's testimony that indicated the cause of April's death was a stab wound or suffocation, April's DNA that was found on the knife, Johnson's fingerprints that were found on a trash bag used to suffocate or strangle April, Johnson who was found driving April's van in Michigan after the murder, and Johnson who had April's blood on his clothing and his shoes after the murder. Therefore, the court did not err in overruling the motion for directed verdict and any argument in support of the motion would have been without value. As a result, Johnson's trial counsel could not be ineffective in failing to argue in support of the motion for directed verdict.

Because we find that none of the prosecutor's statements were improper, trial counsel's performance was not deficient when he failed to object to those statements. In addition, even if the prosecutor's comments constituted misconduct, Johnson is unable to demonstrate a reasonable probability that but for his counsel's deficient performance, the result of the proceeding would have been different, based upon the overwhelming evidence of guilt.

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[18] *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991), *reversed on other grounds sub nom. Morley v. Stenberg*, 828 F. Supp. 1413 (1993).

[19] See *State v. Rothenberger*, 294 Neb. 810, 885 N.W.2d 23 (2016).

(c) Closing Argument

In regard to counsel's failure to object to the State's closing argument, Johnson contends that the argument was highly prejudicial to him and inflamed the jury. The district court ruled that counsel was not ineffective, because the State's closing argument was proper and was supported by the evidence.

The prosecutor's comment specifically complained of by Johnson is as follows:

> There is a tactic at play here, it's not a surprise, let's blame [April], let's blame the police. Why do we do that to get the focus off of [Johnson]. To get the focus off of what did he do and the evidence against him. The other thing — the other tactic at work here is look at this piece of evidence, [defense counsel] got up here and he told you, you know, look at that — look at those few spots on the wall. One has April's one has [Johnson's], doesn't mean nothing. Really does that mean proof beyond a reasonable doubt? Again, that is the temptation I asked you not to fall into, to look at a piece of information in isolation, to look at a piece of evidence in isolation and again, you know, blame the police, blame [April], get the focus off of [Johnson]. We want you to forget that his fingerprint is on this trash bag. We want you to forget that underneath the bag that is associated with him and the killing of April [are] these hats. Were the hats involved, I don't know. They are in the trashcan and if there is a connection between those hats we know that one piece of evidence is certainly tied to . . . Johnson.

[14] In assessing allegations of prosecutorial misconduct in closing arguments, a court first determines whether the prosecutor's remarks were improper. It is then necessary to determine the extent to which the improper remarks had a prejudicial effect on the defendant's right to a fair trial.[20]

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[20] *State v. Nolan*, 292 Neb. 118, 870 N.W.2d 806 (2015).

[15,16] A prosecutor must base his or her argument on the evidence introduced at trial rather than on matters not in evidence.[21] However, a prosecutor is entitled to draw inferences from the evidence in presenting his or her case, and such inferences generally do not amount to prosecutorial misconduct.[22]

In *State v. Dubray*,[23] we stated:

> [W]hen 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.

Here, the record includes evidence of blood splatters on a wall which matched both April's and Johnson's blood; evidence of Johnson's fingerprint on the trash bag; and evidence of two hats found in the garbage bag. As a result, the prosecutor correctly stated the facts. In addition, the jury was properly instructed that the "attorneys may draw legitimate deductions and inferences from the evidence." The prosecutor's comments did not amount to prosecutorial misconduct, because the inferences were based upon the evidence introduced at trial and because the jury was properly instructed in the use of these inferences.

Further, the prosecutor's comments were not an attack on the defense counsel's character, but merely an argument that defense counsel was attempting to divert the juror's attention from the relevant evidence. As a result, there was no prosecutorial misconduct, and therefore, Johnson's trial counsel

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[21] *State v. McSwine*, 292 Neb. 565, 873 N.W.2d 405 (2016).

[22] See *Nolan, supra* note 20. See, also, *Dubray, supra* note 4.

[23] *Dubray, supra* note 4, 289 Neb. at 227, 854 N.W.2d at 604-05.

could not be ineffective in failing to object to the State's closing argument.

(d) Failure to Testify

Concerning Johnson's right to testify, the district court ruled that Johnson merely provided generalizations and factual conclusions that he would have testified that he did not commit the murder and that he would have provided a reason why he was found in Michigan. As a result, the court found no demonstration of prejudice.

[17-19] A defendant has a fundamental constitutional right to testify.[24] The right to testify is personal to the defendant and cannot be waived by defense counsel's acting alone.[25] But a trial court does not have a duty to advise the defendant of his or her right to testify or to ensure that the defendant waived this right on the record. Instead, "'defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.'"[26]

[20] Defense counsel's advice to waive the right to testify can present a valid claim of ineffective assistance in two instances: (1) if the defendant shows that counsel interfered with his or her freedom to decide to testify or (2) if counsel's tactical advice to waive the right was unreasonable.[27]

[21] However, 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.[28] Thus, in a postconviction proceeding, an evidentiary hearing is not

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[24] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[25] *Id.*

[26] *Id.* at 810-11, 806 N.W.2d at 421.

[27] *Iromuanya, supra* note 24.

[28] See *State v. Thorpe*, 290 Neb. 149, 858 N.W.2d 880 (2015).

required (1) when the motion does not contain factual allegations which, if proved, constitute an infringement of the movant's constitutional rights; (2) when the motion alleges only conclusions of fact or law; or (3) when the records and files affirmatively show that the defendant is entitled to no relief.[29]

In assessing postconviction claims of ineffective assistance of counsel for failure to call a particular witness, we have upheld the dismissal without an evidentiary hearing where the motion did not include specific allegations regarding the testimony which the witness would have given if called.[30]

Johnson's motion merely alleges that if he were allowed to testify, he "would have refuted the allegations against him" and he "wanted to explain to the jury why he traveled to Michigan." These reasons are mere conclusions of fact and are not sufficiently detailed to constitute factual allegations which, if proved, constitute an infringement of the movant's constitutional rights. Further, Johnson's allegations are insufficient to show a reasonable probability that the outcome would have been different but for the failure to call him as a witness.

(e) Autopsy Photographs

Johnson alleges that trial counsel was ineffective on direct appeal for assigning as an error the admission of cumulative, gruesome autopsy photographs that depicted the same injuries, but arguing that the district court erred in admitting crime scene photographs, not autopsy photographs.

On direct appeal, we held that Johnson had not assigned that the court erred in admitting cumulative crime scene photographs, and he had not argued his assignment that the court erred in admitting gruesome autopsy photographs. So we did not address whether the court erred in admitting any photographs.

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[29] *Id.*

[30] *Dubray, supra* note 4.

Johnson contends generally that the autopsy photographs admitted during the direct examination of the pathologist who performed the autopsy were cumulative and gruesome and, as a result, were more prejudicial than probative.

[22,23] When analyzing a claim of ineffective assistance of appellate counsel, courts usually begin by determining whether appellate counsel failed to bring a claim on appeal that actually prejudiced the defendant.[31] That is, courts begin by assessing the strength of the claim appellate counsel failed to raise.[32] Counsel's failure to raise an issue on appeal could be ineffective assistance only if there is a reasonable probability that inclusion of the issue would have changed the result of the appeal.[33]

We have reviewed the autopsy photographs admitted into evidence and conclude that they were necessary to understand the pathologist's medical testimony regarding the severity of April's injuries and to establish the cause and manner of April's death. April suffered multiple stabs wounds and had numerous abrasions and ligature marks. The cause of her death included both a stab wound and/or strangulation or suffocation. As such, the records and files in this case show that Johnson was not entitled to relief on the ground that defense counsel failed to object to the admission of the photographs during the trial. Therefore, defense counsel was not ineffective for failing to preserve the issue on direct appeal.

2. Constitutional Right to Speedy Trial

In regard to Johnson's claim that his constitutional right to a speedy trial was violated, the court ruled that because he failed to raise it on direct appeal, it was procedurally barred.

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[31] *State v. Sellers*, 290 Neb. 18, 858 N.W.2d 577 (2015).

[32] *Id.*

[33] *Id.*

[24] Under U.S. Const. amend. VI and Neb. Const. art. I, § 11, a defendant has the right to a speedy trial. Determining whether a defendant's constitutional right to a speedy trial has been violated requires a balancing test in which the courts must approach each case on an ad hoc basis.[34] This balancing test involves four factors: (1) length of delay, (2) the reason for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant.[35]

[25] However, a party cannot raise an issue in a postconviction motion if he or she could have raised that same issue on direct appeal.[36] Whether Johnson's constitutional right to a speedy trial was violated could have been raised in his direct appeal and was not. As a result, the claim is procedurally barred.

V. CONCLUSION

For the reasons set forth above, we conclude that Johnson was not entitled to an evidentiary hearing on his claims of ineffective assistance of counsel. We therefore affirm the district court's order.

Affirmed.

Wright, J., not participating in the decision.

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[34] *Betancourt-Garcia, supra* note 17.

[35] *Id.*

[36] See *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Change of Name of Whilde. Lillias Delong Dulles Whilde, a minor, by and through her mother and next friend, Hannah Whilde, appellee, v. Margaret Whilde, appellant.

904 N.W.2d 707

Filed December 22, 2017. No. S-17-299.

1. **Motions to Vacate: Time.** In a civil case, a court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute.
2. ____: ____. The decision to vacate an order at any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when the 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.
4. **Motions to Vacate: Judgments: Time.** In the absence of an applicable rule to the contrary, a motion asking the court to exercise its inherent power to vacate or modify its own judgment does not toll the time for taking an appeal.

Appeal from the District Court for Otoe County: Michael A. Smith, Judge. Affirmed.

Anthony W. Liakos, of Govier, Katskee, Suing & Maxell, P.C., L.L.O., for appellant.

Julie E. Bear, of Reinsch, Slattery, Bear & Minahan, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, and Stacy, JJ., and Riedmann, Judge.

Miller-Lerman, J.

NATURE OF CASE

Margaret Whilde appeals the order of the district court for Otoe County, Nebraska, which overruled a motion to vacate the court's earlier order which granted a request to change the name of a minor child. She argued that she was entitled to notice by certified mail as a "noncustodial parent" under Neb. Rev. Stat. § 25-21,271(2) (Reissue 2016), and that because she had not received such notice, the order changing the child's name should be vacated. We affirm the district court's order overruling Margaret's motion to vacate.

STATEMENT OF FACTS

The minor child at issue in this case was born in January 2010. On December 21, 2016, the child's biological mother, Hannah Whilde, filed on behalf of the child a petition under § 25-21,271 to change the child's name. The request was to change the child's two middle names, "Delong Dulles," to two new middle names, "Coco Nadine," and to change her last name from "Whilde" to Hannah's family name of "Hoch"; no request was made to change the child's first name. After Hannah filed the petition, she caused notice of the filing of the petition to be published in a newspaper of general circulation in Otoe County for 2 consecutive weeks.

The district court held a hearing on the petition for name change on January 24, 2017. At the hearing, Hannah offered into evidence proof of publication of the notice. Hannah testified at the hearing that she was the natural mother of the child, that there was no noncustodial parent with respect to the child, and that there was "no natural father" involved because the child was "the product of a sperm donation." Hannah further testified regarding the reasons for the name change. She testified that the name change was not for the purpose

of avoiding creditors or hiding the child. She testified instead that the two middle names she proposed were a nickname by which the child had generally been known since birth and the name of "a beloved great-grandmother" who was "very close to" the child. Hannah did not testify at the hearing regarding the reasons for changing the child's last name; however, in the petition, Hannah had stated that she wanted the child to have Hannah's family name and that Hannah was changing her own last name from "Whilde" back to her family name. After Hannah's testimony, the court stated that it found that Hannah had complied with the statute and that there was no good reason the order to change the child's name should not be granted.

The court filed an order that same day in which it stated, inter alia, that it found "statutory notice to have been given pursuant to [§] 25-21,271(2)," that no objection had been filed, that there was no reason to deny the requested name change, and that it was in the child's best interests to have her name changed. The court therefore on January 24, 2017, ordered the child's name to be changed to the name requested by Hannah.

On February 7, 2017, Margaret filed a motion asking the court to vacate its January 24 order changing the child's name. Margaret stated in the motion that she was filing the motion pursuant to Neb. Rev. Stat. § 25-2001 (Reissue 2016). She alleged as follows: Pursuant to an order filed in the district court for Travis County, Texas, on September 27, 2012, Margaret had been appointed "Temporary Non-Parent Possessory Conservator" of the child and, as a result of such status, had been awarded certain rights and duties with respect to the child. In a modification of custody case separate from the instant name change action, on June 6, 2014, Hannah had filed in the district court for Otoe County an application to register the Texas judgment and a complaint to modify said judgment. After a trial at which both Hannah and Margaret appeared in August 2016 in the modification of custody case,

the district court on December 16 had filed an opinion and order of modification in which it found that "an in loco parentis relationship did exist at one time between" Margaret and the child. The court, however, had ultimately ordered that sole legal and physical custody of the child be awarded to Hannah and that Margaret be granted no rights of custody or visitation with the child. On January 10, 2017, Margaret filed a notice of appeal of the district court's December 16, 2016, order modifying the child's custody. No supersedes bond or other stay of the modification and custody ruling in the other action had been implemented. At the time Margaret filed the motion to vacate in this name change case, the appeal of the custody order was pending in the Nebraska Court of Appeals. That appeal was moved to the docket of this court as case No. S-17-045.

Margaret further alleged that at no time prior to the January 24, 2017, hearing in this case had she been provided notice of the request to change the child's name. She argued that she was a "noncustodial parent" of a child who was under 19 years of age and that she should have been provided notice pursuant to § 25-21,271(2), which provides as follows:

> Notice of the filing of the [name change] petition shall be published in a newspaper in the county, and if no newspaper is printed in the county, then in a newspaper of general circulation therein. The notice shall be published (a) once a week for four consecutive weeks if the petitioner is nineteen years of age or older at the time the action is filed and (b) once a week for two consecutive weeks if the petitioner is under nineteen years of age at the time the action is filed. In an action involving a petitioner under nineteen years of age who has a noncustodial parent, notice of the filing of the petition shall be sent by certified mail within five days after publication to the noncustodial parent at the address provided to the clerk of the district court pursuant to subsection (1) of section 42-364.13 for the noncustodial parent if he or she has

provided an address. The clerk of the district court shall provide the petitioner with the address upon request.

Margaret alleged that if she had been provided notice of the petition, she would have filed an objection and would have appeared at the hearing to oppose the name change. Margaret therefore requested that the order changing the child's name be vacated and that no further action be taken regarding the requested name change until the pending appeal in the modification and custody case was decided.

Hannah filed a resistance to Margaret's motion to vacate the name change order. She alleged that the following facts were undisputed: Hannah and Margaret had been an unmarried couple living together in Texas at the time that the child, who was conceived through a sperm donor, was born in January 2010. On November 26, 2011, Hannah took the child and moved to her parents' home in Nebraska City, Nebraska. On November 28, Margaret filed a petition in the district court in Texas. After the Texas court heard the case, it entered a temporary order in which it determined that Margaret was a "'non-parent possessory conservator'" and awarded her periods of visitation with the child. Hannah noted in her resistance that the Texas court's order "put no restriction and made no reference of any change of name for" the child. The Texas order further provided that Hannah had certain exclusive rights, which included, inter alia, "the right to represent the child in legal action[s] and to make other decisions of substantial legal significance concerning the child." After Hannah filed her petition in 2014 to register the Texas order in the district court for Otoe County, the Nebraska court conferred with the Texas court, as required by the applicable uniform act, and determined that the Texas court would relinquish jurisdiction of the modification and custody case to the Nebraska court. Hannah further alleged that when Margaret filed her notice of appeal of the district court's December 16, 2016, order modifying custody of the child, Margaret did not request a stay of the order and did not file a supersedeas bond.

Hannah asserted in her resistance to Margaret's motion to vacate that Margaret had no right to notice by certified mail under § 25-21,271(2). She argued that Margaret was not a "noncustodial parent" under that statute, because both the Texas court and the Nebraska court had found that Margaret was not a biological or adoptive parent of the child, and that the Texas court had designated her only as a "'non-parent possessory conservator,'" while it designated Hannah as the "'parent sole managing conservator.'" She noted that nothing in the Texas court's order gave Margaret rights regarding the child's legal name. She further argued that after the Nebraska court filed its modification and custody order on December 16, 2016, Hannah had sole legal and physical custody of the child, while Margaret had no rights of visitation or custody, and that therefore Margaret was clearly not a "noncustodial parent" at the time Hannah filed the petition on December 21 to change the child's name.

The district court heard arguments on Margaret's motion to vacate on February 21, 2017, and on that day, the court entered in its notes a ruling that it denied the motion. Margaret filed a notice of appeal of the ruling on March 20. The Nebraska Court of Appeals on April 17 issued an order to show cause in which it noted that there had been no signed, file-stamped order entered regarding the motion to vacate from which an appeal could be taken. The district court filed a signed and file-stamped order on April 20 in which it denied Margaret's motion to vacate the January 24 name change order. After a copy of the order was filed in the Court of Appeals, the Court of Appeals found that cause had been shown. The Court of Appeals ordered the appeal to proceed, and the appeal was later moved to our docket on our motion.

ASSIGNMENTS OF ERROR

Margaret claims that the district court erred in its January 24, 2017, order when it granted Hannah's request to change

the child's name and abused its discretion when it overruled her motion to vacate its January 24 order.

STANDARDS OF REVIEW

[1] Although Margaret cited § 25-2001 as the authority for her motion to vacate, we note that in a civil case, a court has inherent power to vacate or modify its own judgments at any time during the term at which those judgments are pronounced, and such power exists entirely independent of any statute. *Kibler v. Kibler*, 287 Neb. 1027, 845 N.W.2d 585 (2014). The district court for Otoe County is in the Second Judicial District, and under Rules of Dist. Ct. of Second Jud. Dist. 2-1 (rev. 1995), the regular term of the court runs from January 1 through December 31 of each calendar year. Therefore, Margaret's February 7, 2017, motion to vacate was filed within the same term as the district court's January 24 order, and § 25-2001 is not applicable. See *Kibler v. Kibler, supra*.

[2,3] The decision to vacate an order at any time during the term in which the judgment is rendered is within the discretion of the court; such a decision will be reversed only if it is shown that the district court abused its discretion. *Id*. An abuse of discretion occurs when the trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id*.

ANALYSIS

Margaret's Notice of Appeal From the District Court's January 24, 2017, Name Change Order Was Not Timely Filed.

As urged by Hannah, we note as an initial matter that Margaret's notice of appeal filed on March 20, 2017, was not timely to appeal the court's January 24 name change order. We further note that pursuant to Neb. Rev. Stat. § 25-1912(2) (Reissue 2016), Margaret's notice of appeal from the order denying the motion to vacate is treated as having been filed

on April 20, the date the district court entered a signed, file-stamped order overruling the motion. Therefore, this appeal will be limited to consideration of the error Margaret assigned regarding the order which overruled her motion to vacate.

[4] Under § 25-1912, a party has 30 days from the entry of judgment to appeal the decision of a district court unless a party has filed a motion which tolls the appeal period. In the absence of an applicable rule to the contrary, a motion asking the court to exercise its inherent power to vacate or modify its own judgment does not toll the time for taking an appeal. *State v. Hausmann*, 277 Neb. 819, 765 N.W.2d 219 (2009). A party can move the court to vacate or modify a final order, but if the court does not grant the motion, a notice of appeal must be filed within 30 days of the entry of the earlier final order if the party intends to appeal it. *Id*.

Thus, to the extent Margaret assigns error to the January 24, 2017, order, she did not timely appeal that order and we do not consider such assignment of error. However, Hannah does not argue, and as we have indicated above we do not find, that Margaret failed to timely appeal the district court's order overruling her motion to vacate. We therefore consider Margaret's assignment of error regarding the order of the court which overruled her motion to vacate.

District Court Did Not Abuse Its Discretion When It Overruled Margaret's Motion to Vacate the District Court's January 24, 2017, Name Change Order.

Margaret contends that she is a "noncustodial parent" under § 25-21,271(2) and that she was entitled to receive notice of the proposed name change by certified mail. She claims that the district court erred when it concluded that she was not a "noncustodial parent" entitled to certified mail notice and overruled her motion to vacate the January 24, 2017, name change order. We conclude that at the time notice was required to be given in this name change action, Margaret was not a

"noncustodial parent" within the meaning of § 25-21,271(2), and we therefore conclude that the district court did not err when it overruled her motion to vacate the January 24 name change order.

Section 25-21,271(3) requires that before a court can order a name change, the court must be "duly satisfied by proof in open court" that, inter alia, "notice of the filing of the petition has been given as required by this section." No challenge has been made to the adequacy of the published notice. However, if it were shown that another type of notice required by law had not been given, such failure could be a valid reason to vacate an order granting a name change.

Section 25-21,271(2) requires that, in addition to the general notice that must be given by publication, "[i]n an action involving a petitioner under nineteen years of age who has a noncustodial parent, notice of the filing of the petition shall be sent by certified mail within five days after publication to the noncustodial parent . . . ." Whether Margaret was entitled to notice by certified mail, and therefore whether notice was given as required by the statute in this case, depends on whether she was a "noncustodial parent" within the meaning of the statute at the time notice was required to be given. The meaning of "noncustodial parent" under § 25-21,271(2) is a question of law which we decide independently of the trial court. See *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017) (statutory interpretation presents question of law which we review independently).

Hannah argues that Margaret was not a "noncustodial parent" when Hannah filed the petition to change the child's name on December 21, 2016, because any rights Margaret had with respect to the child had been terminated by the district court's December 16 order in the separate modification and custody action. Hannah notes that Margaret did not file a notice of appeal of the December 16 order until January 10, 2017, and as we have noted, Margaret did not post a supersedeas bond or seek a stay of the order.

Margaret argues that because the December 16, 2016, order terminating her custody and visitation rights was being appealed at the time she filed the motion to vacate on February 7, 2017, the district court should have looked to the temporary Texas court order to determine her status. Margaret claims that her Texas status as a "Temporary Non-Parent Possessory Conservator" conferred rights that equate to a "noncustodial parent" entitled to certified mail notice under § 25-21,271(2). She further notes that in the modification and custody case, the district court determined that her status under the Texas order had been similar to in loco parentis status under Nebraska law. Margaret contends that in loco parentis status is the equivalent of a noncustodial parent.

Margaret's arguments overlook the fact that the Texas order specifically referred to Margaret as a "Non-Parent" and gave certain rights exclusively to Hannah; most notably, Hannah was given the exclusive right "to represent the child in legal action[s] and to make other decisions of substantial legal significance concerning the child." Furthermore, we have recognized that in loco parentis status is not equivalent to the status of a legal parent and does not entitle a person to all the same rights that a legal parent would enjoy. See *Windham v. Griffin*, 295 Neb. 279, 286, 887 N.W.2d 710, 715-16 (2016) (stating "unlike biological and adoptive parenthood, the status of in loco parentis is temporary, flexible, and capable of being both suspended and reinstated"; "an individual standing in loco parentis, which is temporary in nature, is not the functional equivalent of a lawful parent for all purposes or in all contexts").

The critical fact in our determination of whether Margaret was a "noncustodial parent" for purposes of requiring certified mail service under § 25-21,271(2) is that as of the date of the December 16, 2016, order in the modification and custody case, Hannah was awarded sole legal and physical custody of the child and Margaret was awarded no rights to the child.

The district court's December 16, 2016, order extinguished any rights Margaret may have had with respect to the child as a result of the Texas order or her previous in loco parentis status. As noted, Margaret did not move to stay the modification and custody order pending its appeal, and therefore, the order was effective from the time it was entered and during the pendency of its appeal. See *Hall v. Hall*, 176 Neb. 555, 126 N.W.2d 839 (1964) (stating that appeal does not operate as stay of proceedings unless appellant shall have superseded judgment or final order in manner provided by law; where decree awarding custody of minor child has not been superseded, such order will be enforced as in case of any other nonsuperseded judgment). See, also, *Kula v. Kula*, 180 Neb. 893, 146 N.W.2d 384 (1966), and *Kricsfeld v. Kricsfeld*, 8 Neb. App. 1, 588 N.W.2d 210 (1999).

The order extinguishing Margaret's rights of custody and visitation was effective at all times relevant to this action, including when Hannah filed the name change petition, when she published notice, when the petition was considered and granted by the district court, and when Margaret filed her motion to vacate the name change order and the court overruled Margaret's motion. Although it is not determinative of our resolution of this issue in this appeal, we note parenthetically that in *Whilde v. Whilde, ante* p. 473, 904 N.W.2d 695 (2017), we affirmed the district court's December 16, 2016, modification of custody order in the separate case.

We give the word "parent," under the language of § 25-21,271(2), its plain and ordinary meaning, and Margaret was not a "parent" for purposes of the name-changing provision in § 25-21,271(2). Because Margaret had no legal rights to custody or visitation or otherwise with regard to the child at all relevant times during the pendency of this action to change the child's name, it is clear that she was not a "noncustodial parent" under § 25-21,271(2) and that she was not entitled to notice by certified mail as afforded to a noncustodial parent under the statute. The district court's finding in the January 24,

2017, order that the required statutory notice had been given was therefore not erroneous. We conclude that the district court did not abuse its discretion when it overruled Margaret's motion to vacate the January 24 name change order based on the alleged failure to provide certified mail notice.

CONCLUSION

We conclude that Margaret did not timely appeal the January 24, 2017, name change order, and we therefore do not consider her assignment of error regarding that order. We further conclude that the district court did not abuse its discretion when it overruled Margaret's subsequent motion to vacate the name change order, and we therefore affirm the district court's order overruling the motion to vacate.

Affirmed.

Wright, Kelch, and Funke, JJ., not participating.

Nebraska Supreme Court
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State of Nebraska, appellee, v.
Jeffrey A. Huff, appellant,
905 N.W.2d 59

Filed December 29, 2017. No. S-15-897.

1. **Trial: Juries: Appeal and Error.** The retention or rejection of a juror is a matter of discretion for the trial court. This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial. Thus, the standard of review in a case involving discharge of a juror is whether the trial court abused its discretion.
2. **Motions for Mistrial: Appeal and Error.** Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
3. **Criminal Law: Juror Misconduct: Proof.** Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming misconduct.
4. **Juror Qualifications: Waiver.** A party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection.
5. **Juror Qualifications.** When a party to a criminal case, through diligence, is able to discover a reason to challenge a juror, the objection to the juror must be made at the time of voir dire.
6. **Juror Qualifications: Juror Misconduct: Waiver.** A party does not waive an objection to a juror when the juror has concealed the information that is the subject of the objection.
7. **Trial: Juror Qualifications: Juror Misconduct.** The motives for concealing information during voir dire may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.
8. **Trial: Juries.** Where a juror indicates that he or she is physically incapable of proceeding, such as in the case of the juror's illness or incapacity, examination of the juror before discharging him or her is not required and may not be feasible.

9. ____: ____. Whether a juror paid attention to the trial in order to intelligently comprehend the proceeding is generally left to the discretion of the trial judge.
10. **Trial: Juries: Appeal and Error.** A trial court's decision to remove a juror and substitute an alternate is reviewed for an abuse of discretion.
11. **Trial: Juries.** A court's decision is an abuse of discretion if the decision results in bias or prejudice to the defendant, and prejudice includes the discharge of a juror without factual support or for a legally irrelevant reason.

Petition for further review from the Court of Appeals, Moore, Chief Judge, and Riedmann and Bishop, Judges, on appeal thereto from the District Court for Lancaster County, Robert R. Otte, Judge. Judgment of Court of Appeals affirmed.

Joseph D. Nigro, Lancaster County Public Defender, and Robert G. Hays for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

Jeffrey A. Huff was convicted of first degree sexual assault following a jury trial in the district court for Lancaster County. The Nebraska Court of Appeals affirmed his conviction and sentence.[1] Huff petitioned for further review, specifically challenging the order of the district court granting the State's motion to discharge a juror, M.F., after the parties had rested their cases and before the jury began deliberations. We affirm.

I. BACKGROUND

On April 15, 2015, the State filed an information charging Huff with first degree sexual assault. He was ultimately

[1] *State v. Huff*, 24 Neb. App. 551, 891 N.W.2d 709 (2017).

convicted by a jury. The errors raised in Huff's petition for further review concern only a juror at his trial, and not the underlying charge. We therefore limit our recitation of the facts to those pertinent to our analysis.

Jury selection for Huff's trial took place on August 10, 2015. After voir dire, both parties passed the panel for cause and then exercised their peremptory challenges. Twelve regular jurors and one alternate juror were sworn in and then excused until the following morning.

The Court of Appeals summarized the relevant events that occurred next:

> When trial reconvened on August 11, 2015, one juror, M.F., communicated that he was anxious about serving on the jury and was brought in to discuss the issue with the court and parties. M.F. explained that due to his upbringing, which included crime, gangs, drugs, and domestic assault, he did not think he was "suitable for [jury service] at all." M.F. was questioned as to whether he could listen to the evidence and jury instructions and be fair and impartial. He initially expressed that he did not think he would "be fair due to" his background and experiences. He declined to state whether he thought he would be biased toward the State or toward Huff and indicated only that he felt he was not fit for jury service. Upon further questioning, however, M.F. agreed to follow the law and stated that he believed he could follow the instructions given, place his history and background aside, and fairly and impartially make a decision based on the evidence.
>
> The State then moved to strike M.F. from the jury for cause, a motion to which Huff objected. The district court denied the motion at that point, observing that M.F. had taken the oath administered to the jury and opining that he perhaps merely experienced anxiety about jury service during the overnight break. The court indicated,

however, that "we [could] keep an eye on that issue" as the trial progressed.[2]

The trial then proceeded. After both parties rested and the jury had been excused for the day, the court expressed concern as to whether M.F. had been paying attention during trial. Specifically, the court advised the parties that it had not seen M.F. taking any notes during the trial or otherwise paying attention and stated that "[i]t wouldn't appear to me that [M.F.] would be paying attention as intently as some of the other jurors."

Later that day, at a hearing outside the presence of the jury, the State offered the transcript of the colloquy with M.F. from the first day of trial and a printout of M.F.'s criminal record. The printout showed in excess of 30 misdemeanor convictions M.F. had failed to disclose on his jury questionnaire. Both documents were received into evidence by the court. The State then moved to "strike" M.F. for cause, arguing M.F. could not be fair and unbiased.

The State argued that in the jury questionnaire, M.F. had said he had never been convicted or charged with a crime with a possible penalty of 1 year or more in prison, had never been convicted or charged with a crime involving a motor vehicle other than speeding, and had never been convicted or charged with a crime other than traffic. The State conceded that it could have exercised "a little bit more due diligence" before jury selection. Nevertheless, the State argued that M.F.'s criminal record showed that he had not been "forthcoming when he filled out his jury questionnaire" and that M.F.'s "deceit to the court" was a basis to strike him for cause. The record shows that M.F. was not statutorily disqualified from jury service.

Huff objected to the State's motion to remove M.F. from the jury. Huff argued that the State had not sought to strike M.F. for cause during jury selection and had not used its

[2] *Id.* at 552-53, 891 N.W.2d at 712.

peremptory strike on M.F. prior to his being sworn in and, instead, the State waited until after he had been sworn in. Huff generally contended that nothing had occurred since M.F. had been sworn in that would justify his being discharged.

After listening to the parties' arguments, the court stated that it was "going to sustain the State's motion" and "strike" or discharge M.F. The court reasoned M.F. had not been forthcoming about his criminal history in his jury questionnaire. It also stated that it had observed M.F.'s "apparent disinterest in the trial as it was going along." In this respect, the court noted that M.F. "didn't take a note from the start of the case through the end of evidence." The court also stated that "overall, if he would have been a student in a third grade class, you would have thought that he didn't pay attention to anything that had gone on that particular hour." The court also referred to M.F.'s initial reluctance to serve as a juror.

Huff argued that before the court could discharge M.F., it was "incumbent upon the court to question him." However, the court determined that it had sufficient good cause to discharge M.F. and chose not to examine him.

The next day, prior to bringing the jury into the courtroom, the court heard argument on Huff's motion to vacate its ruling to strike M.F. Huff alternatively moved to "strike" three additional jurors and presented exhibits, including criminal histories and jury questionnaires, which he argued showed that the three had also been dishonest in their questionnaire responses regarding their criminal histories. The court overruled Huff's motions. The court thereafter called M.F. into the courtroom without again examining him and without the other jurors present and informed him that the court had "made a determination to discharge [him] as a juror."

Huff moved for a mistrial based in part on the court's discharge of M.F. The court overruled Huff's motion for mistrial, and the alternate juror was placed on the jury. The jury returned a guilty verdict against Huff, and the court sentenced him to 12 to 20 years' imprisonment.

Huff appealed, arguing the district court erred in granting the State's motion to "strike" M.F. from the jury and in denying his motion for mistrial. The Court of Appeals rejected Huff's claims and affirmed his conviction and sentence.[3]

In doing so, the Court of Appeals held that the district court actually discharged M.F., and did not "strike" him. It reasoned that pursuant to Neb. Rev. Stat. §§ 29-2006 and 29-2007 (Reissue 2016), a "strike" or challenge to a potential juror for cause "shall be made before the jury is sworn, and not afterward," and thus it was imprecise to say M.F. was struck.[4] The court determined that the district court's dismissal of M.F. was more properly characterized as a "discharge" under Neb. Rev. Stat. § 29-2004(2) (Reissue 2016). Section 29-2004(2) refers to the discharge of a juror who has already been seated and provides for replacing a juror who is discharged during trial with an alternate juror.

Huff argued the State waived its challenge to M.F. based on the jury questionnaire by not raising the issue earlier and that in any event, the district court erred when it discharged M.F. without questioning him to ascertain whether he was subject to discharge for cause. Huff relied, in part, on *State v. Myers*,[5] in which we held that a party who fails to challenge a juror for cause waives any objection to the juror's selection and that if grounds for a challenge for cause arise out of matters occurring after the jury is sworn, "it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause."

The Court of Appeals rejected Huff's arguments, reasoning that because § 29-2004(2) applied, rather than § 29-2006, "the State's objection to M.F. as a juror was not waived and the duty to question M.F. prior to discharging him from the

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[3] *Huff, supra* note 1.

[4] *Id.* at 555, 891 N.W.2d at 714.

[5] *State v. Myers*, 190 Neb. 466, 472, 209 N.W.2d 345, 349 (1973).

jury did not arise."[6] The Court of Appeals concluded that the district court did not abuse its discretion when it granted the State's motion to discharge M.F.

The Court of Appeals determined that the same reasoning supported a conclusion that the district court did not abuse its discretion when it overruled Huff's motion for mistrial. We granted Huff's petition for further review.

II. ASSIGNMENTS OF ERROR

Huff claims, summarized and restated, that the district court abused its discretion in granting the State's motion to discharge and denying Huff's motion for mistrial.

III. STANDARD OF REVIEW

[1] The retention or rejection of a juror is a matter of discretion for the trial court.[7] This rule applies both to the issue of whether a venireperson should be removed for cause and to the situation involving the retention of a juror after the commencement of trial.[8] Thus, the standard of review in a case involving discharge of a juror is whether the trial court abused its discretion.[9]

[2] Decisions regarding motions for mistrial are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.[10]

IV. ANALYSIS

1. Removal of Jurors

Nebraska statutes provide for the removal of jurors both before and after the jury is sworn. This case illustrates the difference between disqualifying a juror for cause before the juror

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[6] *Huff, supra* note 1, 24 Neb. App. at 557, 891 N.W.2d at 714.

[7] *State v. Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009).

[8] *Id.*

[9] See *State v. Krutilek*, 254 Neb. 11, 573 N.W.2d 771 (1998).

[10] *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016).

has been sworn (pursuant to § 29-2006) and discharging a juror after he or she has been sworn (pursuant to § 29-2004(2)). We agree with the Court of Appeals that in this case, discharge under § 29-2004(2) is the proper analysis. To the extent the district court and the parties referred to "striking" M.F. from the jury panel, the terminology was imprecise.

Section 29-2004(2) provides that "before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror . . . to take his or her place in the jury box." This statute does not specify the reasons for which a regular juror might be discharged or that the reason for the discharge must be based solely on one of the causes set forth in § 29-2006.[11]

2. Discharge of M.F. From Jury Panel

[3] Where the jury misconduct in a criminal case involves juror behavior only, the burden to establish prejudice rests on the party claiming the misconduct.[12] Because the State sought the discharge of M.F., it had the burden to show that M.F. was biased, engaged in misconduct, or was otherwise unable to continue to serve.

(a) Waiver

[4] Generally, a party who fails to challenge the jurors for disqualification and passes the jurors for cause waives any objection to their selection.[13] For example, in *Turley v. State*,[14] it was discovered after the jury returned a verdict that one of the jurors had a felony conviction. Under those circumstances, we held that the issue of the juror's qualification to serve was waived, stating:

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[11] See *Hilding, supra* note 7.

[12] *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[13] *Myers, supra* note 5.

[14] *Turley v. State*, 74 Neb. 471, 104 N.W. 934 (1905).

> Great latitude is allowed the defendant upon the *voir dire* examination to enable him to ascertain whether there is any ground for objecting to the juror. He cannot waive an objection of this nature, and, after taking his chances of an acquittal before the jury selected, insist upon an objection which he should have raised upon the impaneling of the jury, and, if he makes no effort to ascertain whether a juror offered is qualified to sit, he must be held to have waived the objection.[15]

[5,6] Later, in *State v. Harris*,[16] we summarized the *Turley* holding to be "when a defendant, through diligence, is able to discover a reason to challenge a juror, the objection to the juror must be made at the time of voir dire." We went on to explain that "*Turley* does not stand for the proposition that an objection to a juror is waived when the juror has concealed information and the defendant through diligence cannot discover the information before trial."[17]

In *Harris*, upon examination, it was learned that a juror intentionally failed to disclose she had been convicted of a crime that would have disqualified her from serving as a juror under Neb. Rev. Stat. § 25-1601(1) (Reissue 2016) and deemed her incompetent to be a juror under Neb. Rev. Stat. § 29-112 (Reissue 2016). The juror concealed information during voir dire, and it was ultimately determined that she deliberately lied with the motivation of being placed on the jury.[18] The juror's criminal record was discovered after the jury returned a verdict, and the discovery prompted the defendant to move for a new trial on the basis of juror misconduct. Under those circumstances, we held that a defendant does not waive an objection to a juror when the juror has

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[15] *Id.* at 476, 104 N.W. at 936.

[16] *State v. Harris*, 264 Neb. 856, 861, 652 N.W.2d 585, 589 (2002).

[17] *Id.*

[18] See *Harris, supra* note 16.

concealed the information that is the subject of the objection.[19] We noted the juror had actively concealed her criminal history on her juror questionnaire and that nothing in the record suggested the defendant could have discovered the concealment before trial. We reasoned:

> Attorneys must be able to rely on a statutory scheme intended to prevent disqualified jurors from ever being placed in the jury pool. Attorneys should not be required to ask again at voir dire about past convictions that would disqualify a juror when jurors have already filled out forms addressing the issue.[20]

In the instant case, after the jury had been sworn in, M.F. advised the court that he was reluctant to serve, based upon his upbringing and his background. The court then questioned M.F. and determined that M.F. could be fair and impartial. After the close of evidence, the court, sua sponte, raised additional concerns about M.F. As a result, the State moved to discharge M.F. The court held a hearing on the motion, and the State offered M.F.'s criminal record, which showed numerous convictions for driving under suspension, assaults, and other misdemeanor law violations. At a later hearing, the court received into evidence M.F.'s juror qualification form, which showed his answers concerning his criminal record were inaccurate.

In both *Turley* and *Harris*, the question of waiver was raised after the juries rendered their verdicts. However, in this matter, M.F. was discharged prior to the case being submitted to the jury. The issue of M.F.'s suitability was raised by the trial court itself. As a result, the issue of whether the State waived an objection to M.F.'s concealment of his criminal record need not be considered by us. We also need not consider the correctness of the Court of Appeals' analysis of the issue of waiver after

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[19] *Id.*

[20] *Id.* at 862, 652 N.W.2d at 590.

the jury was sworn in. Instead, we conclude that under these facts and our jurisprudence, the district court had the discretion to discharge M.F.

(b) Questioning of M.F.

[7] The fact that M.F. failed to disclose his criminal history does not per se justify his disqualification from the jury. "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."[21] In *Harris*, we declined to adopt an automatic presumed-bias rule when the juror concealed information. We upheld the discharge, however, because upon questioning, the juror admitted she had concealed information for the purpose of being placed on the jury.

In the instant case, there is no explanation in the record as to why M.F. provided inaccurate information on his jury questionnaire. This is at least in part because M.F. was never questioned on this matter.

The best practice in such a circumstance is to question the juror. In *State v. Myers*, a question of prejudice of the jurors in one case was presented because they had earlier sat as jurors in a related case.[22] We stated that if the court is informed

> of matters which might reasonably constitute grounds for a challenge for cause of one or more jurors, which grounds arose out of matters occurring after the jury was sworn, it is the duty of the court to hear evidence and examine the jurors and determine whether any juror might be subject to disqualification for cause. A failure to inquire under such circumstances constitutes such fundamental unfairness as to jeopardize the constitutional guaranty of the right to trial by an impartial jury. Any

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[21] See *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S. Ct. 845, 78 L. Ed. 2d 663 (1984).

[22] See *Myers, supra* note 5.

lowering of those constitutional standards strikes at the very heart of the jury system.[23]

[8] However, our jurisprudence shows that where a juror indicates that he or she is physically incapable of proceeding, such as in the case of the juror's illness or incapacity, examination of the juror before discharging him or her is not required and may not be feasible.[24]

In the instant case, the district court did conduct a hearing on the issue of whether M.F. should be disqualified and did receive evidence. It did not, however, question M.F. directly as to why he failed to disclose his criminal history. If M.F.'s failure to disclose his criminal record had been the sole basis for discharge, it would have been difficult for this court to review the trial court's decision to discharge M.F. However, because the record demonstrates there were various reasons for the discharge, we consider the lack of disclosure simply a factor in the overall exercise of the trial court's discretion.

(c) M.F.'s Inattentiveness During Trial

[9] The district court also based its decision to discharge M.F. on his inattentiveness. Whether a juror paid attention to the trial in order to intelligently comprehend the proceeding is generally left to the discretion of the trial judge.[25] Here, the court noted on the record that it had been observing M.F. and was concerned he was not paying attention and seemed disinterested in the trial. It stated that M.F. had not taken any notes and compared his attention span to that of a third grade student.

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[23] *Id.* at 472, 209 N.W.2d at 349. See, also, *State v. Robinson*, 198 Neb. 785, 255 N.W.2d 835 (1977).

[24] See *Hilding, supra* note 7.

[25] See *Braunie v. State*, 105 Neb. 355, 180 N.W. 567 (1920).

This court and other courts have upheld discharge based on similar grounds. In *State v. Robinson*,[26] the court gave a general admonishment to the entire jury after one juror appeared to have been sleeping during the proceedings. After the admonishment, the court noted, outside the presence of the jury, that the juror had again been sleeping during a witness' testimony. The court removed the juror and sat the alternate juror.

In *State v. Jorden*,[27] the Washington Court of Appeals found that removing a juror on the ground of inattentiveness during trial was not an abuse of the trial court's discretion. The record showed that no single incident led to the juror's discharge and that the trial court "documented the juror's stages of inattentiveness, ranging from having her eyes closed to an appearance of dozing."[28] The record also documented the specific trial testimony during which the juror was inattentive.

In *U.S. v. Canales*,[29] the Second Circuit discharged a juror for sleeping. The record demonstrated that "over the course of two days, the able district judge, his law clerk, government counsel, and [the defendant's] counsel all witnessed the discharged juror repeatedly closing his eyes, tilting his head backward during testimony, and otherwise giving signs of being asleep."[30]

In the matter before us, the record is not specific as to when and how M.F.'s inattentiveness occurred, aside from the observation that he took no notes. Greater specificity would aid the appellate court's review of the trial court's ruling. Nevertheless, the trial judge made it clear that he had significant concerns about whether M.F. was performing his duty as a juror, and we consider those findings as a factor in

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[26] *State v. Robinson*, 272 Neb. 582, 724 N.W.2d 35 (2006).

[27] *State v. Jorden*, 103 Wash. App. 221, 11 P.3d 866 (2000).

[28] *Id.* at 226 n.5, 11 P.3d at 869 n.5.

[29] *U.S. v. Canales*, 459 Fed. Appx. 55 (2d Cir. 2012).

[30] *Id.* at 57.

determining whether the court abused its discretion in discharging M.F.

(d) Totality of Circumstances

[10,11] A trial court's decision to remove a juror and substitute an alternate is reviewed for an abuse of discretion; the court's decision is an abuse of discretion if the decision results in bias or prejudice to the defendant, and prejudice includes the discharge of a juror without factual support or for a legally irrelevant reason.[31]

Based on the totality of the circumstances shown in the record, the district court did not abuse its discretion in discharging M.F. The record specifically shows: (1) M.F., upon his own volition and after being sworn as a juror, advised the court that he did not think he was suitable for jury service; (2) during trial, the court observed M.F. to be inattentive and uninterested; and (3) M.F. failed to disclose the true nature of his criminal record, which included multiple convictions for crimes other than traffic offenses. As a result, the district court did not abuse its discretion when it discharged M.F.

3. Huff's Motion to Declare Mistrial

Because the district court did not abuse its discretion in discharging M.F., it also did not abuse its discretion when it denied Huff's motion for mistrial based on the same events.

V. CONCLUSION

Although our reasoning differs from that of the Court of Appeals, for the foregoing reasons, we conclude that the Court of Appeals did not err when it affirmed the judgment of the district court.

Affirmed.

Wright, J., not participating in the decision.

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[31] See, e.g., *U.S. v. Ebron*, 683 F.3d 105 (5th Cir. 2012); *U.S. v. De La Vega*, 913 F.2d 861 (11th Cir. 1990); *United States v. Fajardo*, 787 F.2d 1523 (11th Cir. 1986).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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John D. Walters, appellant, v. Melanie Griffith Sporer and Jay A. Sporer, Trustees of the Revocable Inter Vivos Trust of Melanie Griffith dated December 5, 2000, and Douglas M. Lau and Debra L. Lau, husband and wife, appellees.

905 N.W.2d 70

Filed December 29, 2017. No. S-16-623.

1. **Specific Performance: Equity: Appeal and Error.** An action for specific performance sounds in equity, and on appeal, 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 from the conclusion reached by the trial court.
2. **Deeds.** The construction of language in a deed is a question of law.
3. **Statutes.** Statutory interpretation presents a question of law.
4. **Appeal and Error.** On a question of law, an appellate court reaches a conclusion independently of the court below.
5. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
6. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
7. **Property: Options to Buy or Sell: Words and Phrases.** Generally, a right of first refusal, or a preemptive right, is a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer; essentially a dormant option, a right of first refusal is merely contingent until the condition

precedent is met, at which point the preemptive right ripens into a full option.

8. **Property: Options to Buy or Sell.** While a right of first refusal has no binding effect before it has ripened, upon doing so, it legally constrains an owner's right to sell his property by compelling him to offer it first to the party who holds the right of first refusal.
9. **Options to Buy or Sell: Specific Performance: Proof.** A right of first refusal may be enforced by specific performance where it can be proved that the condition triggering the right has occurred and the option holder was ready, able, and willing to buy during the period.
10. **Property: Options to Buy or Sell.** A right of first refusal is a nonvested property interest.
11. **Property: Conveyances: Words and Phrases.** The purpose of a reservation is to reserve to the grantor something new out of that which is conveyed and which did not exist before as an independent right.
12. ____: ____: ____. A reservation is always something taken back out of that which is demised; accordingly, a reservation is a regranting of an interest in the property from the grantee to the grantor.
13. ____: ____: ____. Whether a provision is a reservation or an exception does not depend upon the use of a particular word, but upon the character and effect of the provision itself.
14. **Deeds.** The grantor of a deed may reserve any nonpossessory interest in the land that he could not have held separate from his ownership interest.
15. **Property: Conveyances: Fraud.** A reservation is subject to the statute of frauds.
16. **Deeds: Parties.** The general rule is that the grantee of a deed accepted by him is a party to the deed, even though he does not sign it, and that he is concluded by recitals in the deed and by reservations contained therein in favor of the grantor.
17. **Fraud: Equity.** The statute of frauds is based on principles of equity, in particular, recognition that the purpose of the statute of frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield.
18. **Deeds.** The acceptance of a deed operates to satisfy the requirement, under Neb. Rev. Stat. § 36-103 (Reissue 2016), that a contract creating an interest in land be signed by the party to be charged therewith.
19. **Deeds: Fraud.** In the absence of fraud, one who fails to read a deed cannot avoid the effect of accepting it.
20. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
21. ____. 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 Hitchcock County: David Urbom, Judge. Reversed and remanded for further proceedings.

George G. Vinton for appellant.

John D. Stalnaker, of Stalnaker, Becker & Buresh, P.C., for appellees Melanie Griffith Sporer and Jay A. Sporer.

Randy C. Fair, of Dudden & Fair, P.C., L.L.O., for appellees Douglas M. Lau and Debra L. Lau.

Wright, Miller-Lerman, Cassel, Kelch, and Funke, JJ.

Funke, J.

This is an action by appellant John D. Walters (John) to enforce a right of first refusal set forth in a 1998 warranty deed, by which he and his then-spouse (the Walterses) conveyed real property to appellees Douglas M. Lau and Debra L. Lau. The Laus later sold the property to appellees Jay A. Sporer and Melanie Griffith Sporer by a warranty deed, in 2013, without giving John notice of the Sporers' offer.

The court granted summary judgment for the Laus and the Sporers against John because it ruled that the language in the deed did not satisfy the statute of frauds, Neb. Rev. Stat. § 36-105 (Reissue 2016), and there was no other written agreement signed by the Laus. We hold that a right of first refusal in a deed is an enforceable agreement under the statute of frauds upon the acceptance of the deed. Therefore, we reverse the judgment and remand the cause for further proceedings consistent with this opinion.

I. BACKGROUND

In 1998, the Laus began looking for a wooded acreage to establish a home. Eventually, the Laus entered into negotiations with John to purchase approximately 8 acres of land and for the Walterses to finance the purchase. Subsequently, John and the Laus met with an attorney, chosen by John, to draft the sale documents.

John testified that the attorney represented both him and the Laus because he never spoke with the attorney alone, only with the Laus. The Laus stated that they agreed to use John's attorney because Debra Lau knew him but that the attorney did not represent them. The attorney testified that John had been a client of his prior to the transaction, and he stated that he had no documents indicating that the Laus were his clients or that he jointly represented those parties.

John stated that he and the Laus met with the attorney three times: The first time, the attorney gave them general instructions; the second time, they discussed the terms; and the third time was the closing.

In addition, John stated that he and the Laus had discussed and orally agreed to the right of first refusal before meeting with the attorney and that it was brought up at the second meeting with the attorney. John testified that he remembered asking at the meeting if they needed the right of first refusal in a separate document but that the attorney said it could just be included in the deed.

John stated that he wanted the right of first refusal for several reasons, including the following: He was not trying to sell the property at that time, but was willing to sell it to the Laus because they were friends; he could have extended a pivot on his abutting property to the east to irrigate a portion of the land; he had an oil well abutting the property; and there was a road on the land that he used to access his adjacent land. He testified that he would not have sold the property without the right of first refusal.

Debra Lau also believed the parties met three times. She stated she recalled that during the first two meetings, the discussion included the price per acre, the interest rate for the deed of trust, how payments would be made, an option for the Laus to purchase an additional 5.7 acres, and the paperwork needed for the sale. She admitted that it would be difficult to remember everything from the meetings, however. She stated that during closing, she read only the documents that she signed.

Douglas Lau remembered the Laus' having met with the attorney only once before closing. He stated that they told the attorney everything they wanted at the first meeting. He said that the Laus had few requests and accepted John's first offer for price because they needed the land and were not in a position to barter. He testified that he did not remember discussing a right of first refusal with John. However, he testified that he would have had no objection to granting John a right of first refusal.

The Laus both testified that they believed paragraph 11 of the deed of trust was a right of first refusal and that it was the exclusive statement on the issue. Paragraph 11 of the deed of trust effectively contains a "due on sale" clause: "Should Trustors desire to sell or encumber the subject premises or any part thereof, they shall forthwith obtain the consent of Beneficiary to such sale or encumbrance while any sums remain due on the Note secured by this Trust Deed." If the Laus violated this provision, the Walterses had the right to demand immediate payment of the balance owed and pursue any remedies provided under the deed.

The Laus both stated that they believed their right of first refusal obligation ended once the deed of trust was paid. Debra Lau also stated that this was discussed at the second meeting with the attorney and that she remembered saying that as long as they owed John money on the property, it was not an unreasonable request.

The attorney stated that he did meet with the parties and had discussions with them but that he had no recollection of the specific contents of any conversations he had with the Laus, including whether or not he discussed the right of first refusal with them. He believed that he purposefully included the right of first refusal in the deed, because it was the only time he could recall including such a right in a deed. The attorney also testified that it would have been routine for him to discuss all of the documents in a real estate transaction with the parties, as well as any nonstandard provisions. He believed the absence of a separate document for the right

of first refusal was probably a result of the parties' desire to save expenses.

On September 15, 1998, the Walterses conveyed the 8-acre tract of land to the Laus by a joint tenancy warranty deed. At closing, the parties also executed a promissory note and trust deed for the Walterses to finance the Laus purchase of the property; a grant of a right of use, providing the Laus an easement over other property owned by the Walterses for ingress and egress; an option contract for a 5.7-acre section of land, which was surrounded on three sides by the 8-acre section the Laus had purchased; and other documents related to the transaction. John testified that the Laus also granted him an oral easement to use their driveway to access his adjacent land to the east.

The warranty deed included a reservation of mineral rights, as well as, the right of first refusal. In regard to the right of first refusal, the deed contained the following provision: "No sale of the above-described premises shall be consummated without giving at least 30 days written notice of the terms to Grantor. Grantor shall have the right to buy the lot on the same terms."

The day after closing, Debra Lau, at the attorney's direction, went to the courthouse to sign the "Form 521" "Real Estate Transfer Statement." A Form 521 transfer statement sets forth information regarding the parties to the transaction, the type of property transferred, and the consideration paid.[1] Nebraska law requires that a deed will not be recorded unless the transfer statement is signed by the grantee and filed with the deed.[2]

Debra Lau testified that she was not sure if the attorney told her why she needed to sign the transfer statement but that he might have said it was to get the deed recorded. She also testified that she did not recall discussing the form at closing.

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[1] See Neb. Rev. Stat. § 76-214(1) (Reissue 1996).

[2] *Id.*

The attorney sent the Laus and the Walterses letters, dated 3 days after the closing, in which he enclosed all of the documents involved in the transaction—including copies of the joint tenancy warranty deed. He could not recall ever hearing from the Laus again after sending the letters.

Douglas Lau stated that he read the deed when he received it in the mail a couple of weeks after closing. He stated that he believed the right of first refusal in the warranty deed was between the Walterses and had nothing to do with the Laus. He explained that he believed it was an attempt by John to protect himself in future divorce proceedings. He testified that this was his own belief and not based on any representations made by John.

Debra Lau testified that she remembered receiving the documents in the mail after closing but did not feel the need to read any of them because she had just signed them. She stated that she did not read the deed until she received notice of this litigation.

In 2003, the Laus exercised their option to purchase the 5.7-acre tract, which John conveyed to them by a joint tenancy warranty deed. In 2007, the Laus finished paying John on the promissory note, and, upon their request, the Walterses executed a deed of reconveyance to them.

Around 2013, the Laus decided to sell the approximately 13-acre tract of land with their trailer home. In order to do so, Debra Lau contacted a real estate agent and showed him the Laus' transaction documents for the property, including the warranty deed.

When the Laus listed their property, they did not inform the Walterses, but their agent told them that he would mention the listing to John. John testified that the agent told him that the Laus had listed the property and their trailer home for $75,000. John told the agent that he was interested in the land, but not the trailer home. Later, the agent told John that the Laus might be interested in selling just the property. On both occasions, John told the agent to keep him informed but

did not mention his right of first refusal. John said he did not call the Laus about the property listing because they were not speaking.

The Sporers owned an adjacent acreage west of the Laus' property, and Douglas Lau called Jay Sporer to see if he was interested in purchasing the Laus' property. Douglas Lau did not mention the Walterses' right of first refusal. The Laus entered a purchase agreement with Jay Sporer but neither the purchase agreement nor the Laus' affidavit regarding debts, liens, and adverse claims to the property mentioned the Walterses' right of first refusal. In 2013, the Laus conveyed the property to the Sporers, as trustees of Melanie Griffith's revocable inter vivos trust, by warranty deed, which was recorded that year.

In 2014, John's then-spouse assigned her entire interest in the right of first refusal to John, which he recorded.

John filed suit in February 2014, alleging that he had reserved a right of first refusal in the warranty deed. He claimed that each acre of land conveyed from the Laus to the Sporers is of equal value; accordingly, because the total price of the approximately 13 acres was about $27,000, he valued the 8 acres of land from the 1998 transaction at $16,615.36. He prayed for an order that (1) required the Sporers to convey the property to him after he paid them that amount and (2) quieted title to the property in him.

In their amended answer, the Sporers denied that (1) the warranty deed reflected the Laus' agreement with John, (2) the Laus had agreed to grant the Walterses an indefinite and unlimited right of first refusal, (3) John had any right of first refusal, (4) the Laus were required to give John notice of the 2013 sale to the Sporers, and (5) the 8 acres all had equal value. They alleged that the right of first refusal, to the extent it existed, had expired under the terms of the trust deed. Alternatively, they alleged that there was no meeting of the minds between the Laus and the Walterses regarding the alleged right or that a mistake had been made in drafting the

warranty deed to include this right when the parties had not agreed to it.

For an affirmative defense, the Sporers alleged that John's "[c]omplaint should be barred, in full or in part, due to its failure to comply with Neb. Rev. Stat. §76-301, *et seq.*, providing for the reimbursement of an occupant for improvements made and taxes paid." Finally, they alleged that John's complaint was barred, in whole or in part, by the doctrines of unclean hands, unjust enrichment, estoppel, waiver, or laches.

In April 2015, the Sporers filed a cross-claim against the Laus. They sought an order that the Laus had breached the 2013 warranty deed that conveyed the property to the Sporers and asked for damages, attorney fees, and costs.

In May 2015, the Laus filed an amended answer and counterclaim against John. Their amended answer is nearly identical to the Sporers' amended answer, including the Sporers' allegation regarding Neb. Rev. Stat. § 76-301 (Reissue 2009). In their counterclaim, the Laus alleged that John had commenced his action to harass them, because the parties had an ongoing boundary dispute, and that he had tortuously interfered in their business relationship with the Sporers. They requested damages, attorney fees, and costs.

In October 2015, John moved for summary judgment. The Laus filed a cross-motion for summary judgment against John and moved for summary judgment on the Sporers' cross-claim against them. The Sporers filed a cross-motion for summary judgment against John and opposed the Laus' motion for summary judgment on their cross-claim.

At the hearing on these motions, the parties agreed to submit simultaneous briefs and rebuttal briefs by specified dates. At the end of the hearing, the Sporers argued that a right of first refusal is different from reserving mineral rights in a deed because the grantor has an existing right to the minerals. They argued that a right of first refusal is a property right that the buyers must grant to the seller. For that reason, they argued

that the statute of frauds requires an agreement in writing to be enforceable.

The court found that the right of first refusal in the warranty deed was not a reservation of a right because it did not reserve to John the right to use or enjoy any portion of the property. Further, it held that the contract in the deed was void, under § 36-105, because it was not signed by the Laus. Accordingly, the court found that because there was no contract, there could be no breach. The court ruled that the Laus and the Sporers were entitled to judgment as a matter of law against John and granted their motions for summary judgment. The court denied John's motion for summary judgment.

John then appealed. The Nebraska Court of Appeals dismissed the appeal because the district court had not resolved the Laus' counterclaim against John or the Sporers' cross-claim against the Laus. On remand, John moved the court for a final order. The court concluded that the Laus' counterclaim against John should be dismissed and that the Sporers' cross-claim against the Laus was moot because of its summary judgment. John perfected a timely appeal. We removed the case to our docket on our own motion pursuant to our authority to regulate the caseloads of the Court of Appeals and this court.[3]

II. ASSIGNMENTS OF ERROR

John assigns, restated and reordered, that the court erred in (1) concluding that the right of first refusal was void under § 36-105; (2) failing to conclude that a right of first refusal is a contract that is not subject to real property statutes of frauds; (3) holding that the right of first refusal was not a reservation; (4) considering the statute of frauds defense, because it was not pled as an affirmative defense; (5) granting the Laus and the Sporers summary judgment; and (6) denying John's motion for summary judgment.

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[3] See Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

III. STANDARD OF REVIEW

[1] An action for specific performance sounds in equity, and on appeal, 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 from the conclusion reached by the trial court.[4]

[2-4] The construction of language in a deed is a question of law.[5] Statutory interpretation presents a question of law.[6] On a question of law, an appellate court reaches a conclusion independently of the court below.[7]

[5,6] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose no genuine issue regarding any material fact or the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[8] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[9]

IV. ANALYSIS

1. Right of First Refusal Between John and Laus Is Enforceable

(a) Rights of First Refusal

[7,8] Generally, a right of first refusal, or a preemptive right, "is a right to elect to take specified property at the same

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[4] *O'Connor v. Kearny Junction*, 295 Neb. 981, 893 N.W.2d 684 (2017).

[5] See *Schram Enters. v. L & H Properties*, 254 Neb. 717, 578 N.W.2d 865 (1998).

[6] *In re Estate of Fuchs*, 297 Neb. 667, 900 N.W.2d 896 (2017).

[7] *In re Interest of Becka P. et al., ante* p. 98, 902 N.W.2d 697 (2017).

[8] *Hike v. State*, 297 Neb. 212, 899 N.W.2d 614 (2017).

[9] *Id.*

price and on the same terms and conditions as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer."[10] Essentially a dormant option, a right of first refusal is merely contingent until the condition precedent is met, at which point the preemptive right ripens into a full option.[11] However, a right of first refusal may never ripen into an option if the grantor disposes of the property in a way that does not trigger the condition precedent.[12] While a right of first refusal has no binding effect before it has ripened, upon doing so, it legally constrains an owner's right to sell his property by compelling him to offer it first to the party who holds the right of first refusal.[13]

An option to purchase real estate, on the other hand, is a unilateral contract by which the owner of the property agrees with the holder of the option that he has the right to buy the property according to the terms and conditions of the option.[14] By such an agreement, the owner does not sell the land; nor does the owner at the time contract to sell.[15] The owner does, however, agree that the person to whom the option is given shall have the right, at his election or option, to demand the conveyance in the manner specified.[16] Options, however, may also be subject to a condition precedent which suspends the

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[10] 92 C.J.S. *Vendor and Purchaser* § 180 at 156-57 (2010), citing *Old Port Cove Holdings v. Condo. Ass'n*, 986 So. 2d 1279 (Fla. 2008). See, also, Jonathan F. Mitchell, Note, *Can a Right of First Refusal Be Assigned?*, 68 U. Chi. L. Rev. 985 (2001).

[11] See 92 C.J.S., *supra* note 10. See, also, *Jones v. Stahr*, 16 Neb. App. 596, 746 N.W.2d 394 (2008).

[12] See, e.g., *Park Station v. Bosse*, 378 Md. 122, 835 A.2d 646 (2003).

[13] See *Winberg v. Cimfel*, 248 Neb. 71, 532 N.W.2d 35 (1995). See, also, *Peters v. Smolian*, 49 Misc. 3d 408, 12 N.Y.S.3d 824 (2015); *Manufactured Housing Cmtys. v. State*, 142 Wash. 2d 347, 13 P.3d 183 (2000).

[14] *Winberg, supra* note 13.

[15] *Id.*

[16] *Id.*

holder's right to elect to demand conveyance until the condition has been satisfied.[17]

Options and rights of first refusal are sometimes confused but there is a clear and classic distinction: The option compels performance within the time limit specified or, if none is mentioned, then within a reasonable time, whereas the right of first refusal has no binding effect unless the offeror decides to sell.[18] Nevertheless, in differentiating between rights of first refusal and options, the word "first" has special significance: "'"[T]he limiting word 'First' indicates that there is no intention to create a power of acceptance in the promisee; instead it indicates that the promisee shall be the first party to be given such a power."'"[19]

[9] A right of first refusal may be enforced by specific performance where it can be proved that the condition triggering the right has occurred and the option holder was ready, able, and willing to buy during the period.[20]

(b) Right of First Refusal Is Nonvested Property Interest

All of the parties argue that a right of first refusal is a contract right and not an interest in real estate. John directs us to case law from Nebraska[21] and foreign jurisdictions[22] to support

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[17] See *Bauermeister v. Waste Mgmt. Co.*, 280 Neb. 1, 783 N.W.2d 594 (2010). See, also, Restatement (First) of Property § 393, comment *f.* (1944).

[18] *Winberg, supra* note 13.

[19] *Id.* at 77, 532 N.W.2d at 39, quoting *Landa v. Century 21 Simmons & Co.*, 237 Va. 374, 377 S.E.2d 416 (1989).

[20] See, *Jones, supra* note 11; *Hongsermeier v. Devall*, 16 Neb. App. 379, 744 N.W.2d 481 (2008).

[21] *Bauermeister, supra* note 17; *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978); *Jones, supra* note 11.

[22] *Peters, supra* note 13; *Old Nat'l Bank v. Arneson*, 54 Wash. App. 717, 776 P.2d 145 (1989).

his contentions that a right of first refusal creates no interest in property.

Contrary to John's assertion, neither *Schupack v. McDonald's System, Inc.*,[23] nor *Jones v. Stahr*[24] supports a finding that a right of first refusal does not create an interest in land.

In *Schupack*, we held that a right of first refusal to acquire future restaurant franchises in the Omaha, Nebraska-Council Bluffs, Iowa, area—granted to the right holder by the restaurant corporation—was intended to be personal in nature and could not be transferred or assigned without the corporation's consent, which it had not provided. Whether the right of first refusal gave the right holder an interest in any future franchises that would have allowed him to seek a remedy of specific performance was not at issue in the case, and we made no statements on the subject.[25] Instead, our decision was limited to whether the right of first refusal concerning franchise rights, not real property, was assignable.[26]

In *Jones*, the Nebraska Court of Appeals considered whether an offer to purchase property, as required by a right of first refusal, had been accepted.[27] Therese Dorenbach had granted Daniel F. Stahr and Georgia A. Stahr a subordinate right of first refusal to purchase her property in a sales agreement for adjoining property. In accordance with the agreement, Dorenbach offered the Stahrs the opportunity to purchase her land on the terms and conditions of a purchase agreement she had entered with Wesley J. Jones. The Stahrs accepted the offer but reserved the right to assign the sale contract before closing. Dorenbach rejected the Stahrs' acceptance because

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[23] *Schupack, supra* note 21.

[24] *Jones, supra* note 11.

[25] See *Schupack, supra* note 21.

[26] *Id.*

[27] *Jones, supra* note 11.

she considered the reservation of the right to assign the contract to be a material deviation from the offer, constituting a counteroffer. After the parties initiated litigation, the trial court ruled in favor of Dorenbach, reasoning that the Stahrs' acceptance was a material deviation from the offer because the right of first refusal was personal.

The Court of Appeals reversed the judgment and remanded the cause for entry of specific performance in favor of the Stahrs. It reasoned that the right of first refusal ripened into an option contract when Dorenbach accepted Jones' offer. Because the Court of Appeals determined that option contracts are assignable, it held that the Stahrs' acceptance was not a material deviation from the offer.

John relies on a portion of dicta in *Jones*[28] in which the Court of Appeals acknowledged that many courts presume rights of first refusal to be personal in nature. The appellate court stated that courts have justified such a presumption on two bases: either to avoid a conflict with the rule against perpetuities or because "*the holder of a right of first refusal holds only a general contract right to acquire a later interest in real estate should the property owner decide to sell*."[29]

These statements in *Jones* are neither those relied on by the Court of Appeals in *Jones* nor binding on our decision in the present matter.

In *Bauermeister v. Waste Mgmt. Co.*,[30] the sole issue presented was whether the common-law rule against perpetuities applied to an option subject to a condition precedent. There, family members contracted to sell land to a waste management company to be used as a landfill.[31] Under the contract, the company was to pay the sellers a monthly rent and

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[28] *Id.*

[29] *Id.* at 602, 746 N.W.2d at 399 (emphasis supplied).

[30] *Bauermeister, supra* note 17.

[31] *Id.*

royalty.[32] The contract also provided that upon the termination of the purchase agreement, the sellers had the option to repurchase the land.[33]

We held that the common-law rule against perpetuities should no longer apply to certain commercial transactions, as a matter of policy.[34] In doing so, we explicitly classified the option contract at issue as a nonvested property interest.[35] This classification was relevant because Nebraska's Uniform Statutory Rule Against Perpetuities Act[36] specifically excluded "'[a] nonvested property interest . . . arising out of a nondonative transfer'" from the rule against perpetuities.[37] We reasoned, in part, that because the option would not have been subject to the rule against perpetuities if it was made after the enactment of the Uniform Statutory Rule Against Perpetuities Act, it should also be excluded from the common-law rule.[38]

Similarly, the Court of Appeals has treated a right of first refusal as a nonvested property interest for applying the Uniform Statutory Rule Against Perpetuities Act.[39]

[10] As discussed above, there is little distinction between a right of first refusal and an option subject to a condition precedent. Accordingly, we hold that a right of first refusal is also a nonvested property interest. In doing so, we follow

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[32] *Bauermeister Deaver Ecol. v. Waste Mgmt. Co.*, 290 Neb. 899, 863 N.W.2d 131 (2015).

[33] *Bauermeister, supra* note 17.

[34] *Id.*

[35] *Id.*

[36] Neb. Rev. Stat. §§ 76-2001 through 76-2008 (Reissue 2003).

[37] *Bauermeister, supra* note 17, 280 Neb. at 7, 783 N.W.2d at 598. See § 76-2005(1).

[38] *Bauermeister, supra* note 17.

[39] *Greenhall Investments v. Wiese Dev. Corp.*, 14 Neb. App. 155, 706 N.W.2d 552 (2005).

the majority of courts in the country.[40] While John has cited precedent from foreign jurisdictions holding otherwise, we do not find their reasoning persuasive or binding.

(c) Right of First Refusal Was Reserved in Deed

John argues that reserving a right of first refusal in a deed does not bring the right within the statute of frauds because it is an interest that is not transferred. The Laus and the Sporers argue that a right of first refusal is not an "exception" because it is not a right that a grantor possesses at the time of a conveyance and that it is not a "reservation" because, as the court ruled, it does not create an easement. Additionally, the Laus and the Sporers argue that a right of first refusal is something that the grantee would have to regrant to the grantor, which would bring the creation of a right of first refusal under the real property statute of frauds.

[11,12] The purpose of a reservation is to reserve to the grantor something new out of that which is conveyed and which did not exist before as an independent right.[41] A reservation is always something taken back out of that which is demised.[42] Accordingly, a reservation, in its technical sense, is

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[40] See, e.g., *Bortolotti v. Hayden*, 449 Mass. 193, 866 N.E.2d 882 (2007); *Park Station v. Bosse*, 378 Md. 122, 835 A.2d 646 (2003), citing *Ferrero Constr. v. Dennis Rourke Corp.*, 311 Md. 560, 536 A.2d 1137 (1988); *Barnhart v. McKinney*, 235 Kan. 511, 682 P.2d 112 (1984), citing *Henderson v. Bell*, 103 Kan. 422, 173 P. 1124 (1918); *South Kitsap Family Worship Center v. Weir*, 135 Wash. App. 900, 146 P.3d 935 (2006); *In re Estate of Owen*, 855 N.E.2d 603 (Ind. App. 2006); *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (S.C. App. 1997); *Southall v. Humbert*, 454 Pa. Super. 360, 685 A.2d 574 (1996). See, also, Restatement (Third) of Property (Servitudes) § 3.3, comment *b.* (2000); 61 Am. Jur. 2d *Perpetuities, Etc*. § 61 (2012).

[41] See *Elrod v. Heirs, Devisees, etc.*, 156 Neb. 269, 55 N.W.2d 673 (1952). See, also, *Bauer v. Lancaster Cty. Sch. Dist. 001*, 243 Neb. 655, 501 N.W.2d 707 (1993).

[42] *Elrod, supra* note 41.

a regranting of an interest in the property from the grantee to the grantor.[43] On the other hand, an exception is some existing part of the estate excluded from the grant and retained by the grantor as if there had been no conveyance made by him to the grantee.[44]

[13] Whether a provision is a reservation or an exception does not depend upon the use of a particular word, but upon the character and effect of the provision itself.[45] The terms "exception" and "reservation" are frequently used synonymously, conjunctively, and interchangeably.[46] It is not necessarily conclusive, and many times not even significant, whether the word "except" or "reserve" is selected.[47] The intent is the primary matter to be considered.[48] The Legislature's intent to modify and eliminate such common-law technicalities and exactions was codified in its adoption of the Uniform Property Act, Neb. Rev. Stat. § 76-101 et seq. (Reissue 2009).[49] Specifically, § 76-106 provides that "[a]n otherwise effective reservation of property by the conveyor reserves the interest the conveyor had prior to the conveyance unless an intent to reserve a different interest is effectively manifested."[50]

In its order, the court relied on a statement in *Schaffert v. Hartman*[51] to determine that a right of first refusal is not a valid reservation because it does not create a right to use and

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[43] Restatement (First) of Property, *supra* note 17, § 473.

[44] *Elrod, supra* note 41.

[45] *Id.* See, also, 23 Am. Jur. 2d *Deeds* §§ 265 and 267 (2013).

[46] *Elrod, supra* note 41.

[47] See *id.*

[48] *Id.*

[49] *Id.*

[50] See *id.*

[51] *Schaffert v. Hartman*, 203 Neb. 271, 278 N.W.2d 343 (1979), *disapproved on other grounds, Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992).

enjoy the land. In *Schaffert*, we stated that "'a reservation, while not affecting the title to the thing granted, may reserve to the grantor the right to the use or enjoyment of a portion thereof, as an easement, the right to pass over, or the like.'"[52]

[14] However, as our opinion in *Elrod v. Heirs, Devisees, etc.*[53] makes clear, reservations may create easements but are not limited to creating interests permitting the use and enjoyment of the land. Instead, a grantor may reserve any nonpossessory interest in the land that he could not have held separate from his ownership interest.[54]

In the instant case, the deed contained the following provision: "No sale of the above-described premises shall be consummated without giving at least 30 days written notice of the terms to Grantor. Grantor shall have the right to buy the lot on the same terms."

While the provision does not contain the terms "except" or "reserve," it shows that John intended to create a right of first refusal in himself through the conveyance. Accordingly, we must give such effect to the provision, under § 76-106.

[15] John's argument that a reservation is not subject to the statute of frauds confuses the terms "exceptions" and "reservations." Only an exception is outside of the statute of frauds by causing an interest to be withheld from the conveyance. Instead, as a re-granting of an interest in land by the grantee, a reservation is subject to the statute of frauds, Neb. Rev. Stat. § 36-103 (Reissue 2016), which provides, in relevant part, the following language: "No estate or interest in land . . . shall hereafter be created, granted, assigned, surrendered, or declared, unless . . . by deed of conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same."

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[52] *Id.* at 274, 278 N.W.2d at 346, quoting *Eiseley v. Spooner*, 23 Neb. 470, 36 N.W. 659 (1888).

[53] *Elrod, supra* note 41.

[54] Restatement (First) of Property, *supra* note 17, § 473.

Here, the court applied § 36-105 instead of § 36-103. Section 36-105, in relevant part, states: "Every contract . . . for the sale of any lands, shall be void unless the contract or some note or memorandum thereof be in writing and signed by the party by whom . . . sale is to be made."

Based on our discussion above, the right of first refusal in this case does not resemble a contract for the sale of land. The right of first refusal was only a right to elect to purchase the property at the same price and on the same terms and conditions as those contained in a good faith offer that the Laus manifested a willingness to accept. Accordingly, the right of first refusal in the deed was within § 36-103, not § 36-105. Nevertheless, both statutes require a signature by the party to be charged by the writing.

(d) Laus' Acceptance of Deed Binds Them to Right of First Refusal Contained Therein

John argues that the Laus consented to the right of first refusal by their words, conduct, and acquiescence, which consent is indicated primarily by their acceptance of the deed and not seeking reformation for over 16 years. The Laus and the Sporers argue that the right of first refusal is not enforceable because they did not sign the deed or receive consideration for granting the right and never agreed orally to the right.

[16] "'The general rule is that the grantee in a deed accepted by him is a party to the deed, even though he does not sign it, and that he is concluded by recitals in the deed and by reservations contained therein in favor of the grantor.'"[55] Similarly, Corpus Juris Secundum provides the following on the effect of a grantee accepting a deed that imposes an obligation on the grantee:

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[55] *XTO Energy Inc. v. Nikolai*, 357 S.W.3d 47, 56 (Tex. App. 2011), quoting *Greene v. White*, 137 Tex. 361, 153 S.W.2d 575 (1941).

> Where a deed by which property is conveyed to the grantee, and which purports to be between the parties, is accepted by him or her, the fact that it is signed and sealed by the grantor only will not render it void for want of mutuality, but it will be construed as the deed of both parties. Thus, if the deed contains covenants or restrictions, its delivery to and acceptance by the grantee is deemed equivalent to the grantee's signature so as to the [sic] supply the mutual consent necessary to form a contract and make the covenants or restrictions enforceable.[56]

Other sources have held the same to be true regarding easements[57] and options to repurchase.[58] The enforceability of reservations and covenants included in deeds is a widely accepted and longstanding principle of law.[59] Courts have tested this principle and found it remains valid under both the doctrine of estoppel by deed[60] and the doctrine of part performance,[61]

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[56] 26A C.J.S. *Deeds* § 65 at 93-94 (2011). Accord, *Murphey v. Gray*, 84 Ariz. 299, 327 P.2d 751 (1958); *Carlson v. Libby*, 137 Conn. 362, 77 A.2d 332 (1950); *Harris & Gurganus v. Williams*, 37 N.C. App. 585, 246 S.E.2d 791 (1978); 20 Am. Jur. 2d *Covenants, Etc*. §§ 4 and 151 (2015); 9 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 60.02 n.16 (2000).

[57] See, e.g., *Chase v. Nelson*, 507 N.E.2d 640 (Ind. App. 1987). See, also, *Evans v. Board of County Com'rs*, 97 P.3d 697 (2004), *affirmed* 123 P.3d 432 (2005).

[58] See, e.g., *Scutti Enterprises v. Wackerman Guchone*, 153 A.D.2d 83, 548 N.Y.S.2d 967 (1989); *Mearida v. Murphy*, 106 Ill. App. 3d 705, 435 N.E.2d 1352, 62 Ill. Dec. 380 (1982).

[59] See *The Midland Railway Company v. Fisher*, 125 Ind. 19, 24 N.E. 756 (1890). See, also, *Employers Indemnity Corp. v. Garrett*, 327 Mo. 874, 38 S.W.2d 1049 (1931).

[60] *XTO Energy Inc., supra* note 55, citing *Greene, supra* note 55; *Mearida, supra* note 58; 28 Am. Jur. 2d *Estoppel and Waiver* §§ 15 and 18 (2011).

[61] *Scutti Enterprises, supra* note 58; *Terrell v. Messenger*, 428 So. 2d 1241 (La. App. 1983).

which is codified in Nebraska as Neb. Rev. Stat. § 36-106 (Reissue 2016).

[17] Further, this principle's utility in protecting a grantor from having a reservation invalidated under the statute of frauds is consistent with the policy of the statute of frauds. The statute of frauds "is based on principles of equity, in particular, recognition that the purpose of the Statute of Frauds is to prevent frauds, not to enable a party to perpetrate a fraud by using the statute as a sword rather than a shield."[62]

[18] We are persuaded by the great weight of authority that the acceptance of a deed operates to satisfy the requirement, under § 36-103, that the contract creating an interest in land be signed by the party to be charged therewith.

[19] Further, in the absence of fraud, one who fails to read a contract cannot avoid the effect of signing.[63] Because accepting a deed has the legal effect of signing it, this principle applies with equal force.[64] Accordingly, if a deed contains an unsatisfactory reservation, the grantee may avoid it by refusing acceptance.

Here, the Laus accepted the deed and enjoyed the benefit of it for 15 years. While they claim to have been unaware of the right of first refusal in the deed, the Laus' testimony shows that they believed that they were granting John a right of first refusal through the trust deed. Accordingly, their argument that they did not agree to such a right is more properly characterized as not agreeing to the right for an indefinite duration.

Nevertheless, the attorney testified that it would have been his course of practice to explain the documents in the

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[62] *Scutti Enterprises, supra* note 58, 153 A.D.2d at 87, 548 N.Y.S.2d at 970. See, also, *Corcoran v. Leon's, Inc.*, 126 Neb. 149, 252 N.W. 819 (1934).

[63] *Eicher v. Mid America Fin. Invest. Corp.*, 270 Neb. 370, 702 N.W.2d 792 (2005).

[64] See, *Hughes v. Pontotoc County*, 242 So. 2d 438 (Miss. 1970); *Evans, supra* note 57.

transaction to the parties and highlight the provision in the deed because it was unique. Further, John testified that it was discussed and agreed to by the Laus before and during a meeting with the attorney.

Further, it is undisputed that the Laus accepted the deed and that Debra Lau recorded it. Douglas Lau testified that he read the deed and that any confusion he had regarding the right of first refusal was not based on any misrepresentations by John. While Debra Lau claims she did not read the deed until this litigation was initiated, she cannot escape the effect of accepting it when she had ample opportunity to read the document. Accordingly, we find that the Laus in effect signed the deed and are bound by its terms.

Therefore, we hold that the reservation of the right of first refusal in the deed satisfied the statute of frauds. Consequently, the court erred in granting the Laus' and the Sporers' motions for summary judgment against John. To hold otherwise would be a misapplication of the statute of frauds by inequitably allowing the Laus to retain the benefit of the deed while escaping a clear statement of intent on its face.

[20] Regarding the argument of the Laus and the Sporers concerning consideration, the record does not show that they raised the issue of consideration before the court, and the court did not rule on the issue in its order. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.[65] Therefore, we do not consider this argument on appeal.

2. Remaining Assignments of Error and Arguments

[21] Because the right of first refusal was not voidable under the statute of frauds, we do not consider whether the statute of frauds defense was properly raised as an affirmative

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[65] *deNourie & Yost Homes v. Frost*, 295 Neb. 912, 893 N.W.2d 669 (2017).

defense. An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[66]

John also claims that the court erred in denying his motion for summary judgment. Nevertheless, we find that John is not entitled to summary judgment at this time because material issues of fact remain that have not been considered by the court. As recognized above, an appellate court will not consider an issue on appeal that was not decided by the trial court.

V. CONCLUSION

We hold that a right of first refusal may be reserved in a deed. Further, the acceptance of a deed, absent fraud, satisfies the requirements of the statute of frauds for any reservations contained therein. Accordingly, the court erred by finding that no contract binding the Laus to a right of first refusal existed and by granting summary judgment for the Laus and the Sporers, as a matter of law, against John.

Reversed and remanded for
further proceedings.

Heavican, C.J., participating on briefs.
Wright, J., not participating in the decision.
Stacy, J., not participating.

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[66] *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Kevin Royal, appellant and cross-appellee, v. Loma McKee and Edmund R. McKee, wife and husband, now deceased, et al., appellees, and Omaha Public Power District, appellee and cross-appellant.

905 N.W.2d 51

Filed December 29, 2017. No. S-16-708.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** On appeal from an equity action, an appellate court 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, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Actions: Default Judgments: Complaints: Damages: Proof.** Where a defendant is in default, the allegations of the complaint are to be taken as true against him, except allegations of value and amount of damage. Thus, if the complaint states a cause of action, the plaintiff is entitled to judgment without further proof.
5. **Easements: Adverse Possession: Notice.** Under Nebraska law, a permissive use is not adverse and cannot ripen into an easement. If a use begins as a permissive use, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.

Appeal from the District Court for Otoe County: Jeffrey J. Funke, Judge. Affirmed in part, and in part vacated.

Donald J. Pepperl, P.C., L.L.O., for appellant.

Mark C. Laughlin and Jacqueline M. DeLuca, of Fraser Stryker, P.C., L.L.O., for appellee Omaha Public Power District.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, and Kelch, JJ.

Heavican, C.J.

INTRODUCTION

Kevin Royal filed a quiet title action against his predecessors in interest and against Omaha Public Power District (OPPD) alleging fee title ownership of certain land along the railroad right-of-way passing through his property as a result of adverse possession. OPPD filed a counterclaim, alleging that it had acquired fee simple title to that same land, also under a theory of adverse possession.

The district court granted Royal's motion for entry of default as to his predecessors in interest, but following a trial, denied both Royal's and OPPD's claims of title under adverse possession. Royal appealed, and OPPD cross-appealed. We affirm in part, and in part vacate.

FACTUAL BACKGROUND

Prior Litigation

Royal filed a second amended complaint alleging that he was the owner of certain real property located in Otoe County, Nebraska. He further alleged that OPPD possessed a railroad right-of-way easement which ran through his property. Finally, Royal alleged that he obtained title of the railroad right-of-way by adverse possession and that title should be quieted in his name.

OPPD filed an answer and affirmative defenses, and a counterclaim and cross-claim. OPPD alleged that it was the owner of 100 feet on either side of the center of the rail line running through Royal's property, that OPPD acquired this land by adverse possession, and that title should be quieted in its name.

Various orders from the Otoe County District Court in this litigation predate the order at issue on appeal. In one such order, Royal had filed an action against OPPD alleging damages incurred as a result of its construction of an electricity transmission line within the railroad right-of-way. The district court held that Midland Pacific Railway Company, later Burlington Northern and Santa Fe Railway Company (BNSF), had obtained a railroad right-of-way by eminent domain in 1869 and that the railroad right-of-way had been continuously used since that time for the operation of a railroad. OPPD obtained the railroad's right-of-way from BNSF by quitclaim deed in 1998. The district court held that OPPD did not own fee title to the right-of-way, but acquired an easement in the right-of-way that "traverses across" Royal's property.

In that case, the district court held that OPPD's erection of transmission lines from Lincoln, Nebraska, to Nebraska City, Nebraska, along the railroad line was not an incidental use associated with the operation of a railroad line, but instead was a separate and distinct activity which was not part of the rights acquired through the original 1869 condemnation action.

Another order issued earlier in this litigation provided that as a result of the deeds which ultimately transferred Royal's property to him, Royal was not the titled owner of the railroad right-of-way. As such, Royal's appeal seeking damages from a board of appraisers as a result of the construction of the transmission line was dismissed.

Finally, early in the matter on appeal, an order was filed entering default against all defendants except OPPD. The district court then concluded that the "sole determination left to

be made . . . is whether either Royal or OPPD have proven by a preponderance of the evidence" that they have acquired title to the railroad right-of-way by adverse possession.

History of Ownership

The ownership at issue dates back to the condemnation action granting OPPD's predecessor in interest a railroad right-of-way easement in 1869. OPPD took possession of its predecessor's interest in 1998.

On January 4, 1930, Loma McKee and Edmund R. McKee, wife and husband, and Lois B. Nelson and Obel T. Nelson, wife and husband, conveyed a portion of the land now belonging to Royal to William E. Beecham. This conveyance specifically excluded the right-of-way. On March 11, 1944, Loma McKee (now widowed) and Lois B. Bennefield, formerly Lois B. Nelson, and her husband Benny Bennefield, conveyed the remaining portion of Royal's property to John McCarthy, again specifically excluding the railroad right-of-way. Through various deeds and conveyances from 1987 to 2012, Royal's property was conveyed to him. Those deeds and conveyances always excluded the railroad right-of-way.

As a result of the conveyances specifically excluding the railroad right-of-way, Loma McKee and Lois Bennefield continued to hold fee simple title to that portion of the subject property located within the railroad right-of-way. Any interest that Loma McKee, Lois Bennefield, or their heirs, devisees, legatees, or personal representatives may have had was extinguished by the order of default entered March 17, 2015.

Royal's Use of Property

The record shows that Royal lived in a farmhouse on the property adjacent to the right-of-way on and off from 1989 to 2012. Royal testified that in 1989, he began to assist his father and uncle in farming the property. In conjunction with the farming operation, during that period of time, parts of the right-of-way were utilized by Royal's father and uncle

for uses such as driving farm equipment in the right-of-way, planting and harvesting crops in the right-of-way, using the right-of-way to pasture and chase livestock and to drive four-wheelers, and using the right-of-way to store hay, hunt, and hike, and to access the adjacent creek. Royal's father and uncle also removed trees and brush from the right-of-way, mowed weeds in the right-of-way, and maintained the fence. Most of this was done in the outer 50 feet of the right-of-way. Royal also testified that much of this activity was done on a sporadic basis.

OPPD's Use of Property

The evidence at trial shows the railroad right-of-way had been used continuously for railroad purposes since its establishment and that OPPD had been in control of the right-of-way since 1998. The record shows that OPPD had routinely used the right-of-way and expended significant funds to maintain it. OPPD had authorized BNSF and Union Pacific to use the line, referred to as the "Arbor Line," to deliver coal to OPPD's Nebraska City powerplant and to carry other goods to consumers located along the line. The Arbor Line had also been used by OPPD to store railcars for other railroad entities.

It is not entirely clear from the record whether OPPD ran trains on the line at the time of trial. One witness, formerly employed by OPPD, testified that trains were still operated on the line at the time of his retirement in 2013. But Royal testified that he had not seen a train on the line in the 5 years prior to trial (or from approximately 2011).

An OPPD representative testified that when not using property it owns, OPPD often leased property to others, and that where leases were not in place, adjoining landowners were often permitted to use the land for farming purposes, because such use promotes goodwill and keeps the land maintained. The representative testified that he had informed Royal that OPPD owned the right-of-way (in accordance with OPPD's

erroneous belief that they had purchased the fee title and not an easement over this right-of-way) and that OPPD was aware Royal was using the right-of-way for farming purposes and had observed Royal on the land.

District Court's Decision

Following a bench trial, the district court found that neither Royal nor OPPD had established the elements of adverse possession and that thus, title could not be quieted as to either party.

ASSIGNMENTS OF ERROR

On appeal, Royal alleges 22 assignments of error, which can be restated and consolidated into 3 assignments of error: that the district court erred in (1) "not finding that since the ownership interest of the fee title holders of record [was] extinguished by its Order of March 17, 20[15], that neither . . . Royal nor . . . OPPD proved . . . that he/it was entitled to judgment quieting title in that party by reason of adverse possession," (2) making or failing to make multiple factual findings, and (3) not finding that Royal had proved his claim of adverse possession.

On cross-appeal, OPPD assigns that the district court erred in finding that OPPD did not adversely possess the real property.

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity.[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, provided that where credible evidence is in conflict in a material issue of fact, the appellate court considers and may give weight to the fact that the trial

[1] *Poullous v. Pine Crest Homes*, 293 Neb. 115, 876 N.W.2d 356 (2016).

judge heard and observed the witnesses and accepted one version of the facts rather than another.[2]

In an appeal from the entry of a default judgment, an appellate court will affirm the action of the trial court in the absence of an abuse of discretion.[3]

ANALYSIS

Both Royal's appeal and OPPD's cross-appeal raise the issue of whether either party had obtained title to the 200-foot right-of-way as a result of adverse possession.

[3] A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.[4]

Neb. Rev. Stat. § 39-1404 (Reissue 2016)

Before we turn to Royal's assignments of error, we address OPPD's contention that Royal cannot adversely possess the railroad right-of-way, because § 39-1404 prohibits such ownership. Section 39-1404 provides:

> No privilege, franchise, right, title, right of user, or other interest in or to any street, avenue, road, thoroughfare, alley or public grounds in any county, city, municipality, town, or village of this state, or in the space or region under, through or above any such street, avenue, road, thoroughfare, alley, or public grounds, shall ever arise or be created, secured, acquired, extended, enlarged or amplified by user, occupation, acquiescence, implication, or estoppel.

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[2] *Klein v. Oakland/Red Oak Holdings*, 294 Neb. 535, 883 N.W.2d 699 (2016).

[3] *State of Florida v. Countrywide Truck Ins. Agency*, 258 Neb. 113, 602 N.W.2d 432 (1999).

[4] *Klein v. Oakland/Red Oak Holdings, supra* note 2.

We generally agree with OPPD that this section prohibits land owned by a political subdivision from an ownership change as a result of, among other means, adverse possession. But even assuming that OPPD is a political subdivision for purposes of this section, we find OPPD's contention to be without merit.

The district court has already concluded that OPPD does not own the fee title to the right-of-way and owns only an easement; thus, quieting fee title in Royal would not affect OPPD's interest. And to the extent OPPD might argue that Royal seeks to convert OPPD's easement by adverse possession, we note that Royal concedes that OPPD owns such easement and does not seek to prevent OPPD's ownership of the easement. On these facts, § 39-1404 has no application.

Effect of Earlier Default

We now address Royal's first assignment of error, in which he assigns that the district court erred in "not finding that since the ownership interest of the fee title holders of record [was] extinguished by its Order of March 17, 20[15], that neither . . . Royal nor . . . OPPD proved . . . that he/it was entitled to judgment quieting title in that party by reason of adverse possession."

Royal sought to quiet title on the basis of adverse possession against both OPPD and all prior owners of the property and their heirs and devisees. It appears this was done because the district court had, in prior but related litigation, determined that the right-of-way had remained with the original owners and had not been conveyed from owner to owner when the remainder of the property was transferred. Service on those individuals was done by publication. OPPD was the only defendant to file an appearance.

As a result of the lack of appearance, Royal sought an entry of default against all parties except OPPD. Royal and OPPD stipulated that the motion should be granted. The district court accordingly signed an order stating that "[b]y failing to

answer both [Royal's] Complaint and . . . OPPD's Crossclaims, all Defendants, except . . . OPPD, have relinquished any rights they may have had to the land at issue in the above-captioned matter."

[4] The general rule is that "'where a defendant is in default, the allegations of the [complaint] are to be taken as true against him, except allegations of value and amount of damage.'"[5] Thus, if the complaint states a cause of action, the plaintiff is entitled to judgment without further proof.

But we have also held that a trial court should defer from entering a default judgment against one of multiple defendants when doing so could result in inconsistent and illogical judgments following a determination on the merits as to the defendants not in default.[6]

The facts presented by this appeal demonstrate how the entry of default judgment may lead to an inconsistent and illogical result. While the district court granted default judgment, that default judgment was insufficient to quiet title in Royal or OPPD, because it did not settle the dispute between those parties. Rather, all the entry of default judgment did was extinguish the rights of the prior landowners. And as we find in further detail below, by extinguishing the rights of the prior landowners, and then finding that neither Royal nor OPPD had established the elements of adverse possession, the 200 feet of this right-of-way are effectively owned by no one. This is an illogical result that should be avoided.

We observe that the district court did not err when it ultimately held that the entry of default did not lead to the quieting of title in Royal. However, that portion of the district court's order granting default that extinguished the rights of the prior landowners led to an illogical result and was an

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[5] *Turbines Ltd. v. Transupport, Inc.*, 285 Neb. 129, 137, 825 N.W.2d 767, 774 (2013).

[6] *State of Florida v. Countrywide Truck Ins. Agency, supra* note 3.

abuse of discretion. As such, we vacate that portion of the entry of default.

Alleged Factual Errors

In his second assignment of error, Royal alleges various factual findings as erroneous. Our standard of review is de novo on the record, and we reach a conclusion independent of the decision of the district court. As such, we will not address Royal's claims as to the district court's factual findings. There is no merit to Royal's second assignment of error.

OPPD's Claim of Adverse Possession

We next turn to OPPD's cross-appeal. In it, OPPD claims the district court erred in concluding that it had not established that it adversely possessed the right-of-way.

Our starting point is the conclusion which is the law of the case, that OPPD owns an easement over the right-of-way and not a fee simple. That easement was obtained in 1869, and a railroad was continuously operated on the land by various entities. OPPD acquired the line, known as the Arbor Line, in 1998. Since that time, OPPD authorized BNSF, Union Pacific, and other railroad companies to deliver goods along the line. OPPD also used the line to store railcars for various entities. These uses are permissive and a direct or incidental use associated with the operation of a rail line.

[5] Under Nebraska law, a permissive use is not adverse and cannot ripen into an easement.[7] If a use begins as a permissive use, it retains that character until notice that the use is claimed as a matter of right is communicated to the owner of the servient estate.[8] As such, OPPD's use of the line for railroad purposes was not hostile and therefore cannot ripen into ownership by adverse possession.

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[7] See *Fischer v. Grinsbergs*, 198 Neb. 329, 252 N.W.2d 619 (1977).

[8] *Gerberding v. Schnakenberg*, 216 Neb. 200, 343 N.W.2d 62 (1984).

The character of OPPD's use changed when the transmission line was constructed in approximately 2007. However, on these facts this use was insufficient to establish adverse possession. OPPD filed its counterclaim, asserting that it had adversely possessed the right-of-way in January 2015. This date is less than 10 years after construction of the line. As such, the 10-year time requirement for a claim of adverse possession has not been met.

The district court did not err in finding that OPPD had not established the elements of adverse possession. OPPD's argument on cross-appeal is without merit.

Royal's Claim of Adverse Possession

Having concluded that OPPD did not establish the elements of adverse possession, we turn to Royal's third assignment of error. Royal contends that the district court erred in not quieting title in the 200-foot right-of-way in his name based upon his adverse possession of that property.

In his second amended complaint, Royal sought title to the entire 200 feet of the right-of-way. The district court found that Royal had not met the elements of adverse possession and thus title could not be quieted in Royal:

> Though [Royal] and his predecessors in interest have owned the property surrounding the railroad right-of-way for more than ten years, their use of the property has been sporadic in occurrence and sporadic in location. More specifically, the majority of activities, other than farming, described by Royal have occurred randomly over a nineteen year period. Those uses, such a [sic] walking or riding four wheelers along the right-of-way or allowing hunters access to the right-of-way have occurred so rarely that the same could not be sufficient to put anyone on notice that Royal was intending to claim the right-of-way as his own property.

> Further, the evidence indicates that farming was done routinely upon portions of the right-of-way during that same 19 year period. However, the farming was being done with the tacit approval of OPPD who was holding itself out as the owner of the property. Further, though the farming was allegedly done on an annual basis, it was only done during the planting, growing and harvesting periods and not done consistently throughout each year.
>
> Lastly, the survey presented at trial merely provides a legal description for the entirety of the right-of-way and the outer fifty feet of both sides of the right-of-way. The evidence is clear that Royal has not used the entire right-of-way for his own purposes; that he has rarely used the interior 100 feet of the right-of-way; and has only used portions of the outer 50 feet of the right-of-way for his own purposes. There has not been sufficient evidence presented to adequately describe the land with enough particularity to enable this court to exact the extent of the land adversely possessed and to enter a judgment upon the description. As a result, Royal's use and maintenance of the right-of-way for his own purposes cannot be considered actual, continuous, exclusive, notorious, and adverse under a claim of ownership for the statutory period of 10 years and, therefore, his claim of adverse possession must fail under these [sic] set of facts.

We agree that there is some evidence in the record that lends support to Royal's claim of adverse possession. But applying our de novo standard of review, we must affirm the trial court's finding that Royal did not establish his claim of adverse possession as to the 200 feet of the right-of-way claimed in his amended complaint.

An expert witness for Royal who surveyed the right-of-way testified that there was evidence of farm operations, including tilled land and crop residue. But he observed the property only at the time he conducted the survey. While this testimony

supports the conclusion that some of the land had been used for farming operations, it does not support the conclusion that it was done for a continuous period of time sufficient to prove a claim of adverse possession.

Royal himself testified that there was no area in the outside 50 feet on each edge of the right-of-way that was not utilized in some manner, whether it was farmed or used for pastureland, hay land, or drainage. But Royal also acknowledged that he had not continuously lived on the property and had not continuously assisted with the farming of the property. This limits the weight of Royal's evidence on this point.

Moreover, we note that Royal's credibility was challenged by contrary statements that he made during depositions in this case. The trial court heard and observed the witness, and in finding that Royal had not established the elements of adverse possession, gave greater weight to Royal's deposition testimony.

On the record before us, giving deference to the trial court, who heard and observed the witnesses and accepted one version of the facts rather than another,[9] we find that Royal did not establish the elements of adverse possession as to the 200 feet of the railroad right-of-way and, as such, is not entitled to have title quieted in his name. Royal's final assignment of error is without merit.

CONCLUSION

The district court's order denying both Royal's and OPPD's claims for adverse possession are affirmed. The order granting default judgment to Royal and OPPD and extinguishing the property rights of the prior owners is vacated.

Affirmed in part, and in part vacated.

Wright, J., not participating in the decision.

Funke, J., not participating.

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[9] See *Klein v. Oakland/Red Oak Holdings, supra* note 2.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Francisca Rodriguez, an individual, appellant, v. Surgical Associates P.C. and Greg Fitzke, M.D., an individual, appellees.

905 N.W.2d 247

Filed January 5, 2018. No. S-16-698.

1. **Jury Instructions.** Whether a jury instruction is correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **Trial: Evidence: Appeal and Error.** A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.
5. **Judges: Words and Phrases.** A judicial abuse of discretion exists if the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
6. **Jury Instructions: Pleadings: Evidence.** A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.
7. **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.
8. **Negligence: Liability: Contractors and Subcontractors.** Generally, one who employs an independent contractor is not vicariously liable for

physical harm caused to another by the acts or omissions of the contractor or its servants. An employer's liability for the breach of a nondelegable duty, however, is an exception to this general rule.

9. **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.
10. **Negligence: Liability.** As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
11. **Negligence: Jury Instructions.** A nondelegable duty instruction is not appropriate when there are no judicial admissions or evidence that a defendant had assigned the performance of his duties to a subordinate party at the time that the alleged breach occurred.
12. **Jury Instructions: Damages: Proximate Cause: Proof.** A preexisting condition jury instruction does not permit a jury to assess damages in any amount unless the plaintiff first proves proximate cause.
13. **Juries: Verdicts: Presumptions.** When the jury returns a general verdict for one party, an appellate court presumes that the jury found for the successful party on all issues raised by that party and presented to the jury.
14. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in the appellant's initial brief.
15. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.
16. **Rules of Evidence: Expert Witnesses: Hearsay.** Under Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2016), an expert may rely on hearsay facts or data reasonably relied upon by experts in that field.
17. **Expert Witnesses: Physicians and Surgeons: Records.** A medical expert may express opinion testimony in medical matters based, in part, on reports of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession.
18. **Expert Witnesses: Records: Hearsay: Testimony.** The mere fact that an expert relied on hearsay does not transform it from inadmissible into admissible evidence. However, inadmissible evidence, upon which an expert relies, may be admitted on direct examination if it was offered not to prove the truth of the matter asserted but simply to demonstrate the basis for the expert's testimony.

Appeal from the District Court for Lancaster County: Lori A. Maret, Judge. Affirmed.

Steven H. Howard, of Dowd, Howard & Corrigan, L.L.C., for appellant.

James A. Snowden and Elizabeth Ryan Cano, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellees.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

This appeal arises from an order entered on a general jury verdict for Greg Fitzke, M.D., and Surgical Associates P.C. (collectively appellees) in a medical negligence claim. Francisca Rodriguez claimed that Fitzke was negligent in failing to timely diagnose and treat her, which resulted in her suffering additional injuries.

Rodriguez claims that the court committed reversible error in denying certain jury instructions and allowing witnesses to provide expert opinions that were not disclosed before trial. Because we do not find merit in Rodriguez' claims, we affirm.

I. BACKGROUND

1. Factual Background of Rodriguez' Hospitalization and Treatment

On April 16, 2012, Rodriguez was referred to a hospital in Lincoln, Nebraska, due to stomach pains, fever, and nausea.

Fitzke is a general surgeon and a partner in Surgical Associates who has surgical privileges at the hospital. Upon examining Rodriguez, Fitzke determined that she needed an immediate cholecystectomy, a surgical procedure to remove her gallbladder. Rodriguez' gallbladder was gangrenous and had attached to other organs around it.

While her gallbladder was being removed, it ruptured and released stones and purulent material, or pus, into Rodriguez' abdominal cavity—an unavoidable risk of the surgery. Fitzke

cleaned the abdomen and inserted a drain in Rodriguez' hepatic fossa to allow any accumulation of tissue fluids from the procedure to drain out of the body and be monitored. During or as a result of the surgery, however, Rodriguez' intestine was also perforated, a fact not known by Fitzke at the time.

Later that evening, Rodriguez appeared to be recovering well with only minor pain from the surgery. On April 17, 2012, Rodriguez began experiencing significant pain and her status changed from outpatient to inpatient. Fitzke and Raymond Taddeucci, M.D., another partner with Surgical Associates, testified that her condition was consistent with the extent of her acute cholecystitis and the known complications of the surgery.

Rodriguez' vital signs were relatively stable on April 17, 2012. But, around 11 p.m., Rodriguez' blood pressure became hypotensive, nearly to the point of being classified as shock, and her heart rate increased into tachycardia. At both 3 and 4 a.m., on April 18, Rodriguez' vitals again exhibited significant hypotension, meeting the criteria for shock, and tachycardia. Additionally, she had an elevated respiratory rate, tachypnea; elevated white blood cell count; and decreased oxygen saturation level and urinary output. She was also reported to be confused.

The surgeon on call for Surgical Associates ordered Rodriguez transferred to the intensive care unit and engaged internal medicine services for further treatment and evaluation. She also received a broad-spectrum antibiotic, in addition to the antibiotic that she was given shortly after surgery; intravenous fluids; and oxygen.

A physician's assistant stated in a 4 a.m. progress note that Rodriguez had diffuse tenderness in her abdomen. He also stated the following as potential causes for many of Rodriguez' symptoms: dehydration, blood pressure medications, and early mild sepsis—potentially resulting from the gallbladder material that spilled into her abdomen during surgery or a developing pneumonia. At about 7 a.m., an internal

medicine doctor ordered a CT scan with unspecified contrast of Rodriguez' abdomen because of her pain and hypotension. X rays performed that morning showed that there was free air in Rodriguez' abdomen, which was expected after the procedure, and new developing lobe infiltrates in the left lower lung, which suggested the development of pneumonia.

At about 8 a.m., Fitzke examined Rodriguez and reviewed her laboratory tests. He noted that her abdomen was soft, tender, and distended but that there were no signs of peritonitis. He decided not to perform exploratory surgery, and he canceled the order for a CT scan. He testified that administering intravenous fluids or oral contrast for the CT scan would have been risky because of Rodriguez' decreasing kidney function and developing pneumonia and that the CT scan was unlikely to produce useful information, based on both his physical examination of her and the proximity to surgery. Instead, he decided to continue treating Rodriguez with additional intravenous fluids and antibiotics. He stated that he discussed canceling the CT scan with the internist on duty later that morning.

Throughout the day, test results indicated that Rodriguez' condition was declining into severe sepsis. She continued to experience hypotension, tachycardia, confusion, both an elevated respiratory rate and white blood cell count, and both decreased oxygen saturation levels and urinary output. Rodriguez was also diagnosed with renal failure and exhibited results indicating that she might be suffering organ failure in her heart, brain, and liver.

Between 2 and 3 a.m., on April 19, 2012, the nurses called an internal medicine doctor because Rodriguez was in shock. The doctor placed a central venous catheter into a large vein going down toward Rodriguez' heart. In addition, he gave Rodriguez two vasopressor drugs designed to elevate the blood pressure to a safe level.

The doctor also ordered a "HIDA" scan, which tests whether the liver and biliary system are functioning normally, because bile-tinged fluids were beginning to exit from the drain in

Rodriguez' hepatic fossa. The results of the HIDA scan showed that fluid was passing from the liver to the intestine, ruling out cholangitis. However, it was otherwise equivocal regarding a leak from the biliary system, which would be treated by a nonsurgical procedure, and an intestinal leak, which is a surgical emergency requiring intervention.

When Rodriguez was returned to the intensive care unit at about 12:20 p.m., she again went into shock. Rodriguez was placed on heavy sedation, to allow an endotracheal tube to be inserted directly into the lungs, and placed on a ventilator to help oxygenate her tissues. She was administered 80 percent oxygen, which meant she was going rapidly into overt respiratory failure and clear septic shock. Beginning on the evening of April 18 and throughout April 19, 2012, the nurses also reported several times that Rodriguez' abdomen was distended.

Despite the deterioration in her condition, Rodriguez experienced slight improvement in some of her test results. Many of her issues from the previous day, however, persisted. At 12:20 p.m., Robin Allen, M.D., an internist, stated at the conclusion of her progress report: "? Need to go back to OR."

At about 1:15 p.m., Fitzke examined Rodriguez. He stated in his progress report that her abdomen was not rigid or distended. He also indicated that she might have delayed sepsis from the gross purulence released during her surgery but that there were no signs of ascending cholangitis. Further, he wrote that a CT would still be "of low yield" for identifying a bile leak. He concluded that he would follow Rodriguez' progress and that the sepsis protocol should continue to be followed.

Fitzke testified that his primary consideration at that time was that Rodriguez had sepsis, resulting from the ruptured gallbladder, and that his secondary concern was a bile duct leak. He did not consider an intestinal perforation to be existent because she was not exhibiting peritonitis or succus entericus in her drain; while Rodriguez was not necessarily getting better, factors indicated a positive response to therapy

and a potential for improvement. He discussed the factors present with Allen, another treating physician, and believed that she agreed he did not need to return Rodriguez to the operating room.

At 5 p.m. on April 19, 2012, Fitzke transferred care of Rodriguez to Taddeucci, because Fitzke had to be out of town for a medical meeting the following day. Taddeucci testified that he and Fitzke discussed Rodriguez' condition; Fitzke was not sure what was causing Rodriguez' issues, but they discussed ascending cholangitis, pneumonia, and a bile leak as potential causes.

That evening, John Duch, M.D., a nephrologist, noted that Rodriguez' abdomen was soft but distended with diminishing bowel sounds. He also wrote: "Septic shock. She is on broad-spectrum antibiotics and empiric vasoactive medications, and surgery is following." Additionally, Rodriguez began presenting a fever for the first time since her operation, and her urine output decreased again.

By the morning of April 20, 2012, the other improvements from April 19 had also reversed. Taddeucci examined Rodriguez at about 12:30 p.m. and stated that she was now experiencing peritonitis. Further, the pulmonologist and critical care doctor informed Taddeucci that they had done everything they could but that her condition was not improving. Taddeucci determined that a second surgery would be necessary to address her condition, which he performed at around 2:30 p.m.

The surgery started as an exploratory laparoscopic procedure, intended to discover possible explanations for Rodriguez' decline. During this surgery, however, Taddeucci discovered the perforation in Rodriguez' small intestine. At that point, the nature of the surgery changed to an anastomosis procedure, which is an operation to remove a section of the intestine. Taddeucci also extracted about two quarts of bilious fluid, which had leaked from the intestine into Rodriguez' abdominal cavity. Rodriguez tolerated the procedure well, and there were no complications.

Ultimately, Rodriguez had eight additional operations during the subsequent 1½ months and remained hospitalized until July, with numerous complications. She had her final operation in February 2013, which was a skin graft to heal a large open wound on her abdomen that had persisted since her release. Rodriguez ultimately recovered with no permanent organ injuries.

2. Expert Opinions

At trial, Rodriguez called one surgical expert and one critical care physician. Each testified regarding his opinion of the care Fitzke provided to Rodriguez.

The surgical expert testified that Fitzke breached the standard of care in three instances: (1) by failing to follow the three-step protocol for treating septic shock, (2) by failing to create and follow a reasonable surgical differential diagnosis, and (3) by canceling the CT scan that had been ordered for Rodriguez on April 18, 2012. The critical care physician also testified that Fitzke's canceling the CT scan and failing to timely treat the source of Rodriguez' infections were a breach of the standard of care. As a result of these breaches, each testified that Rodriguez' corrective surgery was delayed by 2 days, occurring on April 20 instead of April 18. The critical care physician also provided testimony concerning the injuries that resulted from the delay.

Appellees called two expert surgical witnesses. They testified that canceling the CT scan was reasonable based on the circumstances. Additionally, they stated that Fitzke had complied with all reasonable standards of care during the postoperation period and that Fitzke made the correct decision by not sending Rodriguez to surgery before April 20, 2012, given the information available at that time.

3. Procedural History

Rodriguez filed her complaint in August 2013, and the matter proceeded to a jury trial in April 2016. The following allegations of negligence against Fitzke were submitted to the

jury: (1) failing to adequately assess Rodriguez following the April 16, 2012, surgery; (2) canceling an April 18 CT scan; (3) failing to order a CT scan; (4) failing to perform surgery on April 18; and (5) failing to perform surgery on April 19.

During deliberations, the jury submitted a question to the court regarding Duch's note on April 19, 2012. The question and answer by the court are as follows:

> Can we have clarification on Dr. Duch[']s note, Exhibit 56, p: 17:
>
> Assessment & Plan:
>
> #4: Septic Shock — "surgery is following"
>
> Does this mean that a surgical operation is expected to occur, or that the surgical team will be following up?
>
> Response:
>
> You must base your verdict only on the evidence presented to you during the trial and the instructions of law I have given you.

The jury returned a general verdict for appellees. Rodriguez filed a motion for new trial, which was overruled. Rodriguez then perfected a timely appeal. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.[1]

II. ASSIGNMENTS OF ERROR

Rodriguez assigns, restated and reordered, that the court erred in (1) failing to give the requested jury instruction regarding Fitzke's liability for the negligence of his surgical team; (2) failing to give the requested jury instruction regarding the aggravation of her preexisting condition; (3) allowing appellees' expert, Taddeucci, to give expert testimony on issues not previously disclosed; and (4) permitting Fitzke to quote a nonexpert and nontestifying treating physician regarding the standard of care for his postoperative treatment of Rodriguez.

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[1] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

III. STANDARD OF REVIEW

[1,2] Whether a jury instruction is correct is a question of law.[2] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[3]

[3,4] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by such rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.[4] A trial court has the discretion to determine the relevancy and admissibility of evidence, and such determinations will not be disturbed on appeal unless they constitute an abuse of that discretion.[5]

[5] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[6]

IV. ANALYSIS

1. Trial Court Did Not Err in Rejecting Rodriguez' Requested Jury Instructions

[6] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.[7] A litigant is entitled to have the jury instructed upon only those theories of the case which are presented by the pleadings and which are supported by competent evidence.[8]

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[2] See *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[3] *Id.*

[4] *Id.*

[5] *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 900 N.W.2d 732 (2017), *modified on denial of rehearing* 297 Neb. 568, 902 N.W.2d 98.

[6] *Armstrong, supra* note 2.

[7] *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[8] *Armstrong, supra* note 2.

[7] 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.[9] However, 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.[10]

(a) Rodriguez Was Not Entitled to Have Nondelegable Duty Language Included in Jury Instructions

Rodriguez contends that the court erred by not including nondelegable duty of care language in jury instruction No. 2. She argues that experts on both sides testified that whether Rodriguez was returned to surgery was ultimately Fitzke's decision, as her attending surgeon. Additionally, she argues that she was prejudiced by the potential for jurors to believe that other doctors were negligent in not returning her to surgery and cites the jury's question about Duch's note as evidence of the confusion.

Appellees contend that the nondelegable duty doctrine is not applicable here, because there was no allegation of a negligent error or omission by a person other than Fitzke. They also argue that Rodriguez was not prejudiced, because there was no attempt to shift the blame to a nonparty and the court gave another instruction that Fitzke could still be liable even if another individual was also negligent.

[8] Generally, one who employs an independent contractor is not vicariously liable for physical harm caused to another by the acts or omissions of the contractor or its servants.[11] This is

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[9] *Id.*

[10] *Id.*

[11] See *Gaytan v. Wal-Mart*, 289 Neb. 49, 853 N.W.2d 181 (2014).

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.[12] An employer's liability for the breach of a nondelegable duty, however, is an exception to this general rule.[13]

[9,10] 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] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.[15] Thus, the person owing a nondelegable duty is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures.[16]

Whether a duty is nondelegable is a question of law.[17] There is no set formula for determining when a duty is nondelegable.[18] "'Indeed, whether a particular duty is properly categorized as "nondelegable" necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations.'"[19] In a given case, the policy question facing a court is whether, on the facts presented, the public interest warrants imposition upon a person who has delegated a task the duty to guard against

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[12] *Id.*

[13] *Eastlick v. Lueder Constr. Co.*, 274 Neb. 467, 741 N.W.2d 628 (2007). Accord *Gaytan, supra* note 11.

[14] *Gaytan, supra* note 11.

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

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* at 363, 656 N.W.2d at 920.

risks implicit in the performance of the task.[20] Courts have often deemed a duty to be nondelegable when the responsibility is so important to the community that the employer should not be permitted to transfer it to another.[21]

In *Long v. Hacker*,[22] we held that a head surgeon is ultimately liable for the negligent acts or omissions of the individuals assisting him or her in surgery.[23] However, we have also held that surgeons are not liable for the failure of hospital employees to execute reasonable instructions left for the treatment of the patient.[24] We have not before considered whether an attending surgeon has a nondelegable duty to diagnose and treat a patient by returning the patient to surgery when necessitated by his or her condition.

In *Morgan v. Mysore*,[25] the plaintiff alleged that the defendant, the internist in charge of the patient's care, was negligent in failing to make a timely diagnosis and treat the patient appropriately. The trial court rejected the plaintiff's requested jury instruction that the defendant had a nondelegable duty "'to be aware of all reasonably available medical information significant to the health of his patient during the time that he is providing medical care to his patient.'"[26] The Court of Appeals affirmed the lower court's decision, because the plaintiff "did not present evidence that [the defendant] delegated or assigned duties in regard to [the patient's] available medical information and [the defendant] did not contend

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[20] *Id.*

[21] *Id.*

[22] *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

[23] See, also, *Hawkes v. Lewis*, 252 Neb. 178, 560 N.W.2d 844 (1997); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

[24] *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998), citing *Reifschneider v. Nebraska Methodist Hosp.*, 222 Neb. 782, 387 N.W.2d 486 (1986).

[25] *Morgan v. Mysore*, 17 Neb. App. 17, 756 N.W.2d 290 (2008).

[26] *Id.* at 26, 756 N.W.2d at 298.

that [he] was not required to be aware of all the medical information."[27]

[11] Based on our longstanding precedent on vicarious liability and the nondelegable duty exception, we agree that a nondelegable duty instruction is not appropriate when there are no judicial admissions or evidence that a defendant had assigned the performance of his duties to a subordinate party at the time that the alleged breach occurred.

Here, the court declined to include the following nondelegable duty language requested by Rodriguez in jury instruction No. 2: "[T]he Court has determined as a matter of law that the obligation to return the plaintiff to surgery on the 18th or the 19th, . . . if any, . . . was that of Defendant Greg Fitzke, M.D."

There were no judicial admissions or evidence that Fitzke had assigned his duty to diagnose or treat Rodriguez to a subordinate on April 18 or 19, 2012. Further, Fitzke, and experts on both sides, testified that, as Rodriguez' attending surgeon, it was ultimately his decision whether or not to return Rodriguez to surgery on April 18 or 19 and that no other doctor could force Fitzke to return her to surgery. Therefore, assuming, without deciding, that Fitzke had a nondelegable duty to diagnose and treat Rodriguez by returning her to surgery, the evidence did not support a nondelegable duty instruction. Consequently, the court did not abuse its discretion in rejecting the instruction.

Rodriguez' argument that she was prejudiced by the potential for jurors to find other parties negligent without this instruction and reference to the jury's question regarding Duch's note are unavailing. First, as discussed above, the negligence of another party was irrelevant, absent evidence that Fitzke had delegated his duty to diagnose or treat Rodriguez to another party. Second, while there was evidence adduced regarding the negligence of other doctors and nurses and Fitzke testified

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[27] *Id.*

that another surgeon could have returned Rodriguez to surgery if her condition necessitated it, a different instruction by the court informed the jury that the negligence of other parties was no defense to finding Fitzke liable for Rodriguez' entire injury if he was also negligent.

(b) Rodriguez Cannot Show Prejudice From Court's Denial of Her Preexisting Condition Instructions

Rodriguez requested two alternative instructions on preexisting conditions. Initially, she contends that there was evidence that she had a preexisting condition consisting of a necrotic gallbladder prior to April 17, 2012. In the alternative, she contends that there is evidence that beginning April 16, she had a preexisting condition of a perforated bowel resulting from her surgery on that date, which perforation continued until April 20, when it was repaired. She argues that both her instructions are correct statements of the law and are supported by the evidence adduced at trial. Additionally, she asserts that she was prejudiced by the jury's not knowing that it could rule in her favor even if her damages could not be separated from the injuries resulting from her preexisting conditions.

Appellees contend that Rodriguez was not prejudiced by the court's rejection of her instructions, because the instructions concern only the apportionment of damages and, by entering a general verdict, the jury never reached the issue of damages.

Rodriguez requested the following instruction, which is partially based on NJI2d Civ. 4.09:

> There is evidence that the Plaintiff had a pre-existing condition consisting of a necrotic gallbladder prior to April 17, 2012. The Defendants are only liable for any damages that you find to be proximately caused by the Defendants' medical negligence.
>
> If you cannot separate damages caused by the pre-existing conditions from those caused by the medical

> negligence, then the Defendants are liable for all of those damages.
>
> The Defendants may be liable for harm to the Plaintiff even though her ultimate injury is greater than usual due to the pre-existing gallbladder condition which predisposed her to at least some minimal post-operative care. In short, the Defendants take the Plaintiff as they find her.

In the alternative, Rodriguez requested the following instruction:

> There is evidence that beginning April 16, 2012, Plaintiff had a perforated bowel resulting from her April 16, 2012 surgery, which perforation continued until April 20, 2012 when it was repaired. Plaintiff claims it was not timely repaired and Defendant is only liable for any damages that you find to be proximately caused by the delay. If you cannot separate damages caused by the pre-existing perforation from those caused by the delay, then Defendant is liable for all of those damages.

[12] In *David v. DeLeon*,[28] we held that a preexisting condition jury instruction, which was similar to the first two paragraphs of Rodriguez' initial instruction, did not permit a jury to assess damages in any amount unless the plaintiff first proved proximate cause.

In *Golnick v. Callender*,[29] we considered whether the court committed error in giving a preexisting condition jury instruction similar to the first two paragraphs of Rodriguez' initial instruction but omitting the third paragraph, which was similar to the third paragraph of Rodriguez' instruction. We held that the plaintiff was not prejudiced because, unlike cases where we approved all three paragraphs, the jury had returned a general verdict.

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[28] *David v. DeLeon*, 250 Neb. 109, 547 N.W.2d 726 (1996).

[29] *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

[13] We stated that "[w]hen the jury returns a general verdict for one party, we presume that the jury found for the successful party on all issues raised by that party and presented to the jury."[30] Accordingly, we interpreted the verdict as finding that the plaintiff failed to prove that the defendant was the proximate cause of the plaintiff's injuries.

Here, the jury also returned a general verdict. Accordingly, we presume that the jury found for appellees on all issues presented to it. Because the jury presumably decided that Fitzke was not negligent or the proximate cause of Rodriguez' injuries, the jury never reached the issues of preexisting conditions or damages. Accordingly, this assignment of error is without merit.

2. Record on Appeal Is Insufficient to Review Whether Trial Court Erred in Permitting Taddeucci to Answer Certain Questions

Rodriguez contends that Taddeucci should not have been allowed to provide standard of care opinions regarding Fitzke's postoperative care, because appellees did not disclose in discovery that Taddeucci would provide such opinions. She argues that appellees violated Neb. Ct. R. Disc. § 6-326(e)(1)(B) by not supplementing their interrogatory to disclose that Taddeucci would testify regarding postoperative care. She argues that the appropriate sanction was to preclude Taddeucci from testifying about Rodriguez' postoperative care.

Appellees contend that they did not violate § 6-326(e)(1)(B), because Rodriguez called Taddeucci in her case in chief and questioned him extensively regarding Fitzke's postoperative care. Accordingly, they assert that she opened the door to cross-examination on the subject and that the question and answer Rodriguez identified did not call for or elicit a standard of care opinion.

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[30] *Id.* at 410, 860 N.W.2d at 193-94.

The Nebraska Court Rules of Discovery in Civil Cases provide, in relevant part, the following:

[Rule 26]

§ 6-326. General provisions governing discovery.

. . . .

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . .

(4) Trial Preparation: . . . .

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

. . . .

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to

. . . .

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.[31]

[Rule 33]

§ 6-333. Interrogatories to parties.

(a) Availability; Procedures for Use. . . .

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[31] § 6-326.

> Each interrogatory shall be repeated and answered separately and fully in writing under oath . . . . The party submitting the interrogatories may move for an order under [§ 6-3]37(a) with respect to any objection to or other failure to answer an interrogatory.[32]
>
> [Rule 37]
>
> **§ 6-337. Failure to make discovery: sanctions.**
>
> . . . .
>
> (d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party . . . fails
>
> . . . .
>
> (2) To serve answers or objections to interrogatories submitted under [§ 6-3]33, after proper service of the interrogatories . . . .
>
> (3) . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.
>
> . . . .
>
> The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by [§ 6-3]26(c).[33]

Further, a sanction authorized by § 6-337(b)(2)(B) is "[a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence."

Appellees' answers to Rodriguez' interrogatories and designation of experts included the following:

> **Interrogatory No. 17:** Identify each expert witness whom you intend to call to testify at trial in this action and state for each such expert:

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[32] Neb. Ct. R. Disc. § 6-333.

[33] Neb. Ct. R. Disc. § 6-337.

> (a) The subject matter on which the expert is expected to testify;
>
> (b) The substance of facts and opinions on which the expert is expected to testify;
>
> (c) The basis for each opinion to be given by the expert . . . .
>
> . . . .
>
> **Supplemental Answer:**
>
> . . . .
>
> 5a. Raymond Taddeucci . . . [;]
>
> b. Dr. Taddeucci is expected to express the opinions set forth in his deposition taken by [Rodriguez;]
>
> c. The operative technique of Dr. Fitzke complied with reasonable standards of care[;]
>
> d. The basis is expected to be set forth in the deposition of Dr. Taddeucci taken by [Rodriguez] and information set forth in the medical records.

In Rodriguez' opening brief, she identified the following question as erroneously permitted, over objection, by the court:

> "Q. Now, based upon the — looking at this without the hindsight of knowing there turned out to be an intestinal perforation, looking at this from the standpoint of what was known to the physicians attending . . . Rodriguez throughout the period that we've talked about here today, was there ever a point where in your opinion the patient was required to be taken back to surgery?"[34]

In Rodriguez' reply brief, she also argued that she was prejudiced by Taddeucci's being permitted to respond, over objection, to the following question: "'With regards to the decision of . . . Fitzke to cancel the CT scan, do you believe that complied with the appropriate standards of care?'"[35]

[14] We begin by noting that the purpose of an appellant's reply brief is to respond to the arguments the appellee

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[34] Brief for appellant at 23.

[35] Reply brief for appellant at 9.

has advanced against the errors assigned in the appellant's initial brief.[36] While this second question is encompassed in Rodriguez' assignment of error, her attempt to raise it for the first time in her reply brief is untimely, because it gave appellees no opportunity to respond.[37]

[15] Further, it is incumbent upon the appellant to present a record supporting the errors assigned; absent such a record, an appellate court will affirm the lower court's decision regarding those errors.[38]

The question Rodriguez bases her claim on concerns the postoperative care provided to Rodriguez by Fitzke. Regarding Rodriguez' interrogatory requesting appellees to identify the scope of opinions that Taddeucci would provide, appellees stated that he would provide opinions regarding Fitzke's operative technique and "the opinions set forth in his deposition taken by [Rodriguez]."

Rodriguez' deposition of Taddeucci is not included in the record. Accordingly, we do not know whether the subject of Fitzke's postoperative care was discussed in the deposition. Therefore, we are unable to assess whether appellees failed to comply with § 6-326, because we cannot determine the scope of Taddeucci's expected testimony that was actually disclosed in the interrogatory. Because Rodriguez failed to satisfy her duty to present a record that supported her assignment of error, we affirm the court's ruling on this issue.

3. Fitzke's Testimony Was Permitted Under Nebraska Rules of Evidence

Rodriguez argues that, in response to one of her questions, Fitzke provided a nonresponsive, hearsay answer that stated the opinion of Allen, who was not designated as an expert. She again contends that appellees violated § 6-326 by failing

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[36] *Hike v. State*, 297 Neb. 212, 899 N.W.2d 614 (2017).

[37] *Id.*

[38] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

to disclose Allen as an expert, her opinion, and the relevant foundation for her opinion. Rodriguez further contends that classifying the testimony as Fitzke's perception is merely pretext to admit Allen's testimony.

Appellees argue that Fitzke did not provide Allen's opinion. Instead, they contend that he stated only his perception of her opinion, which said nothing about the truth of his belief. Further, they assert that the answer was directly responsive to Rodriguez' line of questioning and that precise question because it was asking if he disregarded her opinion.

Rodriguez' objection concerned Fitzke's answer to the final question from Rodriguez' attorney in the following interchange:

> Q. Okay. And did Dr. Allen put at the bottom here, question mark, "Need to go back to OR"?
>
> A. She did write that, yes.
>
> Q. So there is at least one question mark in this record relative to your return — relative to the question of whether you need to take her back to surgery; correct?
>
> A. An internist questioned whether or not going back to the operating room would be helpful.
>
> Q. So this is the second time that an internist, meaning a hospitalist, has had a suggestion about the care and you've answered the question, no. We've heard about the CAT scan and going back to the OR; correct?
>
> A. No, that's not correct. I canceled the CAT scan, and there was a question as to — from Dr. Allen's standpoint as to whether we felt going back to the operating room would be helpful at that point in time, and we had a discussion, and we or I decided — I ultimately decided that she did not need to go back to the operating room, but we discussed the factors that were in front of us, and *I believe that she agreed*.

(Emphasis supplied.)

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered

in evidence to prove the truth of the matter asserted."[39] Neb. Evid. R. 701, Neb. Rev. Stat. § 27-701 (Reissue 2016), provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

In his testimony, Fitzke did not relay any out-of-court statements made by Allen, but merely described his perception of Allen's opinion after speaking with her. Since Fitzke's statement was limited to his perception of Allen's opinion, it was permissible under § 27-701. Fitzke established that he had firsthand knowledge of what Allen said in the discussion and his belief as to her opinion on the topic was an inference that was rationally based on the conversation of the subject. Further, it cannot rationally be argued that the testimony was not helpful to the determination of whether Fitzke breached the standard of care by not returning Rodriguez to surgery on April 19, 2012. The credibility of his opinion of her conclusion goes to the weight of the statement, rather than to its admissibility.[40]

Accordingly, his statement was not hearsay and did not support a violation of § 6-326 by presenting an undisclosed opinion of an undisclosed expert.

[16-18] Even if Fitzke's answer was hearsay, Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 2016), provides that an expert may rely on hearsay facts or data reasonably relied upon by experts in that field.[41] Specifically, a medical expert may express opinion testimony in medical matters based, in part,

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[39] Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 2016).

[40] See *Harmon Cable Communications v. Scope Cable Television*, 237 Neb. 871, 468 N.W.2d 350 (1991).

[41] *State v. Hudson*, 268 Neb. 151, 680 N.W.2d 603 (2004).

on reports or statements of others which are not in evidence but upon which the expert customarily relies in the practice of his or her profession.[42] While the mere fact that an expert relied on hearsay, however, does not transform it from inadmissible into admissible evidence,[43] we have permitted inadmissible evidence, upon which an expert relies, to be admitted on direct examination if it was offered not to prove the truth of the matter asserted but simply to demonstrate the basis for the expert's testimony.[44]

Fitzke was disclosed as an expert who would testify regarding whether he "applied the degree of skill and knowledge expected of a reasonable and prudent general surgeon . . . managing . . . a patient post-operatively." To the extent that his answer was addressing whether he exercised an appropriate degree of skill and knowledge in caring for Rodriguez postoperatively, Fitzke's statement regarding his understanding of Allen's opinion was offered to show that he believed he was not disregarding the opinion of another physician involved in Rodriguez' treatment; it was not offered to prove that Allen did not believe that Rodriguez needed to be returned to surgery. Further, as part of his statement, Fitzke provided his independent opinion, which he reached, in part, based on Allen's opinion. The opinion of an internist involved in the treatment of a postoperative patient is clearly a fact relied upon by experts in the medical field. Accordingly, to the extent that hearsay of Allen's opinion was admitted into evidence through Fitzke's testimony, it was permitted, under § 27-703.

Fitzke's answer was also responsive to the question by Rodriguez' attorney. Rodriguez' attorney had asked whether

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[42] *Id.*

[43] See *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994).

[44] See *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997).

Allen questioned whether Rodriguez needed to be returned to the operating room. He then went on to directly question whether Fitzke disregarded Allen's opinion about whether Rodriguez needed to be returned to the operating room. Accordingly, Fitzke's statement that he discussed the note Allen made with her and believed that she changed her opinion to agree with him was directly relevant to whether or not he was disregarding her opinion. Accordingly, this assignment of error is without merit.

V. CONCLUSION

We find that the court did not err in rejecting Rodriguez' proposed jury instructions or jury instruction language. Further, we find that the record on appeal is insufficient to review whether the court erred in permitting Taddeucci to answer certain questions. Finally, we conclude that the court did not abuse its discretion by ruling Fitzke's answer was admissible. Therefore, we affirm.

Affirmed.

Wright, J., not participating in the decision.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Greg A. Glass, appellant.

905 N.W.2d 265

Filed January 5, 2018. No. S-16-861.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Postconviction: Evidence: Witnesses: Appeal and Error.** In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law.
3. **Effectiveness of Counsel: Appeal and Error.** With regard to the questions of counsel's performance or prejudice to the defendant, as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **Due Process: Convictions: Proof.** The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he or she is charged.
5. **Homicide: Intent: Lesser-Included Offenses.** Both second degree murder and voluntary manslaughter involve intentional killing and are differentiated by the presence or absence of the sudden quarrel provocation involved in manslaughter. If the sudden quarrel provocation exists, it lessens the degree of the homicide from murder to manslaughter.
6. **Criminal Law: Statutes: Convictions: Time: Appeal and Error.** A new rule applies to criminal cases still pending on direct review, because they are not final. As to convictions that are already final, however, the rule applies only in limited circumstances.

7. **Constitutional Law: Criminal Law: Statutes: Sentences: Time.** New substantive rules of constitutional law for criminal cases generally apply retroactively. Substantive rules include rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense. Constitutional substantive rules alter the range of conduct or the class of persons that the law punishes.
8. **Criminal Law: Statutes: Convictions: Time.** Substantive rules apply retroactively, because they carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him or her.
9. **Constitutional Law: Criminal Law: Statutes: Convictions: Time.** New constitutional rules of criminal procedure generally do not apply retroactively. Most procedural rules regulate only the *manner of determining* the defendant's culpability. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise.
10. **Criminal Law: Courts: Time.** Courts give retroactive effect to only a small set of "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.
11. **Habeas Corpus: Courts: States: Jury Instructions: Due Process.** A federal court may grant habeas relief on the basis of a faulty state law jury instruction only if the erroneous instruction so infected the entire trial that the resulting conviction violates due process.
12. **Effectiveness of Counsel: Appeal and Error.** When a claim of ineffective assistance of appellate counsel is based on the failure to raise a claim on appeal of ineffective assistance of trial counsel (a layered claim of ineffective assistance of counsel), an appellate court will look first at whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue.
13. **Constitutional Law: Effectiveness of Counsel.** A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
14. **Effectiveness of Counsel: Proof: Words and Phrases: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. To show prejudice, a defendant must demonstrate a reasonable probability that but for his or her counsel's deficient

performance, the result of the proceeding would have been different. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Douglas County: Peter C. Bataillon, Judge. Affirmed.

Sean M. Conway, of Dornan, Lustgarten & Troia, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

I. NATURE OF CASE

In 1999, following a jury trial, Greg A. Glass was convicted of second degree murder and use of a firearm to commit a felony. Glass appeals the August 25 and 30, 2016, orders of the district court for Douglas County, in which the court denied his amended and supplemental motions for postconviction relief after holding an evidentiary hearing. The evidence received at the hearing pertained to Glass' claims relating to jury instructions at his trial and to his allegations that he had received ineffective assistance of trial and appellate counsel. Glass appeals, repeating his claim that the jury instructions given in his case denied him due process and did not comply with this court's holdings in *State v. Smith*, 282 Neb. 720, 806 N.W.2d 383 (2011) (*State v. Ronald Smith*), which he contends applies retroactively to his case on collateral review. He also claims that the district court erred when it rejected his ineffective assistance of counsel claims. We find no error and affirm.

II. STATEMENT OF FACTS

1. Background

In 1999, Glass was convicted of second degree murder and use of a firearm to commit a felony. The charges arose from the July 1998 shooting death of Glass' former employer, Adolph Fentress, Sr. Fentress was shot in the head while working at an automobile detailing shop, Downtown Auto Sales (Downtown Auto), which he co-owned. The facts for which we find support in the record are set forth in the memorandum opinion of the Nebraska Court of Appeals rejecting Glass' arguments on direct appeal. See *State v. Glass*, No. A-99-919, 2000 WL 944020 (Neb. App. July 11, 2000) (not designated for permanent publication).

At trial, Glass testified in his own defense. According to his testimony, he worked for Downtown Auto earlier in the year but had quit. Glass claimed Fentress owed him money, and he had tried to collect it on several occasions. According to Glass, at one point when he tried to collect his money, Fentress threatened him with a tire iron and told him to stay away from Downtown Auto.

Glass testified that on July 2, 1998, he had come to Downtown Auto again to collect his money, because Fentress had agreed to meet him. Glass testified that he brought a gun to protect himself because of the previous threatening encounters with Fentress. After they met, Glass and Fentress began arguing, and then Glass believed Fentress picked up a weapon. Glass testified that he retreated to the door area of the office and that Fentress came at him. According to Glass, he raised his gun and shot Fentress in self-defense. He testified that he then panicked and drove off in a red BMW from the lot.

Several eyewitnesses testified for the prosecution, including Downtown Auto employee Deon Marion. Marion testified that on the day of Fentress' death, he was working in the parking lot outside and noticed a person whom he later identified as Glass standing near the Downtown Auto building. Marion witnessed Glass call out to Fentress. Marion observed an expression from

Fentress that communicated that something was wrong. Marion went into the office and called the police. The sound of a gunshot was picked up in the recording of that telephone call.

Another eyewitness was Adolph Fentress, Jr. (Adolph), the teenage son of Fentress. Adolph testified that he observed an argument between Fentress and Glass. Adolph said that Fentress appeared to have something behind his back and overheard Glass say, "drop it." Adolph observed something under Glass' shirt, and saw Glass move toward the office, followed by Fentress. Adolph testified that Glass pulled out a gun and shot Fentress. He next observed Glass go through Fentress' pockets, remove a wallet and keys, and drive away in a red BMW that their shop had serviced. Glass was later found in the red BMW. When police arrived and processed the scene, they found Fentress' deceased body on the floor of the shop and found a tire iron next to his body.

The jury found Glass guilty of second degree murder and use of a firearm to commit a felony, and not guilty of theft by unlawful taking.

2. Postconviction Proceedings

Glass filed a pro se motion for postconviction relief on August 23, 2012. Among the claims set forth in the motion was a claim that trial counsel provided ineffective assistance when counsel failed to object to the "malice" definition in the jury instructions. The district court appointed counsel for Glass' postconviction proceeding. Glass then amended the motion for postconviction relief and claimed he was denied due process based on jury instructions which did not require the jury to consider manslaughter, that is, whether the killing was intentional, but provoked by a sudden quarrel, before convicting Glass of second degree murder. Glass also alleged ineffectiveness of trial and appellate counsel.

Glass argued that the instruction given in his case did not comply with our holdings in *State v. Ronald Smith* and *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013). He claimed

ineffective assistance of trial counsel in three respects: failing to call witnesses who would have testified to the victim's violent and aggressive character; failing to relay a plea offer in advance of trial; and failing to obtain an expert ballistics witness who could have testified about the range of the gunshot, the path of the gunshot, or any other matters that may have aided Glass in his self-defense claim. Finally, Glass claimed that his separate appellate counsel, who was different from his trial counsel, was ineffective on direct appeal for failing to allege the foregoing claims against trial counsel.

A hearing was conducted, at which the court received evidence, including testimony from Glass and exhibits including depositions of trial and appellate counsel. In an August 25, 2016, order, the court overruled Glass' amended motion for postconviction relief. With regard to the claim regarding jury instructions on second degree murder and manslaughter, the court reasoned that the claim was procedurally barred because Glass failed to raise it on direct appeal. Alternatively, the court rejected the claim because the rule stated in *State v. Ronald Smith*, upon which Glass relied, was not a new constitutional rule that required retroactive application, but was a new criminal rule which would not be retroactively applied to cases that were final and which were not pending on direct appeal when *State v. Ronald Smith* was decided. The district court also concluded that the "step instruction" under which the jury first considered second degree murder before considering manslaughter to which Glass now objects was settled law at the time of the 1999 trial.

With regard to each of Glass' ineffective assistance of counsel claims, the court determined that there was no prejudicial error by trial counsel for failing to call a witness familiar with Fentress' aggressive character, failing to call an expert to address ballistic and autopsy findings, and failing to relay a plea offer. With regard to the failure to call a witness familiar with Fentress' character, the court noted that two witnesses testified about the behavior of Glass and Fentress prior to

the shooting and that the additional witness was not involved in the incident giving rise to the case and would not have changed the jury's perception of events. With regard to the decision not to call a forensic expert to reexamine the findings of the State's expert regarding the gunshot wound, weapon used, autopsy report, and other forensic results, the court noted that Glass' only argument for why it might be necessary was because the entrance wound was somewhat irregular. Glass did not demonstrate how a different interpretation of the evidence would affect the outcome of the case. With regard to the claim that trial counsel failed to communicate a plea offer, the court found that the evidence refuted the suggestion that a plea deal was offered by the State.

Because the court found no prejudicial error by trial counsel in connection with any of the claims, it found no prejudicial error when Glass' appellate attorney did not raise the same issues on direct appeal.

In an August 30, 2016, order, the district court also overruled a supplemental pro se postconviction motion filed by Glass. This supplemental motion alleged that the jury was incorrectly instructed at trial on second degree murder and manslaughter. The district court rejected this claim.

This appeal followed.

III. ASSIGNMENTS OF ERROR

Glass claims that the district court erred when it rejected his postconviction allegations that his due process rights to a fair trial and impartial jury were violated by the jury instructions given at his 1999 trial and that he was prejudiced by the deficient performance of his trial and appellate counsel regarding his convictions for second degree murder and use of a firearm to commit a felony.

IV. STANDARDS OF REVIEW

[1] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Jones*, 297 Neb. 557, 900 N.W.2d 757 (2017).

[2] In an evidentiary hearing on a motion for postconviction relief, the trial judge, as the trier of fact, resolves conflicts in the evidence and questions of fact. An appellate court upholds the trial court's findings unless they are clearly erroneous. In contrast, an appellate court independently resolves questions of law. See *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017).

[3] 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. See *State v. Alarcon-Chavez, supra*.

V. ANALYSIS

1. Summary of Analysis of Jury Instructions

Glass filed amended and supplemental motions for postconviction relief alleging a constitutional violation under Neb. Rev. Stat. § 29-3001 et seq. (Reissue 2016). Our analysis of the validity of Glass' claim is framed by whether he was deprived of a constitutional right. As we explain below, we conclude that Glass' constitutional rights were not abridged in connection with the jury instructions of which he complains.

Glass offers several rationales for relief which we consider, in turn, in our analysis and ultimately find unpersuasive. His several theories rest on his assertion that our decision in *State v. Ronald Smith* applies to his case and affords relief. Because we conclude that constitutional principles do not require that *State v. Ronald Smith* be applied retroactively on collateral review, that plain error did not occur, and that Glass did not suffer a constitutional violation and was not deprived of due process, we reject Glass' claim related to the jury instructions that were used at his trial.

[4] Glass contends that under the U.S. Supreme Court's retroactivity test applicable to cases on collateral review, *State*

v. Ronald Smith should be applied retroactively, because it announced a new substantive rule of constitutional law which violated his rights. See *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion), and *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because it was not a new substantive constitutional rule, we reject this argument. Relying on cases such as *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013), Glass next contends that the jury instruction at his trial constituted plain error requiring reversal. Because the cases on which Glass relies were on direct appeal at the time of our consideration, they are inapplicable to Glass' postconviction case on collateral review. Ultimately, Glass claims that he suffered a constitutional violation by use of the jury instruction that was given at his trial and that as such, it violated due process. We recognize that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." See *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Glass was convicted by sufficient proof of second degree murder upon a proper jury instruction regarding second degree murder. The instruction regarding sudden quarrel manslaughter, albeit now deemed faulty, did not deprive Glass of due process in connection with the charge for second degree murder of which he was convicted. See *id*.

2. *State v. Ronald Smith*

In his postconviction motion, Glass claimed that he was denied his constitutional rights because the jury at his 1999 trial was given improper jury instructions regarding the manner it should consider second degree murder and sudden quarrel manslaughter and also because the elements of sudden quarrel manslaughter were inaccurate. Under the jury instructions given in this case, if the jury found proof of second degree murder beyond a reasonable doubt, the jury was not

required to consider whether the killing was the result of sudden quarrel manslaughter. Glass does not challenge the content of the jury instruction regarding second degree murder in and of itself. However, he argues that the step instruction given in his case did not comply with our holdings in *State v. Ronald Smith* and *State v. Trice, supra*.

[5] Under our holdings in *State v. Ronald Smith*, both second degree murder and voluntary manslaughter involve intentional killing and are differentiated by the presence or absence of the sudden quarrel provocation involved in manslaughter. If the sudden quarrel provocation exists, it lessens the degree of the homicide from murder to manslaughter. Following *State v. Ronald Smith*, where there is evidence that (1) a killing occurred intentionally without premeditation and (2) the defendant was acting under the provocation of a sudden quarrel, a rational jury could convict a defendant of sudden quarrel manslaughter and a jury should be given the option of convicting of either second degree murder or sudden quarrel manslaughter depending upon its resolution of the fact issue regarding provocation. See, also, *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012). Thus, a step instruction which directed the jury to convict the defendant of second degree murder if it found an intentional killing, but did not allow the jury to also consider whether the killing was provoked by a sudden quarrel, was an incorrect statement of the law.

3. *Teague*/*Schriro* Retroactivity Test

In its decisions in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (plurality opinion), and *Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), as well as other cases, the U.S. Supreme Court set forth a test for determining when a new rule of constitutional law will be applied to cases on collateral review. See, also, *Montgomery v. Louisiana*, 577 U.S. 190, 136 S. Ct. 718, 193 L. Ed. 2d 599 (2016). We have adopted the *Teague*/

Schriro retroactivity test. See *State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716 (2014). The threshold question in this appeal, as asserted by Glass, is whether the new rule pronounced in *State v. Ronald Smith* applies to Glass on collateral review. If the rule were applicable on collateral review, and assuming evidence of sudden quarrel manslaughter existed, we would reverse his convictions and remand the cause for a new trial. Because Glass' convictions were final before *State v. Ronald Smith* was decided, he is entitled to relief in this postconviction case if the rule announced in *State v. Ronald Smith* applies retroactively on collateral review.

[6-8] When a decision of this court results in a "new rule," that rule applies to criminal cases still pending on direct review, because they are not final. *State v. Mantich, supra*. See *Schriro v. Summerlin, supra*. As to convictions that are already final, however, the rule applies only in limited circumstances. *Id*. New substantive rules of constitutional law for criminal cases generally apply retroactively. Substantive rules include "'rules forbidding criminal punishment of certain primary conduct'" and "'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery v. Louisiana*, 136 S. Ct. at 728. Constitutional substantive rules "'alter[] the range of conduct or the class of persons that the law punishes.'" *Montgomery v. Louisiana*, 577 U.S. at 206. Such rules apply retroactively, because they "'necessarily carry a significant risk that a defendant stands convicted of "an act that the law does not make criminal"'" or faces a punishment that the law cannot impose upon him or her. *State v. Mantich*, 287 Neb. at 330, 842 N.W.2d at 724.

[9,10] New constitutional rules of criminal procedure, on the other hand, generally do not apply retroactively. *Montgomery v. Louisiana, supra*. Most procedural rules "regulate only the *manner of determining* the defendant's culpability." *Schriro v. Summerlin*, 542 U.S. at 353 (emphasis in original). They do not produce a class of persons convicted of conduct the law

does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. *Schriro v. Summerlin, supra.* "Because of this more speculative connection to innocence, we give retroactive effect to only a small set of '"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.'" 542 U.S. at 352. Accord *Montgomery v. Louisiana, supra*. This class of rules is extremely narrow. *Schriro v. Summerlin, supra*.

4. New Rule in *State v. Ronald Smith*

Although *State v. Ronald Smith* announced a new manslaughter rule which we applied on direct review, see *State v. Trice*, 286 Neb. 183, 835 N.W.2d 667 (2013), it did not recognize a new constitutional rule, see *State v. Smith*, 284 Neb. 636, 822 N.W.2d 401 (2012), or a new constitutional claim for purposes of timeliness as understood in Nebraska's postconviction statutes. *State v. Harrison*, 293 Neb. 1000, 881 N.W.2d 860 (2016). As discussed above, a new rule applies retroactively on collateral review only if it is (1) a constitutional substantive rule or (2) a watershed rule of criminal procedure. Glass does not argue that the rule in *State v. Ronald Smith* implicates a watershed rule of criminal procedure, and we agree. Thus, we turn to his argument that the rule applies retroactively because it is a substantive constitutional rule. As explained below, we reject this argument.

In *State v. Ronald Smith*, we clarified both that sudden quarrel manslaughter is an intentional crime and that a step jury instruction requiring a jury to acquit the defendant of second degree murder before considering sudden quarrel manslaughter is improper. In *Harrison*, we concluded that *State v. Ronald Smith* did not recognize a new constitutional claim and therefore did not toll the 1-year statute of limitations under § 29-3001(4)(d) for timely filing a postconviction motion. We explained that *State v. Ronald Smith* was based upon our

interpretation of the criminal statute that defines manslaughter, Neb. Rev. Stat. § 28-305 (Reissue 2016), not on a newly recognized constitutional right.

We conclude that the holding in *State v. Ronald Smith* that it is improper for a jury to consider second degree murder without simultaneously considering sudden quarrel manslaughter is a change to the acceptable method for the jury to deliberate and is a procedural rule change "regulat[ing] only the *manner of determining* the defendant's culpability." See *Schriro v. Summerlin*, 542 U.S. 348, 353, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004).

State v. Ronald Smith also interpreted the language of the manslaughter statute to clarify the intent requirement for sudden quarrel manslaughter and dispel the confusion between the statutory crimes of second degree murder and sudden quarrel manslaughter. See § 28-305(1). We believe that nonretroactivity of the *State v. Ronald Smith* rule poses no danger to Glass of a wrongful conviction for second degree murder. In the instant case, the jury found Glass guilty of second degree murder. The record shows that a rational jury could find each element of second degree murder beyond a reasonable doubt.

5. Due Process

Glass contends that the holdings in *State v. Ronald Smith* show that he suffered a constitutional violation, thereby depriving him of due process. We do not agree.

When Glass was tried in 1999, the criminal law in Nebraska regarding second degree murder had been clarified in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998), and malice was not an element of second degree murder, the absence of provocation was not an element of second degree murder, and a conviction for manslaughter did not require proof of intent.

[11] In another postconviction case which concerned a 2004 homicide, *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011), we reasoned that a comparable step instruction for

second degree murder and manslaughter did not relieve the State of its burden to prove the elements of second degree murder and did not violate due process. Subsequently, the U.S. Court of Appeals for the Eighth Circuit rejected the defendant's federal habeas petition complaining that our rejection of his postconviction claims denied him due process rights. *Iromuanya v. Frakes*, 866 F.3d 872 (8th Cir. 2017). The Eighth Circuit stated that our rejection of the defendant's claims relating to his jury instructions "was not contrary to, nor an unreasonable application of, [Nebraska] Supreme Court precedent." *Id.* at 879. The Eighth Circuit offered the following quote regarding due process: "A federal court may grant habeas relief on the basis of a faulty state law jury instruction only if the erroneous instruction 'so infected the entire trial that the resulting conviction violates due process.'" *Id.* at 881 (quoting *Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). The Eighth Circuit added that complaints about the retroactivity of *State v. Ronald Smith* are "not a federal due process problem," *Iromuanya v. Frakes*, 866 F.3d at 881, thus leaving the issue for our resolution.

Applicable U.S. Supreme Court precedent for due process requires the State to prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. See *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). At Glass' trial, as we have noted, the State was required to prove beyond a reasonable doubt each of the elements of the crime of which Glass stands convicted, second degree murder. The suggestion by Glass that the jury might have convicted him of sudden quarrel manslaughter does not defeat the validity of his second degree murder conviction on collateral review where the conviction was supported by sufficient evidence. We conclude that notwithstanding our holdings in *State v. Ronald Smith*, given the sufficient evidence of the commission of second degree murder, Glass' due process right to trial by an impartial jury was not offended by the step jury instruction requiring the jury to first acquit

Glass of second degree murder before considering sudden quarrel manslaughter, or by defining manslaughter as an unintentional crime.

6. Ineffective Assistance of Counsel

[12] Glass was represented by different counsel at trial and on appeal. Glass sought postconviction relief for the alleged ineffective assistance provided by his trial counsel and appellate counsel. When a claim of ineffective assistance of appellate counsel is based on the failure to raise a claim on appeal of ineffective assistance of trial counsel ("a 'layered' claim of ineffective assistance of counsel"), an appellate court will look first at whether trial counsel was ineffective under the test in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *State v. Dubray*, 294 Neb. 937, 953, 885 N.W.2d 540, 554 (2016). If trial counsel was not ineffective, then the defendant was not prejudiced by appellate counsel's failure to raise the issue. *State v. Dubray, supra.*

[13,14] Before considering Glass' specific claims for postconviction relief, we review the applicable general standards. The Nebraska Postconviction Act, § 29-3001 et seq., 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 or her constitutional rights such that the judgment was void or voidable. *State v. Starks*, 294 Neb. 361, 883 N.W.2d 310 (2016). A proper ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial. *State v. Vela*, 297 Neb. 227, 900 N.W.2d 8 (2017). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington, supra*, the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. *State v. Vela, supra*. To show prejudice under the prejudice component of the *Strickland* test, the defendant must demonstrate

a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. *State v. Vela, supra*. A reasonable probability does not require that it be more likely than not that the deficient performance altered the outcome of the case; rather, the defendant must show a probability sufficient to undermine confidence in the outcome. *Id*.

Following our independent review, we conclude that the district court did not err when it rejected Glass' ineffective assistance of counsel claims after an evidentiary hearing.

(a) Trial Counsel's Failure to Call a Witness to Testify to the Victim's Violent Character

Glass alleged that trial counsel was ineffective because he failed to call a potential witness who would have testified that Fentress generally had a reputation for being violent. In his testimony, Glass' trial counsel denied that Glass told him about "any witnesses whatsoever" who would have testified about Fentress' tendency for violence.

The record shows that the additional witness now proposed by Glass was not involved in the incident giving rise to the case and, we believe, even if relevant, would not have changed the jury's perception of events. As the district court noted in its order, two witnesses testified at trial about the behavior of Glass and Fentress prior to the shooting. Even if admitted, the proposed additional witness testimony would have been cumulative and Glass was not prejudiced by trial counsel's alleged failure to call the potential witness. See *State v. Grant*, 293 Neb. 163, 876 N.W.2d 639 (2016). We find no prejudicial error.

(b) Trial Counsel's Decision Not to Retain an Expert to Address Ballistic and Autopsy Findings

Glass alleged that trial counsel was ineffective by failing to retain and call an expert to address ballistic and autopsy

findings at trial. Glass' trial counsel testified that he never considered retaining an independent expert, because he saw no reason to do so; he was comfortable with the autopsy findings, and based on his experience, he knew that the conclusions about the lack of stippling and its correlation to the distance between the shooter and the victim was accurate and consistent with the evidence.

With regard to the decision not to call a forensic expert to reexamine the findings of the State's expert regarding the gunshot wound, weapon used, autopsy report, and other forensic results, the district court in its order noted that Glass' only argument for why such evidence might be necessary was because the entrance wound was somewhat irregular. Glass did not present evidence or a specific explanation of how a different interpretation of the evidence would have affected the outcome of the case. Trial counsel was not deficient in failing to engage a ballistics expert.

(c) Trial Counsel Not Relaying Plea Offer

Glass alleged that his trial counsel was deficient and that he was prejudiced because counsel failed to look into and relay a plea offer by the State. At the hearing on his amended motion, Glass testified that he asked his trial counsel to look into a potential plea deal. Approximately 9 years after his trial, Glass claims that his family told him that the State had "supposedly" extended a plea offer of manslaughter. At the evidentiary hearing, Glass' trial counsel testified that there was never a plea offer from the State, that the State was adamant about taking the case to trial, and that if the State would have allowed Glass to plead to manslaughter, counsel would have relayed it to Glass and definitely advised him to accept the deal. The district court found trial counsel's testimony credible and determined that there was no deficient performance by trial counsel for not relaying a plea offer, because Glass did not show the existence of a plea offer by the State, other than by an unsubstantiated

rumor. The district court's findings are not clearly erroneous, and they support the district court's rejection of this claim. *State v. Alarcon-Chavez*, 295 Neb. 1014, 893 N.W.2d 706 (2017). The district court did not err.

(d) Ineffectiveness of Appellate Counsel Claims

Glass also alleged ineffectiveness of appellate counsel for failing to raise the above issues on direct appeal. Because the court found no prejudicial error by trial counsel in connection with any of the claims, it found no prejudicial error when Glass' appellate attorney did not raise the same issues on direct appeal. *State v. Dubray*, 294 Neb. 937, 885 N.W.2d 540 (2016).

Direct appeal counsel testified that he did not recall Glass' asking him to raise claims of ineffective assistance of trial counsel based on Glass' present allegations. This testimony is also supported by a letter to appellate counsel regarding claims for ineffective assistance of trial counsel in which Glass made no mention of the three ineffective assistance of counsel claims Glass is currently raising.

As noted above, trial counsel was not deficient and appellate counsel was not ineffective when he did not raise the claims Glass now asserts without success. Accordingly, we conclude that the district court did not err when it concluded that Glass' allegations regarding appellate counsel's performance were without merit, and we therefore affirm the orders denying postconviction relief.

VI. CONCLUSION

As explained above, we conclude that the holdings in *State v. Ronald Smith* do not apply to Glass retroactively on collateral review. The State was required to prove each element of the crime of second degree murder of which Glass stands convicted, and because the evidence was sufficient, Glass' convictions did not offend his due process rights. Further, we

have reviewed Glass' claims of ineffectiveness of trial and appellate counsel and agree with the district court that they are without merit. Accordingly, we conclude that the district court did not err when it denied Glass' amended and supplemental motions for postconviction relief.

Affirmed.

Wright, J., not participating in the decision.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Karen Amend et al., appellants, v. Nebraska Public Service Commission, appellee.

905 N.W.2d 551

Filed January 12, 2018. No. S-16-948.

1. **Motions to Dismiss: Pleadings: Appeal and Error.** A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Tort Claims Act: Appeal and Error.** Whether the allegations made by a plaintiff constitute a cause of action under the State Tort Claims Act or whether the allegations set forth claims which are precluded by the exemptions set forth in the act is a question of law, for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.
4. **Tort Claims Act: Immunity: Waiver: Appeal and Error.** An exception to the State's waiver of immunity under the State Tort Claims Act is an issue that the State may raise for the first time on appeal and that a court may consider sua sponte.
5. **Jurisdiction: Appeal and Error.** An appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.
6. **Constitutional Law: Immunity: Waiver.** Under the 11th Amendment, a nonconsenting state is generally immune from suit unless the state has waived its immunity.
7. **Tort Claims Act: Immunity: Waiver.** The State Tort Claims Act allows a limited waiver of the State's sovereign immunity, subject to statutory exceptions.
8. **Statutes: Appeal and Error.** Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation

to ascertain the meaning of statutory words which are plain, direct, and unambiguous.

9. **Statutes: Immunity: Waiver.** Statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.
10. **Immunity: Waiver.** In order to strictly construe against a waiver of sovereign immunity, courts broadly read exemptions from a waiver of sovereign immunity.
11. **Statutes: Immunity: Waiver.** A waiver of sovereign immunity is found only where stated by the most express language of a statute or by such overwhelming implication from the text as will allow no other reasonable construction.
12. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The discretionary function exception is expressed in nearly identical language in the State Tort Claims Act and the Political Subdivisions Tort Claims Act; thus, cases construing the state exception apply as well to the exception granted to political subdivisions.
13. **Tort Claims Act: Immunity: Appeal and Error.** An appellate court must determine whether sovereign immunity lies from the nature of the underlying dispute. Where the facts are undisputed, whether an exception to immunity under the State Tort Claims Act precludes suit is a question of law.
14. **Public Service Commission: Constitutional Law: Administrative Law.** The Public Service Commission's authority to regulate public grain warehouses is purely statutory, in contrast to its plenary authority to regulate common carriers under Neb. Const. art. IV, § 20.
15. **Public Service Commission: Tort Claims Act.** The Public Service Commission is a state agency for purposes of the State Tort Claims Act, and as a result, the provisions of the act are applicable in tort suits against the commission.
16. **Tort Claims Act: Licenses and Permits.** State agencies may not be sued under the State Tort Claims Act for claims based upon the failure to suspend or revoke a license.
17. **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: Susan I. Strong, Judge. Affirmed.

Shawn D. Renner and Andre R. Barry, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., for appellants.

Douglas J. Peterson, Attorney General, and Timothy R. Ertz for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

This appeal concerns the dismissal of a complaint filed in the district court for Lancaster County under Nebraska's State Tort Claims Act (STCA)[1] which alleged the Nebraska Public Service Commission (PSC), the appellee, negligently failed to enforce Nebraska statutes and regulations against Pierce Grain Elevator, Inc. (PEI). The district court ruled appellants' claims were grounded in exceptions to the STCA's limited waiver of sovereign immunity and granted the PSC's motion to dismiss. We affirm.

I. BACKGROUND

The following statement of facts is taken from allegations in appellants' complaint, which we accept as true for purposes of reviewing the district court's dismissal of the complaint.

Appellants are a group of over 30 farmers and farm management customers of PEI, a grain warehouse in northeast Nebraska, which failed and closed in March 2014. Throughout the fall of 2013 and spring of 2014, each appellant conducted business with PEI, unaware that PEI was financially unstable.

On July 15, 2013, the PSC performed a compliance review of PEI which showed outstanding checks written by PEI exceeded PEI's account balance by more than $603,000. PEI's owner equity was over $5.8 million in the negative, and its working capital ratio was $7.2 million in the negative. The PSC found PEI had over a half-million-dollar working capital deficiency dating back to at least December 31, 2012. The

[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2014).

PSC contacted PEI's bank and expressed concern but took no further action. Until its closure, PEI's net worth and working capital ratio remained negative by millions of dollars. Nevertheless, PEI continued to contract with appellants and take possession of their grain.

On March 5, 2014, the PSC terminated PEI's grain warehouse and grain dealer licenses. Appellants were in large part unpaid for their grain. Appellants suffered a cumulative financial loss of over $2.56 million.

In June 2016, appellants filed a complaint against the PSC under the STCA which alleged their losses resulted from the PSC's negligent failure to perform its obligations under Nebraska law. Appellants' lawsuit claims the PSC failed to enforce several Nebraska statutes and regulations which impose minimum financial requirements for grain dealers. In particular, appellants highlight a regulatory procedure which they contend, based on the facts of this case, imposed a mandatory duty on the grain warehouse director for the PSC to file a complaint before the PSC concerning PEI's law violations, obtain a hearing on the matter, and notify PEI and its security provider. Appellants contend, due to the PSC's failure to fulfill its legal duties, PEI continued to conduct business with appellants, which caused appellants' financial losses.

The PSC responded to appellants' complaint by moving to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(1). Following a hearing, the district court granted the PSC's motion. The court found appellants' suit was barred by sovereign immunity, because the substance of appellants' claims fell within the "failure to suspend or revoke a license" exception to the STCA's limited waiver of immunity provided in § 81-8,219(8). The court further found appellants' suit was barred by the STCA's discretionary function exception provided in § 81-8,219(1). The court dismissed appellants' claims with prejudice for lack of subject matter jurisdiction. Appellants filed an appeal, and we granted their motion to bypass the Nebraska Court of Appeals.

II. ASSIGNMENTS OF ERROR

Appellants assign, restated and reordered, the district court erred in (1) dismissing appellants' claims for lack of subject matter jurisdiction under § 6-1112(b)(1) based on exceptions to the STCA, (2) concluding that appellants' claims are barred by the license revocation exception in § 81-8,219(8), (3) concluding that appellants' claims are barred by the discretionary function exception in § 81-8,219(1), and (4) dismissing appellants' complaint without leave to amend.

III. STANDARD OF REVIEW

[1] A district court's grant of a motion to dismiss on the pleadings is reviewed de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[2]

[2] Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

[3] Whether the allegations made by a plaintiff constitute a cause of action under the STCA or whether the allegations set forth claims which are precluded by the exemptions set forth in the act is a question of law, for which an appellate court has a duty to reach its conclusions independent of the conclusions reached by the district court.[4]

IV. ANALYSIS

We first address whether exceptions to STCA's limited waiver of immunity, enumerated in § 81-8,219, are affirmative defenses which the State must plead and prove. We then

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[2] *Salem Grain Co. v. Consolidated Grain & Barge Co.*, 297 Neb. 682, 900 N.W.2d 909 (2017).

[3] *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

[4] See, *Bartunek v. State*, 266 Neb. 454, 666 N.W.2d 435 (2003); *Hammond v. Nemaha Cty.*, 7 Neb. App. 124, 581 N.W.2d 82 (1998).

address whether the State has waived its sovereign immunity with respect to appellants' claims.

1. Exception to STCA's Waiver of Immunity Is Not Affirmative Defense Which State Must Plead and Prove

Appellants argue that the district court erred by considering application of exceptions to the STCA, because the PSC's motion to dismiss under § 6-1112(b)(1) did not raise affirmative defenses. Appellants contend that exceptions to the STCA are affirmative defenses which the State must plead and prove.

The PSC argues that even if consideration of exceptions to the STCA was improper, the district court reached the correct result. Alternatively, the PSC argues that we should revise Nebraska's affirmative defense rule.

[4,5] During the pendency of this appeal, we decided *Davis v. State*.[5] In *Davis*, we overruled our prior line of cases which held that exceptions to the limited waivers of sovereign immunity provided by the STCA and the Political Subdivisions Tort Claims Act (PSTCA)[6] are affirmative defenses which the State must plead and prove. We held that an exception to the State's waiver of immunity under the STCA is an issue that the State may raise for the first time on appeal and that a court may consider sua sponte.[7] We recognized this rule is more consistent with the settled principle that the lack of subject matter jurisdiction may be raised at any time by any party

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[5] *Davis v. State*, 297 Neb. 955, 902 N.W.2d 165 (2017) (overruling *Hall v. County of Lancaster*, 287 Neb. 969, 846 N.W.2d 107 (2014); *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Reimers-Hild v. State*, 274 Neb. 438, 741 N.W.2d 155 (2007); *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998); *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997); *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992); and *D.M. v. State*, 23 Neb. App. 17, 867 N.W.2d 622 (2015)).

[6] Neb. Rev. Stat. §§ 13-901 to 13-928 (Reissue 2012).

[7] *Davis, supra* note 5.

or by the court sua sponte.[8] We explained that an appellate court has an independent duty to decide jurisdictional issues on appeal, even if the parties have not raised the issue.[9] In light of this duty, a rule which treats exceptions to waivers of immunity as waivable affirmative defenses places courts in an unworkable position when a jurisdictional defect is apparent on the face of a plaintiff's complaint. Consequently, even where a party has not raised the issue, an appellate court has the power to determine whether a plaintiff's allegations, taken as true, show that a tort claim is facially barred by an STCA exception under § 81-8,219.

At argument, appellants acknowledged this recent change in the law and that their prior position that the PSC was required to plead and prove exceptions to the STCA as affirmative defenses is foreclosed by our recent decision.

2. State Has Not Waived Sovereign Immunity for Claims Based on State Agency's Failure to Suspend or Revoke License

(a) Conclusions of Law Regarding Claims Under STCA

[6-8] Under the 11th Amendment,[10] a nonconsenting state is generally immune from suit unless the state has waived its immunity.[11] 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." The Legislature has provided limited waivers of the State's sovereign immunity through the STCA, subject to statutory

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[8] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

[9] *Davis, supra* note 5.

[10] U.S. Const. amend. XI.

[11] *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890); *Lamb v. Fraternal Order of Police Lodge No. 36*, 293 Neb. 138, 876 N.W.2d 388 (2016).

exceptions.[12] Appellate courts give statutory language its plain and ordinary meaning and will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[13]

[9-11] It is well settled that statutes that purport to waive the State's protection of sovereign immunity are strictly construed in favor of the sovereign and against the waiver.[14] In order to strictly construe against a waiver of sovereign immunity, we broadly read exemptions from a waiver of sovereign immunity.[15] 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.[16]

[12] The discretionary function exception under the STCA and PSTCA is expressed in nearly identical language; thus, cases construing the state exception apply as well to the PSTCA exception.[17] In analyzing § 13-910(4), the PSTCA equivalent to the STCA's "failure to suspend or revoke a license" exception under § 81-8,219(8), we have stated the language of the exception is clear and unambiguous.[18]

[13] An appellate court must determine whether sovereign immunity lies from the nature of the underlying dispute.[19]

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[12] § 81-8,219; *Shipley v. Department of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

[13] *Lindsay Internat. Sales & Serv. v. Wegener*, 297 Neb. 788, 901 N.W.2d 278 (2017).

[14] *Zawaideh v. Nebraska Dept. of Health & Human Servs.*, 285 Neb. 48, 825 N.W.2d 204 (2013).

[15] *Stick v. City of Omaha*, 289 Neb. 752, 857 N.W.2d 561 (2015).

[16] *Jill B. & Travis B. v. State*, 297 Neb. 57, 899 N.W.2d 241 (2017).

[17] *Shipley, supra* note 12; *Lawry, supra* note 5, *overruled on other grounds, Davis, supra* note 5; *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

[18] *Rohde v. City of Ogallala*, 273 Neb. 689, 731 N.W.2d 898 (2007).

[19] See, *County of Lancaster v. State*, 247 Neb. 723, 529 N.W.2d 791 (1995); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

Where the facts are undisputed, whether an exception to immunity under the STCA precludes suit is a question of law.[20]

(b) Provisions of STCA Apply to PSC

[14] The PSC is an independent regulatory body created by the Nebraska Constitution in article IV, § 20.[21] The PSC's authority to regulate public grain warehouses is purely statutory, in contrast to its plenary authority to regulate common carriers under Neb. Const. art. IV, § 20.[22] Under Neb. Rev. Stat. § 75-109.01(2) (Reissue 2009 & Cum. Supp. 2014), the PSC is vested with jurisdiction over grain pursuant to the Grain Warehouse Act[23] and the Grain Dealer Act.[24] Chapter 88, article 5, of the Nebraska Revised Statutes grants the PSC broad regulatory powers, including licensing authority, over all public grain warehouses.[25] A public warehouse cannot be considered a "common carrier."[26] As a result, the authority of the PSC to regulate public grain warehouses springs from legislative enactment, and nothing else.

Section 88-545 grants the PSC authority to enforce the Grain Warehouse Act and to adopt and promulgate rules and regulations to aid in the administration of the act. Section 75-903.01 permits the PSC to, upon the filing of a complaint and after a hearing, suspend or revoke the license of any grain dealer for failure to comply with the requirements of

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[20] See *D.K. Buskirk & Sons v. State*, 252 Neb. 84, 560 N.W.2d 462 (1997).

[21] *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015).

[22] *In re Claims Against Pierce Elevator*, 291 Neb. 798, 868 N.W.2d 781 (2015); *In re Complaint of Fecht*, 224 Neb. 752, 401 N.W.2d 470 (1987).

[23] See Neb. Rev. Stat. §§ 88-525 to 88-552 (Reissue 2014 & Cum. Supp. 2016).

[24] See Neb. Rev. Stat. §§ 75-901 to 75-910 (Reissue 2009 & Cum. Supp. 2016).

[25] *In re Complaint of Fecht*, 216 Neb. 535, 344 N.W.2d 636 (1984).

[26] *Id.*

the Grain Dealer Act or any rule or regulation adopted and promulgated pursuant to such act.

[15] The STCA defines "[s]tate agency" to include all "commissions of the State of Nebraska . . . the primary function of which is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska."[27] The PSC's broad statutory authority over the business of grain dealing, as well as its jurisdiction over several other matters of public concern enumerated in § 75-109.01, demonstrates that the PSC is an instrumentality of the State and part of the sovereign power of the State. Further, in at least one other matter, we have applied the STCA to actions of the PSC.[28] Therefore, under the circumstance of the instant case, the PSC is a state agency for purposes of the STCA, and as a result, the provisions of the STCA are applicable here.[29]

(c) Appellants' Claims Are Grounded in License Revocation Exception to STCA's Waiver of Immunity

As noted, if a statutory exception to the STCA's limited waiver of immunity applies to appellants' claims, the claims are barred. Here, we first address whether the "failure to suspend or revoke a license" exception precludes appellants' suit. The STCA provides that the State's waiver of sovereign immunity shall not apply to "[a]ny claim based upon the issuance, denial, suspension, or revocation of or failure or refusal to issue, deny, suspend, or revoke any permit, license, certificate, or order."[30]

[16] Section 81-8,219(8) is clear and unambiguous. State agencies may not be sued under the STCA for claims based upon the failure to suspend or revoke a license.

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[27] § 81-8,210(1).

[28] *D.K. Buskirk & Sons, supra* note 20.

[29] See, § 81-8,209; *Zimmerman v. Douglas Cty. Hosp.*, 252 Neb. 583, 563 N.W.2d 349 (1997).

[30] § 81-8,219(8).

We have referred to the principle that an appellate court must determine whether sovereign immunity lies from the underlying substance of a dispute as the "gravamen of the complaint test."[31] Under this test, parties cannot defeat the Legislature's intent to preserve exceptions to the State's sovereign immunity by attempting to plead around statutory exceptions through a "semantic recasting of events."[32]

Appellants argue, as a result of the PSC's negligent failure to perform its obligations in the months leading up to PEI's closure, appellants lost a total of over $2.56 million. Appellants allege the PSC had reviewed PEI's records and knew PEI was out of compliance with its legal financial requirements, but failed to enforce the law to ensure compliance. Specifically, appellants allege the PSC knew PEI had violated rules and regulations which required grain dealers to maintain a minimum net worth of $10,000[33] and maintain a working capital ratio of not less than 1 to 1.[34] Appellants argue the PSC's knowledge of PEI's law violations gave rise to a ministerial duty on behalf of the PSC to institute complaint proceedings against PEI under 291 Neb. Admin. Code, ch. 8, § 003.08, now codified as 291 Neb. Admin. Code, ch. 8, § 003.07 (2016). Section 003.07 of the Grain Warehouse Rules and Regulations provides:

> [I]f the Grain Warehouse Director or other Commission personnel have reasonable cause to believe that a grain dealer has violated the statutes or rules of the Commission, the Director or other Commission personnel will:
>
> 003.07A File a complaint before the Commission against the grain dealer setting forth the alleged violation.

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[31] *Jill B., supra* note 16, 297 Neb. at 89, 899 N.W.2d at 263 (citing *Stonacek v. City of Lincoln*, 279 Neb. 869, 782 N.W.2d 900 (2010)).

[32] *Britton v. City of Crawford*, 282 Neb. 374, 386, 803 N.W.2d 508, 518 (2011). Accord *Johnson v. State*, 270 Neb. 316, 700 N.W.2d 620 (2005) (quoting *United States v. Shearer*, 473 U.S. 52, 105 S. Ct. 3039, 87 L. Ed. 2d 38 (1985)).

[33] 291 Neb. Admin. Code, ch. 8, § 003.03H (2016).

[34] § 003.03I.

003.07B Obtain a hearing date on the complaint.

003.07C Notify the grain dealer and its security provider of the complaint and hearing date on the complaint.

Appellants argue that if such complaint proceedings had occurred, they would not have sustained any losses. They assert that PEI would have ceased doing business sooner, that appellants would not have deposited grain with and marketed grain through PEI, or that PEI would have recapitalized and would not have failed.

Appellants argue their claims are not grounded in the "failure to suspend or revoke a license" exception, because the complaint does not specifically allege the PSC was obligated to suspend or revoke PEI's license. Appellants argue the complaint alleges only that the grain warehouse director for the PSC was required to file a complaint and bring PEI's law violations to the attention of the PSC.

Appellants' arguments are flawed for two reasons. First, the natural outcome of the instituting of complaint proceedings under § 003.07 would have been the suspension or revocation of PEI's license. Section 003.08, titled "Suspension or Revocation of License," provides, upon the filing of a complaint, the PSC may temporarily suspend a grain dealer's license without a hearing.[35] If, following a hearing, the PSC finds the allegations in the complaint are true, then it may revoke the grain dealer's license. Thus, as the district court found, the claim that the PSC negligently failed to institute complaint proceedings against PEI is "inextricably linked" to a claim that the PSC negligently failed to revoke or suspend PEI's license.[36]

Second, appellants' complaint allegations are broader than they argue. Appellants' causation theory is not based only on the lack of notice of PEI's law violations, but that by failing to enforce financial rules and regulations against PEI, the PSC

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[35] 291 Neb. Admin. Code, ch. 8, § 003.08 (2016).

[36] *Britton, supra* note 32, 282 Neb. at 386, 803 N.W.2d at 518.

allowed PEI to continue to conduct business while financially unstable, which ultimately led to PEI's failure and appellants' losses. As the PSC argues, appellants' causation theory cannot rely on lack of notice alone. The procedure provided under § 003.07 provides notice to the PSC, PEI, and PEI's security provider, and not grain dealer customers such as appellants. Based on the complaint allegations, but for the PSC's lack of enforcement of regulations during the months prior to PEI's closure, there would be no claim. Therefore, reading § 81-8,219(8) broadly, as we must, the gravamen of appellants' allegations of negligence is the PSC's failure to suspend or revoke PEI's license. Appellants' suit is thus barred under § 81-8,219(8).

[17] An appellate court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[37] Because we find that the PSC is immune from appellants' claims under the "failure to suspend or revoke a license" exception, we need not address whether appellants' claims are barred under the discretionary function exception. Further, we do not address appellants' assignment that the district court erred by dismissing the complaint without leave to amend, because the lack of subject matter jurisdiction for appellants' claims renders amending futile.

V. CONCLUSION

For the foregoing reasons, we conclude that appellants' negligence claims are grounded in a state agency's alleged failure to suspend or revoke a license and that the Legislature has preserved sovereign immunity for such conduct. We affirm the district court's determination that it lacked subject matter jurisdiction over the case and that the PSC is entitled to judgment as a matter of law.

Affirmed.

Wright, J., not participating.

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[37] *Salem Grain Co., supra* note 2.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

John C. Nimmer, appellant, v. Giga Entertainment Media, Inc., appellee.

905 N.W.2d 523

Filed January 12, 2018. No. S-17-070.

1. **Judgments: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.
2. **Jurisdiction: Rules of the Supreme Court: Pleadings: Appeal and Error.** When reviewing an order dismissing a party from a case for lack of personal jurisdiction under Neb. Ct. R. Pldg. § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.
3. **Motions to Dismiss: Appeal and Error.** In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.
4. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.
5. **Due Process: Jurisdiction: States.** Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.
6. **Constitutional Law: Jurisdiction: States.** Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.
7. **Due Process: Jurisdiction: States.** If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.

8. ____: ____: ____. The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.
9. ____: ____: ____. Due process for personal jurisdiction over a nonresident defendant requires that the defendant's minimum contacts with the forum state be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
10. **Due Process: Jurisdiction: States: Appeal and Error.** In analyzing personal jurisdiction, an appellate court considers the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.
11. **Jurisdiction: States.** Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.
12. ____: ____. The purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts, or of the unilateral activity of another party or a third person. Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself or herself that create a substantial connection with the forum state.
13. ____: ____. A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.
14. ____: ____. To satisfy general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in continuous and systematic general business contacts with the forum state.
15. ____: ____. If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.

Appeal from the District Court for Sarpy County: David K. Arterburn, Judge. Affirmed as modified.

John C. Nimmer, of Nimmer Law Office, pro se.

Clarence E. Mock, of Johnson & Mock, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

I. INTRODUCTION

John C. Nimmer, a licensed attorney, began providing legal representation for Digital Broadcasting Corporation (DBC) in 1995. In 2012, DBC merged with Giga Entertainment Media, Inc. (GEM), whereby GEM became the surviving corporation. DBC shareholders received a single share of GEM in exchange for each share owned in DBC.

In 2015, Nimmer withdrew from representation of DBC. Upon resigning from representation, Nimmer made a demand on GEM for cash legal fees and a repurchase of DBC common shares. After the parties failed to reach a settlement, Nimmer, acting pro se, filed a claim of breach of contract against GEM. GEM filed a motion to dismiss for lack of personal jurisdiction.

Following a hearing, the trial court granted GEM's motion to dismiss for lack of personal jurisdiction and dismissed Nimmer's complaint with leave to amend the complaint. Nimmer filed an amended complaint that included additional claims for tortious conversion and a violation of Nebraska's Uniform Deceptive Trade Practices Act.[1] GEM filed a second motion to dismiss for lack of personal jurisdiction. The district court granted GEM's motion to dismiss for lack of personal jurisdiction and dismissed Nimmer's complaint with prejudice. Nimmer appeals. We affirm as modified.

II. BACKGROUND

1. Factual Background

Nimmer stated in his affidavit that he has provided legal services to DBC and its affiliates since April 1995, in exchange for DBC common shares and cash compensation. DBC was

[1] See Neb. Rev. Stat. §§ 87-301 to 87-306 (Reissue 2014 & Cum. Supp. 2016).

a Delaware corporation with its home offices formerly in Nassau County, New York, and is now dissolved. According to Nimmer, he provided legal services to "Sky Cable, LLC," one of DBC's affiliates that is now a dissolved Nevada business entity, with its former home office in Omaha, Nebraska.

Nimmer attached extensive documentation to his affidavit regarding any contact he had with DBC and GEM in addition to any document referencing both DBC and GEM. Among those documents is a June 24, 2008, letter that Nimmer sent to Gary Nerlinger, chairman of DBC, confirming the understanding that the agreement for the performance of legal services to DBC

> shall be governed by, and construed and enforced in accordance with, the laws of the State of Nebraska. [DBC] hereby irrevocably submits to the jurisdiction of any federal or state courts of the State of Nebraska for purpose of any suit, action, or other proceeding arising out of this letter Agreement.

Nerlinger signed the letter as accepted.

Also attached to Nimmer's affidavit are the minutes for a June 1, 2012, DBC board of directors telephonic meeting in which DBC's board of directors approved a statutory merger of DBC's assets with GEM. Nimmer averred in his affidavit that "[a]fter GEM's creation in May 2012 by DBC[, Nimmer] continued to e-mail itemized billing statements for overlapping DBC and GEM legal work to the same persons addressed to 'DBC and Affiliates'." On August 30, Charles Noska, GEM's vice president of logistic integration, sent an email from a GEM email account to "DBC and now [GEM] Investors," informing them that "[DBC] has been transformed formally into . . . GEM." The email also included an attached "copy of the GEM Business Plan." On September 26, Noska sent another email concerning the GEM business plan, with the subject line "GEM (formerly DBC) Index for Substantiating Articles and Research."

Lawrence W. Silver, vice president of GEM, stated in his affidavit that GEM is a Nevada corporation with its

principal place of business in New York. GEM has no offices in Nebraska; owns no property in Nebraska; generates no revenue in Nebraska; maintains no corporate records in Nebraska; and has no employees, officers, or directors in Nebraska. Silver also stated that since GEM's formation in 2012, there has not been a single instance in which a GEM employee, officer, or director traveled to Nebraska on company business or has otherwise been in Nebraska for any purpose relating in any way to GEM's business activities. GEM has not contracted to supply goods or services in Nebraska, nor registered with the Secretary of State to do business in Nebraska.

On April 1, 2015, GEM mailed a letter to DBC shareholders, directing them to surrender their DBC shares in order to be issued shares in GEM. The process set forth in the letter required DBC shareholders to send their certificates to GEM. DBC notified shareholders that "[t]he DBC certificates will be copied, recorded and forwarded to legal counsel, . . . Nimmer[,] by our administrative division."

On July 8, 2015, Nimmer emailed Noska to inform him that he, Nimmer, refused to surrender his DBC certificates. On November 12, Nimmer withdrew from his representation of DBC.

In an email dated November 15, 2015, GEM's outside counsel, Abram Pafford, stated:

> [I]f you want to send proposed stipulation language stating that GEM agrees to Nebraska as a forum for any litigation between itself and Nimmer Law Office, and that GEM agrees it is responsible for any legal fee invoices determined by a court to be owed by DBC to Nimmer Law Office, I will send it to the company and probably recommend that the Board agree to it.
>
> My recommendation would be based on my understanding that without regard to corporate form, there have at least been verbal agreements and a course of dealing between GEM and Nimmer Law Office whereby GEM agreed to assume responsibility for the unpaid balance of legal fees owed by DBC to Nimmer Law Office.

In an email from Pafford to Nimmer later that same day, Pafford stated:

> Since you cannot be bothered with proposing stipulation language, and since you ignored my email indicating that I was authorized to act for the company on the limited issue of appropriate stipulation language, here is the language I would propose:
>
> "The Parties stipulate that Nebraska is the proper venue for this litigation, and that the Nebraska courts can properly exercise personal jurisdiction over GEM."

In a November 17 email, Pafford stated that "[GEM] has offered a stipulation that would cover the issues of Nebraska venue and successor liability for your legal fees in a straightforward manner. . . . If you choose to file suit without responding to the proposed stipulation that is up to you . . . ."

After the parties failed to reach a settlement, Nimmer, acting pro se, filed claims of breach of contract for failing to repurchase Nimmer's 584,500 DBC common shares and sought the value of those shares based upon a share price at the time of the merger.

2. Procedural Background

On October 28, 2016, Nimmer filed a verified amended complaint. In his amended complaint, Nimmer alleged that GEM is the successor of DBC and that thus, DBC's actions are ascribable to GEM for purposes of personal jurisdiction, because (1) Nimmer's monthly billing statements for legal representation were addressed to "'DBC and Affiliates'" and later to "'GEM/DBC and Affiliates'" and sent to the same persons; (2) DBC stated to Nimmer that it would merge with GEM and that GEM would automatically acquire DBC's assets and would remain responsible for DBC's financial obligations; (3) GEM changed plans to instead cause a share-for-share exchange, after which DBC would be dissolved; (4) the April 1, 2015, letter from GEM to DBC shareholders requested DBC shareholders to surrender DBC stock certificates to GEM which would be forwarded to Nimmer as GEM's legal counsel;

(5) Nimmer demanded cash legal fees and DBC common shares upon resigning from further representation of GEM, and GEM agreed to a payment plan of legal fees but Nimmer has not agreed to a share repurchase plan; (6) GEM's legal counsel stipulated to a Nebraska venue in an email to Nimmer; (7) both entities have been under common control because there is substantial overlap among DBC's former owners, management, attorneys, accountants, agents, and consultants and those in GEM; (8) GEM has admitted that it is DBC's successor in interest in (a) early GEM shareholder updates sent to DBC shareholders by Noska, "an officer/director of both DBC and GEM, on behalf of GEM from a GEM e-mail account e-mailed DBC shareholders," and once referred to "'DBC and now [GEM] Investors,'" and once stated in the subject line "'[GEM] (formerly DBC) Sept 26 2012 update,'" (b) an April 1, 2015, email sent by GEM to DBC shareholders requiring that they exchange DBC shares for GEM shares, and (c) a November 13, 2015, screenshot of GEM's website in which GEM describes its beginnings as involving "digital wireless television systems and FCC bandwidth licenses," which is what DBC and its affiliates had done and not what GEM did; (9) Nerlinger controlled both DBC and GEM by (a) recommending all officer and board member candidates to Silver, who then appointed those candidates, (b) directing the current GEM "initial public offering" process, (c) directing significant changes to DBC's and GEM's business models, (d) directing day-to-day operations, (e) attending and directing board of directors meetings, (f) conducting conference calls for investors, (g) negotiating and consummating contracts that were signed by other officers and directors, (h) receiving substantial equity ownership, (i) claiming in agreements disclosed in litigation that he is the founder of GEM, (j) "'cherry pick[ing]'" which GEM shareholders received updates about GEM, (k) serving as Nimmer's primary point of contact for legal representation of DBC and GEM, and (l) routinely exceeding his scope as a consultant to GEM; (10) Nimmer provided legal representation to one of DBC's affiliates, Sky Cable, which had its former home offices

in Omaha commencing in 1995 until Sky Cable's dissolution; (11) for the duration of Nimmer's representation of DBC and GEM, DBC and GEM have issued and sold their own securities and have substantially overlapping management as is apparent from their public filings; (12) a February 5, 2002, fee agreement between Nimmer and DBC provided that "'venue for all fee matters will continue to be conferred specifically upon Nebraska'"; (13) the February 5, 2002, and June 24, 2008, fee agreements between Nimmer and DBC provided that venue was proper in Nebraska and that the laws of Nebraska applied; (14) DBC expressly admitted in previous litigation that while it was a Delaware corporation with its home offices in New York, it conducts business in Nebraska; (15) Nimmer provided litigation and nonlitigation services for DBC in Nebraska; and (16) Nerlinger made several trips to Nebraska related to legal services provided by Nimmer.

Nimmer also contended that GEM's actions, standing alone, confer personal jurisdiction, because (1) GEM's retention of Nimmer as legal counsel from May 2012 until November 2015 constituted sufficient minimum contacts; (2) GEM's legal counsel stipulated to a Nebraska venue in response to Nimmer's demands for cash payment for legal fees; and (3) Nimmer's claims of tortious conversion and violation of the Uniform Deceptive Trade Practices Act constitute tortious acts by GEM that are intentional, directed at Nebraska, and knowingly cause harm to Nimmer in Nebraska, thereby constituting sufficient specific minimum contacts with Nebraska.

On January 12, 2017, the district court granted GEM's motion to dismiss, finding that the court lacked personal jurisdiction over GEM.[2] The court noted that the "factual allegations on which [Nimmer] relies include contacts from 15 to 20 years ago, a forum selection clause from a 2008 fee agreement between [Nimmer] and DBC, and the fact that [Nimmer] had provided legal services to GEM," and that such

[2] See Neb. Ct. R. Pldg. § 6-1112(b)(2). See, generally, § 6-1112(b).

was insufficient to constitute the requisite minimum contacts between GEM and Nebraska. Nimmer appeals.

III. ASSIGNMENTS OF ERROR

Nimmer assigns, restated, that the trial court erred in (1) finding that Nebraska did not have personal jurisdiction over GEM and (2) dismissing Nimmer's complaint with prejudice.

IV. STANDARD OF REVIEW

[1,2] When a jurisdictional question does not involve a factual dispute, the issue is a matter of law. An appellate court reviews questions of law independently of the lower court's conclusion.[3] When reviewing an order dismissing a party from a case for lack of personal jurisdiction under § 6-1112(b)(2), an appellate court examines the question of whether the nonmoving party has established a prima facie case of personal jurisdiction de novo.[4]

[3] In reviewing the grant of a motion to dismiss, an appellate court must look at the facts in the light most favorable to the nonmoving party and resolve all factual conflicts in favor of that party.[5]

V. ANALYSIS

[4,5] Nimmer argues that the district court erred in finding that the court lacked personal jurisdiction over GEM. Personal jurisdiction is the power of a tribunal to subject and bind a particular entity to its decisions.[6] Before a court can exercise personal jurisdiction over a nonresident defendant, the court must determine, first, whether the long-arm statute is satisfied and, if the long-arm statute is satisfied, second, whether minimum contacts exist between the defendant and

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[3] *S.L. v. Steven L.*, 274 Neb. 646, 742 N.W.2d 734 (2007).

[4] *VKGS v. Planet Bingo*, 285 Neb. 599, 828 N.W.2d 168 (2013).

[5] *RFD-TV v. WildOpenWest Finance*, 288 Neb. 318, 849 N.W.2d 107 (2014).

[6] *In re Petition of SID No. 1*, 270 Neb. 856, 708 N.W.2d 809 (2006).

the forum state for personal jurisdiction over the defendant without offending due process.[7]

On appeal, Nimmer makes three primary arguments regarding personal jurisdiction. Nimmer first argues that specific personal jurisdiction exists over GEM because of GEM's tortious conversion and the Uniform Deceptive Trade Practices Act claims. Nimmer also argues that general personal jurisdiction exists over GEM because of Nimmer's provision of legal advice to GEM. Alternatively, Nimmer argues that general personal jurisdiction exists over GEM due to the actions of GEM's "alter ego predecessor DBC."[8]

1. Long-Arm Statute

[6] Nebraska's long-arm statute, Neb. Rev. Stat. § 25-536 (Reissue 2016), extends Nebraska's jurisdiction over nonresidents having any contact with or maintaining any relation to this state as far as the U.S. Constitution permits.[9] Therefore, the issue is whether GEM had sufficient contacts with Nebraska so that the exercise of personal jurisdiction would not offend federal principles of due process.[10]

2. Minimum Contacts

[7-9] If the long-arm statute has been satisfied, a court must then determine whether minimum contacts exist between the defendant and the forum state for personal jurisdiction over the defendant without offending due process.[11] The benchmark for determining if the exercise of personal jurisdiction satisfies due process is whether the defendant's minimum contacts with the forum state are such that the defendant should reasonably anticipate being haled into court there.[12]

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[7] *S.L. v. Steven L., supra* note 3.

[8] Brief for appellant at 14.

[9] *VKGS v. Planet Bingo, supra* note 4.

[10] See *Erickson v. U-Haul Internat.*, 274 Neb. 236, 738 N.W.2d 453 (2007).

[11] *Id.*

[12] *Id.*

Due process for personal jurisdiction over a nonresident defendant requires that the defendant's minimum contacts with the forum state be such that "'maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'"[13]

[10-12] In analyzing personal jurisdiction, we consider the quality and type of the defendant's activities to decide whether the defendant has the necessary minimum contacts with the forum state to satisfy due process.[14] Whether a forum state court has personal jurisdiction over a nonresident defendant depends on whether the defendant's actions created substantial connections with the forum state, resulting in the defendant's purposeful availment of the forum state's benefits and protections.[15] The "purposeful availment" requirement "'ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts . . . or of the "unilateral activity of another party or a third person."'"[16] Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself or herself that create a "'"substantial connection"'" with the forum state.[17]

[13-15] A court exercises two types of personal jurisdiction depending upon the facts and circumstances of the case: general personal jurisdiction or specific personal jurisdiction.[18] To satisfy general personal jurisdiction, the plaintiff's claim does not have to arise directly out of the defendant's contacts with the forum state if the defendant has engaged in "'"continuous and systematic general business contacts"'" with the forum

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[13] *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 481, 675 N.W.2d 642, 649 (2004), quoting *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[14] *S.L. v. Steven L., supra* note 3.

[15] *Erickson v. U-Haul Internat., supra* note 10.

[16] *S.L. v. Steven L., supra* note 3, 274 Neb. at 653, 742 N.W.2d at 741.

[17] *Id.*

[18] *Erickson v. U-Haul Internat., supra* note 10.

state.[19] If the defendant's contacts are neither substantial nor continuous and systematic, but the cause of action arises out of or is related to the defendant's contact with the forum, a court may assert specific jurisdiction over the defendant, depending on the quality and nature of such contact.[20]

(a) Specific Personal Jurisdiction Over GEM

Nimmer first argues that because his claims of tortious conversion and violation of the Uniform Deceptive Trade Practices Act are intentional torts, specific personal jurisdiction over GEM exists. GEM contends that Nimmer has cited no authority to support his assertions, nor does GEM have any meaningful contacts with Nebraska; thus, GEM is not subject to specific personal jurisdiction.

Nimmer cites to Neb. Rev. Stat. § 8-1112 (Reissue 2012), which states:

> Registering as a broker-dealer, issuer-dealer, agent, investment adviser, or investment adviser representative under the Securities Act of Nebraska or directly or indirectly offering a security or investment adviser services in this state shall constitute sufficient contact with this state for the exercise of personal jurisdiction over such a person in any action which arises under the act.

Nimmer relies heavily on *Abdouch v. Lopez*.[21] In *Abdouch*, the plaintiff filed suit against an out-of-state defendant and his company because the defendant attempted to sell a book through his company's website, which the plaintiff contended was a violation of her privacy rights. To determine whether specific personal jurisdiction in Nebraska existed over the company based on the online advertisement for the book, this court, in *Abdouch*, applied the test set forth by the U.S. Supreme Court in *Calder v. Jones*[22]:

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[19] *Id.* at 249, 738 N.W.2d at 464.

[20] *S.L. v. Steven L., supra* note 3.

[21] *Abdouch v. Lopez*, 285 Neb. 718, 829 N.W.2d 662 (2013).

[22] *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984).

> "'[A] defendant's tortious acts can serve as a source of personal jurisdiction only where the plaintiff makes a prima facie showing that the defendant's acts (1) were intentional, (2) were uniquely or expressly aimed at the forum state, and (3) caused harm, the brunt of which was suffered—and which the defendant knew was likely to be suffered—[in the forum state].'"[23]

This court then quoted the Eighth Circuit Court, which held that it "'construe[s] the *Calder* effects test narrowly, and hold[s] that, absent additional contacts, mere effects in the forum state are insufficient to confer personal jurisdiction.'"[24] We accordingly held that the plaintiff failed to prove that Nebraska residents were targeted with the advertisement, because the advertisement did not "expressly direct its offer of sale to Nebraska."[25] We further explained that "the mention of Nebraska here is incidental and was not included for the purposes of having the consequences felt in Nebraska."[26] Furthermore, in response to the plaintiff's contention that she had a representative contact the defendant with her objection to his commercial use of her name and identity in his advertisement, this court emphasized that "'"it is essential in each case that there be *some act by which the defendant purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."'"[27]

In *RFD-TV v. WildOpenWest Finance*,[28] we addressed personal jurisdiction based on the enforceability of the arbitration clause in a contract. RFD-TV, LLC (RFD), a Nebraska

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[23] *Abdouch v. Lopez, supra* note 21, 285 Neb. at 731, 829 N.W.2d at 674.

[24] *Id.* at 732, 829 N.W.2d at 675.

[25] *Id.* at 733, 829 N.W.2d at 675.

[26] *Id.*

[27] *Id.* at 734, 829 N.W.2d at 676 (emphasis in original), quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985).

[28] *RFD-TV v. WildOpenWest Finance, supra* note 5.

corporation, entered into an agreement with Sunflower Broadband Corporation (Sunflower) in which the parties agreed, among other things, to arbitration in Nebraska. Knology, Inc., a television provider, purchased the assets of Sunflower. Knology then became a wholly owned subsidiary of WOW! Cable (WOW). We found that RFD had "failed to make a prima facie case that [WOW and Knology] were subject to the arbitration clause."[29] We explained that WOW and Knology "were not signatories to the Sunflower Agreement" and that they "did not expressly assume the agreement when they purchased Sunflower's assets."[30] Furthermore, we addressed whether Nebraska had personal jurisdiction over WOW and Knology. We stated:

> Parties who reach out beyond one state and create continuing relationships and obligations with citizens of another state are subject to regulation and sanctions in the other state for the consequences of their activities. Mail and telephone communications sent by a defendant into a forum may count toward the minimum contacts that support jurisdiction, but, as we noted in *Kugler Co. v. Growth Products Ltd.*, [265 Neb. 505, 658 N.W.2d 40 (2003),] the existence of a contract with a party in a forum state or the mere use of interstate facilities, such as telephones and mail, does not, in and of itself, provide the necessary contacts for personal jurisdiction. In *Kugler Co.*, we said we would also look at the prior negotiations between the parties and the contemplated consequences of their dealings.[31]

Accordingly, we held that while WOW and Knology paid licensing fees to a party in Nebraska, occasionally used telephone, email, and mail to discuss and pay invoices from RFD over the course of 2 years, actual business dealings between RFD and WOW and Knology were "extremely limited,"

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[29] *Id.* at 327, 849 N.W.2d at 115.

[30] *Id.*

[31] *Id.* at 328, 849 N.W.2d at 115-16.

because WOW and Knology "paid to provide services based on terms negotiated by other parties."[32] Therefore, we dismissed the complaint for lack of personal jurisdiction.

Nimmer contends that GEM's tortious conversion and violation of the Uniform Deceptive Trade Practices Act were both a result of DBC's decision to do a share-for-share exchange with GEM rather than the initially agreed-upon statutory merger. Nimmer argues that this alleged deception gave shareholders, who had received the DBC shares on a tax-deferred basis, two unappealing options upon exchange: pay taxes on GEM shares or receive substitute GEM shares with lesser rights. Nimmer alleges that the tortious conversion and violation of the Uniform Deceptive Trade Practices Act were tortious acts by GEM that were intentional and directed at Nimmer in Nebraska, thereby constituting sufficient specific minimum contacts with Nebraska. Nimmer directs us to an April 1, 2015, "Dear Shareholder" letter from GEM and a June 4, 2015, email from GEM requesting Nimmer to sign the restricted stock award agreement as support for his contention that the contacts were directed at Nebraska.

We disagree that *Abdouch* is helpful to Nimmer's position. In *Abdouch*, we construed the *Calder* effects test[33] narrowly. In determining whether the plaintiff sufficiently alleged that the defendant's tortious acts were "'"uniquely or expressly aimed"' at the forum state," this court found that the plaintiff did not make a prima facie showing, because she had failed to demonstrate "an intent to target and focus on Nebraska residents."[34] We find similarly here.

The April 1, 2015, letter was a generic email letter sent to all shareholders. As in *Abdouch*, Nimmer failed to demonstrate that GEM "had an intent to target and focus on Nebraska residents" with this generic email letter. Furthermore, this email letter indicates merely that GEM used Nimmer as

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[32] *Id*. at 328, 849 N.W.2d at 116.

[33] See *Calder v. Jones, supra* note 22.

[34] *Abdouch v. Lopez, supra* note 21, 285 Neb. at 734, 829 N.W.2d at 675-76.

legal counsel and sent Nimmer a generic shareholder letter. Similar to the parties in *RFD-TV*, paying fees to a party in Nebraska, "occasionally us[ing] telephone, e-mail, and mail to discuss and pay invoices from RFD over the course of" several years is not sufficient when actual business dealings are "extremely limited."[35]

Nimmer has provided no other proof of his business dealings with GEM to supplement this correspondence, nor has Nimmer demonstrated how any tortious consequences of this letter were felt in Nebraska. In Nimmer's fee arrangement letters with DBC, he explains that he has a New York satellite office from which he also transacts business as a New York licensed attorney. Therefore, as in *Abdouch*, any impact upon Nimmer as a resident of Nebraska was "incidental."[36] This letter provides no basis in finding that GEM "'"purposefully avail[ed] itself of the privilege of conducting activities"'" within Nebraska.[37]

We turn next to the June 4, 2015, email. We find that this email also does not serve as a basis for recovery for either tort claim. In contrast, we observe that this thread of emails provides a basis to find that GEM disclosed the change from a statutory merger to a share-for-share exchange and that Nimmer simply declined to sign the restricted stock agreement after being requested to do so. Therefore, Nimmer has failed to plead facts that demonstrate the cause of action for the tortious claims arising out of or related to GEM's June 4 email to Nimmer.

Finally, Nimmer does not explain how § 8-1112 is applicable to his claims. Nimmer merely states in his propositions of law that the offering of securities constitutes sufficient minimum contacts. He has not indicated that GEM is a registered broker-dealer in Nebraska or that GEM has "directly or

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[35] See *RFD-TV v. WildOpenWest Finance, supra* note 5, 288 Neb. at 328, 849 N.W.2d at 116.

[36] See *Abdouch v. Lopez, supra* note 21, 285 Neb. at 733, 829 N.W.2d at 675.

[37] *Id.* at 734, 829 N.W.2d at 676 (emphasis omitted).

indirectly offer[ed] a security or investment adviser services" in Nebraska.[38] Nimmer has not established specific personal jurisdiction over GEM based solely based on tortious conduct directed at Nebraska.

(b) Continued Retention of Nimmer

Nimmer next argues that GEM's continued retention of Nimmer for "transactional legal work from his Nebraska office constitutes sufficient minimum contacts with Nebraska to confer personal jurisdiction over GEM."[39] GEM argues that it "has never done business in Nebraska and has never had any meaningful operational or jurisdictional contacts of any kind within the state."[40]

In *Burger King Corp. v. Rudzewicz*,[41] a leading case on the issue of personal jurisdiction, the U.S. Supreme Court held that an individual's contract with an out-of-state party alone cannot "automatically establish sufficient minimum contacts in the other party's home forum."[42] Instead, the Court stated that courts must look at "prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing" to determine whether the defendant purposefully established minimum contacts within the forum.[43]

Under this test, then, we must look to the terms of the contract and the parties' "actual course of dealing" to determine whether the defendant purposefully established minimum contacts within the forum.[44] In determining whether the legal services established minimum contacts in the forum, we analyze

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[38] See § 8-1112.

[39] Brief for appellant at 16.

[40] Brief for appellee at 13.

[41] *Burger King Corp. v. Rudzewicz, supra* note 27.

[42] *Id.*, 471 U.S. at 478.

[43] *Id.*, 471 U.S. at 479.

[44] See *id.*

the "prior negotiations and contemplated future consequences" of the relationship of the two parties.[45]

Thompson Hine, LLP v. Taieb,[46] is relevant to this inquiry. In this case, the D.C. Circuit Court held that Washington, D.C., did not have personal jurisdiction over a Florida resident who retained lawyers in an Ohio law firm's Washington, D.C., office to represent him in a matter pending in Oregon. The court reasoned that "[a] non-resident's mere retention of a D.C.-based service provider, absent any other deliberate contact with the forum—demonstrated either by the terms of the contract itself or by the non-resident's actual dealings with the District—cannot qualify as a 'minimum contact.'"[47]

Nimmer is correct that while a contract alone does not establish minimum contacts, the establishment of a continuing relationship with obligations to the instate party could. But no contract between Nimmer and GEM exists in the record. Instead, Nimmer implies a contract by stating that GEM retained and utilized him for legal services from May 2012 until November 2015, and thereafter settled Nimmer's cash claim for legal fees.

Nimmer asserts in his amended complaint and brief that he represented GEM "from GEM's inception on May 12, 2012 without interruption until November 12, 2015." Nimmer further argues on appeal that his legal representation of GEM was composed of "legal advice, transactional work, securities law compliance, and legal advice regarding litigation."[48] It appears from Nimmer's amended complaint that he advised GEM on the disclosures for GEM's filings from 2013 through 2015. It also appears that Nimmer acted as legal counsel for GEM in anticipation of the statutory merger based on the "Dear Shareholder" letter, which states that Nimmer would receive

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[45] See *id*.

[46] *Thompson Hine, LLP v. Taieb*, 734 F.3d 1187 (D.C. Cir. 2013).

[47] *Id.* at 1194.

[48] Brief for appellant at 12.

and record the DBC certificates. But, it is unclear from the record whether Nimmer performed this service, because he later emailed GEM stating that he did not receive any certificates. It is also unclear whether this service was for GEM or DBC. Thus, we are not persuaded that Nimmer has met his burden to show that any contract between himself and GEM was sufficient to support a finding of personal jurisdiction.

In this type of personal jurisdiction inquiry, courts also consider the timeframe of the alleged contacts. In *Johnson v. Woodcock*,[49] the Eighth Circuit held that "'[m]inimum contacts must exist either at the time the cause of action arose, the time the suit was filed, or within a reasonable period of time immediately prior to the filing of the lawsuit,'" and found that the contacts in that case, which occurred in the 1960's to 1980's, were not within a reasonable timeframe. The court additionally found that occasional correspondence between the parties was too attenuated to support a finding of personal jurisdiction.

Nimmer claims that he provided representation for Sky Cable, an affiliate of DBC located in Omaha. But by Nimmer's own admission, that representation occurred over 20 years ago and did not involve GEM. We conclude that the contacts between the forum state and Sky Cable are not within a reasonable timeframe of the current allegations and thus are not supportive of a finding of personal jurisdiction.

Nimmer has not shown that a substantial relationship existed between GEM and the forum state based on the legal services Nimmer provided to GEM. We agree with GEM that Nimmer has not provided any details as to whether his legal work for GEM pertained to disputes involving Nebraska, issues arising under Nebraska law, or any connection beyond the Nebraska location of one of his offices. As such, Nimmer provides no basis for an understanding of any services rendered to GEM in Nebraska. None of these contacts are such that GEM should reasonably anticipate being haled into

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[49] *Johnson v. Woodcock*, 444 F.3d 953, 956 (8th Cir. 2006).

court in Nebraska. We find Nimmer's argument to be without merit.

(c) General Personal Jurisdiction Over GEM—DBC's Alter Ego

Nimmer contends that "it is proper to ascribe the actions of [GEM's] alter ego predecessor DBC to GEM for general jurisdiction minimum contacts analysis."[50] In addition to the extensive list of reasons in Nimmer's amended complaint that GEM is DBC's predecessor, Nimmer contends in his brief that GEM is DBC's alter ego because (1) GEM was a creation of DBC for purposes of reincorporation in Delaware and a name change; (2) the ownership and management of GEM is the same as those of the former DBC, primarily through Nerlinger's sole control of each; and (3) GEM has made numerous admissions to DBC and GEM shareholders, and others, that GEM is a mere continuation of DBC.

Nimmer cites several cases to illustrate that courts have found successor corporations liable for the actions of a parent corporation based on the theories of corporate successor liability and contractual successor liability.[51] Nimmer contends that this court should apply those theories when ascribing minimum contacts for personal jurisdiction.

In support of Nimmer's argument for application of contractual successor liability to personal jurisdiction, Nimmer cites the Delaware Superior Court unpublished case *Universal Capital Mgmt., Inc. v. Micco World, Inc.*[52] In that case, the plaintiff entered into two contracts with a corporation which later merged into the defendant corporation. The two contracts stated that they were binding on the parties and their respective

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[50] Brief for appellant at 16.

[51] See, *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 103 S. Ct. 1991, 76 L. Ed. 2d 120 (1983); *Earl v. Priority Key Servs.*, 232 Neb. 584, 441 N.W.2d 610 (1989).

[52] *Universal Capital Mgmt., Inc. v. Micco World, Inc.*, No. 10C-07-039 RRC, 2011 WL 2347612 (Del. Super. June 2, 2011) (unpublished opinion).

successors. The court acknowledged that the corporate merger alone was insufficient to establish personal jurisdiction.[53] But the court looked at the defendant corporation's conduct and found that because it continued to operate under the terms of the contracts, personal jurisdiction existed.

Nimmer also cites *Clune v. Alimak AB*,[54] in which the Eighth Circuit found in a wrongful death action that personal jurisdiction existed over a parent corporation of a subsidiary that distributed a defective product. The court held that the contacts of the parent company and subsidiary were sufficient to establish minimum contacts in the forum state. The court emphasized that the parent company was a shell corporation that had no employees or products to sell.[55] We find that neither of these cases are persuasive under the facts of this case. Contrary to Nimmer's assertion, *Universal Capital Mgmt., Inc*. does not support the proposition that similar to successor contractual liability, a predecessor's contacts may be ascribed to its successor for personal jurisdiction. Instead, the court made clear that for purposes of personal jurisdiction, the court must analyze the contacts of the defendant corporation "in its own right," and whether it "continued to operate under the terms of the two contracts," causing injury in the forum state.[56] Furthermore, unlike in *Clune*, DBC is not the parent corporation of GEM, nor is GEM a shell company for purposes of DBC's liability. Therefore, the analysis in *Clune* is not relevant under these facts.

Instead, we find *Ashby v. State*,[57] to be persuasive. In *Ashby*, we refused to extend a coconspirator liability theory to minimum contacts for purposes of establishing personal jurisdiction. We declined to reach the issue, noting:

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[53] *Id.*

[54] *Clune v. Alimak AB*, 233 F.3d 538 (8th Cir. 2000).

[55] *Id.*

[56] *Universal Capital Mgmt., Inc. v. Micco World, Inc., supra* note 52, 2011 WL 2347612 at *5.

[57] *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010).

> Due process for personal jurisdiction over a nonresident defendant requires that the plaintiff allege specific acts by the defendant which establish that the defendant had the necessary minimum contacts before a Nebraska court can exercise jurisdiction over a person. Without minimum contacts, a Nebraska court cannot exercise jurisdiction over [the defendant] without violating his right to due process. The difficulty with establishing personal jurisdiction based on an alleged conspiracy is that it merges the jurisdiction issue with the merits of the case.[58]

We do not revisit this decision. As such, we decline Nimmer's invitation to incorporate successor liability and contractual successor liability for minimum contacts for purposes of personal jurisdiction under these facts.

Finally, we reject Nimmer's assertion that GEM's legal counsel stipulated to Nebraska venue. In support of this contention, Nimmer relies on emails sent to him from Pafford. These emails include discussions for a proposed settlement upon Nimmer's withdrawal from legal representation. There is no indication that Nimmer accepted this offer. That the dispute was not settled prior to trial provides a basis for this court to find that Nimmer did not accept GEM's proposed settlement.

As established above, accepting Nimmer's allegations as true and reviewing the record in a light most favorable to Nimmer, we find that Nimmer's amended complaint and general allegations failed to show that GEM made substantial connections with Nebraska resulting in GEM's purposeful availment of Nebraska's benefits and protections. Nimmer's assignment of error is without merit.

(d) Whether District Court Erred in Dismissing Nimmer's Complaint With Prejudice

Nimmer argues that the district court erred in dismissing his complaint with prejudice. GEM argues that a dismissal

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[58] *Id.* at 532, 779 N.W.2d at 360-61.

with prejudice was appropriate because "Nimmer was given a chance to amend his complaint, and after full briefing on this amended complaint, the district court entered its order of dismissal with prejudice."[59]

In support of his argument, Nimmer cites *RFD-TV v. WildOpenWest Finance*,[60] in which RFD asserted that the district court erred in dismissing the case with prejudice. We stated:

> There is no statutory grant of judicial discretion to decide whether to dismiss with or without prejudice on a motion to dismiss for lack of personal jurisdiction. Thus, we find this issue to be a question of law. The Eighth Circuit has said that "a dismissal with prejudice operates as a rejection of the plaintiff's claims on the merits and res judicata precludes further litigation." However, the Full Faith and Credit Clause of the U.S. Constitution requires a court to recognize a judgment from another jurisdiction only if the court rendering the judgment had jurisdiction over the subject matter and parties. Thus, a dismissal for lack of personal jurisdiction, even a dismissal with prejudice, should not prevent RFD from pursuing its claims in an appropriate forum.
>
> On the other hand, a dismissal with prejudice would preclude RFD from filing a second suit with the same claims in a Nebraska court. . . . However, as noted by the Eighth Circuit in *Pohlmann v. Bil-Jax, Inc.*, [176 F.3d 1110 (8th Cir. 1999),] because personal jurisdiction is determined at the time a suit is commenced, it is possible that due to future events, this legal situation could change. Although it seems unlikely under the facts of this case, if, for example, appellees were to relocate to Nebraska, then personal jurisdiction over appellees in a subsequent suit could be proper in this state.

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[59] Brief for appellee at 27.

[60] *RFD-TV v. WildOpenWest Finance, supra* note 5.

> We also note that in this case, both parties agreed in briefs and in arguments before this court that the dismissal should have been without prejudice.[61]

For these reasons, we reversed the district court's opinion and modified the order to a dismissal without prejudice.

We agree that generally a trial court's dismissal of a claim for lack of personal jurisdiction must be without prejudice. This follows from the premise that a court lacking jurisdiction cannot adjudicate the merits of a claim.[62] Here, as in *RFD-TV*, it is possible that personal jurisdiction could be found in a subsequent lawsuit. But that does not mean that a dismissal for lack of jurisdiction can never have preclusive effect. If a subsequent suit presented no different circumstances, the same result would necessarily follow. Thus, in that sense, the dismissal could be described as "with prejudice." Generally speaking, it is better to adhere to the articulation of a dismissal without prejudice. For this reason, we find that the district court erred in dismissing the case with prejudice and its order is modified to a dismissal without prejudice.

VI. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed as modified.

Affirmed as modified.

Wright, J., not participating in the decision.

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[61] *Id.* at 329-30, 849 N.W.2d at 116-17.

[62] Cf. 20 Am. Jur. 2d *Courts* § 53 (2015).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Barbara Lewison, appellant, v. Carol Renner, appellee.

905 N.W.2d 540

Filed January 12, 2018. No. S-17-173.

1. **Motions for New Trial: Judges: Words and Phrases: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion. A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.
2. **Negligence: Proof.** To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages.
3. **Negligence: Motor Vehicles: Proof.** In an automobile negligence action, a plaintiff must prove each of the following elements: (1) that the defendant was negligent in one or more of the ways alleged, (2) that this negligence was a proximate cause of the collision, (3) that the collision was a proximate cause of some damage to the plaintiff, and (4) the nature and extent of that damage.
4. **Expert Witnesses.** When the character of an alleged injury is subjective rather than objective, a plaintiff must establish the cause and extent of the injury through expert medical testimony.
5. **Physicians and Surgeons: Expert Witnesses: Words and Phrases.** Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.
6. ____: ____: ____. Medical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least "probable," in other words, more likely than not.
7. **Pleadings: Proof.** It is an elementary rule of pleading that matters admitted by the pleadings need not be proved.

8. **Pleadings.** Generally, an admission made in a pleading on which the trial is had is more than an ordinary admission, it is a judicial admission.
9. **Pleadings: Evidence: Waiver.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
10. **Pleadings: Intent.** It is important to consider the context in which a judicial admission is made.
11. ____: ____. A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context.
12. **Negligence: Motor Vehicles: Damages.** When a defendant admits the collision caused "some injury" but expressly denies the nature and extent of the injuries and damages claimed, it is improper to construe the admission as conceding the collision caused all of the injuries claimed by the plaintiff.
13. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in the successful party's favor, and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence.
14. **Juries: Verdicts: Presumptions.** When the jury returns a general verdict for one party, a court presumes that the jury found for the successful party on all issues raised by that party and presented to the jury.
15. **Trial: Expert Witnesses.** Triers of fact are not required to take opinions of experts as binding upon them, and determining the weight to be given expert testimony is uniquely the province of the fact finder.

Appeal from the District Court for Buffalo County: John H. Marsh, Judge. Affirmed.

Michael W. Meister for appellant.

Jeffrey H. Jacobsen and Nicholas R. Norton, of Jacobsen, Orr, Lindstrom & Holbrook, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ., and Moore, Chief Judge.

Stacy, J.

After an automobile collision, Barbara Lewison sued Carol Renner for negligence, claiming injuries to her neck, back, and

wrists. Renner admitted her negligence caused the collision and also admitted the collision caused "some injury" to Lewison, but specifically denied the nature and extent of the injuries and damages claimed. The jury returned a general verdict for Renner. Lewison moved for a new trial, arguing the verdict was inadequate in light of Renner's admissions. The trial court denied the motion for new trial, and Lewison appeals. Finding no error, we affirm.

I. FACTS

On December 21, 2012, in Kearney, Nebraska, Renner made a left turn in front of a vehicle being driven by Lewison and the two vehicles collided. Lewison was taken from the scene by ambulance and treated in the emergency room for complaints of neck and back pain.

In 2014, Lewison filed a negligence action against Renner in Buffalo County District Court. She alleged the collision caused injuries to her neck, back, and wrists. She further alleged that because of those injuries, she incurred medical expenses of $53,270 and experienced mental and physical pain and suffering.

Renner's operative answer admitted her negligence was the proximate cause of the collision with Lewison and further admitted "the collision was the cause of some injury to [Lewison]." But Renner "specifically denie[d] the nature and extent of the damage and injury claimed by [Lewison]."

1. Evidence Presented at Trial

The case was tried to a jury. Lewison testified at trial, but recalled very few details of her medical history and was generally a poor historian. Most of the evidence regarding Lewison's medical history and treatment was provided through the video depositions of four medical experts. Of the four medical experts, three were Lewison's treating doctors and one was hired by Renner as a defense expert.

The only exhibits Lewison offered at trial were the video depositions of her doctors and the standard life expectancy

table. She did not offer any evidence regarding the amount of her medical expenses, nor did she offer evidence of lost earnings, property damage, or other special damages. At oral argument before this court, Lewison's attorney explained that the decision not to offer evidence of Lewison's medical expenses was a strategic one, designed to avoid anchoring the jury to a formulaic approach to calculating damages.

(a) Family Doctor

Lewison's family doctor testified that 1 week after the collision, his office treated Lewison for tightness in her neck and bruising. Lewison returned to the family doctor 10 days later, reporting moderate neck spasms. CT scans of Lewison's head, neck, and thoracic spine were negative. She was referred to physical therapy and prescribed pain medications.

According to the family doctor, Lewison first complained to him about tingling in her hands on February 5, 2013, roughly 6 weeks after the collision. He ruled out any injuries related to her cervical spine and eventually diagnosed her with carpal tunnel syndrome and referred her to an orthopedic hand surgeon.

The family doctor was not asked to offer an opinion on whether the collision caused Lewison's neck and wrist complaints. But he did testify that her neck complaints were "consistent" with the collision and that the collision "could" have caused her wrist pain. When asked whether "some of" Lewison's medications were related to injuries suffered in the 2012 collision, he replied, "I think sometimes yes, sometimes no. She has other aches and pains elsewhere. But, yes, sometimes she takes it for back pain, or neck pain, or head pain." The family doctor summarized:

> I would say [Lewison] is a unique individual and maybe doesn't read the book as far as being a standard run-of-the-mill patient, and that she might have aches and pains that sometimes are hard to figure out no matter what day of the week it is.

(b) Hand Surgeon

Lewison's family doctor referred her to an orthopedic hand and microvascular surgeon in Kearney. The hand surgeon first saw Lewison in March 2013, approximately 3 months after the collision. At that time, Lewison complained of numbness and tingling in both hands. The hand surgeon testified that Lewison had undergone a carpal tunnel surgery in 1992, and he ultimately performed additional carpal tunnel surgeries in 2014. When asked whether the collision could have caused Lewison's wrist complaints, the hand surgeon replied, "Well, it's possible." Lewison's counsel then asked:

> Q . . . [I]n this case, if we didn't have anything other than the description provided by Ms. Lewison of the accident, would it be more likely than not, then, to say that the accident caused . . . the carpal tunnel?
>
> A Well, you know, I — I'm not sure that I can say that . . . .

When asked directly "whether or not the automobile accident of December 21st, 2012, caused or contributed . . . in any way" to Lewison's carpal tunnel, the hand surgeon replied:

> Well, it — it's possible that the injuries to her hands caused enough swelling around those nerves that it increased the pressure, and it — and, but more than likely, there was probably some amount of preexisting problem. Obviously, she had previous surgery on the right, and people tend to be built fairly symmetrically, and so if you're going to have a — a problem with a tight tunnel for a nerve on one side, you're likely to have a similar problem on the other, unless there was some other reason for it, like, for example, an old fracture or something that changed the architecture of that tunnel. So if somebody has idiopathic carpal tunnel on one side, you would expect sometime within . . . the next several years they'll probably develop[] similar symptoms in the other. It's not 100 percent, but it's pretty common.

(c) Pain Specialist

Eleven months after the collision, Lewison visited a pain specialist in Kearney for back pain. The pain specialist testified that Lewison had an extensive history of back problems, including: a back surgery when she was 19; a lumbar diskectomy and fusion surgery in 1989; and a series of nerve ablation (or rhizotomy) surgeries, the most recent of which was in 2011. With respect to the cause of Lewison's recent back pain, the pain specialist said "it's hard for me to help out on that." Lewison's counsel asked:

> Q So — so obviously, the car accident didn't cause her back problems. The question I guess we have here is did it aggravate the preexisting back problems that she had?
>
> A Yeah, so it's tough for me to, you know, give a definitive statement on that, and — and I, you know, I — definitely, it could have; but can anyone say, would she still have wound up needing the procedure I ultimately did, which is spinal cord stimulator implant, that's tough for me to say whether . . . her disease progression was going to keep going, whether — the way it was, and develop into this with or without the car accident. I think it would have been easier to say the car accident precipitated it if within that first month afterwards we were dealing with excruciating back pain; but for me, like you said, I was 11 months out, basically . . .
>
> Q Right, right.
>
> A . . . before I saw her.

(d) Defense Expert

A neurologist was hired by Renner to examine Lewison and review her medical records. He testified that Lewison had a long history of neck, back, and wrist pain before the collision. But he also testified that Lewison "may well have had a temporary sprain or strain, but any persisting pain after four to six weeks was not caused by the accident." He ultimately

testified that the medical treatment Lewison received "from the emergency room and for four to six weeks or so after that was both appropriate and reasonably caused by the — necessitated by the accident." This expert did not testify about the cost of such treatment, and no bills for this period of treatment, or any other, were offered.

2. Jury Instructions and Verdict

Regarding Renner's admissions, the court instructed the jury:

> [Renner] admits that she was negligent in the operating of a motor vehicle and that her negligence was the proximate cause of some injury to [Lewison]. [Renner] denies the nature and extent of [Lewison's] injury and damages.
>
> Based upon this admission[,] the Court had found as a matter of law that [Renner] was negligent and her negligence was a proximate cause of the accident and you must accept those findings as true.

The court then instructed the jury that, in light of Renner's admissions, Lewison had the following burden of proof:

> B. BURDEN OF PROOF
>
> Before [Lewison] can recover against [Renner], [Lewison] must prove, by the greater weight of the evidence[,] the nature and extent of her damages proximately caused by [Renner's] negligence.
>
> C. EFFECT OF FINDINGS
>
> If [Lewison] has not met this burden of proof, then your verdict must be for [Renner].
>
> On the other hand, if [Lewison] has met this burden of proof, then your verdict must be for [Lewison].

Regarding recoverable damages, the jury was instructed:

> If you return a verdict for [Lewison], then you must decide how much money will fairly compensate [Lewison] for her injury.
>
> I am about to give you a list of the things you may consider in making this decision. From this list, you must

> only consider those things you decide were proximately caused by [Renner's] negligence:
>
> 1. The nature and extent of the injury, including whether the injury is temporary or permanent (and whether any resulting disability is partial or total);
>
> 2. The reasonable value of the medical (hospital, nursing, and similar) care and supplies reasonably needed by and actually provided to [Lewison] (and reasonably certain to be needed and provided in the future);
>
> 3. The physical pain and mental suffering [Lewison] has experienced (and is reasonably certain to experience in the future)[.]

The jury was given the standard preexisting injury instruction found in NJI2d Civ. 4.09.

The jury was also given two verdict forms: one finding in favor of Lewison with a line for the amount of damages, and the other finding in favor of Renner. No party objected to the jury instructions or the verdict forms, and no error is assigned to them on appeal.

During deliberations, the jurors sent a written question asking, in part, "What bills have been paid for so far?" After consulting with counsel, the court replied, "You have received all the evidence that has been presented. Keep deliberating." After further deliberations, the jury returned a unanimous verdict for Renner.

3. Motion for New Trial

Lewison timely moved for a new trial claiming, among other things, that the jury's verdict was "inadequate" in light of Renner's admissions and was not sustained by sufficient evidence. Specifically, Lewison argued that because Renner had admitted her negligence proximately caused "some injury" to Lewison, the jury had to return a verdict for Lewison, even if they found minimal damages. Renner disagreed. She argued that by admitting the collision caused "some injury" but specifically denying the nature and extent of Lewison's claimed

injuries and damages, Lewison retained both the burden to prove which injuries were proximately caused by the accident and the burden to prove the nature and extent of her damages. Renner argued that Lewison failed to carry her burden of proof and that the jury properly returned a defense verdict.

The district court denied Lewison's motion for new trial and entered judgment on the jury's verdict. Lewison timely appealed, and we moved the case to our docket on our own motion.[1]

II. ASSIGNMENT OF ERROR

Lewison assigns, restated, that the trial court erred in overruling her motion for new trial because the jury's verdict was inadequate in light of Renner's judicial admissions.

III. STANDARD OF REVIEW

[1] An appellate court reviews a denial of a motion for new trial for an abuse of discretion.[2] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[3]

IV. ANALYSIS

Lewison argues she is entitled to a new trial, because the jury's verdict was not sustained by sufficient evidence or was contrary to law.[4] She contends "[t]here is no explanation for a [defense] verdict . . . ,"[5] given that Renner admitted the collision was caused by her negligence, and also admitted the collision caused Lewison "some injury."

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[1] See Neb. Rev. Stat. § 24-1106 (Reissue 2016).

[2] See *Armstrong v. Clarkson College*, 297 Neb. 595, 901 N.W.2d 1 (2017).

[3] *Id.*

[4] See Neb. Rev. Stat. § 25-1142(6) (Reissue 2016).

[5] Brief for appellant at 8.

To determine whether the trial court abused its discretion in denying Lewison's motion for new trial, we first set out Lewison's burden of proof in this negligence action.[6] Next, we consider how Renner's admissions affected that burden of proof. And finally, we consider the evidence adduced at trial to determine whether the jury's verdict was supported by the evidence.

1. Burden of Proof in Negligence Action

[2,3] To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages.[7] More specifically, in an automobile negligence action, a plaintiff must prove each of the following elements: (1) that the defendant was negligent in one or more of the ways alleged, (2) that this negligence was a proximate cause of the collision, (3) that the collision was a proximate cause of some damage to the plaintiff, and (4) the nature and extent of that damage.[8]

[4-6] When the character of an alleged injury is subjective rather than objective, a plaintiff must establish the cause and extent of the injury through expert medical testimony.[9] Although expert medical testimony need not be couched in the magic words "reasonable medical certainty" or "reasonable probability," it must be sufficient as examined in its entirety to establish the crucial causal link between the plaintiff's injuries and the defendant's negligence.[10] We have explained that "[m]edical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be

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[6] See *Macke v. Pierce*, 266 Neb. 9, 661 N.W.2d 313 (2003).

[7] *Latzel v. Bartek*, 288 Neb. 1, 846 N.W.2d 153 (2014).

[8] See, e.g., NJI2d Civ. 2.01.

[9] See *Doe v. Zedek*, 255 Neb. 963, 587 N.W.2d 885 (1999).

[10] *Id.*

stated as being at least 'probable,' in other words, more likely than not."[11]

2. Impact of Admissions on Burden of Proof

[7-11] "'It is an elementary rule of pleading that matters admitted by the pleadings need not be proved.'"[12] Generally, an admission made in a pleading on which the trial is had is more than an ordinary admission, it is a judicial admission.[13] A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.[14] It is important to consider the context in which a judicial admission is made.[15] A judicial admission does not extend beyond the intendment of the admission as clearly disclosed by its context.[16]

(a) Admission of Negligence and Proximate Cause of Collision

In this case, Renner's answer admitted she was negligent in operating her vehicle and admitted her negligence was the proximate cause of the collision with Lewison. Based on those unconditional admissions, the trial court correctly found, as a matter of law, that Renner was negligent and that her negligence proximately caused the collision. The jury was instructed

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[11] *Id.* at 975, 587 N.W.2d at 894, citing *Berggren v. Grand Island Accessories*, 249 Neb. 789, 545 N.W.2d 727 (1996).

[12] *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 205, 313 N.W.2d 645, 648 (1981), quoting *Peitz v. Hausman*, 198 Neb. 344, 252 N.W.2d 628 (1977).

[13] *Lange Building & Farm Supply, Inc., supra* note 12.

[14] See *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

[15] *City of Ashland v. Ashland Salvage*, 271 Neb. 362, 711 N.W.2d 861 (2006).

[16] *In re Estate of Radford, supra* note 14.

to accept those findings as true. As such, Renner's judicial admissions effectively relieved Lewison of her burden to prove the first two elements of her negligence action.[17]

(b) Admission of "[S]ome [I]njury"

Lewison alleged that as a result of the collision, she "sustained injuries to her wrists, neck, and back." Renner's answer admitted the collision was the cause of "some injury" to Lewison, but specifically denied "the nature and extent of the damage and injury claimed" by Lewison.

We considered a similar admission in *Springer v. Smith*.[18] In that case, the defendant filed an answer admitting the collision was proximately caused by his negligence and further admitting the plaintiff "suffered some injury" in the collision, but specifically denying that the injuries were "of the nature and extent alleged" by the plaintiff.[19] We began our analysis by observing that under such a scenario, the proximate cause of the plaintiff's alleged damages remained a controverted issue, because the defendant had "disputed the claimed injuries in his pleadings and at the trial."[20] We observed that "[a]n admission of liability for an accident does not constitute an admission that all damages claimed by a plaintiff, even though undisputed in the record, were the proximate result of the collision."[21] And given the nature of the defendant's admissions in *Springer*, we reasoned it was proper for the trial court to instruct the jury that before the plaintiff could recover against the defendant, the plaintiff had the burden to prove, by a preponderance of

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[17] See *Dolberg v. Paltani*, 250 Neb. 297, 549 N.W.2d 635 (1996) (finding negligence as matter of law equates to finding plaintiff established first two of four negligence elements, but issues of causation and damages remain for jury's determination).

[18] *Springer v. Smith*, 182 Neb. 107, 153 N.W.2d 300 (1967).

[19] *Id.* at 108, 153 N.W.2d at 301.

[20] *Id.* at 110, 153 N.W.2d at 302.

[21] *Id.*

the evidence, that "as a proximate result of the accident . . . the plaintiff sustained injuries and damages; and . . . [t]he extent of the damages, if any, which the plaintiff has sustained."[22]

[12] *Springer* illustrates that when a defendant admits the collision caused "some injury" but expressly denies the nature and extent of the injuries and damages claimed, it is improper to construe the admission as conceding the collision caused all of the injuries claimed by the plaintiff.[23]

Here, Renner admitted "some injury" but expressly denied that Lewison's injuries, or her damages, were of the nature or extent claimed by Lewison. The record does not suggest Renner was ever asked to specify what she intended by "some injury." But considering Renner's judicial admission in context, we conclude it did not relieve Lewison of her burden to prove both that her claimed injuries and damages were proximately caused by the collision and the nature and extent of her damages. In other words, the cause of Lewison's claimed injuries, as well as the nature and extent of her injuries and damages, were controverted by Renner. Lewison's arguments to the contrary lack merit.

3. Jury's Verdict Was Supported by Evidence

[13] In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in the successful party's favor, and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence.[24]

[14] Here, the jury returned a general verdict for Renner. When the jury returns a general verdict for one party, a

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[22] *Id.*

[23] Accord *Golnick v. Callender*, 290 Neb. 395, 860 N.W.2d 180 (2015).

[24] *Holman v. Papio-Missouri River Nat. Resources Dist.*, 246 Neb. 787, 523 N.W.2d 510 (1994).

court presumes that the jury found for the successful party on all issues raised by that party and presented to the jury.[25] Consequently, we must treat the jury's verdict as having found that Lewison failed to meet her burden of proof on both of the contested issues: (1) whether the collision was the proximate cause of any injury or damage to Lewison and (2) the nature and extent of that damage.

We pause briefly to observe that the burden of proof instruction given in this case effectively combined the two controverted elements (proximate cause and nature/extent of the damages) into a single statement by instructing that Lewison had to prove "the nature and extent of her damages proximately caused by [Renner's] negligence." While the better practice is to separate out for the jury each element of a party's burden of proof, no one objected to combining these elements in the jury instructions, and no error has been assigned to the instructions on appeal.

On this record, considering the evidence most favorably to the successful party, we can find no abuse of discretion in the trial court's conclusion that the jury's verdict was supported by the evidence. Lewison's neck, back, and wrist complaints were subjective in nature and, as such, the cause and the nature/extent of such injuries had to be proved through expert medical testimony.[26] At trial, her treating doctors' opinions on causation were equivocal and were couched in terms of possibilities, rather than probabilities. Lewison does not attempt to argue otherwise on appeal, and instead, she relies exclusively on the opinion of the defense expert who testified that the medical treatment Lewison received "from the emergency room and for four to six weeks or so after that was both appropriate and reasonably caused by the — necessitated by the accident." Lewison argues that in light of this testimony, the

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[25] *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

[26] See *Doe v. Zedek, supra* note 9.

jury had no choice but to return a verdict in Lewison's favor. We disagree.

[15] Triers of fact are not required to take opinions of experts as binding upon them, and determining the weight to be given expert testimony is uniquely the province of the fact finder.[27] Here, the jury reasonably could have given more weight to Lewison's own doctors than to the defense expert, and therefore concluded Lewison had failed to meet her burden of proof on causation. And even if the jury did give weight to the defense expert's testimony, it reasonably could have concluded Lewison failed to meet her burden of proof regarding the nature and extent of her damages, because the record contains no evidence from which the jury could determine the cost of Lewison's medical treatment during the 4- to 6-week period after the collision.

The record amply supports the conclusion that Lewison failed to meet her burden of proof regarding one or both of the contested issues: the cause of her injuries and the nature and extent of her damages. The trial court did not abuse its discretion in overruling Lewison's motion for new trial.

V. CONCLUSION

For the foregoing reasons, we affirm the district court's denial of Lewison's motion for new trial.

Affirmed.

Wright, J., not participating.

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[27] *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993).

Nebraska Supreme Court
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Herbert Lee Campbell, appellant, v. Brad Hansen, appellee.

905 N.W.2d 519

Filed January 12, 2018. No. S-17-399.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.
2. **Affidavits: Appeal and Error.** When an in forma pauperis application is denied and the applicant seeks leave to proceed in forma pauperis in order to obtain appellate review of that denial, the trial court does not have authority to issue an order that would interfere with such appellate review.
3. **Jurisdiction: Affidavits: Appeal and Error.** In an interlocutory appeal from an order denying leave to proceed in forma pauperis, an appellate court obtains jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper in forma pauperis application and affidavit.

Petition for further review from the Court of Appeals, Inbody, Riedmann, and Arterburn, Judges, on appeal thereto from the District Court for Johnson County, Vicky L. Johnson, Judge. Judgment of Court of Appeals reversed, and cause remanded for further proceedings.

Herbert Lee Campbell, pro se.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

INTRODUCTION

This appeal presents a slightly different question from our recent decision in *Mumin v. Frakes*.[1] Here, the question is whether a petitioner for habeas corpus relief whose initial motion to proceed in forma pauperis (IFP) was denied and who takes a timely interlocutory appeal from that denial, accompanied by a motion to proceed IFP on appeal, must file a second appeal where the district court also denies the second IFP motion. Because the Nebraska Court of Appeals' summary dismissal incorrectly determined that a second appeal was necessary, we reverse, and remand for further proceedings.

BACKGROUND

Herbert Lee Campbell filed a petition for writ of habeas corpus along with a motion to proceed IFP and poverty affidavit. The district court for Johnson County denied the motion by placing an "X" on the line corresponding to the following: "The Court hereby denies Motion to Proceed [IFP] for reason this is a meritless/frivolous action. **The party filing the application shall have thirty days to proceed with an action or appeal upon payment of fees, costs, or security.**"

Within 30 days, Campbell initiated an appeal from the district court to the Court of Appeals, by filing a notice of appeal along with a second motion to proceed IFP and a second poverty affidavit. On May 5, 2017, the district court denied the second motion to proceed IFP, that is, the motion to proceed IFP on appeal. The court's order stated that the legal positions advanced were frivolous and that Campbell had 30 days to proceed with an action or appeal upon payment of fees, costs, or security.

On June 26, 2017, the Court of Appeals summarily dismissed the appeal. The court determined that it lacked jurisdiction, because Campbell did not pay a docket fee or appeal by June 5

[1] *Mumin v. Frakes, ante* p. 381, 904 N.W.2d 667 (2017).

from the denial of IFP status on appeal. It subsequently overruled Campbell's motion for rehearing. We granted Campbell's petition for further review and later ordered the appeal to be submitted without oral argument.

ASSIGNMENT OF ERROR

Campbell assigns that the Court of Appeals erred in concluding that after the district court dismissed his request to proceed IFP on appeal, he had 30 days in which to pay a docket fee or appeal the May 5, 2017, denial of IFP status.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent from the lower court's decision.[2]

ANALYSIS

We first dispense with one of Campbell's arguments in support of his petition for further review. He asserted that the May 5, 2017, denial of IFP status was not for appeal purposes, but, rather, was a second denial to proceed IFP on his petition for writ of habeas corpus. Although we disagree, Campbell's confusion is somewhat understandable.

The district court's form of order presented three possible options for the court to select as its ruling. The court selected the following option:

> The Court hereby denies Motion to Proceed in Forma Pauperis[.] **The legal positions advanced by petitioner are frivolous. The writ is a collateral attack on a judgment of a valid conviction. The court had jurisdiction of the parties and subject matter and such a writ will not lie. See Peterson v. Houston, 284 Neb. 861 (2012). The party filing the application shall have thirty days**

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[2] *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

to proceed with an action or appeal upon payment of fees, costs, or security.

The court's ruling did not specifically state that it was denying IFP for purposes of appeal. But the option for granting the motion to proceed IFP stated that it was "for appeal purposes." Given this context and because Campbell filed the motion with his notice of appeal, we are satisfied that the court's denial of IFP status in the May 2017 order was addressed to his substitute for the statutory docket fee on appeal and not in further response to his initial motion to proceed IFP.

Campbell also asserted that "the district court was without jurisdiction to enter the May 5, 2017 order."[3] Although Campbell did not elaborate, he cited *State v. Carter*[4] and Neb. Rev. Stat. § 25-2301.02 (Reissue 2016). Section 25-2301.02 authorized Campbell's interlocutory appeal from the denial of his first motion to proceed IFP and would have required that he be provided with a free transcript of the hearing on IFP eligibility, had there been such a hearing. To the extent Campbell is arguing that the district court could not interfere with his right to an interlocutory appeal of the denial of his request to proceed IFP, we agree.

[2] We recently clarified that a court does not have authority to deny a second request to proceed IFP made as part of an interlocutory appeal seeking appellate review of an initial denial of a request to proceed IFP.[5] As we explained in *Glass v. Kenney*[6] and repeated in *Mumin v. Frakes*,[7] when an IFP application is denied and the applicant seeks leave to proceed IFP in order to obtain appellate review of that denial, the trial court does not have authority to issue an order that

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[3] Brief for appellant in support of petition for further review at 3.

[4] *State v. Carter, supra* note 2.

[5] See *Mumin v. Frakes, supra* note 1.

[6] See *Glass v. Kenney*, 268 Neb. 704, 687 N.W.2d 907 (2004).

[7] See *Mumin v. Frakes, supra* note 1.

would interfere with such appellate review. Here, the district court did just that. After denying Campbell's application to proceed IFP at the commencement of the case, the court also denied his application to proceed IFP on appeal from the initial denial.

At this juncture, the procedural posture of Campbell's case diverges from that in *Glass v. Kenney* and *Mumin v. Frakes*. In those cases, the applicant also filed an appeal from the denial of IFP status on appeal. Here, Campbell did not do so. For that reason, the Court of Appeals concluded it lacked jurisdiction.

[3] But Campbell took the necessary steps to vest jurisdiction with the Court of Appeals. In an interlocutory appeal from an order denying leave to proceed IFP, an appellate court obtains jurisdiction over the appeal upon the timely filing of a notice of appeal and a proper IFP application and affidavit.[8] Campbell timely filed a notice of appeal, a motion to proceed IFP, and a poverty affidavit. Thus, the Court of Appeals erred in dismissing the appeal for lack of jurisdiction.

The Court of Appeals did not have the benefit of our *Mumin v. Frakes* opinion, and its dismissal is understandable under the circumstances. In *Glass v. Kenney* and *State v. Carter*,[9] the applicants each filed two appeals—one appeal from an initial order denying IFP and a second appeal from an order denying IFP on appeal. Thus, the Court of Appeals was under the impression that Campbell should have paid a docket fee or appealed the May 2017 denial of IFP status.

But as our *Mumin v. Frakes* opinion explained, because another statute authorizes commencement of a habeas corpus proceeding without advance payment of fees,[10] Campbell's petition for a writ of habeas corpus was properly filed with the district court whether the first motion to proceed IFP

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[8] See *Glass v. Kenney, supra* note 6.

[9] *State v. Carter, supra* note 2.

[10] See Neb. Rev. Stat. § 29-2824 (Reissue 2016).

was granted or denied. Moreover, requiring an appeal from the second motion to proceed IFP unnecessarily multiplies appeals. As we pointed out in *Mumin v. Frakes*, where no prepayment of fees or costs is required, deferring the ruling on an IFP application would permit a trial court to reach the merits of the case without a lengthy delay resulting from an interlocutory appeal from an order denying IFP. Here, as in *Mumin v. Frakes*, there was no district court order directly ruling on the petition for writ of habeas corpus. Rather, Campbell's appeal ran solely from the first order denying IFP status. According to § 25-2301.02, Campbell was entitled to appellate review of the district court's initial denial of IFP status. He cannot be required to pay a docket fee in order to obtain such review; rather, his poverty affidavit served as a substitute for the statutory docket fee otherwise required.[11] The Court of Appeals erred in dismissing the appeal for lack of jurisdiction.

CONCLUSION

Because the Court of Appeals acquired jurisdiction upon Campbell's timely filing of a notice of appeal, accompanied by an application for IFP status and poverty affidavit, we reverse its decision dismissing the appeal. We remand the cause to the Court of Appeals for a determination on the merits of the error assigned by Campbell regarding the denial of his first motion to proceed IFP.

Reversed and remanded for
further proceedings.

Wright, J., not participating.

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[11] See Neb. Rev. Stat. §§ 25-1912 and 33-103 (Reissue 2016).

Nebraska Supreme Court
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State of Nebraska, appellee, v. Teon D. Hill, appellant.

905 N.W.2d 668

Filed January 19, 2018. No. S-16-441.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the appellate court will uphold the trial court's findings of fact unless they are clearly wrong, but will reach a conclusion independent of that reached by the trial court with regard to questions of law.
2. **Expert Witnesses: Appeal and Error.** The standard for reviewing the admissibility of expert testimony is abuse of discretion.
3. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.
4. **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.
5. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.

7. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
8. ____: ____. 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.
9. **Criminal Law: Trial: Prosecuting Attorneys.** Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.
10. ____: ____: ____. A prosecutor's improper comments during closing argument can require reversal of a conviction if the comments prejudiced the defendant's rights in obtaining a fair trial.
11. **Trial: Prosecuting Attorneys: Appeal and Error.** In determining whether a prosecutor's conduct was prejudicial, an appellate court ordinarily looks to the cumulative effect of the improprieties, the strength of the evidence against the defendant, and whether the district court took any curative action.
12. **Trial: Prosecuting Attorneys: Jury Instructions: Appeal and Error.** Not every variance between a prosecutor's advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given and the remarks are not crucial to the State's case.
13. **Verdicts: Juries: Jury Instructions: Presumptions.** Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.
14. **Effectiveness of Counsel: Proof: Appeal and Error.** In order to show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), a defendant must show, first, that counsel was deficient and, second, that the deficient performance actually caused prejudice to the defendant's case.
15. **Effectiveness of Counsel: Proof: Presumptions: 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), may be addressed in either order, and the entire ineffectiveness analysis should be viewed with a strong presumption that counsel's actions were reasonable.
16. **Criminal Law: Motions for Mistrial: Proof: Appeal and Error.** A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial. The defendant must prove that the alleged

error actually prejudiced him or her, rather than creating only the possibility of prejudice.

Appeal from the District Court for Douglas County: Kimberly Miller Pankonin, Judge. Affirmed.

Gregory A. Pivovar and Jeff T. Courtney, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

I. INTRODUCTION

On December 10, 2013, Virgil Dunn was fatally shot two blocks north of the Spencer Street housing projects in Omaha, Nebraska, in what appeared to be a robbery. On June 4, 2014, Teon D. Hill was charged in Dunn's death.

On February 24, 2016, a jury found Hill guilty of first degree murder and two counts of possession of a deadly weapon by a prohibited person. Hill was found not guilty of use of a deadly weapon (firearm) to commit a felony. On April 28, Hill was sentenced to life imprisonment on the murder conviction and 15 to 20 years' imprisonment on each conviction of possession of a deadly weapon. The latter two sentences were ordered to be served concurrently to each other and consecutively to the life sentence. Hill appeals. We affirm.

II. BACKGROUND

1. Factual Background

(a) Homicide

A December 10, 2013, surveillance video shows Dunn making a purchase at a liquor store at 30th and Pinkney Streets in Omaha at approximately 9:54 p.m. The purchase was placed in a white plastic bag. Surveillance video indicates

that Dunn then walked toward 28th Avenue. At approximately 10 p.m., a gunshot detection system notified the Omaha Police Department of six shots fired in the area. Officers were dispatched immediately and found Dunn wounded in front of a residence located on North 28th Avenue. Dunn no longer had the plastic bag or his wallet. A baseball cap was lying on the ground approximately 50 feet from Dunn's body; Dunn had not been wearing a baseball cap in the surveillance video. Dunn was taken to the hospital, where he died of gunshot wounds shortly thereafter. There are several witness accounts in the record, but none of the witnesses actually saw the shooting.

That night, Randy Nunn was driving a van full of children from daycare at approximately 10:20 p.m. when he heard gunshots. He slowed the van and saw "two guys coming with hoodies." They were both around "five, seven; five, eight." One person was wearing a black hoodie, and the other had a "white or grayish hoody." One person was carrying a "white grocery bag," but it was difficult to see because "[i]t was dark that night." The person carrying the bag "might have had [a baseball hat]." As the two men were approaching him, Nunn "sped up" because he "didn't know if they [were] getting shot at [or] if they were shooting." Nunn looked in his rearview mirror and noticed that one of the men took longer to cross the bridge, because he "probably . . . dropped something." Nunn took the children home and told his girlfriend what he had seen. Nunn's girlfriend then called the police.

Raul Francia testified that he was at home watching television with his brother when, "just before 10 p.m.," he "heard like five, six shots." Francia opened the front door, walked outside, and "saw a guy running . . . to the projects." The man was "maybe six-foot tall," "African-American," and wearing "a black hoody or a black jacket" and "a hat maybe."

(b) Arrest

On February 12, 2014, Metro Area Fugitive Task Force officers were conducting surveillance in the area of the

Spencer Street housing projects in Omaha, near the location of the December 10, 2013, shooting. Officers were attempting to locate a wanted fugitive, Charles Toles. Toles was described as an "African-American male, five, seven to five, nine; a hundred and sixty pounds." Officers "had been receiving tips that he was frequenting the Spencer West Housing Projects area."

Omaha police officer Jeffrey Gassaway, a member of the task force, testified that while conducting surveillance, he observed a "Ford Taurus driving slowly" with a "black male in the passenger seat who matched the general physical description of Toles," and a female driver. In fact, Hill, and not Toles, was the passenger in the Taurus. Gassaway asked U.S. Marshal Rovance Lewis, another member of the task force, to also follow the Taurus. Gassaway noticed that the Taurus accelerated as the officers began following it, and "the driver went through the stop sign." The driver of the Taurus drove in a "big square" and violated the stop sign at each corner by failing to come to a complete stop. Because the driver violated "at least six traffic control devices," Gassaway activated his vehicle's emergency lights and pulled over the Taurus at 30th and Evans Streets. The driver of the Taurus did not initially pull over in response to the activation of the emergency lights. Gassaway testified that the driver was "actively fleeing from" him and continued to make several turns, but pulled over eventually.

Gassaway and Lewis approached the Taurus simultaneously. As Gassaway approached, he "saw [Hill] reach down briefly." Based on his training and experience, this movement caused Gassaway concern, because "maybe [Hill] was concealing contraband or a weapon." Hill exited the Taurus with his hands up, and Gassaway "was 100 percent positive that it was not . . . Toles." When Gassaway observed Hill step out of the car, Gassaway "told him keep your hands in the air, and . . . Lewis approached him and took physical hold of him and just escorted him back to the back of the car." Hill disputes that he exited the Taurus voluntarily and contends that the

officers "removed [Hill] from the car."[1] Gassaway testified that he "felt that we needed to investigate further based on why this vehicle was fleeing from us and violating traffic control devices." Gassaway proceeded to ask the driver for her identification, driver's license, and vehicle registration. Gassaway observed that there was an infant in the back seat of the Taurus and that the driver was "extremely nervous and agitated," repeatedly asking if she could call her mother.

Gassaway asked the driver if she would give the officers "permission to search the vehicle, and she did." Gassaway "walked over immediately to the area where . . . Hill exited, and looked inside the vehicle underneath the seat and saw a handgun." Gassaway left the handgun in place and called the crime laboratory to photograph and collect the handgun. The handgun had six live cartridges in the cylinder. A box with live ammunition and a magazine were recovered from a black purse that was also in the vehicle. However, the handgun was a type of weapon that did not require a magazine for reloading, and the investigator determined that the magazine in the black purse "would belong to something separate" from the handgun found under the seat. Gassaway then requested the other officers who had arrived to place Hill under arrest for possession of a firearm.

(c) Baseball Cap

An Omaha police officer testified that he was dispatched to the location of Dunn's shooting on December 10, 2013, and arrived within "one to two minutes" of dispatch. As the officer was heading north on 28th Avenue from Bristol Street, he "observed something in the street, which, as we got closer, appeared to be a red baseball cap." The cap was "in the middle of the Street on North 28th Avenue . . . south of the residence located [on] North 28th Avenue" and about 50 feet from Dunn's body.

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[1] Brief for appellant at 20.

Melissa Helligso, a forensic DNA analyst, swabbed the inside of the cap for DNA evidence. She swabbed two different areas: inside the headband area of the cap and inside the front area of the cap. Helligso testified that she utilized "methodology and procedure that includes PCR — STR [polymerase chain reaction short tandem repeat] type of work [that] has been accredited and certified through the ASCLD [American Society of Crime Laboratory Directors] and also subject . . . to peer review." For inside the headband area, Helligso "was able to determine that the major DNA profile matches . . . Hill at all of the major alleles obtained; therefore, he's not excluded as the major contributor of the DNA tested." Helligso further stated:

> The probability of an unrelated individual matching the major DNA profile from the specimen, given that . . . Hill expresses this profile, is 1 in 1.94 quintillion, which is 10 with 18 zeros for Caucasians; 1 in 1.94 quadrillion, which is 15 zeros, for African-Americans; and 1 in 26.0 quadrillion for American Hispanics.

In regard to the front area of the cap, Helligso similarly "was able to find that [Hill] was not excluded as the major contributor to the DNA tested." Helligso stated:

> The probability that an unrelated individual matching the major DNA profile from this specimen, given that . . . Hill expresses this profile, is . . . 1 in 802 sextillion, which is 21 zeros for Caucasians; 1 in 391 quintillion, which is 18 zeros for African-Americans; and 1 in 3.78 sextillion for American Hispanics.

(d) Spent Projectile and Jeans

A spent projectile was found within the fabric of Dunn's jacket. Helligso tested a swab of the projectile and determined that a DNA profile consistent with a single male individual was present. Helligso was able to determine that "Dunn is not excluded as the source of the DNA tested." The probability of an unrelated individual matching the DNA profile from the spent projectile, given that Dunn expresses this

DNA profile, "is 1 in 344 quintillion for Caucasians, 1 in 108 quintillion for African-Americans, and 1 in 68.0 quintillion for American Hispanics." The spent projectile was thus presumably shot into Dunn and caught in his jacket upon exiting his body. A crime laboratory technician for the forensic investigations services with the Omaha Police Department testified that based on her analysis of the spent projectile at the crime scene and a test fire from the handgun found in the Taurus, the handgun found under Hill's seat fired the spent projectile found in Dunn's jacket.

Helligso performed DNA analysis on a swab of the inside right front pocket of the jeans. Investigators swabbed the inside of Dunn's front right pocket, because Dunn was found without his wallet and investigators suspected that the shooter took the wallet from this pocket. The DNA test "generated a profile that was consistent with a mixture of at least three individuals." Dunn's DNA matched a partial profile within the major mixture of the profile, while the results were inconclusive as to Hill because his profile was not present in at least half of the loci generated in the mixture.

(e) Handgun and Live Ammunition Rounds

Because there were no fingerprints on the handgun found under Hill's seat, DNA testing was ordered to confirm that Hill was in possession of the firearm used to shoot Dunn. Helligso analyzed a swab of the handgun for DNA and found that "there was a mixture of at least three individuals" and "there was a mixture within the major contributor." Helligso found that "Hill matches a full profile within the major mixture DNA profile, therefore, . . . Hill is not excluded as a major contributor to the DNA tested." Thus, "[t]he probability of a random individual matching a major DNA profile . . . given that . . . Hill expresses this profile, is 1 in 7.05 million for Caucasians, 1 in 2.97 million for African-Americans, and 1 in 7.70 million for American Hispanics."

Helligso also tested a swab taken of the six live ammunition rounds found in the handgun. Helligso "detected a mixture of at least two people" and "was able to determine a major contributor." Helligso found that Hill "was in 14 of the loci out of 15 of the major mixture, therefore, he's not excluded as a major profile contributor to the DNA tested." Helligso stated that "[t]he probability of a random individual matching a partial major DNA profile from this specimen, given that . . . Hill expresses this profile, is 1 in 251 million for Caucasians, 1 in 46.9 million for African-Americans, and 1 in 47.0 million for American Hispanics."

2. Procedural Background

On June 4, 2014, Hill was charged with count I, murder in the first degree; count II, use of a deadly weapon (firearm) to commit a felony; and counts III and IV, possession of a deadly weapon by a prohibited person. On June 5, Hill filed a plea in abatement. On August 21, following a hearing, the district court overruled Hill's plea in abatement.

On January 27, 2015, Hill filed a motion to suppress and a motion in limine. In the motion to suppress, Hill argued that the officers did not have probable cause to stop the vehicle and that the search of Hill's person and the vehicle was improper. Hill argued that the fruits of such search, namely the handgun and the live ammunition rounds, were inadmissible. In the motion in limine, Hill argued that the DNA sample taken from him was obtained without a valid warrant based on probable cause, without a valid court order, and without voluntary consent. Hill also contended that Helligso, the State's DNA witness, did not qualify as an expert and that the reasoning and methodology she used did not meet the requirements for admissibility.

On September 8, 2015, the district court overruled Hill's motion to suppress and motion in limine. In its order, the court found that (1) police had probable cause to stop the vehicle after observing multiple traffic violations; (2) Hill, as a passenger in the vehicle, did not have standing to challenge the

search, and even if he had standing, the driver consented to the search; and (3) Hill's *Daubert*/*Schafersman*[2] challenge to the introduction of DNA evidence was without merit.

At the close of the State's case on February 23, 2016, Hill made a motion to dismiss, which the court overruled. On February 24, the jury found Hill guilty of murder in the first degree and guilty of both counts of possession of a deadly weapon by a prohibited person. However, the jury found Hill not guilty of use of a deadly weapon to commit a felony. On April 28, Hill was sentenced to life imprisonment on the murder conviction, and 15 to 20 years' imprisonment on each conviction of possession by a prohibited person, to be served concurrently to each other and consecutively to the life sentence. Hill appeals.

III. ASSIGNMENTS OF ERROR

Hill assigns, restated, that the district court erred in (1) overruling Hill's motion to suppress, (2) overruling Hill's motion in limine, (3) allowing the State's counsel in rebuttal closing arguments to argue facts not in evidence, (4) failing to find that Hill was denied effective assistance of counsel, and (5) overruling Hill's motion to dismiss and motion for directed verdict.

IV. STANDARD OF REVIEW

[1] In determining the correctness of a trial court's ruling on a motion to suppress, the appellate court will uphold the trial court's findings of fact unless they are clearly wrong, but will reach a conclusion independent of that reached by the trial court with regard to questions of law.[3]

[2] The standard for reviewing the admissibility of expert testimony is abuse of discretion.[4]

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[2] See *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).

[3] *State v. Henry*, 292 Neb. 834, 875 N.W.2d 374 (2016).

[4] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

[3,4] 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.[5] Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, an appellate court reviews the admissibility of evidence for an abuse of discretion.[6]

[5] Regardless of whether the evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as a failure to direct a verdict, insufficiency of the evidence, or failure to prove a prima facie case, the standard is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence; such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the evidence admitted at trial, viewed and construed most favorably to the State, is sufficient to support the conviction.[7]

[6-8] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[8] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[9] 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*,[10] an appellate court reviews such legal determinations independently of the lower court's decision.[11]

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[5] *State v. Henry, supra* note 3.

[6] *Id.*

[7] *State v. White*, 272 Neb. 421, 722 N.W.2d 343 (2006).

[8] *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[9] *Id.*

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

[11] *State v. Rocha, supra* note 8.

V. ANALYSIS

1. Motion to Suppress

Hill argues that the district court erred in overruling the motion to suppress because "[t]here was no probable cause fo[r] the stop, nor any reasonable suspicion" and "the allegations of infractions were a pretext."[12] The State argues that the district court correctly denied Hill's motion to suppress because the officer had probable cause to believe that a traffic violation had occurred. The State contends that the officers "observed multiple traffic violations before stopping the white Taurus."[13] The district court overruled the motion to suppress, finding that the "police had probable cause to stop the vehicle after observing multiple traffic violations."

In *Whren v. United States*,[14] officers became suspicious of a vehicle waiting at a stop sign and observed the vehicle turn without signaling and speed off at an "'unreasonable'" speed. The officers pulled over the vehicle, approached, and observed plastic bags of what appeared to be crack cocaine. The petitioners asserted that the stop was not supported by reasonable suspicion or probable cause, because the "ground for approaching the vehicle—to give the driver a warning concerning traffic violations—was pretextual."[15] The U.S. Supreme Court stated that "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."[16] The Court then held that "the officers had probable cause to believe that petitioners had violated the traffic code"[17] and that "[s]ubjective

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[12] Brief for appellant at 13, 16.

[13] Brief for appellee at 9.

[14] *Whren v. United States*, 517 U.S. 806, 808, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

[15] *Id.*, 517 U.S. at 809.

[16] *Id.*, 517 U.S. at 810.

[17] *Id.*, 517 U.S. at 819.

intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[18]

In *State v. Dallmann*,[19] we addressed a defendant's contention that officers "had decided, without probable cause, to follow and stop" the defendant and used the defendant's subsequent traffic violation as "a pretext to obtain consent to search the vehicle." We rejected that argument, holding that "a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle."[20] We further stated that "[i]f an officer has probable cause to stop a violator, the stop is objectively reasonable, and any ulterior motivation on the officer's part is irrelevant."[21]

Gassaway and Lewis testified that they observed the Taurus fail to stop at multiple stop signs and fail to signal turns. Hill attempts to distinguish this case from *Whren* by arguing that the officers "made the decision to initiate a traffic stop" by radioing the other officers before witnessing a traffic violation.[22] Hill appears to want this court to take Gassaway's and Lewis' subjective intentions into account, but this court must interpret the U.S. Supreme Court's decision in *Whren* and conclude, as it did in *Dallman*, that the officers' subjective intentions are irrelevant in the probable cause analysis. Once the officers observed the traffic violations, they had sufficient probable cause to stop the vehicle.

We note that Hill cites *State v. Van Ackeren*[23] and *U.S. v. Crawford*[24] for the proposition that "the officers were not justified in conducting an investigative stop of the Ford Taurus," because the "officers did not present any specific or articulable

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[18] *Id.*, 517 U.S. at 813.

[19] *State v. Dallmann*, 260 Neb. 937, 948, 621 N.W.2d 86, 97 (2000).

[20] *Id.* at 949, 621 N.W.2d at 97.

[21] *Id.*

[22] Brief for appellant at 15.

[23] *State v. Van Ackeren*, 242 Neb. 479, 495 N.W.2d 630 (1993).

[24] *U.S. v. Crawford*, 891 F.2d 680 (8th Cir. 1989).

facts which tend to show that they had reasonable suspicion that . . . Hill had or was committing a crime, and were therefore not justified in conducting the stop."[25] Here, as discussed above, the officers witnessed the driver of the vehicle commit several traffic violations and they subsequently initiated a traffic stop. Based on their observations of traffic violations, the officers had probable cause to stop the vehicle. Therefore, *Van Ackeren* and *Crawford* are inapplicable.

Next, we address Hill's contention that by searching the vehicle, the officers "went beyond the scope of a limited Terry Stop."[26] In *State v. Konfrst*,[27] we held that "[t]he right to be free from unreasonable searches and seizures may be waived by the consent of the citizen." We explained:

> When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that the consent was given by the defendant, but may show that the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.[28]

Gassaway testified that he asked the driver of the vehicle if she would give the officers "permission to search the vehicle, and she did." As someone who "possessed common authority over" the vehicle, the driver could provide voluntary consent to search the premises.[29] Any right that Hill possessed to be free from unreasonable search of the area under the passenger's seat was waived by the driver's consent. Therefore, we find that there was no Fourth Amendment violation in conducting the search.

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[25] Brief for appellant at 17-18.

[26] *Id*. at 19. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[27] *State v. Konfrst*, 251 Neb. 214, 224, 556 N.W.2d 250, 259 (1996).

[28] *Id.* at 224-25, 556 N.W.2d at 259.

[29] See *id.*

Finally, we need not address Hill's contention that the search was unreasonable because the officers lacked probable cause to arrest him and search the vehicle incident to his arrest. Regardless of Hill's arrest, the driver consented to the search of her vehicle. The handgun Hill wishes to suppress was found in the vehicle pursuant to that consent.

We find that the district court did not err in overruling Hill's motion to suppress, because the search did not violate his Fourth Amendment rights.

Hill's first assignment of error is without merit.

2. Motion in Limine

Hill argues that the district court erred in overruling his motion in limine because the expert testimony did not meet the test under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[30] as it involved "samples containing mixtures for major contributors only" and utilized a database that "does not include Omaha as a sub-population" or "scientific parameters for race."[31] The district court overruled Hill's motion in limine, finding that the DNA testing met the three prongs of the *Daubert* test.

In *State v. Bauldwin*,[32] we addressed the reliability of PCR-STR analysis for mixed samples of DNA, the same analysis used in this case. In our analysis, we stated the *Daubert* standard:

> A trial judge acts as a gatekeeper for expert scientific testimony, and must determine (1) whether the expert will testify to scientific evidence and (2) if that testimony will be helpful to the trier of fact. This entails a preliminary assessment whether the reasoning or methodology underlying the testimony is scientifically valid and

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[30] See *Daubert v. Merrell Dow Pharmaceuticals, Inc., supra* note 2.

[31] Brief for appellant at 21-23.

[32] *State v. Bauldwin*, 283 Neb. 678, 811 N.W.2d 267 (2012).

whether that reasoning or methodology may properly be applied to the facts in issue.[33]

Applying the *Daubert* standard to the PCR-STR analysis, we found:

> The State's expert witnesses testified that the scientific community has generally accepted the PCR-STR methodology as a means to identify contributors to mixed samples of DNA. The accreditation of each individual laboratory rests, in part, on the analysts' ability to pass proficiency testing regarding mixed DNA samples. The DNA laboratory was accredited. Testimony also showed that scientific literature had been published about the PCR-STR methodology regarding mixed samples. Furthermore, we have repeatedly found that the PCR-STR analysis itself produces sufficiently reliable information to be admitted at trial. The Legislature has also recognized the reliability of the PCR-STR methodology.[34]

We further explained:

> The inability of PCR-STR analysis to definitely label the cell source of each DNA contributor in a mixed sample does not affect the underlying validity of the methodology, or its admissibility under the *Daubert*/*Schafersman* framework. In essence, [the defendant] claims that the PCR-STR methodology is not scientifically valid because it is not able to do *more*—it cannot definitively identify the cell source for each contributor to a mixed DNA sample. [The defendant's] assertions, however, go to the weight of the evidence, rather than to its admissibility.[35]

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[33] *Id.* at 702, 811 N.W.2d at 287-88, citing *Schafersman v. Agland Coop, supra* note 2.

[34] *Id.* at 704, 811 N.W.2d at 289.

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

In *State v. Ellis*,[36] this court analyzed whether expert opinion testimony regarding PCR-STR testing of mixed samples of DNA was "'unduly prejudicial.'" We explained:

> [T]he purpose of examining each locus is to determine two things: (1) whether the contributor of the reference sample can be excluded as a contributor and (2) how commonly one might expect the profile that is generated to occur randomly in the population. In other words, the initial question was not whether the alleles that were found at each locus identified [the defendant] as the contributor; instead, it was whether the testing *excluded* [the defendant] as a *possible contributor*. And obviously, an allele that could be found in both [the defendant's] and [the victim's] genetic profile would not exclude [the defendant] as a possible contributor.[37]

We then turned to the second step of the analysis and stated that "the fact that the DNA sample was a mixture clearly affected the calculation of how many people might be expected to have genetic profiles consistent with the sample," however, "that goes to the weight of the evidence, not its admissibility."[38] Thus, the court held that the district court did not abuse its discretion in concluding that the DNA evidence was admissible.

As in *Bauldwin* and *Ellis*, the State's expert and a forensic DNA analyst, Helligso, provided expert testimony on PCR-STR testing of mixed DNA samples and supported her findings with testimony that the laboratory was "accredited and certified through the ASCLD," that the PCR-STR methodology is subject to publication within the field and within the general scientific community, that it is scientifically testable, and that it allows her to make determinations with a reasonable degree of scientific certainty. In regard to each piece of

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[36] *State v. Ellis, supra* note 4, 281 Neb. at 586, 799 N.W.2d at 285.

[37] *Id.* at 587, 799 N.W.2d at 286.

[38] *Id.* at 587-88, 799 N.W.2d at 286.

DNA-tested evidence, Helligso stated whether Hill could "be excluded as a possible contributor" based on the swabs of evidence and the buccal swab from Hill.[39] Helligso then utilized the second step of the test in *Ellis*, a "frequency analysis," to determine the probability of the DNA match to another individual. This analysis was broken down into the frequency within different races.

Hill contends that Helligso may not extend "conclusions to opine that a sample may indicate identity opinions [because] the case law limits the conclusions that may be drawn," and he cites *Ellis* to support the proposition.[40] However, Hill misinterprets *Ellis*. Hill addresses only the first prong of *Ellis*, as to whether the testing excluded Hill as a possible contributor.[41] Upon application of the second prong, the frequency analysis provides how commonly one might expect the profile that is generated to occur randomly in the population.[42] As we found in *Bauldwin*, the fact that PCR-STR testing "cannot definitively identify the cell source for each contributor to a mixed DNA sample" does not make it inadmissible.[43] Instead, the frequency of occurrence in mixed samples goes to the "weight of the evidence."[44]

This court has accepted "frequency analysis" under PCR-STR methodology that analyzes the probability of the DNA match to another individual by different races and found it to be "reliable" and "relevant."[45] Furthermore, it is unclear what Hill means by "the sub-population of Omaha."[46] Hill cites no

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[39] See *State v. Ellis, supra* note 4, 281 Neb. at 586, 799 N.W.2d at 285.

[40] Brief for appellant at 22.

[41] See *State v. Ellis, supra* note 4.

[42] *Id.*

[43] *State v. Bauldwin*, *supra* note 32, 283 Neb. at 704, 811 N.W.2d at 289.

[44] See *id*.

[45] See *State v. Fernando-Granados*, 268 Neb. 290, 312-13, 682 N.W.2d 266, 283 (2004).

[46] Brief for appellant at 21.

precedent to support his assertion, nor is there any case law requiring the database to apply to a subpopulation from the area of the crime scene in its DNA analysis. We find, as we did in *Bauldwin*, that "the PCR-STR analysis itself produces sufficiently reliable information to be admitted at trial."[47]

The district court did not abuse its discretion in admitting that testimony. Hill's second assignment of error is without merit.

3. State's Factual Assertion in Rebuttal Closing Argument

Hill also contends that the district court erred in denying his motion to strike a statement made by the State in rebuttal closing argument, suggesting that a neighbor witnessed the individual fleeing the scene lose his cap at or near the crime scene, when in fact this was not an accurate recitation of the facts as presented at trial. Hill takes issue with the following lines of the State's rebuttal closing argument:

> What [do Francia] and [Nunn] say? There was conversation about the hat because [cocounsel] and I, in putting those witnesses on, had them describe what they saw, and they both said, it seemed like one of them had a hat, and then when I looked again, he didn't have a hat. That's what they said.
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> [Hill's counsel]: Objection. That's not what they said. Move to strike.
>
> THE COURT: Overruled. The jurors will remember the evidence as they remember the evidence.
>
> [State's counsel]: You're the arbiters of the facts, and take a look at it, they both talked about that, is that — they both said, as they took their initial glances, it seems that they — they had a hat and then it wasn't.

The State contends that it was not an error for the district court to overrule Hill's objection, because

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[47] *State v. Bauldwin, supra* note 32, 283 Neb. at 704, 811 N.W.2d at 289.

> [t]here was no intent to mislead the jury by the statement, it was doubtless an inadvertent remark which was the result of a logical progression of facts — if [Hill's] hat was at the scene of the shooting, and [Hill] was not, then he must have been there in sufficiently recent times so that the hat was still at the crime scene.[48]

[9,10] Prosecutors have a duty to conduct criminal trials in a manner that provides the accused with a fair and impartial trial.[49] A prosecutor's improper comments during closing argument can require reversal of a conviction if the comments "'prejudiced the defendant's rights in obtaining a fair trial.'"[50]

[11-13] In determining whether a prosecutor's conduct was prejudicial, we ordinarily look to "'the cumulative effect of the improprieties, the strength of the evidence against the defendant, and whether the district court took any curative action.'"[51] "'[N]ot every variance between [a prosecutor's] advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given' and the remarks are not crucial to the State's case."[52] Absent evidence to the contrary, it is presumed that a jury followed the instructions given in arriving at its verdict.[53]

The State's assertion in its rebuttal closing argument was less than precise. Two witnesses testified that they saw a man running from the scene, and they both mentioned the man might have been wearing a hat. However, neither of the witnesses testified that when they looked again, the man running no longer wore a hat. In Hill's closing argument, defense counsel also addressed the factual issue and stated, "Now . . . there we are, down to two people running who may or may not have

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[48] Brief for appellee at 31.

[49] *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[50] *U.S. v. Darden*, 688 F.3d 382, 388 (8th Cir. 2012).

[51] *Id.*

[52] *State v. Iromuanya*, *supra* note 49, 282 Neb. at 819, 806 N.W.2d at 427.

[53] *State v. Morgan*, 286 Neb. 556, 837 N.W.2d 543 (2013).

a connection with each other. . . . [W]e don't know if they dropped a hat." Hill also stated in his closing argument:

> Remember, if you remember . . . Dunn looked out, looked around, did you see anyone heading facing [sic] him? And he said no. So . . . Francia says he cannot detect the race of the person because the hood is up, all the way to — until they see them turn and there's these lights.
>
> And, again, I asked him, did you see a hat fly off? Didn't see a hat fly off. So we have three witnesses: One who says the person with a bag had a hood up and may have had a baseball hat underneath it; and the other witness who says they see somebody running also with a hood up, can't tell the race from behind, hood is down, to be able to do that. None of them saw a hat fly off the three people fleeing the scene that were — the three people that were described as fleeing the scene.

The total record is over 1,800 pages in length. The State's closing argument was 42 pages long, and its rebuttal closing argument was 23 pages long. The State called 27 witnesses and offered 272 exhibits. The State's inaccurate statements in its rebuttal closing argument did not have a significant cumulative effect, because the State was merely connecting the extensive circumstantial evidence that had already been presented to the jury. The State's witnesses had presented testimony that the cap was found on the same street where Dunn was shot as officers reached the scene, that a man fleeing the scene might have been wearing a cap, and that one of the men witnessed fleeing the scene took longer to cross the bridge because, according to an eyewitness, he "probably . . . dropped something."

After the first statement, the district court admonished the jurors to "remember the evidence as they remember the evidence." Furthermore, jury instruction No. 12 states that "[s]tatements, arguments, and questions of the lawyers for the State and the defendant" are not evidence. We hold that the district court did not abuse its discretion in overruling Hill's

objection to the State's statements in its rebuttal closing argument. Hill's third assignment of error is without merit.

4. Ineffective Assistance of Counsel

Next, we turn to whether Hill was denied effective assistance of counsel. Under Nebraska law, in order to raise the issue of ineffective assistance of trial counsel where appellate counsel is different from trial counsel, a defendant must raise on direct appeal any issue of ineffective assistance of trial counsel which is known to the defendant or is apparent from the record, or the issue will be procedurally barred on postconviction review.[54] In this appeal, Hill asserts 10 ineffective assistance of counsel claims directed at his trial counsel.

The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.[55] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[56] We conclude that the record is sufficient to address some, but not all, of Hill's ineffective assistance claims.

[14,15] In order to show ineffective assistance of counsel under *Strickland v. Washington*,[57] a defendant must show, first, that counsel was deficient and, second, that the deficient performance actually caused prejudice to the defendant's case.[58] 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.[59]

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[54] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[55] *State v. Ramirez*, 284 Neb. 697, 823 N.W.2d 193 (2012).

[56] *Id.*

[57] *Strickland v. Washington, supra* note 10.

[58] *State v. Cullen*, 292 Neb. 30, 870 N.W.2d 784 (2015).

[59] *Id.*

(a) Failure to Ask for Limiting Instruction, Admonishment to Jury, or Move for Mistrial

First, we address whether Hill was denied effective assistance of counsel when his attorney failed to ask for a limiting instruction, admonishment to the jury, or move for a mistrial after the district court allowed the State to assert that two witnesses testified that one of the people fleeing the shooting "had a hat," and when they "looked again," the person "didn't have a hat." Hill's trial counsel objected to the State's assertion of fact. Hill contends that trial counsel was ineffective for thereafter failing to object to the second inaccurate statement by the State that both witnesses said that "as they took their initial glances, it seems that they — they had a hat and then it wasn't," and failing to move for a mistrial. Hill contends that without the State's comments, "there would not be any evidence at all tying . . . Hill to the scene of the shooting."[60]

[16] A mistrial is properly granted in a criminal case where an event occurs during the course of a trial that is of such a nature that its damaging effect cannot be removed by proper admonition or instruction to the jury and thus prevents a fair trial.[61] The defendant must prove that the alleged error actually prejudiced him or her, rather than creating only the possibility of prejudice.[62]

In this case, we conclude that counsel was not deficient. Defense counsel objected to the State's comments. The judge overruled counsel's objection and admonished the jury. Any motion for mistrial would have been futile. Moreover, as noted above, the State's comments did not rise to the level of prosecutorial misconduct. As such, any deficiency by counsel was not prejudicial.

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[60] Brief for appellant at 26.

[61] *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[62] *Id.*

(b) Failure to Share and Discuss Reports With Hill and Provide Him With Discovery

Hill contends that he saw counsel on "less than 10 occasions and most of those lasted less than 15 minutes" and that he was "not provided with a copy of the reports," nor did counsel discuss any reports with him.[63] We conclude that the record on direct appeal is insufficient for us to resolve this claim, and we therefore do not reach it.

(c) Failure to Provide Hill With Depositions of Witness

Hill argues that counsel did not provide Hill with Gassaway's deposition, which prejudiced Hill by "depriving him of the right to aid in his own defense."[64] It is not possible to evaluate whether defense counsel was ineffective, because the record contains insufficient evidence as to whether Hill was present at Gassaway's deposition or whether trial counsel provided Hill with Gassaway's deposition. Because the record is insufficient to address this assignment of error, we decline to address it on direct appeal.

(d) Failure to Take Depositions of Witnesses and Police Officers

Hill argues that counsel failed to take the depositions of Nunn; Francia; Francia's brother; James Dailey, who lived near the location of the crime; and officers present at the traffic stop.

Hill mentions Francia's brother in his argument, but does not include him in the assignment of error. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court.[65] Therefore, any alleged failure

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[63] Supplemental brief for appellant at 27.

[64] *Id.* at 28.

[65] *State v. Filholm*, 287 Neb. 763, 848 N.W.2d 571 (2014).

by counsel to take Francia's brother's deposition is not preserved on review.

Hill contends that Dailey was a "key witness to the issue of robbery"[66]; however, the record shows that Dailey heard gunshots while at his home and only saw an unidentified figure, who was apparently Hill, stagger off Dailey's doorstep. Dailey did not leave his house or witness anyone else. Therefore, the record refutes Hill's claim with respect to Dailey and it is without merit.

Hill further argues that counsel failed to depose "numerous other police officers present at the site of the stop and involved in the motion to suppress."[67] But in order to avoid dismissal without an evidentiary hearing, Hill is required to specifically allege what the testimony of these witnesses would have been, had they been called in order.[68] "Without such specific allegations, the . . . 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."'"[69] We find that Hill's description is not a sufficient allegation of deficient performance.

We further find that the record is not sufficient to address the claims that pertain to Nunn and Francia.

(e) Failure to Present Evidence of Alibi Pursuant to Notice of Alibi

Hill argues that counsel filed a notice of alibi, but none of Hill's alibis were presented at trial. Hill argues that counsel failed to introduce (1) testimony from Hill's son's nurse that she met with Hill at the time of the shooting, (2) testimony from Hill's mother that she talked to Hill during the time period and "she could have testified as to where [Hill] identified himself as being and the nature of the conversation" and

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[66] Supplemental brief for appellant at 28.

[67] *Id.*

[68] See *State v. Abdullah*, 289 Neb. 123, 853 N.W.2d 858 (2014).

[69] *Id.* at 133, 853 N.W.2d at 867.

that she "drove by his house" and "knew that he was home,"[70] and (3) telephone records from Hill's telephone.

We turn to the first claim. Hill contends that he met with his son's nurse at his home between 10 and 10:30 p.m., which was the time the record shows the shooting occurred, and that the home was located "many miles away from the scene of the shooting."[71] We conclude that Hill's first claim sufficiently alleges deficient performance, but that his second and third claims are without merit.

We turn next to the second and third claims. Hill contends that Hill's mother knew where Hill was located based on a telephone conversation at the time. Thus, Hill's mother's knowledge of Hill's location would be based solely on what Hill told her over the telephone. This is inadmissible hearsay, and the claim is without merit.

Hill further contends that Hill's mother "drove by his house" and "knew that he was home."[72] However, Hill does not provide any basis as to how Hill's mother knew that he was home. We find that this claim is insufficiently pled.

Hill also claims that his telephone records would have shown to the jury "who he talked to that night and for what period of time."[73] But Hill does not provide any further explanation as to how this could impact his alibi defense. We conclude that Hill has not sufficiently alleged deficient performance.

(f) Failure to Obtain and Introduce Hill's Telephone Records

Hill also argues that counsel was ineffective for failing to call as witnesses the people he talked to on the telephone, "which would have proved an inability to be at the scene of the murder."[74] We conclude, for the reasons stated above, that this

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[70] Supplemental brief for appellant at 29.

[71] *Id.*

[72] *Id.*

[73] *Id.* at 30.

[74] *Id.*

claim does not identify deficient performance and has not been sufficiently pled.

(g) Failure to Investigate and Hire DNA Expert to Refute Findings of State's DNA Expert and to Educate Jury as to Meaning of DNA Evidence

Hill contends that counsel was ineffective for failing to call an expert to develop and contradict the State's expert testimony on the DNA results. Hill argues that "DNA is a complicated matter" and that because there were major contributors in mixed samples on the cap and on the handgun, another expert was needed to explain "the significance of those statistics and what does it mean in light of those DNA statistics being the only things tying [Hill] to both the gun and the scene of the crime."[75] The record indicates that Helligso extensively explained DNA testing in general terms and specifically explained PCR-STR testing to the jury prior to describing the DNA test results. Hill does not explain the portion of Helligso's testimony that could be refuted or what another expert could add to the testimony that Helligso did not already explain. We find that this claim has not been sufficiently pled.

(h) Failure to Properly Advise Hill of His Right to Testify and Failure to Call Hill as Witness

Hill contends that he "wanted to present a defense and to testify" but that he waived his right to testify due to counsel's advice.[76] We conclude that the record is insufficient to address this claim.

(i) Failure to Present Any Defense

Hill argues that counsel was ineffective for failing to present any defense. On direct appeal, an appellate court can

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[75] *Id.* at 30-31.

[76] *Id.* at 32.

determine whether the record proves or rebuts the merits of a claim of ineffective assistance of trial counsel only if it has knowledge of the specific conduct alleged to constitute deficient performance.[77] An appellant must make specific allegations of the conduct that he or she claims constitutes deficient performance by trial counsel when raising an ineffective assistance claim on direct appeal.[78] Hill's argument that trial counsel failed "to present any defense" does not allege specific conduct.[79] Therefore, we look only to the specific defenses further alleged by Hill.

Hill repeats several of the arguments we have already addressed and adds that "the mother of one of his children . . . would testify that he was never in the neighborhood of the murder."[80] Hill further claims that she "was even excluded from the trial throughout pursuant to the sequestration order, in contemplation of her testimony."[81] Hill provides no explanation as to what she would have said or how she could have supported Hill's alibi on the night of the shooting. Nonetheless, we find that Hill has not sufficiently pled this claim.

(j) Failure to Follow Through on Motion for New Trial Based Upon Inconsistent, Incongruent, and Untenable Jury Verdict

Hill argues that counsel failed to recognize the "incongruency and inconsistency" of the jury's finding first degree murder and not finding use of a weapon to commit a felony.[82] Hill contends that "[t]he failure to pursue this motion may have foreclosed it from being considered on appellate [review] and

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[77] *State v. Filholm, supra* note 65.

[78] *Id.*

[79] Supplemental brief for appellant at 33.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 35.

if so it was ineffective assistance of counsel."[83] The record shows that the motion for new trial was withdrawn with the consent of Hill.

Hill does not explain why the withdrawal of the motion constituted ineffective assistance of counsel. He has not alleged specific conduct to constitute deficient performance; thus, his claim is not preserved for review. Hill's fourth assignment of error is without merit.

4. Motion to Dismiss and Motion for Directed Verdict

Hill argues that the district court erred in overruling his motion to dismiss and motion for directed verdict, because there was no eyewitness testimony placing Hill at the scene of the shooting, there was "insufficient evidence to convict"[84] Hill, the DNA testing was "[q]uestionable science,"[85] and the "alleged loss of a hat by an assailant should not have been allowed in argument to the jury."[86]

Hill was tried by a jury on four counts and convicted of first degree murder and two counts of possession of a deadly weapon by a prohibited person. Hill did not offer any evidence in his defense at trial. On February 23, 2016, Hill made a motion to dismiss at the close of the State's case and after the jury conference. The court denied Hill's motions.

As discussed above, we have concluded that the DNA evidence was admissible.[87] While there is no eyewitness testimony, there was significant circumstantial evidence supporting Hill's convictions, including DNA testing of the cap found at the scene, DNA testing of the handgun found under Hill's seat, analysis that matched the spent bullet in Dunn's jacket

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[83] *Id.*

[84] *Id.* at 21.

[85] Brief for appellant at 23.

[86] *Id.* at 24.

[87] See *State v. Bauldwin, supra* note 32.

to the handgun found under Hill's seat, and eyewitness testimony of one or two suspects fleeing the scene of Dunn's shooting, one of whom might have been wearing a cap.

Whether the evidence presented by the State supports Hill's convictions was a matter for the finder of fact.[88] Viewing the evidence in the light most favorable to the State, we determine the record reflects sufficient evidence to sustain the convictions beyond a reasonable doubt.

Hill's fifth assignment of error is without merit.

VI. CONCLUSION

The judgments and convictions of the district court are affirmed.

Affirmed.

Wright, J., not participating.

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[88] See *id.*

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Hand Cut Steaks Acquisitions, Inc., an Arkansas corporation, appellant and cross-appellee, v. Lone Star Steakhouse & Saloon of Nebraska, Inc., a Nebraska corporation, appellee and cross-appellant, and LSF5 Cactus, L.L.C., a Delaware limited liability company, appellee.

905 N.W.2d 644

Filed January 19, 2018. No. S-16-1005.

1. **Evidence: Stipulations: Appeal and Error.** In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.
2. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.
3. **Landlord and Tenant: Abandonment.** An abandonment of leased premises by the tenant constitutes an offer to terminate the lease.
4. **Landlord and Tenant: Abandonment: Intent.** Whether there has been an acceptance by the landlord of the tenant's abandonment of the premises is largely a matter of intention, and such an acceptance may be inferred from acts of the landlord inconsistent with the continuance of the lease.
5. **Landlord and Tenant.** Whether a surrender and acceptance of leased premises occurred is a question of fact.
6. **Landlord and Tenant: Abandonment: Damages.** After a tenant abandons leased property, a landlord may mitigate its damages not only by reletting the property to another tenant, but also by selling the property.
7. **Landlord and Tenant: Abandonment: Intent.** Like retaking and reletting leased property, the act of attempting to sell and selling the property by a landlord after a tenant abandons it is equivocal and can evince an

intent to mitigate the landlord's damages just as easily as it can evince an intent to accept the tenant's surrender.

8. **Landlord and Tenant: Abandonment: Damages: Intent: Presumptions.** Where a landlord's actions are not inconsistent with an intent to mitigate its damages, a court will not presume that the landlord intended to accept the tenant's surrender of the leased premises and terminate the lease.
9. **Landlord and Tenant: Abandonment: Damages.** A landlord may not unreasonably refuse to accept a qualified and suitable substitute tenant for the purpose of mitigating the damages recoverable from a tenant who has abandoned the leased premises prior to the expiration of the term.
10. ____: ____: ____. A landlord has a duty to relet the premises in order to mitigate damages when a tenant abandons the premises prior to the expiration of a lease. This duty to mitigate requires that the landlord take all reasonable steps to reduce his damages.
11. **Landlord and Tenant: Abandonment: Damages: Proof.** In a landlord's action to recover unpaid rent upon a tenant's abandonment of the premises prior to the end of the lease term, the tenant has the burden to show that the landlord unreasonably failed to relet the premises and mitigate damages.
12. **Landlord and Tenant: Abandonment: Damages.** After a tenant has abandoned leased premises, a landlord may satisfy its duty to mitigate damages by retaking the premises and making reasonable efforts to relet the premises on the tenant's account, to sell the property, or both.
13. **Landlord and Tenant: Leases: Breach of Contract: Damages: Sales: Time.** A landlord may generally recover unpaid rent and expenses due under a lease from the time of the tenant's breach through the time a sale of the property is completed, plus any commercially reasonable expenses incurred in order to procure a new tenant or buyer.
14. **Landlord and Tenant: Abandonment: Damages.** A landlord's efforts to mitigate its damages after a tenant abandons the leased property must be commercially reasonable under the circumstances.
15. **Landlord and Tenant: Abandonment: Damages: Time.** A landlord's duty to mitigate its damages arises when the tenant abandons or surrenders the property.
16. **Landlord and Tenant: Abandonment: Damages.** Until there is an abandonment or tender of property by a tenant, a landlord has no duty to mitigate its damages by reletting or selling the property.
17. **Landlord and Tenant: Abandonment: Damages: Sales: Time.** If a landlord's efforts to mitigate its damages by selling abandoned property are reasonable under all the circumstances—including reasonable in time—damages will ordinarily run until the date of sale.

18. **Jurisdiction: Words and Phrases.** Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.
19. **Constitutional Law: Jurisdiction: Due Process: Service of Process: States.** Courts' ability to validly exercise personal jurisdiction is not without limit. The Due Process Clause of the 14th Amendment to the U.S. Constitution bars a court from exercising personal jurisdiction over an out-of-state defendant, served with process outside the state, unless that defendant has sufficient ties to the forum state.
20. **Constitutional Law: Jurisdiction: Statutes: Due Process: States.** A two-step analysis is used to determine whether a Nebraska court may validly exercise personal jurisdiction over an out-of-state defendant. First, a court must consider whether Nebraska's long-arm statute—Neb. Rev. Stat. § 25-536 (Reissue 2016)—authorizes the exercise of personal jurisdiction over the defendant. Second, a court must consider whether the exercise of personal jurisdiction over the defendant comports with the Due Process Clause.
21. **Constitutional Law: Jurisdiction: Statutes: Due Process.** If a Nebraska court's exercise of personal jurisdiction would comport with the Due Process Clause of the 14th Amendment, it is authorized by the long-arm statute—Neb. Rev. Stat. § 25-536(2) (Reissue 2016).
22. **Constitutional Law: Jurisdiction: Due Process: States: Words and Phrases.** To satisfy the Due Process Clause, a court may only exercise personal jurisdiction over a defendant that is not present in the forum state if that defendant has "minimum contacts" with the forum such that the exercise of jurisdiction does not offend traditional notions of fair play and substantial justice. To constitute sufficient minimum contacts with the forum, a defendant's conduct and connection with the forum state must be such that he or she should reasonably anticipate being haled into court there.
23. **Jurisdiction: States.** Whether a defendant's contacts with the forum state are sufficient to support the exercise of personal jurisdiction will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.
24. ____: ____. Personal jurisdiction is proper where the defendant's contacts proximately result from actions by the defendant himself or herself that create a substantial connection with the forum state.
25. ____: ____. In the minimum contacts analysis, courts will consider the burden on a defendant in light of considerations such as (1) the forum state's interest in adjudicating the dispute, (2) the plaintiff's interest

in obtaining convenient and effective relief, (3) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (4) the shared interest of the several states in furthering fundamental substantive social policies. Consideration of these factors may sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.

26. ____: ____. The nature and quality of a defendant's contacts with the forum state necessary to support the exercise of personal jurisdiction depend on the connection between the contacts and the claim being asserted.
27. **Jurisdiction: States: Words and Phrases.** General, or all-purpose, jurisdiction is jurisdiction arising where a defendant's affiliations with a state are so continuous and systematic as to render the defendant essentially at home in the forum state.
28. **Jurisdiction.** Where a court has general personal jurisdiction over a defendant, it can adjudicate any claim against the defendant—even a claim that arises outside the forum state and bears no connection to the defendant's contacts with the forum.
29. **Jurisdiction: Words and Phrases.** Specific, or case-linked, jurisdiction requires that a claim arise out of or relate to the defendant's contacts with the forum.
30. **Jurisdiction.** A defendant need not be at home in the forum to be subject to specific personal jurisdiction, but, rather, there must be an affiliation between the forum and the underlying controversy.
31. **Jurisdiction: Words and Phrases.** Specific personal jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction. There must be a substantial connection between the defendant's contacts and the operative facts of the litigation.
32. **Jurisdiction: Due Process: Contracts.** For purposes of personal jurisdiction, it is sufficient for purposes of due process that a suit be based on a contract which has substantial connection with that state.
33. **Jurisdiction: States.** Personal jurisdiction may not be avoided merely because a defendant did not physically enter the forum state.
34. **Jurisdiction: States: Contracts.** To determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing.
35. **States: Real Estate.** Generally, a state has a unique interest in adjudicating transactions affecting its land.

36. **Landlord and Tenant: Guaranty: States.** While a guaranty of a personal debt generally bears no intrinsic connection to any particular location, a guaranty to pay and perform a tenant's obligations under a lease of real property uniquely affects the state in which the premises are located.
37. **Jurisdiction: Due Process: States: Real Estate.** While the Due Process Clause's personal jurisdiction analysis no longer bears a rigidly territorial focus, states nevertheless, as coequal sovereigns in a federal system, have a special interest in adjudicating disputes relating to the real property with their borders.
38. **Jurisdiction: Guaranty: States.** Where a guarantor takes on obligations that are uniquely tied to and uniquely affect a particular location, it is not unreasonable for courts of that state to exercise personal jurisdiction over the guarantor in connection with claims arising from or related to those obligations.
39. **Jurisdiction: States: Contracts.** While the minimum contacts personal jurisdiction analysis is distinct from a choice-of-law analysis, a choice-of-law contractual provision in favor of the forum state's law is a relevant contact with the forum.
40. **Contracts: Attorney Fees: Public Policy.** In the absence of a uniform course of procedure or authorization by statute, contractual agreements for attorney fees are against public policy and will not be judicially enforced.

Appeal from the District Court for Douglas County: Leigh Ann Retelsdorf, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

David L. Welch and Jeffrey A. Nix, of Pansing, Hogan, Ernst & Bachman, L.L.P., for appellant.

Michael S. Degan, of Kutak Rock, L.L.P., for appellees.

Heavican, C.J., Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

I. INTRODUCTION

When a tenant abandons leased property, a landlord may either accept the abandonment, thereby terminating the lease, or attempt to relet or sell the property. Here, after the tenant stopped paying rent and the landlord sued, the tenant

surrendered the property. The landlord rejected offers by prospective tenants and instead, after lengthy negotiations, sold the property.

Following a bench trial on stipulated facts, the district court awarded damages to the date the landlord reached a tentative agreement to sell rather than to an actual sale date. And the court dismissed the tenant's out-of-state guarantor for lack of jurisdiction.

On appeal, we affirm the district court's damages award because, although the landlord did not terminate the lease, the duration of finalizing the sale was not reasonable. But because the guaranty established sufficient connections to Nebraska, we reverse the dismissal of the guarantor.

II. BACKGROUND

1. Parties

The tenant, Lone Star Steakhouse & Saloon of Nebraska, Inc. (Lone Star), is a Nebraska corporation. Lone Star leased property in west Omaha, Nebraska, to use for the operation of a steakhouse restaurant from the landlord, Hand Cut Steaks Acquisitions, Inc. (HCS), an Arkansas corporation. LSF5 Cactus L.L.C. (Cactus), a Delaware limited liability company doing business in Texas, is a subsidiary of Lone Star's parent company. Cactus guaranteed the performance of Lone Star's obligations under the lease.

2. Property and Lease to Lone Star

In 2010, HCS hired an agent to list and market the property. He did so, eventually securing Lone Star as a tenant. Lone Star leased the property for a 66-month term, to run from 2010 through 2016. The lease began with 6 months of free rent, followed by rent increasing incrementally. Lone Star was also responsible for paying property taxes, property insurance, and common area maintenance costs.

The lease contained an attorney fee provision: "In the event of litigation between the parties to enforce this Lease, the

prevailing party in any such action shall be entitled to recover reasonable costs and expenses of suit, including, without limitation, court costs, attorneys' fees, and discovery costs."

The lease also contained a choice-of-law provision: "This Lease shall be construed, interpreted, and enforced pursuant to the applicable laws of the state in which the Premises are located."

Cactus executed a guaranty of the lease which provided that

> [Cactus], in consideration of the direct and material benefits that will accrue to [it], and for the purpose of inducing [HCS] to enter into [the lease] with Lone Star . . . , a subsidiary of [Cactus], absolutely and unconditionally guarantees the payment and performance of, and agrees to pay and perform as primary obligor, all liabilities, obligations, and duties (including but not limited to payment of rent) imposed upon [Lone Star] under the terms of the . . . Lease.

And the lease acknowledged the guaranty signed by Cactus: "As an inducement to [HCS] to enter into this Lease, [Lone Star] agrees and acknowledges that its obligations under this Lease shall be guaranteed . . . by its parent corporation, [Cactus], a Delaware limited liability company . . . ." Cactus was also an insured under a general liability and workers' compensation and employers' liability insurance policy covering Lone Star's restaurant in Omaha.

3. Restaurant Closes and HCS Sues

In October 2012, Lone Star notified HCS that it planned to shut down its restaurant in 3 weeks. Lone Star continued paying rent through February 2013, but then stopped. In March 2013, HCS served a notice of default on Lone Star. In April, HCS filed suit against Lone Star and Cactus. Later in April, HCS demanded that Lone Star surrender the premises. Its demand letter stated, "This Notice shall in no way be construed as a termination of [the] Lease or as a relinquishment

or waiver by [HCS] as to any rental amounts or other amounts due under [the] Lease . . . .” Lone Star surrendered the premises in early May, and the parties executed an acknowledgment of tender and receipt of premises agreement.

4. Interest From Prospective Tenants

Shortly after Lone Star notified HCS that it planned to close the restaurant, HCS began receiving inquiries about the availability of the property.

According to the parties’ trial stipulation, “[HCS] relied upon [the agent] to relay communications for purposes of selling or reletting the Premises.” But the parties also stipulated that HCS did not hire the agent or anyone else as a broker for the purpose of reletting the premises, before or after HCS regained control of the premises in May 2013. The agent did not do any marketing or list the property for HCS as was done in 2010, when he secured Lone Star’s tenancy.

From October 2012 through February 2013, the agent and HCS’ owner, Pat Boyd, corresponded with a broker representing a pizza firm about leasing or purchasing the property. The broker told HCS that the pizza firm “[w]ants the [p]roperty” and made multiple offers for a sale or lease. Boyd said in his deposition that he was not interested in the pizza firm because he did not find any of its offers acceptable and because he “was not interested in their concept.” Boyd also said that he made up his mind that he was not interested in the pizza firm as a tenant as early as November 2012.

HCS also received two offers in May 2013 from a broker on behalf of a restaurant proprietor interested in starting a crab restaurant. Regarding the crab restaurant, Boyd testified, “This particular concept, we — we weren’t interested in putting in our building.” Boyd also said that he was not interested because he learned that the proprietor previously had several other restaurant concepts that failed.

5. Negotiations With Ultimate Buyer

Discussions with the ultimate buyer began in December 2012. In January 2013, the buyer sent HCS an offer to purchase the property. HCS rejected the offer and expressed its interest in negotiating a lease rather than a sale. They continued to negotiate, and in May, the buyer made another offer to purchase the property. Boyd told the buyer he was more interested in a lease than a sale of the property. The buyer told Boyd, "'We are too far apart to make a ground lease work here[, but w]e can be much more aggressive . . .'" in negotiating a purchase. The buyer asked HCS to make a counteroffer for the sale of the property. After further negotiations, a letter of intent (LOI) outlining the terms of the sale of the property for $1.715 million was executed in June 2013. However, it took until September 2013 for the parties to finalize the purchase agreement for the property and, due to some issues with title insurance, until April 2014 to close on the sale.

6. Pretrial Motions and Orders

Before trial, the district court granted a motion of Cactus, the guarantor of Lone Star's lease, to dismiss it for lack of personal jurisdiction. But the court later granted HCS' motion to reconsider its order and allowed limited discovery with regard to Cactus' contacts with Nebraska. After discovery was conducted, the court denied Cactus' renewed motion to dismiss and reserved ruling on the issue until trial. The district court also granted in part and denied in part HCS' pretrial motion for summary judgment, granting summary judgment on the issue of Lone Star's breach of the lease.

A bench trial was held on stipulated facts on the issue of damages, after which the district court issued a "Bench Trial Order." The court concluded that HCS had not accepted Lone Star's surrender of the lease, because HCS' "actions were consistent with a landlord attempting to mitigate its damages." The court also concluded that "[HCS] took reasonable

steps to mitigate its damages after Lone Star's breach of the Lease."

The district court also addressed the issue of whether a landlord may mitigate its damages by selling, rather than reletting, the property:

> The Court does not find it reasonable to fault Lone Star for the lengthy closing process in the negotiations between [HCS] and [the buyer]. Under the theory of contracts, the breaching party is not to be punished for [its] breach, but rather, the non-breaching party is to be made whole. It would indeed be a punishment for Lone Star to pay nearly a year's worth of damages because the closing period between [HCS] and [the buyer] was such a drawn-out negotiation. Therefore, for purposes of mitigation and damages, the Court finds that the accrual of damages ended when [HCS] signed its [LOI] to sell the Premises to [the buyer] on June 13, 2013.

The district court awarded money damages against Lone Star in the amount of $49,415.27.

The district court also concluded that it lacked personal jurisdiction over Cactus and dismissed HCS' claims against it. The district court's order reserved the issue of attorney fees for a later hearing. After the order, HCS moved for attorney fees, based on the provision in the lease that attorney fees be awarded to the prevailing party in the event of litigation over the lease, and moved for a new trial. Lone Star also moved for a new trial. The district court overruled HCS' motions and overruled Lone Star's motion as untimely. HCS filed a timely appeal, and Lone Star asserted a cross-appeal.

III. ASSIGNMENTS OF ERROR

HCS claims that the district court erred by (1) "overruling the Motion for New Trial and awarding an insufficient amount of damages to" HCS, (2) "overruling the Motion for New Trial and ruling that . . . Cactus . . . was properly dismissed from the action," and (3) "overruling [HCS'] Motion for attorney's fees."

Lone Star claims that the district court erred by (1) "failing to find that [HCS] accepted Lone Star's surrender of its tenancy, thereby terminating the lease"; (2) "failing to find that [HCS] failed to mitigate damages, thereby excusing Lone Star's obligations under the lease"; (3) "finding that Lone Star breached the lease"; (4) "awarding damages to [HCS]"; and (5) "failing to enter judgment in favor of Lone Star."

IV. STANDARD OF REVIEW

[1] In a case in which the facts are stipulated, an appellate court reviews the case as if trying it originally in order to determine whether the facts warranted the judgment.[1]

[2] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.[2]

V. ANALYSIS

1. Surrender and Termination of Lease

Lone Star argues that HCS accepted its surrender of the lease, thereby terminating the lease, by retaking the property for HCS' own benefit and selling the property. Lone Star claims that the district court's finding to the contrary was erroneous. HCS claims that it retook possession of the property in order to relet the property on Lone Star's account in order to mitigate its damages. We agree with the district court that when Lone Star surrendered the property, HCS did not accept Lone Star's offer to terminate the lease.

[3-5] We have held that "'[a]n abandonment of leased premises by the tenant constitutes an offer to terminate the lease . . .'" and that "'whether there has been an acceptance

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[1] *Klein v. Oakland/Red Oak Holdings*, 294 Neb. 535, 883 N.W.2d 699 (2016).

[2] *Quality Pork Internat. v. Rupari Food Servs.*, 267 Neb. 474, 675 N.W.2d 642 (2004).

by the landlord of the tenant's abandonment of the premises is largely a matter of intention, and such an acceptance may be inferred from acts of the landlord inconsistent with the continuance of the lease.'"[3] And "[w]hether a surrender and acceptance occurred is a question of fact . . . ."[4]

The relevant evidence of HCS' intent is its conduct after Lone Star surrendered the premises. To a lesser extent, HCS' conduct before Lone Star's surrender may also be relevant to show its intent. The act of retaking possession is itself equivocal as to a lessor's intent.[5] Such conduct could show an intent to accept the tenant's abandonment, or could show an intent to relet the property on the tenant's account in order to mitigate damages.[6]

[6-8] None of HCS' actions were inconsistent with retaking the property for the purpose of reletting it on Lone Star's account in order to mitigate its damages. Lone Star argues that "[t]he act of selling, or attempting to sell, the leased premises is an act wholly and entirely inconsistent with continuation of the lease"[7] and thus shows that HCS accepted Lone Star's surrender. But as we discuss below, a landlord may mitigate its damages not only by reletting the property to another tenant, but also by selling the property. Thus, like retaking and reletting the premises, the act of attempting to sell and selling the property is equivocal. A sale can evince an intent to mitigate the landlord's damages just as easily as it can evince an intent to accept the tenant's surrender. Our review of the record shows no actions by HCS that are inconsistent with an intent

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[3] *Waite Lumber Co., Inc. v. Masid Bros., Inc.*, 189 Neb. 10, 21, 200 N.W.2d 119, 126 (1972); 50 C.J.S. *Landlord & Tenant* §§ 213 and 218 (2006).

[4] *Signal Management Corp. v. Lamb*, 541 N.W.2d 449, 451 (N.D. 1995).

[5] *Id.*; *First Wisconsin Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 286 N.W.2d 360 (1980).

[6] See, *Signal Management Corp. v. Lamb, supra* note 4; *First Wisconsin Trust Co. v. L. Wiemann Co., supra* note 5.

[7] Brief for appellee Lone Star on cross-appeal at 17.

to mitigate its damages by retaking and reletting or selling the property. Where a landlord's actions are not inconsistent with an intent to mitigate its damages, we will not presume that the landlord intended to accept the tenant's surrender and terminate the lease.[8]

Moreover, in divining HCS' intent with regard to the surrender of the lease, we can look to its own words. HCS expressly stated that it was not terminating the lease when it demanded that Lone Star surrender the property. In the notice to quit, HCS wrote that its notice "shall in no way be construed as a termination of [the] Lease or as a relinquishment or waiver by [HCS] as to any rental amounts or other amounts due under [the] Lease for the remainder of the term, or until [HCS] is able to obtain a satisfactory tenant . . . ." HCS' own words were unequivocal that its demand for the surrender of the property was not a termination of the lease.

Because HCS' actions were not inconsistent with an intent to retake the property for the purpose of mitigating its damages after Lone Star's breach by reletting or selling the property, and because HCS expressly stated that it did not intend to terminate the lease, we conclude that HCS did not accept Lone Star's offer to terminate the lease through its abandonment of the property. We affirm the district court's conclusion on this issue.

2. Mitigation of Damages

HCS argues that the district court erred in awarding it damages only through the date that HCS and the buyer executed the LOI for the sale of the property. HCS argues that this is inconsistent with the court's conclusion that it acted reasonably to mitigate its damages. Lone Star argues that HCS failed to make reasonable efforts to relet the property in order to mitigate its damages when it rejected bona fide offers to lease the property and instead sought to sell the property—which took a considerable time to consummate.

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[8] See *Signal Management Corp. v. Lamb, supra* note 4.

[9-11] This court has held that "a landlord may not unreasonably refuse to accept a qualified and suitable substitute tenant for the purpose of mitigating the damages recoverable from a tenant who has abandoned the leased premises prior to the expiration of the term."[9] We have also explained:

> A landlord has a duty to relet the premises in order to mitigate damages when a tenant abandons the premises prior to the expiration of a lease. . . . This duty to mitigate requires that the landlord take all reasonable steps to reduce his damages. . . . In a landlord's action to recover unpaid rent upon a tenant's abandonment of the premises prior to the end of the lease term, the tenant has the burden to show that the landlord unreasonably failed to relet the premises and mitigate damages.[10]

This case presents a related question: If a landlord must make reasonable efforts to mitigate damages after a tenant's abandonment by seeking to relet the leased premises, may the landlord instead seek to mitigate by selling the property? While we suggested that selling is a viable option for mitigation in our opinion in *Properties Inv. Group v. JBA, Inc.*,[11] wherein we approved of a landlord's mitigation efforts and said that "[the landlord's] evidence shows that all of the steps it took *to sell* or lease the property were reasonable," we have yet to explicitly decide the question.

[12,13] Courts in other jurisdictions have concluded that a landlord may mitigate after a tenant abandons by selling the

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[9] *Bernstein v. Seglin*, 184 Neb. 673, 677, 171 N.W.2d 247, 250 (1969).

[10] *Hilliard v. Robertson*, 253 Neb. 232, 237, 570 N.W.2d 180, 183 (1997). See, also, *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997); *Middagh v. Stanal Sound Ltd.*, 234 Neb. 576, 452 N.W.2d 260 (1990), *supplemented* 235 Neb. 433, 455 N.W.2d 762; *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990).

[11] *Properties Inv. Group v. JBA, Inc.*, 242 Neb. 439, 446, 495 N.W.2d 624, 629 (1993) (emphasis supplied).

property.[12] The theory behind allowing a sale to mitigate the damages in a breach of a lease by an abandoning tenant is that "the sale price approximate[s] the value of the future rentals."[13] We agree with these authorities and hold that after a tenant has abandoned the leased premises, a landlord may satisfy its duty to mitigate damages by retaking the premises and making reasonable efforts to relet the premises on the tenant's account, to sell the property, or both. And a landlord may generally recover unpaid rent and expenses due under the lease from the time of the tenant's breach through the time the sale of the property is completed, plus any commercially reasonable expenses incurred in order to procure a new tenant or buyer.[14]

[14,15] But a landlord's efforts must be commercially reasonable under the circumstances.[15] In order to determine whether HCS' efforts to lease or sell the property were reasonable, we will look at its conduct beginning at the time its duty to mitigate arose, when Lone Star surrendered the property to HCS.[16]

[16] We need not, and do not, address the adequacy of HCS' efforts to find a new tenant between the time Lone Star informed HCS that it would be ceasing operation of its restaurant in October 2012 and the time HCS retook possession of the property in May 2013. Lone Star continued to pay rent

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[12] See, e.g., *Krasne v. Tedeschi and Grasso*, 436 Mass. 103, 762 N.E.2d 841 (2002); *McGuire v. City of Jersey City*, 125 N.J. 310, 593 A.2d 309 (1991).

[13] *McGuire v. City of Jersey City, supra* note 12, 125 N.J. at 320, 593 A.2d at 314.

[14] *Middagh v. Stanal Sound Ltd., supra* note 10; *Noble v. Kerr*, 123 Ga. App. 319, 180 S.E.2d 601 (1971), *disapproved on other grounds, Continental Cas. Co. v. Union Camp Corp.*, 230 Ga. 8, 195 S.E.2d 417 (1973). See, also, *Lu v. Grewal*, 130 Cal. App. 4th 841, 30 Cal. Rptr. 3d 623 (2005).

[15] *Tech Center 2000, LLC v. Zrii, LLC*, 363 P.3d 566 (Utah App. 2015); *Geller v. Kinney*, 980 N.E.2d 390 (Ind. App. 2012).

[16] *Miller v. Burnett*, 54 Kan. App. 2d 228, 397 P.3d 448 (2017). See, also, *Hilliard v. Robertson, supra* note 10.

until March 2013 and remained in possession of the property until May. Until there was an abandonment or tender of the property by Lone Star, HCS had no duty to mitigate its damages by reletting or selling the property.[17]

HCS and Lone Star executed an acknowledgment of tender and receipt, a formal acknowledgment of Lone Star's surrender of the property to HCS, on May 2, 2013. Through the month of May, HCS was engaged in active negotiations with the ultimate buyer to lease or sell the property. They negotiated and executed an LOI by mid-June. We conclude that HCS' initial efforts to mitigate its damages by leasing or selling the property, through the date of the LOI, were reasonable.

But it took another 10 months from that time until the sale was completed in April 2014. The rent that accumulated during this 10-month period is approximately $90,000, not to mention other expenses. HCS argues that these delays were not its fault, claiming that "[a]ny delays were the result of [the buyer], which is notorious for delays in transactions such as these."[18] But choosing to sell the property to a buyer that in HCS' own words was "notorious" for delays, to the exclusion of pursuing other bona fide offers to lease the property, was not a commercially reasonable way to mitigate damages. Instead, these delays were attributable to HCS' choice to pursue a deal with that buyer. And HCS chose this lengthy path with the knowledge that it had bona fide offers to lease the property from other suitors.

Under our de novo standard of review of this bench trial on stipulated facts,[19] we conclude that HCS' initial efforts to lease or sell the property were reasonable, but that the delay after the execution of the LOI was not reasonable. This conclusion is driven by the specific facts presented.

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[17] See *Miller v. Burnett, supra* note 16. See, also, *Hilliard v. Robertson, supra* note 10.

[18] Brief for appellant at 19.

[19] *Klein v. Oakland/Red Oak Holdings, supra* note 1.

[17] To be clear, we are not establishing a legal rule that where a landlord mitigates its damages after a tenant's abandonment by selling the property, damages stop accruing at the time the landlord executes an LOI for the sale of the property. If the landlord's efforts to mitigate are reasonable under all the circumstances—including reasonable in time—damages will ordinarily run until the date of sale.[20] Our conclusion is simply that on the facts of this case, HCS' efforts to mitigate were reasonable only up to a certain point. Thus, we affirm the district court's award of damages for unpaid rent.

We also affirm the district court's award of damages based on amounts due under the lease for common area maintenance, utilities, repairs and maintenance, taxes, and insurance. The calculation of these damages turns on the date at which the damages under the lease stopped accruing. Because we affirm the district court's conclusion that damages ran through June 13, 2013, the date of the LOI for sale to the ultimate buyer, we affirm the district court's calculation of these expenses as well.

We also affirm the district court's denial of damages for HCS' "[l]andlord [c]ontribution" under the lease of 6 months' free rent at the beginning of the term. Providing this free rent at the beginning of the term was part of the bargained-for exchange that HCS agreed to under the lease. As the district court pointed out, nothing in the lease provides that Lone Star must repay the value of this free rent in the event it breached the lease. To allow HCS to recover damages for the value of this free rent in addition to damages for the rent due under the lease would be to allow a double recovery, putting it in a better position than it would have been had Lone Star not breached the contract. We affirm the district court's award of damages.

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[20] *McGuire v. City of Jersey City, supra* note 12; *Noble v. Kerr, supra* note 14.

3. Personal Jurisdiction

HCS claims the district court erred in concluding that the court lacked personal jurisdiction over Cactus and consequently dismissing its claim against Cactus.

In the guaranty, Cactus "absolutely and unconditionally guarantee[d] the payment and performance of, and agree[d] to pay and perform as primary obligor, all liabilities, obligations, and duties (including but not limited to payment of rent) imposed upon [Lone Star] under the terms of the . . . Lease." The guaranty stated that it was made by Cactus "in consideration of the direct and material benefits that will accrue to [Cactus], and for the purpose of inducing [HCS] to enter into" the lease with Lone Star.

The lease itself acknowledged the guaranty, providing that "[a]s an inducement to [HCS] to enter into this Lease, [Lone Star] agrees and acknowledges that its obligations under this Lease shall be guaranteed . . ." by Cactus. The lease provided that it "shall be construed, interpreted, and enforced pursuant to the applicable laws of the state in which the Premises are located," i.e., Nebraska law. Cactus was also a subsidiary of Lone Star's parent company. And Cactus was a named insured in a certificate of liability insurance covering the property and operation of the Lone Star restaurant.

HCS argues that these contacts by Cactus with Nebraska are sufficient for the exercise of personal jurisdiction over Cactus in Nebraska and that the district court erred in dismissing its claim against Cactus. We agree.

(a) Minimum Contacts Analysis

[18,19] Personal jurisdiction is the power of a tribunal to subject and bind a particular person or entity to its decisions.[21] Courts' ability to validly exercise personal jurisdiction is not without limit. The Due Process Clause of the 14th Amendment

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[21] *Quality Pork Internat. v. Rupari Food Servs., supra* note 2. See, generally, Larry L. Teply & Ralph U. Whitten, *Civil Procedure*, ch. 3 (5th ed. 2013) (discussing personal jurisdiction generally).

to the U.S. Constitution bars a court from exercising personal jurisdiction over an out-of-state defendant, served with process outside the state,[22] unless that defendant has sufficient ties to the forum state.[23]

[20] A two-step analysis is used to determine whether a Nebraska court may validly exercise personal jurisdiction over an out-of-state defendant.[24] First, a court must consider whether Nebraska's long-arm statute[25] authorizes the exercise of personal jurisdiction over the defendant.[26] Second, a court must consider whether the exercise of personal jurisdiction over the defendant comports with due process.[27]

[21] Nebraska's long-arm statute authorizes courts to exercise personal jurisdiction over any person "[w]ho has any . . . contact with or maintains any . . . relation to this state to afford a basis for the exercise of personal jurisdiction consistent with the Constitution of the United States."[28] Thus, if a Nebraska court's exercise of personal jurisdiction would comport with the Due Process Clause of the 14th Amendment, it is authorized by the long-arm statute.[29] Although in its brief HCS also asserted authorization under § 25-536(1)(f), at oral argument, it abandoned that argument.

[22-24] To satisfy the Due Process Clause, a court may only exercise personal jurisdiction over a defendant that is not present in the forum state if that defendant has "minimum contacts" with the forum such that the exercise of jurisdiction

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[22] See *Burnham v. Superior Court of Cal., Marin County*, 495 U.S. 604, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990) (instate service of process).

[23] See *Internat. Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

[24] See *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

[25] Neb. Rev. Stat. § 25-536 (Reissue 2016).

[26] *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

[27] *Id.*

[28] § 25-536(2).

[29] See, *id.*; *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

"does not offend 'traditional notions of fair play and substantial justice.'"[30] To constitute sufficient minimum contacts, "the defendant's conduct and connection with the forum State [must be] such that he [or she] should reasonably anticipate being haled into court there."[31] Whether a defendant's contacts with the forum state are sufficient to support the exercise of personal jurisdiction "will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[32] Thus, "[j]urisdiction is proper . . . where the [defendant's] contacts proximately result from actions by the defendant [himself or herself] that create a 'substantial connection' with the forum State."[33]

Two primary purposes are served by the requirement of minimum contacts with the forum.[34] First, "[i]t protects the defendant against the burdens of litigating in a distant or inconvenient forum."[35] The burden on the defendant is always of "primary concern."[36] And second, the minimum contacts inquiry "acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."[37]

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[30] *Internat. Shoe Co. v. Washington, supra* note 23, 326 U.S. at 316.

[31] *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

[32] *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

[33] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985). See, also, *Walden v. Fiore*, 571 U.S. 277, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

[34] See *World-Wide Volkswagen Corp. v. Woodson, supra* note 31.

[35] *Id.*, 444 U.S. at 292.

[36] *Id.*

[37] *Id.* See, also, *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 582 U.S. 255, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017).

[25] In the minimum contacts analysis, courts will consider the burden on a defendant in light of other considerations, such as (1) "the forum State's interest in adjudicating the dispute," (2) "the plaintiff's interest in obtaining convenient and effective relief," (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and (4) "the shared interest of the several States in furthering fundamental substantive social policies."[38] Consideration of these factors may "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[39]

[26] The nature and quality of a defendant's contacts with the forum state necessary to support the exercise of personal jurisdiction depend on the connection between the contacts and the claim being asserted.[40] The U.S. Supreme Court has identified two categories of personal jurisdiction, "general jurisdiction" and "specific jurisdiction."[41]

[27,28] General, or all-purpose, jurisdiction is jurisdiction arising where a defendant's "'affiliations with the State are so "continuous and systematic" as to render [the defendant] essentially at home in the forum State.'"[42] Where a court has general personal jurisdiction over a defendant, it can adjudicate any claim against the defendant—even a claim that arises

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[38] *World-Wide Volkswagen Corp. v. Woodson, supra* note 31, 444 U.S. at 292.

[39] *Burger King Corp. v. Rudzewicz, supra* note 33, 471 U.S. at 477.

[40] See, generally, Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966) (general and specific jurisdiction).

[41] See *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., supra* note 37, 582 U.S. at 262.

[42] *Id.*, 137 S. Ct. at 1785 (Sotomayor, J., dissenting). See, also, *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

outside the forum state and bears no connection to the defendant's contacts with the forum.[43]

[29-31] By contrast, specific, or case-linked, jurisdiction requires that a claim "'aris[e] out of or relat[e] to the defendant's contacts with the *forum*.'"[44] A defendant need not be "'at home'" in the forum to be subject to specific personal jurisdiction, but, rather, there "must be 'an affiliation between the forum and the underlying controversy . . . .'"[45] "'[S]pecific [personal] jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction.'"[46] Thus, "there must be a substantial connection between [the defendant's] contacts and the operative facts of the litigation."[47]

Cactus, a Delaware limited liability company doing business in Texas, clearly did not have "'"continuous and systematic"'" contacts with Nebraska; nor was it "'essentially at home'" in Nebraska.[48] Rather, HCS asserts that the district court had specific personal jurisdiction over Cactus. Thus, the relevant ties between Cactus and Nebraska are those that bear some relation to this case. Cactus' unrelated contacts with Nebraska, or lack thereof, have no bearing on our specific personal jurisdiction analysis.

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[43] See *Bristol-Myers Squibb v. Superior Ct. of CA, supra* note 37.

[44] *Id.*, 137 S. Ct. at 1780 (emphasis in original). See, also, *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014); *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

[45] *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., supra* note 37, 582 U.S. at 262. See, also, *Goodyear Dunlop Tires Operations, S. A. v. Brown, supra* note 42.

[46] *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., supra* note 37, 582 U.S. at 262 (quoting *Goodyear Dunlop Tires Operations, S. A. v. Brown, supra* note 42).

[47] *Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569, 585 (Tex. 2007).

[48] See *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., supra* note 37, 582 U.S. at 271 (Sotomayor, J., dissenting).

Two U.S. Supreme Court cases provide guidance for analyzing minimum contacts for specific personal jurisdiction in cases involving contract claims. In *McGee v. International Life Ins. Co.*,[49] the Court concluded that a California court could exercise personal jurisdiction over a Texas life insurance company for a claim arising from a life insurance contract issued to a California resident. A California resident purchased a life insurance policy from an Arizona insurer.[50] Several years later, a Texas insurer assumed all of the Arizona company's life insurance obligations.[51] The Texas insurer sent a reinsurance certificate to the California resident, offering to insure him under the same terms as his prior policy, which he accepted.[52] The California resident continued to pay his insurance premiums by mail to the insurer's office in Texas.[53] The Texas insurer did no other business in California and had no agents or offices in California.[54] When the California resident died, the Texas insurer refused to pay the beneficiary under the policy.[55] The beneficiary sued the Texas insurer in California state court.[56] The insurer contended the California court lacked personal jurisdiction over it.[57]

[32] In spite of the Texas insurer's lack of other connections to California, the Court concluded that "[i]t is sufficient for purposes of due process that the suit was based on a

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[49] *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

contract which had substantial connection with that State."[58] The Court reasoned:

> The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.[59]

The Court concluded that the California court's exercise of personal jurisdiction did not violate the Due Process Clause.[60]

[33] In *Burger King Corp. v. Rudzewicz*,[61] the Court concluded that a Florida court could validly exercise personal jurisdiction over a Michigan defendant.[62] The defendant operated a restaurant franchise in Michigan.[63] The franchising corporation, which maintained its headquarters in Florida, sued the Michigan franchisee for breach of the franchise agreement in Florida court.[64] The franchisee argued that the Florida court could not validly exercise personal jurisdiction over him; after all, he maintained no offices in Florida and had never even visited Florida.[65] But the Court rejected this argument, reasoning that "this franchise dispute grew directly out of 'a contract which had a *substantial* connection with that State.'"[66] The Court said that personal jurisdiction "may not be avoided merely because the defendant did not *physically* enter the forum State."[67] By seeking and obtaining a franchise

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[58] *Id.*, 355 U.S. at 223.

[59] *Id.*

[60] *McGee v. International Life Ins. Co., supra* note 49.

[61] *Burger King Corp. v. Rudzewicz, supra* note 33.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*, 471 U.S. at 479 (emphasis in original).

[67] *Id.*, 471 U.S. at 476 (emphasis in original).

agreement with the corporation, the Court said, the defendant "deliberately 'reach[ed] out beyond' Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization."[68] Thus, the Court concluded that the exercise of personal jurisdiction by a Florida court did not violate the Due Process Clause.[69]

(b) Cactus' Contacts With Nebraska

Several reasons support our conclusion that Cactus "'reach[ed] out'"[70] to Nebraska and "purposefully avail[ed] itself of the privilege of conducting activities within"[71] Nebraska, "thus invoking the benefits and protections of its laws,"[72] such that it "should reasonably anticipate being haled into court"[73] in Nebraska in connection with claims arising from the lease and guaranty.

First, as both the guaranty and lease expressly acknowledged, the purpose of Cactus' guaranty was to induce HCS to enter into the agreement with Lone Star, a Nebraska corporation, to lease the Nebraska property for the operation of a business in Nebraska. Unlike a contract that merely has incidental effects in a particular state, Cactus executed this guaranty for the express purpose of inducing the lease of Nebraska property to a Nebraska business.

In *Quality Pork Internat. v. Rupari Food Servs.*,[74] we concluded that the defendant had sufficient minimum contacts with Nebraska to justify the exercise of personal jurisdiction.

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[68] *Id.*, 471 U.S. at 479-80.

[69] *Burger King Corp. v. Rudzewicz, supra* note 33.

[70] See *id.*, 471 U.S. at 479.

[71] See *Hanson v. Denckla, supra* note 32, 357 U.S. at 253.

[72] See *id.*

[73] See *World-Wide Volkswagen Corp. v. Woodson, supra* note 31, 444 U.S. at 297.

[74] *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

Under the oral contract at issue in that case, the defendant, a Florida food business, arranged for the plaintiff, a Nebraska producer of pork products, to ship products to a Texas food distributor.[75] The Nebraska plaintiff had previously done business with the Texas food distributor, but stopped selling to it after its account became delinquent.[76] The Nebraska plaintiff agreed to ship products to the Texas food distributor because of the Florida defendant's agreement to pay for the orders.[77] After paying for the first two orders, the defendant failed to pay for the third.[78] The Nebraska plaintiff sued in Nebraska court, and the Florida defendant objected to the court's exercise of personal jurisdiction over it.[79]

[34] We concluded that the Florida defendant had sufficient minimum contacts with Nebraska.[80] We said that "[t]o determine whether a defendant's contract supplies the contacts necessary for personal jurisdiction in a forum state, a court is to consider the parties' prior negotiations and future contemplated consequences, along with the terms of the contract and the parties' actual course of dealing."[81] We noted that "[the Florida defendant] induced [the Nebraska plaintiff] to ship products to [the Texas distributor]" with which it had previously ceased doing business.[82] We reasoned that "[b]y purposefully conducting business with [the Nebraska plaintiff], [the Florida defendant] could reasonably anticipate that it might be sued in Nebraska if it failed to pay for products ordered from [the Nebraska plaintiff]."[83] We said

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[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.* at 484, 675 N.W.2d at 651.

[82] *Id.*

[83] *Id.* at 485, 675 N.W.2d at 652.

that "[w]here a defendant who has purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other consideration would render jurisdiction unreasonable," and we found no such compelling case.[84]

Cactus' guaranty presents an inducement similar, though not identical, to that in *Quality Pork Internat.*[85] While in *Quality Pork Internat.*, the out-of-state defendant induced a Nebraska business to do business with an out-of-state third party, here Cactus induced an out-of-state business to lease Nebraska property to a Nebraska business. But both here and in *Quality Pork Internat.*, the defendant purposefully reached out to induce a particular action within the forum state. When making such an inducement, Cactus should have reasonably anticipated being haled into Nebraska courts in the event that the Nebraska lessee of the Nebraska property failed to perform its obligations under the lease, the performance of which Cactus guaranteed.

[35] Second, Nebraska has a significant interest in having the dispute over this guaranty of the lease of Nebraska property adjudicated in Nebraska courts. Unlike a situation in which out-of-state parties agree for one party to guarantee the personal debt of a third party who happens to be a Nebraska resident, Nebraska has a unique interest in adjudicating transactions affecting Nebraska land. And a "'forum State's interest in adjudicating the dispute,'" among other considerations, may "sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[86]

Importantly, Cactus did not merely guarantee the payment of rent due under the lease, but "agree[d] to pay and perform as primary obligor, all liabilities, obligations, and duties

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[84] *Id.*

[85] See *Quality Pork Internat. v. Rupari Food Servs., supra* note 2.

[86] *Burger King Corp. v. Rudzewicz, supra* note 33, 471 U.S. at 477.

(including but not limited to payment of rent) imposed upon" Lone Star under the lease. Those additional duties—which Cactus agreed to perform "as primary obligor"—included payment of utility services and real estate taxes; maintaining property, liability, and workers' compensation insurance; and maintaining and repairing the entire premises, including landscaping, sidewalks, and parking area, in a "first class manner and condition."

[36,37] While a guaranty of a personal debt generally bears no intrinsic connection to any particular location, a guaranty to pay and perform a tenant's obligations under a lease of real property uniquely affects the state in which the premises are located.[87] Real property, of course, is always and inevitably within the territorial borders of the state in which it lies. While the Due Process Clause's personal jurisdiction analysis no longer bears a "rigidly territorial focus,"[88] states nevertheless, as "coequal sovereigns in a federal system,"[89] have a special interest in adjudicating disputes relating to the real property within their borders.[90]

[38] Where a guarantor takes on obligations that are uniquely tied to and uniquely affect a particular location, it is not unreasonable for courts of that state to exercise personal jurisdiction over the guarantor in connection with claims arising from or related to those obligations.[91] Cactus guaranteed the performance of Lone Star's contractual obligations to pay rent for the lease of Nebraska property, to pay Nebraska property taxes, to maintain in good repair the Nebraska property, and

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[87] See, generally, *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977).

[88] *Daimler AG v. Bauman, supra* note 44, 571 U.S. at 128.

[89] *World-Wide Volkswagen Corp. v. Woodson, supra* note 31, 444 U.S. at 292. See, also, *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., supra* note 37.

[90] See, generally, *Shaffer v. Heitner, supra* note 87.

[91] See, generally, *Burger King Corp. v. Rudzewicz, supra* note 33; *McGee v. International Life Ins. Co., supra* note 49.

to maintain property and liability insurance for the Nebraska property and Lone Star's Nebraska business. The guaranty of these obligations was such that Cactus "should reasonably anticipate being haled into court"[92] in Nebraska in the event of litigation over the guaranty and lease.

[39] Third, Cactus guaranteed the performance of Lone Star's obligations under the lease, which obligations were governed by Nebraska law pursuant to the lease's choice-of-law provision. Cactus "agree[d] to pay and perform as primary obligor, all liabilities, obligations, and duties" of the tenant under a lease governed by Nebraska law. While the minimum contacts personal jurisdiction analysis is distinct from a choice-of-law analysis, a choice-of-law contractual provision in favor of the forum state's law is a relevant contact with the forum.[93]

In *Burger King Corp.*, the Court relied on the franchise agreement's choice-of-law provision to conclude that jurisdiction was proper, stating that the provision "reinforced [the defendant's] deliberate affiliation with the forum State and the reasonable foreseeability of possible litigation there."[94] The Court further said that the choice-of-law provision showed that the defendant "'purposefully availed himself of the benefits and protections of Florida's laws' by entering into contracts expressly providing that those laws would govern franchise disputes."[95]

By "absolutely and unconditionally guarantee[ing] the payment and performance of, and agree[ing] to pay and perform as primary obligor, all liabilities, obligations, and duties . . . imposed upon [Lone Star] under the terms of the . . . Lease," which duties and obligations were governed by Nebraska law, Cactus "purposefully avail[ed] itself of the privilege of

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[92] *World-Wide Volkswagen Corp. v. Woodson, supra* note 31, 444 U.S. at 297.

[93] *Burger King Corp. v. Rudzewicz, supra* note 33.

[94] *Id.*, 471 U.S. at 482.

[95] *Id.*

conducting activities within [Nebraska], thus invoking the benefits and protections of [Nebraska's] laws."[96]

Finally, the fact that Cactus was a named insured on the insurance policy covering the property and the Lone Star business is a relevant, though less significant, contact with Nebraska. But Cactus' relationship with Lone Star as a subsidiary of Lone Star's parent company is not a relevant contact where there has been no attempt to "pierce the corporate veil"[97] and impute Lone Star's Nebraska residency or Nebraska contacts to Cactus.

In sum, because Cactus guaranteed the full performance of a Nebraska business' obligations of a lease of Nebraska property in order to induce HCS to enter into that lease, which was governed by Nebraska law, Cactus has sufficient minimum contacts with Nebraska to justify the exercise of personal jurisdiction over it by Nebraska's courts. We reverse the district court's dismissal of Cactus and remand the cause for further proceedings consistent with this opinion.

4. Attorney Fees

The lease between HCS and Lone Star provided for the award of attorney fees to the prevailing party in the event of litigation to enforce the lease. HCS claims that the district court erred in overruling its motion for attorney fees. We disagree.

[40] Since the 1800's, this court has refused to enforce contractual provisions providing for the award of attorney fees for the prevailing party, instead holding to the "American Rule" that each party pay its own costs.[98] And we recently reaffirmed our position that "in the absence of a uniform

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[96] See *Hanson v. Denckla, supra* note 32, 357 U.S. at 253.

[97] See, generally, *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 686, 508 N.W.2d 836, 842 (1993).

[98] See, *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007); *Parkert v. Lindquist*, 269 Neb. 394, 693 N.W.2d 529 (2005); *Security Co. v. Eyer*, 36 Neb. 507, 54 N.W. 838 (1893); *Dow v. Updike*, 11 Neb. 95, 7 N.W. 857 (1881).

course of procedure or authorization by statute, contractual agreements for attorney fees are against public policy and will not be judicially enforced."[99] We decline to depart from our long-held jurisprudence, and we affirm the district court's overruling of HCS' motion for attorney fees.

5. HCS' Motion for New Trial

HCS' appeal of the overruling of its motion for new trial is premised on the same issues addressed in this opinion. Thus, we need not address it separately.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's award of damages to HCS and the court's denial of HCS' requested attorney fees. We reverse the district court's dismissal of Cactus and remand the cause for further proceedings on HCS' claim against Cactus.

Affirmed in part, and in part reversed and remanded for further proceedings.

Wright and Miller-Lerman, JJ., not participating.

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[99] *Stewart v. Bennett, supra* note 98, 273 Neb. at 22, 727 N.W.2d at 429.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Luis Bedolla, appellant.

905 N.W.2d 629

Filed January 19, 2018. No. S-16-1031.

1. **Pleadings.** Issues regarding the grant or denial of a plea in bar are questions of law.
2. **Evidence: Appeal and Error.** On a question of law, an appellate court reaches a conclusion independent of the court below.
3. **Motions for Mistrial: Pleadings: Prosecuting Attorneys: Intent: Appeal and Error.** While the denial of a plea in bar generally involves a question of law, an appellate court reviews under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial.
4. **Pleadings: Final Orders: Double Jeopardy: Jurisdiction: Appeal and Error.** An order overruling a plea in bar is a final, appealable order that an appellate court has jurisdiction to review. Such appellate jurisdiction is based on the reasoning that under Neb. Rev. Stat. § 25-1902 (Reissue 2016), a plea in bar is a "special proceeding," and an order overruling a nonfrivolous double jeopardy claim affects a substantial right.
5. **Double Jeopardy: Pleadings.** A plea in bar may be used to raise a double jeopardy challenge to the State's right to retry a defendant following a mistrial.
6. **Motions for Mistrial: Double Jeopardy.** When a mistrial has been declared upon the defendant's motion, the Double Jeopardy Clause generally does not bar retrial except when the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.
7. **Constitutional Law: Double Jeopardy.** The Double Jeopardy Clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution.

Appeal from the District Court for Hall County: Teresa K. Luther, Judge. Affirmed.

Jim K. McGough, of McGough Law, P.C., L.L.O., for appellant.

Douglas J. Peterson, Attorney General, and Siobhan E. Duffy for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Miller-Lerman, J.

NATURE OF CASE

Luis Bedolla appeals the order of the district court for Hall County which denied his plea in bar to charges of sexual assault of a child. Although Bedolla had moved for a mistrial in the first trial, he contends that a new trial would subject him to double jeopardy because the State had created the need for a mistrial when it moved to amend the information and a jury instruction after the jury had begun deliberations. We conclude that the district court did not err when it denied Bedolla's plea in bar.

STATEMENT OF FACTS

On August 4, 2015, the State filed an information charging Bedolla with seven counts of various degrees of sexual assault of a child. The offenses involved three different victims and were charged as having occurred on various dates ranging from June 2002 through May 2015. One of the counts was charged as first degree sexual assault of a child, in violation of Neb. Rev. Stat. § 28-319.01 (Reissue 2016). With regard to that charge, the information stated that the victim was a person under 12 years of age identified as "C.Z-M." and that the offense occurred "[o]n or between February 17, 2009 and February 17, 2011."

At Bedolla's trial, C.Z-M., who was born in February 1999, testified that "[o]ver the span of roughly 12 years, [she] was abused by [Bedolla] in a sexual manner" and that the abuse had been occurring "from as young as [she could] remember." She stated that in one of the first incidents she could remember,

Bedolla had "put his hand underneath [her] skirt and underneath [her] underwear and he stuck a finger inside of [her]." When asked how old she was when this incident occurred, she responded, "Maybe before elementary school, so very young." In a second incident that occurred when C.Z-M. "was older . . . maybe in the fifth, sixth grade, so around 10, 11," Bedolla groped her breasts and he "went underneath [her] skirt, but not underneath [her] underwear" and "poke[d] with his hand." In another incident, which occurred at C.Z-M.'s sister's graduation party in May 2011, Bedolla "started grasping [her] breast area and started touching [her]."

C.Z-M. testified that the incidents she described were not the only incidents and that she could not remember all the occurrences, which she described as "a constant thing." When asked again regarding the first incident described above, she stated that it occurred when she was "five or six." She testified that she remembered "three incidents" that occurred when she "was younger than 12" and that they were of "the same nature" as the first incident described above. She testified that one of these incidents occurred when she was "nine or ten" and that Bedolla "slid his hand down [her] pants underneath [her] underwear and he stuck a finger inside of [her]."

On cross-examination, C.Z-M. admitted that in an interview at a child advocacy center, she had stated that Bedolla's abuse of her had begun when she was "[f]our or five" and that it had stopped when she was "seven or eight." When asked whether that was different from her testimony that he had abused her consistently for 12 years, she acknowledged that it was but she testified that the abuse "would stop and start and start and stop" and that she "would call that consistent." On redirect, C.Z-M. testified that in the interview at the child advocacy center, after she stated that the abuse had stopped when she was 7 or 8, she disclosed to the interviewer "at least two more incidents that happened after" that time.

At the jury instruction conference, neither party objected to the court's proposed instruction regarding the crimes charged. With respect to the charge of first degree sexual assault of a

child, the court instructed the jury that the State alleged that Bedolla committed the assault "on or between February 17, 2009, and February 17, 2011." This followed the language of the charge in the information. In its closing argument, the State said that with regard to the charge of first degree sexual assault of a child, it needed to prove to the jury that

> between the dates of February 17, 2009, and February 17, 2011, the defendant, . . . Bedolla, was an individual 19 years of age or older, and that the victim, [C.Z-M.], was a person 12 years of age or younger, and that during that time frame [Bedolla] subjected [C.Z-M.] to sexual penetration.

In the closing argument for the defense, Bedolla's counsel argued that there was "no evidence of any penetration between those dates, '09 and 2011" and that, instead, C.Z-M. had testified regarding penetration that occurred when she was "four or five." He argued that given that C.Z-M. was born in 1999, "these events happened in 2003 or 2004." Bedolla's counsel further noted that C.Z-M. had testified that "it stopped when she was seven or eight," which was before 2009.

After the closing arguments and the instructions noted above, the jury began its deliberations. Approximately 1 hour after it began its deliberations, the jury submitted the following question to the court: "'Is there a reason we're looking at a two-year period only for the sexual assault first degree on a child?'" In response to the jury's question, the court heard arguments from the parties outside the presence of the jury regarding how it should respond to the jury's question. See Neb. Rev. Stat. § 25-1116 (Reissue 2016). The State argued that it should be allowed to amend both the information and the jury instruction to conform to the evidence presented at trial. The State therefore moved to amend both the information and the jury instruction with regard to the timeframe encompassed in the charge of first degree sexual assault of a child "to change the date range that is charged . . . to February 17, 2003, to February 17, 2011." In response, Bedolla argued that there was no precedent for changing the jury instruction

with respect to a particular criminal charge after the case had been submitted to the jury. Bedolla noted that the State had not objected to the instruction that was given, and he argued that "[i]f the shoe were on the other foot" and the defense had asked to amend an instruction after the case had been submitted, "everybody would be saying you waived any objection to that by not objecting to the instruction." He contended that it was untimely to amend a jury instruction, "particularly when the jury points out a problem with it."

The court thereafter sustained the State's motions to amend the information and to amend the jury instruction. The court then called the jury into the courtroom and, over Bedolla's objection, responded to the jury's question by stating: "Jury instruction No. 2 (Elements) has been amended and the jury will be reinstructed on it. The original jury instruction No. 2 should be disregarded." The court then read an amended instruction on first degree sexual assault of a child in which the offense was charged as having occurred "on or between February 17, 2003, and February 17, 2011." The jury was excused to resume deliberations.

After the jury resumed deliberations, Bedolla moved the court for a mistrial based on "the unusual procedure that's been employed here." According to Bedolla's comments, following the court's response to the jury's question, the jury resumed deliberations and soon reached a "quick verdict." Bedolla's counsel asserted that the court's decision to amend the instruction "tells the jury that part, if not all, of my closing arguments should be disregarded without giving me an opportunity to respond." Bedolla argued in support of mistrial that "the appropriate remedy here is to retry the case," and he stated that if the court did not grant a mistrial, he would "follow up immediately after verdict with a motion for new trial." The court sustained Bedolla's motion and declared a mistrial.

Bedolla thereafter filed a plea in bar in which he asserted that "[b]ut for the actions of the State in asking to amend the charge and the given instruction as to Count I, no mistrial would have been granted," and he argued that "continued

prosecution of this matter is a violation of the double jeopardy clauses of both the United States and Nebraska Constitutions."

At a hearing on the plea in bar, Bedolla acknowledged precedent to the effect that "where a mistrial has been granted at the request of the defendant," retrial generally does not violate double jeopardy unless "the State did something to goad the defendant into making that motion for mistrial." Bedolla then stated that he was "not making an argument that the State did anything to goad [him] into requesting a mistrial" and that instead, he was "asking for an expansion" to consider "this very unique situation." He argued that in this case, "[i]t was the State's actions that ultimately led to the grounds for the mistrial" and that therefore, this case was "analogous" to a case in which the State goaded the defendant to move for a mistrial.

In its response, the State emphasized that this case involved a mistrial declared at the defendant's urging and it argued that Bedolla "cannot be first allowed to urge the Court to declare a mistrial" and "then attempt to use the same issue to his advantage later by claiming double jeopardy . . . in a subsequent trial." The State asserted that it "did not seek to amend the information in an attempt to goad [Bedolla] into seeking a mistrial," and it argued that because it did not goad Bedolla, double jeopardy did not bar a subsequent prosecution. At the conclusion of the hearing, the district court denied Bedolla's plea in bar.

Bedolla appeals the denial of his plea in bar.

ASSIGNMENT OF ERROR

Bedolla claims that the district court erred when it denied his plea in bar.

STANDARDS OF REVIEW

[1,2] Issues regarding the grant or denial of a plea in bar are questions of law. *State v. Lavalleur, ante* p. 237, 903 N.W.2d 464 (2017). On a question of law, an appellate court reaches a conclusion independent of the court below. *Id*.

[3] While the denial of a plea in bar generally involves a question of law, we review under a clearly erroneous standard a finding concerning the presence or absence of prosecutorial intent to provoke the defendant into moving for a mistrial. *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015).

ANALYSIS

Bedolla claims that the district court erred when it denied his plea in bar because a new trial would violate double jeopardy. He acknowledges our precedent to the effect that when a defendant moves for a mistrial and a mistrial is declared, double jeopardy does not prohibit a new trial unless the State goaded, or provoked, the defendant into moving for a mistrial. Similar to his argument to the district court, on appeal, Bedolla does not assert that the State goaded him into moving for a mistrial but instead argues that the "exceptional circumstances" of this case require us to extend our precedent to cover other cases wherein the State's actions "prevent a . . . verdict from being rendered." Brief for appellant at 10. We determine that the circumstances of this case do not convince us to extend our jurisprudence, that Bedolla has not shown that the State provoked him into moving for a mistrial, and that double jeopardy does not prevent a new trial.

[4] We note as an initial matter that we have held that an order overruling a plea in bar is a final, appealable order that we have jurisdiction to review. *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017). Such appellate jurisdiction is based on the reasoning that under Neb. Rev. Stat. § 25-1902 (Reissue 2016), a plea in bar is a "special proceeding," and an order overruling a nonfrivolous double jeopardy claim affects a substantial right. *Id*.

[5] A plea in bar may be used to raise a double jeopardy challenge to the State's right to retry a defendant following a mistrial. *State v. Combs, supra*. The Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution provides, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The 5th Amendment's

protection against double jeopardy applies to states through the 14th Amendment to the U.S. Constitution. *Benton v. Maryland*, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). This provision prohibits a criminal defendant from being put in jeopardy twice for the same offense and "unequivocally prohibits a second trial following an acquittal." *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). But when the first trial ends in a mistrial, double jeopardy does not automatically bar a retrial. See, *Arizona v. Washington, supra*; *State v. Combs, supra*.

[6] In cases where a mistrial has been declared at the prosecution's request over a defendant's objection, the defendant may be retried only if the prosecution can demonstrate a "'manifest necessity'" for the mistrial. *Arizona v. Washington*, 434 U.S. at 505. But when a mistrial has been declared upon the defendant's motion, the Double Jeopardy Clause generally does not bar retrial except in circumstances that the U.S. Supreme Court in *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), described as a "narrow exception to the rule that the Double Jeopardy Clause is no bar to retrial." That narrow exception, pursuant to which double jeopardy bars a retrial, is "limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. at 679.

[7] In this case, Bedolla does not assert that the State provoked or goaded him into moving for a mistrial. Instead, he argues that because of the "exceptional circumstances" of this case, we should expand the "narrow exception" of *Oregon v. Kennedy*. In *State v. Muhannad*, 290 Neb. 59, 858 N.W.2d 598 (2015), we rejected a similar invitation to broaden the "narrow exception" of *Oregon v. Kennedy*. We noted in *State v. Muhannad* that in prior cases, we had consistently held that the Double Jeopardy Clause of the Nebraska Constitution provided no greater protection than that of the U.S. Constitution, and accordingly, we declined to extend the *Oregon v. Kennedy* exception beyond situations where the prosecutor intended that

its conduct would provoke a mistrial. We noted that in *Oregon v. Kennedy*, the U.S. Supreme Court had specifically rejected a more generalized standard of bad faith conduct, harassment, or overreaching as an exception to the defendant's waiver of his or her right to a determination by the first tribunal and had stated that, consequently, "'[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on [the] defendant's motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.'" *State v. Muhannad*, 290 Neb. at 65-66, 858 N.W.2d at 604 (quoting *Oregon v. Kennedy, supra*).

We are aware that after *Oregon v. Kennedy*, some state courts "have adopted broader rules governing the consequences of prosecutorial misconduct under the state [constitutional] provision providing double jeopardy protection." *People v. Griffith*, 404 Ill. App. 3d 1072, 1083, 936 N.E.2d 1174, 1184, 344 Ill. Dec. 417, 427 (2010) (citing cases decided by Supreme Courts of Arizona, Hawaii, New Mexico, Oregon, and Pennsylvania, but declining to expand Illinois' rule beyond that set forth in *Oregon v. Kennedy*). However, as noted above, we have consistently held that the Double Jeopardy Clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution, and we are not persuaded in this instance to read our state Constitution as a source to expand the narrow exception under *Oregon v. Kennedy* beyond those circumstances where intent to provoke the defendant to move for a mistrial has been shown.

We read *Oregon v. Kennedy* as characterizing a defendant's decision to move for a mistrial as "the defendant's waiver of his or her right to a determination by the first tribunal." *State v. Muhannad*, 290 Neb. at 65, 858 N.W.2d at 604. We further read the U.S. Supreme Court's analysis in *Oregon v. Kennedy* to the effect that double jeopardy generally does not bar retrial when the defendant moved for a mistrial, as stemming from the fact that the defendant made a knowing decision to pursue mistrial rather than another remedy to correct a perceived

error in the first trial. In this case, when Bedolla moved for a mistrial, he stated that if a mistrial was not granted, he would move for a new trial after the jury's verdict was entered. Having chosen the remedy of a mistrial, Bedolla narrowed the application of double jeopardy to those circumstances set forth in *Oregon v. Kennedy* and this court's precedent. We find nothing regarding the circumstances of this case that would justify straying from the narrow exception set forth in our precedent.

For completeness, we note that Bedolla claims that the district court erred when it sustained the State's motions to amend the information and the jury instruction. However, because Bedolla chose to address these alleged errors by requesting a mistrial, the question whether the court erred in these rulings is not presented to us. Instead, the question before us is the propriety of the district court's denial of Bedolla's plea in bar and, more specifically, whether double jeopardy prevents a new trial following the declaration of a mistrial granted at Bedolla's request. Under the standards set forth in *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982), and this court's precedent, the relevant inquiry is whether the State provoked Bedolla to move for a mistrial and not whether the court's rulings that motivated him to pursue a mistrial were correct. We therefore make no comment on whether the district court erred when it sustained the State's motions to amend the information and the jury instruction after the jury had begun deliberations or when it gave the jury an amended instruction in response to the jury's question.

CONCLUSION

We conclude that double jeopardy does not bar a new trial following Bedolla's successful motion for a mistrial. We therefore affirm the order of the district court which denied Bedolla's plea in bar.

Affirmed.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
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Danny R. Robinson, Jr., appellant, v. Robert Houston et al., appellees.

905 N.W.2d 636

Filed January 19, 2018. No. S-17-287.

1. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.
2. **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.
3. **Affidavits: Waiver.** A litigant lacking sufficient funds to pay the costs, fees, or security may apply to the court to proceed in forma pauperis, having the otherwise required costs, fees, or security waived.
4. **Affidavits.** Under Neb. Rev. Stat. § 25-2301.02 (Reissue 2016), a party's application to proceed in forma pauperis must generally be granted unless an objection is raised by another party or the court that the applicant either has sufficient funds to pay costs, fees, or security or is asserting legal positions which are frivolous or malicious.
5. **Affidavits: Appeal and Error.** Where an objection to an application to proceed in forma pauperis is sustained, Neb. Rev. Stat. § 25-2301.02 (Reissue 2016) provides the applicant the right to immediately appeal the denial.
6. **Statutes: Appeal and Error.** Unless a statute provides for an appeal, such right does not exist.
7. **Statutes: Intent.** When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.
8. **Statutes.** Silence can be a meaningful indicator of statutory meaning.
9. ____. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language.

10. **Statutes: Appeal and Error.** An appellate court does not consider a statute's clauses and phrases as detached and isolated expressions. Instead, the whole and every part of the statute must be considered in fixing the meaning of any of its parts.
11. **Affidavits: Appeal and Error.** The right to interlocutory appeal of an in forma pauperis denial in Neb. Rev. Stat. § 25-2301.02(1) (Reissue 2016) applies only to denials made pursuant to the two bases for denial set forth in that subsection.
12. **Statutes: Prisoners: Affidavits: Appeal and Error.** There is no statutory basis for an interlocutory appeal of a denial of leave to proceed in forma pauperis under Neb. Rev. Stat. § 25-3401 (Reissue 2016).
13. **Judgments: Final Orders: Time: Appeal and Error.** An appeal cannot be taken from a conditional order purporting to dismiss a pleading in the future upon the occurrence of an event.

Appeal from the District Court for Lancaster County: Robert R. Otte, Judge. Appeal dismissed.

Danny R. Robinson, Jr., pro se.

Douglas J. Peterson, Attorney General, and James D. Smith for appellees.

Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

INTRODUCTION

In this appeal, we must determine whether an interlocutory appeal is authorized under Nebraska's "three strikes" prisoner litigation statute,[1] which prohibits a prisoner who has previously filed at least three frivolous civil actions from proceeding in forma pauperis (IFP) without leave of court. Because we conclude that neither this statute nor the general IFP statute provides a right to interlocutory appeal of a "three strikes" denial and because there was not a final, appealable order, we dismiss the appeal for lack of jurisdiction.

[1] Neb. Rev. Stat. § 25-3401 (Reissue 2016).

BACKGROUND

Danny R. Robinson, Jr., sued numerous prison officials, alleging a myriad of civil rights violations relating to his treatment by prison officials and the conditions of his confinement at the Nebraska State Penitentiary. The case was filed in the district court for Johnson County, Nebraska.

The district court initially sustained Robinson's motion to proceed IFP. The court later sustained Robinson's motion to transfer the case to Lancaster County, Nebraska. Once the case was transferred to Lancaster County, the prison officials filed a motion to reconsider the prior order granting IFP status to Robinson. They brought to the court's attention three district court cases that Robinson had filed in Johnson County District Court in which Robinson had been denied IFP status, attaching the denial orders to their motion. Under the heading "Ruling of the Court," those orders from the prior cases each stated: "The Court hereby denies Motion to Proceed [IFP] for reason action is meritless."

After a hearing at which Robinson appeared by telephone, the Lancaster County District Court sustained the motion to reconsider and vacated the prior order allowing Robinson to proceed IFP, pursuant to the "three strikes" provision.[2]

The court's order gave Robinson 30 days to pay the required filing fee and stated that "[i]f no action is taken the matter may be dismissed without notice or hearing." Robinson immediately appealed the court's order. He filed a praecipe requesting a transcript with all of the pleadings in the case, but failed to request a bill of exceptions. We moved this appeal to our docket.[3]

ASSIGNMENT OF ERROR

Robinson's sole assignment of error is that "[t]he district court erred in ruling that [Robinson] was ineligible to proceed

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[2] See § 25-3401(2)(a).

[3] Neb. Rev. Stat. § 24-1106(3) (Reissue 2016).

[IFP] status based on the assertion that he had previously filed three frivolous actions." The prison officials filed a brief challenging this court's jurisdiction.

STANDARD OF REVIEW

[1] A jurisdictional issue that does not involve a factual dispute presents a question of law, which an appellate court independently decides.[4]

ANALYSIS

[2] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.[5] The prison officials argue that because the "three strikes" statute does not authorize an interlocutory appeal, we lack jurisdiction over Robinson's appeal. We agree.

[3-5] We recognize the existence of Nebraska's general statutes regulating proceedings IFP.[6] A litigant lacking sufficient funds to pay the costs, fees, or security may apply to the court to proceed IFP, having the otherwise required costs, fees, or security waived.[7] These general statutes permit a court to authorize the "commencement, prosecution, defense, or appeal therein, of a civil or criminal case in forma pauperis."[8] Under § 25-2301.02(1), a party's application to proceed IFP must generally be granted unless an objection is raised by another party or the court that the applicant either "(a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious." Where such an objection is sustained and IFP status

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[4] *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[5] *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

[6] See Neb. Rev. Stat. §§ 25-2301 to 25-2310 (Reissue 2016).

[7] See § 25-2301.02(1).

[8] § 25-2301.01.

is denied, § 25-2301.02 provides the applicant the right to immediately appeal the denial.

In 2012, the Nebraska Legislature passed into law L.B. 793 in order "to limit frivolous civil actions filed by prisoners."[9] Patterned after a part of the federal Prison Litigation Reform Act of 1995,[10] L.B. 793 (codified at § 25-3401) provides that a prisoner who has filed three or more civil actions found to be frivolous may not proceed IFP in any civil case without leave of court. The statute does not apply to habeas corpus or postconviction cases, and the "three strikes" bar does not apply where a court determines that the prisoner "is in danger of serious bodily injury."[11] Although both the general IFP statutes and the "three strikes" statute address proceedings IFP, the latter statute permits a trial court to exercise additional discretion in a narrow class of cases where a particular litigant is determined to have filed frivolous actions in the past. In those circumstances, a trial court may deny leave to proceed IFP despite the litigant's indigence and even though the court may not be persuaded that the proposed action is frivolous—meaning wholly without merit, that is, without rational argument based on the law or on the evidence.[12] But the "three strikes" statute is silent on a prisoner's right to appeal a denial of IFP pursuant to this section.[13]

[6,7] The question we face here is whether the right to interlocutory appeal of an IFP denial in § 25-2301.02 also authorizes a prisoner to appeal the denial of IFP status under the subsequently enacted "three strikes" provision of § 25-3401. The legal backdrop for interpreting these statutes is that unless

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[9] 2012 Neb. Laws, L.B. 793.

[10] 28 U.S.C. § 1915(g) (2012); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801 and 804, 110 Stat. 1321.

[11] § 25-3401(2)(a).

[12] See *State v. Carter*, 292 Neb. 16, 870 N.W.2d 641 (2015).

[13] See § 25-3401.

a statute provides for an appeal, such right does not exist.[14] When interpreting a statute, the starting point and focus of the inquiry is the meaning of the statutory language, understood in context.[15]

[8,9] When reading a statute, what it *does not say* is often as important as what it *does say*.[16] Silence can be a meaningful indicator of statutory meaning.[17] In adopting the "three strikes" provision in § 25-3401, the Legislature did not provide for a right to interlocutory appeal of a denial of IFP status. Neither does § 25-3401 make reference to the right to appeal in § 25-2301.02. Nor was § 25-2301.02 amended to cover "three strikes" denials of IFP status. As we have often said, "It is not within the province of this court to read a meaning into a statute that is not warranted by the legislative language."[18] Thus, we will not read into § 25-3401 a right to interlocutory appeal that the Legislature has not seen fit to enact.

These omissions are magnified by the definition of "[c]ivil action" in § 25-3401. It defines the term to include not only "a legal action seeking monetary damages, injunctive relief, [or] declaratory relief . . . that relates to or involves a prisoner's conditions of confinement," but also "any appeal filed in any court in this state" that does likewise.[19] In other words,

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[14] *Heckman v. Marchio, supra* note 4.

[15] *Kozal v. Nebraska Liquor Control Comm., supra* note 5. See, also, *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (Sykes, J., dissenting; Bauer and Kanne, JJ., join) (statutory interpretation); *BankDirect Capital v. Plasma Fab*, 519 S.W.3d 76 (Tex. 2017) (statutory interpretation); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56-58 (2012).

[16] See, *Stewart v. Nebraska Dept. of Rev.*, 294 Neb. 1010, 885 N.W.2d 723 (2016); *Nebraska Account. & Disclosure Comm. v. Skinner*, 288 Neb. 804, 853 N.W.2d 1 (2014).

[17] See *id*.

[18] *State v. Gilliam*, 292 Neb. 770, 781, 874 N.W.2d 48, 57 (2016), *cert. denied* 580 U.S. 958, 137 S. Ct. 371, 196 L. Ed. 2d 290.

[19] § 25-3401(1)(a).

the requirement of § 25-3401(2)(a) that a prisoner having three strikes obtain leave of court to proceed IFP applies both to commencement of an action and to an appeal, so long as the action or appeal relates to or involves a prisoner's conditions of confinement. Yet, the Legislature provided no right to interlocutory appeal of a "three strikes" denial of IFP status in § 25-3401.

[10] And a fundamental principle of statutory interpretation is that statutory language must always be read in context.[20] As we have said before, 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.[21] Another way of stating the same principle is that "statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole."[22]

[11] In one of the general IFP statutes, context matters. Section 25-2301.02(1) provides that "[i]f an objection [to an application to proceed IFP] is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal . . . ." But the "objection" referred to in that sentence refers back to an earlier part of that subsection: "An application to proceed in forma pauperis shall be granted unless there is *an objection* that the party filing the application (a) has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious."[23] Thus, when the right to interlocutory appeal of an IFP denial in § 25-2301.02(1) is read in context, it becomes clear that it applies only to

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[20] Scalia & Garner, *supra* note 15. See, also, *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (importance of context in statutory interpretation).

[21] *Doty v. West Gate Bank*, 292 Neb. 787, 874 N.W.2d 839 (2016).

[22] *State ex rel. Kalal v. Dane County*, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124 (2004).

[23] § 25-2301.02(1) (emphasis supplied).

denials made pursuant to the two bases for denial set forth in that subsection.

[12] Because the right to interlocutory appeal of a denial of an application to proceed IFP in § 25-2301.02(1) applies only to the two bases for denial in that subsection and because § 25-3401 provides no right to interlocutory appeal, there is no statutory basis for an interlocutory appeal of a "three strikes" denial of IFP status under § 25-3401. Thus, Robinson's attempt to appeal immediately had no statutory basis.

[13] Moreover, the order from which Robinson attempted to appeal was not a final order under the general statutes governing appeals.[24] Rather, it was a conditional order. The order required Robinson to pay the filing fee within 30 days or face dismissal. Thus, it did not actually dismiss the action. Nor was the action automatically dismissed upon expiration of the 30-day period. We have long held that an appeal cannot be taken from a conditional order purporting to dismiss a pleading in the future upon the occurrence of an event.[25] Thus, our record shows that at the time of Robinson's attempted appeal, there was no final, appealable order.

CONCLUSION

Because there was no statutory basis for an interlocutory appeal of the district court's order and because the order was not a final order, we lack appellate jurisdiction to review the district court's order. Therefore, we dismiss this appeal.

Appeal dismissed.

Heavican, C.J., and Wright, J., not participating.

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[24] See Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[25] *Nichols v. Nichols*, 288 Neb. 339, 847 N.W.2d 307 (2014).

Nebraska Supreme Court
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State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Alison H. Motta, respondent.

905 N.W.2d 641

Filed January 19, 2018. No. S-17-602.

Original action. Judgment of public reprimand.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

INTRODUCTION

This case is before the court on the conditional admission filed by Alison H. Motta, respondent, on November 16, 2017. The court accepts respondent's conditional admission to the charge contained in the amended formal charges and enters an order of public reprimand.

FACTS

On July 19, 2013, respondent was admitted to the practice of law in the State of Nebraska pro hac vice by order of the county court for Douglas County, Nebraska. Her admission was for appearing in the case of "State v. Anthony Garcia" (Garcia case), docketed in Douglas County Court as case No. CR13-17383 and in the district court for Douglas County as case No. CR13-2322. Anthony Garcia had been charged with committing four homicides. Respondent is also admitted to the practice of law in the State of Illinois. With respect to the Garcia case, at all relevant times, she was engaged in the practice of law in Omaha, Nebraska.

With respect to discipline, pursuant to Neb. Ct. R. § 3-302, respondent is under the jurisdiction of the "District Two Committee on Inquiry." The matters alleged in the amended formal charges were reviewed by said committee pursuant to Neb. Ct. R. § 3-309(H) (rev. 2011). The committee determined that there were reasonable grounds for discipline of respondent and that a public interest would be served by the filing of formal charges.

On November 16, 2017, the Counsel for Discipline of the Nebraska Supreme Court filed amended formal charges against respondent. The amended formal charges consist of one count against respondent arising from her extrajudicial statements to the media regarding the Garcia case.

The amended formal charges state that during the Garcia case, on June 26, 2015, the trial court issued a protective order under seal regarding an unrelated 2007 homicide known as the Blanchard homicide. The protective order stated, "'[N]o information or knowledge obtained [by the State or Garcia] from the review [of the Blanchard homicide evidence] may be used, disclosed, or referenced during preparation for trial, during trial, or for any other matter in this [Garcia] prosecution.'"

Shortly before trial of the Garcia case was scheduled to commence on April 4, 2016, a suspect was arrested in the Blanchard homicide. After the arrest of the suspect in the Blanchard homicide and prior to the Garcia trial, respondent made numerous statements to news media related to the suspect in the Blanchard homicide indicating that it was the belief of Garcia's defense team that such suspect was involved in two of the homicides for which Garcia stood charged. Omaha television news station WOWT quoted respondent as saying, "'By cross-comparing the DNA evidence that they discovered at the . . . Blanchard scene, DNA [of the suspect in the Blanchard homicide] was at both scenes. I don't see how they're going to explain the cross-over in the DNA and the existence of both people at both crime scenes.'" Omaha television news

station KMTV quoted respondent as saying, "'This evidence conclusively exonerates . . . Garcia and shows that it cannot be a coincidence the two manners of killing being signature like and the crossover between the two scenes of the same two suspects.'" Respondent also made statements to the Omaha World-Herald newspaper that the defense team hoped that "'we'll get a call from the County Attorney's office that they're dismissing those charges.'"

Following respondent's statements to the media, on March 30, 2016, the State moved for sanctions against her. On March 31, respondent and her out-of-state cocounsel jointly renewed their motion for admission pro hac vice due to the withdrawal of prior local Nebraska counsel. Following an April 4 hearing, the trial court issued an order nunc pro tunc finding that respondent violated the protective order regarding the Blanchard homicide with her public dissemination of the DNA results in the Blanchard homicide. The trial court further found that respondent's statements to news media violated Neb. Ct. R. of Prof. Cond. § 3-503.6. The trial court disqualified respondent from continued admission to practice and participate in the Garcia case pro hac vice.

The amended formal charges allege that by her actions, respondent violated her oath of office as an attorney licensed to practice law pro hac vice in the State of Nebraska, as provided by Neb. Rev. Stat. § 7-104 (Reissue 2012), as well as § 3-503.6 (trial publicity) and Neb. Ct. R. of Prof. Cond. § 3-508.4(a) and (d) (misconduct).

On November 16, 2017, respondent filed a conditional admission pursuant to Neb. Ct. R. § 3-313(B) of the disciplinary rules, in which she conditionally admitted that she violated the oath of office of her pro hac vice admission as an attorney and professional conduct rules §§ 3-503.6 and 3-508.4(a) and (d). In the conditional admission, respondent states she did not knowingly or intentionally violate these rules of professional conduct, but acknowledges and admits that her conduct violated the identified rules of professional conduct.

Respondent knowingly does not challenge or contest the truth of the matters conditionally admitted and waived all proceedings against her in exchange for a public reprimand.

The proposed conditional admission included a declaration by the Counsel for Discipline stating that respondent's proposed discipline is appropriate and consistent with sanctions imposed in other disciplinary cases with similar acts of misconduct and will protect the public.

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 her conduct, respondent violated conduct rules §§ 3-503.6 and 3-508.4(a) and (d) and the oath of office of

her pro hac vice admission as an attorney in the State of Nebraska. Respondent has waived all additional proceedings against her in connection herewith. Upon due consideration, the court approves the conditional admission and enters the orders as indicated below.

CONCLUSION

Respondent is publicly reprimanded. If respondent applies to appear pro hac vice in a case pending in the state courts of the State of Nebraska, she must disclose this discipline in any such application. Respondent is directed to pay costs and expenses in accordance with 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 public reprimand.

Wright, J., not participating.

Nebraska Supreme Court
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State of Nebraska on behalf of Mariah B. and Renee B., minor children, appellee, v. Kyle B., appellant.

906 N.W.2d 17

Filed January 26, 2018. No. S-16-1142.

1. **Contempt: Appeal and Error.** In a civil contempt proceeding where a party seeks remedial relief for an alleged violation of a court order, an appellate court employs a three-part standard of review in which (1) the trial court's resolution of issues of law is reviewed de novo, (2) the trial court's factual findings are reviewed for clear error, and (3) the trial court's determinations of whether a party is in contempt and of the sanction to be imposed are reviewed for abuse of discretion.
2. **Contempt: Due Process: Judgments: Appeal and Error.** Though the ability to pay the purge amount in a civil contempt proceeding is a factual question that is reviewed for clear error, whether the facts result in a due process violation is a question of law.
3. **Contempt: Words and Phrases.** Civil contempt requires willful disobedience as an essential element. "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.
4. **Contempt.** If it is impossible to comply with the order of the court, the failure to comply is not willful.
5. **Words and Phrases: Appeal and Error.** Willfulness is a factual determination to be reviewed for clear error.
6. **Contempt: Proof: Evidence: Presumptions.** Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence and without any presumptions.
7. **Contempt: Presumptions: Child Support.** Neb. Rev. Stat. § 42-358(3) (Reissue 2016) provides that a rebuttable presumption of contempt shall be established if a prima facie showing is made that court-ordered child or spousal support is delinquent.

8. ____: ____: ____. Necessarily, the rebuttable presumption of contempt provided by Neb. Rev. Stat. § 42-358(3) (Reissue 2016) encompasses the essential element of willfulness.
9. **Contempt: Evidence: Child Support.** In contempt proceedings, both Neb. Rev. Stat. § 42-358(3) (Reissue 2016) and logic dictate that a valid child support order is evidence of the parent's ability to pay the amount specified therein.
10. **Child Support.** The parent's ability to pay is an important consideration in setting the amount of a child support order.
11. **Child Support: Rules of the Supreme Court: Presumptions.** Child support established under the Nebraska Child Support Guidelines is presumed correct, unless one or both parties present sufficient evidence to rebut that presumption.
12. **Trial: Witnesses: Evidence.** Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof.
13. **Constitutional Law: Criminal Law: Contempt: Due Process.** A criminal or punitive sanction is invalid if imposed in a proceeding that is instituted and tried as civil contempt, because it lacks the procedural protections that the Constitution would demand in a criminal proceeding.
14. **Contempt: Sentences.** A present inability to comply with a contempt order is a defense, not necessarily to contempt, but to the sanction of incarceration.
15. **Contempt: Judgments.** When a purge order involves payment of money, the sum required to purge oneself of contempt must be within the contemnor's ability to pay within the time period provided in the order, taking into consideration the assets and financial condition of the contemnor and his or her ability to raise money.
16. **Contempt.** Contemnors in civil contempt must carry the keys of their jail cells in their own pockets.
17. **Contempt: Presumptions: Child Support.** The statutory presumption of contempt under Neb. Rev. Stat. § 42-358(3) (Reissue 2016) is inapplicable to the question of whether the purge plan is punitive.
18. **Contempt: Judgments.** Despite any overlap with the finding of willful disobedience in the underlying contempt, a court that imposes incarceration as part of civil contempt proceedings shall make express findings regarding the contemnor's ability to comply with the purge order.
19. **Contempt: Proof.** It is the contemnor who has the burden to assert and prove the inability to comply with the contempt order as a defense to incarceration.

20. ____: ____. The burden of both production and persuasion is on the contemnor to show the present inability to comply.
21. ____: ____. A showing of inability to comply with a purge order entails attempts to exhaust all resources and assets or borrow sufficient funds and the inability to thereby secure the funds to comply with the order.
22. **Contempt.** The contemnor's inability to comply with a contempt order cannot be voluntarily created, for example by not diligently seeking a job at one's earning potential.
23. ____. The inability-to-pay threshold for determining that the contemnor lacks the keys to his or her own jail cell is higher than the indigence threshold for appointing counsel. Thus, a finding of indigency for purposes of retaining legal counsel does not preclude a finding that the contemnor is able to pay whatever purge amount has been set by the court.
24. **Child Support.** The support of one's children is a fundamental obligation which takes precedence over almost everything else.

Appeal from the District Court for Lancaster County: Kevin R. McManaman, Judge. Affirmed.

Nancy R. Wynner, of Olson, Zalewski & Wynner, L.L.P., for appellant.

Joe Kelly, Lancaster County Attorney, and Jason M. Cooper and Braden W. Storer, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

NATURE OF CASE

A father appeals from an order of civil contempt for failure to pay child support. He was found indigent for purposes of appointment of counsel in the contempt proceedings. He asserts that he did not willfully disobey the support order. Further, he argues that the purge plan set forth in the contempt order is impossible to perform, making it a punitive rather than coercive sanction. We affirm.

BACKGROUND

Paternity and Child Support Order

In a paternity action filed by the State due to the involvement of the "Title IV-D Division"[1] of the Department of Health and Human Services (DHHS), Kyle B. was established as the father of Mariah B. and Renee B. Genetic testing had determined with a probability of 99.999 percent that Kyle was the biological father of the children.

Kyle was ordered to pay $230 in child support per month beginning on December 1, 2015. The amount of Kyle's monthly child support obligation was established in accordance with the child support guidelines. The district court referee calculated that Kyle was capable of earning $8 per hour and of working 40 hours per week, for a total monthly earning capacity of $1,387. By failing to respond to the State's request for admissions, Kyle was deemed to have admitted this earning potential. Attached to the referee's report was evidence that Kyle had earned $4,306.90 working at a roofing company from October to December 2014 and had earned $3,578.62 working there from July to September 2014.

Kyle did not attend the hearing at which evidence was submitted pertaining to paternity and child support, and his counsel withdrew. Kyle did not appeal from the child support order.

Contempt Order

On June 7, 2016, the court issued an order for Kyle to appear at a hearing scheduled for July 7 and show cause why he should not be in contempt for willfully failing to comply with the December 2015 order. The order to appear required Kyle to bring to the hearing his income tax returns for the past 3 years, as well as his last three wage statements. Kyle was appointed counsel on July 8, 2016, upon a finding of

[1] Neb. Rev. Stat. § 43-3341(12) (Reissue 2016).

indigency. On September 12, the court issued another order to appear, at a hearing scheduled for November 2, on the order to show cause.

Kyle appeared at the November 2, 2016, hearing, represented by his appointed counsel. At the hearing, the State introduced a certified copy of a history of Kyle's payments to DHHS. The document demonstrated that Kyle had never made payments on the December 2015 order and that he was $2,551.59 in arrears.

Kyle did not submit income tax returns, wage statements, or any other financial documentation. The only evidence presented by Kyle at the hearing was his own testimony. Kyle testified that he was unemployed. Kyle stated that his "last good job" was working as a "roof loader" for the roofing company. That job ended in November 2015 when he was laid off for the winter.

Kyle testified that he had been applying for three jobs per week for the past 2 months, as required by a workforce development program he was participating in. The most recent jobs he applied for were at a supermarket, a home improvement store, and a discount department store. Kyle explained that he had not applied for work at a fast food restaurant or for other food service work, because he was still "trying to get [his] food handler's permit to go that route."

Kyle refused to describe how many and what jobs he had applied for in the approximately 10-month period between the November 2015 layoff and beginning the workforce development program. After repeated evasiveness on Kyle's part, the court instructed him to "calm[] down" and "listen carefully" to the State's questions. But Kyle still refused to describe in detail his search for employment, stating, "I'm not gonna sit here and just keep beating around the bush about I'm not trying to get a job or this or that."

Kyle stated that he had done some subcontracting work since being laid off at the roofing company. He did not say how long he had worked as a subcontractor, nor how much he had earned.

Kyle indicated that he had not pursued more subcontracting work because he was disabled. Kyle testified that he had a "third grade reading and writing disability" and "a back problem and a neck problem" related to a fall out of a tree in 2005. Kyle testified that he had applied for disability benefits the day before the hearing.

Kyle testified that he paid $506 per month for rent and utilities. He spent an unknown amount on cigarettes. He also had a third child, a 6-month-old daughter, to support.

Kyle explained that he had not paid child support for Mariah and Renee because he was struggling financially. Kyle elaborated that during the times that he was employed as a subcontractor, it was not "that much money or that much work." What money he had made "[p]robably" went toward his rent and utilities. Beyond Kyle's odd jobs, the mother of Kyle's 6-month-old daughter had been paying their rent, utilities, and other expenses with her Social Security income. That relationship had recently ended, however, and Kyle testified that he had "no money" at the time of the hearing.

Kyle did not clearly indicate whether he had applied for or received unemployment benefits at any point since he was laid off in November 2015. He testified that he was not receiving any assistance at the time of the hearing.

Kyle expressed that the amount of the support order was too high. Kyle indicated that the amount of the support order may have been set too high because he had failed to attend the paternity hearing in December 2015. He claimed he had missed the hearing because he did not receive the paperwork informing him of the court date. Though Kyle claimed he had since brought the amount of the child support order to the court's attention two or three times, there is no evidence that Kyle moved for modification of the order.

Kyle did not deny being aware of the December 2015 child support order as of its effective date. He specifically acknowledged that he was aware of the child support order, though his testimony was imprecise as to when. He said:

> Well, I think the first time that I was aware that I was starting to pay child support, the guy who was representing me did not give me the paperwork to where I was supposed to make the payment to the child support, this and that. I don't know. It's my first time going through this stuff. I got reading and writing and disability problems myself. I've just been trying to figure out — it's been set at such a high — such high — like 200-whatever dollars, and I've been telling them that it's been hard for me to afford to pay my own bills and to still be able to afford to pay the child support.

Kyle did not assert that ignorance of the order was the reason for his failure to pay child support.

The court found Kyle in willful contempt of the December 2015 order. In its written contempt order, the court specifically found that during the period applicable to the contempt citation, Kyle had the ability to pay the support ordered. Pursuant to the contempt order, Kyle was committed to 60 days' jail time, to be suspended as long as he paid to the clerk of the court "$230.00 a month on current child support and $100.00 [a month] on arrearage, commencing January 1, 2017." In the event that Kyle complied with this payment schedule for 18 months, he would be purged of contempt. In the event commitment was issued as a result of noncompliance, he would be released and purged of contempt upon payment of $1,000. The court did not set forth an explicit finding that Kyle was at that time able to pay the purge amount. Nor does the record reflect that the court pronounced its order in Kyle's presence.

Kyle timely appeals the contempt order.

ASSIGNMENTS OF ERROR

Kyle assigns that the district court abused its discretion in (1) finding him in civil contempt; (2) imposing an unreasonable, arbitrary, capricious, and punitive sanction; and (3) setting for the purge plan payment amounts that were impossible to perform.

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.[2]

[2] Though the ability to pay the purge amount is a factual question that we review for clear error, whether the facts result in a due process violation is a question of law.[3]

ANALYSIS

Kyle appeals from a contempt order imposed to enforce the prior judgment of paternity and child support.[4] The parties agree that the underlying proceedings were instituted and tried as civil contempt. Kyle's attorney asserts on appeal that the district court erred in finding Kyle in contempt because he did not willfully disobey the support order and, further, that the court erred in setting a purge amount that resulted in a punitive rather than coercive sanction. Kyle asserts that for these reasons, the district court's order was unreasonable, arbitrary, and capricious.

Willful

[3-5] We first address whether the court clearly erred in finding that Kyle's violation of the child support order was

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[2] *Hossaini v. Vaelizadeh*, 283 Neb. 369, 808 N.W.2d 867 (2012).

[3] See, *United States v. Armstrong*, 781 F.2d 700 (9th Cir. 1986); *Arbor Farms v. GeoStar Corp.*, 305 Mich. App. 374, 853 N.W.2d 421 (2014); *Reed v. Reed*, 265 Mich. App. 131, 693 N.W.2d 825 (2005); *In re Wilson*, 879 A.2d 199 (Pa. Super. 2005).

[4] See *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, supra* note 2.

willful. Civil contempt requires willful disobedience as an essential element.[5] "Willful" means the violation was committed intentionally, with knowledge that the act violated the court order.[6] If it is impossible to comply with the order of the court, the failure to comply is not willful.[7] Willfulness is a factual determination to be reviewed for clear error.[8]

[6-8] Outside of statutory procedures imposing a different standard, it is the complainant's burden to prove civil contempt by clear and convincing evidence and without any presumptions.[9] But, as this is a case involving child support payable to DHHS, the presumption set forth in Neb. Rev. Stat. § 42-358(3) (Reissue 2016) is applicable. Section 42-358(3) provides in part that "[a] rebuttable presumption of contempt shall be established if a prima facie showing is made that the court-ordered child or spousal support is delinquent." Necessarily, the rebuttable presumption of contempt provided by § 42-358(3) encompasses the essential element of willfulness.[10]

It is undisputed that the State made such a prima facie showing that Kyle was delinquent in his court-ordered child support by providing a certified copy of payments, balances, and arrearages maintained by the Title IV-D Division of DHHS.[11]

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[5] *Hossaini v. Vaelizadeh, supra* note 2.

[6] *Sickler v. Sickler*, 293 Neb. 521, 878 N.W.2d 549 (2016). See, also, *Hossaini v. Vaelizadeh, supra* note 2.

[7] *Novak v. Novak*, 245 Neb. 366, 513 N.W.2d 303 (1994), *overruled on other grounds, Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 4.

[8] See, *In re Interest of Thomas M.*, 282 Neb. 316, 803 N.W.2d 46 (2011); *State on behalf of Lockwood v. Laue*, 24 Neb. App. 909, 900 N.W.2d 582 (2017). See, also, e.g., *In re Hollis*, 150 B.R. 145 (D. Md. 1993); *People v. Penson*, 197 Ill. App. 3d 941, 557 N.E.2d 230, 145 Ill. Dec. 460 (1990); *McLarty v. Walker*, 307 S.W.3d 254 (Tenn. App. 2009).

[9] *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 4.

[10] See *D'Angelo v. Guarino*, 88 So. 3d 683 (La. App. 2012).

[11] See Neb. Rev. Stat. § 43-3342.01 (Reissue 2016).

We conclude that the district court did not err in finding that Kyle's testimony failed to rebut the presumption of contempt established pursuant to § 42-358(3).

Contrary to the assertions of Kyle's attorney on appeal, Kyle did not indicate at the contempt hearing that he was ignorant of the fact that he was violating a court order. The only testimony regarding Kyle's lack of knowledge related to his failure to attend the paternity hearing. Kyle's testimony that he was confused at some point about where he was supposed to send his payments did not rebut the presumption of willfulness; instead, it demonstrated his knowledge of the support order.

Neither do we find merit to Kyle's argument that the district court erred in concluding that it was possible to comply with the support order. Kyle argues that the district court erred in finding his conduct willful because there was no evidence that he was able to pay the court-ordered child support. But the State presented evidence establishing a presumption that Kyle was able to comply with the 2015 order when it made a prima facie showing that the court-ordered child support was delinquent.[12]

[9] Other jurisdictions hold under either common law or a statutory presumption that a child support order calculated in accordance with applicable guidelines creates a presumption that the parent was able to pay the amount so ordered during the time period subject to contempt.[13] The parent rebuts this presumption of ability to pay by demonstrating that circumstances beyond the parent's control have intervened since the time the child support order was entered.[14] We similarly hold that in contempt proceedings, both § 42-358(3) and logic dictate that a valid child support order is evidence of the parent's ability to pay the amount specified therein.

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[12] See § 42-358(3).

[13] See, *Polli v. Vina*, 557 So. 2d 55 (Fla. App. 1989). See, also, 18 U.S.C. § 228(b) (2012).

[14] See *Polli v. Vina, supra* note 13.

[10,11] The Nebraska Court of Appeals applied a similar presumption in *In re Interest of Noelle F. & Sarah F.*[15] when it held that a child support order issued in accordance with the Nebraska Child Support Guidelines presupposed a financial ability that, absent other evidence, defeated a claim of indigence for purposes of appointment of counsel. We have consistently held that in determining the amount of a child support award, the trial court must consider the status, character, and situation of the parties and attendant circumstances, including the financial condition of the parties and the estimated cost of support of the children.[16] In other words, the parent's ability to pay is an important consideration in setting the amount of the child support order.[17] We have also held that child support established under the Nebraska Child Support Guidelines is presumed correct, unless one or both parties present sufficient evidence to rebut that presumption.[18]

The best way to rebut the presumption of an ability to pay established by a child support order issued in accordance with the Nebraska Child Support Guidelines is evidence to demonstrate a change of circumstances. Though not decisive in a contempt proceeding, procedures exist for parents whose situation has changed to timely file a complaint for modification of the child support order pursuant to Neb. Rev. Stat. § 42-364 (Reissue 2016) or to ask DHHS to consider referring the child support order to the county attorney or authorized attorney for filing an application for modification under Neb. Rev. Stat. § 43-512.15 (Reissue 2016).[19]

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[15] *In re Interest of Noelle F. & Sarah F.*, 3 Neb. App. 901, 534 N.W.2d 581 (1995).

[16] *Faaborg v. Faaborg*, 254 Neb. 501, 576 N.W.2d 826 (1998).

[17] See *id.* See, also, *Bird v. Bird*, 205 Neb. 619, 288 N.W.2d 747 (1980).

[18] See, *State on behalf of A.E. v. Buckhalter*, 273 Neb. 443, 730 N.W.2d 340 (2007); *Sylvis v. Walling*, 248 Neb. 168, 532 N.W.2d 312 (1995).

[19] See, also, Neb. Rev. Stat. § 43-512.12 (Reissue 2016).

Kyle failed to demonstrate a change of circumstances defeating the presumption of his ability to pay in accordance with the support order. Viewed in the light most favorable to the prevailing party, Kyle's unsupported claims of unemployment and disability stated nothing new or different. Other than his testimony that he had applied for three jobs per week for the past 2 months with no success, Kyle did not present any evidence that his ability to earn $8 per hour and work 40 hours per week had diminished since the date of the support order. Instead, he was evasive when asked to specify how many jobs and what kind of jobs he had applied for during the 11 months he failed to pay child support, and none he described appeared to be in a field he had experience in. Given that Kyle was working as a roof loader with the same alleged disabilities until his seasonal layoff in November 2015, Kyle failed to adequately explain why he has not since sought employment in a similar field.

Kyle's testimony that he suffered disabilities that diminished his earning capacity was simply as follows: "I was actually taking on some jobs through a subcontractor subcontracting work and finishing up some work there. But physically with my disability and this and that, I try to do things hands-on so —." Kyle presented no medical documentation or expert testimony supporting his assertion that he suffered from reading and writing disabilities and "a back problem and a neck problem" which prevented him from earning income sufficient to pay his child support obligations.

Furthermore, as this testimony illustrates, Kyle was vague as to the extent he had actually earned income doing subcontracting work during the 11 months that the support order had been in effect. Kyle failed to comply with the court's prior order that he submit at the hearing his tax returns and wage statements. Kyle failed to provide the court with any employment records. The court reasonably could have made a negative inference from Kyle's disobedience of the court's order. Though Kyle stated that his support was sometimes supplied

entirely by the mother of his 6-month-old daughter, such testimony does not establish his inability to become employed; nor do his obligations toward that child relieve him of the duty to support Mariah and Renee.[20]

[12] Triers of fact have the right to test the credibility of witnesses by their self-interest and to weigh it against the evidence, or the lack thereof.[21] In this case, Kyle's testimony was woefully inadequate when weighed against the presumption inherent to the child support order that he was capable of paying it. The district court did not clearly err in finding that during the period applicable to the contempt citation, Kyle had the ability to pay the support ordered by the December 2015 order. By explicitly finding that Kyle had the ability to pay and implicitly finding that Kyle had knowledge of the support order, the district court found that Kyle's disobedience was willful. The court did not clearly err in these findings and did not abuse its discretion in determining that Kyle was in contempt.

Ability to Comply With Purge Order

[13,14] We turn next to whether the court erred in setting a purge amount in excess of Kyle's present ability to pay, thereby making the sanction of incarceration punitive. A criminal or punitive sanction is invalid if imposed in a proceeding that is instituted and tried as civil contempt, because it lacks the procedural protections that the Constitution would demand in a criminal proceeding.[22] A present inability to comply with a contempt order is a defense, not necessarily to contempt, but

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[20] See *Richardson v. Anderson*, 8 Neb. App. 923, 604 N.W.2d 427 (2000).

[21] *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989); *First Nat. Bank of Omaha v. First Cadco Corp.*, 189 Neb. 734, 205 N.W.2d 115 (1973).

[22] *Sickler v. Sickler, supra* note 6.

to the sanction of incarceration.[23] Though the ability to pay the purge amount is a factual question that we review for clear error, whether the facts result in a due process violation is a question of law.[24]

[15,16] When a purge order involves payment of money, the sum required to purge oneself of contempt must be within the contemnor's ability to pay within the time period provided in the order, taking into consideration the assets and financial condition of the contemnor and his or her ability to raise money.[25] For the punishment to retain its civil character, the contemnor must, at the time the sanction is imposed, have the ability to purge the contempt by compliance and either avert punishment or, at any time, bring it to an end.[26] Contemnors in civil contempt must carry the keys of their jail cells in their own pockets.[27]

[17] Though related and involving similar evidence, the due process question of whether Kyle is able to pay the purge amount is not the same as whether Kyle willfully violated the December 2015 child support order and was thereby in contempt. The statutory presumption of contempt under § 42-358(3) does not determine the question of whether the purge plan is punitive. And while a presumption of an ability to pay the child support order made in accordance with the Nebraska Child Support Guidelines may be relevant, it is not conclusive as to the reasonableness of the purge amount. Kyle's ability to pay in accordance with the child support order was evaluated over the 11-month period since its issuance,[28]

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[23] See *id*.

[24] See, *United States v. Armstrong, supra* note 3; *Arbor Farms v. GeoStar Corp., supra* note 3; *Reed v. Reed, supra* note 3; *In re Wilson, supra* note 3.

[25] See *id*.

[26] *Id.*

[27] See *id.*

[28] See *id.*

but whether the purge plan was punitive was evaluated at the time of the order of contempt. A past ability to comply with an order does not show a present ability to purge the contempt.[29] But past failure coupled with unpersuasive or unsupported claims of present inability is sufficient.

[18] We reiterate our recent holding in *Sickler v. Sickler*[30] that, despite any overlap with the finding of willful disobedience in the underlying contempt, a court that imposes incarceration as part of civil contempt proceedings shall make express findings regarding the contemnor's ability to comply with the purge order. Such a finding is required because of "the importance of the ability to comply in distinguishing between civil and criminal contempt and its due process implications."[31]

While the district court stated in its order that Kyle had the ability to pay the support obligation, it failed to explicitly find that Kyle had the present ability to comply with the contempt order. Kyle does not assign as error the court's failure to make a specific finding regarding his ability to comply with the contempt order, however. And we find no plain error, because the record supports the court's implicit conclusion that Kyle failed to prove an inability to comply.

[19-22] It is the contemnor who has the burden to assert and prove the inability to comply with the contempt order as a defense to incarceration.[32] The burden of both production and persuasion is on the contemnor to show the present inability to comply.[33] Such a showing entails attempts to exhaust all resources and assets or borrow sufficient funds and the inability to thereby secure the funds to comply with the purge

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[29] *Sickler v. Sickler, supra* note 6.

[30] *Id.*

[31] *Id.* at 543, 878 N.W.2d at 566.

[32] See *Sickler v. Sickler, supra* note 6.

[33] *Id.*

order.[34] In general, the contemnor's inability to comply cannot be voluntarily created, for example by not diligently seeking a job at one's earning potential.[35]

As already discussed, the evidence suggested that Kyle was able to work as a roof loader despite his claimed disabilities. The district court did not find credible Kyle's testimony to the contrary.

Kyle's evidence that he was unable to comply consisted of his self-serving and vague testimony that he had unsuccessfully applied for work during the prior 2 months. The only specific testimony regarding Kyle's recent attempts to gain employment were that he had applied for three jobs per week and that his most recent three applications were in retail—a field that there was no evidence he had experience in. Kyle provided scant evidence he was incapable of finding work similar to his "last good job" as a roof loader, which he had been able to perform despite the disabilities alleged at the hearing. Kyle's failure to find a job in the 2 months preceding the hearing did not foreclose the district court from finding that Kyle would be able to obtain full-time employment within the 2-month grace period of the contempt order.

Furthermore, although Kyle testified that he did not own a vehicle or his home, and that he had "no money," Kyle failed to make a full accounting of his assets. Instead, he disobeyed the court's order to produce his tax documents.

Finally, Kyle presented no evidence whatsoever of an inability to borrow sufficient funds to comply with the purge order.

[23] It is true that the district court found Kyle indigent on July 8, 2016, for purposes of the appointment of counsel. Kyle relies on this finding in asserting that it was impossible for him to pay the purge amount. But the inability-to-pay threshold for determining that the contemnor lacks the keys to

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[34] *Id.*

[35] See *Jenkins v. State*, 60 Neb. 205, 82 N.W. 622 (1900).

his or her own jail cell is higher than the indigence threshold for appointing counsel.[36] Thus, a finding of indigency for purposes of retaining legal counsel does not preclude a finding that the contemnor is able to pay whatever purge amount has been set by the court.

Neb. Rev. Stat. § 29-3901(3) (Reissue 2016) defines indigent as "the inability to retain legal counsel without prejudicing one's financial ability to provide economic necessities for one's self or one's family." A court may find indigency for purposes of appointment of counsel based alone on a situation where expenses exceed income, and a person is not required to prejudice one's financial ability to provide economic necessities for oneself or one's family in order to be determined indigent for that purpose.[37] Nor must a person dispose of all his or her assets or have exhausted all possible sources of borrowing money before being eligible for appointment of counsel.[38]

[24] In contrast, as stated, an inability to comply with a purge order entails having exhausted all assets and opportunities to borrow sufficient funds.[39] Moreover, a purge order involving simply the arrears owed in child support promotes rather than prejudices the contemnor's provision for his or her family. As we have said before, "[t]he support of one's children is a fundamental obligation which takes precedence over almost everything else."[40]

We read the contempt order as including the $230 monthly support obligation as part of the purge amount. It may have

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[36] See *In re Mancha*, 440 S.W.3d 158 (Tex. App. 2013). See, also, *Lamb v. Eads*, 346 N.W.2d 830 (Iowa 1984). But see, *Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011); *Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983); *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337 (Mo. App. 1986).

[37] See *State v. Masilko*, 226 Neb. 45, 409 N.W.2d 322 (1987).

[38] *Id.*

[39] See *Sickler v. Sickler, supra* note 6.

[40] *State v. Reuter*, 216 Neb. 325, 328, 343 N.W.2d 907, 910 (1984).

been the court's intention to impose as the purge amount $100 monthly in arrearages and to simply reiterate that Kyle must continue his underlying monthly support obligation during that time. But that does not appear on the face of the order to be what the court did. While we recognize the purge order in this respect is irregular, in that it includes future child support installments which have not yet accrued, Kyle does not challenge the propriety of including in the purge amount his ongoing monthly obligation. The question presented is whether it was impossible to comply with the order. The record supports the court's conclusion that Kyle did not demonstrate inability to pay $330 monthly for 18 months, beginning approximately 2 months from the time of the contempt hearing, or, alternatively, inability to pay $1,000 once jailed.

We find no merit to Kyle's claim that the contempt order impermissibly imposed a criminal or punitive sanction in a civil proceeding.

CONCLUSION

There is no merit to Kyle's assignments of error challenging the underlying finding of contempt and the reasonableness of the purge amount. We affirm the order of contempt.

Affirmed.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Facilities Cost Management Group, LLC, appellant, v. Otoe County School District 66-0111, also known as Nebraska City Public Schools, appellee.

906 N.W.2d 1

Filed January 26, 2018. No. S-16-1193.

1. **Juries: Verdicts.** A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.
2. **Juries: Verdicts: Presumptions.** Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury.
3. **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.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Trial: Courts: Juries: Attorneys at Law: Notice: Appeal and Error.** In Nebraska, the failure of the court to notify counsel of a jury's question is reversible error only if prejudice results.
6. **Rules of Evidence: Juries.** Pursuant to Neb. Rev. Stat. § 27-606(2) (Reissue 2016), juror affidavits cannot be used for the purpose of showing a juror was confused, as that would relate directly to the juror's mental processes in rendering the verdict.
7. **Pretrial Procedure: Appeal and Error.** A trial court's ruling on a discovery sanction will not be disturbed on appeal absent an abuse of discretion.
8. **Pretrial Procedure.** The determination of an appropriate discovery sanction is to be considered in the factual context of the particular case.
9. **Rules of the Supreme Court: Pretrial Procedure: Expert Witnesses.** The Nebraska Court Rules of Discovery in Civil Cases allow a party to discover facts known and opinions held by opposing experts.

10. ____: ____: ____. A party may, through interrogatories, require the other party to identify each person intended to be called as an expert witness, disclose the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify.
11. ____: ____: ____. Generally, a party who has responded to a discovery request with a response that was complete when made is under no duty to supplement the response. However, a party has a duty to seasonably supplement its discovery response with respect to any question directly addressed to the identity of experts expected to be called at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.
12. **Pretrial Procedure: Expert Witnesses.** When determining what discovery sanction is appropriate, a trial court should consider the explanation for the failure to comply, the importance of the expert's testimony, the surprise to the opposing party, any time needed to prepare to meet the testimony from the expert, and the possibility of a continuance.
13. **Judgments: Verdicts: Directed Verdict.** A motion for judgment notwithstanding the verdict may be granted when the movant's previous motion for directed verdict, made at the conclusion of all the evidence, should have been sustained.
14. **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.
15. ____: ____. On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
16. **Motions for New Trial: Appeal and Error.** An appellate court reviews a denial of a motion for new trial for an abuse of discretion.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Affirmed.

John A. Svoboda and Adam J. Wachal, of Gross & Welch, P.C., L.L.O., for appellant.

Larry E. Welch, Jr., Damien J. Wright, and Larry E. Welch, Sr., of Welch Law Firm, P.C., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, and Funke, JJ.

Stacy, J.

This case, which is before us for a second time, involves a dispute over amounts owed under a contract between Facilities Cost Management Group (FCMG) and Otoe County School District 66-0111, also known as Nebraska City Public Schools (the School District). In the first appeal, we found the jury had been given an erroneous instruction and we reversed a verdict in favor of FCMG and remanded the cause for a new trial.[1] On retrial, the jury returned a verdict in favor of the School District. FCMG appeals, assigning error to the admission and exclusion of certain evidence, to the jury instructions, and to the court's ruling on posttrial motions. Finding no reversible error, we affirm.

I. FACTS

1. General Background

In 2008, FCMG entered into a contract with the School District to perform certain architectural, owner representative, and project management services related to a large construction project undertaken by the School District. The project spanned almost 5 years. During that time, a dispute arose over amounts due FCMG under the contract.

FCMG ultimately filed a breach of contract action against the School District. After a jury trial, FCMG was awarded approximately $1.9 million in damages. The School District appealed, and we reversed, and remanded for a new trial after finding the trial court had improperly instructed the jury that § 11.2 of the parties' contract was unambiguous.[2]

The case was then retried. The second jury trial generally focused on two issues. The first was how FCMG's fees were

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[1] *Facilities Cost Mgmnt. Group v. Otoe Cty. Sch. Dist.*, 291 Neb. 642, 868 N.W.2d 67 (2015).

[2] *Id.*

to be calculated under the contractual provision we found was ambiguous, § 11.2, which provided in part:

> These fees and costs are intended to be converted to Lump Sum amounts with the initial approval by the Owner and Architect of the Project Scope, Budget, and concept to be advanced for funding. Lump Sum amounts and inclusions shall remain effective for the duration of the Project(s), except in the event of approved changes in the scope of work or alternatives to be bid adding two percent or more to the scope. In such event the Lump Sum fees and costs shall be increased proportionately to reflect the full percentage of changes.

The second issue was the School District's affirmative defenses. The School District asserted that FCMG fraudulently induced it into entering the contract by representing that the contract contained a guaranteed maximum price. In this regard, the School District claimed FCMG led it to believe that once the School District approved the initial scope and budget, FCMG would manage the project to that fixed budget, and that project costs would not change unless the School District approved scope changes or selected alternative construction options. The School District also alleged as an affirmative defense that FCMG misrepresented the fees it intended to charge and that the School District entered into the contract in reliance on that misrepresentation.

2. Precontract Negotiations

In 2006, the School District decided to construct a new grade school and make significant renovations to its existing grade school and high school. Merle Rambo, the sole shareholder, director, and officer of FCMG, submitted a proposal for the project to the School District. The proposal emphasized that FCMG was not a traditional architectural firm, but instead would serve as the project's architect, owner's representative, and manager. It stated that because of this, FCMG had the "unique ability" to "offer guaranteed maximum cost options."

After Rambo presented his proposal, the School District submitted various questions to him. One question asked whether there was a "guaranteed maximum price for the project," and Rambo responded, "Yes," followed by an explanation. Another question asked what happened if the bids came in over the budget, and Rambo responded FCMG would match the bids to the budget. The School District also asked whether the fees FCMG showed in the proposal were "all inclusive," and Rambo responded the "costs are all inclusive, incorporating construction, equipment, site development and related project management expenses."

The School District decided to hire FCMG, and Rambo sent a standard form agreement for architectural services to Thomas Farrell, the School District's representative. The parties customized certain parts of the standard form agreement, including the fee agreement in § 11.2.

Rambo signed the customized contract on July 18, 2007. Farrell did not sign until August 9. During the interim, Farrell asked Rambo questions regarding § 5.2.2 of the contract, which stated that "[n]o fixed limit of Construction Cost shall be established as a condition of this Agreement . . . ." Farrell thought this was inconsistent with FCMG's responsibility, as outlined in its proposal, to perform as the owner's representative and project manager and to manage the project to a fixed budget. To address these concerns, the parties added § 12.7 to the contract. This section states that FCMG's earlier proposal was attached "for general reference purposes." Farrell testified that by doing this, he thought the parties were incorporating a guaranteed maximum price into the contract. He further testified that he would not have signed the contract if a guaranteed maximum price was not part of the deal.

Farrell also discussed fees with Rambo prior to signing the contract. Farrell was confused because there was a fee schedule in § 11.2, but other sections of the contract referenced "OR/PM" or "Owner Representative/Project Management" fees. According to Farrell, Rambo told him the final fees would be

approximately 11 percent of the project budget, plus reimbursables. Farrell testified that he would not have signed the contract had he known this was not the fee agreement.

At trial, Rambo acknowledged telling Farrell the fees would be 10 to 12 percent, but explained he thought Farrell was asking about only architectural fees, and not owner representative or project management fees. Rambo also explained that the fee rates in his proposal covered only architectural fees and did not cover owner representative or project manager fees.

3. Approval of Project Scope

In January 2008, Rambo prepared a project budget and presented it to the School District at a school board meeting. The budget was presented in the form of a grid, which showed the costs for the project broken down into categories such as site and construction, equipment, professional services, and connection systems. The parties generally agree that this was the point where FCMG's fees were to be converted into a "Lump Sum" pursuant to § 11.2 of the contract.

The January 2008 budget grid showed a project cost of $24.6 million. During Rambo's presentation, the School District asked him to identify the lump-sum fee in the grid. He indicated the fee was shown in the category titled "professional services" in the amount of $1,944,000. At trial, Rambo testified that this answer referred only to his architectural fees, as that is what he thought the School District was referencing. Rambo prepared a trial exhibit showing that in aggregate, the 2008 budget grid actually showed fees, in various categories, in the amount of $3,824,000. Trial testimony established, however, that at least some of these fees were not ascertainable by the School District at the time the budget grid was presented in January.

4. Additions to Project Scope

In August 2008, Rambo presented the School District a list of alternatives to consider for the construction projects. Each alternative was presented with a corresponding cost. The

School District understood the costs associated with the alternatives were "the cost that would be incurred to the overall Project"[3] if selected. The School District approved the alternatives with associated costs listed by Rambo of $1.4 million. The School District understood this should have increased the project budget from $24.6 million to $26 million.

In May 2009, FCMG emailed the School District a revised budget. This budget showed total project costs of $27.5 million. The School District asked why the budget was shown as $27.5 million, when it understood it was now $26 million. FCMG responded with a one-page memorandum attempting to explain several scope increases. The School District also asked Rambo to explain how his fees were being calculated, but he did not respond.

FCMG presented evidence that the School District approved and added over $4.8 million in scope changes to the projects. The School District presented evidence that it added only approximately $2.9 million in scope changes.

5. Expert Testimony

(a) Robert Mabrey

Both parties presented expert testimony on how FCMG's fees should be calculated under the provisions of § 11.2 of the contract. Robert Mabrey, an architect who testified for the School District, explained how to calculate FCMG's "proportionate" adjustment of fees under § 11.2. Mabrey testified that the calculation required determining the proportionate relationship between fees and construction costs at the time the original lump sum was agreed upon, and then applying that percentage to determine FCMG's fees for increases in the scope of construction. As a hypothetical example, if the initial approved construction costs were $20 million, and the initial lump-sum fee was $2 million, then FCMG would be entitled to an additional fee of 10 percent of the cost of any approved scope increases or selected alternatives.

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[3] Brief for appellee at 15.

Mabrey then looked to the January 2008 budget grid to determine the lump sum. He found it included construction costs of $ 19.9 million. Mabrey acknowledged the parties did not agree on what that budget grid included for FCMG's fees; FCMG argued the budget grid showed approximately $3.8 million in fees, while the School District contended it showed only $1.9 million in fees. Because of this dispute, Mabrey prepared two calculations of the proportional difference—one based on FCMG's fee numbers and the other based on the School District's fee numbers.

Using FCMG's assertion that the budget grid included fees of $3.8 million, Mabrey concluded that was 19.23 percent of the construction cost of $19.9 million. He then applied this percentage to the additional construction costs incurred during the course of the project, which he calculated at $2.9 million. This computation resulted in Mabrey's finding that FCMG would be entitled to an additional fee of $562,302. In sum, FCMG's fees would be the $3.8 million plus $562,302, for a total of approximately $4.3 million. It was undisputed that FCMG previously had been paid $3,661,127 in fees, so according to Mabrey, the amount due using that computation would be $725,195.

Mabrey also did the computation using the School District's assertion that the budget grid lump-sum fee amount was $1.9 million, not $3.8 million. Under that scenario, the percentage of fees to construction costs was 12.65, and applying that percentage to the $2.9 million in scope changes resulted in increased fees of $369,974. This computation resulted in Mabrey's finding that FCMG was entitled to total fees of approximately $2.8 million. Because FCMG already had been paid an amount in excess of $2.8 million, no fees remained due under this scenario.

(b) Robert Kirchner

Robert Kirchner testified as an expert for FCMG. Kirchner is a forensic accountant with a background in banking, accounting, and finance. Before trial, the School District moved in

limine to limit Kirchner's testimony to how FCMG calculated its fees, arguing that he was not qualified by either his education, training, or experience to offer any opinion about the meaning or interpretation of the contract provisions at issue, or whether the fees charged by FCMG were consistent with the terms of the contract. The district court overruled the motion in limine.

At trial, Kirchner testified he had reviewed the invoices FCMG sent to the School District and he explained how FCMG's fees were actually calculated in those invoices. However, the district court sustained the School District's objections to Kirchner's testimony on how FCMG's fees should be calculated under the terms of the contract or whether FCMG's method was consistent with the contract. The court generally reasoned that Kirchner was not qualified as an expert to give such opinions.

(c) Michael Purdy

Michael Purdy is an architect who provided services on the project for FCMG. Before the first trial, he was disclosed as an expert witness for FCMG. The disclosure stated Purdy would offer opinions "about any and all aspects of the project, including, but not limited to the scope of the project and changes thereto and to the fees charged."

At the first trial, Purdy testified about scope changes to the project, but did not offer an opinion about how fees were to be calculated under the contract. When the cause was remanded for retrial, FCMG did not supplement the expert disclosure for Purdy or otherwise indicate his testimony at the second trial would differ from that offered previously.

At the second trial, Purdy again testified about scope changes to the project. In addition, FCMG attempted to elicit opinion testimony from Purdy regarding how the contract should be interpreted in calculating fees due to FCMG. The School District objected to these questions, and the trial court sustained the objections, finding such testimony was outside the scope of the expert disclosure.

6. Jury Instructions

The jury was instructed that § 11.2 of the contract was ambiguous as to the phrase "'scope of work'" and that the jury must determine "which of two or more meanings represents the true intentions of the parties. It is for you to determine the intent of the parties from all the facts and circumstances." The jury was further instructed:

> B. Burden of Proof
>
> Before [FCMG] can recover against the [School District] on its claim for breach of contract, FCMG must prove, by the greater weight of the evidence, each and all of the following:
>
> 1. The terms of the written contract, including the meaning of Section 11.2;
>
> 2. That [FCMG] substantially performed its part of the contract;
>
> 3. That [the School District] breached the contract by failing to pay fees for services provided by FCMG pursuant to the contract;
>
> 4. That the breach of contract was a proximate cause of some damage to FCMG; and
>
> 5. The nature and extent of that damage.
>
> C. Effect of Findings
>
> If [FCMG] has not met this burden of proof, then your verdict must be for the [School District].
>
> On the other hand, if [FCMG] has met its burden of proof, then you must consider the [School District's] affirmative defenses that [FCMG] fraudulently induced the [School District] to enter into the contract and/or materially misrepresented the full scope of services it would provide and/or the amount of fees it would charge pursuant to the contract and the manner in which said fees would be calculated.

The jury was given two verdict forms. Verdict form No. 1 provided: "We, the jury, find[s] that [FCMG] is entitled to damages from the [School District] on its breach

of contract claim and awards to [FCMG] damages in the amount of $ _____." Verdict form No. 2 provided: "We, the jury, finds in favor of the [School District] and against [FCMG]."

After deliberations began, the jury submitted the following question to the court concerning FCMG's burden of proof on the breach of contract claim:

> Regarding Section B of Instruction 2 if the required 10/12 majority of jurors do not find [FCMG] met [its] burden of proof, must 10/12 then agree [FCMG] has not met the burden of proof to rule for the [School District]?
>
> In other words, do 10 jurors have to agree that the burden of proof was not met by FCMG to rule in favor of [the School District], or do we rule for the [School District] since 10/12 jurors cannot say FCMG has met [its] burden?

The court, without notifying counsel, replied: "You must refer to and follow the jury instructions."

Later, the jury submitted a second question to the court: "If at least 10 of our jury members cannot find in favor of [FCMG's] burden of proof being met, shall we rule for the [School District]?" The Court replied: "You have deliberated for more than six hours; therefore ten or eleven of you can reach a verdict." Before beginning deliberation, the jury had been instructed: "A verdict reached during the first six hours of your deliberation must be agreed to by all of you, that is, it must be unanimous. After six hours of deliberation, you may reach a verdict agreed to by ten or eleven of you." The jury subsequently returned verdict form No. 2, signed by 10 jurors, finding in favor of the School District.

7. Posttrial Motions

FCMG timely moved for judgment notwithstanding the verdict or alternatively for a new trial. Both motions were denied, and FCMG timely filed this appeal.

II. ASSIGNMENTS OF ERROR

FCMG assigns, restated, renumbered, and consolidated, that the trial court erred in (1) allowing the School District to put on evidence of a material misrepresentation and a fraudulent misrepresentation and instructing the jury on these defenses; (2) failing to instruct jurors that they could award FCMG damages, even if the School District prevailed on an affirmative defense; (3) improperly responding to jury questions without contacting counsel; (4) excluding Purdy's testimony about the fee calculation; (5) preventing Kirchner from testifying about the meaning of the contract; (6) excluding evidence of prejudgment interest; and (7) denying the post-trial motions.

III. ANALYSIS

[1,2] Much of our analysis in this case is shaped by the general verdict the jury returned in favor of the School District. A jury, by its general verdict, pronounces upon all or any of the issues either in favor of the plaintiff or the defendant.[4] Because a general verdict does not specify the basis for an award, Nebraska law presumes that the winning party prevailed on all issues presented to the jury.[5]

Applying the general verdict rule here, we presume the jury found in the School District's favor on all issues submitted, including whether the contract was breached and how § 11.2 of the contract was to be interpreted. Within this framework, we examine FCMG's assignments of error.

1. Affirmative Defenses

[3,4] FCMG assigns that the trial court erred in allowing the School District to put on evidence of its affirmative defenses and erred in instructing the jury on the School District's

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[4] *Heckman v. Burlington Northern Santa Fe Ry. Co.*, 286 Neb. 453, 837 N.W.2d 532 (2013); *Wulf v. Kunnath*, 285 Neb. 472, 827 N.W.2d 248 (2013).

[5] *Id.* See, also, *Balames v. Ginn*, 290 Neb. 682, 861 N.W.2d 684 (2015).

affirmative defenses. 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.[6] In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.[7]

Here, the jury was instructed to consider the School District's affirmative defenses only if it found FCMG had met its burden of proof on the breach of contract claim. Under the general verdict rule, we presume the jury determined the breach of contract issue in favor of the School District. Thus, the jury never reached the question of the School District's affirmative defenses, and any alleged error in admitting evidence or instructing the jury on those affirmative defenses would necessarily be harmless.[8] FCMG's assignments relating to the School District's affirmative defenses cannot form the basis for reversible error.

2. Questions From Jury

The jury submitted two questions to the court during deliberations. The court responded to both questions without contacting counsel. FCMG argues this procedure did not comply with Neb. Rev. Stat. § 25-1116 (Reissue 2016), which provides:

> After the jury [members] have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information

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[6] *In re Estate of Clinger*, 292 Neb. 237, 872 N.W.2d 37 (2015); *Arens v. NEBCO, Inc.*, 291 Neb. 834, 870 N.W.2d 1 (2015).

[7] *InterCall, Inc. v. Egenera, Inc.*, 284 Neb. 801, 824 N.W.2d 12 (2012); *Karel v. Nebraska Health Sys.*, 274 Neb. 175, 738 N.W.2d 831 (2007).

[8] See *Scheele v. Rains*, 292 Neb. 974, 874 N.W.2d 867 (2016).

> upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

[5] FCMG is correct that the procedure utilized by the court did not comply with § 25-1116. However, in Nebraska, the failure of the court to notify counsel of a jury's question is reversible error only if prejudice results.[9] FCMG contends the jury's questions illustrate it was confused about whether damages could be awarded to FCMG if the jury found the School District had proved "one or both of its"[10] affirmative defenses. FCMG does not explain, however, why this is so or how answering the jury's questions in a different manner or contacting counsel prior to answering, would have made any difference.

Nothing about the court's failure to notify counsel of the jury's questions can reasonably be interpreted to result in prejudice to FCMG. Again, because the general verdict rule applies, we presume the jury found that FCMG failed to prove the School District breached the contract. FCMG's argument that the court's answers confused the jury is premised on the presumption that the jury found a breach and, thus, is directly contrary to the general verdict rule. A similar factual situation was present in *State v. Owen*,[11] and there, the Nebraska Court of Appeals held no prejudice resulted when the trial court referred the jury back to the instructions without notifying counsel of the jury question. Likewise here, the court effectively referred the jury back to its instructions in response to both questions. On this record, we do not find prejudicial error in the trial court's responses to the questions asked by the jury.

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[9] *In re Estate of Corbett*, 211 Neb. 335, 318 N.W.2d 720 (1982). See *Brodersen v. Traders Ins. Co.*, 246 Neb. 688, 523 N.W.2d 24 (1994).

[10] Brief for appellant at 27.

[11] *State v. Owen*, 7 Neb. App. 153, 580 N.W.2d 566 (1998).

3. Juror Affidavits

When it moved for a new trial, FCMG submitted the affidavits of two jurors, one of whom signed the verdict returned by the jury and one of whom did not. The affidavits generally reflected the affiants' belief that the jury's two questions were poorly phrased by the foreperson and that the jury instructions were confusing regarding the effect of the affirmative defenses. The affidavits did not state that any extraneous information was considered by the jurors or that any outside influence affected the jury. Over objection, the court received the juror affidavits, but overruled the motion for new trial.

In its brief on appeal, FCMG relies on the juror affidavits to support its argument that the jury was confused by the instructions. The specific argument presented is that the jury did not think it could award any damages to FCMG if it found for the School District on one or both of the affirmative defenses.

Again, such an argument is premised on the jury's finding the School District breached the contract and then going on to consider its affirmative defenses. This factual scenario is simply not supported by the record before us. Moreover, according to Neb. Rev. Stat. § 27-606(2) (Reissue 2016):

> Upon any inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes.

[6] Pursuant to § 27-606(2), juror affidavits cannot be used for the purpose of showing a juror was confused, as that would

relate directly to the juror's mental processes in rendering the verdict.[12] We find no error in denying FCMG's motion for new trial.

4. Exclusion of Expert Testimony

FCMG argues it was error to limit the trial testimony of two of its experts. 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.[13]

(a) Purdy

Purdy testified as an expert for FCMG at the first trial and again at the second trial. Before the first trial, the School District served interrogatories on FCMG asking, among other things, that FCMG identify each expert witness it intended to call, the subject matter on which the expert would testify, and the "substance of the facts and opinions" to which each witness was expected to testify. On July 1, 2013, FCMG answered the interrogatory and identified Purdy as an expert expected to testify "about any and all aspects of the project, including, but not limited to the scope of the project and changes thereto and to the fees charged."

Purdy was deposed by the School District before the first trial. Purdy did not, either in his deposition or at trial, offer an opinion regarding the interpretation of § 11.2 or how fees should be calculated under the contract. After § 11.2 was found on appeal to be ambiguous and the cause was remanded for retrial, the School District designated Mabrey as its expert who would testify about how fees should be calculated under the contract. FCMG disclosed that Kirchner would be its expert on that issue. FCMG did not supplement its prior expert disclosure as to Purdy.

Purdy was called to testify at the second trial, and FCMG attempted to elicit his opinion on how § 11.2 of the contract

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[12] See *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002).

[13] *In re Estate of Clinger, supra* note 6; *Arens v. NEBCO, Inc., supra* note 6.

should be interpreted and how it related to calculation of fees. The School District objected to this testimony, arguing it was outside the scope of the opinions FCMG had disclosed for Purdy and resulted in unfair surprise. The trial court sustained the School District's objection and did not allow Purdy to testify about his opinion on that issue. FCMG argues this was an excessive discovery sanction, and suggests the exclusion of this evidence amounted to prejudicial error and warrants a new trial.

[7,8] A trial court's ruling on a discovery sanction will not be disturbed on appeal absent an abuse of discretion.[14] The determination of the appropriate sanction is to be considered in the factual context of the particular case.[15]

[9-11] The Nebraska Court Rules of Discovery in Civil Cases allow a party to discover facts known and opinions held by opposing experts.[16] A party may, through interrogatories, require the other party to identify each person intended to be called as an expert witness, disclose the subject matter on which the expert is expected to testify, and state the substance of the facts and opinions to which the expert is expected to testify.[17] Generally, a party who has responded to a discovery request with a response that was complete when made is under no duty to supplement the response.[18] However, a party has a duty to seasonably supplement its discovery response with respect to any question directly addressed to the identity of experts expected to be called at trial, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony.[19]

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[14] See *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994).

[15] *Id.*

[16] Neb. Ct. R. Disc. § 6-326(b)(4).

[17] § 6-326(b)(4)(A)(i).

[18] § 6-326(e).

[19] § 6-326(e)(1)(B).

Neb. Ct. R. Disc. § 6-337 allows a party to apply for an order compelling discovery and allows a trial court to impose discovery sanctions if a party has failed to comply with a court order to provide or permit discovery. And in *Norquay v. Union Pacific Railroad*,[20] we held that a trial court may appropriately exclude all or part of an expert's testimony at trial as a sanction for noncompliance with the discovery rules requiring supplementation. *Norquay* observed that when it comes to the expected testimony of an expert:

> "[I]f a party changes his plans about the expert witnesses he will use at trial or if there is a change in the subject matter on which an expert will testify or the substance of his testimony a supplemental response must be made. This is necessary to carry out the provisions of Rule [§ 6-326(b)(4)] with regard to expert witnesses. With the expert witnesses, as with the persons having knowledge of discoverable facts, any change in plan would routinely come to the attention of the lawyers for the party and the burden of supplementation is very small."[21]

[12] *Norquay* instructs that the appropriate sanction for failing to supplement expert discovery responses should be determined by trial courts based on the factual context of each case, and should be reviewed by appellate courts for an abuse of discretion. When determining what sanction is appropriate, a trial court should consider the explanation for the failure to comply, the importance of the expert's testimony, the surprise to the opposing party, any time needed to prepare to meet the testimony from the expert, and the possibility of a continuance.[22]

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[20] *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987).

[21] *Id*. at 538, 407 N.W.2d at 154 (quoting 8 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2049 (1970)).

[22] *Norquay v. Union Pacific Railroad, supra* note 20. See, also, *Brown v. Hansen*, 1 Neb. App. 962, 510 N.W.2d 473 (1993).

FCMG argues its February 2013 disclosure did not require supplementation, because it broadly stated Purdy would testify about "'the fees charged.'"[23] FCMG also argues that *Norquay* and § 6-337 only apply when a party completely fails to respond to a discovery request regarding an expert. Finally, FCMG generally argues that exclusion of evidence is a particularly harsh sanction and suggests that the court here should have imposed a lesser sanction.

On this record, we find no abuse of discretion in the trial court's exclusion of Purdy's testimony regarding the proper interpretation of § 11.2. FCMG's February 2013 discovery responses, while broadly referencing fees, said nothing about Purdy's offering an opinion on the interpretation of the contract provisions generally or § 11.2 in particular. After FCMG served its discovery responses, the School District took Purdy's deposition and he did not offer an opinion regarding the interpretation of § 11.2; nor was such an opinion elicited from Purdy during the first trial. If FCMG wished to expand the scope of Purdy's expert testimony in the second trial to include opinions regarding the proper interpretation of § 11.2, it should have supplemented its interrogatory answer accordingly.

For the sake of completeness, we expressly reject FCMG's suggestion that *Norquay* and § 6-337 only allow a court to exclude expert testimony if there has been a complete failure to disclose anticipated opinions. Although that was the factual circumstance presented in *Norquay*, we also have applied the *Norquay* rule to limit an expert's trial testimony when a party who has failed to supplement prior discovery responses seeks to offer an undisclosed opinion at trial.[24] The trial court here had discretion to consider a variety of sanctions, and under the circumstances presented, we find no abuse of discretion in

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[23] Brief for appellant at 13.

[24] See, e.g., *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001).

excluding Purdy's opinion testimony on the proper interpretation of the contract.

(b) Kirchner

At trial, Kirchner testified about how FCMG actually calculated its fees, based on his review of the invoices it submitted to the School District. However, the court sustained the School District's objections to questions seeking to elicit Kirchner's opinion on whether the method used by FCMG to calculate its fees was legally consistent with the contractual language. The court generally reasoned that Kirchner, as a forensic accountant, was not qualified to give an expert opinion on the legal interpretation of the contract. FCMG contends this was an abuse of discretion. We disagree.

FCMG relies on *Maiz v. Virani*[25] for the proposition that Kirchner was qualified to give an expert opinion as to how the contract should be interpreted. In that case, a forensic accounting expert testified about the damages incurred by the plaintiffs in a complicated financial case. In doing so, the accounting expert apparently referenced specific provisions of the parties' contracts when explaining assumptions he made in arriving at his opinions. On appeal, the defendants alleged his testimony was improper, because he was not qualified to testify as to the meaning of the parties' ambiguous contract. The 11th Circuit effectively held that the accounting expert did not actually render opinions on the meaning of the contracts, but instead only referenced contractual provisions as the basis for his calculations. As such, the opinion in *Maiz* actually supports the trial court's finding that Kirchner was not qualified to give an expert opinion on how the contract should be interpreted—it does not support FCMG's argument.

We find no abuse of discretion in the trial court's decision to preclude Kirchner from offering an opinion on whether the method actually used by FCMG to calculate fees was consistent with the contractual language.

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[25] *Maiz v. Virani*, 253 F.3d 641 (11th Cir. 2001).

5. Prejudgment Interest

FCMG moved for partial summary judgment seeking a determination that it was entitled to prejudgment interest as a matter of law. The court denied the motion for partial summary judgment and expressly held that FCMG was not entitled to prejudgment interest. At trial, FCMG made an offer of proof that, if permitted, it had a witness who was prepared to testify that prejudgment interest was owed and who would have calculated the amount due.

On appeal, FCMG alleges the trial court erred in refusing to allow evidence of prejudgment interest. 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.[26]

Again, because the jury returned a general verdict in favor of the School District, we presume the jury found FCMG failed to prove breach of contract. So, on this record, the trial court could not have committed prejudicial error by refusing to allow FCMG to produce evidence of prejudgment interest on damages allegedly owed.

6. Posttrial Motions Properly Denied

FCMG contends the damages awarded at trial were clearly inadequate and the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) or, alternatively, for new trial. We find no error in denying either motion.

(a) JNOV

FCMG moved for a directed verdict at the close of all the evidence, and the district court denied the motion. After the jury returned a verdict in favor of the School District, FCMG moved for JNOV, which the district court denied.

[13-15] A motion for JNOV may be granted when the movant's previous motion for directed verdict, made at the

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[26] *In re Estate of Clinger, supra* note 6; *Arens v. NEBCO, Inc., supra* note 6.

conclusion of all the evidence, should have been sustained.[27] To sustain a motion for JNOV, 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.[28] On a motion for JNOV, the moving party is deemed to have admitted as true all the relevant evidence admitted that is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.[29]

Here, FCMG's motion for JNOV was premised on its claim that the verdict for the School District was the result of confusing jury instructions. Because a motion for JNOV asks the trial court to revisit whether the movant's prior motion for directed verdict should have been granted as a matter of law, it is improper to rely upon allegedly confusing jury instructions as the basis for a JNOV motion. We have previously addressed, and rejected, FCMG's assignment that the jury instructions were erroneous, and that issue fares no better reframed as one in support of JNOV.

(b) New Trial

[16] FCMG moved alternatively for a new trial, asserting the jury's award of damages was inadequate, not sustained by the evidence, and contrary to law. The district court denied the motion. An appellate court reviews a denial of a motion for new trial for an abuse of discretion.[30]

In its brief, FCMG describes the jury's verdict as an "award of ***zero*** damages"[31] and argues the award was inadequate

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[27] *Frank v. Lockwood*, 275 Neb. 735, 749 N.W.2d 443 (2008).

[28] *United Gen. Title Ins. Co. v. Malone*, 289 Neb. 1006, 858 N.W.2d 196 (2015); *Martensen v. Rejda Bros.*, 283 Neb. 279, 808 N.W.2d 855 (2012).

[29] *Frank v. Lockwood, supra* note 27.

[30] See, *Knapp v. Ruser*, 297 Neb. 639, 901 N.W.2d 31 (2017); *Cisneros v. Graham*, 294 Neb. 83, 881 N.W.2d 878 (2016).

[31] Brief for appellant at 21.

because "the evidence at trial indisputably showed that FCMG was entitled to be paid for additional work on the project."[32] Its argument is premised on the theory that the jury found in FCMG's favor on the breach of contract claim, but awarded no damages because it also found for the School District on one or more of its affirmative defenses. But the record does not support that premise.

The jury returned a general verdict for the School District, and thus an appellate court must presume the jury found in favor of the School District on all issues, including the breach of contract claim. Furthermore, contrary to FCMG's assertion that the evidence was "indisputable,"[33] Mabrey specifically testified that under the School District's calculations, FCMG had already been paid more than what was due. The trial court did not abuse its discretion in failing to grant the motion for new trial.

IV. CONCLUSION

We find no merit to FCMG's assignments of error, and we affirm the judgment of the district court.

Affirmed.

Wright and Kelch, JJ., not participating.

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[32] *Id.*

[33] *Id.* at 17.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Jennifer T., appellant, v. Lindsay P., appellee.

906 N.W.2d 49

Filed February 2, 2018. No. S-17-107.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Parent and Child: Standing: Words and Phrases.** In loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural parent when the evidence shows that the nonparent's exercise of such rights is in the child's best interests.
3. **Parent and Child.** In order to stand in loco parentis, one must assume all obligations incident to the parental relationship.
4. **Parent and Child: Parental Rights.** A person in loco parentis generally holds the same rights as a lawful parent. However, in loco parentis status does not, by itself, eclipse the superior nature of the parental preference accorded to biological or adoptive parentage.
5. **Actions: Parent and Child: Standing.** In the face of a natural parent's objection, in loco parentis gives standing to litigate whether the child's best interests are served by maintaining the in loco parentis relationship.
6. **Parent and Child.** In loco parentis status is, unlike biological and adoptive parentage, transitory.
7. **Actions: Parent and Child.** A litigant cannot seek a declaration of permanent parental status under the in loco parentis doctrine.
8. **Parent and Child.** Once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis.
9. ____. Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.
10. **Courts: Jurisdiction: Adoption: Minors.** An order of consent under Neb. Rev. Stat. § 43-104(1)(b) (Reissue 2016) granted by the district

court does nothing more than permit the county court, as the tribunal having exclusive original jurisdiction over adoption matters, to entertain such proceedings.

11. **Adoption.** An order of consent under Neb. Rev. Stat. § 43-104(1)(b) (Reissue 2016) is not a determination of the child's best interests or any other issue pertaining to adoption.
12. **Courts: Jurisdiction: Adoption.** The consent under Neb. Rev. Stat. § 43-104(1)(b) (Reissue 2016) can be understood as a limited deferral to the adoption court of the first court's jurisdictional priority.
13. **Courts: Jurisdiction.** Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, the court whose power is first invoked by proper proceedings acquires jurisdiction to the exclusion of all tribunals to adjudicate the rights of the parties.
14. ____: ____. Two courts cannot possess at the same time the power to make a final determination of the same controversy between the same parties.
15. ____: ____. A court with jurisdictional priority can choose to relinquish it.
16. ____: ____. Jurisdictional priority is a matter of judicial administration and comity. It is not to protect the rights of the parties but the rights of the courts to coordinate jurisdiction to avoid conflicts, confusion, and delay in the administration of justice.
17. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.
18. **Final Orders: Appeal and Error.** Having a substantial effect on a substantial right depends most fundamentally on whether the right could otherwise effectively be vindicated through an appeal from the final judgment.
19. ____: ____. Generally, an immediate appeal from an order is justified only if the right affected by the order would be significantly undermined or irrevocably lost by waiting to challenge the order in an appeal from the final judgment.
20. **Adoption.** Orders of consent under Neb. Rev. Stat. § 43-104(1)(b) (Reissue 2016) do not affect a substantial right, because they do not resolve the issue of adoption.
21. **Injunction: Final Orders.** Orders staying proceedings to await the termination of related proceedings in another court are usually not final.
22. ____: ____. The finality of an order granting a stay depends upon the practical effect and impact the stay order might have on the relief requested by the litigants.

23. **Injunction: Dismissal and Nonsuit.** A substantial right is affected by an order granting a stay if its effect is tantamount to a dismissal or to a permanent denial of the requested relief.
24. **Final Orders: Appeal and Error.** It is the effect on the appellant's rights, not another's, that justifies the immediate review of an interlocutory order.
25. **Dismissal and Nonsuit: Moot Question.** The mere possibility of mootness is not the functional equivalent of a dismissal or a permanent denial of the requested relief.
26. **Injunction: Dismissal and Nonsuit.** A temporary stay that merely preserves the status quo pending a further order is not an order that amounts to a dismissal of the action or that permanently denies relief to a party.
27. **Courts: Jurisdiction.** A litigant's substantial rights are not affected by the mere fact that one court has determined that the interests of judicial administration are best served by temporarily deferring jurisdictional priority to another court of this state.

Appeal from the District Court for Douglas County: J. Michael Coffey, Judge. Appeal dismissed.

Lindsay Belmont, of Koenig Dunne, P.C., L.L.O., for appellant.

Desirae M. Solomon for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

INTRODUCTION

The former partner of a biological mother who conceived via in vitro fertilization brought a custody action in district court based on her alleged in loco parentis status to the child. The biological mother and her wife subsequently filed a petition in county court for stepparent adoption. The district court consented to the adoption and stayed the custody action pending the resolution of the adoption petition. We must determine whether the consent to adoption or the order staying the custody action presents a final order.

BACKGROUND

Lindsay P. and Jennifer T. were in a committed relationship from 2001 to 2012. During the course of that relationship, Lindsay conceived Chase T. by artificial insemination through an anonymous donor. Chase was born in 2010, and Jennifer stayed home to care for him while Lindsay worked outside the home.

Lindsay and Jennifer separated in 2012, but they continued to coparent Chase. They agreed to a parenting schedule under which Lindsay had Chase on Mondays and Tuesdays, Jennifer had Chase on Wednesdays and Thursdays, and they alternated weekend parenting time. Lindsay married Jessica P. in 2015.

On August 12, 2015, Jennifer filed a complaint in the district court for Douglas County for initial determination of custody and to establish support. The complaint, as amended, alleged that Jennifer has stood in loco parentis for Chase since his birth, assuming all rights, responsibilities, and obligations incident to a lawful parental relationship. Jennifer sought sole legal and physical custody of Chase, with reasonable parenting time to be awarded to Lindsay. Jennifer also sought child support and an order requiring both parties to share in medical, educational, and other expenses relating to Chase's care.

Approximately 1 month after Jennifer's custody action was filed, Lindsay and Jessica filed a petition for stepparent adoption in the county court for Douglas County. Lindsay filed a motion for the district court to consent to the stepparent adoption, under Neb. Rev. Stat. § 43-104 (Reissue 2016).

Jennifer filed a motion in county court to intervene in the adoption proceeding and to stay the adoption proceeding pending the custody action. At the same time, Jennifer filed a motion in the district court seeking to enjoin Lindsay from proceeding in the county court adoption matter.

Lindsay moved in district court for summary judgment or dismissal of the custody action. Rather than ruling on

Lindsay's motion, the district court stayed the custody action pending resolution of the adoption proceeding.

Subsequently, in county court, Jennifer was denied the right to intervene. The county court also overruled her motion to stay the adoption proceedings. Jennifer appealed the county court's orders, and we reversed.

We explained in *In re Adoption of Chase T.*[1] that the county court lacked jurisdiction to issue its order dismissing Jennifer's complaint to intervene and overruling her motion to stay the adoption proceeding, because the county court had failed to obtain the district court's consent to the adoption. The county court's order was vacated.[2]

While the appeal in *In re Adoption of Chase T.* was pending, Jennifer moved in district court for a release of its stay. She alleged that per the district court's instructions, she had requested to intervene in the adoption proceedings, but that the request was denied for lack of standing. She further alleged that her "in loco parentis parental relationship must be established first, before she has a right to intervene in the adoption action." Jennifer also asserted that the district court had an obligation to retain its jurisdictional priority over the county court, because the custody action was filed first. The district court sustained the request to release the stay.

After our opinion in *In re Adoption of Chase T.*, Lindsay renewed her request for the district court's consent to the adoption.

Jessica eventually filed a motion to intervene in the custody action. Lindsay then filed a motion asking the court to reissue its stay of the custody action—after ruling on her motion for consent to adoption and Jessica's motion to intervene.

Lindsay argued that a stay was warranted, because a decision in the adoption proceeding was required before the court

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[1] *In re Adoption of Chase T.*, 295 Neb. 390, 888 N.W.2d 507 (2016).

[2] *Id.*

could make "an informed decision regarding all issues and litigants." She claimed that a stay would avoid unneeded litigation and expense. At a hearing on the motions for consent to adoption, intervention, and stay, Lindsay elaborated that she thought the adoption proceeding should be resolved first in order to protect Chase's right to be adopted, as well as to establish Jessica's status vis-a-vis any visitation rights that might ultimately be ordered in the custody action.

Jennifer objected to the motions filed by Lindsay and Jessica. On the motion to intervene, Jennifer argued that any in loco parentis rights pertaining to Jessica were irrelevant to her own in loco parentis claim to custody. As for the motions for consent and stay, Jennifer asserted that the district court had jurisdictional priority over the county court. She also argued that a determination of her in loco parentis rights must be made by the district court before the adoption proceeds, because the county court, through its vacated order, had determined that she lacked standing. Finally, she asserted that a stay would cause irreparable harm to her in loco parentis right to parent Chase.

On January 27, 2017, the court overruled the motion by Jessica to intervene in the custody action, but it consented to the adoption proceeding. In the same order, the district court granted the motion to stay the custody action "until further order of the Court." Jennifer appeals the January 27 order.

ASSIGNMENTS OF ERROR

Jennifer assigns that the district court erred in (1) granting its consent to the adoption to proceed in county court and (2) staying the custody proceedings in the district court.

STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law.[3]

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[3] *In re Adoption of Amea R.*, 282 Neb. 751, 807 N.W.2d 736 (2011).

ANALYSIS

Jessica's underlying custody action in this case derives from common law.[4] We held in *Latham v. Schwerdtfeger*[5] that the former partner to the biological mother of a child conceived via artificial insemination had standing under the doctrine of in loco parentis to seek custody and court-ordered visitation of the child. We recognized a "'wide spectrum of arrangements [have filled] the role of the traditional nuclear family'" and that a biological parent who "'voluntarily created and actively fostered'" a former partner to assume the status of a parent cannot erase that relationship after the parties' separation "'simply because . . . she regretted having done so.'"[6]

[2] In loco parentis is a common-law doctrine that gives standing to a nonparent to exercise the rights of a natural parent when the evidence shows that the nonparent's exercise of such rights is in the child's best interests.[7] This standing doctrine protects the rights of the natural parent from intrusions by third parties except when those third parties have a stature like that of a parent.[8]

[3-5] In order to stand in loco parentis, one must assume all obligations incident to the parental relationship.[9] In turn, a person in loco parentis generally holds the same rights as

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[4] See *Latham v. Schwerdtfeger*, 282 Neb. 121, 802 N.W.2d 66 (2011), *disapproved on other grounds, Windham v. Griffin*, 295 Neb. 279, 887 N.W.2d 710 (2016).

[5] *Id.*

[6] *Id.* at 130, 134, 802 N.W.2d at 74, 76.

[7] See *Latham v. Schwerdtfeger, supra* note 4.

[8] See *In re Guardianship of Brydon P.*, 286 Neb. 661, 838 N.W.2d 262 (2013).

[9] See, *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002), *disapproved on other grounds, In re Interest of Enyce J.*, 291 Neb. 965, 870 N.W.2d 413 (2015); *Weinand v. Weinand*, 260 Neb. 146, 616 N.W.2d 1 (2000), *disapproved on other grounds, Windham v. Griffin, supra* note 4.

a lawful parent.[10] However, in loco parentis status does not, by itself, eclipse the superior nature of the parental preference accorded to biological or adoptive parentage.[11] Rather, in the face of a natural parent's objection, in loco parentis gives standing to litigate whether the child's best interests are served by maintaining the in loco parentis relationship.[12]

[6-9] The parental preference accorded to biological or adoptive parentage is based in part on the fact that in loco parentis status is, unlike biological and adoptive parentage, "transitory."[13] We have held that a litigant cannot seek a declaration of permanent parental status under the in loco parentis doctrine.[14] Once the person alleged to be in loco parentis no longer discharges all duties incident to the parental relationship, the person is no longer in loco parentis.[15] Termination of the in loco parentis relationship also terminates the corresponding rights and responsibilities afforded thereby.[16]

District Court's Consent Was Not Final Order

The district court in this case has not yet determined whether Jennifer has a right to custody and visitation by virtue of her alleged in loco parentis relationship with Chase. Instead, the court gave its statutory consent to the adoption proceedings and stayed the action. Under § 43-104(1)(b), the county court must have the consent of any other court with jurisdiction over the child's custody before it has jurisdiction to entertain the merits of any issue in the adoption proceeding.[17]

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[10] See *Windham v. Griffin, supra* note 4.

[11] See *id.*

[12] See *In re Guardianship of Brydon P., supra* note 8.

[13] *Id.* at 674, 838 N.W.2d at 272. See, also, *Windham v. Griffin, supra* note 4.

[14] *In re Guardianship of Brydon P., supra* note 8.

[15] *In re Interest of Destiny S., supra* note 9.

[16] *Id.*

[17] See *In re Adoption of Chase T., supra* note 1.

[10-12] The consent granted by the district court does nothing more than permit the county court, as the tribunal having exclusive original jurisdiction over adoption matters, to entertain such proceedings.[18] Such consent is not a determination of the child's best interests or any other issue pertaining to adoption.[19] Indeed, because county courts have exclusive jurisdiction over adoption, we have said that a nonadoption court lacks authority to decide such matters.[20] The consent under § 43-104(1)(b) can be understood as a limited deferral to the adoption court of the first court's jurisdictional priority.

[13,14] Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, the court whose power is first invoked by proper proceedings acquires jurisdiction to the exclusion of all tribunals to adjudicate the rights of the parties.[21] Logically, two courts cannot possess at the same time the power to make a final determination of the same controversy between the same parties.[22]

The doctrine of jurisdictional priority usually applies to two pending cases only when they involve the same whole issue.[23] In other words, the two actions must be materially the same, involving substantially the same subject matter and the same parties.[24] But this is sometimes extended to situations where each action composes part of the whole issue,[25] and we have

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[18] See *Klein v. Klein*, 230 Neb. 385, 431 N.W.2d 646 (1988).

[19] See *Smith v. Smith*, 242 Neb. 812, 497 N.W.2d 44 (1993).

[20] *Id.*

[21] See, *Molczyk v. Molczyk*, 285 Neb. 96, 825 N.W.2d 435 (2013); *State ex rel. Consortium for Economic & Community Dev. for Hough Ward 7 v. Russo*, 2017 Ohio 8133, 151 Ohio St. 3d 129, 86 N.E.3d 327 (2017).

[22] See *id.*

[23] *Charleen J. v. Blake O.*, 289 Neb. 454, 855 N.W.2d 587 (2014).

[24] See *id.*

[25] See *State ex rel. Consortium For Economic & Community Dev. For Hough Ward 7 v. McMonagle*, 2016 Ohio 4704, 68 N.E.3d 125 (2016).

applied this broader concept of jurisdictional priority to matters of continuing jurisdiction of child custody.[26] We have indicated that the first court with jurisdiction over a child's custody has priority over a subsequent court with jurisdiction over the child's custody, even if the subject matter of the proceedings is not otherwise the same.[27]

[15,16] A court with jurisdictional priority can choose to relinquish it.[28] In *Charleen J. v. Blake O.*,[29] we explained that we have sometimes referred to the second court as lacking jurisdiction, but this is wrong. "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."[30] Jurisdictional priority is a matter of judicial administration and comity.[31] It is not to protect the rights of the parties but the rights of the courts to coordinate jurisdiction to avoid conflicts, confusion, and delay in the administration of justice.[32] The consent provision of § 43-104(1)(b) contemplates that another court has jurisdictional priority over the custody of the child, and it contemplates that only with the other court's consent will the adoption be allowed to proceed.

Jennifer argues in this appeal that she has been prejudiced by the district court's deferral of its jurisdictional priority to the county court. She argues that without a prior determination in the custody action of her in loco parentis status, the county court may deny her standing to intervene in the adoption proceeding. Further, she argues that if the county court grants the adoption, her custody action will be moot; she assumes this

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[26] See *Charleen J. v. Blake O., supra* note 23 (and cases cited therein).

[27] See *Charleen J. v. Blake O., supra* note 23.

[28] *Id.*

[29] See *id*.

[30] *Id*. at 463, 855 N.W.2d at 595 (emphasis in original).

[31] *Charleen J. v. Blake O., supra* note 23.

[32] See *id.*

because she assumes that three people cannot have joint legal custody over a child.

[17] But before reaching the merits of the district court's decision, we must determine if we have appellate jurisdiction. For an appellate court to acquire jurisdiction over an appeal, there must be a final order or final judgment entered by the court from which the appeal is taken.[33] The January 27, 2017, order did not dismiss the custody action or make a final determination of its merits; thus, it was not a final judgment.[34] The question, therefore, is whether we are presented with a final order.

Jennifer asserts that both aspects of the January 27, 2017, order, the consent and the stay, affected a substantial right and were made in a special proceeding. Neb. Rev. Stat. § 25-1902 (Reissue 2016) provides that "an order affecting a substantial right made in a special proceeding . . . is a final order."

We have held that a substantial right is an essential legal right, not a mere technical right.[35] It is a right of "substance." It is not enough that the right itself be substantial; the effect of the order on that right must also be substantial.[36]

We have said that an order affects a substantial right if it affects the subject matter of the litigation, such as diminishing a claim or defense that was available to the appellant prior to the order from which he or she is appealing. We have also said that whether the effect of an order is substantial depends upon whether it affects with finality the rights of the parties in the subject matter.[37]

[18,19] Having a substantial effect on a substantial right depends most fundamentally on whether the right could otherwise effectively be vindicated through an appeal from the

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[33] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[34] See *id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

final judgment.[38] Generally, an immediate appeal from an order is justified only if the right affected by the order would be significantly undermined or irrevocably lost by waiting to challenge the order in an appeal from the final judgment.[39]

In several cases, we have held that orders involving consent to adoption are not final orders, because they do not affect a substantial right.[40] In *Klein v. Klein*,[41] we held that a district court's order of consent under § 43-104(1)(b) was not a final order, even if the consent was the last act the court would take in relation to the child. In *In re Adoption of Krystal P. & Kile P.*,[42] we held that the county court's order finding that consent was not required from the then Department of Social Services was not final. Finally, in *In re Adoption of Madysen S. et al.*,[43] we held that the county court's determination that due to abandonment, a father's consent was not required, was not a final order.

[20] We concluded in these cases that the orders did not affect a substantial right, because they did not resolve the issue of adoption.[44] Despite the orders, the county court could ultimately decide to deny the petition for adoption—at which point, the complaining party's substantial rights would never be affected.[45] And, if instead the adoption were permitted, then the rights at issue could be effectively vindicated in an appeal from the final judgment of adoption.[46]

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[38] *Id.*

[39] *Id.*

[40] See, *In re Adoption of Krystal P. & Kile P.*, 248 Neb. 907, 540 N.W.2d 312 (1995); *Klein v. Klein, supra* note 18.

[41] *Klein v. Klein, supra* note 18.

[42] *In re Adoption of Krystal P. & Kile P., supra* note 40.

[43] *In re Adoption of Madysen S. et al., supra* note 33.

[44] See *Klein v. Klein, supra* note 18.

[45] See *In re Adoption of Madysen S. et al., supra* note 33.

[46] See *id.*

We see no reason to diverge from this precedent here. It is true that in these cases concerning the immediate appealability of consent-related orders, the complaining parties were allowed to participate in the adoption proceedings. Indeed, in *In re Adoption of Madysen S. et al.*, we emphasized the father's continued ability to participate in the best interests hearing in the adoption proceeding when we concluded that the order of abandonment and substitute consent did not affect the father's substantial rights.

We understand that it is precisely Jennifer's ability to intervene in the adoption proceedings that she argues is one of the substantial rights at issue. But Jennifer presents no argument that the district court's consent represented a rejection of the in loco parentis status under which she claims standing in both the custody action and the adoption proceedings. Nor does she assert that a determination in the district court of her in loco parentis status would collaterally estop her claim to standing in the adoption proceeding.

While we have held under certain circumstances that an order denying intervention affects a substantial right,[47] this is not an appeal from an order denying intervention. The only effect of the consent order is that the county court has jurisdiction to consider Jennifer's motion to intervene and any other issues related to the adoption proceeding. As we have already discussed, the district court's consent is not a determination of the merits of any matter under the exclusive jurisdiction of the county court.[48]

We conclude that the district court's order of consent does not affect Jennifer's alleged right to intervene in the adoption proceedings. The order of consent was not final, and we lack jurisdiction to address its merits. We turn next to the order of stay.

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[47] See *Streck, Inc. v. Ryan Family*, 297 Neb. 773, 901 N.W.2d 284 (2017). Compare *In re Adoption of Amea R., supra* note 3.

[48] See *Smith v. Smith, supra* note 19.

District Court's Stay Was Not Final Order

[21] Orders staying proceedings to await the termination of related proceedings in another court are usually not final.[49] Stays are often used to regulate the court's own proceedings or to accommodate the needs of parallel proceedings.[50] Regularly allowing immediate appeals from such orders would promote piecemeal appeals, chaos in trial procedure, and a succession of appeals in the same case to secure advisory opinion to govern further actions of the trial court.[51]

[22,23] But the finality of an order granting a stay depends "'"upon the practical effect and impact the stay order might have on the relief requested by the litigants."'"[52] We have held that a substantial right is affected by an order granting a stay if its effect is tantamount to a dismissal or to a permanent denial of the requested relief.[53]

We have recognized orders staying litigation to be final in just two instances, in *Sullivan v. Storz*[54] and in *Kremer v. Rural Community Ins. Co*.[55]

In 1952, in *Sullivan v. Storz*, we said that an order granting a continuance for approximately 2 years under the then

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[49] *In re Interest of L.W.*, 241 Neb. 84, 486 N.W.2d 486 (1992). See, also, *Kinsey v. Colfer, Lyons*, 258 Neb. 832, 606 N.W.2d 78 (2000).

[50] 15A Charles Alan Wright et al., Federal Practice & Procedure § 3914.13 (2001).

[51] See *In re Adoption of Madysen S. et al., supra* note 33.

[52] *In re Interest of L.W., supra* note 49, 241 Neb. at 97, 486 N.W.2d at 496.

[53] See, *Shasta Linen Supply v. Applied Underwriters*, 290 Neb. 640, 861 N.W.2d 425 (2015); *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010); *In re Interest of L.W., supra* note 49.

[54] *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952). See, also, *Tongue v. Lloyd*, 92 Neb. 488, 138 N.W. 738 (1912) (adjournment for more than 90 days, which was in violation of statutory maximum, worked dismissal and was therefore final).

[55] *Kremer v. Rural Community Ins. Co., supra* note 53.

Soldiers' and Sailors' Civil Relief Act affected the plaintiff's substantial right to trial without unreasonable and unnecessary delay.[56] Though we did not describe it as such, other courts reason that certain delays may be so protracted as to effectively dismiss the action and put the plaintiff out of court.[57]

More recently, in *Kremer v. Rural Community Ins. Co.*, we held that an order staying an action while the parties engaged in court-ordered arbitration was final.[58] We said that the order diminished the party's alleged entitlement to litigate in court and was tantamount to a dismissal. The substantial right affected was not the delay but the compulsion to arbitrate and the effective disposition of all the issues presented.[59] We explained that the claimed right to litigate implicated by the court's order "cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do."[60]

[24] Jennifer relies on the concept of jurisdictional priority in asserting that the district court's stay of the custody proceeding affected a substantial right. But we have never held that a stay granted in order to defer a court's jurisdictional priority to another court presents a final order. Jurisdictional priority is not about the rights of parties but the rights of the courts.[61] And it is the effect on the appellant's rights, not

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[56] See *Sullivan v. Storz, supra* note 54. See, also, *Carmicheal v. Rollins*, 280 Neb. 59, 783 N.W.2d 763 (2010).

[57] See, *King v. Cessna Aircraft Co.*, 505 F.3d 1160 (11th Cir. 2007); *Dependable Highway Exp. v. Navigators Ins. Co.*, 498 F.3d 1059 (9th Cir. 2007); *767 Third Ave. v. Consulate General of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000); *American Mfrs. Mut. Ins. v. Edward D. Stone, Jr.*, 743 F.2d 1519 (11th Cir. 1984).

[58] *Kremer v. Rural Community Ins. Co., supra* note 53.

[59] See *id.*

[60] *Id.* at 602, 788 N.W.2d at 549.

[61] See *Charleen J. v. Blake O., supra* note 23.

another's, that justifies the immediate review of an interlocutory order.[62]

There is some federal authority holding that a stay is appealable if its practical effect is to permanently surrender federal jurisdiction over the suit to a state court's judgment by virtue of the res judicata effect of the other judgment precluding any further substantive decision in the federal court.[63] We can find no similar authority pertaining to the surrender of jurisdiction from one court to another within the same state.

[25] Regardless, the custody and the adoption proceedings concerning Chase do not have an identity of issues that would unavoidably result in precluding further substantive decisions by the district court. As Jennifer describes her argument, the custody action would be moot only if the county court approved the stepparent adoption. She concedes that her custody action would be unaffected if the county court does not grant the adoption. Without deciding the merits of Jennifer's underlying mootness assumption, we hold that the mere possibility of mootness is not the functional equivalent of a dismissal or a permanent denial of the requested relief.

[26] Furthermore, we note that the district court's order did not stay the custody action pending resolution of the adoption proceedings. Instead, the action was stayed merely until further order of the court. Presumably, the district court will monitor the adoption proceedings and will revisit and reassess the stay as it sees fit. We have held that a temporary stay that "merely preserves the status quo pending a further order is not

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[62] See *In re Adoption of Amea R., supra* note 3.

[63] See, *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *In re Urohealth Systems, Inc.*, 252 F.3d 504 (1st Cir. 2001); *Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165 (3d Cir. 1999); *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir. 1992).

an order that amounts to a dismissal of the action or that permanently denies relief to a party."[64]

This appeal is distinguishable from *Jesse B. v. Tylee H.*[65] *Jesse B.* presented an appeal from the final judgment dismissing a habeas and declaratory judgment action challenging the legality of the proposed adoption that was pending when the action commenced. Habeas corpus is an appropriate remedy for a claim that a child is being illegally detained by the county court for adoption.[66] Despite this, the district court in *Jesse B.* stayed the habeas and declaratory judgment action until the adoption proceeding concluded. And, after the adoption was approved, the district court dismissed the habeas and declaratory judgment action on the ground that it could no longer exercise jurisdiction.

On appeal, we reversed the dismissal. We disagreed with any contention that the habeas and declaratory judgment action, inasmuch as it challenged the constitutionality of the certain adoption consent statutes, was moot. We also opined that the district court, as the first court to exercise jurisdiction over the claims in the habeas proceeding, was required to retain it to the exclusion of the county court.

But the present custody action, unlike the action in *Jesse B.*, does not challenge the legality of the county court's exercise of jurisdiction over the child to be adopted. Furthermore, *Jesse B.* did not present an immediate appeal from an interlocutory order. It is thus inapposite to the question before us of whether the stay presents a final order.

[27] We conclude that, without more, a litigant's substantial rights are not affected by the mere fact that one court has determined that the interests of judicial administration are

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[64] *Shasta Linen Supply v. Applied Underwriters, supra* note 53, 290 Neb. at 648, 861 N.W.2d at 431.

[65] *Jesse B. v. Tylee H.*, 293 Neb. 973, 883 N.W.2d 1 (2016).

[66] See *id.*

best served by temporarily deferring jurisdictional priority to another court of this state. We hold this to be true even if the issues presented to the court with jurisdictional priority *might* be rendered moot by the time the stay is lifted.

As with the order of consent, Jennifer asserts that her right to intervene was affected by the deferral of jurisdictional priority reflected through the stay. She reasons that the absence of a prior determination by the district court of her in loco parentis status might serve as grounds for the county court to deny her motion to intervene in the adoption proceedings.

Jennifer presents no legal argument, however, that a prior determination of her in loco parentis status by the district court would be required for her to intervene in the adoption proceeding. Such an argument would run contrary to the transitory nature of in loco parentis status.

Neither does Jennifer argue that the county court lacks jurisdiction to determine her in loco parentis status when considering her motion to intervene. As stated, in loco parentis is a concept of standing. Standing ordinarily is determined in the proceeding into which the party wishes to intervene.

Finally, Jennifer does not explain how her alleged right to intervene in the adoption proceedings cannot be effectively vindicated through an appeal in that proceeding. If the right allegedly affected is the right to intervene in another proceeding, then it is more apt to consider whether it can be effectively vindicated in an appeal in that proceeding rather than in the action before us.

Because the district court's order does not determine the merits of any issue pertaining to Jennifer's ability to intervene in the adoption proceedings, Jennifer should seek redress of this right in the adoption proceeding—if indeed the county court again denies her motion. The speculative effect of the district court's stay upon Jennifer's right to intervene in the adoption proceeding in county court does not rise to the level

of "affecting a substantial right"[67] for purposes of a final order analysis.

CONCLUSION

Neither the order granting consent to adoption nor the order staying the custody proceedings pending further order of the court present a final, appealable order. Accordingly, we dismiss Jennifer's appeal for lack of jurisdiction.

Appeal dismissed.

Wright, J., not participating.

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[67] See § 25-1902.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Scott T. Boyd, M.D., appellant, and Great Plains Diagnostics, LLC, appellee, v. John Cook, M.D., et al., appellees.

906 N.W.2d 31

Filed February 2, 2018. No. S-17-177.

1. **Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.
2. **Actions: Arbitration and Award: Appeal and Error.** While a court's decision to issue a stay in an action is generally reviewed under an abuse of discretion standard of review, the decision whether to stay proceedings and compel arbitration is a question of law that an appellate court reviews de novo.
3. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
4. **Jurisdiction: Legislature: Appeal and Error.** In order for an appellate court to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature.
5. **Judgments: Final Orders: Words and Phrases.** A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.
6. **Judgments: Words and Phrases.** Every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.
7. **Final Orders: Appeal and Error.** The only three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.

8. **Final Orders.** Under Neb. Rev. Stat. § 25-1315 (Reissue 2016), an order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not final and is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
9. **Dismissal and Nonsuit: Final Orders.** Generally, an order of dismissal is a final, appealable order.
10. **Actions: Appeal and Error.** An order issuing a stay within an action is generally not appealable.
11. **Actions: Dismissal and Nonsuit: Final Orders.** A stay that is tantamount to a dismissal of an action or has the effect of a permanent denial of the requested relief is a final order.
12. **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.
13. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.
14. ____. A lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.
15. ____. Just as parties may not confer subject matter jurisdiction on a court by consent, neither may parties deprive a court of subject matter jurisdiction by their own agreement.
16. **Arbitration and Award: Contracts: Venue.** Arbitration provisions are properly understood as contractual agreements between parties to resolve their disputes in an arbitral venue.
17. **Arbitration and Award: Contracts: Parties.** A contractual arbitration provision creates a contractual right which may be enforced only by a party to the contract.
18. **Arbitration and Award: Contracts: Waiver.** Like other contractual rights, an agreement to arbitrate can be waived by the parties.
19. **Arbitration and Award: Contracts.** Arbitration provisions are not self-executing.

Appeal from the District Court for Douglas County: Shelly R. Stratman, Judge. Reversed and remanded for further proceedings.

Steven A. Klenda and Geoffrey N. Blue, of Klenda, Gessler & Blue, L.L.C., and Robert W. Futhey and Mark Laughlin, of

Fraser Stryker, P.C., L.L.O., for appellant and appellee Great Plains Diagnostics, LLC.

James J. Frost, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Cassel, J.

I. INTRODUCTION

Nearly 3 years into litigation between two doctors and various associated business entities, the district court determined that because of arbitration and venue provisions in an employment contract, it lacked jurisdiction. The court indefinitely stayed a claim for dissolution of one entity and dismissed all other claims. This appeal followed. Because the arbitration provision, which neither party sought to enforce, did not deprive the court of jurisdiction, we reverse, and remand for further proceedings.

II. BACKGROUND

John Cook, M.D., owned Midwest Pain Clinic, P.C. (Midwest Pain). In early 2012, Midwest Pain employed Scott T. Boyd, M.D., as an anesthesiologist. Midwest Pain and Boyd detailed the terms of Boyd's employment in a written contract.

The employment contract contained a jurisdiction and venue provision: "Except as set forth in [an arbitration provision], the [c]ourt located in Union County, South Dakota, shall have jurisdiction and be the venue of all disputes between [Midwest Pain] and [Boyd], whether such disputes arise from this [a]greement or otherwise." And it contained an arbitration provision stating that "any dispute or controversy arising out of the interpretation or operation" of the contract "shall be resolved by arbitration" as set forth in the agreement.

Based on Boyd's experience operating a urinalysis laboratory, Boyd, Cook, and Cook's son, Jacob Cook (Jacob), formed Great Plains Diagnostics, LLC (Great Plains), in early 2013.

Great Plains was a urinalysis laboratory that operated in a building owned by an associated entity and in which Midwest Pain and another associated entity also operated. Boyd was the majority owner and manager of Great Plains, while Jacob was its executive director. Jacob was also the office manager of Midwest Pain.

Disputes arose regarding access to documents and billing data, billing procedures, and billing codes assigned to services provided. In October 2013, Jacob resigned his positions at both Midwest Pain and Great Plains to take another job out of state. That same month, offers regarding a partnership and a draft separation agreement were refused.

Things apparently came to a head in early January 2014. On January 10, Boyd's employment with Midwest Pain was terminated and he was locked out of Great Plains' offices.

In April 2014, Cook and Jacob sued to dissolve Great Plains. They sought dissolution, the appointment of a receiver to wind up Great Plains' business, and an order enjoining Boyd from disposing of any of Great Plains' assets.

Additional claims, styled as counterclaims, followed. Boyd and Great Plains eventually asserted 10 different claims against Cook, Jacob, Midwest Pain, and other associated entities. Midwest Pain asserted a counterclaim against Boyd, and it made a separate counterclaim with another entity against Great Plains.

Cook, Jacob, Midwest Pain, and two other entities moved for summary judgment on 7 of the 10 claims made by Boyd and Great Plains, which motion, in February 2016, the district court overruled in part and sustained in part. The court granted summary judgment on four of the claims by Boyd and Great Plains and on two other claims as to Boyd, but not as to Great Plains. And the court denied summary judgment on one of the claims.

In January 2017, the district court dismissed sua sponte all of the claims in the case other than the dissolution proceeding as to Great Plains. The court noted that Boyd's employment

contract with Midwest Pain contained an arbitration provision and a provision that jurisdiction and venue for all disputes between Boyd and Midwest Pain are proper in Union County, South Dakota. The court concluded that it lacked jurisdiction over the causes of action in the case, excluding the Great Plains dissolution proceeding, and dismissed those claims. It stayed the dissolution proceeding pending the outcome of arbitration. Boyd moved the court to reconsider its dismissal, which motion the court overruled.

Boyd appealed the district court's order of dismissal and its prior order sustaining in part the motion for summary judgment. We moved the appeal to our docket.

III. ASSIGNMENTS OF ERROR

Boyd's assignments of error, restated, are that the district court erred by (1) dismissing the case for lack of jurisdiction, (2) granting summary judgment on his claim under the Nebraska Wage Payment and Collection Act, and (3) granting summary judgment on his fraudulent inducement claim. Cook and others take no position on the district court's sua sponte dismissal, but argue that this court lacks appellate jurisdiction to review the latter two assignments of error relating to the district court's partial grant of summary judgment. In the alternative, they argue that the district court correctly granted summary judgment on the claims from which Boyd appeals.

IV. STANDARD OF REVIEW

[1] When a jurisdictional question does not involve a factual dispute, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's.[1]

[2] While a court's decision to issue a stay in an action is generally reviewed under an abuse of discretion standard of

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[1] *Hand Cut Steaks Acquisitions v. Lone Star Steakhouse, ante* p. 705, 905 N.W.2d 644 (2018).

review,[2] the decision whether to stay proceedings and compel arbitration is a question of law that an appellate court reviews de novo.[3]

V. ANALYSIS

1. 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.[4] To determine whether we have appellate jurisdiction to review the district court's order of dismissal or its prior summary judgment order, we first recall principles of Nebraska law governing appellate jurisdiction.

(a) Nebraska Appellate Jurisdiction

[4] Under the Nebraska Constitution, this court has only "such appellate jurisdiction as may be provided by law."[5] That is to say, "in order for this court to have jurisdiction over an appeal, appellate jurisdiction must be specifically provided by the Legislature."[6]

[5,6] The Legislature has provided that appellate courts have jurisdiction to review the judgments and final orders of the district courts.[7] And the Legislature has defined a "judgment"

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[2] See, *Sullivan v. Storz*, 156 Neb. 177, 55 N.W.2d 499 (1952). See, also, *Lamb v. Dist. Ct. of Fourth Judicial Dist.*, 356 Mont. 534, 234 P.3d 893 (2010); *In re Application for Water Rights of U.S.*, 101 P.3d 1072 (Colo. 2004).

[3] See *Good Samaritan Coffee Co. v. LaRue Distributing*, 275 Neb. 674, 748 N.W.2d 367 (2008).

[4] *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

[5] Neb. Const. art. V, § 2. Accord *Heckman v. Marchio*, 296 Neb. 458, 894 N.W.2d 296 (2017).

[6] *Heckman v. Marchio, supra* note 5, 296 Neb. at 460, 894 N.W.2d at 299.

[7] Neb. Rev. Stat. § 25-1911 (Reissue 2016).

as "the final determination of the rights of the parties in an action."[8] A final judgment is one that disposes of the case either by dismissing it before hearing is had upon the merits, or after trial by rendition of judgment for the plaintiff or defendant.[9] Conversely, every direction of a court or judge, made or entered in writing and not included in a judgment, is an order.[10]

[7] "Final orders" are also defined by statute:

> An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this chapter.[11]

Thus, the only three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.[12]

Also, Neb. Rev. Stat. § 25-1315 (Reissue 2016) provides that when a case involves multiple claims or multiple parties, a party may generally only appeal when all claims and the rights of all parties have been resolved. If a court issues an order that is final as to some, but not all, of the claims or parties, such an order is appealable "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."[13] In the absence of such an entry

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[8] Neb. Rev. Stat. § 25-1301(1) (Reissue 2016).

[9] *In re Adoption of Madysen S. et al.*, 293 Neb. 646, 879 N.W.2d 34 (2016).

[10] *Id.*

[11] Neb. Rev. Stat. § 25-1902 (Reissue 2016).

[12] See *State v. Combs*, 297 Neb. 422, 900 N.W.2d 473 (2017).

[13] § 25-1315(1).

of judgment, orders adjudicating fewer than all claims or the rights of fewer than all the parties are not final and are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."[14] Thus, absent an entry of judgment under § 25-1315, no appeal will lie unless all claims have been disposed as to all parties in the case.[15]

(b) Finality of District Court's Dismissal

[8] As an initial matter, our appellate review in this case encompasses only the district court's dismissal and stay order and not its prior summary judgment order. As we read the court's dismissal order, it dismissed all nondissolution claims, including those claims on which it previously granted summary judgment. Under § 25-1315(1), an order that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" is not final and "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Because the district court's prior summary judgment order granted summary judgment on only some of the claims and left other claims to be resolved at trial, the order did not adjudicate all of the claims in the case and was thus "subject to revision at any time."[16] In light of the provisional nature of the prior summary judgment order, we understand the district court's order dismissing "all matters, not to include the judicial dissolution of Great Plains," to include those claims on which the court previously granted summary judgment. The district court's dismissal of those claims for lack of jurisdiction

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[14] *Id.*

[15] See *Cerny v. Todco Barricade Co.*, 273 Neb. 800, 733 N.W.2d 877 (2007). See, generally, *Castellar Partners v. AMP Limited*, 291 Neb. 163, 864 N.W.2d 391 (2015) (discussing § 25-1315).

[16] See § 25-1315(1).

effectively vacated its prior summary judgment order. As a result, our review in this appeal is limited to the court's dismissal and stay order.

Before reviewing the appealability of the dismissal order under the general final order statute, we first note that the order is not made appealable by the provisions of Nebraska's Uniform Arbitration Act. Neb. Rev. Stat. § 25-2620 (Reissue 2016) authorizes appellate jurisdiction to review certain arbitration-related orders, such as an order denying an application to compel arbitration or an order granting an application to stay arbitration. But this section does not address whether a party may appeal an order *granting* an application to compel arbitration or to stay judicial proceedings.[17] Appellate jurisdiction to review an order compelling arbitration and staying the action is determined by looking to the general final order statute, § 25-1902.[18] Here, the district court's order, which stayed the dissolution proceeding pending the outcome of arbitration and dismissed all other claims, does not fall within the limited scope of § 25-2620.

Neither is the order here reviewable as a judgment. The district court's order was not a "final determination of the rights of the parties in an action"[19] because it did not determine all of the parties' rights. The order left the dissolution proceeding unresolved, staying that claim pending the outcome of arbitration.[20]

[9] It necessarily follows that we have jurisdiction to review the court's dismissal order only if it constitutes a final order. Had the district court's order simply dismissed all claims, it would unquestionably be a final order. Generally, an order of

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[17] *Kremer v. Rural Community Ins. Co.*, 280 Neb. 591, 788 N.W.2d 538 (2010).

[18] *Id.*

[19] § 25-1301(1). See, also, *Cattle Nat. Bank & Trust Co. v. Watson*, 293 Neb. 943, 880 N.W.2d 906 (2016).

[20] See *Cattle Nat. Bank & Trust Co. v. Watson, supra* note 19.

dismissal is a final, appealable order.[21] But the district court's order dismissed all claims except the Great Plains dissolution proceeding, which it stayed pending arbitration.

Thus, whether we have jurisdiction turns on whether the order staying the dissolution proceeding is a final order. If the stay is not a final order, then the district court's order under § 25-1315 would be one that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties" and would therefore not be final. If the stay is a final order, then the dismissal and stay order does not fall within § 25-1315 and we have appellate jurisdiction to review it.

[10,11] An order issuing a stay within an action is generally not appealable.[22] But we have held that a stay that is "tantamount to a dismissal of an action or has the effect of a permanent denial of the requested relief" is a final order.[23] In *Kremer v. Rural Community Ins. Co.*,[24] we concluded that a court order under Nebraska's Uniform Arbitration Act staying an action has the same effect as a dismissal because "[t]he parties cannot litigate their dispute in state courts." Though the order at issue here is distinct from the one in *Kremer*, we reach the same conclusion.

In *Kremer*, the trial court, on the defendant's motion, compelled arbitration and stayed the case. Here, the court's order was issued sua sponte and did not compel arbitration, but dismissed most claims because of the arbitration provision and stayed the remaining claim, for dissolution of Great Plains, pending the result of arbitration. The order staying the dissolution proceeding was tantamount to a dismissal of that

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[21] *Bargmann v. State*, 257 Neb. 766, 600 N.W.2d 797 (1999) (decided before enactment of § 25-1315); *Robinson v. NABCO, Inc.*, 10 Neb. App. 968, 641 N.W.2d 401 (2002); *Janet K. v. Kevin B.*, 5 Neb. App. 169, 556 N.W.2d 270 (1996).

[22] *Kremer v. Rural Community Ins. Co., supra* note 17.

[23] *Id.* at 600, 788 N.W.2d at 548.

[24] *Id.* at 600-01, 788 N.W.2d at 548.

claim, because it stayed that claim for an indefinite period of time and conditioned the lifting of the stay on the parties' arbitrating their other claims. It was thus similar to the order in *Kremer* in that it put the parties out of court and effectively forced them to arbitrate their claims. We conclude that the order staying the Great Plains dissolution proceeding was a final order.

Because both the stay of the dissolution proceeding and the dismissal of all other claims were final, the order staying and dismissing claims disposed of all claims as to all parties within the meaning of § 25-1315. We have jurisdiction to review the district court's order.

2. District Court's Dismissal and Stay Order

Boyd argues that the district court erred by dismissing the nondissolution claims and staying the dissolution proceeding, while the appellees take no position on the correctness of the court's order. Boyd argues that the employment contract's arbitration provision had been waived by the parties by extensively litigating the claims subject to the provision and that the venue and jurisdiction provision did not deprive the district court of subject matter jurisdiction. We agree that the district court's dismissal and stay order was erroneous.

[12-14] When the district court concluded that it lacked jurisdiction, it did not specify whether it was referring to personal or subject matter jurisdiction. But the court appeared to be referring to the latter. 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.[25] American courts long ago adopted the "'no-waiver, no-consent' rule" for subject matter jurisdiction from the English

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[25] *J.S. v. Grand Island Public Schools*, 297 Neb. 347, 899 N.W.2d 893 (2017).

common law.[26] As we have frequently stated, parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created by waiver, estoppel, consent, or conduct of the parties.[27] And a lack of subject matter jurisdiction may be raised at any time by any party or by the court sua sponte.[28]

[15] Just as parties may not confer subject matter jurisdiction on a court by consent, neither may parties deprive a court of subject matter jurisdiction by their own agreement.[29] A court's subject matter jurisdiction derives from the constitutional and statutory sources of its authority, not the agreement of the litigants that appear before it.[30]

[16] The district court erred in concluding that the arbitration and jurisdiction and venue provisions of the employment agreement deprived it of subject matter jurisdiction. As a basic principle of law, a contractual agreement can do no such thing.[31] While some older case law inaptly referred to arbitration agreements as "oust[ing the] courts of jurisdiction,"[32] such provisions are properly understood as contractual agreements between parties to resolve their disputes in an arbitral

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[26] Larry L. Teply & Ralph U. Whitten, *Civil Procedure* 44 (5th ed. 2013) (emphasis omitted).

[27] *J.S. v. Grand Island Public Schools, supra* note 25.

[28] *Id.*

[29] *State, etc. v. University of Wisconsin-Madison*, 96 Wis. 2d 492, 292 N.W.2d 657 (Wis. App. 1980). See, *J.S. v. Grand Island Public Schools, supra* note 25; *Shaffer v. Jeffery*, 915 P.2d 910 (Okla. 1996).

[30] *Dial 800 v. Fesbinder*, 118 Cal. App. 4th 32, 12 Cal. Rptr. 3d 711 (2004) (as modified). See, generally, *J.S. v. Grand Island Public Schools, supra* note 25 (subject matter jurisdiction).

[31] See, *Dial 800 v. Fesbinder, supra* note 30; *State, etc. v. University of Wisconsin-Madison, supra* note 29.

[32] See, e.g., *Dowd v. First Omaha Sec. Corp.*, 242 Neb. 347, 353, 495 N.W.2d 36, 40 (1993). But see *Park Construction Co. v. Independent School Dist. No. 32*, 209 Minn. 182, 296 N.W. 475 (1941).

venue.[33] This court has recognized that "[a]rbitration is purely a matter of contract."[34] And while an arbitration provision, like a forum selection provision, may create an enforceable right to resolve disputes between the parties to the contract in another forum, such provisions do not bear on the subject matter jurisdiction of the court.[35] As the Supreme Court of Oklahoma explained, "[t]he contractual right to compel arbitration [is] a defense to an action on the contract," but "[t]he affirmative defense of an agreement to arbitrate is not the same thing as lack of subject matter jurisdiction."[36] An order compelling arbitration made pursuant to Nebraska's Uniform Arbitration Act[37] or the Federal Arbitration Act[38] may deprive a court of jurisdiction to adjudicate the claims subject to arbitration, but it is the arbitration order and the underlying statute, not the arbitration agreement itself, that deprive the court of jurisdiction.[39]

And the employment contract here does not even purport to deprive the court of subject matter jurisdiction. The arbitration clause provides that disputes between Boyd and Midwest Pain are to be resolved by arbitration. And the jurisdiction

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[33] See, *In re Nestorovski Estate*, 283 Mich. App. 177, 769 N.W.2d 720 (2009); *Catrini v. Erickson*, 113 Conn. App. 195, 966 A.2d 275 (2009); *Park Construction Co. v. Independent School Dist. No. 32, supra* note 32.

[34] *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 13, 637 N.W.2d 876, 880 (2002).

[35] *Catrini v. Erickson, supra* note 33. See, *Big City Small World Bakery Cafe, LLC v. Francis David Corporation*, 265 F. Supp. 3d 750 (2017); *Grasty v. Colorado Technical University*, 599 F. Appx. 596 (7th Cir. 2015) (memorandum opinion). See, also, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974).

[36] *Shaffer v. Jeffery, supra* note 29, 915 P.2d at 913.

[37] Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 2016).

[38] 9 U.S.C. §§ 1 to 16 (2012).

[39] *Kremer v. Rural Community Ins. Co., supra* note 17. See *Ruff v. Splice, Inc.*, 398 Ill. App. 3d 431, 923 N.E.2d 1250, 338 Ill. Dec. 101 (2010).

and venue provision states that "the [c]ourt located in Union County, South Dakota, shall have jurisdiction and be the venue of all disputes between [Midwest Pain] and [Boyd], whether such disputes arise from this [a]greement or otherwise." If the reference to jurisdiction in this latter provision were somehow read to refer to subject matter—rather than personal—jurisdiction, such a provision would have no legal effect.

[17-19] Finally, from the premise that a contractual arbitration provision merely creates a contractual right, it necessarily follows that this right may be enforced only by a party to the contract.[40] Here, neither party sought to enforce the arbitration provision, yet the court dismissed or stayed all claims in the case in an attempt to push the dispute into arbitration. But like other contractual rights, an agreement to arbitrate can be waived by the parties.[41] Arbitration provisions are not self-executing.[42] It is improper for a court to try to enforce such a contractual right on behalf of the parties.[43] We need not decide whether the extensive litigation that has occurred in this case constitutes a waiver of the arbitration agreement because neither party sought to enforce the arbitration agreement in the first place. Waiver of a contractual provision is a defense to enforcement of that provision, but a party must first seek to invoke the provision before it is necessary to consider the

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[40] *Yang v. Majestic Blue Fisheries, LLC*, 876 F.3d 996 (9th Cir. 2017) (only party to arbitration agreement may enforce agreement).

[41] *Good Samaritan Coffee Co. v. LaRue Distributing, supra* note 3.

[42] *Dial 800 v. Fesbinder, supra* note 30. See, also, *Good Samaritan Coffee Co. v. LaRue Distributing, supra* note 3.

[43] See *Yang v. Majestic Blue Fisheries, LLC, supra* note 40. Cf., *Sarpy Cty. Farm Bureau v. Learning Community*, 283 Neb. 212, 808 N.W.2d 598 (2012) (courts should generally not decide issues not raised by parties); *Good Samaritan Coffee Co. v. LaRue Distributing, supra* note 3 (arbitration waiver).

affirmative defense of waiver.[44] Because no party has sought to enforce the arbitration agreement, it was error for the district court to do so on its own accord.

VI. CONCLUSION

For the reasons set forth above, we reverse the stay and dismissal order and remand the cause for further proceedings.

Reversed and remanded for further proceedings.

Wright, J., not participating.

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[44] See, *Omaha Police Union Local 101 v. City of Omaha*, 292 Neb. 381, 872 N.W.2d 765 (2015) (waiver generally); *Good Samaritan Coffee Co. v. LaRue Distributing, supra* note 3. See, also, *Dial 800 v. Fesbinder, supra* note 30.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Donald V. Cain, Jr., appellant, v. Custer County Board of Equalization, appellee.

906 N.W.2d 285

Filed February 2, 2018. No. S-17-370.

1. **Taxation: Judgments: Appeal and Error.** An appellate court reviews Nebraska Tax Equalization and Review Commission decisions for errors appearing on the record.
2. ____: ____: ____. When reviewing a Nebraska Tax Equalization and Review Commission judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Administrative Law.** An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion.
4. ____. Administrative agency action taken in disregard of the agency's own substantive rules is arbitrary and capricious.
5. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo.
6. **Constitutional Law: Due Process.** The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.
7. **Administrative Law: Statutes.** The meaning and interpretation of statutes and regulations are questions of law.
8. **Due Process.** Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.
9. **Administrative Law: Due Process.** A party appearing in an adjudication hearing before an agency or tribunal is entitled to due process protections similar to those given to litigants in a judicial proceeding.
10. **Due Process: Notice.** Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due

process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.

11. **Taxation.** An owner is not deprived of his property without due process of law by means of taxation if he has an opportunity to question its validity or amount of such tax or assessment in some stage of the proceedings, either before that amount is finally determined or in a subsequent proceeding for its collection.
12. **Judges: Evidence.** Generally, a successor judge may not make a decision based on conflicting evidence that a predecessor judge heard.
13. **Trial: Judges: Due Process: Witnesses.** Due process entitles a litigant to have all the evidence submitted to a single judge who can see the witnesses testify and, thus, weigh their testimony and judge their credibility.
14. **Due Process.** Oral argument is not an essential element of due process.
15. **Trial: Judges: Due Process: Waiver.** A party has a due process right that a successor or substitute judge may not render a judgment for a predecessor judge who conducted the trial, but the party may waive this right and agree to have a successor judge decide the case.
16. **Taxation: Valuation: Presumptions: Evidence.** A presumption exists that a county board of equalization has faithfully performed its official duties in making a property tax assessment and has acted upon sufficient competent evidence to justify its action. The presumption disappears when competent evidence to the contrary is presented. Once the presumption is rebutted, whether the valuation assessed is reasonable becomes a question of fact based on all of the evidence.
17. **Taxation: Valuation: Proof.** The burden of showing a property tax valuation to be unreasonable rests upon the taxpayer.
18. ____: ____: ____. The taxpayer's burden to show a property tax valuation to be unreasonable is not met by showing a mere difference of opinion. Rather, the taxpayer must establish the valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is a result of arbitrary or unreasonable action and not just a mere error in judgment.
19. **Taxation: Notice: Proof.** When the Tax Equalization and Review Commission hears a property tax protest under Neb. Rev. Stat. § 77-1507.01 (Reissue 2009) and performs the factfinding functions that a county board of equalization would have if the county had timely provided notice to the taxpayer, the taxpayer's burden of persuasion is by a preponderance of the evidence.
20. **Evidence: Words and Phrases.** Competent evidence is evidence that is admissible and tends to establish a fact in issue.

21. **Property: Valuation: Witnesses.** A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation.
22. **Taxation: Valuation: Evidence.** When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.
23. **Taxation: Valuation.** In tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.
24. **Evidence: Presumptions.** A presumption may take the place of evidence unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the determination of the issues depends upon the evidence.
25. ____: ____. A presumption is not evidence and should never be placed in the scale to be weighed as evidence.
26. **Administrative Law.** If an agency rule is but an aid to help the agency in its decision, then the rule is not binding upon the agency unless the rule confers a procedural benefit upon a party.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded with directions.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellant.

Steven R. Bowers, Custer County Attorney, and Glenn A. Clark for appellee.

Heavican, C.J., Wright, Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Funke, J.

Donald V. Cain, Jr., appeals an order of the Tax Equalization and Review Commission (TERC) affirming the decision of the Custer County assessor (Assessor) regarding the 2012 taxable value of his agricultural property. Because we find error on the record, we reverse the TERC's order and remand the cause with directions to sustain Cain's property valuation protests for the 2012 tax year.

I. BACKGROUND

Cain owns property in Custer County southwest of Broken Bow, Nebraska. The subject property encompasses 10 contiguous parcels totaling 1,093.93 acres of agricultural land exclusively used for cattle production and grazing. The land consists of rolling hills with Valentine sand and native grass. About 756 acres of the property is irrigated native grass upon which Cain grazes cattle. In 2006, Cain improved this portion of his land with center pivot irrigation systems to enhance livestock grazing. Cain does not cultivate row crops on the subject property.

In 2012, the Assessor increased the total assessed value of Cain's property from $734,968 to $1,834,925. This represented nearly a 250-percent property tax increase from the prior year, without improvements being made to the property during that time. This sharp increase was largely due to the Assessor's decision to change the classification of irrigated grassland for purposes of valuation. From 2006 to 2012, the Assessor had used a Nebraska Department of Revenue formula to adjust the value of irrigated native grassland. In 2012, the Assessor reclassified irrigated grassland by uniformly classifying all irrigated land as irrigated cropland, whether the land is used for "cultivated row crops, small grains, seeded hay, forage crops, or grasses."[1]

Cain protested. Because Cain had not been provided timely notice of the increased assessments, he was not afforded an evidentiary hearing for his protests before the Custer County Board of Equalization. Pursuant to Neb. Rev. Stat. § 77-1507.01 (Reissue 2009), Cain directly petitioned the TERC to determine the actual value of each parcel. The TERC consolidated Cain's protests and afforded him a hearing on his petitions. A divided panel of two TERC commissioners, Nancy J. Salmon and Thomas D. Freimuth, affirmed the Assessor's increased valuations of Cain's property for 2012.

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[1] See 350 Neb. Admin. Code, ch. 14, § 002.21B (2009).

Following an appeal, in *Cain v. Custer Cty. Bd. of Equal.* (*Cain I*),[2] we found plain error and reversed, and remanded. We found the TERC's role according to the procedure provided under § 77-1507.01 was to "'determine the actual value or special value of real property for that year.'"[3] We found the TERC's decision to determine Cain's protests using the clear and convincing evidence standard provided under Neb. Rev. Stat. § 77-5016(9) (Cum. Supp. 2016) was erroneous, because such standard applied in "'all appeals'" before the TERC.[4] However, the TERC's role was not to conduct an appellate review but to perform an initial review of Cain's challenges to the increased assessments. We held the TERC's decision erroneously increased the taxpayer's burden of proof in a proceeding under § 77-1507.01. We remanded the cause with instructions for the TERC to reconsider the matter on the record using the preponderance of the evidence standard applicable to initial protests before a county board of equalization.

Freimuth resigned as a TERC commissioner in September 2015, so upon remand, the matter was assigned to another commissioner, Robert W. Hotz. Cain moved for a new hearing on the merits and an opportunity to present supplemental evidence and argue the case under the preponderance of the evidence standard. He also filed a notice of constitutional issues in which he requested the TERC to vacate the Assessor's valuations of his property and determine that the statutes he challenged were unconstitutional. The TERC denied both requests, determining that it had no authority to do anything other than follow this court's instructions on remand.

Both Hotz and Salmon reviewed the full record and, without an additional hearing, considered Cain's protests. The TERC issued a new order which reversed in part the Assessor's

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[2] *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

[3] *Id.* at 745, 868 N.W.2d at 346.

[4] *Id.* at 748, 868 N.W.2d at 347.

determination with respect to three parcels of Cain's land, because, due to clerical errors, these parcels had been incorrectly assessed as including water wells. For the remaining seven parcels, the TERC accepted the Assessor's reasoning and affirmed the Assessor's 2012 valuations of Cain's property. The TERC's order stated, "[TERC] finds that the presumptions in favor of the initial valuations by the . . . Assessor have not been rebutted by a preponderance of the evidence . . . ."

Cain timely appeals.

II. ASSIGNMENTS OF ERROR

Cain assigns, restated, that the TERC erred by (1) failing to conduct a hearing following remand which permitted him argument under the correct standard of review, (2) failing to hear constitutional claims and decide those issues, (3) rendering a decision not supported by sufficient evidence, (4) failing to follow remand instructions, (5) making errors of law, and (6) violating Cain's constitutional rights by failing to classify his property in a uniform and proportionate manner.

III. STANDARD OF REVIEW

[1-5] We review decisions of the TERC for error appearing on the record of the commission.[5] When reviewing a TERC judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.[6] An administrative agency's decision is arbitrary when it is made in disregard of the facts or circumstances without some basis which would lead a reasonable person to the same conclusion.[7] Administrative agency action

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[5] Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2016); *Burdess v. Washington Cty. Bd. of Equal., ante* p. 166, 903 N.W.2d 35 (2017).

[6] See *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 296 Neb. 501, 894 N.W.2d 308 (2017).

[7] *Brenner v. Banner Cty. Bd. of Equal.*, 276 Neb. 275, 753 N.W.2d 802 (2008).

taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[8] Questions of law arising during appellate review of the TERC's decisions are reviewed de novo.[9]

[6,7] The determination of whether the procedures afforded to an individual comport with constitutional requirements for procedural due process presents a question of law.[10] The meaning and interpretation of statutes and regulations are questions of law.[11]

IV. ANALYSIS

We first address whether Cain's due process rights were violated. We then address whether the TERC erred in affirming the Assessor's valuation of Cain's property for the 2012 tax year.

1. No Due Process Right to Oral Argument

Cain assigns that the TERC violated his due process rights by not permitting him to argue how the preponderance of the evidence standard of proof applied to the adduced evidence.

[8-11] Due process principles protect individuals from arbitrary deprivation of life, liberty, or property without due process of law.[12] A party appearing in an adjudication hearing before an agency or tribunal is entitled to due process protections similar to those given to litigants in a judicial proceeding.[13]

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[8] *Blakely v. Lancaster County*, 284 Neb. 659, 825 N.W.2d 149 (2012).

[9] *Brenner, supra* note 7.

[10] *In re Interest of Carmelo G.*, 296 Neb. 805, 896 N.W.2d 902 (2017); *State v. McCurry*, 296 Neb. 40, 891 N.W.2d 663 (2017).

[11] *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017).

[12] *Bryan M. v. Anne B.*, 292 Neb. 725, 874 N.W.2d 824 (2016).

[13] See, *Crown Products Co. v. City of Ralston*, 253 Neb. 1, 567 N.W.2d 294 (1997); *Geringer v. City of Omaha*, 237 Neb. 928, 468 N.W.2d 372 (1991); *Krusemark v. Thurston County Bd. of Equal.*, 10 Neb. App. 35, 624 N.W.2d 328 (2001).

Due process does not guarantee an individual any particular form of state procedure. Instead, the requirements of due process are satisfied if a person has reasonable notice and an opportunity to be heard appropriate to the nature of the proceeding and the character of the rights which might be affected by it.[14] This court has stated that an owner is not deprived of his property without due process of law by means of taxation if he has an opportunity to question its validity or the amount of such tax or assessment at some stage of the proceedings, either before that amount is finally determined or in a subsequent proceeding for its collection.[15]

In Cain's petition for review, he argued that because, after remand, only one of the commissioners assigned to decide Cain's protests was present at the evidentiary hearing, the TERC failed to decide the matter by a quorum, as required under Neb. Rev. Stat. § 77-5005(2) (Cum. Supp. 2016). Cain argued this procedure violated his due process rights under Neb. Rev. Stat. §§ 77-5003(1) and 77-5015 (Cum. Supp. 2016).

[12,13] In *Liljestrand v. Dell Enters.*,[16] we found a workers' compensation claimant's due process rights were violated where the original trial judge retired during an appeal and, on remand, the case was assigned to a new judge who reviewed the record and issued an order without an evidentiary hearing. In reversing, and remanding for a new trial, we agreed with the general rule that a successor judge may not make a decision based on conflicting evidence that a predecessor judge heard.[17] We stated that "'due process entitles a litigant to have all the evidence submitted to a single judge who can see the

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[14] *In re Interest of S.J.*, 283 Neb. 507, 810 N.W.2d 720 (2012); *Slansky v. Nebraska State Patrol*, 268 Neb. 360, 685 N.W.2d 335 (2004).

[15] *Farmers Co-op Assn. v. Boone County*, 213 Neb. 763, 332 N.W.2d 32 (1983).

[16] *Liljestrand v. Dell Enters.*, 287 Neb. 242, 842 N.W.2d 575 (2014).

[17] *Id.*

witnesses testify and, thus, weigh their testimony and judge their credibility.'"[18] We noted the issue for determination was the nature and extent of the claimant's permanent disability, which we found involved evaluating the credibility of the witnesses, and that the successor judge had no opportunity to assess credibility before deciding the case.

At oral argument in this appeal, Cain conceded he had not assigned as error the TERC's refusal to hear additional evidence. Cain did not request a new evidentiary hearing before Hotz, the successor commissioner. Cain noted our instructions on remand were limited to reconsideration on the record using the preponderance of the evidence standard (though we could not have predicted one of the two commissioners who heard the evidence would resign). Instead, Cain argued he was entitled to argue how the standard of proof applied to the evidence. Here, Cain asserts only the right to make a legal argument pertaining to an already existing record.

[14,15] We have not recognized oral argument as a free-standing procedural due process right.[19] Oral argument may be desirable but it is not indispensable, nor is it an essential element of due process.[20] The due process right protected in *Liljestrand*, that a successor or substitute judge may not render a judgment for a predecessor judge who conducted the trial, is primarily based on the need for the ruling judge to consider credibility where the evidence is in conflict.[21] A party may

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[18] *Id*. at 248, 842 N.W.2d at 580 (quoting *Smith v. Freeman*, 232 Ill. 2d 218, 902 N.E.2d 1069, 327 Ill. Dec. 683 (2009)).

[19] *Ready Mix, Inc. v. Nebraska Railroads*, 181 Neb. 697, 150 N.W.2d 275 (1967).

[20] See *State v. Smith*, 199 Neb. 368, 259 N.W.2d 16 (1977).

[21] *Liljestrand, supra* note 16. See, also, *State ex rel. Bonner v. McSwine*, 14 Neb. App. 486, 709 N.W.2d 691 (2006); *Newman v. Rehr*, 10 Neb. App. 356, 630 N.W.2d 19 (2001), *affirmed on other grounds* 263 Neb. 111, 638 N.W.2d 863 (2002); *In re Marriage of Seyler*, 559 N.W.2d 7 (Iowa 1997).

waive this right and agree to have a successor judge decide the case.[22]

We find, by asserting only the right to make a legal argument to the decisionmaker regarding the controlling standard of evidence and by failing to request relief in the form of a new evidentiary hearing before the TERC, that Cain waived the due process rights applicable in *Liljestrand*. Cain's argument that he was entitled to argue the case following remand is without merit. Cain's due process rights were not violated.

2. TERC Erred in Affirming Assessor's Valuations

Cain argues the TERC erred in affirming the Assessor's valuations of his property for the 2012 tax year.

Under Neb. Rev. Stat. § 77-201(1) (Reissue 2009), all real property, unless expressly exempt, is subject to taxation and is to be valued at its actual value. As we noted in *Burdess v. Washington Cty. Bd. of Equal.*,[23] the Legislature has made agricultural and horticultural land a separate and distinct class of property for purposes of property taxation. While most real property is valued for taxation purposes at 100 percent of its actual value, which is "the market value of real property in the ordinary course of trade,"[24] the Legislature has determined that agricultural and horticultural land shall be valued at 75 percent of its value.[25]

In *Bartlett v. Dawes Cty. Bd. of Equal.*,[26] we reviewed the statutory scheme used to value agricultural land:

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[22] *Smith, supra* note 18; *In re Marriage of Seyler*, *supra* note 21. See *Louis v. Nebraska Dept. of Corr. Servs.*, 12 Neb. App. 944, 687 N.W.2d 438 (2004).

[23] *Burdess, supra* note 5.

[24] Neb. Rev. Stat. § 77-112 (Reissue 2009).

[25] See § 77-201(2).

[26] *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 962, 613 N.W.2d 810, 817 (2000).

> Agricultural land constitutes a separate and distinct class of property for purposes of property taxation.[27] Neb. Const. art. VIII requires uniform and proportionate assessment within the class of agricultural land. Agricultural land is then divided into "categories" such as irrigated cropland, dry cropland, and grassland.[28] These categories are further divided into subclasses based on soil classification.[29]

This court, in *Bartlett*, rejected the assessor's use of market areas employed in the case as violative of the statutory scheme set out by the Legislature. The evidence indicated that the market areas established by the assessor were not based on soil classification, but, instead, were based on assessment-to-sales ratios. Because the subclasses of agricultural land had to be based on soil classification, not upon where the land was located, we determined that the market areas did not constitute subclasses of agricultural land as defined by our statutes.

After our decision in *Bartlett*, the Legislature enacted Neb. Rev. Stat. § 77-103.01 (Reissue 2009),[30] which set forth that a class or subclass based on market characteristics shall be based on characteristics that affect the actual value in a different manner than it affects the actual value of properties not within the market characteristic class or subclass. The factors to consider now include parcel use, parcel type, location, geographic characteristics, zoning, city size, parcel size, and market characteristics appropriate for the valuation of such land.

The Nebraska Court of Appeals, in *Vanderheiden v. Cedar Cty. Bd. of Equal.*,[31] found market areas based upon an

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[27] See Neb. Rev. Stat. § 77-1359 (Cum. Supp. 2016).

[28] See Neb. Rev. Stat. § 77-1363 (Cum. Supp. 2016).

[29] See *id.*

[30] See *Vanderheiden v. Cedar Cty. Bd. of Equal.*, 16 Neb. App. 578, 746 N.W.2d 717 (2008).

[31] *Vanderheiden, supra* note 30.

examination of the land for soil types, productivity, availability of water, relation to market distribution points, land use, geography, and sales history were in accordance with § 77-103.01.

Under § 77-112, actual value of real property for purposes of taxation may be determined using professionally accepted mass appraisal methods, including, but not limited to, (1) the sales comparison approach, taking into account factors such as location, zoning, and current functional use; (2) the income approach; and (3) the cost approach. This statute does not require use of all the specified factors, but requires use of applicable statutory factors, individually or in combination, to determine actual value of real estate for tax purposes.[32]

As set forth in Neb. Rev. Stat. § 77-1507.01 (Reissue 2009), "[a]ny person otherwise having a right to appeal may petition the [TERC] to determine the actual value or special value of real property for that year . . . ."

[16-19] In initial protests before the TERC, the valuation by the assessor is presumed to be correct, and the burden of proof rests upon the taxpayer to rebut this presumption and to prove that an assessment is excessive.[33] A presumption exists that a county board of equalization has faithfully performed its official duties in making an assessment and has acted upon sufficient competent evidence to justify its actions.[34] The presumption disappears when competent evidence to the contrary is presented.[35] Once the presumption is rebutted, whether the valuation assessed is reasonable becomes a question of fact based on all of the evidence, with the burden

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[32] *US Ecology v. Boyd Cty. Bd. of Equal.*, 256 Neb. 7, 588 N.W.2d 575 (1999).

[33] *Cain I, supra* note 2.

[34] See, § 77-5016(9); *JQH La Vista Conf. Ctr. v. Sarpy Cty. Bd. of Equal.*, 285 Neb. 120, 825 N.W.2d 447 (2013); *Brenner, supra* note 7 (citing *Ideal Basic Indus. v. Nuckolls Cty. Bd. of Equal.*, 231 Neb. 653, 437 N.W.2d 501 (1989)).

[35] *JQH La Vista Conf. Ctr., supra* note 34.

of proof resting on the taxpayer.[36] The taxpayer's burden to show the valuation to be unreasonable is not met by showing a mere difference of opinion.[37] Rather, the taxpayer must establish the valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is a result of arbitrary or unreasonable action and not just a mere error in judgment.[38] When the TERC hears a property tax protest under § 77-1507.01 and performs the factfinding functions that a county board of equalization would have if the county had timely provided notice to the taxpayer, the taxpayer's burden of persuasion is by a preponderance of the evidence.[39]

Thus, the ultimate issue of fact in this case is the actual value of Cain's subject property in 2012.

(a) Evidence

For the purpose of property tax assessments, the Assessor developed five market areas based on her record of property sales, soil type, availability of water, and topography, but not based on land use. Cain's property is located in market area 1, the highest valued land in the county, and has been valued as part of that market area for some time. Within each market area, the Assessor categorized agricultural property into subclasses of irrigated cropland, grassland, and dryland, which were designated as "A," "G," and "D," respectively. Property in each category was further classified by soil capability. A rating from "1" to "4" was given to each parcel, with "1" representing soil with the highest productivity rating and "4" representing the lowest quality soil. Under this framework, for example, category "4A" was irrigated cropland with poor soil

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[36] See *id.*

[37] See *id.* (citing *Bumgarner v. County of Valley*, 208 Neb. 361, 303 N.W.2d 307 (1981)).

[38] See *id.*

[39] See *Cain I, supra* note 2.

and category "4G" was grassland with poor soil. But property classified as "4A" or "4G" was valued differently depending upon the market area in which it was located.

Market areas 1, 2, and 3 are most relevant. Market area 1 primarily comprised the lower southeastern portion of the county, which contained soil suitable for crop production. Market area 1 contains most of the farm activity in the county and contains land with silt loam and flat row crop production. Market area 2, characterized as the Sandhills region, primarily comprised the northwestern and northern parts of the county. Market area 3 was a transitional area between market areas 1 and 2.

In 2012, the Assessor designated the nonirrigated portions of Cain's property as grassland and valued such land between $495 and $505 per acre, depending on soil capability. The Assessor classified the irrigated portions of Cain's property as irrigated cropland, or "A." This meant Cain's irrigated land was valued between a range of "1A" and "4A," or between $2,100 and $2,930 per acre in market area 1. The Assessor placed almost 600 acres of Cain's land into the "4A" category, poor quality irrigated cropland valued at $2,100 per acre. The same category was valued per acre at $450 in market area 2 and $870 in market area 3. The remaining 100-plus irrigated acres were valued between $2,105 and $2,930.

At the evidentiary hearing, Cain adduced evidence that the Assessor inequitably classified the irrigated portions of his land, because the valuations did not take into consideration that his property was not comparable to irrigated cropland in terms of soil type, topography, and land use. Cain irrigated only native grasses. In 2006, he drilled two wells for pivot irrigation to combat dust from a feedlot south of his property. In all, his property had three wells and seven irrigation pivots. He testified he used irrigation conservatively to avoid erosion. Cain submitted affidavits stating his opinion that the taxable value of his property for the 2012 year was $778,625, or an average of $711.77 per acre.

Cain and his expert witness, Cyril Thoene, both testified the best and most productive use of Cain's property was for cattle grazing and not for row crop production, because the soil was mostly Valentine sand. Thoene presented a county soil map which showed that a band of Valentine sand ran southeast from the Sandhills region to an area just south of Broken Bow, where Cain's property was located. The land containing Valentine sand is fragile with little fertility. The land has slopes, is highly erodible, and overall is not suitable for farming.

In 2010, Thoene, a certified general appraiser, appraised Cain's property and determined that approximately 95 percent of the soil was rolling Valentine sand with steep slopes. He testified that Valentine soils are some of the poorer land that one could farm. He opined that Cain's property was most comparable to property in market area 2, the lowest valued agricultural land in the county. He stated that but for the presence of irrigation systems, Cain's property would be identical to the Sandhills grassland found in market area 2. Because of its proximity to Broken Bow, however, Thoene believed the property should be valued between the 2012 values for "4A" property in market area 2 ($450 per acre) and market area 3 ($870 per acre).

In completing his appraisal report, Thoene considered each of the three appraisal methods—the sales comparison approach, the income approach, and the cost approach—and determined a value estimate based upon the Uniform Standards of Professional Appraisal Practice. Thoene said that the uniqueness of Cain's irrigated grassland made it difficult to find comparable sales. He kept records of every sale in the county and had not seen any recent sales of irrigated grassland in Custer County. But he found comparable sales in 2010 outside the county where the property owner had installed pivot irrigation but used the land for livestock grazing. Thoene determined that those properties sold for about one-quarter to one-third of the selling price for average- to high-quality irrigated cropland. Thoene stated these market findings supported his

opinion that Cain's property should be valued between $450 and $870 per acre.

The Assessor explained how she classified Cain's property. She testified that even though Cain's property contained Valentine sand, the property was not equivalent to property in market area 2, because Cain's soil had "a little loam in it." She determined this by using a Department of Revenue soil chart not offered into evidence. She explained her valuations accounted for soil types through market sales and the soil capability subclassifications.

The Assessor admitted that Cain's property was valuated the same as other irrigated cropland in market area 1, regardless of its topography and whether it was suitable for crop production. She conceded that Cain's property had poor quality soil and that if irrigation systems were not present on the land, his property would be classified as grassland and valued between $495 to $510 per acre.

The Assessor explained her property valuations were based upon state statutes and Department of Revenue rules and regulations and that she lacked authority to make adjustments for irrigated grassland. She relied upon the Department of Revenue's regulation, 350 Neb. Admin. Code, ch. 14, § 002.21B, which defines irrigated cropland as all land where irrigation is used, whether for "cultivated row crops, small grains, seeded hay, forage crops, or grasses." She admitted, however, that from 2006 to 2012, she used a formula to adjust the value of irrigated grassland. She said both the county and the Department of Revenue were aware of her practice to adjust valuations for irrigated grassland. She conceded that the Department of Revenue did not require her to discontinue making adjustments for irrigated grassland.

In response to a question posed by Freimuth, the Assessor admitted the actual value of Cain's property could be somewhere between the value of property in market areas 2 and 3:

> Q Do you agree with . . . Thoene's position that it's somewhere between Market Area 2 and Market Area 3,

somewhere between 450 and 870? If you were to say, from a (indiscernible) standpoint or similarity standpoint, would you agree with . . . Thoene that it's somewhere between 450 and 870, Market Area 2, Market Area 3 valuation?

A It could possibly be. I would more soon use a formula because there's going to be other irrigated grass. It's just not one person that this would envelop.

(b) Resolution

[20-22] Competent evidence is evidence that is admissible and tends to establish a fact in issue.[40] A resident owner who is familiar with his or her property and knows its worth is permitted to testify as to its value without further foundation; this principle rests upon the owner's familiarity with the property's characteristics, its actual and potential uses, and the owner's experience in dealing with it.[41] When an independent appraiser using professionally approved methods of mass appraisal certifies that an appraisal was performed according to professional standards, the appraisal is considered competent evidence under Nebraska law.[42]

The burden of persuasion imposed on Cain is not met by showing a mere difference of opinion unless it is established by a preponderance or greater weight of the evidence that the valuation placed upon the property when compared with valuations placed on other similar property is grossly excessive and is the result of a systematic exercise of intentional will or failure of plain duty, and not mere errors of judgment.[43] Beginning with a presumption that the Assessor faithfully performed her

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[40] *TJ 2010 Corp. v. Dawson Cty. Bd. of Equal.*, 22 Neb. App. 989, 866 N.W.2d 93 (2015).

[41] *Darnall Ranch v. Banner Cty. Bd. of Equal.*, 276 Neb. 296, 753 N.W.2d 819 (2008); *Brenner, supra* note 7.

[42] *JQH La Vista Conf. Ctr., supra* note 34.

[43] See, *Cain I, supra* note 2; *JQH La Vista Conf. Ctr., supra* note 34.

official duties in making an assessment and acted upon sufficient competent evidence, we must determine in the instant case if there is competent evidence to the contrary such that the presumption disappeared.

We determine that the TERC erred in disregarding Cain's testimony that, in his opinion, the subject property had an actual value of approximately $711.77 per acre. This testimony constituted competent evidence under the rule that an owner who is familiar with his property and knows its worth is permitted to testify as to its value.

We also determine that the TERC erred in disregarding the testimony of Thoene, whose expertise as a real estate appraiser was demonstrated by the evidence. Thoene testified that he used the sales comparison approach to determine his estimated value of between $450 and $870 per acre. His appraisal report, which was received into evidence, indicated that Thoene utilized all three mass appraisal methods and that those methods support his estimated value. His appraisal was therefore competent evidence which was entitled to weight in determining the actual value of the subject property.

[23] We have recognized that in tax valuation cases, actual value is largely a matter of opinion and without a precise yardstick for determination with complete accuracy.[44]

[24,25] The record shows the TERC used an erroneous evidentiary standard in determining Cain's protests. The TERC found that "the presumptions in favor of the initial valuations by the County Assessor have not been rebutted by a preponderance of the evidence." However, as we have previously held, the presumption of validity afforded to the Assessor's valuation disappears once competent evidence to the contrary is presented.[45] A presumption may take the place of evidence

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[44] *Brenner, supra* note 7.

[45] See, *JQH La Vista Conf. Ctr., supra* note 34; *Brenner, supra* note 7; *TJ 2010 Corp., supra* note 40; *Zabawa v. Douglas Cty. Bd. of Equal.*, 17 Neb. App. 221, 757 N.W.2d 522 (2008).

unless and until evidence appears to overcome or rebut it, and when evidence sufficient in quality appears to rebut it, the presumption disappears and thereafter the determination of the issues depends upon the evidence.[46] A presumption is not evidence and should never be placed in the scale to be weighed as evidence.[47] And, once the presumption of validity disappears, the taxpayer bears the burden of showing the county's valuation is unreasonable.[48]

The opinions of Cain and Thoene that the actual value of the subject property was approximately 60 percent lower than the 2012 valuation determined by the Assessor constituted competent evidence which caused the presumption of validity afforded to the Assessor's valuation to disappear. Therefore, the reasonableness of the Assessor's valuation was a question of fact based upon all the evidence presented, and Cain had the burden of showing such valuation to be unreasonable.

Most of Cain's and Thoene's testimony about the unique qualities and value of Cain's land was unrefuted, except for the Assessor's competing position that all irrigated property must be valued as irrigated cropland.

[26] The regulation the Assessor relied on states: "Irrigated Cropland includes all land where irrigation is used, whether for cultivated row crops, small grains, seeded hay, forage crops, or grasses."[49] This definition of "[i]rrigated [c]ropland" is a subdefinition of "[c]ropland."[50] The purpose of this definition "is to establish *guidelines* for the assessment of agricultural land."[51] This type of agency rule is merely an aid, and not a

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[46] See, *First Nat. Bank in Kearney v. Bunn*, 195 Neb. 829, 241 N.W.2d 127 (1976); *In re Estate of Drake*, 150 Neb. 568, 35 N.W.2d 417 (1948).

[47] *Bohmont v. Moore*, 138 Neb. 784, 295 N.W. 419 (1940).

[48] See *id*.

[49] 350 Neb. Admin. Code, ch. 14, § 002.21B.

[50] *Id.*, § 002.21.

[51] *Id.*, § 001.01 (emphasis supplied). See Neb. Rev. Stat. § 77-1330(1) (Cum. Supp. 2016).

command. If an agency rule is but an aid to help the agency in its decision, then the rule is not binding upon the agency unless the rule confers a procedural benefit upon a party.[52] The definitional guideline of "[i]rrigated [c]ropland"[53] here provides no procedural benefit and therefore is not mandatory.

The Assessor admitted she was not instructed to utilize this regulation and that she had not adhered to it from 2006 to 2012. Thus, the Assessor's premise about a legal requirement for uniform classification of irrigated land is not persuasive.[54] In truth, under §§ 77-103.01, 77-112, and 77-1363, assessors are not limited to a single method of determining the actual value of property for tax purposes. Rather, assessors are charged with a duty to consider a wide range of relevant factors in order to arrive at a proper assessment which does not exceed actual value.

Based on our review of the record, we find Cain proved by the greater weight of the evidence that his irrigated grassland property was not comparable to the vast majority of the high quality farming land within market area 1 and was more comparable to valuations placed on other similar property in market areas 2 and 3, as well as Cain's own nonirrigated property. As a result, we find the TERC erred by failing to find Cain carried his burden to prove by a preponderance of the evidence that the Assessor's value of his irrigated grassland property for the 2012 tax year was grossly excessive and the result of arbitrary or unreasonable action.

3. Remaining Assignments of Error

Because we have determined that the TERC's order should be reversed, we do not address Cain's remaining assignments

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[52] See *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

[53] See 350 Neb. Admin. Code, ch. 14, § 002.21B.

[54] See *Beynon Farm Products v. Bd. of Equalization*, 213 Neb. 815, 331 N.W.2d 531 (1983).

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.[55]

V. CONCLUSION

We conclude that Cain has shown by a preponderance of the evidence that the valuation of the property at issue for the tax year 2012 is $870 per acre, for a total of $951,719.10. We remand the matter to the TERC with directions that it direct the Assessor to set the valuation of the property at such amount for the tax year 2012, upon which amount taxes for such year shall be determined and paid.

Reversed and remanded with directions.

Wright, J., not participating in the decision.

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[55] *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017).

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

State of Nebraska ex rel. Counsel for Discipline of the Nebraska Supreme Court, relator, v. Jeremy C. Jorgenson, respondent.

906 N.W.2d 43

Filed February 2, 2018. No. S-17-487.

1. **Disciplinary Proceedings.** Violation of a disciplinary rule concerning the practice of law is a ground for discipline.
2. ____. The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances.
3. ____. With respect to the imposition of attorney discipline, each attorney discipline case must be evaluated in light of its particular facts and circumstances.
4. ____. For purposes of 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.
5. ____. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases.
6. ____. 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 respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law.
7. **Judgments: Records: Judicial Notice.** A court has the right to examine its own records and take judicial notice of its own proceedings and judgments in a former action.
8. **Disciplinary Proceedings.** Cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions.

9. ____. An attorney's cooperation with the discipline process is fundamental to the credibility of attorney disciplinary proceedings.

Original action. Judgment of suspension.

Julie L. Agena, Assistant Counsel for Discipline, for relator.

No appearance for respondent.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Per Curiam.

INTRODUCTION

On May 11, 2017, formal charges containing two counts were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against Jeremy C. Jorgenson, respondent. Jorgenson filed no answer to the formal charges. We granted the Counsel for Discipline's motion for judgment on the pleadings under Neb. Ct. R. § 3-310(I) (rev. 2014), limited to the facts set forth in the formal charges, and ordered the parties to brief the issue of the appropriate discipline to impose. In its brief, relator suggested the discipline of suspension. Jorgenson did not file a brief. We now order that Jorgenson be indefinitely suspended from the practice of law in the State of Nebraska, with a minimum suspension of 2 years, effective immediately.

STATEMENT OF FACTS

Jorgenson was admitted to the practice of law in the State of Nebraska on April 15, 2008. At all relevant times, he was engaged in private practice in Omaha, Nebraska.

The formal charges filed by relator consist of two counts and allege that Jorgenson (1) failed to provide competent and diligent representation to his client when he failed to appear at oral arguments on the client's appeal, (2) knowingly disobeyed his obligation to the court by failing to appear at oral arguments, (3) failed to adequately supervise support staff, and (4) failed to timely respond to a demand for information

from the Counsel for Discipline. Below, we set forth the factual basis for each count and the procedural history of the present action.

Count I

The first count arises out of Jorgenson's failure to appear for oral arguments in the U.S. Court of Appeals for the Eighth Circuit.

On October 19, 2016, Jorgenson, who had been appointed to represent the appellant, returned the court's "Oral Argument Response Form" to the Eighth Circuit. In the form, Jorgenson acknowledged receipt of the court's calendar scheduling oral arguments in Lincoln, Nebraska, on October 25, 2016; however, Jorgenson failed to appear on that date.

On October 26, 2016, the Eighth Circuit issued a show cause order, directing Jorgenson to show why he should not be personally disciplined for failing to appear and present oral arguments. Jorgenson failed to file a timely response.

On December 2, 2016, Jorgenson filed an untimely response to the show cause order. In his response, Jorgenson reported, inter alia, that he was unable to attend the oral arguments due to a multiweek capital murder trial followed by a death penalty aggravation hearing throughout the month of October 2016. Because of the demands of the trial, Jorgenson stated that in his absence, he relied on staff and other attorneys to meet his obligations to other clients. Jorgenson stated that he had various brief conversations with a paralegal regarding rescheduling the oral arguments and/or having another attorney substitute as counsel. Ultimately, the oral arguments were not rescheduled and Jorgenson alleged that he was not informed until the end of October that he had missed the oral arguments. After discussing the case with the assistant U.S. Attorney, Jorgenson alleges he was reassured that the matter would be considered on the briefs, which adequately apprised the Eighth Circuit of the issues presented. He claimed that his paralegal never opened the email served by the Eighth Circuit containing the show cause order. Jorgenson reported that he

had apologized to his client and client's family members and that he accepted responsibility for failing to make the appropriate arrangements.

On December 6, 2016, the Eighth Circuit issued an order which determined that Jorgenson's actions would be grounds for suspension of his ability to practice before the Eighth Circuit or for disbarment; however, Jorgenson was not a member of the Eighth Circuit bar. The order stated that should Jorgenson ever apply for admission to the Eighth Circuit bar, he would not be permitted to become a member without a prior review and approval of the chief judge of the Eighth Circuit. The order instructed the clerk not to appoint Jorgenson under the Criminal Justice Act in any future appeals, and to forward the details of the matter to the clerk of the U.S. District Court for the District of Nebraska and the Counsel for Discipline.

On January 12, 2017, a "notice of Formal Grievance" was sent to Jorgenson by certified mail. On January 31, Jorgenson responded, stating that he was unaware of the show cause order issued by the Eighth Circuit until December 2, 2016, and responded on the same day. He stated that during the capital murder trial, he had relied heavily on other lawyers and legal staff and that the paralegal tasked with checking his emails did not review them as instructed. Jorgenson further stated that an article published in an Omaha newspaper regarding the Eighth Circuit's order was itself akin to a public reprimand. He reported that since the publication of the newspaper article, his firm had interfered with his ability to access client information and respond to matters promptly.

The formal charges for count I allege that Jorgenson (1) failed to provide competent and diligent representation to his client when he failed to appear at oral arguments for his appeal, (2) knowingly disobeyed his obligation to the court by failing to appear at oral arguments, and (3) failed to adequately supervise support staff. The charges allege that through these actions, Jorgenson 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), 3-503.4(c) (fairness to opposing party and counsel), and 3-508.4(a) and (d) (misconduct).

Count II

The second count generally arises out of Jorgenson's failure to communicate with relator.

On August 30, 2016, relator sent Jorgenson notification that a preliminary inquiry had been opened pursuant to a client grievance from K.H. The notification asked for written explanation of the issues raised in the grievance.

After Jorgenson failed to respond to the notice, on September 19, 2016, relator sent a second letter requesting a written explanation of the issues raised by K.H. The letter indicated that a failure to respond "'may, in and of itself, be enough to elevate the matter to a more severe level of discipline.'"

Jorgenson requested additional time to respond to K.H.'s grievance, due to the pending capital murder trial and the need for additional time to review his records regarding the complainant's matter. Extra time was granted. After the capital murder trial ended on October 28, 2016, Jorgenson failed to provide a written response to the preliminary inquiry.

On January 12, 2017, a notice of formal grievance was sent by certified mail to Jorgenson. On January 31, Jorgenson responded and noted that his "'ability to respond promptly was frustrated in multiple ways.'" Specifically, he reported that his cell phone had become inoperable, that he had lost his text message conversations with K.H.'s family, and that his server account had been canceled causing the loss of thousands of emails and his calendar. He reported that "[b]ecause of the length of [the capital murder trial], and considering that the most important concern of [K.H.'s] was receiving the documents, I thought my time was more appropriately spent getting caught up in other pending matters that had been on hold during [the capital murder trial]."

The formal charges for count II allege that in failing to timely respond to a demand for information from relator,

Jorgenson violated his oath of office as an attorney, § 7-104, and Neb. Ct. R. of Prof. Cond. § 3-508.1(b) (bar admission and disciplinary matters) and § 3-508.4(a) and (d) (misconduct).

Procedural History

Pursuant to Neb. Ct. R. § 3-302, Jorgenson is under the jurisdiction of the Committee on Inquiry of the Second Judicial District.

On March 24, 2017, the formal complaint was sent to Jorgenson, providing 10 working days to submit a written response to the complaint. Jorgenson failed to respond. The matters alleged in the formal complaint were reviewed by the Committee on Inquiry pursuant to Neb. Ct. R. § 3-309(H) (rev. 2011). On May 8, the Committee on Inquiry determined there were reasonable grounds for discipline of respondent and that public interest would be served by the filing of formal charges.

On May 11, 2017, formal charges were filed against Jorgenson. On May 31, Jorgenson signed a receipt and entry of appearance which he filed with this court. Jorgenson failed to file a timely answer to the formal charges. On July 6, relator filed a motion for judgment on the pleadings pursuant to § 3-310(I), which we granted on August 8, limited as to the facts. The parties were directed to brief the issue of discipline.

Relator filed its brief on September 7, 2017, recommending the discipline of suspension. Jorgenson did not file a brief regarding discipline. The court entered a default notice against Jorgenson on October 17.

ASSIGNMENT OF ERROR

The only question before this court is the appropriate discipline.

ANALYSIS

Because Jorgenson did not file an answer to the formal charges, this court granted the Counsel for Discipline's motion for judgment on the pleadings as to the facts. Having

concluded that Jorgenson violated the Rules of Professional Conduct and his oath of office as an attorney, § 7-104, we must determine the appropriate sanction.

[1,2] Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *State ex rel. Counsel for Dis. v. Gast*, 296 Neb. 687, 896 N.W.2d 583 (2017). The basic issues in a disciplinary proceeding against an attorney are whether discipline should be imposed and, if so, the appropriate discipline under the circumstances. See *id*. Neb. Ct. R. § 3-304 of the disciplinary rules provides the following may be considered as discipline for attorney misconduct:

> (A) Misconduct shall be grounds for:
> (1) Disbarment by the Court; or
> (2) Suspension by the Court; or
> (3) Probation by the Court in lieu of or subsequent to suspension, on such terms as the Court may designate; or
> (4) Censure and reprimand by the Court; or
> (5) Temporary suspension by the Court; or
> (6) Private reprimand by the Committee on Inquiry or Disciplinary Review Board.
> (B) The Court may, in its discretion, impose one or more of the disciplinary sanctions set forth above.

See, also, § 3-310(N).

[3-5] We have observed that, with respect to the imposition of attorney discipline, each attorney discipline case must be evaluated in light of its particular facts and circumstances. *State ex rel. Counsel for Dis. v. Island*, 296 Neb. 624, 894 N.W.2d 804 (2017). For purposes of 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. *Id*. The propriety of a sanction must be considered with reference to the sanctions imposed in prior similar cases. *State ex rel. Counsel for Dis. v. Gast, ante* p. 203, 903 N.W.2d 259 (2017).

[6] 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 respondent generally, and (6) the respondent's present or future fitness to continue in the practice of law. *Id*.

[7] As aggravating factors, we note that Jorgenson has previously been disciplined. See *State ex rel. Counsel for Dis. v. Jorgenson*, 284 Neb. 507, 822 N.W.2d 367 (2012) (imposing discipline of public reprimand). A court has the right to examine its own records and take judicial notice of its own proceedings and judgments in a former action. *State ex rel. Counsel for Dis. v. Gast, supra*. Thus, in addition to the current formal charges, we also consider the relevant facts from Jorgenson's previous disciplinary proceedings. See *id*. (citing *State ex rel. Counsel for Dis. v. Lopez Wilson*, 283 Neb. 616, 811 N.W.2d 673 (2012); *State ex rel. Counsel for Dis. v. Ellis*, 283 Neb. 329, 808 N.W.2d 634 (2012)). In 2012, Jorgenson received a public reprimand and 1 year's probation for client incidents generally involving his entering into a contingency fee agreement to represent a client, when Jorgenson should have known the client's claims were time barred, and by entering into contingency fee agreements not committed to writing. See *State ex rel. Counsel for Dis. v. Jorgenson, supra*.

[8] In the present case, the facts established by our order granting judgment on the pleadings show that Jorgenson violated the disciplinary rules in two separate incidents in the same year involving noncompliance and a lack of communication with clients, with the courts, and with the Counsel for Discipline. This represents a pattern of noncompliance with our disciplinary rules, and cumulative acts of attorney misconduct are distinguishable from isolated incidents, therefore justifying more serious sanctions. See *State ex rel. Counsel for Dis. v. Gast, supra.*

As an additional aggravating factor, we note that Jorgenson's client, who was the appellant in the appeal to the Eighth Circuit, was left without counsel when respondent failed to

appear for oral arguments before the Eighth Circuit. Rather than fully taking responsibility, Jorgenson blamed support staff which he evidently had failed to adequately supervise. Likewise, after receiving notification from relator that another client was seeking his file, Jorgenson took months to provide the file, blamed support staff for the delay, and minimized the importance of returning the client's file.

[9] We are unable to acknowledge mitigating factors, because we lack any record on the question. In the present disciplinary process, Jorgenson has failed to correspond with relator at several points, failed to respond to the formal charges by way of an answer, and failed to brief the issue of discipline as directed by this court. We have stated that responding to inquiries and requests for information from relator is an important matter, and an attorney's cooperation with the discipline process is fundamental to the credibility of attorney disciplinary proceedings. See *State ex rel. Counsel for Dis. v. Gast, ante* p. 203, 903 N.W.2d 259 (2017); *State ex rel. Counsel for Dis. v. Tonderum*, 286 Neb. 942, 840 N.W.2d 487 (2013). In failing to file an answer to the formal charges, Jorgenson missed the opportunity to enlighten us about any additional mitigating factors or his current or future fitness to practice law. Failing to participate in the disciplinary process is a very serious matter. See *id*.

Finally, we must consider the appropriate sanction, which we do with reference to the sanctions imposed in prior similar cases. Prior cases, though factually unique, offer some insight. See, e.g., *State ex rel. Counsel for Dis. v. Ubbinga*, 295 Neb. 995, 893 N.W.2d 694 (2017) (suspending attorney for 2 years who failed to complete work for client, failed to communicate with client, failed to provide client with file, and failed to cooperate with relator's investigation); *State ex rel. Counsel for Dis. v. Tighe*, 295 Neb. 30, 886 N.W.2d 530 (2016) (indefinite suspension after attorney failed to respond to formal charges regarding similar client issues, and requiring attorney to demonstrate that he has made behavioral changes that will allow him to practice law within disciplinary rules); *State ex*

rel. Counsel for Dis. v. Moore, 294 Neb. 283, 881 N.W.2d 923 (2016) (suspending attorney for 2 years with 2 years' monitored probation following conditional admission of attorney's client neglect, failure to communicate or provide accounting and refund to client, and lack of communication with relator); *State ex rel. Counsel for Dis. v. Tonderum, supra* (declining to disbar attorney and instead imposing indefinite suspension after attorney failed to respond to formal charges).

In view of the facts which have been established, and Jorgenson's conduct in connection with the current matter, we determine that Jorgenson be indefinitely suspended from the practice of law in the State of Nebraska, with a minimum suspension of 2 years, effective immediately. Upon application for reinstatement, Jorgenson shall fully answer for the current charges; shall fully answer for failing to respond to his clients, the Counsel for Discipline, and the courts; and shall also have the burden to demonstrate his present and future fitness to practice law.

CONCLUSION

We order that Jorgenson be indefinitely suspended from the practice of law in the State of Nebraska, with a minimum suspension of 2 years, effective immediately. Jorgenson may apply for reinstatement consistent with the terms outlined above. Jorgenson 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. Jorgenson is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2012) and § 3-310(P) and Neb. Ct. R. § 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 suspension.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

In re Estate of Glenn G. Forgey, deceased. Dean R. Forgey et al., appellants and cross-appellees, v. Lyle A. Forgey, individually and as Trustee, appellee, cross-appellant, and cross-appellee, and Bessie I. Forgey-McCoy et al., appellees and cross-appellants.

906 N.W.2d 618

Filed February 9, 2018. No. S-16-1027.

1. **Trusts: Equity: Appeal and Error.** Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record; but where an equity question is presented, appellate review of that issue is de novo on the record.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue.
3. ____: ____. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
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. **Judgments.** The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide.
7. **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.
8. **Wills: Trusts.** The interpretation of the words in a will or a trust presents a question of law.

9. **Attorney Fees: Appeal and Error.** A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion.
10. **Judgments: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.
11. **Trusts.** A trustee has the duty to administer the trust in good faith, in accordance with its terms and the purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code.
12. ____. The Nebraska Uniform Trust Code 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.
13. **Accounting.** An accounting is ordinarily an appropriate remedy for a breach of the duty to inform and report.
14. **Decedents' Estates: Jurisdiction.** County courts have exclusive jurisdiction over all matters relating to decedents' estates, including the probate of wills and construction thereof.
15. **Decedents' Estates: Jurisdiction: Equity.** In exercising exclusive original jurisdiction over estates, county courts may apply equitable principles to matters within probate jurisdiction.
16. **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.
17. **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.
18. **Trusts.** If a trust has two or more beneficiaries, a trustee has a duty of impartiality among beneficiaries.
19. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee.
20. **Attorney Fees: Appeal and Error.** When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
21. **Attorney Fees.** To determine the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the

responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.

22. **Laches.** Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.
23. **Laches: Equity.** Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.
24. **Laches.** What constitutes laches depends on the circumstances of the case.

Appeal from the County Court for Keya Paha County: James J. Orr, Judge. Affirmed in part, and in part reversed and remanded with directions.

David A. Domina, of Domina Law Group, P.C., L.L.O., for appellants.

Michael L. Johnson, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee Lyle A. Forgey.

Kyle S. Irvin for appellees Bessie I. Forgey-McCoy et al.

Miller-Lerman, Stacy, Kelch, and Funke, JJ., and Arterburn, Judge.

Kelch, J.

I. INTRODUCTION

This appeal arises from a trustee's failure to distribute the corpus of the trust following the grantor's death in 1993. Marvel Forgey and her three children, all beneficiaries of the Glenn G. Forgey Revocable Trust (the trust), appeal the order of the county court for Keya Paha County resulting from their suit against Lyle A. Forgey, who was another beneficiary and was the trustee. Marvel and her children sought to remove Lyle as trustee, secure administration of the trust, value the trust assets, divide those assets into separate trusts for the beneficiaries, and determine liabilities for alleged breaches of

fiduciary duties by Lyle. Bessie I. Forgey-McCoy and her two children, all three also beneficiaries, joined as interested parties. Primarily accepting Lyle's version of the facts, the county court valued and distributed the trust assets, assessed damages against Lyle for estate tax interest and penalties, and declined to award attorney fees or costs to any party. Marvel and her children appealed; Lyle cross-appealed, and Bessie and her children filed a separate cross-appeal. While we largely agree with the county court's findings in this case, we conclude that the county court committed error by not awarding damages for Lyle's untimely reports and accountings of his failure to collect rents on behalf of the trust. We further determine that the county court abused its discretion in declining to award attorney fees to Marvel, Bessie, and their respective children. Accordingly, we affirm in part, and in part reverse and remand with directions.

II. BACKGROUND

Glenn G. Forgey died in 1993. He was survived by three children: Lyle and Bessie, mentioned above, and Wayne Forgey, who is now deceased. Wayne was survived by his wife, Marvel, and by their three children.

During his lifetime, Glenn transferred property into the trust. Lyle has been the sole trustee at all relevant times. The trust gave the trustee broad discretion to make decisions for the trust in good faith. It required the trustee to provide an annual report to the beneficiaries upon Glenn's death. The trust further directed the trustee, upon the grantor's death, to use the principal or net income of the trust to pay the grantor's legal debts, death expenses, estate administration costs, and inheritance and estate taxes. The trust, as amended, further provided:

> Upon the death of the Grantor and distribution of the Grantor's estate from probate, the Trustees shall divide the *residue* of the assets of this trust . . . into *equal shares*, so as to provide one share for each then living child of the Grantor and one share for the then living issue, collectively, of each deceased child of the Grantor. In so

> dividing the assets of [this trust], . . . *in funding* [*Lyle's*] *equal share of the trust assets the Trustees shall allocate to his share all common stock which* [*this trust*] *may then own in* [a bank in Ainsworth, Nebraska].

(Emphasis supplied.)

No administrative proceedings were commenced for the trust until 2013, when Marvel initiated this litigation, along with her children (hereinafter collectively Marvel). Bessie and her two children (hereinafter collectively Bessie) joined the action as interested parties. Marvel sued to remove Lyle as trustee, secure administration, value assets, divide and distribute them to separate trusts, determine liabilities for defalcations by Lyle, and recover attorney fees and costs.

Bessie filed her own counterpetition, requesting similar relief.

Lyle also counterpetitioned, asking the county court to approve his actions as trustee; determine or confirm the allocation of trust assets, income, expenses, and compensation; and award him attorney fees and costs.

The sections immediately below summarize evidence relevant to the parties' claims on appeal, and we recount additional relevant facts in the analysis portion of this opinion.

1. Division

Pretrial litigation revealed that the corpus of the trust included agricultural real estate, bank stock, cash, and a promissory note.

The county court, observing that the trust provided that trust assets were to be distributed upon Glenn's death, applied the principle that equity considers that done which ought to have been done and treated the division of the trust as though it had occurred upon Glenn's death.

The county court further determined that "it was clearly Glenn's intent that his trust be divided equally and that Lyle's one-third share be funded using the bank stock and that the remaining assets would be divided between Wayne's trust and Bessie's trust."

In dividing the trust this way, the county court relied on the testimony and report provided by Lyle's expert, Tyler Bartruff, an attorney working in the field of forensic accounting and federal estate taxes.

Bartruff based his report on the hypothetical assumption that the trust was split into three equal shares as of Glenn's date of death in 1993. The report also assumed that the federal estate tax return was timely filed and that the tax was timely paid on a deferred basis under I.R.C. § 6166 (2012). The report allocated the bank stock to Lyle's share and added additional liability to Lyle's share to make the three shares proportionate. Bartruff's report then proceeded with a cashflow summary for each beneficiary's share from the split in 1993 until December 31, 2015, using data provided in other exhibits.

2. Valuation

(a) Bank Stock

At the time of trial, the trust owned 13,276 shares (bank stock), or 66.2 percent, of the holding company for a bank in Ainsworth, Nebraska. Lyle owned the remaining shares in his individual capacity.

Two witnesses testified about the bank stock's value: Janet Labenz and Fred Lockwood, each a certified public accountant (CPA) with experience in bank valuation.

Labenz' testimony and her written report gave a clear and concise explanation of her reasoning, which resulted in her applying a lack of marketability discount and valuing the trust's bank stock at $7,209,000 as of September 13, 2013.

Lockwood did not apply a lack of marketability discount and valued the trust's bank stock as of September 30, 2013, at $9,804,000. Counsel were unable to elicit a straightforward explanation to support Lockwood's conclusion; and because Lockwood was not a certified valuation analyst, as was Labenz, he was unable to submit a written report.

The county court expressly accepted Labenz' $7,209,000 valuation of the bank stock.

(b) Land

Upon Glenn's death, the trust owned three substantial parcels of agricultural real estate located in Brown and Keya Paha Counties in Nebraska and in Tripp County in South Dakota.

On January 15, 2016, the Brown County real estate was distributed and sold by stipulation of the parties. The sale price of $9,148,172.70 was equally distributed to the separate trusts for Wayne and Bessie.

At trial, Marvel's counsel presented the reports of Larry Radant, who appraised the three parcels as of 2015. Radant determined values of $1,065,000 for the Keya Paha County real estate, $5,630,000 for the Tripp County real estate, and $9,700,000 for the Brown County real estate.

In addition, Marvel's counsel also presented values for the Keya Paha County and Tripp County real estate prepared by a different appraiser.

The county court relied on the real estate values established by Radant, valuing the trust's real estate at $16,395,000 total. This valuation included Radant's appraisal of the Brown County real estate, which had been previously sold below Radant's appraised value.

(c) Cash

The county court awarded the parties cash based on Bartruff's report, which calculated each party's share of the trust had Lyle divided the trust into three equal shares upon Glenn's death, timely filed the estate tax return, and paid the associated taxes on a deferred basis. That report allocated the trust's cash as follows: $1,960,910 to Lyle and $382,169 to Wayne and Bessie ($191,084.50 to Wayne and $191,084.50 to Bessie). The county court apparently considered past distributions to Bessie totaling $167,550 and added these distributions to Bartruff's total of $382,169. Accordingly, the county court awarded $1,960,910 to Lyle's trust and divided $549,719 between Wayne's trust and Bessie's trust, resulting in $274,860 to Wayne's trust and $274,860 to Bessie's trust. The county

court then subtracted $167,550 from Bessie's share, allocating $107,310 to Bessie's trust.

(d) Bradley Williams Note

The parties do not dispute that as of the time of trial, Bradley Williams owed the trust $61,423. As described in more detail below, the county court allocated the note representing that debt to Lyle in its final distribution, deducted its cash value from Lyle's trust, and divided its cash value equally between Wayne's and Bessie's trusts.

3. Breaches of Fiduciary Duty

Marvel and Bessie presented evidence attempting to show various breaches of fiduciary duty by Lyle and resulting damages.

(a) Estate Taxes

The parties do not dispute that Lyle was late in filing the trust's federal estate tax return and in paying the resulting tax liability. There was evidence that although Lyle's CPA, Bruce Hocking, timely prepared the federal estate tax return for Lyle's signature, Lyle neglected to sign and mail it on time. Due to Lyle's tardiness, the Internal Revenue Service (IRS) assessed penalties and interest against the trust amounting to approximately $2,200,000.

To pay the estate tax liability, Lyle obtained loans for the trust, borrowing from himself in his individual capacity and from the bank in which he and the trust held stock. Hocking admitted that this benefited Lyle, as owner of one of the notes representing the trust's debt and a shareholder at the bank, more than it benefited Wayne and Bessie. However, neither Marvel nor Bessie wanted Lyle to sell the trust's land to pay the federal estate tax obligation; nor did Bessie want Lyle to sell the bank stock.

Hocking negotiated with the IRS and achieved a settlement which allowed the trust to deduct the interest on the loans as an administrative expense, which, in turn, directly reduced

the federal estate tax liability and resulted in a fiduciary income tax benefit.

Using the settlement negotiated by Hocking, Bartruff, Lyle's expert, opined that the trust incurred damages totaling $854,803 as a result of Lyle's late payment to the IRS. Bartruff explained that this number represented the difference between the amount that the trust actually paid for estate taxes, penalties, and interest and what would have been paid had the estate tax return been timely filed and had a proper election under § 6166 been made.

Lockwood, Marvel's expert, testified that the damage to the trust for Lyle's breach regarding the estate taxes, penalties, and interest was $2,258,141. To obtain this figure, Lockwood added $552,052 in penalties to $1,706,089, which included interest on the principal ($976,432), interest for federal penalties ($308,339), interest on the bank note ($380,734), and interest on money borrowed from Lyle ($141,382). However, Lockwood overlooked that the $976,432 in interest on the principal already included $308,339 in interest for penalties.

The county court accepted the testimony of Lyle's expert, Bartruff, on the matter of damages related to federal estate taxes. Accordingly, the county court determined that Lyle's breach of his duty to timely handle matters pertaining to estate taxes damaged the trust in the amount of $854,803.

(b) Cattle Operation Rents

Marvel and Bessie alleged a breach of trust by Lyle for failing to charge rent to himself and to Wayne for use of the trust's land for their cattle operations.

Prior to Glenn's death, Glenn, Lyle, and Wayne conducted a cattle operation using 12,000 acres of pasture belonging to Glenn, as well as real estate belonging to Lyle and Wayne. Glenn, Lyle, and Wayne shared the profits 20 percent, 45 percent, and 35 percent, respectively. At some point, the land became part of the trust. After Glenn's death, from 1993 to 2009 or 2010, Lyle and Wayne continued to share the cattle

operation on the same terms, with the trust assuming Glenn's 20 percent.

After Glenn's death, Lyle paid no rent to the trust, nor did Lyle collect rents from Wayne on behalf of the trust. Lyle testified that the cattle operation handled rents in this manner before Glenn's death.

Lyle testified that the trust's cattle operation used some of his land and his labor, management, and equipment and that he did not charge the trust, nor did the trust pay Wayne, for his labor, management, and equipment. Lyle also testified that the trust did not pay for using pastureland owned by the family's limited partnership or for any inputs for crops grown there and used to feed the trust's cattle. However, there was also evidence that the trust borrowed money for feed, other general operating expenses, and real estate taxes for its portion of the cattle operation.

Lyle pointed out that the terms of the cattle operation allowed the trust to pay down its federal estate tax obligation without selling trust property.

Marvel did the bookkeeping for Wayne, and she testified that when they settled up each year, they did not have any claim against the trust.

Marlin Krohn, an agricultural land manager, testified that based on the industry standard, the value of Lyle's and Wayne's labor and management of the cattle operation was $550,000 from 1994 to 2009. Krohn further testified that had the trust's pastureland been rented out at market rates between 1993 and 2009, those rents would have totaled $2,100,000. He opined that the trust could have received $600,000 more in net income if the cattle had been liquidated in 1993 or 1994 and the real estate leased from that time until 2009, yet that it was reasonable for the cattle operation to have continued. Krohn observed that cattle feeding operations were profitable in 1993 or 1994, despite the subsequent unexpected downturn in the market.

The county court found that Lyle and Wayne ran the cattle business with Glenn until his death and that there was never

an agreement that they would be charged rent to continue using the land. The county court also noted that continuing the cattle operation under those terms allowed for the payment of tax liability. Thus, it found that Lyle's actions regarding this issue were authorized and of benefit to the beneficiaries. Consequently, the county court assessed no damages against Lyle arising from the cattle operation.

(c) Cash Distributions

Lyle did not make cash distributions from the trust to the other beneficiaries until 2008. It was alleged that this was a breach of Lyle's fiduciary duty.

In 2008, 2009, and 2010, Bessie received distributions totaling $167,550. Bessie testified that during this period, she told Lyle when she needed money from the trust and he would give her money, sometimes a little more than she requested. Bessie testified that she had the understanding that she chose to forgo her distributions prior to 2008 to facilitate payment of IRS obligations and avoid the trust's having to sell land or bank stock.

After Marvel filed suit in 2013, Lyle began making equal trust income distributions. In 2015, the county court ordered equal distributions to separate trusts for Lyle, Wayne, and Bessie.

Joel Wiegand, a CPA, calculated that if all the distributable income had been distributed from the trust to Bessie for her one-third share, total taxes for one-third of the trust tax plus Bessie's individual tax would have been $124,265 lower for 1993 through 2012. Wiegand pointed out that cash distributions did not become available until 2008 when debts were retired. According to Wiegand, Bessie would have been taxed $37,284 less had a one-third share of cash been distributed to her when available in 2008 and thereafter. Wiegand opined that it was prudent to retain funds to make payments on debts incurred to pay federal estate taxes.

Hocking, Lyle's CPA, testified that until all federal estate tax obligations were paid in full in 2000, he advised Lyle

from time to time that no distributions should be made to the trust beneficiaries. He testified that at that time, an election under § 6166 was still a possibility, and that § 6166 required any distributable trust income to be used to defray federal estate tax liability.

Lockwood testified that the lack of distributions allowed more assets to remain in the trust and resulted in $191,381 of excess, avoidable taxes.

The county court accepted Wiegand's testimony that the available cash of the trust did not exceed its liabilities until 2008. Because Lyle's refusal to make cash distributions allowed the tax liability to be paid without selling trust assets, the county court found that Lyle's actions allowed the trust to grow from approximately $3 million at Glenn's death to over $25 million at the time of trial and thus actually benefited the beneficiaries. Additionally, the county court noted that Bessie received $167,550 of cash distributions and that Bessie herself testified that Lyle distributed cash to her whenever she asked and sometimes gave her more than she requested.

(d) Williams Note

Marvel and Bessie claimed that Lyle breached his fiduciary duty and caused damages by failing to collect on the Williams note. At the time of Glenn's death in 1993, Williams owed the trust $136,423. The record shows payments of $25,000 in 2004 and $40,000 in 2013. Deducting these payments results in a balance of $71,423, but no one disputes that the balance was $61,423 at the time of trial. Lockwood testified at trial that he learned that Lyle believed he could collect the balance of the note.

The county court found that there was no evidence as to how Lyle breached his fiduciary duties in not collecting the debt. It concluded that equity required allocating the note to Lyle's trust, deducting $61,423 in cash from Lyle's distribution and distributing $30,711 in cash to Wayne and $30,711 in cash to Bessie.

On appeal, Marvel claims that the county court ought to have allocated the note to Lyle. This is what the county court did in the body of its order, but as described in more detail below, the allocation is not entirely clear on the county court's balance sheet.

(e) Failure to Account

Marvel claimed that Lyle had failed to abide by the terms and purposes of the trust by failing to maintain sufficient records and to account for trust income and expenses annually. Bessie made similar claims.

Lyle admitted that as trustee, he had not provided a formal accounting. Members of Wayne's family and Bessie's family confirmed that prior to the litigation, they had not received any report or balance sheet that gave a picture of the trust's affairs.

According to the transcript of a family meeting in 2008, Hocking provided Wayne's family and Bessie's family with the trust's fiduciary income tax returns from 1993 through 2007. At the 2008 meeting, Hocking also provided income tax returns for the trust showing a "general ledger," rather than a transaction-by-transaction account, for the income and expenses of the trust from 2003 to 2007.

In 2013, Lyle provided the other beneficiaries with fiduciary income tax returns from 1993 to 2012. After the proceedings commenced in 2013, Lyle provided a full accounting for 2003 to 2012 to Wayne's family and Bessie's family. During the litigation, Lyle provided accountings and fiduciary income tax returns for 2013 to 2015.

The county court found no showing that the untimely accounting caused any loss to the beneficiaries and awarded no damages.

4. Attorney Fees and Costs

All parties requested attorney fees and costs. The county court conducted a posttrial hearing on the matter and received affidavit evidence.

The county court determined that each party should pay his or her own attorney fees and costs. It noted that while it did not believe Lyle had poor intentions, his own actions and neglect opened the door to accusations of breaches of fiduciary duty. As for the remaining parties, the county court noted that most of their claims against Lyle lacked merit and amounted to "microscopically probing" Lyle's actions for nearly criminal activity with the goal of "receiving a bigger piece of the pie," while contingency agreements between the parties and their counsel "fan[ned] the flames."

5. County Court's Final Distribution

In accordance with its analysis, the county court ordered Lyle to distribute the trust's assets as follows:

Lyle's Trust	
Bank Shares	$7,209,000
Cash	1,960,910
Estate Tax Penalties and Interest	(854,803)
Adjustment for Williams Note, Allocated to Lyle	(61,423)
TOTAL for Lyle	$8,253,684
Wayne's Trust	
One-half Land	$8,197,500
Cash for one-half Williams Note	30,711
Cash	274,860
TOTAL for Wayne	$8,503,071
Bessie's Trust	
One-half Land	$8,197,500
Cash for one-half Williams Note	30,711
Cash	274,860
Cash Adjustment	(167,550)
TOTAL for Bessie	$8,335,521

III. ASSIGNMENTS OF ERROR

On appeal, Marvel assigns the county court erred when it (1) held that no damages were associated with Lyle's failure to render accountings; (2) failed to hold Lyle liable for excess interest on estate tax debt caused by failure to pay taxes on

time and for loss of installment payment interest benefits; (3) failed to find that Lyle caused damages for loss of the alternative valuation election of § 6166, requiring payment of avoidable taxes; (4) failed to value assets as of the filing date or the date of trial and to assess damages for delayed administration; (5) awarded Lyle substantially all trust income retroactively to the time of Glenn's death; (6) failed to award damages against Lyle for nonpayment of rents; (7) failed to award damages against Lyle for failure to collect valid debts owed to the trust; and (8) failed to award attorney fees and costs to Marvel.

On cross-appeal, Bessie assigns that the county court erred in (1) retroactively and hypothetically setting the creation of the shares of the trust as of the date of Glenn's death in 1993 and then awarding Lyle substantially all trust income retroactively to Glenn's date of death; (2) considering Lyle's actions as trustee in failing to collect rents from both himself and Wayne; (3) failing to award Bessie damages for Lyle's failure to distribute income to Bessie, consistent with the testimony of Wiegand; (4) failing to award Bessie attorney fees against Lyle for his multiple breaches of trust; and (5) holding that no damages were associated with Lyle's failure to render accountings.

On cross-appeal, Lyle assigns that although the county court properly divided the trust, it erred in (1) failing to hold that the claims for breach of fiduciary duty were barred by laches, because there should be no damages for breach of fiduciary duty if income from the bank stock is not allocated to Lyle's trust since Glenn's death; (2) failing to hold that Wayne's family and Bessie's family are barred from claims for breach of fiduciary duty by estoppel, waiver, release, consent, ratification and acquiescence; and (3) failing to award attorney fees, costs, and expenses to Lyle.

IV. STANDARD OF REVIEW

[1-3] Absent an equity question, an appellate court reviews trust administration matters for error appearing on the record;

but where an equity question is presented, appellate review of that issue is de novo on the record. *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions concerning the matters at issue. *Id.* When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *In re Estate of Radford*, 297 Neb. 748, 901 N.W.2d 261 (2017).

[4,5] When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *In re Trust of Rosenber*g, 273 Neb. 59, 727 N.W.2d 430 (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).

[6,7] The existence of a fiduciary duty and the scope of that duty are questions of law for a court to decide. *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014), *modified on denial of rehearing* 290 Neb. 392, 861 N.W.2d 682 (2015). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id.*

[8] The interpretation of the words in a will or a trust presents a question of law. *In re Estate of Shell*, 290 Neb. 791, 862 N.W.2d 276 (2015).

[9,10] A trial court's decision awarding or denying attorney fees will be upheld on appeal absent an abuse of discretion. *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Id.*

V. ANALYSIS

1. Marvel's Appeal and Bessie's Cross-Appeal

Glenn died in 1993, and Lyle, the trustee, did not distribute the trust assets upon Glenn's death as required by the trust. As the county court observed, "Now, more than twenty years later, serious and difficult controversies have arisen . . . ." The county court made factual findings and applied equitable principles to craft a remedy. Marvel and Bessie now challenge that remedy, along with some of the factual findings upon which it is based.

The complications in this case have arisen, in large part, from Lyle's failure to inform the beneficiaries concerning the state of the trust over the course of many years. Accordingly, Marvel first assigns that the county court erred by finding no damages resulted when Lyle breached his fiduciary duty by failing to render timely accountings. Bessie also seeks damages resulting from Lyle's failure to render accountings.

[11,12] Marvel properly notes that a trustee has the duty to administer the trust in good faith, in accordance with its terms and the purposes and the interests of the beneficiaries, and in accordance with the Nebraska Uniform Trust Code. *In re Conservatorship of Abbott, supra*. The Nebraska Uniform Trust Code 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. *Id.* Prior to January 1, 2005, a trustee was required to keep the beneficiaries of the trust reasonably informed of the trust and its administration and, on reasonable request, provide a beneficiary with a statement of the accounts of the trust annually. See, Neb. Rev. Stat. § 30-2814 (Reissue 1995); 2003 Neb. Laws, L.B. 130, § 78. Commencing January 1, 2005, the Nebraska Uniform Trust Code required a trustee to send to distributees at least annually a report of the trust property, liabilities, receipts, and disbursements. See, Neb. Rev. Stat. § 30-3878 (Reissue 2016); L.B. 130, § 78.

Lyle clearly violated the requirement, prior to 2005, to keep the beneficiaries of the trust reasonably informed; and after 2005, he violated his duty to send to distributees a report at least annually. The record reflects that Lyle did not provide any reasonable reports to Marvel and Bessie until 2008. Then, after this action was filed, Lyle provided an accounting from 2003 to 2012. Lyle contends that this was adequate, but we disagree. Failing to provide any information to the beneficiaries from the date of Glenn's death in 1993 until 2008 reflects a violation of Lyle's duties to report. Marvel and Bessie should not be required to initiate legal action to compel Lyle to comply with his statutory obligation. However, the question becomes, other than attorney fees, what damages have been shown by Marvel and Bessie.

[13] An accounting is ordinarily an appropriate remedy for a breach of the duty to inform and report. *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. 389, 849 N.W.2d 458 (2014). However, here, Marvel and Bessie have further alleged that Lyle must account for the damages he caused by his breach of duty as trustee and that a judgment should be entered against him. Specifically, Marvel claims that the measure of damages is a different distribution than was ordered by the county court, which difference would account for tax penalties, avoidable taxes, and excess interest paid when favorable IRS rates became unavailable, all due to Lyle's defaults, as well as unpaid rents, extra income taxes that would have been avoided by proper distributions, and attorney fees. Similarly, Bessie groups Lyle's failure to account with her assigned errors relating to the cattle operation, income distributions, and attorney fees and ultimately requests a different distribution as the remedy. Essentially, Marvel and Bessie incorporate all of their assigned errors in suggesting a measure of damages for Lyle's failure to render accountings. Therefore, we shall address these intertwined assignments of error together.

[14-17] In analyzing these assigned errors, we recognize that under Neb. Rev. Stat. § 24-517(1) (Cum. Supp. 2012),

county courts have exclusive jurisdiction over all matters relating to decedents' estates, including the probate of wills and construction thereof. *In re Estate of Stuchlik*, 289 Neb. 673, 857 N.W.2d 57 (2014), *modified on denial of rehearing* 290 Neb. 392, 861 N.W.2d 682 (2015). Although this case is not an equity action, in exercising exclusive original jurisdiction over estates, county courts may apply equitable principles to matters within probate jurisdiction. *Id.* 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. *Id*. Such 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. *Id.*

In regard to distribution and valuation of trust assets, the county court was faced with when to value the assets, because contrary to the terms of the trust, the trust assets were not distributed at Glenn's date of death into three separate trusts. Lyle suggested that the county court divide Glenn's trust as of his date of death, according to the calculations of Lyle's expert, Bartruff. In finding that it could follow such an approach, the county court quoted the following portion of the Restatement (Third) of Trusts § 89, comment *g*. at 285-86 (2007):

> Occasionally the time for trust termination arrives and a directed division into separate trusts or distribution of the property is unduly delayed or disregarded even though the trustee has, in one way or another, performed other aspects of winding up the trust's affairs. . . . It would seem appropriate to treat the beneficiary . . . as owner [of] (or holder of a power of withdrawal over) the trust property or appropriate portion thereof—an example of equity treating as done what ought to have been done.

Rather than offering an alternative distribution schedule for the trust as of the time of Glenn's death, Marvel and Bessie

want the distributions and valuations to be deemed made at the time of trial. Marvel argues that the county court ought to have valued the trust assets as of 2016. She contends that we should adopt a rule that where distribution is delayed, as here, the assets should be valued as of the date of distribution. Marvel acknowledges that Nebraska has not addressed the valuation date for distributed assets. She points to *King v. Onthank*, 152 N.H. 16, 871 A.2d 14 (2005), where the lower court, upon termination of the trust, valued the assets at the time of distribution, which was 3 years after the grantor's death. The appellate court in *King v. Onthank* noted that the grantor's intent would control the date of valuation if such intent could be determined from the trust document. It ultimately held that under the particular facts presented, the lower court was not plainly erroneous in finding that the equitable date for valuation was approximately the date the trust assets were distributed.

Marvel also cites *Van Schaack v. AmSouth Bank, N.A.*, 530 So. 2d 740 (Ala. 1988), where the appellate court determined that trust assets should be valued at the date of distribution. However, in *Van Schaack v. AmSouth Bank, N.A.*, unlike the instant case, the terms of the decedent's will created and funded the residual trust.

We find *King v. Onthank, supra*, where the date of valuation of trust assets is determined by the particular facts presented to the lower court, to be more in line with our existing jurisprudence. For instance, in domestic relations cases, we have found that generally, the date on which a court values the marital estate should be rationally related to the property composing the marital estate. See *Brozek v. Brozek*, 292 Neb. 681, 874 N.W.2d 17 (2016). In other words, we look to the facts of each case.

Here, Lyle's expert, Bartruff, presented a report to opine a hypothetical balance sheet of the trust had Lyle timely filed the estate tax return, used all beneficial tax options, and paid the associated taxes on a deferred basis. Bartruff based the beginning values for the balance sheet on the final

values accepted by the IRS after negotiations. As provided by Glenn's trust, Bartruff split the beginning values into three equal trusts, with Lyle receiving the bank stock and Wayne's and Bessie's trusts receiving the remaining assets. He determined the net change to each trust based upon the cash inflows and outflows for various items, such as dividend income, ranching operations, fiduciary tax payments, and estate tax and interest payments. Additionally, Bartruff based his report on the position that the trust would not have been able to pay the estate tax liability as of the date of filing without having to liquidate some of the estate's assets. The record supports that Bessie did not want land or bank stock sold to pay the trust's tax obligations and that from 1993 to 2009, Marvel did not want land sold. Therefore, Bartruff determined the prudent course of action would have been to apply for a deferred payment plan with the IRS, which allowed reduced interest rates over several years. Based upon this analysis, he determined, using 2013 values, the ultimate division of the trust between the beneficiaries.

Marvel and Bessie assert that this approach is erroneous. They argue that Lyle benefited, since Lyle's treatment of expenses resulted in positive net income for the bank, whereas the assets assigned to Wayne and Bessie had negative income. Marvel and Bessie claim that Lyle should account for the loss of income to Wayne and Bessie because Lyle paid trust administration expenses using cattle operation income and not bank income. Bessie argues that the bank dividends at their present value should have been part of the residue, with the beneficiaries' trusts funded therefrom. However, 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). In its factual findings, the county court accepted the facts posited by Bartruff's calculations that divided the trust assets as of Glenn's date of death. In turn, the income and expenses associated with the trust assets followed the respective owners

of those assets. We conclude that the county court was not clearly wrong in adopting this approach. Therefore, with Bartruff's approach controlling, Marvel and Bessie's position concerning expenses and income has no merit.

The valuation of bank stock was another major difference of opinion between the parties that greatly affected valuation and distribution of trust assets. Marvel and Bessie endorse the testimony of Marvel's expert, Lockwood, who opined that the value of the bank stock was $9,804,000. On the other hand, Lyle's expert, Labenz, applied a lack of marketability discount and valued the bank stock at $7,209,000.

The county court found Lyle's experts to be more credible and accepted their opinions concerning these factual issues. In doing so, the county court was not applying an equitable principle, but simply, as the trier of fact, determining which expert was more credible. As such, we review the county court findings of fact for error on the record. See *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 794 N.W.2d 700 (2011). We find the decision to accept the testimony of Lyle's experts is supported by competent evidence and is neither arbitrary, capricious, nor unreasonable. See *In re Trust of Rosenberg*, 273 Neb. 59, 727 N.W.2d 430 (2007), and *In re Estate of Dueck, supra*.

As previously noted, the county court distributed the trust assets as follows:

Lyle's Trust	
Bank Shares	$7,209,000
Cash	1,960,910
Estate Tax Penalties and Interest	(854,803)
Adjustment for Williams Note, Allocated to Lyle	(61,423)
TOTAL for Lyle	$8,253,684
Wayne's Trust	
One-half Land	$8,197,500
Cash for one-half Williams Note	30,711
Cash	274,860
TOTAL for Wayne	$8,503,071

Bessie's Trust	
One-half Land	$8,197,500
Cash for one-half Williams Note	30,711
Cash	274,860
Cash Adjustment	(167,550)
TOTAL for Bessie	$8,335,521

The county court accepted the blueprint for distribution as outlined by Lyle's experts, but the final values used by the county court were similar to the values that Marvel and Bessie requested in their briefs. The difference between the county court's final distribution of assets and that of Marvel and Bessie mainly stems from Marvel's and Bessie's claims that the bank stock should have been valued at $9,804,000, rather than $7,209,000, and that the bank dividend income increased the cash for Lyle.

Although we review the equitable question of distribution of the trust de novo, under the facts of this case, the county court could not render an equitable solution without first making factual findings as to which experts' opinions to accept. Because the county court accepted the expert opinions presented by Lyle as more credible, this, in turn, controlled the court's method of distribution. Certainly, other methods of distribution exist, but here, the distribution under this circumstance was reasonable.

The primary difference between Marvel's and Bessie's position and the county court's distribution is the extent to which the county court offset any alleged damages caused by Lyle. The county court only offset Lyle for any additional taxes and interest due to late filing, but Marvel and Bessie requested offsets for other issues, namely cattle operation rents, estate taxes, and the Williams note.

Marvel and Bessie contend that Lyle was not impartial in failing to collect rent for use of trust land for the cattle operation and that he should pay the associated damages.

[18] If a trust has two or more beneficiaries, a trustee has a duty of impartiality among beneficiaries. *In re Estate of*

Stuchlik, 289 Neb. 673, 857 N.W.2d 57 (2014), *modified on denial of rehearing* 290 Neb. 392, 861 N.W.2d 682 (2015). This includes a duty to act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests. *Id*.

> "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." . . .

Id. at 689, 857 N.W.2d at 70 (emphasis omitted), quoting Restatement (Third) of Trusts § 79 (2007).

Prior to Glenn's death, Glenn, Lyle, and Wayne conducted a joint cattle operation using trust land without either Lyle's or Wayne's paying rent. Any profits were divided with Glenn receiving 20 percent, Lyle receiving 45 percent, and Wayne receiving 35 percent. This division of any profits continued after Glenn's death, with the trust receiving Glenn's 20-percent share. Marvel and Bessie claim that Lyle violated his fiduciary duties by continuing the cattle operation without collecting rents.

The county court concluded that Lyle had not breached his fiduciary duty regarding rents. It relied on the testimony of Krohn, an agricultural land manager. Krohn valued Lyle's and Wayne's labor and management of the cattle operation from 1994 to 2009 at $550,000. Krohn admitted that the trust could have received $600,000 more if they had liquidated the operation in 1993 or 1994 and leased the real estate until 2009. However, he also observed that it was reasonable for the cattle operation to continue at that time, despite the subsequent unexpected downturn in the cattle market, because cattle feeding operations were profitable in 1993 or 1994. In addition to Krohn's testimony, the county court acknowledged other evidence that Lyle and Wayne contributed real estate, cattle,

and equipment to the cattle operation. The county court did not expressly assign a value to these contributions, but it apparently found them, along with the labor and management valued by Krohn, similar to Lyle's and Wayne's rent obligations, had they been assessed.

In this case, the county court accepted Lyle's proposal to treat Glenn's trust as having been divided at Glenn's date of death. As a result, the county court effectively found that Lyle's trust should be entitled to the bank dividends, since the bank stock was his property. We find that a similar approach should have been applied to the land, which was treated by Lyle's expert as belonging jointly to Wayne and Bessie. If the land had been distributed upon Glenn's death, then the cattle operation would have been required to pay rent for using it. Any such rents would have been paid as follows: 20 percent by the trust, 45 percent by Lyle, and 35 percent by Wayne. Krohn opined that at market rates, the rent for pastureland would have been $2,100,000 between 1993 and 2009. Marvel claims that the county court should have assessed Lyle $1,433,544 (80 percent of $1,791,930) in uncollected land rent, and Bessie requested $1,716,743 (80 percent of $2,145,929).

We agree with Marvel and Bessie that Lyle, acting as an impartial trustee, should have treated the land as belonging to Wayne and Bessie, which, in turn, would have required the cattle operation to pay rent for using the land. Here, the record is clear that Bessie was unaware that rents were even an issue, since Lyle provided her no accounting as to the land. Wayne's situation is problematic because he was part of the cattle operation and had inside information as to whether rents were being paid. And the record is not clear as to whether Wayne demanded rent during his life, with Marvel testifying that she did the bookkeeping for Wayne's ranch operation and that when they "settled up" each year, they did not have any claim against the trust. Further, the reality is that Wayne, as co-owner of the cattle operation and of the land, could choose not to collect rent in regard to himself, and he has already

benefited by not being charged rents for his share of the cattle operation.

Although this is a breach of fiduciary duty action against Lyle, not Wayne, Lyle was still in a position of control in regard to Bessie's land, since he failed to provide her with any relevant financial information. Consequently, we conclude that Lyle breached his fiduciary duty as trustee to Bessie by his use of her one-half interest in the land and by personally benefiting from not collecting rents for his share of the cattle operation in the amount of $472,500 (45 percent of $1,050,000, which is one-half of $2,100,000). In addition, we conclude that Lyle further breached his fiduciary duty as to Bessie by failing to collect rents from Wayne for Wayne's use of Bessie's land, amounting to uncollected rent of $367,500 (Wayne's 35 percent of $1,050,000).

On remand, therefore, the distribution to Lyle's trust shall be reduced by $840,000 ($472,500 + $367,500) and said property shall be transferred directly to Bessie's trust.

Concerning federal estate tax obligations, the trust clearly provided that when Glenn, the grantor, died, Lyle's first obligation as trustee was to pay, either from trust principal or income, all of Glenn's legal obligations and all estate and inheritance taxes. Only after these obligations were paid was the residue of the trust to be divided equally among Glenn's living children or their surviving children. The evidence shows that Hocking prepared the federal estate tax return for Lyle to sign and that Lyle, without any adequate explanation, failed to timely file it. This resulted in the trust's incurring penalties and additional interest.

Marvel and Bessie claim that the county court erred in not awarding them damages by subtracting from Lyle's share approximately $2,200,000 representing the gross amount of penalties and interest associated with Lyle's lapses in filing and paying federal estate taxes. However, as noted by Lyle, Hocking negotiated a settlement with the IRS that allowed the trust to deduct the interest as an administrative expense, which in turn

directly reduced the federal estate tax liability and resulted in a fiduciary income tax benefit. Using this negotiated settlement, Bartruff calculated that the trust incurred damages of $854,803, which represented the difference between the amount that the trust actually paid for estate tax obligations and what would have been paid had the estate tax return been timely filed and the available beneficial election made. The county court again accepted the testimony of Lyle's experts and offset the amount of $854,803 against Lyle's share. We find the record contained competent evidence to support this decision.

Regarding the Williams note, Marvel claims that the county court erred when it failed to award damages against Lyle for failure to collect this valid debt owed to the trust. Lyle was not able to explain why he failed to collect on the note, but there was some evidence that he believed he could still do so. In the body of its order, the county court stated:

> The trust is the holder of a promissory note from . . . Williams where $61,423.00 remains uncollected. Although there was no evidence as to how Lyle breached his duties in not collecting this debt, this court believes equity requires allocating this note to Lyle's trust and therefore $30,711.00 additional cash should be allocated to Wayne's trust and $30,711.00 additional cash allocated to Bessie's trust.

The conclusion of the order contained a similar provision. However, the balance sheet attached to the court's order, entitled "EXHIBIT 'A,'" simply reflects that Wayne and Bessie each receive an "[u]ndivided one-half of . . . Williams [n]ote." This wording has apparently led Marvel to the conclusion that Wayne's and Bessie's trusts each received one-half of the note, rather than its cash value. We understand the confusion; and on remand, the county court shall amend the order's exhibit A to clarify that Wayne's and Bessie's trusts each receive an additional $30,711 of cash, as the body and conclusion of its order provide. With this finding and direction to the county court, this assigned error has no merit.

[19,20] Lastly, Marvel and Bessie claim that the county court erred in failing to award attorney fees and costs to them. Attorney fees and expenses may be recovered only where provided for by statute or when a recognized and accepted uniform course of procedure has been to allow recovery of an attorney fee. See *In re Trust Created by Martin*, 266 Neb. 353, 664 N.W.2d 923 (2003). And in a judicial proceeding involving the administration of a trust, the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy. Neb. Rev. Stat. § 30-3893 (Reissue 2016). When an attorney fee is authorized, the amount of the fee is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *In re Conservatorship of Abbott*, 295 Neb. 510, 890 N.W.2d 469 (2017); *Barnett v. Peters*, 254 Neb. 74, 574 N.W.2d 487 (1998); *Rapp v. Rapp*, 252 Neb. 341, 562 N.W.2d 359 (1997). A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *In re Conservatorship of Abbott, supra*.

The county court denied Marvel and Bessie attorney fees and stated in part:

> As for Lyle's attorney fees and costs, generally a trustee would be allowed to be reimbursed from the trust those fees incurred in successfully defending against claims for breach of duty. Although in this court's opinion Lyle was largely successful in defending against the claims against him, there is no hiding that the trust lost $854,803.00 due to his neglect involving the estate tax issue. Further, although this court does not believe Lyle had mal intentions, it is true that Lyle's actions opened the door to being accused of breaches of fiduciary duties. His neglect with the [IRS], not providing annual

> accountings, and lending money himself and through the bank, could reasonably create a suspicion of self-dealing. Lyle incurred significant attorney fees and costs in defending his actions, most of which this court has found to be acceptable. But, it's only because Lyle created the circumstances where it maybe was not unreasonable for others to doubt his conduct as being in their best interests. It is for these reasons this court feels that justice and equity require Lyle to be responsible for his own attorney fees and costs.
>
> . . . .
>
> . . . Again, to this court, the majority of those accusations were without merit. It is for these reasons this court feels that justice and equity require [Marvel and Bessie] to be responsible for their own attorney fees and costs.

We understand the county court's reluctance to award attorney fees, since the majority of the claims against Lyle were determined to be unfounded. But without an award of attorney fees, there is no penalty for not reporting to the beneficiaries for many years until the litigation occurred. As Marvel points out, in *In re Rolf H. Brennemann Testamentary Trust*, 288 Neb. 389, 849 N.W.2d 458 (2014), we found attorney fees were warranted where, similarly to this case, the trustees clearly breached their duty to inform and report for decades and the beneficiary had little choice but to file litigation to resolve any doubts about the trust's administration. And if we do not impose a penalty such as attorney fees in the instant case, then future trustees may believe that the statutory requirement to report has no significance. In addition, we have now found that Lyle breached his duties by the additional amount of $840,000. As a result, we find that the county court abused its discretion by not awarding attorney fees to Marvel and Bessie.

[21] We have previously found that to determine the value of legal services rendered by an attorney, it is proper to

consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. See *In re Guardianship & Conservatorship of Donley*, 262 Neb. 282, 631 N.W.2d 839 (2001). And we have approved a contingent fee in trust litigation. See *In re Estate of Stull*, 261 Neb. 319, 622 N.W.2d 886 (2001).

The record reflects that this litigation was extensive, spanning several years. Trial lasted 4 days, and numerous exhibits and depositions were offered. We have concluded that Marvel and Bessie were successful in showing that Lyle breached his fiduciary duties and caused damages by failing to report and account for his failure to pay rents. Further, Lyle failed to act on several issues until litigation commenced; and the attorneys showed a high level of skill.

As set forth in the affidavit received at the hearing on attorney fees, Marvel's counsel seeks a contingent fee of 10 percent of the recoveries or distributions to Marvel, along with costs of $6,439.52. The actual recovery found by the county court was $854,803. We have now added damages of $840,000, but those are in regard to Bessie. Therefore, in light of the factors enumerated above, Marvel shall be awarded a total of $85,480 (10 percent of $854,803) in attorney fees and costs of $6,439.

Bessie requests an award for attorney fees of $81,910.13, costs of $4,510.66, and other expenses of $12,960.43, for a total of $99,381.22. Considering again the factors above, and the fact that Marvel brought this action, we award Bessie attorney fees of $40,955 and costs in the amount of $17,470.

This judgment against Lyle for attorney fees and costs in the total amount of $150,344 shall be a reduction in the distribution his trust receives, and $150,344 from the property in Lyle's trust or to be distributed shall be directly

transferred to the attorneys for Marvel and Bessie, according to this opinion.

2. Lyle's Cross-Appeal

On cross-appeal, Lyle assigns that the county court erred in failing to find that any claims by Marvel and Bessie were barred by the doctrine of laches.

[22-24] Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice. *Cleaver-Brooks, Inc. v. Twin City Fire Ins. Co.*, 291 Neb. 278, 865 N.W.2d 105 (2015). Laches does not result from the mere passage of time, but because during the lapse of time, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another. *Id.* What constitutes laches depends on the circumstances of the case. *Id*.

Lyle contends that it would be inequitable for Marvel and Bessie to bring actions against Lyle for breach of fiduciary duty after Lyle contributed part of his dividends from the bank stock toward payment of federal estate tax obligations. However, for laches to apply, the bank dividends would need to have been Lyle's property in the first place. This lawsuit was initiated, in part, to resolve whether the bank dividends were Lyle's. Therefore, the doctrine of laches does not apply. This assigned error is without merit.

Lyle also assigns that the county court erred in failing to find that any claims by Marvel and Bessie were barred by estoppel, waiver, release, consent, ratification, and acquiescence. Specifically, Lyle points out that Wayne and Bessie either participated in or knew about the cattle operation. We have already dealt with this allegation in addressing claims that Lyle failed to account for rents in the cattle operation. As a result, we will not address this issue again.

Lastly, Lyle claims that he should have been awarded attorney fees. We have already determined that Lyle breached his fiduciary duties; and, accordingly, he is not entitled to attorney fees.

VI. CONCLUSION

Although we agree with most of the county court's findings, we conclude that the county court was clearly wrong in not awarding damages caused by Lyle's breaches of fiduciary duty in failing to provide timely reports and accountings that showed his failure to collect rents on behalf of the trust. Further, we conclude that the county court abused its discretion in declining to award attorney fees to Marvel and Bessie. Thus, we affirm in part, and in part reverse and remand with directions to apportion damages, attorney fees, and costs in accordance with this opinion.

Affirmed in part, and in part reversed and remanded with directions.

Heavican, C.J., and Wright and Cassel, JJ., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Mark A. Onstot, appellant and cross-appellee, v. Maria D. Onstot, appellee and cross-appellant.

906 N.W.2d 300

Filed February 9, 2018. No. S-17-038.

1. **Divorce: Child Custody: Child Support: Property Division: Alimony: Attorney Fees: Appeal and Error.** In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.
2. **Evidence: Appeal and Error.** In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue. When evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Divorce: Mental Health: Appeal and Error.** An appeal involving support for a mentally ill spouse under Neb. Rev. Stat. § 42-362 (Reissue 2016) is reviewed de novo on the record and affirmed in the absence of an abuse of discretion on the part of the trial judge.
4. **Property Division.** As a general rule, property which one party brings into the marriage is excluded from the marital estate.
5. **Property Division: Proof.** The burden of proof to show that property is a nonmarital asset remains with the person making the claim.
6. **Affidavits: Records: Appeal and Error.** In order to be considered on appeal, any affidavit used on a motion before the trial court must have been offered in evidence in the trial court and made part of the bill of exceptions.
7. **Records: Appeal and Error.** The party appealing has the responsibility of including within the bill of exceptions matters from the

record which the party believes are material to the issues presented for review.

8. ____: ____. A bill of exceptions is the only vehicle for bringing evidence before the Nebraska Supreme Court. Evidence which is not made part of the bill of exceptions may not be considered.
9. **Divorce: Mental Health: Alimony.** Neb. Rev. Stat. § 42-362 (Reissue 2016) empowers the court to order the payment of such support and maintenance to a mentally ill spouse as it may deem necessary and proper, having due regard to the property and income of the parties.
10. ____: ____: ____. Reasonableness is the ultimate criterion to be applied in testing whether support and maintenance is to be awarded a mentally ill spouse under Neb. Rev. Stat. § 42-362 (Reissue 2016) and, if so, the amount and duration thereof.
11. **Divorce: Alimony: Public Policy: Legislature.** The trial court cannot condition the termination of spousal support upon cohabitation with another person, because such matters are public policy issues for the Legislature, not the courts, to decide.
12. **Divorce: Alimony: Modification of Decree.** Cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of spousal support.

Appeal from the District Court for Sarpy County: William B. Zastera, Judge. Affirmed in part as modified, and in part vacated.

Thomas J. Anderson, P.C., L.L.O., for appellant.

Robin L. Binning, of Binning & Plambeck, for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

I. INTRODUCTION

Mark A. Onstot appeals, and Maria D. Onstot cross-appeals, from the decree of dissolution entered by the district court for Sarpy County, which dissolved the parties' marriage, divided their assets and debts, and awarded spousal support for Maria. For the reasons set forth below, we affirm

the district court's decree in part, as modified herein, and in part vacate.

II. BACKGROUND

Mark and Maria were married in October 1999. Mark filed a complaint for dissolution of marriage in July 2013, and the matter proceeded to a bench trial in March and June 2016. The contested issues at trial, as relevant to this appeal, were (1) the equitable division of the house Mark owned prior to the marriage and (2) the determination of appropriate spousal support for Maria under Neb. Rev. Stat. § 42-362 (Reissue 2016).

1. Mark's House

Prior to the marriage, Mark owned a house located on Platte River Drive in Bellevue, Nebraska. Mark testified that he purchased the house in 1990 for $58,800, and he believed that the mortgage at the time of purchase was $48,000. He made some improvements to the house over the following years, including installing new siding, constructing a new garage, and installing new windows and new flooring, all of which was paid for with his own money prior to the marriage. Mark testified that he believed the house was worth approximately $100,000 at the time of the parties' marriage in 1999, but there was no evidence presented regarding the balance on the mortgage at that time. There was also no documentation to confirm Mark's testimony regarding the date of purchase, the purchase price, the amount mortgaged, or the value of the house at the time of the parties' marriage. At the time of trial, the house was appraised at $200,000 and had a loan balance of $32,538.

Following a bench trial, the district court awarded the house to Mark, subject to the remaining mortgage balance of approximately $32,500, for which Mark was ordered to be solely responsible. It determined that the property was valued at $200,000 and had equity in the amount of $167,500, which it

ordered to be divided equally between the parties. It further ordered Mark to refinance, sell, or otherwise remove Maria's financial responsibility for the mortgage, and to pay Maria $83,746 for her share of the net equity in the property, within 60 days from the entry of the decree.

2. Spousal Support

After Mark filed his complaint for dissolution, Maria filed a motion for the appointment of a guardian ad litem on the basis of mental illness, pursuant to § 42-362. In support of the motion, she submitted an affidavit from her psychologist, Dr. Glenda L. Cottam, who stated that Maria exhibited anxiety and mental illness to such a degree that her ability to think clearly and engage in appropriate reality testing was compromised and that she would not be able to act in her own best interests, make appropriate decisions, or assist her lawyer in preparing her case. The district court granted the motion and appointed a guardian ad litem to represent Maria throughout these proceedings.

Shortly thereafter, Maria filed a motion requesting temporary support in the amount of $3,000 per month, again pursuant to § 42-362. The motion itself did not include any supporting documentation as to her income or expenses, and the record on appeal does not contain a bill of exceptions from the hearing. Mark filed an affidavit in resistance to the motion for support, stating that Maria did not need $3,000 per month and that he could not afford to pay that amount. The district court awarded temporary spousal support of $1,500 per month, beginning on March 1, 2014. Because of the lack of record on appeal, it is unclear what evidence the court considered in making this determination.

In August 2015, Mark filed an application to modify spousal support, because he had just retired from his employment with the railroad and his income had been reduced to only $3,034 per month in retirement benefits. The court denied his application to modify.

The evidence at trial showed that Maria had been diagnosed with a mood disorder with some transient psychotic features, paranoia, depression, anxiety, and post-traumatic stress disorder. Regarding Maria's symptoms, Dr. Cottam testified that Maria becomes very agitated, has hallucinations, and dissociates from reality. Dr. Cottam further explained that Maria was very paranoid at times—she talked about conspiracies, "stink bombs" being set off at her place of employment, people that were out to get her, a particular woman that was always following her, and lights being shone into her apartment. She has been hospitalized on a number of occasions because her anxiety and paranoia cause her blood pressure to increase to a level that is medically dangerous. Her anxiety causes other physical symptoms as well, including swelling of her tongue, tingling in her fingers, heaviness in her body, loss of her voice, ringing in her ears, changes in her vision, and loss of coordination. Dr. Cottam opined that due to Maria's mental health issues, she was not competent to testify and was in need of a legal guardian. Because Maria was unable to testify, her guardian ad litem testified in her place at trial.

At the time of trial, the evidence showed that Maria's monthly income was $3,453, which included Social Security disability benefits, spousal benefits from the railroad, and the $1,500 temporary support payment from Mark. Her monthly expenses were $3,721, and therefore exceeded her monthly income even with Mark's temporary support payment.

Mark's monthly income at the time of trial included $3,602 in railroad retirement benefits, but he testified that he actually received only $3,100 per month after taxes. Mark also received $750 per month in rental income, but he testified that it was offset by mortgage payments and expenses for the rental property. Mark's monthly expenses were $3,954, although he acknowledged that his food expense of $700 per month and his gas expense of $400 per month were high due to his

preferences for eating out frequently and driving his truck rather than his more gas-efficient car.

In its decree, the district court found that Maria was mentally ill and entitled to protection under § 42-362. It awarded her continuing spousal support in the amount of $700 per month, beginning July 1, 2016, and continuing so long as she is mentally ill or until she remarries, the death of either party, or further order of the court. Following the entry of the decree, Mark filed a motion to alter or amend the decree, requesting that his obligation to pay spousal support would cease in the event Maria was cohabiting. The district court amended the decree to reflect that Maria's spousal support shall continue until Maria is no longer mentally ill, the death of either party, or Maria's remarriage or cohabitation with a significant other.

III. ASSIGNMENTS OF ERROR

On appeal, Mark assigns the district court erred (1) in awarding any equity in his house to Maria or, alternatively, in failing to grant him credit for the home's value as of the date of marriage, and in requiring him to sell the property if he did not refinance or otherwise remove Maria's financial responsibility for the mortgage within 60 days and (2) in awarding excessive temporary and permanent spousal support to Maria.

On cross-appeal, Maria assigns that the district court abused its discretion in ordering that her spousal support would cease upon her cohabitation with a significant other.

IV. STANDARD OF REVIEW

[1] In an action for the dissolution of marriage, an appellate court reviews de novo on the record the trial court's determinations of custody, child support, property division, alimony, and attorney fees; these determinations, however, are initially entrusted to the trial court's discretion and will normally be affirmed absent an abuse of that discretion.[1]

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[1] *Marshall v. Marshall, ante* p. 1, 902 N.W.2d 223 (2017).

[2] In a review de novo on the record, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions on the matters at issue.[2] However, when evidence is in conflict, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.[3]

[3] An appeal involving support for a mentally ill spouse under § 42-362 is reviewed de novo on the record and affirmed in the absence of an abuse of discretion on the part of the trial judge.[4]

V. ANALYSIS

1. Mark's House

Mark claims the trial court erred in awarding any equity in his house to Maria or, alternatively, in failing to grant him credit for its value as of the date of marriage, and in requiring him to sell the property if he does not refinance or otherwise remove Maria's financial responsibility for the mortgage within 60 days.

Mark purchased the residence located on Platte River Drive in 1990, approximately 9 years prior to the marriage. He testified he paid $58,800 for the property and took out a mortgage for the purchase in the amount of $48,000. He opined that the residence had a value of $100,000 at the time of the marriage in 1999. The district court found the entire equity in the residence to be marital property and ordered that it be divided equally between the parties.

[4,5] Because he purchased the residence prior to the marriage, Mark claims that it is entirely premarital or, alternatively, that the equity he had prior to the marriage is premarital. As a

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[2] *Bergmeier v. Bergmeier*, 296 Neb. 440, 894 N.W.2d 266 (2017).

[3] *Id.*

[4] See *Black v. Black*, 223 Neb. 203, 388 N.W.2d 815 (1986).

general rule, property which one party brings into the marriage is excluded from the marital estate.[5] However, the burden of proof to show that property is a nonmarital asset remains with the person making the claim.[6]

We agree that the equity in the residence at the time of the parties' marriage in 1999 was a nonmarital asset which, if established, should be set aside as Mark's separate property.[7] However, assuming Mark's testimony established the value of the residence at $100,000 at the time of the marriage, he did not testify or supply any documentation as to whether the residence was either encumbered or unencumbered at that time and, if encumbered, to what extent. Because Mark has failed to establish that there was any equity in the house at the time of the parties' marriage, he has failed to meet his burden of proving that the property is a nonmarital asset. We therefore conclude that the district court did not err in including the entirety of the equity in the residence in the marital estate.

Mark further assigns that the district court erred in ordering him to refinance the residence and pay off Maria within 60 days of the decree. We acknowledge that the trial court has discretion in the amount of time allowed to refinance property. But, here, Mark's ability to refinance promptly has been impaired by his obligation to pay $700 per month in spousal support, especially as a retiree with a monthly net income of only $3,100. Therefore, we find that under these particular circumstances, the district court's requirement that Mark refinance the mortgage within 60 days constituted an abuse of discretion. We modify the decree to extend the time period for Mark to refinance the residence and pay off Maria to 6 months from the filing of the mandate in the district court.

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[5] See *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000).

[6] *Id.*

[7] See *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). See, also, *Heald v. Heald, supra* note 5.

2. Spousal Support

(a) Temporary Support

[6] Mark claims the trial court erred in awarding temporary spousal support in the amount of $1,500 per month under § 42-362. However, the record on appeal does not contain any bill of exceptions in regard to the hearing for temporary spousal support. The transcript does contain a document entitled "Affidavit in Support of Application to Re-Set Support" that was filed with the court. We have long held that an affidavit must be offered as an exhibit and must be made part of the bill of exceptions in order to be considered on appeal.[8] In *Peterson v. George*,[9] we stated:

> The fact that an affidavit used as evidence in the district court was filed in the office of the clerk of the district court and made a part of the transcript is not important to a consideration and decision of an appeal in the cause to this court. If such an affidavit is not preserved in a bill of exceptions, its existence or contents cannot be known by this court.

Here, we have no record that the "Affidavit in Support of Application to Re-Set Support" was received at any pretrial hearing. Whether the district court reviewed the affidavit or any evidence for purposes of Mark's pretrial application to reset spousal support is unknown.

[7,8] The party appealing has the responsibility of including within the bill of exceptions matters from the record which the party believes are material to the issues presented for review.[10] A bill of exceptions is the only vehicle for bringing evidence

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[8] See, *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002); *Peterson v. George*, 168 Neb. 571, 96 N.W.2d 627 (1959).

[9] *Peterson v. George, supra* note 8, 168 Neb. at 577, 96 N.W.2d at 631.

[10] See, Neb. Rev. Stat. § 25-1140 (Reissue 2016); *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001); *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); *State v. Schaneman*, 235 Neb. 655, 456 N.W.2d 764 (1990); *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986).

before the Nebraska Supreme Court. Evidence which is not made part of the bill of exceptions may not be considered.[11] Without the benefit of a proper record, we will not consider this alleged error.

(b) Continuing Support

Next, Mark claims the trial court erred in awarding continuing spousal support in the amount of $700 per month until either party dies, Maria remarries or cohabits with a significant other, or she is no longer mentally ill.

An appeal involving support for a mentally ill spouse under § 42-362 is reviewed de novo on the record and affirmed in the absence of an abuse of discretion on the part of the trial judge.[12] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[13]

Mark does not contest whether Maria suffers from a mental illness. And the district court awarded spousal support pursuant to § 42-362, which in relevant part provides:

> When a marriage is dissolved and the evidence indicates that either spouse is mentally ill, the court may, at the time of dissolving the marriage or at any time thereafter, make such order for the support and maintenance of such mentally ill person as it may deem necessary and proper, having due regard to the property and income of the parties, and the court may require the party ordered to provide support and maintenance to file a bond or otherwise give security for such support. . . . The order for support may, if necessary, be revised from time to time on like application.

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[11] See, *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Gingrich*, 211 Neb. 786, 320 N.W.2d 445 (1982).

[12] See *Black v. Black, supra* note 4.

[13] *Marshall v. Marshall, supra* note 1.

[9,10] Section 42-362 empowers the court to order the payment of such support and maintenance as it may deem necessary and proper, having due regard to the property and income of the parties, and, to that extent, parallels the alimony contemplated by Neb. Rev. Stat. § 42-365 (Reissue 2016), but provides an additional specific ground to be considered—the mental illness of a spouse.[14] Further, we have held that in dealing with spousal support under the provisions of § 42-362, reasonableness is the ultimate criterion to be applied in testing whether support and maintenance is to be awarded and, if so, the amount and duration thereof.[15]

The decree does not contain any findings as to why the district court chose to award $700 per month in spousal support, which was not an amount requested by either party. Mark's gross retirement income was $3,602, but he testified that after taxes, he received approximately $3,100. Although Maria points out that Mark is now receiving $750 per month in rental income, Mark testified this was offset by mortgage payments and expenses for the rental property. Mark's monthly expenses after excluding the temporary spousal support payment and mortgage payments and expenses for the rental property is approximately $2,000. In addition, Mark acknowledged his food and gas expenses were high due to his particular lifestyle. It appears the district court found Mark's credible monthly expenses to be less than his monthly income. On the other hand, Maria had monthly income of $3,453 and monthly expenses of $3,721.

Here, the court was faced with a long-term marriage, a mentally ill spouse who has no ability at present to work, and, as in *Black v. Black*,[16] a spouse who has needs above her income which exceed the amount of support and maintenance awarded.

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[14] *Stephens v. Stephens*, 297 Neb. 188, 899 N.W.2d 582 (2017).

[15] *Black v. Black, supra* note 4.

[16] *Id.*

Certainly, the $700 spousal support obligation, coupled with Mark's other monthly expenses, may place him at or near his net income level. This is concerning and provides no flexibility for Mark, but Maria is in an even more difficult financial position. Sadly, when many couples divorce, there is not enough money to satisfy the needs of both parties. But in this instance, based upon the totality of the circumstances and evidence, we cannot find the order of spousal support was an abuse of discretion.

(c) Cross-Appeal

The district court initially entered a decree which awarded Maria spousal support in the amount of $700 per month commencing July 1, 2016, and continuing so long as Maria is mentally ill or until she remarries, the death of either party, or further order of the court. Following the entry of the decree, the district court partially granted Mark's motion to alter or amend by ordering that the spousal support would further terminate upon Maria's cohabitating with a significant other. On cross-appeal, Maria contends that it was improper to include any provision terminating spousal support if she cohabitates with another person. And, at oral argument, counsel for Maria agreed that Maria's cohabitation with another person was not within the parties' contemplation at the time of the entry of the decree.

[11,12] Maria is correct in that we have previously held that the trial court cannot condition the termination of spousal support upon cohabitation with another person, because such matters are public policy issues for the Legislature, not the courts, to decide.[17] However, cohabitation, together with a showing that such arrangement improved a former spouse's overall financial condition, might warrant a modification of spousal support.[18] Accordingly, that part of the district court's order

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[17] *Else v. Else*, 219 Neb. 878, 367 N.W.2d 701 (1985).

[18] *Id.* See, also, *Stephens v. Stephens, supra* note 14.

adding Maria's cohabitation with a significant other to the list of conditions terminating Mark's spousal support obligation is hereby vacated.

VI. CONCLUSION

We affirm in part the decree entered by the district court, as modified to allow Mark 6 months following the date of the mandate to refinance the residence and pay off Maria. We vacate the portion of the district court's order stating that Mark's support obligation would terminate upon Maria's cohabitation with a significant other.

Affirmed in part as modified, and in part vacated.

Wright, J., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

State of Nebraska, appellee, v. Michael A. Nolt, appellant.

906 N.W.2d 309

Filed February 9, 2018. No. S-17-073.

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. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, which an appellate court reviews independently of the lower court's determination.
3. **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 a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
4. **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.
5. **Search and Seizure: Search Warrants.** In the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.
6. ____: ____. A failure in the ministerial act of returning and filing a search warrant does not void the warrant.

7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness and, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.
8. **Effectiveness of Counsel: Records: Appeal and Error.** The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved. The determining factor is whether the record is sufficient to adequately review the question.
9. **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.
10. **Due Process: Police Officers and Sheriffs: Identification Procedures.** Due process concerns arise when law enforcement officers use unnecessarily suggestive means to procure an identification.
11. **Police Officers and Sheriffs: Identification Procedures: Pretrial Procedure.** Even when the police use unnecessarily suggestive means to procure an identification, the suppression of the resulting identification is not the inevitable consequence. Instead, the trial judge must screen the evidence for reliability pretrial.
12. ____: ____: ____. Identification evidence must be screened for reliability pretrial whenever it is obtained via unnecessarily suggestive procedures arranged by law enforcement officers.
13. **Rules of Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant under the stress of the event.
14. **Rules of Evidence: Hearsay: Proof.** The key requirement to the excited utterance exception is spontaneity, which requires a showing that the statements were made without time for conscious reflection.
15. **Rules of Evidence: Hearsay.** An excited utterance does not have to be contemporaneous with the exciting event. It may be subsequent to the event if there was not time for the exciting influence to lose its sway. The true test is not when the exclamation was made but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.
16. ____: ____. Facts relevant to whether a statement is an excited utterance include the declarant's manifestation of stress, the declarant's physical condition, and whether the declarant spoke in response to questioning.

17. **Rules of Evidence: Hearsay: Police Officers and Sheriffs.** Statements made in response to questions from law enforcement in particular do not generally have inherent guarantees of reliability and trustworthiness. But the declarant's answer to a question may still be an excited utterance if the context shows that the statement was made without conscious reflection.
18. **Search and Seizure: Police Officers and Sheriffs: Evidence: Proof.** Under the inevitable discovery doctrine, evidence obtained without a valid warrant is nonetheless admissible if the State shows by a preponderance of the evidence that the police would have obtained the disputed evidence by proper police investigation entirely independent of the illegal investigative conduct.
19. **Constitutional Law: Search and Seizure.** For purposes of the Fourth Amendment, a search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.
20. ____: ____. For purposes of the Fourth Amendment, a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property.
21. ____: ____. As a general rule, a person has no reasonable expectation of privacy in places readily accessible to the public.
22. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing a claim of ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess reasonable strategic decisions by counsel.
23. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.

Appeal from the District Court for Douglas County: Timothy P. Burns, Judge. Affirmed.

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

Douglas J. Peterson, Attorney General, and Nathan A. Liss for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

I. NATURE OF CASE

After a jury trial, Michael A. Nolt was convicted of first degree murder, manslaughter, two counts of use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. Nolt appeals his convictions, alleging that evidence obtained pursuant to an alleged invalid warrant should have been excluded. Nolt also alleges three ineffective assistance of counsel claims.

II. FACTS

At around 2:11 a.m., on October 10, 2015, Omaha police received a report of a shooting at a residence in the northwest precinct of Omaha, Nebraska. After knocking and receiving no response, police entered the residence and immediately discovered the motionless, wounded body of Aurelius Hassell lying on the couch with his sweatpants pulled down to his knees. They then heard a female voice coming from down the hallway and found Tommynique Valentine, who advised them that she had been shot in the leg. In another bedroom, six children were found unharmed. Officers then asked Valentine if there was anyone else in the house, and she told them about another victim, Malquan King, in a bedroom closet. When an officer went to check on King, he was motionless and not breathing. King and Hassell were later pronounced dead. In connection with the shooting, Nolt was charged with first degree murder, attempted murder, and use of a firearm to commit a felony, among other charges.

At trial, the State called a number of witnesses. Valentine testified about the events that occurred at her house on the night of the shootings, and officers testified about the investigation that followed. The State also introduced redacted versions of telephone calls that Nolt made to his mother while in jail. After the State rested, Nolt testified in his own defense.

1. Night of Shootings

At trial, Valentine testified about the events that occurred at her house the night of the shootings. She testified that at the

time of the incident, she was in a relationship with King. King was coming back to Omaha after traveling with his friend, Hassell, and another man whom Valentine had never met. According to Valentine, King had referred to this latter person as his "'white homeboy.'"

Valentine and King had planned for King to stay the night at Valentine's house that night. Valentine had been in contact with him before she fell asleep around 10 p.m. on October 9, 2015. At approximately 2 a.m., the next day, she awoke to the sound of the doorbell. King, Hassell, and the white male were outside, and a white Chevrolet Impala was parked in the driveway. Valentine let King and Hassell into the house, and they talked in the front room for a few minutes before Hassell went back outside. Hassell then came back in and asked if the white male could use the bathroom. Valentine said, "Sure."

According to Valentine, she walked back to her bedroom with King while Hassell stayed in the front room. Valentine testified that Hassell was sitting on the couch and was "on his phone." When Valentine got to her bedroom, she discovered her 3-year-old daughter was asleep on the bed, so she picked her daughter up and carried her to a bedroom where other children were sleeping. As Valentine carried her daughter down the hall, she crossed paths with the white male who was on his way to the bathroom. The white male nodded his head, and Valentine said, "[H]ello."

Valentine testified that she got "a good look" at the white male. She described him as "clean cut" and wearing glasses, a white long-sleeved dress shirt, khaki pants, and black dress shoes.

While Valentine was putting her daughter to bed, King got ready for bed. According to Valentine, King had taken off his clothes and placed them in her hamper. (The clothes were later found folded on the bed.) Valentine sat on the bed and waited for the white male and Hassell to leave so that she could turn off the lights and lock her door.

A moment later, the bathroom door opened and Valentine heard "pop, pop, popping sounds." Unsure of what the sound

was, she told King to go check it out. Instead, King asked Valentine if she had a gun. Valentine then became worried, and she went and hid in her closet. King was on his way to hide in the closet with Valentine when Valentine heard louder popping noises and saw King's face change. King had been shot.

Valentine did not see the shooter, but heard the sound of dress shoes walking away down the hall. She then heard more shots fired. Next, Valentine heard the sound of dress shoes walking back to the bedroom and heard a voice say, "Talk to me, Talk to me. Are you okay?" Valentine did not make a sound. After that, additional shots were fired and Valentine was struck in the leg. Valentine then heard the sound of shoes again and heard the front door open and close. After she heard the front door close, Valentine came out of the closet, grabbed her cell phone from the nightstand, and went back into the closet to call the 911 emergency dispatch service.

Valentine was taken to a hospital for treatment. As she was being transported to an ambulance, she saw that the white Impala was gone.

2. Investigation

Omaha police officers testified at trial about the investigation that followed the shootings. When officers arrived at the scene, they found Hassell deceased in the living room and King deceased in the bedroom. They also found a number of gun shells throughout the house. Photographs of the scene were entered into evidence.

The photographs show Hassell lying on the couch with his feet on the floor and his hands curled up near his face. One cell phone was on the ground between Hassell's feet, and another one was on the couch. King was found lying just inside Valentine's bedroom closet. Two cell phones were found in the bedroom, one on the bed and one on the ground near the bedroom door.

King's cell phone contained information that eventually led police to Nolt. From King's cell phone, a detective in the

digital forensics unit was able to retrieve photographs and the Global Positioning System (GPS) coordinates of where the photographs were taken. One of the photographs was a "selfie" of King—a photograph King had taken of himself, a week before his death. Nolt was in the background. From the GPS coordinates imbedded in the photograph's file, the detective determined that the photograph was taken at a hotel in Fort Wayne, Indiana. An officer investigating the case contacted the hotel's manager. The officer asked the manager if either King or Hassell had rented a room there. The manager indicated that neither had. Later, however, the manager called the officer back to provide further information that she felt might be relevant to their investigation, including Nolt's name. The manager also provided officers with still photographs from the hotel's surveillance video showing Nolt talking to front desk staff.

Nolt was featured in another photograph on King's cell phone. The GPS information imbedded in that photograph indicated that it was taken 1 week before King's death at a car rental company in Fort Wayne.

As part of their investigation, officers spoke to a couple of King's friends. One of these friends, Alejandro Luna, testified at trial that Nolt was traveling with King and Hassell because they could not get a rental car in their name, but Nolt got one for them in his name.

After police learned Nolt's name and other details about the rental vehicle from the car rental company, they sought and received a search warrant for OnStar Corporation (OnStar), which services GPS devices in vehicles, to provide the rental car's GPS data to police. The Impala was tracked to a residence in Mesa, Arizona. Information regarding the case was relayed to Mesa police, and a local task force went to the residence. Members of the task force saw Nolt and another male leave the residence in the Impala, and they followed the two men to a nearby discount department store. Nolt went into the store and purchased .40-caliber ammunition. After Nolt returned to

the Impala, the task force took Nolt into custody in the store parking lot.

Later that day, police executed a search warrant at the Mesa residence. They found a black duffelbag containing items belonging to Nolt, including an Indiana driver's license, an Arizona identification card, and a .40-caliber Smith & Wesson handgun, the same caliber of firearm used to kill King and Hassell.

Nolt's cell phone records were also subpoenaed as part of the investigation. An officer who analyzed the records testified that the records show that Nolt placed a call from Walnut, Iowa, at 3:14 a.m., approximately 1 hour after the shooting. Later that morning, another call was placed from Kansas City, and at 6:30 p.m., in the Denver, Colorado, area. The next day calls were made from Santa Fe and Albuquerque, New Mexico, and Phoenix, Arizona.

3. Jail Calls

The State offered as exhibits recordings of three telephone calls Nolt made to his mother while in jail. Redacted versions of the recordings were admitted into evidence.

In the first call, Nolt and his mother were discussing where his glasses were. His mother told him that the detective told her that they did not have Nolt's glasses. Nolt told her, "They got all my glasses." He told her that one pair of glasses was "wherever the gun was at" and that "[m]y glasses were in my suitcase."

In the second call, Nolt told his mother, "Hey, you know what some guys were saying?" He said, "they say, 'You were one shot away,'" and he laughed. His mother asked him, "What's that mean?" Nolt replied that "[Valentine] should have been killed, too." Nolt laughed again. Then his mother laughed and said, "You know I said the same thing? I said . . . 'Your aim ain't very good, is it?' Didn't you have your glasses on you . . . ?" Nolt and his mother laughed. His mother said, "Right?" Nolt laughed again and said, "Oh, I don't know anything about what you're talking about." They both laughed again.

In the third call, Nolt told his mother, "[Valentine] was so mad at me, you would think I killed her boyfriend or something." Nolt then laughed.

4. Nolt's Testimony

Nolt ultimately testified that he shot King and Hassell in self-defense.

Nolt testified that a couple of weeks before the incident in Omaha, King, Hassell, and Luna were shot at outside of an apartment building by "a tall black guy." At that time, Hassell was shot in the buttocks.

Nolt also testified about the days leading up to the shooting in Omaha. He testified that he, King, and Hassell were traveling together and that they had gone to Kansas City to pick up some of Hassell's property and then to Omaha to see King's girlfriend, Valentine.

Nolt then testified about the events that occurred at Valentine's house on the night of the shootings. He testified that when they arrived at Valentine's house, he asked to go inside and use the bathroom. When he went inside, he saw Hassell sitting on the couch in the living room with a gun and a bag of marijuana out. According to Nolt, after he returned to the living room from using the bathroom, he told Hassell that he was leaving and asked for the car keys. Nolt claimed Hassell then said, "no, you ain't going anywhere" and grabbed his gun, so Nolt "fired on him." Nolt testified that he then heard King asking for a gun, so he went to the bedroom and shot King as well. When he returned to the living room, Hassell "jump[ed] at" Nolt and Nolt fired the gun again. Afterward, Nolt drove to Arizona to stay with a friend, and on the way, he threw Hassell's gun away at a rest stop.

Nolt testified that to get money in Arizona, he sold the property that Hassell had picked up in Kansas City, along with some video games that King had stolen a few days before the shooting. On cross-examination, Nolt testified that he knew Hassell carried a lot of cash on him.

5. Verdicts and Sentences

The jury convicted Nolt of first degree murder for the killing of King, manslaughter for the killing of Hassell, two counts of use of a deadly weapon to commit a felony, and possession of a deadly weapon by a prohibited person. He was acquitted on the charges related to the shooting of Valentine. He was sentenced to life in prison for King's murder, to 45 to 50 years' imprisonment for use of a deadly weapon to commit a felony, to 18 to 20 years' imprisonment for the manslaughter of Hassell, to 18 to 20 years' imprisonment for use of a deadly weapon to commit a felony, and to 45 to 50 years' imprisonment for possession of a deadly weapon by a prohibited person. All five of Nolt's sentences were to be served consecutively, resulting in an aggregate sentence of life imprisonment plus 126 to 140 years' imprisonment.

Additional facts are set forth below as they are relevant for analyzing the issues presented.

III. ASSIGNMENTS OF ERROR

Nolt assigns that the district court erred when it permitted the State to introduce evidence derived from the warrant for Nolt's GPS data. Nolt also assigns that his trial counsel was ineffective for failing to object to an officer's hearsay statement, failing to move to suppress Valentine's in-court identification, and failing to "adequately investigate and present several aspects of Nolt's defense." Finally, Nolt assigns that the cumulative effect of the ineffective assistance provided by trial counsel deprived Nolt of his constitutional right to a fair trial.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, 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.[1]

[2] Statutory interpretation presents a question of law, which we review independently of the lower court's determination.[2]

[3] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[3] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.[4] 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*,[5] an appellate court reviews such legal determinations independently of the lower court's decision.[6]

V. ANALYSIS

Before delving into the assignments of error, we note that the State claims Nolt waived all error regarding the evidence that established Nolt as the shooter because Nolt himself testified that he was the shooter. Nolt, on the other hand, argues that such evidence should not have been admitted and that the error forced him to abandon a misidentification theory of defense and instead testify to support a self-defense theory. Nolt claims that if the evidence in question was not admitted, his misidentification theory would have remained a viable defense, and that he would not have testified, which would have resulted in a reasonable probability of a different outcome in his case.

[4] Because the case is resolvable without deciding this issue, we decline to address the State's argument. An appellate

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[1] *State v. Jasa*, 297 Neb. 822, 901 N.W.2d 315 (2017).

[2] *State v. Smith*, 286 Neb. 77, 834 N.W.2d 799 (2013).

[3] *State v. Rocha*, 286 Neb. 256, 836 N.W.2d 774 (2013).

[4] *Id.*

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

[6] *State v. Rocha, supra* note 3.

court is not obligated to engage in an analysis that is not necessary to adjudicate the case and controversy before it.[7]

1. Validity of OnStar Warrant

Nolt first assigns that the district court erred in permitting the State to introduce evidence derived from a warrant that Nolt claims is invalid. Before analyzing Nolt's claim, we set forth additional facts relevant to the issue presented.

(a) Additional Facts

Prior to trial, Nolt filed a motion to suppress any and all evidence derived from the Onstar search. This evidence includes property found during the search of the Impala and the search of the residence in Mesa. In the motion, Nolt alleged that the Onstar search was unlawful under the Fourth Amendment, because it was not authorized by a valid warrant.

Nolt claims that the warrant was invalid, because the officer who obtained the warrant failed to comply with the following statutory requirements:

> (1) The warrant must be executed and returned within ten days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property or shall leave the copy and the receipt at the place from which the property was taken. . . . The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken if they are present, or in the presence of at least one credible witness other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or magistrate shall deliver a copy of the inventory upon request to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

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[7] *State v. Huston, ante* p. 323, 903 N.W.2d 907 (2017).

(2) The return and inventory required by subsection (1) of this section may be submitted to the magistrate or judge in person or by facsimile or other electronic means.[8]

The officer who obtained the warrant for OnStar gave a copy to a deputy U.S. marshal for service with OnStar. After that, the officer placed the original warrant in his desk drawer and did not return it until July 19, 2016, after an attorney for the State contacted him about it. When asked why he did not return it sooner, the officer stated, "I didn't realize I had to. I didn't look at it like a regular search warrant because I wasn't looking for property. And then on top of that, we're extremely busy. And once it was in my desk drawer, I honestly forgot about it."

After the hearing, the district court found that the fact that the warrant was not returned within 10 days was purely a ministerial defect and did not negate the validity of the warrant. Therefore, it determined that the OnStar search was conducted pursuant to a valid warrant and thus denied Nolt's motion to suppress the evidence derived from the OnStar search.

(b) Analysis

On appeal, Nolt argues that the district court erred in denying his motion to suppress. The State argues that suppression is not a remedy for the violation of § 29-815. It argues that the officer's failure to return the warrant within the time limit provided by § 29-815 was purely a ministerial defect and that such errors do not render a warrant invalid. In this instance, we agree.

[5,6] We have previously stated that in the absence of a clear showing of prejudice, the failure to comply strictly with postservice statutory requirements will not invalidate a search conducted pursuant to an otherwise valid warrant.[9] We have specifically stated that "a failure in the ministerial

[8] Neb. Rev. Stat. § 29-815 (Reissue 2016).

[9] *State v. Hinton*, 226 Neb. 787, 415 N.W.2d 138 (1987); *State v. McCown*, 189 Neb. 495, 203 N.W.2d 445 (1973).

act of returning and filing a search warrant does not void the warrant."[10] Thus, here, where there is no clear showing of prejudice, the officer's failure to return the warrant did not invalidate it.

In his reply brief, Nolt argues that although ministerial defects do not *typically* render a warrant invalid, such defects should render a warrant invalid when the police deliberately and intentionally disregard the ministerial rule, citing *State v. Moore*.[11] Nolt argues that the officer deliberately and intentionally disregarded § 29-815. We note that it is unclear whether Nolt made this argument to the trial court. His brief in support of his motion to suppress is not made a part of the record, and the trial court did not explicitly address that argument.

Regardless, we find that *Moore* does not apply to this case. In *Moore*, the Nebraska Court of Appeals was considering whether a violation of a procedural rule regarding nighttime searches invalidated a search, whereas here we were are dealing with a postservice statutory requirement, which is ministerial in nature.

Because the officer's failure to timely return the warrant was a ministerial defect that did not prejudice Nolt's trial, the failure to timely return it did not invalidate it, and Nolt's first assignment of error is without merit.

2. Ineffective Assistance of Counsel Claims

[7] Nolt next asserts three claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness and, but for counsel's deficient performance, there is a reasonable probability that the result of the trial would have been different.[12]

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[10] *State v. Hinton*, 226 Neb. at 800, 415 N.W.2d at 146.

[11] *State v. Moore*, 2 Neb. App. 206, 508 N.W.2d 305 (1993).

[12] See *Strickland v. Washington, supra* note 5.

A "reasonable probability is a probability sufficient to undermine confidence in the outcome [of the trial]."[13]

[8,9] The fact that an ineffective assistance of counsel claim is raised on direct appeal does not necessarily mean that it can be resolved.[14] The determining factor is whether the record is sufficient to adequately review the question.[15] An ineffective assistance of counsel claim will not be addressed on direct appeal if it requires an evidentiary hearing.[16] We conclude that the record is sufficient to address all of Nolt's ineffective assistance claims.

(a) Failure to Move to Suppress Valentine's In-Court Identification of Nolt

Nolt assigns that his trial counsel was ineffective because he failed to move to suppress Valentine's in-court identification of Nolt. Nolt argues that Valentine's in-court identification should not have been admitted because it was corrupted by improper police conduct occurring after Valentine identified Nolt in a photographic lineup.

(i) Additional Facts

Prior to trial, no motion was made to suppress Valentine's in-court identification of Nolt. At trial, Valentine was asked to identify the white male that was in her house on October 10, 2015, and she indicated it was Nolt.

On cross-examination, Valentine was asked about her out-of-court identification of Nolt. The State objected to that line of questioning, and during a sidebar, counsel for Nolt explained that he was trying to show that Valentine's in-court identification was unreliable because of police misconduct occurring after her out-of-court identification of Nolt. Counsel for

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[13] *Id.*, 466 U.S. at 694.

[14] *State v. Watt*, 285 Neb. 647, 832 N.W.2d 459 (2013).

[15] *Id.*

[16] *Id.*

Nolt represented to the court that a photographic lineup was done by one officer and that when another officer came in, Valentine asked him how she did. That officer allegedly stated, "Well, I'm not allowed to say, but by the way, as a result of your identification, we're going to arrest somebody." The State's objection to the line of questioning was overruled, and defense counsel was allowed to question Valentine about statements made after the out-of-court identification. The following exchange occurred:

> Q. . . . [D]id you inquire of that second officer, How'd I do?
>
> A. I wouldn't say I said that [sic] exact words.
>
> Q. You wanted to know if you were correct?
>
> A. I knew I was correct. I just . . .
>
> Q. Did you ask, Was I correct?
>
> A. I don't recall.
>
> Q. Do you recall him telling you, I'm not supposed to tell you that?
>
> A. I recall him saying we can't discuss, or something of that nature. I don't know the specifics. That's over a year ago.
>
> Q. Okay. Do you recall him saying even though he's not supposed to discuss specifics, he then discussed someone being arrested?
>
> A. No. Because I didn't . . .
>
> Q. Okay. Nothing further on that subject.

(ii) Analysis

To prevail on this claim of ineffective assistance of counsel, Nolt must show that the failure to move to suppress Valentine's in-court identification fell below an objective standard of reasonableness and that if such motion had been made, a reasonable probability exists that the result of the trial would have been different.[17] However, if the motion would not

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[17] See *Strickland v. Washington, supra* note 5.

have been granted, then it cannot be said that trial counsel's performance was deficient or that the result of the trial would have been different. Thus, we first consider whether a motion to suppress would have been successful.

[10,11] Due process concerns arise when law enforcement officers use unnecessarily suggestive means to procure an identification.[18] But, even when the police use such a procedure, the U.S. Supreme Court has indicated that suppression of the resulting identification is not the inevitable consequence.[19] Instead, the trial judge must screen the evidence for reliability pretrial.

Here, Nolt argues that a pretrial hearing would have revealed that Valentine's in-court identification was too unreliable to be admissible. The State, on the other hand, argues that a pretrial hearing was not required because the in-court identification was not arranged by law enforcement. We agree with the State.

[12] Identification evidence must be screened for reliability pretrial whenever it is obtained via unnecessarily suggestive procedures arranged by law enforcement officers. Here, Nolt is not arguing that law enforcement arranged an unnecessarily suggestive pretrial photographic lineup or in-court identification. Instead, he argues that improper police conduct occurring after the first identification procedure tainted Valentine's in-court identification. We are unaware of, and Nolt does not cite, any authority that requires a pretrial reliability screening in this situation. Instead, in such a case, we think it is the role of the jury, not the judge, to determine the reliability of such evidence, and it suffices to challenge reliability at trial through the mechanisms designed for that purpose, including cross-examination of the witness

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[18] See *Perry v. New Hampshire*, 565 U.S. 228, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012).

[19] *Id.*

making the identification.[20] And that is exactly what Nolt's counsel did.

Even assuming that the district court would have conducted a pretrial hearing on the reliability of Valentine's in-court identification, the identification would only be suppressed if it was "'so [unnecessarily] suggestive as to give rise to a very substantial likelihood of irreparable misidentification.'"[21] In *Manson v. Brathwaite*,[22] the U.S. Supreme Court explained that "reliability is the linchpin in determining the admissibility of identification testimony." It set forth the following reliability factors: "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation."[23] The Court explained that these factors are to be weighed against "the corrupting effect of the suggestive identification itself."[24]

Based on the above factors, we conclude that the indicia of reliability outweigh any alleged corrupting influence. Valentine testified that she got "a good look" at Nolt on the night of the shootings. She was able to describe in detail what Nolt was wearing that night. From a photographic lineup, Valentine positively identified Nolt as the man who was in her house the night of the shooting. At trial, Valentine appeared confident in both that identification and her in-court identification of him. When asked if Nolt looked the same at trial as

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[20] See *id.*, 565 U.S. at 248 (holding that "the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement").

[21] *Id.*, 565 U.S. at 238.

[22] *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

[23] *Id.*

[24] *Id.*

he did on the night of the shooting, Valentine testified that he had gained weight, but his facial features were the same. And importantly, Valentine had already positively identified Nolt in the photographic lineup before the alleged unnecessarily suggestive comment.

Because Valentine's in-court identification was sufficiently reliable, any pretrial motion to suppress such identification would have been futile. Therefore, Nolt's trial counsel was not ineffective for failing to move to suppress the identification, and Nolt's assignment of error is without merit.

(b) Failure to Object to Hearsay Statement

Nolt also argues that his trial counsel was ineffective because he failed to object to an inadmissible hearsay statement, i.e., Valentine's statement to an officer describing the shooter. Before analyzing this claim, we set forth additional facts relevant to the issue.

(i) Additional Facts

Officer Corey Gorden was one of the officers who responded to Valentine's call. He rode on the ambulance with her and asked her questions on the way to the hospital. At trial, Gorden testified that when he asked Valentine who shot her, she described the person as a "nerdy, white male . . . with brownish blonde hair wearing a white dress shirt, tan pants, and dress shoes." No objection was made to the statement.

On appeal, Nolt argues that his trial counsel was ineffective for failing to object to the above statement as hearsay. The State argues that trial counsel was not ineffective for not objecting because the statement is admissible under the excited utterance exception to the hearsay rule. Relevant to that exception, Gorden was asked about how Valentine appeared to him during the ambulance ride. Gorden responded, "Emotional. She had tears in her eyes and she was — seemed scared but still somewhat calm." When asked what he meant by "calm," Gorden stated that Valentine's voice was not escalated, her

breathing was not labored, and she was "coherent to the . . . questions [she was asked]."

(ii) Analysis

[13,14] The parties agree that Valentine's statement constituted hearsay, but disagree as to whether the excited utterance exception applies. For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant under the stress of the event.[25] The key requirement is spontaneity, which requires a showing that the statements were made without time for conscious reflection.[26]

Here, the startling event was the shooting, and Valentine's statement related to the shooting because it described the shooter. Thus, the issue is whether Valentine's statement was made under the stress of the shooting.

[15-17] An excited utterance does not have to be contemporaneous with the exciting event.[27] It may be subsequent to the event if there was not time for the exciting influence to lose its sway.[28] The true test is not when the exclamation was made but whether, under all the circumstances, the declarant was still speaking under the stress of nervous excitement and shock caused by the event.[29] Relevant facts include the declarant's manifestation of stress, such as "'yelling,'" and the declarant's physical condition.[30] Also relevant is whether the declarant spoke in response to questioning.[31] Statements made

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[25] *State v. Jacob*, 242 Neb. 176, 494 N.W.2d 109 (1993).

[26] *Id.*

[27] *State v. Hale*, 290 Neb. 70, 858 N.W.2d 543 (2015).

[28] *Id.*

[29] *Id.*

[30] *Id.* at 79, 858 N.W.2d at 550.

[31] *State v. Hale, supra* note 27.

in response to questions from law enforcement in particular do not generally have inherent guarantees of reliability and trustworthiness.[32] But the declarant's answer to a question may still be an excited utterance if the context shows that the statement was made without conscious reflection.[33]

Based on the circumstances presented in this case, including Gorden's observations of Valentine while she was in the ambulance, we conclude that Valentine's statement was made under the stress of the startling event. Before Valentine herself was shot, she saw King's face when he was shot. Further, Valentine was in the house while the gun was fired multiple times, littering the house with gun shells. When questioned, Valentine was in an ambulance on her way to the hospital with a gunshot wound and facing an unknown medical outcome. Although Valentine's statement was made in response to questions from law enforcement, and despite her maintaining sufficient composure to answer the questions, we find that she was still under the stress of being shot and the stress of viewing another person being shot. Thus, we find that Valentine's statement was made without conscious reflection and that the excited utterance exception does apply. Therefore, Nolt's assignment of error is without merit.

(c) Failure to Investigate and Present Certain Aspects of Nolt's Defense

Nolt also asserts that his trial counsel was ineffective because he failed to "adequately investigate and present several aspects of Nolt's defense." Nolt sets forth the following list of "trial counsel's [alleged] failures":

- Trial counsel failed to elicit Nolt's testimony that, in the last hour of the drive between Kansas City and Omaha on October 10, 2015, Hassell and King discussed murdering Nolt and burying him in the Nevada desert

[32] *Id.*

[33] *Id.*

while they believed Nolt was asleep in the back seat of the vehicle;
- Trial counsel failed to formally compel either the State or OnStar to produce an email purportedly sent from OnStar to law enforcement pertaining to the GPS data obtained by law enforcement, which prejudiced Nolt because law enforcement officers engaged in illegal behavior when obtaining said GPS data, including representations to OnStar of having a search warrant before it was issued by the lower court;
- Trial counsel failed to formally compel either the State or the . . . car rental company to divulge all communications, particularly those in which law enforcement obtained, and [the car rental company] revealed, the Vehicle Identification Number (VIN) for the 2015 Chevrolet Impala at issue during trial. Such communications would have revealed that law enforcement officers engaged in illegal behavior when obtaining said VIN and other information from [the car rental company].[34]

(i) Failure to Compel OnStar Emails

We first address Nolt's claim that his trial counsel was ineffective for failing to compel the State or OnStar to produce certain emails. Although Nolt does not explain how the OnStar emails would have benefited him at trial, we presume, as does the State, that Nolt's claim is that it would have revealed that the GPS search was premature and illegal. The State argues that even if such was true, the GPS evidence would have still been admissible under the inevitable discovery doctrine. We agree.

[18] Under the inevitable discovery doctrine, evidence obtained without a valid warrant is nonetheless admissible if the State shows by a preponderance of the evidence that the

[34] Brief for appellant at 28-29.

police would have obtained the disputed evidence by proper police investigation entirely independent of the illegal investigative conduct.[35] Here, the GPS data was obtained the same day that the warrant was issued. Thus, even if the GPS data was obtained *before* the warrant was issued, the police would have obtained the same evidence pursuant to the warrant that was issued. Accordingly, the GPS evidence would still have been admissible and the result of the trial the same.

(ii) Communications With Car Rental Company Regarding Impala

We also conclude that the result of the trial would have been the same if Nolt's trial counsel had moved to compel the State or the car rental company to disclose their communications. Although Nolt fails to explain how the communications would have benefited him at trial, we presume, as does the State, that Nolt's claim is that the communications would have revealed that the information obtained about the Impala, namely the vehicle identification number (VIN), were obtained via an illegal search and seizure. However, as the State points out, a warrant was not needed because the police communication with the car rental company was not a search and obtaining the VIN was not a seizure for Fourth Amendment purposes.

[19-21] The Fourth Amendment to the U.S. Constitution protects individuals against unreasonable searches and seizures by the government.[36] A "'search [for Fourth Amendment purposes] occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable,'"[37] and

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[35] See *State v. Ball*, 271 Neb. 140, 710 N.W.2d 592 (2006). See, also, *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992) (holding that fruits of search were properly admitted because if defendant would not have consented, then affidavit would have been completed and search warrant obtained to perform the same search).

[36] See *State v. Jenkins*, 294 Neb. 684, 884 N.W.2d 429 (2016).

[37] *Id.* at 695, 884 N.W.2d at 439 (citing *Kyllo v. United States*, 533 U.S. 27, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001)).

a "'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property."[38] Here, Nolt could not have had an expectation of privacy with regard to the police communication with the car rental company, because there is no evidence that it agreed to keep any information about Nolt's rental car confidential and no evidence that confidentiality is typical in such situations. Furthermore, Nolt had no possessory interest in the VIN of the Impala. The car rental company owned the car and was free to convey information about it to police. Moreover, as a general rule, a person has no reasonable expectation of privacy in places readily accessible to the public,[39] and federal law requires that the VIN be placed in the plain view of someone outside the automobile.[40] Fourth Amendment protections were not invoked by the car rental company's voluntarily providing the VIN to police. Thus, a warrant was not required, and Nolt's trial counsel was not ineffective for failing to move to compel the State or the car rental company to disclose their communications.

We note that to the extent that Nolt had an expectation of privacy or possessory interest in the contents or location of the Impala, no Fourth Amendment violation occurred because police obtained a warrant for both the GPS search and the subsequent seizure of the Impala in Arizona.

(iii) King and Hassell's Alleged Discussion of Murdering Nolt

Finally, Nolt argues that his counsel was ineffective for failing to elicit Nolt's testimony regarding an alleged conversation between King and Hassell about their plan to murder

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[38] *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

[39] See *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) ("[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").

[40] *New York v. Class*, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986).

Nolt. Nolt argues that the conversation contributed to the circumstances surrounding his decision to use deadly force and that the introduction of such evidence would have bolstered his self-defense theory.

[22,23] When reviewing a claim of ineffective assistance of counsel, trial counsel is afforded due deference to formulate trial strategy and tactics, and an appellate court will not second-guess reasonable strategic decisions by counsel.[41] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[42] The presumption can be rebutted without an evidentiary hearing only when a decision by counsel cannot be justified as a result of a plausible trial strategy.[43]

We conclude that it is plausible that Nolt's counsel decided to not elicit testimony about the alleged conversation in order to save Nolt's credibility. While it is conceivable that evidence of the alleged conversation might have helped the jury understand why Nolt would be quick to think that Hassell was reaching for a gun to harm him, the same evidence also serves to undermine Nolt's credibility. As pointed out by the State, if the jury had been presented with evidence that King and Hassell had discussed their plans to kill Nolt in Nolt's presence, then the jury might wonder why Nolt did not try to escape to safety when he was outside Valentine's house by himself.

Nolt's argument would have more merit if the district court had not instructed the jury on Nolt's claim of self-defense. But here, the court instructed the jury on self-defense and the jury apparently disbelieved Nolt's testimony because it found him guilty.

Because any benefit provided by evidence of the alleged conversation would be negated by the blow to Nolt's credibility, we conclude that it is plausible that Nolt's counsel did

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[41] See *State v. Nesbitt*, 279 Neb. 355, 777 N.W.2d 821 (2010).

[42] *Id.*

[43] *State v. Brown*, 268 Neb. 943, 689 N.W.2d 347 (2004).

not elicit testimony about the alleged conversation for this reason. Thus, Nolt's trial counsel was not ineffective for failing to adduce this evidence, and Nolt's assignment of error is without merit.

3. Cumulative Error

Finally, Nolt alleges that the cumulative effect of the ineffective assistance of trial counsel deprived Nolt of his constitutional right to a fair trial. But, as explained above, we found no merit to any of Nolt's ineffective assistance of counsel claims. Thus, the alleged errors could not have been cumulative, and Nolt's last assignment of error is without merit.

VI. CONCLUSION

For the foregoing reasons, Nolt's assignments of error are without merit, and the judgment of the district court is affirmed.

Affirmed.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Retroactive, Inc., a Nebraska corporation, doing business as Funkytown, appellee, v. Nebraska Liquor Control Commission, an agency of the State of Nebraska, appellant, and City of Omaha, a political subdivision of the State of Nebraska, appellee.

906 N.W.2d 328

Filed February 9, 2018. No. S-17-202.

1. **Judgments: Jurisdiction: Appeal and Error.** Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.

Appeal from the District Court for Lancaster County: Darla S. Ideus, Judge. Vacated and dismissed.

Douglas J. Peterson, Attorney General, and Milissa Johnson-Wiles for appellant.

Burke J. Harr and Justin D. Eichmann, of Houghton, Bradford & Whitted, P.C., L.L.O., for appellee Retroactive, Inc.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Heavican, C.J.

INTRODUCTION

The Nebraska Liquor Control Commission (Commission) denied the issuance of a Class C liquor license to applicant Retroactive, Inc., doing business as Funkytown, for premises

located in Omaha, Nebraska. Retroactive sought review in the district court, arguing that the decision of the Commission (1) was arbitrary and capricious and unsupported by evidence and (2) exceeded the authority of the Commission. The City of Omaha (City) filed a motion to dismiss for failure to name the citizen objectors as "necessary parties" to the petition for review. The district court denied the City's motion and entered an order reversing the Commission's decision to deny the Class C liquor license. The Commission appeals. We hold that the district court did not have subject matter jurisdiction, because the Commission did not name the citizen objectors as parties of record to the petition for review.

BACKGROUND

Factual Background

On October 1, 2015, Retroactive applied for a Class C liquor license for a nightclub located at 1516 Jones Street in Omaha (application). Nine objectors filed citizen protests against the application. All of the objectors reside in a residential building that shares a common wall with the proposed nightclub. On December 17, the Commission held a hearing concerning the application.

At the hearing, the City called three witnesses. First, an assistant city attorney for the City testified that Retroactive's owner previously applied for a liquor license for the same location and that the application was denied. The attorney asked the court to take administrative notice of the file and order of denial for that license. Second, David Hecker, an objector, testified that he objected to the application, because the business proposal was inconsistent with the current status of the neighborhood and the application was identical in all material respects to the one that had previously been denied by the Omaha City Council and the Commission. Third, Billy Coburn, an objector, testified that "the nature of the community in the neighborhood . . . has changed over the last two years since prior clubs have existed at 1516 Jones." Coburn

stated that issuance of the liquor license "will devalue the surrounding properties, affect the safety of the neighborhood, and the adjoining walls were not addressed for sound control." The two objectors who testified were not represented by counsel.

Procedural Background

Pursuant to Neb. Rev. Stat. § 53-131 (Cum. Supp. 2016), on October 1, 2015, Retroactive made an application for the Commission's issuance of a Class C liquor license for the location at 1516 Jones Street in Omaha. On November 3, the Omaha City Council held a hearing pursuant to Neb. Rev. Stat. § 53-134 (Cum. Supp. 2016) and passed a resolution to recommend denial of the application. On November 5, the Commission received a recommendation from the Omaha City Council to deny the application. On December 17, pursuant to Neb. Rev. Stat. § 53-133 (Cum. Supp. 2016), the Commission conducted a hearing on the application, and on January 8, 2016, the Commission entered an order denying the application.

On January 19, 2016, Retroactive filed a petition for review under the Administrative Procedure Act (APA) in the district court. In the petition, Retroactive argued that (1) the January 8 order was arbitrary and capricious, (2) the January 8 order was unsupported by evidence, and (3) the Commission's determination outlined in the January 8 order exceeds its statutory authority.

The City filed a motion to dismiss on February 24, 2016, arguing that the citizen objectors were "necessary parties" to the action and were not made a party to the petition for review under the APA. The district court filed an order on May 9, overruling the City's motion to dismiss. The court found that "[t]he plain language of § 53-1,115(4) limits its application to 'for purposes of this section.'" Therefore, the court found that "the citizen protesters who provided written protests and those who testified at the hearing before the Commission were not 'parties of record' as that term is defined by the APA."

The district court filed an order on January 24, 2017, reversing the Commission's decision to deny the application. The district court remanded the matter to the Commission to issue a Class C liquor license. The Commission appeals. The City did not file a notice of appeal.

ASSIGNMENTS OF ERROR

The Commission assigns, restated, that the district court erred in (1) failing to dismiss the petition on appeal for lack of subject matter jurisdiction, because Retroactive failed to name Hecker as a "necessary party" to its review under the APA, and (2) reversing the decision of the Commission to deny a Class C liquor license to Retroactive.

STANDARD OF REVIEW

[1] Determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusions independent from a trial court.[1]

ANALYSIS

Citizen Objectors as Parties of Record

We note that the Commission uses the terms "necessary party" and "party of record" interchangeably in its brief. We read the Commission's use of the term "necessary party" to mean "party of record" as that term is used in Neb. Rev. Stat. §§ 53-1,115 (Reissue 2010) and 84-917 (Reissue 2014). The Commission argues that the district court erred in failing to dismiss the petition on appeal for lack of subject matter jurisdiction due to the failure of Retroactive to name Hecker as a party on appeal according to §§ 53-1,115 and 84-917. Retroactive contends that the Nebraska Liquor Control Act's statutory definition of "party of record" in § 53-1,115 does not

[1] *Kozal v. Nebraska Liquor Control Comm.*, 297 Neb. 938, 902 N.W.2d 147 (2017).

extend to the APA and that under *Shaffer v. Nebraska Dept. of Health & Human Servs.*,[2] the citizen objectors are not parties of record, because the citizen objectors were not treated as parties by the hearing officer at the hearing held before the Commission.

Both parties cite to *Shaffer*, in which this court determined that a Medicaid provider was a "party of record" at a Department of Health and Human Services hearing, and therefore a party of record pursuant to § 84-917(2)(a)(i) in the subsequent appeal to the district court. This court reasoned that the Medicaid provider was a "party of record" at the hearing, because the provider (1) was required by federal law to be a party to the hearing and (2) participated in the hearing and was treated as a party by the hearing officer. In determining whether the provider was treated as a party, this court stated that the provider "appeared at the fair hearing to explain and defend its decision."[3] In addition, the provider's "representatives presented evidence, cross-examined witnesses, entered into stipulations, and presented arguments" and "[a]t the beginning and conclusion of the hearing, the hearing officer referred to [the Medicaid recipient] and [the Medicaid provider] as the 'parties.'"[4] This court accordingly vacated the judgment, because "the failure to make [the Medicaid provider] a party to the appeal deprived the district court of jurisdiction."[5]

We recently decided *Kozal v. Nebraska Liquor Control Comm.*[6] In *Kozal*, issued subsequent to the district court's review of the Commission's decision in this case, we held that "the definition of 'party of record' in § 53-1,115(4) controls for

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[2] *Shaffer v. Nebraska Dept. of Health & Human Servs.*, 289 Neb. 740, 857 N.W.2d 313 (2014).

[3] *Id.* at 751, 857 N.W.2d at 322.

[4] *Id.*

[5] *Id.* at 752, 857 N.W.2d at 323.

[6] *Kozal v. Nebraska Liquor Control Comm., supra* note 1.

purposes of the APA's requirement that '[a]ll parties of record shall be made parties to the proceedings for review' in a review of the Commission's proceedings."[7] Thus, this court concluded that "the definition in § 53-1,115(4) is the controlling definition of 'party of record' for purposes of APA review of the Commission's proceedings."[8]

This court then addressed the application of *Shaffer* and analyzed the underlying facts to determine whether "the citizen objectors in this case acted as and were treated as parties in the Commission's hearing on the retailers' license renewal applications."[9] We held that

> [b]ecause citizen objectors are defined by the Nebraska Liquor Control Act as "part[ies] of record" in the Commission's liquor license application proceedings and because the citizen objectors acted as and were treated as parties in the Commission's hearing, we conclude that they are "parties of record" for purposes of the APA.[10]

Ultimately, this court held that the failure to include the citizen objectors meant that the district court never acquired subject matter jurisdiction to review the Commission's order.[11]

In *Kozal*, prior to analyzing the application of *Shaffer* to the facts, we held that the definition of "party of record" under § 53-1,115(4) applied for purposes of the APA. We observe that contrary to our decision in *Kozal*, it is not necessary to also analyze the underlying facts to determine whether citizen objectors "acted as and were treated as parties."[12] *Shaffer* involved a Medicaid provider at a Department of Health and Human Services hearing and is inapplicable to the current facts.

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[7] *Id.* at 948, 902 N.W.2d at 155.

[8] *Id.* at 948, 902 N.W.2d at 156.

[9] *Id.* at 952, 902 N.W.2d at 158.

[10] *Id.* at 953-54, 902 N.W.2d at 158-59.

[11] *Id.*

[12] *Id*. at 953, 902 N.W.2d at 158.

We define "parties of record" solely based on statute, not on the factual examination conducted in *Shaffer*. To the extent that *Kozal* suggested that citizen objectors in a proceeding before the Commission must do things such as submit pretrial witness and exhibit lists, file and respond to prehearing motions, call witnesses at the hearing, make stipulations, object to evidence, and examine and cross-examine witnesses in order for a court to have subject matter jurisdiction, such was dicta that we decline to extend to this case.[13]

In the case before us, § 53-133(1)(b) requires that the Commission receive "objections in writing." Nine objectors filed citizen protests against the application. At the start of the hearing before the Commission, all nine forms submitted by the citizen objectors, including the objection submitted by Hecker, were offered and accepted into evidence.

The forms upon which the citizen objectors filed their protests against the application state that "[i]f after hearing the license is approved costs for the hearing will be assessed against the protestants." The statutory authority for this provision, § 53-1,115(3), states in pertinent part that "[u]pon final disposition of any proceeding, costs shall be paid by the party or parties against whom a final decision is rendered." As a result, all of the citizen objectors who submitted such forms have incurred a monetary risk by being invested in the outcome of the case.

Furthermore, the forms also require the citizen objectors to state their names and addresses. The citizen objectors sign the form, affirming that the information they have provided is available to the public.

The Commission argues on appeal that Hecker filed a citizen protest as an "individual protesting the issuance" of a liquor license through "objections in writing."[14] We agree and conclude that Hecker is a "party of record" under § 53-1,115(4).

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[13] See *id.*

[14] Brief for appellant at 9-10. See § 53-133(1)(b).

We hold that Retroactive's failure to name Hecker precluded the district court from acquiring subject matter jurisdiction review of the Commission's order.

The Commission's first assignment of error has merit.

District Court's Reversal of Commission's Final Determination

Because we find that Hecker was a "party of record" under the APA and that the district court did not have subject matter jurisdiction, we need not address the Commission's second assignment of error.

CONCLUSION

Retroactive failed to include all parties of record in the Commission proceeding when it sought review in the district court. The district court never acquired subject matter jurisdiction. The district court's order reversing the Commission's decision is vacated, and the cause is remanded with directions to dismiss.

Vacated and dismissed.

Wright, J., not participating.

Nebraska Supreme Court
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T. Louise Ewers, personally and as Personal Representative of the Estate of Mickley (Michael) Lynn Ellis, appellant, v. Saunders County, Nebraska, a political subdivision, et al., appellees.

906 N.W.2d 653

Filed February 9, 2018. No. S-17-251.

1. **Pretrial Procedure: Appeal and Error.** Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion.
2. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
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. **Pretrial Procedure: Evidence.** A party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission.
5. **Rules of the Supreme Court: Pretrial Procedure.** Neb. Ct. R. Disc. § 6-336 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission.
6. **Rules of the Supreme Court: Pretrial Procedure: Evidence: Proof.** Neb. Ct. R. Disc. § 6-336 is not self-executing. Thus, a party that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer

or object to the request and must also offer the request for admission as evidence.

7. **Rules of the Supreme Court: Pretrial Procedure.** If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of Neb. Ct. R. Disc. § 6-336 which require that the matter be deemed admitted.
8. **Malpractice: Physician and Patient: Proof: Proximate Cause.** In a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries.
9. **Malpractice: Physicians and Surgeons: Proximate Cause: Damages.** In the medical malpractice context, the element of proximate causation requires proof that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff.
10. **Negligence: Proximate Cause.** A defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them.
11. **Negligence: Proximate Cause: Words and Phrases.** A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred.
12. **Proximate Cause: Words and Phrases.** A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct.
13. **Expert Witnesses: Proximate Cause.** Expert testimony is almost always required to prove proximate causation.

Appeal from the District Court for Saunders County: James C. Stecker, Judge. Affirmed.

Larry R. Demerath, of Demerath Law Office, and Justin B. Demerath, of O'Hanlon, McCollom & Demerath Law Firm, for appellant.

Joseph S. Daly and Mary M. Schott, of Sodoro, Daly, Shomaker & Selde, P.C., L.L.O., and J. Scott Paul, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees Advanced Correctional Health Care, Inc., et al.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

This appeal arises from the in-custody death of Mickley (Michael) Lynn Ellis. T. Louise Ewers, personally and as personal representative of Ellis' estate, brought a wrongful death action alleging medical malpractice by Advanced Correctional Healthcare, Inc. (ACH), and its agents in their individual and official capacities (collectively Appellees). Ewers also filed suit against Saunders County, the Saunders County sheriff's office, Saunders County Corrections, Saunders Medical Center, and Dan Scott, but those causes of action are not relevant to this appeal. Ewers now appeals from the orders of the district court for Saunders County that denied her discovery motions and granted Appellees' motion for summary judgment. We conclude that the district court did not err, and we affirm.

BACKGROUND

Ellis was incarcerated in the Saunders County jail on May 27, 2010. During the morning of June 22, he spoke with Mallory Reeves, a licensed practical nurse employed by ACH, the medical contractor hired by Saunders County. In her notes, Reeves stated that Ellis wanted to talk to a counselor about nightmares he was having and that she told him to fill out a "sick call," which is how an inmate reports medical issues.

Instead of filling out a "sick call," Ellis filled out a "kite" form, which is how an inmate relays reports or requests to jail personnel. In the form, he requested help with his nightmares. He mentioned that he was having chest pain and "hard" breathing when he awoke from the nightmares and that he was waiting to find the right medication to help him. Ellis had a history of chest pain and shortness of breath after nightmares and, about 3 weeks prior, had been taken to a hospital for mental health issues.

After receiving the "kite" form, jail personnel completed an incident narrative. According to the incident narrative, jail personnel informed Reeves of the physical complaints Ellis described on the "kite" form, and she responded that it was not a medical issue, as Ellis was requesting to speak with someone, and that there was not anything she could do for him. At her deposition, Reeves did not recall that conversation but admitted that chest pain was a serious complaint that could be life-threatening. As a result of the "kite" form, an appointment was made for Ellis to speak with a pastor.

Ellis made no further complaints until 3:40 a.m. on June 25, 2010. He told jail personnel that he was having trouble breathing and that his back hurt. At 4 a.m., jail personnel contacted Mary Scherling, a nurse practitioner employed by ACH. She suggested that Ellis breathe into a bag, believing he was having a panic attack. At 4:08 a.m., jail personnel called Scherling back and reported that breathing into the bag was not helping and that Ellis was now complaining of chest pain. Scherling instructed jail personnel to take Ellis to the hospital. At the Saunders Medical Center, Ellis was treated for a heart attack, but he died at 6:20 a.m. from a bilateral pulmonary embolism.

Ewers, who is Ellis' sister, filed suit, alleging that Ellis' death and associated damages resulted from the negligence of Reeves and Scherling. Ewers sought damages from Reeves and Scherling in their individual capacities and from ACH. In part, Ewers specifically averred that as a result of the negligence of Appellees, Ellis experienced damages and injuries, including chest pain, trouble breathing, and nightmares.

Summary Judgment

On January 6, 2017, Appellees filed a motion for summary judgment. The district court conducted a hearing and received evidence. For purposes of the appeal of the summary judgment, only the evidence relating to Reeves' conduct is relevant.

Victoria Halstead, a registered nurse, reviewed the autopsy report and medical records for Ellis and depositions by Reeves,

Scherling, the sheriff, and jail personnel. She explained in a deposition that any person who complains of chest pain or shortness of breath requires a face-to-face assessment. Therefore, she opined that Reeves should have conducted an in-person assessment of Ellis' condition on June 22, 2010. Further, in Halstead's opinion, Ellis should have been taken to a hospital to be examined by a physician that day.

Halstead conceded that other than the "kite" form that Ellis filled out on June 22, 2010, he made no further reports of chest pain, shortness of breath, or other issues on June 22, 23, or 24. She stated that she could not predict whether the results of a complete medical assessment on June 22 would have yielded normal or abnormal results, but she suspected that the results would have been abnormal. But she testified that she did not have an opinion as to what a medical "workup" on June 22 would have shown.

The district court received the deposition testimony of Joyce Black, a registered nurse with a Ph.D. in nursing who both parties used as an expert witness. Ewers' counsel conducted direct examination for Black's deposition, and Appellees' counsel cross-examined her.

Black testified that she instructs graduate students on the subject of pulmonary embolism. To prepare for her testimony, Black reviewed records from the Saunders County jail; records of Ellis' emergency room visits, autopsy and forensic toxicology report, and death certificate; narratives of events from jail personnel; and the Nebraska State Patrol investigative report.

Black explained that a blood clot, or embolus, can form, perhaps in the leg, and that a piece of the clot can break off and travel through the body until it becomes lodged in a lung (a pulmonary embolism). As a result, the clot will then block the flow of blood and oxygen to the tissue beyond the clot, and that tissue stops functioning. She testified that "[e]arly diagnosis is better in all cases because you want to stop the extension and additional clots from forming, and you do that with anti-coagulation." But Black also stated

that even with early treatment, not all pulmonary embolisms are survivable.

Black further explained that the body mounts an inflammatory response to a pulmonary embolism. According to Black, the pain is "exquisite" or "excruciating" and does not go away. Black testified that the pain continues during the entire inflammatory response, which lasts about 72 hours. Black testified that in addition to excruciating pain, someone dying of a pulmonary embolism would experience the sensation of difficulty breathing and possibly the feeling of impending doom. She testified that once blood flow is completely blocked, a patient would remain conscious for less than 1 minute.

Black testified that surgeons would remove saddle emboli, the type that Ellis suffered, only when such emboli are positioned a certain way and that even then, there was a risk that the clot would break during surgery and kill the patient. She described having a patient's family say goodbye prior to surgery because "that's how uniformly fatal that particular embolus is."

Based on Ellis' history; his complaint on June 22, 2010; and the absence of additional complaints until June 25, Black offered her opinion that there was no pulmonary embolus on June 22. Black testified with "reasonable medical certainty" that an examination on June 22 would not have shown that Ellis was having a medical issue or a pulmonary embolism. She stated that if Ellis had experienced a pulmonary embolism on June 22, his condition would have worsened on June 22, 23, and 24. According to Black, based on Ellis' history of anxiety, it was not problematic for Reeves not to examine him on June 22.

Upon examination by Ewers' counsel, Black agreed that if, hypothetically, Ellis had a pulmonary embolism on June 22, 2010, then Reeves, hypothetically, should have examined him. She also agreed that if Ellis had a pulmonary embolism on June 22 and had been treated for it, his chances of recovery would have been higher. Black emphasized, however, that in

her opinion, Ellis did not suffer a pulmonary embolism on June 22.

The district court granted the motion for summary judgment, finding no material issue of fact as to causation. It found that there was no expert testimony establishing a causal link between the acts of Reeves and Scherling and injuries or damages suffered by Ellis or Ewers. Specifically, the district court discerned no evidence that Ellis suffered a pulmonary embolism on June 22, 2010, or that an examination of Ellis on June 22 would have identified the presence of a pulmonary embolism on that date. It expressly rejected Ewers' argument that Black's response to a hypothetical question, that early detection of a pulmonary embolism on June 22 could have helped Ellis if he suffered from such condition on that day, was sufficient to show causation, because Black did not subscribe to the version of the facts presented in the hypothetical question.

Ewers now appeals the order granting summary judgment.

Discovery

In addition to challenging the summary judgment, Ewers assigns errors pertaining to the discovery process and Appellees' alleged failure to timely and properly respond to requests for admission, requests for production, and interrogatories.

On April 8, 2014, Ewers filed a motion to compel discovery, which alleged that Appellees had provided "[i]mproper and/or inadequate" responses to certain requests for admission, requests for production, and interrogatories, purportedly "Sent 11-20-13."

On April 21, 2014, the district court sustained the motion and gave Appellees another opportunity to answer Ewers' "11-20-13" discovery. Ewers claims that the district court allowed Appellees 2 weeks to provide its answers.

On July 16, 2014, Ewers filed a motion to deem requests for admission admitted and to dismiss Appellees' answer, regarding "11-20-13" discovery. Ewers contended that Appellees had not provided the answers required by the district court's

previous order. On August 18, 2014, the district court ordered that supplemental answers and admissions be provided by August 25 or be deemed admitted.

On September 16, 2014, Ewers filed an amended motion to deem requests for admission admitted and to dismiss Appellees' answers, regarding the discovery for ACH, Reeves, and Scherling on November 13, 2013, and March 27 and April 9, 2014. She alleged that Appellees failed to comply with the district court's previous order because they had not submitted their responses to the requests for admission by August 25, 2014, and alleged such responses were improper. Further, she alleged that Appellees had provided untimely and insufficient responses to other requests for admission and no response to her other requests for documents and interrogatories. Following a hearing on September 16, 2014, the district court found that there was not sufficient evidence to ascertain the degree to which the requests were incomplete or had been or not been complied with. Given this, the district court made no ruling on the timeliness of the admissions.

On September 25, 2014, Ewers filed a motion to deem requests for admission admitted and to dismiss Appellees' answer, regarding the same discovery as the previous motion. Following a hearing, Ewers filed an "Explanation of Discovery Responses From Defendants," which alleged that Appellees had failed to comply with previous court orders to provide discovery responses and Black's expert report, or allow Ewers to depose Jessica Young, an attorney for ACH. On October 27, the district court's pretrial order stated, "Rule 37 request to be responded to within 30 days. Court will address the issue of imposition of costs as the result of the delay in discovery at time of trial."

On December 5, 2014, Ewers filed a motion to deem requests for admission admitted and to dismiss defendant's answer, again regarding the same discovery as the previous motion. On December 17, the district court noted that the record had become "voluminous and confusing" and that "it is difficult, if not impossible for the court to ascertain what

has and has not been requested and what has and what has not been appropriately answered." It ordered the parties to submit all discovery disputes to the district court in a specific outline format and to meet and discuss the outline in advance of the next hearing. The district court attached an outline form for the parties to fill in and provided explicit instructions on how to do so.

On February 11, 2015, Ewers filed a motion to compel "B" discovery or, in the alternative, dismissal of Appellees' answer, which concerned Appellees' responses to requests for admission and interrogatories. A hearing was held on February 23. Ewers used a paragraph format to summarize the litigation and did not comply with the outline format required by the district court's previous order, claiming at the hearing that the issues were too complex for an outline format. On February 25, the district court ruled that all discovery matters not presented in the format it had ordered were waived. However, the district court did order that all interrogatories must be signed under oath within 10 days.

Appellees subsequently submitted responses to interrogatories signed under oath by Sherri Miller, not Young, who had previously signed the responses, but not under oath.

On April 3, 2015, Ewers filed an "Amended Motion to Compel 'B' Discovery or . . . Dismissal of Defendants' Answers and/or . . . Hold Defendants in Contempt and/or . . . Disqualify Defendants' Counsel for a Conflict of Interests." The motion stated that Appellees' counsel had committed repeated and intentional violations of court and ethical rules. On April 14, the district court denied all relief requested by Ewers' motion.

On November 30, 2016, following the sua sponte recusal of the initial judge, Ewers filed a motion to dismiss Appellees' answers or, in the alternative, to deem requests for admission admitted. The motion alleged that Appellees had repeatedly refused to answer discovery requests, comply with orders of the court regarding discovery, and timely answer requests for admission. On December 30, with a new judge presiding, the

district court overruled the motion, finding the district court's previous orders were the law of the case. Regarding discovery documents now addressed on appeal, it observed that Ewers had refused to use the outline format ordered by the previous judge. The district court further noted that all prior motions to deem requests for admission admitted or dismiss Appellees' answers were denied by the district court and that Ewers had failed to show a fundamental change or that the earlier orders were erroneous. In addition to denying Ewers' latest motion, the district court ruled that it was frivolous and granted Appellees attorney fees of $500.

On January 27, 2017, the district court made a journal entry memorializing that Ewers had been given 10 days to pay the $500 attorney fees pursuant to the December 30, 2016, order.

Ewers now appeals the order dated December 30, 2016, and the journal entry dated January 27, 2017.

ASSIGNMENTS OF ERROR

Ewers assigns, renumbered and restated, that the district court erred in (1) failing to correctly apply the law by not deeming the request for admission as admitted, failing to impose Neb. Ct. R. Disc. § 6-337 sanctions on Appellees for failure to follow Nebraska Court Rules of Discovery in Civil Cases, such as dismissing the answer of Appellees; (2) failing to find there is a genuine issue of material fact in this case and granting Appellees' motion for summary judgment; and (3) failing to find that Reeves was also the proximate cause of Ellis' pain and suffering.

STANDARD OF REVIEW

[1,2] Decisions regarding discovery are directed to the discretion of the trial court, and will be upheld in the absence of an abuse of discretion. *Moreno v. City of Gering*, 293 Neb. 320, 878 N.W.2d 529 (2016). The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id*.

[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. *White v. Busboom*, 297 Neb. 717, 901 N.W.2d 294 (2017).

ANALYSIS

Discovery

Over the course of the litigation, Ewers filed several motions to compel discovery, to impose sanctions, to deem her requests for admission admitted, and to dismiss Appellees' answers, all of which the district court denied. Now on appeal, Ewers claims that the district court erroneously applied the law by not deeming her requests for admission admitted and by declining to impose § 6-337 sanctions on Appellees for failure to follow Nebraska Court Rules of Discovery in Civil Cases.

[4,5] Ewers correctly notes that the Nebraska Supreme Court rules relating to discovery provide that a party may serve on another party written requests for admission and that unless answered, objected to within 30 days after service, or requested to be withdrawn, the requests are deemed admitted. See Neb. Ct. R. Disc. § 6-336. We have held that a party's failure to make a timely and appropriate response to a request for admission constitutes an admission of the subject matter of the request, which matter is conclusively established unless, on motion, the court permits withdrawal of the admission. *Tymar v. Two Men and a Truck*, 282 Neb. 692, 805 N.W.2d 648 (2011). We have recognized that § 6-336 is self-enforcing, without the necessity of judicial action to effect an admission which results from a party's failure to answer or object to a request for admission. *Tymar v. Two Men and a Truck, supra.*

[6,7] We have noted, however, that § 6-336 is not self-executing. *Tymar v. Two Men and a Truck, supra.* Thus, a party

that seeks to claim another party's admission, as a result of that party's failure to respond properly to a request for admission, must prove service of the request for admission and the served party's failure to answer or object to the request and must also offer the request for admission as evidence. *Id.* If the necessary foundational requirements are met and no motion is sustained to withdraw an admission, a trial court is obligated to give effect to the provisions of § 6-336 which require that the matter be deemed admitted. *Tymar v. Two Men and a Truck, supra*.

In her reply brief, Ewers points to several exhibits and argues that the record reflects compliance with the prerequisites to deem requests for admission admitted pursuant to § 6-336. One exhibit cited is an affidavit from counsel for Ewers verifying the accuracy of several exhibits and purporting to verify delivery of discovery. The affidavit states in part, "Exhibit 73, Delivery to ACH, 11/20/13." Exhibit 73 itself was not attached to the affidavit. Exhibit 73, along with other exhibits in the record referenced by Ewers, contains the front page of Ewers' request for admission and the responses from ACH. These exhibits do not contain, as required, a complete copy of the request for admission or a copy of any certificate of service (notice of service) that would have been completed in conjunction with the admissions. As the district court specifically pointed out, this lack of evidence prevented it from ruling on Ewers' motions, and it ultimately resulted in the district court's requesting that Ewers set forth her requested discovery and any alleged failure to respond in a format that the district court could use in its determination. Ewers, however, failed to comply with the order. Consequently, we find no abuse of discretion by the district court in declining to impose sanctions or to deem Ewers' requests for admission admitted by Appellees.

Summary Judgment

Ewers assigns that the district court erred in granting Appellees' motion for summary judgment. As the parties

moving for summary judgment, Appellees had the burden to show that no genuine issue of material fact exists and to produce sufficient evidence to demonstrate that they were entitled to judgment as a matter of law. See *Barnes v. American Standard Ins. Co. of Wis.*, 297 Neb. 331, 900 N.W.2d 22 (2017). 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. *White v. Busboom*, 297 Neb. 717, 901 N.W.2d 294 (2017).

[8,9] Here, the substantive issue is whether there is a genuine issue of material fact that Appellees committed medical malpractice when treating Ellis at the jail. Currently, in Nebraska, in a malpractice action involving professional negligence, the burden of proof is upon the plaintiff to demonstrate the generally recognized medical standard of care, that there was a deviation from that standard by the defendant, and that the deviation was a proximate cause of the plaintiff's alleged injuries. *Cohan v. Medical Imaging Consultants*, 297 Neb. 111, 900 N.W.2d 732 (2017). In the medical malpractice context, the element of proximate causation requires proof that the physician's deviation from the standard of care caused or contributed to the injury or damage to the plaintiff. *Id*.

Ewers claims that Halstead's expert opinion, that a medical examination should occur when someone is complaining of chest pain or shortness of breath, is sufficient proof of the standard of care. Therefore, Ewers contends that Reeves should have examined Ellis in person on June 22, 2010, and that without such an examination or admission to the hospital on June 22, a breach of the standard of care occurred. On our review, we give Ewers the benefit of this inference that the standard of care had been breached by Appellees. See *White v. Busboom, supra*.

[10-12] However, a defendant's negligence is not actionable unless it is a proximate cause of the plaintiff's injuries or is a cause that proximately contributed to them. *Hamilton*

v. Bares, 267 Neb. 816, 678 N.W.2d 74 (2004). A proximate cause is a cause that produces a result in a natural and continuous sequence and without which the result would not have occurred. *Radiology Servs. v. Hall*, 279 Neb. 553, 780 N.W.2d 17 (2010). A defendant's conduct is a proximate cause of an event if the event would not have occurred but for that conduct, but it is not a proximate cause if the event would have occurred without that conduct. *Worth v. Kolbeck*, 273 Neb. 163, 728 N.W.2d 282 (2007). Appellees assert that there was no expert testimony in this record, from anyone qualified to render a medical opinion, that the breach of the standard of care by Reeves on June 22, 2010, was causally connected to the fatal pulmonary embolism suffered by Ellis on June 25. We agree.

To support her position, Ewers points to Halstead's testimony. Although Halstead opined that Reeves breached the standard of care, she did not causally connect Reeves' failure to examine Ellis in person on June 22, 2010, to his fatal pulmonary embolism on June 25, nor did she opine that such an examination would have resulted in a different outcome. In other words, Halstead offered no testimony showing causation.

Ewers also relies on Black's statement that "[e]arly diagnosis is better in all cases because you want to stop the extension and additional clots from forming, and you do that with anti-coagulation." She argues that this evidence translates into causation pursuant to *Richardson v. Children's Hosp.*, 280 Neb. 396, 787 N.W.2d 235 (2010). In *Richardson*, we held that an expert's opinion that the outcome would have been different had a patient, who died of necrotizing hemorrhagic pancreatitis, earlier received intravenous fluids was sufficiently akin to a degree of medical certainty and was sufficient to establish causation for purposes of a medical malpractice case. In so holding, we reiterated the principle that expert opinion is to be judged in view of the entirety of the expert's opinion and is not validated or invalidated solely on the basis of the presence or

lack of the magic words "'reasonable medical certainty.'" *Id.* at 405, 787 N.W.2d at 243.

In countering, Appellees note that Black's statement that "[e]arly diagnosis is better in all cases . . ." does not prove causation because it was a general medical opinion taken out of context. Appellees further assert that Ewers is misguided in relying on Black's hypothetical opinion that if Ellis had been examined on June 22, 2010, and if a nonfatal pulmonary embolus had been discovered on that date, his chances of recovery would have been higher. As Black emphasized in her testimony, the facts in Ellis' case were different from the facts posed in the hypothetical question. In addition, Black opined that Ellis did not experience a pulmonary embolus on June 22, because he did not complain of any pain from June 22 to 25 and had himself advised medical staff of his history of anxiety-related chest pain. Black stated that if Ewers had actually suffered a pulmonary embolus on June 22, his condition would have worsened from that point forward to June 25. And the facts here show that after reporting his symptoms on June 22, Ellis did not complain of pain again until June 25.

[13] Expert testimony is almost always required to prove proximate causation. *Thone v. Regional West Med. Ctr.*, 275 Neb. 238, 745 N.W.2d 898 (2008). In the absence of expert testimony on causation, the finder of fact would be left to resort to guess, speculation, or conjecture as to the issue. See *Snyder v. Contemporary Obstetrics & Gyn.*, 258 Neb. 643, 605 N.W.2d 782 (2000) (burden of proving cause of action is not sustained by evidence from which jury can arrive at its conclusions only by guess, speculation, conjecture, or choice of possibilities; there must be something more which would lead a reasoning mind to one conclusion rather than to another). Our previous cases discussing the sufficiency of expert opinions in a medical malpractice case have held that expert medical testimony based on "could," "may," or "possibly" lacks the definiteness required to meet the claimant's burden to prove

causation. See, e.g., *Paulsen v. State*, 249 Neb. 112, 541 N.W.2d 636 (1996). As we have observed:

> Our well-known preference for the use of the phrases "reasonable degree of medical certainty" or "reasonable degree of probability" is an indication to courts and parties of the necessity that the medical expert opinion must be stated in terms that the trier of fact is not required to guess or speculate at the cause of the injury.

Id. at 121, 541 N.W.2d at 643. Here, Black's answer to a hypothetical question assuming facts not present does not rise to the level of certainty required and would invite the trier of fact to speculate. Therefore, Black's testimony on early diagnosis being beneficial did not establish causation as argued by Ewers. But whether Black, a registered nurse, could render an opinion on medical causation was not raised as an issue in this case, and we make no comment thereon.

Ewers further claims that Appellees withheld an email from Black which may have affected her opinions. However, Ewers took Black's deposition, apparently did not provide her the email during the deposition, but ultimately named Black as her expert even though Black had not seen the email. Under these circumstances, Ewers had the opportunity to question Black about the email and could have supplemented her deposition or other discovery. Therefore, this argument has no merit.

In sum, even giving Ewers the benefit of every reasonable inference, without any expert testimony showing that Appellees' actions were the proximate cause of the fatal pulmonary embolism suffered by Ellis on June 25, 2010, or were a cause that proximately contributed to it, the district court correctly found that there was no genuine issue of material fact as to causation and that Appellees were entitled to judgment as a matter of law.

Lastly, Ewers claims that the district court erred in failing to find that Reeves was also the proximate cause of Ellis' pain and suffering. Ewers argues that Black's description of the pain inflicted by an embolus traveling through a patient's

lung established proximate cause. However, this argument also fails due to the absence of expert testimony establishing a causal connection between Reeve's conduct on June 22, 2010, and the pulmonary emboli on June 25. Evidence of the pain Ellis suffered on June 25 would apply to damages, not causation. Therefore, this assignment of error is without merit.

CONCLUSION

For the reasons stated above, we conclude that the district court did not abuse its discretion in declining to deem Ewers' requests for admission admitted, to dismiss Appellees' answers to discovery, and to sanction Appellees. Further, finding no genuine issue of material fact as to causation, we conclude that the district court did not err in granting Appellees' motion for summary judgment. We affirm.

Affirmed.

Wright, J., not participating.



Nebraska Supreme Court

I attest to the accuracy and integrity of this certified document.

-- Nebraska Reporter of Decisions

Heritage Bank, Trustee of the Charles L. Gabel Revocable Trust, appellee, v. James L. Gabel et al., appellants.

906 N.W.2d 640

Filed February 9, 2018. No. S-17-363.

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 those facts and that the moving party is entitled to judgment as a matter of law.
2. **Judgments: Words and Phrases.** According to Neb. Rev. Stat. § 25-1301(1) (Reissue 2016), a judgment is the final determination of the rights of the parties in an action.
3. **Judgments.** A judgment must be sufficiently certain in its terms to be able to be enforced.

Appeal from the District Court for Polk County: Rachel A. Daugherty, Judge. Reversed and remanded for further proceedings.

John C. Hahn, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellants.

Kent E. Rauert and Samuel R. O'Neill, of Svehla Law Offices, P.C., L.L.O., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

INTRODUCTION

Heritage Bank, as trustee of the Charles L. Gabel Revocable Trust (Trust), brought an action for forcible entry and detainer against James L. Gabel (James), C.J. Land & Cattle, L.P., and MCGFF, LLC (collectively Appellants), after James failed to pay rent on farmland in accordance with a lease agreement. The district court for Polk County granted summary judgment in favor of Heritage Bank, and Appellants now appeal. Upon our review of the record, we discern genuine issues of material fact. Therefore, we reverse, and remand for further proceedings.

FACTS

Charles L. Gabel (Charles) owned various parcels of farmland in Polk County. He and his son, James, farmed the land together for at least 30 years.

On February 8, 2008, Charles established the Trust and transferred the farmland to the Trust. The Trust named Charles as the initial trustee and James as the successor trustee. Charles, as trustee, leased the farmland to C.J. Land & Cattle, of which James was the general partner, for a term of 20 years. Payment due under the lease was 30 percent of the crops produced on the land each year, to be delivered no later than March 1 of the following year.

On May 5, 2010, C.J. Land & Cattle, through James as its general partner, assigned all of its rights under the lease to MCGFF. On March 1, 2011, the Trust leased the land directly to MCGFF, under the same terms as the prior lease, including the 30-percent crop-share provision.

On September 11, 2012, Charles resigned as trustee. Although not specifically appointed, James assumed the duties as successor trustee. On May 1, 2013, James, as a member of MCGFF, assigned all of MCGFF's rights under the March 1, 2011, lease to himself. As a result, James is the current tenant of the land.

Charles amended the Trust various times before his death. As his health began to decline, proceedings were initiated in the county court for Cass County for a guardianship and conservatorship for Charles. In addition, a separate proceeding was brought in Cass County by James for administration of the Trust. On August 26, 2014, Heritage Bank, by stipulation of James, was appointed as trustee through the proceedings for administration of the Trust.

Charles died on November 18, 2015. James later filed a petition to determine the validity of a subsequent Trust of Charles in the county court for Cass County. The county court found that it lacked jurisdiction to hear the petition, because the subsequent Trust was associated with a will contest pending before the district court for Cass County. At the time of this appeal, that proceeding was apparently still ongoing.

Meanwhile, James failed to deliver the 2015 crop payment to Heritage Bank by March 1, 2016. Rather than providing written notice of default, Heritage Bank served James with a written notice to vacate the property within 3 days. When James failed to do so, Heritage Bank filed an amended complaint against James, C.J. Land & Cattle, and MCGFF. The first cause of action alleged that the leases and assignments were invalid for various reasons, while the second cause of action was for forcible entry and detainer. It alleged that even if the leases and assignments were valid, James had not paid rent to the Trust as required by the terms of the lease and was in unlawful possession of the land following receipt of the notice to vacate. It sought restitution of the land to the Trust, as well as damages and costs. Appellants answered that James was the rightful trustee and that thus, Heritage Bank lacked standing to bring this action, particularly following Charles' death.

On January 20, 2017, Heritage Bank filed a motion for summary judgment as to its second cause of action for forcible entry and detainer. The evidence presented at the hearing showed that James had failed to deliver the Trust's share of

the 2015 crops by March 1, 2016. The president of Heritage Bank provided an affidavit stating that he made numerous demands to James and his attorneys, both in person and via email, including several communications instructing them where the crops were to be delivered.

In his affidavit, James stated that he was willing and able to deliver the crops as required under the lease at all times, but was awaiting instruction on where to deliver them. James further stated that under terms of the lease, the tenant must be given a written notice of default for unpaid rents and a reasonable amount of time to correct any such default, neither of which was given to him. The evidence showed that James eventually deposited two checks with the clerk of the Polk County Court containing 30 percent of the 2015 crop proceeds. However, those checks were not delivered to that court until October 27, 2016. James stated that any default was cured by delivery of the checks and that any harm suffered by the Trust was due to Heritage Bank's failure as trustee.

On March 13, 2017, the district court issued a written order granting summary judgment in favor of Heritage Bank. It concluded that Heritage Bank was the trustee, because it was the only entity that had been issued letters of trustee. It noted that although James believed he should have been appointed trustee pursuant to the Trust documents, he had not been so appointed and the proceeding to determine the validity of the various Trust documents was still ongoing. It found the undisputed evidence established that Appellants did not deliver the 2015 crop payment to the trustee by March 1, 2016. Regarding the required notice of default, the district court found that Appellants had notice they were not in compliance with the terms of the lease after James was served with a notice to vacate, a complaint, and an amended complaint. The district court found that the defect was not cured within a reasonable amount of time, because Appellants did not submit checks for the crop proceeds to the clerk of the district court

until October 27, 2016, which was approximately 6 months after he was served in this matter.

The granting of the judgment on the second cause of action implicitly dismissed the first cause of action, the dismissal of which was later formalized by the parties. Appellants have now filed this appeal.

ASSIGNMENTS OF ERROR

Appellants assign that the district court erred in finding that there was no genuine issue of material fact as to (1) whether or not Heritage Bank is the proper trustee and the real party in interest, (2) whether or not James breached the lease agreement by failing to deliver the trust crops on time, (3) whether or not Heritage Bank complied with the lease agreement, and (4) whether or not James cured any breach of the lease agreement within a reasonable time.

STANDARD OF REVIEW

[1] 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 those facts and that the moving party is entitled to judgment as a matter of law. *O'Brien v. Cessna Aircraft Co., ante* p. 109, 903 N.W.2d 432 (2017).

ANALYSIS

Before proceeding with the assigned errors, we note that the order of the district court stated in conclusion that the motion for summary judgment was sustained, but it did not set forth any further recitation as to what the order granted as a judgment. One would need to view both the motion for summary judgment and the amended complaint in conjunction with the court's order to determine the relief granted.

[2,3] Our concern with this type of order is twofold. First, Neb. Rev. Stat. § 25-1301(1) (Reissue 2016) states, "A judgment is the final determination of the rights of the parties in an

action." Second, the general rule of law is that a judgment must be sufficiently certain in its terms to be able to be enforced. *Friedman v. Friedman*, 290 Neb. 973, 863 N.W.2d 153 (2015). The judgment must be in such a form that a clerk is able to issue an execution upon it which an officer will be able to execute without requiring external proof and another hearing. *Id.* Here, the order simply stated, "The [m]otion for [s]ummary [j]udgment is [s]ustained." It is difficult to find that this order fully determined the rights of the parties without further defining the judgment granted and that a clerk could issue an execution without having to make his or her own determination of what the order entailed. We urge trial courts to fully set forth the exact judgment being granted so that litigants, clerks, and sheriffs are able to proceed without any additional inquiry. Nonetheless, since the remaining issues in the instant case may arise on remand, we shall proceed with the analysis, assuming without deciding that the order actually granted the forcible entry and detainer judgment sought.

Appellants initially claim that the district court erred in finding that there is no issue of material fact as to whether or not Heritage Bank is the proper trustee of the Trust and the real party in interest. Appellants explain this position in their brief:

> Since Charles' death Heritage [Bank] has continued to act as though it is the Trustee based on the August 26, 2014 Appointment. The Appellants argue that this has been improper and that the appointment of Heritage [Bank] as Conservator and Trustee only applied prior to Charles' death. Upon the death of Charles, the Trust became irrevocable and the Successor Trustee named therein, James, became trustee. . . . The death of Charles created a vacancy in trusteeship. *See* Neb. Rev. Stat. §30-3860(a)(5). That vacancy should have been filled by James, the person designated to serve as successor trustee according to the Trust. *See* Neb. Rev. Stat. §30-3860(c).

Brief for appellant at 13.

However, the record presented to this court reflects that James initiated an action to administer the Trust in the county court for Cass County. During the pendency of the trust administration proceeding, James stipulated to the appointment of Heritage Bank as trustee. The order following the stipulation is not in the record before us, but the record does contain the letters of trustee issued to Heritage Bank on October 7, 2014, naming it as trustee prior to Charles' death. Further, the record does not contain any entry whereby Heritage Bank was removed as trustee.

In this instance, Charles' death does not control whether Heritage Bank is the trustee. The conservatorship and trust administration were docketed separately and are two separate proceedings. One is to determine whether a conservator is needed over the business affairs of an alleged incapacitated person, and the other action is a request for the county court to administer a trust. Even if the conservatorship terminated upon the death of Charles, Heritage Bank was the court-appointed trustee prior to his death and, as a separate legal banking entity, it continued as such after his death, absent removal by order of the court. Consequently, the record before this court supports the district court's finding that Heritage Bank was the trustee and had standing to bring this action. Appellants' assignment of error on this issue has no merit.

Appellants' remaining assignments of error are intertwined and shall be addressed together. Appellants contend that the district court erred in finding that there is no issue of material fact as to whether James breached the lease agreement by failing to deliver the Trust crops on time, whether Heritage Bank complied with the lease agreement, and whether James cured any breach of the lease agreement within a reasonable time.

First, Appellants claim that the evidence is in dispute as to whether James was properly directed concerning a location for crop delivery and, therefore, could not timely deliver the crops. They point to the first paragraph of the lease, which

states in part that the agreed payment was "30% of the crops produced on said real estate on an annual basis delivered at Tenant's expense to an elevator within 15 miles of the farms as Owner shall direct." James, by affidavit, stated that he requested a delivery location from Heritage Bank but that Heritage Bank failed to provide a delivery site. In countering this, Heritage Bank points to an exhibit which it claims sets forth that numerous demands were made for delivery of the crops to a location within 15 miles from the leased property. However, that exhibit, an affidavit of the president of Heritage Bank, sets forth only that "numerous demands" for delivery of the crops were made on James but does not disclose where Heritage directed the delivery location to occur. Thus, the record contains conflicting evidence concerning whether Heritage complied with the lease.

Next, Appellants claim that Heritage Bank never provided James with a notice of default, as required by the lease. They argue that such notice would have allowed James 30 days to cure the alleged breach. Heritage Bank contends that its requests for delivery of the crops and the notice to vacate, along with service of the amended complaint, acted as sufficient notice of default. The district court agreed.

The lease agreement states, in relevant part:

> In the event Lessee fails to make the payment of rent or if default is made in the performance of any other term or condition thereof by Lessee, the lease, at the option of Lessor, shall terminate and be forfeited and Lessor may re-enter the premises and remove all persons in possession therefrom. Lessee shall be given written notice of any such default or breach and forfeiture of said lease shall not result if, within 30 days of such written notice, Lessee has corrected the default or has taken action reasonably likely to correct this default within a reasonable time thereafter.

The plain language of the lease required Heritage Bank to provide written notice of the default or breach to James which,

in turn, would allow him 30 days to cure. The title of a particular document forwarded to James does not control whether he was given the proper notice. Rather, we must review the content of each document sent to James to determine whether he received proper notice. Here, the terms of the lease that James allegedly breached were not specifically set forth within the notice to vacate. Further, the record does not contain any evidence that Heritage Bank set forth the alleged breaches in any other written communications. That is, there is no evidence that James had any way to cure those breaches within 30 days as allowed by the lease. Further, any notice of the alleged breaches given to James by way of service of the complaint would not allow James adequate time to cure, since litigation of the matter had already commenced. Nor would the district court's order to pay the crop proceeds into that court constitute a notice of default and right to cure. Either the parties complied with the terms of the lease prior to the court action or they did not. Even if James had paid the crop proceeds into the district court within 30 days of the court order, that would not have barred Heritage Bank from proceeding with the forcible entry and detainer action.

Accordingly, upon our review of the record, we conclude that genuine issues of material fact precluded summary judgment in this instance. See *O'Brien v. Cessna Aircraft Co., ante* p. 109, 903 N.W.2d 432 (2017).

CONCLUSION

The judgment of the district court is reversed, and the matter is remanded for further proceedings.

Reversed and remanded for
further proceedings.

Wright, J., not participating.

Nebraska Supreme Court
I attest to the accuracy and integrity of this certified document.
-- Nebraska Reporter of Decisions

Platte River Whooping Crane Maintenance Trust, Inc., appellant, v. Hall County Board of Equalization, appellee.

906 N.W.2d 646

Filed February 9, 2018. No. S-17-389.

1. **Taxation: Judgments: Appeal and Error.** Appellate courts review decisions rendered by the Tax Equalization and Review Commission for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Taxation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission.
4. **Taxation: Charities.** A tax exemption for charitable use is allowed because those exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing.

Appeal from the Tax Equalization and Review Commission. Reversed and remanded with directions.

Jordan W. Adam, of Fraser Stryker P.C., L.L.O., for appellant.

Timothy L. Moll, of Rembolt Ludtke, L.L.P., for appellee.

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Kelch, and Funke, JJ.

Kelch, J.

NATURE OF CASE

The issue presented is whether the Platte River Whooping Crane Maintenance Trust, Inc. (Crane Trust), is a charitable organization within the meaning of Neb. Rev. Stat. § 77-202(1)(d) (Cum. Supp. 2014).

BACKGROUND

Application for Exemption

The Crane Trust is a nonprofit corporation dedicated to conserving and protecting the natural habitat for whooping Cranes, sandhill Cranes, and other migratory birds along the Platte River in central Nebraska. For the last decade, the Hall County Board of Equalization (Board) granted a charitable tax exemption under § 77-202(1)(d) to various properties owned by the Crane Trust. In December 2014, the Crane Trust sought a property tax exemption for six additional parcels of land (Subject Properties). The Subject Properties consist of 829.68 acres of land and carry a property tax liability of approximately $22,000 for 2015, the tax year in question. At that time, the Board denied the Crane Trust's application for a property tax exemption for the Subject Properties. There is no explanation in the record as to why the Board granted tax exemption to some of the Crane Trust's properties, but not to the Subject Properties.

The Crane Trust appealed to the Nebraska Tax Equalization and Review Commission (TERC). A hearing was held, during which the Crane Trust presented evidence about its educational efforts, contributions to the scientific community, and other benefits to the public. The evidence was largely undisputed.

Evidence Presented at Hearing

The Crane Trust presented evidence showing that its conservation efforts benefit the thousands of people who visit its property each year to observe the crane migration, learn about the prairie, and interact with nature. The Crane Trust

provides free public tours during crane season, and its property is open year round at no charge to the public. The Crane Trust also has a large network of public trails, which are used by the public for exercise and for an annual cross-country race for a local high school.

Students, researchers, and scientists from all across the country visit the Crane Trust to perform scientific research on the Subject Properties every week. The Crane Trust also performs research on the land and has published more than 30 articles in the past decade, which are available to the public for free. Some of the articles come from research that the Crane Trust performed on the Subject Properties in 2015.

The Crane Trust also provides educational activities to teach the public about habitat and conservation. It posts informational signs along its trails and hosts a program for public schools in which students visit its property every month to study the plants, wildlife, insects, and habitat with the help of a Crane Trust biologist.

The evidence also showed that a portion of the Subject Properties was leased to a farming operation for cattle grazing, for which the Crane Trust received $9,300. The Crane Trust's chief executive officer testified that the lease money was not distributed to its members, directors, officers, or anyone else and that the cost of managing the Subject Properties far exceeded the amount of lease money. The chief executive officer testified that the cattle grazing was part of the Crane Trust's habitat management program—that the grazing and hoof compaction on the soil provides a natural disturbance on the grassland that helps promote and sustain different species on the parcels, cycle nutrients on the prairie, open up the grassland for the crane to use, and keep invasive species of plants at bay.

TERC Affirms Board's Denial of Exemption

Following the hearing, TERC affirmed the Board's decision to deny tax exemption to the Subject Properties. It stated

that the issue was whether the term "charitable organization" in the relevant statute was broad enough to include an organization devoted to protecting natural habitat. It concluded that although the Crane Trust provides educational, scientific, and recreational benefits to the public, Nebraska courts have limited charitable exemptions to "traditional charitable enterprises providing relief [to] the poor and distressed." Therefore, it concluded that the policy question of whether to expand the definition to include conservation efforts must be left to the Legislature.

TERC found that the Crane Trust provided some level of mental, social, and physical benefits to the public, but ultimately determined that it was not a charitable organization because § 77-202(1)(d) has never been applied to conservation groups or activities.

The Crane Trust now appeals from TERC's decision.

ASSIGNMENT OF ERROR

The Crane Trust assigns that TERC erred in affirming the Board's decision to deny tax exemption for the Subject Properties for the 2015 tax year.

STANDARD OF REVIEW

[1-3] Appellate courts review decisions rendered by TERC for errors appearing on the record.[1] 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.[2] The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission.[3]

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[1] *Cain v. Custer Cty. Bd. of Equal.*, 291 Neb. 730, 868 N.W.2d 334 (2015).

[2] *Id.*

[3] *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000).

ANALYSIS

The Nebraska Constitution authorizes the Legislature to exempt from taxes "property owned and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user."[4] Pursuant to this authority, the Legislature adopted a statute that exempts from property taxes:

> Property owned by educational, religious, charitable, or cemetery organizations, or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for educational, religious, charitable, or cemetery purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin.[5]

The parties stipulated that the Subject Properties were not used for the sale of alcohol and were not owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. Furthermore, the Crane Trust applied for exemption as a charitable organization; it does not argue that it qualifies as an educational, religious, or cemetery organization. Thus, the issues are limited.

For Crane Trust to be entitled to a property tax exemption for its six parcels, it must show (1) that the parcels are owned by a charitable organization; (2) that the parcels are used exclusively for educational; religious, charitable, or cemetery purposes; and (3) that the parcels were not owned or used for financial gain or profit to either the owner or user. TERC concluded that the Crane Trust failed to show the parcels were

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[4] Neb. Const. art. VIII, § 2.

[5] § 77-202(1)(d).

owned by a charitable organization and thus did not address the other two requirements.

Nature of Organization

In concluding that the Crane Trust was not a charitable organization, TERC noted that the Supreme Court has never held that a conservation group may fit within the definition of "charitable organization" under § 77-202. While true, we have also never considered it.

Section 77-202(1)(d) provides that a "charitable organization means an organization operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons." Applying this statutory language, TERC acknowledged that the Crane Trust's conservation efforts provided mental, social, and physical benefits to the public, but concluded, without explanation, that the Subject Properties were not operated exclusively for those purposes.

We conclude that TERC's finding that the Crane Trust did not operate exclusively for the public's benefit is not supported by the evidence. The term "exclusively" means the primary or dominant use of the property is controlling in determining whether the property is exempt from taxation.[6] And as TERC noted, the Crane Trust adduced considerable evidence of its efforts to provide educational, scientific, and recreational benefits to the general public. The evidence shows that the Crane Trust's efforts to protect the natural habitat for migratory birds ensures that the public can continue to enjoy and learn about that habitat and birds and wildlife thereon.

Additionally, the evidence shows that the Crane Trust is engaged in numerous endeavors to educate the public about the habitat, the wildlife on the habitat, and conservation in general. The Crane Trust's land, including the Subject Properties, is

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[6] See *Fort Calhoun Bapt. Ch. v. Washington Cty. Bd. of Eq.*, 277 Neb. 25, 759 N.W.2d 475 (2009).

also open for and subject to scientific study. While the Board argues that the evidence discussed in this paragraph is irrelevant, because the Crane Trust is not applying for exemption as an educational organization, we disagree. We find this evidence relevant to whether the Crane Trust is providing a mental benefit to the public. "'[M]ental'" means "'intellectual,'" which in turn means, among other things, "'engaged in creative literary, artistic, or scientific labor.'"[7]

After reviewing the evidence, we conclude that the Crane Trust operated exclusively for the purpose of the mental, social, or physical benefit of the public.

[4] TERC found, and the Board argues, that the Legislature did not intend for conservation groups to be considered a "charitable organization" under § 77-202(1)(d). Although we appreciate TERC's deference to the Legislature, we respectfully disagree. A tax exemption for charitable use is allowed because those exemptions benefit the public generally and the organization performs services which the state is relieved pro tanto from performing.[8] In Neb. Rev. Stat. § 37-803 (Reissue 2016) of the Nongame and Endangered Species Conservation Act, the Legislature declared that the "state shall assist in the protection of [certain] species of wildlife and wild plants which are determined to be threatened or endangered" and that "it is the policy of this state to conserve species of wildlife for human enjoyment" and other purposes. Because the Legislature views the conservation of endangered species as a policy of the state, and conservation groups like the Crane Trust relieve the state of that burden, we conclude that the Legislature intended for those groups, provided they otherwise meet "charitable organization" criteria, to be considered "charitable organizations" under § 77-202(1)(d).

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[7] *Neb. State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 15, 465 N.W.2d 111, 120 (1991).

[8] *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002).

Our decision is supported by several other states' interpretations of similar statutes. For example, in *Francis Small Heritage v. Town of Limington*,[9] the Maine Supreme Judicial Court held that a conservation group qualified as a charitable organization because the organization lessened the burdens of the government by assisting the state in achieving its conservation policy goals. The Maine court concluded that the Legislature enunciated a strong public policy in favor of conservation when it declared in a section of its Natural Resources Protection Act that the state's wetlands and wildlife habitat are "'resources of state significance'" and that they benefit the state's citizens.[10]

And in *Turner v. Trust for Public Land*,[11] a Florida court concluded that a conservation group qualified as a charitable organization because there was "little question that conservation serves a public purpose" where Florida's state constitution provided that it was "'the policy of the state to conserve and protect its natural resources and scenic beauty . . . .'" A number of other states, using rationale similar to that in *Francis Small Heritage* and *Turner*, have also concluded that conservation organizations may qualify as charitable organizations.[12]

Use of Subject Properties

In addition to showing that the Subject Properties are owned by a charitable organization, the Crane Trust must also show that the Subject Properties are used exclusively for educational, religious, charitable, or cemetery purposes.[13]

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[9] *Francis Small Heritage v. Town of Limington*, 98 A.3d 1012 (Me. 2014).

[10] *Id.* at 1020.

[11] *Turner v. Trust for Public Land*, 445 So. 2d 1124, 1126 (Fla. App. 1984).

[12] See, *New England Forestry v. Board of Assessors*, 468 Mass. 138, 9 N.E.3d 310 (2014); *Pecos River Open Spaces, Inc. v. Cnty. of San Miguel*, 2013 NMCA 029, 495 P.3d 1129 (2013); *Little Miami v. Kinney*, 68 Ohio St. 2d 102, 428 N.E.2d 859 (1981); *Mohonk Trust v. Assessors*, 47 N.Y.2d 476, 392 N.E.2d 876, 418 N.Y.S.2d 763 (1979).

[13] See *Lincoln Woman's Club v. City of Lincoln*, 178 Neb. 357, 133 N.W.2d 455 (1965).

In this case, the Crane Trust's status as a charitable organization and its use of the Subject Properties are closely related issues. For this reason, the parties largely repeat their arguments or incorporate them by reference. For the same reasons that we found the Crane Trust qualified as a charitable organization, we find that the Subject Properties were used exclusively for charitable purposes.

Financial Gain or Profit

Finally, the Crane Trust must show that the Subject Properties were not owned or used for financial gain or profit to either the owner or user. The Board argues that the Subject Properties were used for financial gain or profit solely because the Crane Trust entered into a lease agreement for cattle grazing with a farming operation for $9,300. However, the fact that income is generated as a result of an exempt use of the property does not make the property taxable.[14] Property is not used for financial gain or profit to either the owner or user if no part of the income from the property is distributed to the owners, users, members, directors, or officers, or to private individuals.[15]

Here, the evidence showed that the lease money was not distributed to its owners, users, members, directors, officers, or anyone else, and that the cost of managing the Subject Properties far exceeded the amount of lease money. Although there was some evidence that the cattle grazing furthered the Crane Trust's habitat management program, even if it did not, the use of the land for cattle grazing was incidental to the Crane Trust's primary purpose of conserving and protecting the natural habitat for migratory birds and wildlife for the public's benefit. We therefore conclude that the Subject Properties were not owned or used for financial gain or profit to either the owner or user.

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[14] *Neb. Unit. Meth. Ch. v. Scotts Bluff Cty. Bd. of Equal.*, 243 Neb. 412, 499 N.W.2d 543 (1993).

[15] *Fort Calhoun Bapt. Ch., supra* note 6.

Because the Subject Properties meet the requirements for a charitable tax exemption under § 77-202(1)(d), we conclude that they are entitled to exemption for the tax year in question. We therefore reverse TERC's decision and remand the cause for an order in accordance with this opinion.

CONCLUSION

For the reasons set forth above, we reverse TERC's decision and remand the cause for TERC to enter an order that the Subject Properties are entitled to a property tax exemption under the provisions of § 77-202(1)(d).

Reversed and remanded with directions.

Wright, J., not participating.

Cassel, J., dissents.

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